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## PREFACE

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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] was, as the citation states, published in 1993. That's twenty years ago. It was also designed for a two-semester, six-hour course, and it was generous in its coverage, so that teachers could pick and choose what they wanted to cover. The result was a long book, much more than is needed for the four-hour, one-semester course that I am currently teaching. It was also out of the order that I am now using in the course and needed a quite extensive supplement to cover developments, particularly in public law, since 1993. Clearly something more user-friendly and up-to-date was called for.

This book is a start in that direction. It contains all the assignments for this year's property course, and nothing more. It has all the updates that I have passed out as supplementary materials over the course of the last twenty years. Almost all of the cross-references have been revised so that they refer to material in this book. Occasionally, where the material is not in the book, they refer to DKM3, but that is for the sake of completeness. You don't have to use DKM3 in order to use this book.

These materials are formatted in the way that DKM3 is with the following exceptions: (1) Page numbers are given with an initial "S." (That's a reflection of the fact that this book began life as a Supplement.) (2) On the last page of a given set of footnote numbers, the footnotes will sometimes be found at the end of the section rather than at the bottom of the page. (3) Pages that are drawn from DKM3, even if they have been updated, contain bracketed "star page" references to DKM3. (4) References to statutes and treatises used to be by the publication date of the paper copy. Since most of these are now available online, I have put in the date '2012' where I have updated them. I have also added a note in diamond brackets (<>), where there is something problematical about the updated citation.

I'm a great believer in the internet, and I would like to publish this online. Unfortunately, I don't have the right to do so. I will distribute the book in paper form through the Distribution Center, probably in three packages. One is already there. The second will cover the material for October and the the third for November. The reason for the delay is that I'm working on updating and (I hope) cutting. I think that the book is still a bit too long for the course.

The paper edition is not ideal. It's bulky, and it does not take advantage of the fact that the cross-references are hyperlinked. Hence, I have also broken the book up into pdf packets, one for each class. If you want to put them all together now, you certainly may (that way the hyperlinks will work), but you'll have do it again in November if you want to get the final version for this year.

There are certainly areas in the coverage of private law in the book that could use updating, and I'm working on it. The book is not, however, that out of date. The private law of property moves rather slowly. I know of an experienced property teacher who has decided to go totally modern. He uses no cases decided before the year 2000. The amazing thing about his course is that the substantive content of his course is almost the same as mine.

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## INTRODUCTION

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Many students find their first course in property both difficult and mystifying. There are good reasons for this feeling: (1) Property more than any other branch of law has its roots deep in the past. Doctrines, the original reasons for which are all but lost in the passage of time, have been molded, sometimes imperfectly, to fit modern needs. (2) Property more than any other first-year law course is a survey course. It lays the foundation for courses in the devolution of wealth (wills, trusts, future interests, estates, and estate planning), for courses in modern real estate transactions (conveyancing, land finance, and land planning), for courses dealing with natural resources (water, oil and gas, and environmental law) and less obviously, for courses in constitutional law, tax, business organizations (corporations, partnership etc.), patents and copyrights, economic regulation (anti-trust, regulated industries) and commercial transactions. (3) Much of the factual stuff of property is new to many students. Most of us know something about auto accidents; few of us know much about drilling for oil, or even, the mechanics of a sale of residential real estate. (4) The concept of property in the abstract is probably a more difficult one to deal with than that of a contract or even a tort or a crime.

Much of what makes property difficult, however, also gives it what is, at least for us (the editorial “we”), its unique fascination. Study of the history of property law not only imparts insights into the past but also permits the student to observe the complicated process of a society’s coming to grips with its traditions-trying to determine which values of the past should be preserved and which modified, trying to sort out which pieces of society’s ancient machinery can be put to modern use and which should be discarded. The survey nature of the course permits the student to range over a wide variety of topics and to observe some of the basic characteristics of the workings of the law. Similarly, the variety and complexity of the factual situations in which property cases arise permit the student to observe the law’s attempts to fit its notions and values to the enormous variety and complexity of human experience. Finally, the slipperiness of the concept of property permits the student to begin to ask if not to answer some of the fundamental, jurisprudential questions which have puzzled philosophers since the beginnings of speculative thought.

