A copy of this syllabus (and of everything else that I hand out in class) is available on the web http://www.law.harvard.edu/faculty/cdonahue/courses/prop/syll.html. This link is also found in “MyHLS.”

PROPERTY SECTION 1
Tentative Syllabus and Assignments

Prof. Donahue Fall, 2009

[I do not allow the use of laptop computers in class. While there are a number of reasons for this, the most compelling from my point of view is that they seem to be a barrier to conversation and thought. For those who are concerned that they might miss something taking handwritten notes, I will have every class recorded, and the recordings will be available online.

Because of the difficulty of room scheduling until the construction is completed. We will be doing make-up classes by “flipping,” i.e., on some days Property will be in the time-slot and room for Legislation and Regulation or Procedure, and vice-versa. We will give you plenty of notice when this has to happen.]

1. Introduction. Traditionally, property was a six-hour course taught over the entire first year of law school. With the increasing “semesterization” of first-year courses, the tendency is to relegate property to the spring. There are, no doubt, some things about the course that may be a bit easier to understand after one has had a semester of law school; there are also, however, some things about the course that make more sense in the context of the first-semester program. I have taught the course in both the fall and the spring and have found that the advantages and disadvantages of each semester are about evenly balanced. Doing the course in the fall will mean that we will spend a bit more time on the material covered in the first four weeks of the syllabus. Also, although we will not omit any material that we would cover if we were doing the course in the spring, I will not examine you on the “common-law” (as opposed to the “modern”) system of estates in land and future interests (basically, our topic for October). I will give more details about this when we get to that point of the course.

Property in the fall begins at the beginning, at least conceptually and methodologically. It asks some basic questions about legal method, particularly about the analysis of cases, and it introduces us to the basic forms of establishing entitlements in our law of property. It then proceeds to spend about a month on conveyancing and estates in land, about a month on private and public controls on land use, and about a week wrapping up the big ideas. While there are certainly plenty of other topics that we could cover, this coverage manages to introduce most if not all of the major themes in the modern law of property.

2. Materials. The book for the course is C. DONAHUE, T. KAUPER & P. MARTIN, CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION (3d ed., West Publishing Co., 1993) [hereafter DKM3]. I have also put together a supplement to the casebook, called “Supplement” in the syllabus. I may issue additional supplementary materials, but I will not increase the amount of reading. Over the course of the semester, I plan to rewrite some of the longer notes and text in DKM3, both to bring them up-to-date and to make them more appropriate for a four-hour course rather than the six-hour course for which they were designed. The first set of such notes are those on Pierson v. Post, our first case.

I urge you to read the Preface and Introduction to DKM3 now. The Syllabus also provides a skeletal outline as we go along. Finally, I will distribute outlines of the material as we cover it. (The first one is attached to this
All of these attempt to give you the “big picture” of the material, something we tend to lose sight of in class in our effort to figure out who sued whom in the Jones case.

There is no Prosser on Torts for Property. JOSEPH SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES (4th ed. 2006) is a relatively new hornbook that covers most of what we will be covering in the course. It is a long book and has not yet stood the test of time, but it is probably the best comprehensive, single-volume treatise on the market. W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY (3d ed. 2000) is a more traditional hornbook covering much of the same ground. For those seeking more compact coverage J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY (3d ed. 1989), J. SPRANKLING, UNDERSTANDING PROPERTY LAW (2000), and R. BERNHARDT, REAL PROPERTY IN A NUTSHELL (4th ed. 2000) may be more helpful than harmful if properly used. Some students find C. MOYNIHAN & S. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY: AN HISTORICAL BACKGROUND OF THE COMMON LAW OF REAL PROPERTY AND ITS MODERN APPLICATION (4th ed. 2005) or T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS (2d ed. 1984) useful for the estates section of the course. For various reasons—one of which is ignorance—I do not recommend any of the other standard student books on Property, except for the “Gilbert’s Outline” discussed below. You may buy any of the above-cited books (or the Gilbert’s) if you wish, but the only required book is DKM3.

This year, I am recommending but not requiring, that students purchase the “Gilbert’s Outline” of property. The author is a professor at the University of Michigan, and his knowledge of property is profound. His predecessor was a professor at UCLA and one of the leading property scholars of his generation. My problem is not with the competence of the authors; my problem is with the genre. This is something that we should talk about during the semester.

3. Syllabus. You will find that the syllabus contains, in addition to page assignments, a brief description of what the class will be about. When a case name or names are given, we will devote much of the class to analysis of that case or those cases. When a case name is not given, we will devote the class to a discussion of problems, doctrine or policy. The fact that a case is not listed in the syllabus does not mean that you should not read the case if it is on the assigned pages; rather the fact that the case name is not mentioned in the syllabus means that I hope you can handle the case by yourselves and will try to put the class emphasis elsewhere. Page references are to DKM3; references to the Supplement are indicated by “S”.

4. How to Proceed. At the beginning of each of the numbered sections of the book, I recommend that you skim through the section, getting some sense of its basic organization. It will frequently be helpful to read over the textual notes before you prepare the principal cases, but a reading of the notes (and even more of an outline) should never substitute for a reading of the principal cases. On the other hand, the notes are important. They are designed to provoke your thinking on a given topic and to give you doctrinal background which is frequently important for understanding what is going on in the principal cases.

DKM was designed to be taught out of order. It therefore has more than the usual number of cross-references. Most students find that the cross-references are more useful when they come to review the material than they are when they dealing with the material for the first time.

You will frequently come to questions in the notes for which you cannot provide a simple answer. This should not concern you. You should, however, begin to ask yourself why it is that you cannot give a simple answer to the question, and if this process provokes some thought on the nature of legal materials generally, so much the better. You should feel no compulsion to look up the authorities cited in
the notes unless you really want to. You should, however, familiarize yourself sufficiently with legal citation form that you know what it is that is being cited.

5. Question and Answer Sessions. Beginning in October (earlier if there is demand), I will schedule weekly question and answer sessions probably on Friday afternoons (they usually last about an hour). These are not extra classes, and I will cover no new material. Indeed, I won’t “cover” any material. These sessions are designed to allow you to ask any questions that you want to ask. Attendance is not required. In the past most students have come to some of them; a few have come to all or none of them. In one of the last question and answer sessions in December, I will go over an essay question from an old exam. I will also schedule one during the exam period before the exam.

6. Office Hours. My office is in Hauser 512 in the Law School. My assistant is Jane Reader who sits in Hauser 518. My office hours are currently scheduled from 3:30-5:30 on Wednesdays, or by appointment. There is a sign-up sheet on the door. Signing up for the office hours is usually not necessary at the beginning of the term, but it will be by the end.

7. Syllabus. I have had much more confidence in syllabi in previous courses than I do in this one. The configuration of the course is somewhat different this year from what it was last year and substantially different from what it was in previous years. I am confident that we will take up the material in this order and that the readings will be no longer than what is given below. I am far less confident that we will take up the material on the specific dates mentioned or that what we will take up will be exactly what is given here. This is the basics; there will probably be variations.

PROPERTY SECTION 1
Tentative Syllabus and Assignments

Prof. Donahue Fall, 2009

Topic I. ESTABLISHING ENTITLEMENTS

A. Possession = Ownership?

Thu., Sep. 03. Pierson, Supplement, pp. S2-S21. (Read the principal case carefully, probably more than once. Then look at the Questions on p. S6. The Notes that follow give you material that you can use in answering the questions. In the first class, we probably will not have reference to the material in Notes 4-6, but we may well have reference to the Problems on pp. S20-21. The Note on the Reception will not be the subject of much discussion.)