This last point may serve to explain why I did not begin this introduction in the normal fashion by saying what this book is about. It is about property, and property is very hard to define. Much of Chapters 1 and 7 are devoted to a search for a definition of property. Nonetheless, we really ought to make an initial stab at it here: It is sometimes said that the law of property is the law of the relation of persons to things. Like many sweeping definitions, this one falls short of being satisfactory. Clearly it suggests that the relationship I have to my watch, commonly called “ownership,” is defined and explored in the law of property. But it is not likely to suggest to the uninitiated that the West Publishing Company’s relationship to the arrangement of words in this introduction, less commonly called “copyright,” is also defined and explored in a branch of the law of property.

Further, the habit of speaking of the law of property in terms of labels regarding a person and a thing, “ownership,” “copyright,” may lead to the confusion that property law deals with one person and one thing in a vacuum. Such is not the case. There is no property on the philosopher’s desert island. Robinson Crusoe did not need property until Friday arrived. Property, then, like any other branch of law, deals with legal relations among persons. Physical things are frequently involved, although sometimes nonphysical things like the arrangement of words on this page are involved, in addition to or in lieu of physical things. Thus, we may recast our original definition and say that property is the law concerned with the relationship between persons with respect to things,” “things” being very broadly conceived.

Because property law concerns the relationship of persons, the terminology and doctrines of other branches of law frequently are relevant, if not decisive. If you take my watch without my permission, that is a tort, perhaps also a crime. Similarly, I can agree to sell you my watch, and that agreement is governed, at least in part, by the law of contract. Thus, property is a peculiar hybrid constantly borrowing from other fields, and we will continually have to make reference to those other fields in order to elucidate the law of property.

While the definition which we have given above probably encompasses all of the law of property, it does little to explain where property ends and other subjects, such as tort and contract begin. More practically, it probably does not explain why this book deals with the topics it does. A partial answer to both questions may be found in another slippery word—real—which is derived from the Latin *res* meaning “thing.” “Real” is used by the law in many ways. It can be used in its normal sense as the opposite of “fictional,” but this meaning is not helpful for our present purpose. It can also be used to describe a type of legal proceeding in which the plaintiff seeks to recover from the defendant a specific thing rather than just money damages. The fact that historically in the Anglo-American legal system land was the only thing which could be recovered specifically has led to our distinction between *real* and *personal* property. Both types of property are dealt with in this book, but the emphasis is on real property, largely because of the greater complexity of land law.

A related meaning of “real” refers to those rights which I have not just against a specific individual or groups of individuals but against the whole world or against a great many people. These rights are known as *in rem* rights as opposed to *in personam* rights.<sup>1</sup> It would be nice if we could say that this book deals with *in rem* rights and duties while contracts and torts courses deal with *in personam* rights and duties. Unfortunately, such a division, however logical it might be, would do great violence to the somewhat illogical way in which our law has developed and also would leave such important topics as the purchase and sale of land scattered over a number of courses. Thus, we are forced back to our original definition: this is a book about the law which deals with relationships between persons with respect to things. The “thing” which we will be most concerned with is land, although we will spend some time, particularly in the initial chapters of the book, with tangible things, which are not land, such as wild animals, watches, and cars, and to a lesser extent with intangible things, such as copyrights and bank accounts.

There are numerous ways of dividing the law of property. One traditional way of dividing the topic is according to the nature of the right or power you wish to talk about. Such a division might begin with the classification of types of interests in property (what have you got), continue with a discussion of how those interests are transferred (how do you convey it) and close with a discussion of limitations which the law imposes on the use of a thing (how can you use it). Another approach might divide the topics functionally, using, perhaps as a paradigm, the development of a piece of real estate: proceeding from the original title in the state to its acquisition by a developer to its transfer to a homeowner, examining at each stage the types of interests involved, the way they are transferred and the limitations on their use.