Fri., Sep. 04. Pierson (cont’d); Keeble, Supplement, pp. S21-S26. (Class will begin with Keeble and will then loop back to consider Pierson, particularly in the light of Notes 4-6. Neither the Note on Reports nor the Note on the Private Law of Wild Animals Today will be subject of much discussion, unless you want to ask questions about them.)


Thu., Sep. 10. Johnson, Percheman, Supplement, pp. S26-S40. (We will not cover the Note on Indian Titles in class.)

B. Possession vs. Ownership

Wed., Sep. 16. Adverse Possession of Land, pp. 63-83. (Class discussion will focus on the questions posed in the notes rather than on the principal cases.)

Thu., Sep. 17. Adverse Possession (cont’d), pp. 83-94; Hohfeld, Supplement, pp. S52-S56). (We will not cover pp. 90-94 in class. We will probably not cover the Note on Disability Provisions, though it provides a nice exercise for self-testing. Class discussion will focus on the questions posed on p. 85-86, making use of the analysis suggested by Hohfeld.)

Fri., Sep. 18. Adverse Possession (review the above assignments).

C. Possession or Ownership: What is it worth?


Thu., Sep. 24. Edwards (2 cases), pp. 228-44.

Fri., Sep. 25. Review Edwards (2 cases), pp. 228-44.

D. A Very Brief Introduction to the Property You Can’t Touch


Topic II. TRANSFER OF OWNERSHIP OF LAND

A. Conveyancing


B. What You Can Transfer

Wed., Oct. 07. Introduction to Common Law Estates and Future Interests: Present Estates, pp. 384-98, 406-07 (Summary); Problems pp. 388, 391 [we probably will not do nos. 5 and 6 in class, but they are good exercises], 393.

Thu., Oct. 08. Future Interests, pp. 407-23; Problems, pp. 411 [focus on nos. 9 and 10; 8 and 11 get into more detail than is necessary for our purposes], 423.


Mon., Oct. 19. (Class will meet at 3:20 in P102, i.e., your regular time and room for Legislation and Regulation.) Beal, pp. 524-30. (The note to this case asks you to compare the result in this case with that in Jezo v. Jezo; the facts in Jezo are given on p. 516.) Common Law and Community Property, pp. 539-59, 564-71. (Note: This is long. I don’t expect you to remember the details. What I want you to do is to get some idea of the various ways in which the law deals either positively or negatively with the marital unit.)

Tue., Oct. 20. (Class will meet at 3:20 in P102, i.e., your regular time and room for Legislation and Regulation.) Javins, Lemle, pp. 433-35, 749-63, 770-77; Summary of Arguments Pro and Con, Supplement, pp. S73-S78.

Wed., Oct. 21. Pennell, Braschi, pp. 802-24 (quit at subsection (3)).

Topic III. PRIVATE AND PUBLIC CONTROL OF LAND USE

A. Private Control


Fri., Oct. 23. Waldrop, pp. 889-99; Petersen, pp. 899-904; Cox, pp. 904-12; Cooke, pp. 923-27.

Wed., Oct. 28. Waldrop, Petersen, Cox, Cooke (cont’d); Introduction to Covenants, pp. 954-9.

Thu., Oct. 29. Charping, Richmond, Riley, pp. 969-95.

Fri., Oct. 30. Riley (cont’d), Ginsberg, Camelback, pp. 995-1012.

B. Public Control

Wed., Nov. 04. Preble, Euclid, pp. 1013-20 (all you need to read of the note that begins on p. 1020 is the first sentence), 1027-40.

Thu., Nov. 05. Pierro, Stoyanoff pp. 1040-54. Exclusionary Zoning, pp. 1054-82; Hall, Supplement, pp. S132-S137. (This is, admittedly, a lot. There’s an extensive outline of this assignment in the general outline for Topic III, which will be available on the website).


Thu., Nov. 12. (Class will meet at 1:00 in LLS, i.e., the regular time and room for Property.) Legislation and Regulation.

Fri., Nov. 13. (Class will meet at 1:00 in LLS, i.e., the regular time and room for Property.) Legislation and Regulation.
Wed., Nov. 18. *Lucas*, Supplement, pp. S81-S98. (Note: this is a further edited version of the same case that appears in DKM, pp. 1144-73, i.e., I managed to get 30 pp. down to 18.)

Thu., Nov. 19. *Palazzolo*, Supplement, pp. S98-S108); *Kelo v. City of New London* (Supplement, pp. S108-S132). (Careful; this is long; we really should read one Supreme Court case largely unedited.)

Topic IV. THE WHAT AND WHY OF PROPERTY


Wed., Nov. 25. Thanksgiving Holiday.


Fri., Nov. 27. Thanksgiving Holiday.


TBD. Final Exam (one hour in-class [short answer questions] followed by take-home for the rest of the day [essay question]).
Donahue Outline of Topic I Property

SKELETON OUTLINE OF TOPIC I

Pierson v. Post

1. Facts
   a. “Relevant”
   b. “Irrelevant” -- role of the lawyer

2. Process
   a. Capias/summons
   b. Appearance before the justice
   c. Declaration -- trespass vs. case
   d. Jury
   e. Certiorari
   f. Assignment of error -- 6 -> 1

3. Holding

4. Sources of Law
   a. Statutes
   b. Common law cases
      i. N.Y.
      ii. England (Keeble)
      iii. Other common law jurisdictions
   c. Wisdom
   d. Custom
   e. Policy

5. Reasoning Process--Did the court have to reach this result?
   a. No, because Justinian is not binding in N.Y., even in 1805
      i. There’s a common law case that shows another way (Keeble)
      ii. Policy leads the other way, at least a/c the dissent
      iii. Custom may lead the other way
   b. Even if we look to Justinian
      i. He doesn’t put this case
      ii. The closest analogue is decided as a matter of imperial
          fiat rather than natural law
   c. The policy is shaky
      i. Majority assumes:
         that people in this situation will know the law
         that the rule it is proposing is more certain
         that more disputes occur at the capture stage than at
         the possession stage
      ii. Dissent assumes
         that foxes are a bad thing
         that people in this situation will know the law
         that having the fox will encourage hunters

6. Agway
   a. From the point of view of the Pa. Attorney General
   b. Why didn’t it work
   c. From the point of view of a legislative committee
   d. The public/private distinction

7. Why did they reach this result? The place where the academic and
   the practical meet.
   a. Structure--unconscious
   b. Interests--conscious
   c. The pegs theory of jurisprudence--particularism
8. Where does this lead us? The fork in the road
   a. The high road—occupation as the root of property—Johnson
   b. The middle road—system building with other cases—pp. 18–19
   c. The low road—practical implications—the unceasing abuse
      of fundamental ideas—Agway

Pierson Penumbra

1. Occupation theory
   a. What is the occupation theory
   b. To what extent is it a "justification" of property? normative
      vs. descriptive--as descriptive almost certainly wrong:
         Acquisitiveness should be protected
         Basic human needs
         Protecting human will
         On the ground of efficiency
         In order to protect the peace

2. Johnson
   a. The facts
   b. Why not follow the occupation theory here?
      i. The Indians didn’t occupy
      ii. Possession doesn’t equal power to convey
      iii. Lost by conquest
      iv. Sovereignty + derivative power

3. Percheman—pure race prejudice?
   a. Permanent vs. non-permanent
   b. Law of nations vs. the Indians
   c. The treaty and the treaty clause
   d. The sovereign has acted (his acts must be manipulated)

Jus Tertii

1. Actions to recover real property, historically

2. Tapscott
   a. What action in 1250?
   b. Why is this still an issue in the 19th century?
   c. What does the first sentence of the opinion mean?
   d. Should Mrs. Cobbs be protected?

3. Winchester
   a. Why is the city allowed to raise the jus tertii?
   b. What happened to the policy of protecting peaceable possession?
   c. Need the city worry about having to pay twice?

4. Why Winchester different from Tapscott
   a. She undertook to prove ownership
   b. She must prove ownership because she’s seeking permanent
      damages
      i. How to do this at common law
      ii. The problem of sovereign immunity
   c. Policy of protecting peaceable possession
   d. Policy against double recovery

5. Summary
   a. Possession/seisin-based notion of ownership
b. Why? Policies and principles:
   i. Proof
   ii. Peace
      Criminal
      Civil
   iii. Possession worth protecting in itself?

Adverse Possession

1. Adverse Possession -- Stat. 21 Jac. 1 (1623)
   a. Change in method
   b. Consequences of the statute for ownership
   c. Derivation of the 5 essential elements
   d. Policy of the statute
      i. Laches
      ii. Reward | how related?
      iii. Clearing titles |
   e. What length of time?
   f. Why have disability provisions?

2. Keeble in Hohfeldian terms

3. The position of AP in Hohfeldian terms
   a. right (possession)
   b. privilege (use)
   c. power (to run out the statute)
   d. power (convey) -> Belotti

4. Consider the following problems in Hohfeldian terms
   a. O -> life estate W -> remainder C, W leaves, AP enters
      i. After statute has run C sues AP
      ii. AP enters before O conveys
   b. AP -> life estate W -> remainder C, W dies, C enters, O sues
      i. Neither W nor C has held for stat period, but together they have
      ii. After holding for statutory period, W -> T, W dies, C sues T
   c. O -> life estate W -> remainder C, conveyance is void,
      W enters and holds for statutory period -> T and dies, C sues

Geragosian and Peters

1. What is the rule of the Geragosian case?

2. Does it make sense (see below)?

3. To what extent does Peters modify the rule?
   a. Larger encroachment
   b. Registered land

Geragosian

1. What the lower court held

2. Why not ejectment?

3. How to measure damages
   a. Loss to plaintiff
   b. Benefit to defendant
4. Effect of granting injunction

5. Why did the upper court hold as it did?
   a. Reasons offered
   b. Ways out
      i. Relative hardship
      ii. Laches
      iii. Estoppel
      iv. Unclean hands
   c. Some speculations -- Rugg, Crosby, Pierce, Field, Lummus, Qua and Donahue

*Edwards*

April, 1928 -- Lee filed suit
Edwards v. Lee, 230 Ky. 370 (1929) -- interlocutory appeal
Edwards v. Sims, 232 Ky. 791 (1929) -- prohibition action
Edwards v. Lee, 250 Ky. 166 (1932) -- fixing the boundaries
Edwards v. Lee’s Adm’r, 265 Ky. 418 (1936) -- damages awarded

1. Effect of procedure

2. Theories of cave ownership
   a. Accession
      i. Segmented
      ii. Joint
   b. Res nullius
      i. Mouth owner
      ii. Explorer
   c. Regalian rights

3. What’s the majority got going for it?
   a. Expectations (mineral law)
   b. The air rights cases distinguished
   c. ?Psychology
   d. Difficulties with the Logan theory

4. The remedy
   a. Waiver of tort and suit in *assumpsit*
   b. How the court got there
      i. Equitable accounting
      ii. Assumpsit for use and occupation
      iii. Passive transmissibility -- Hambly, Phillips
      iv. Trade secrets
   c. What would Lee have gotten if Edwards had done it right?
      i. Accounting profits does not equal economic rent
      ii. Variables
         where the 1/3 lay
         knowledge
         bargaining skill
      iii. Difference between before and after
## 5. The Value of the Cave

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<th>Time</th>
<th>Equals</th>
<th>Sum</th>
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<td>$1000</td>
<td>1 yr.</td>
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Sum from 0 to 100 of the PV of $1000 p/a @ 8% = $12,494

Sum from 0 to infinity of the PV of $1000 p/a @ 8% = $12,500