We have adopted neither of these forms of organization completely in this book. Some of the topics which such forms of organization entail, such as capacity to deal with interests in land—are traditionally covered in law schools in different courses—family law and constitutional law in the case of capacity. Other topics—such as the types of interests in land—are sufficiently difficult that their treatment is best postponed until after the student is exposed to some fundamental

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<sup>1</sup> In civil procedure the *in rem*–*in personam* distinction is used to describe the way an action is begun: *in personam* by personal service of process on the defendant, *in rem* by seizing or attaching a piece of property. The civil procedure use of these terms is related to, but should not be confused with, the use being made in the text.

concepts, such as possession, and some fundamental institutions, such as the conveyance of land by deed. The basic outline of the book does follow the traditional tripartite division: ownership, conveyance and use, and this division is reflected in the three major parts of the book. The individual chapters, however, reflect the interrelated nature of these categories; in some of them the functional approach comes to dominate, in some of them an organization based on the types of people whose interests are at stake.

Chapter 1 revolves around the question: what do we mean when we say this thing is *mine* and that thing is *yours*? This question raises the further question of how *title* to something is established. We deal with various situations in which title derives from possession, original capture of wild animals, and “squatting” on land; and situations in which the relative rights of one who possesses a thing must be resolved against an “owner” or other actors.

Chapter 2 takes a functional approach; it examines a piece of land from the point of view of the natural resources to which it may relate, caves, water, oil and gas, and air space, and asks how the law has used the concepts we have developed in the first two chapters to allocate those resources. Section 2(E) of Chapter 3 asks to what extent this law has or should change in the light of today’s broad concern with the environment.

Chapter 3 examines the transfer of interests in property and some of the types of interests which may be created by transfers. The emphasis of the chapter is on transactions within the family, although there is a basic introduction to commercial conveyances of land in section 1. Chapter 4 deals with the law of housing, principally in the context of the landlord-tenant relationship. It concludes with a look at important forms of public intervention in the housing market and evaluation of recent shifts in landlord tenant laws.

Chapters 5 and 6 return again to the topic of land use, which we began to treat in Chapter 3. The focus of Chapters 5 and 6 is on the land itself rather than on the natural resources which it may contain. Chapter 5 deals with private restrictions on land use, nuisance, easements, covenants, and servitudes. Chapter 6 deals with public restrictions on land use and the boundary between regulation and public exercise of the power of eminent domain.

Chapter 7 deals with property in a more abstract form. We seek a definition of what is property by examining a number of constitutional cases in which the right of property is opposed to “civil rights” and by examining some cases which illustrate or seem to illustrate various philosophical theories of property.

Even this brief outline should make it apparent that we believe that property contains large doses of both private and public law. Most of the chapters and many of the sections deal first with the way in which the law resolves disputes between private individuals regarding a given thing and then outlines the various ways by which the state intervenes in its own name in the same questions. Thus, section 1 of Chapter 1 treats first with disputes between individuals concerning the right to wild animals, then deals with the involvement of the state in its own name through various types of conservation laws.

Every teacher develops certain themes developed throughout the course. The following list of questions indicates some of the salient themes of this book:

(1) What is property? Why should this particular interest be afforded the peculiar constitutional protection granted “property” rights? (2) A right is only as good as the means by which a court will enforce it. What alternative remedies are available to vindicate this right and what effect will the existence of these remedies have on the behavior of the possessor of the right? (3) Property law is the law of wealth or lack of it. What economic forces is the law protecting or thwarting? (4) To what extent does the personal situation of the parties (bad guys versus good guys) control the result in a given case? To what extent should it?

*Some Hints on Using This Book*

1. There are a lot of questions in this book, and hard as it may be for you to believe, they are designed not to harass you but to help you to understand the materials. Many of the questions are straight-forward ones placed there to call your attention to a particular point in the materials. Such questions usually come at the beginning of a list of questions. Other questions are less straight-forward: they ask you to apply a rule of law to a fact situation not posed by the cases theretofore covered, or they ask for a policy argument. You should not be surprised if you cannot devise a simple answer to such questions. You should, however, be able to devise an intelligent answer to them and to give the arguments for and against your conclusion. The questions are usually accompanied by citations of further authority. The questions are designed, however, so that you can arrive at an intelligent answer without consulting these authorities. You should try your hand at the question before you look at the authorities. In most instances the answers which the authorities provide are suggestive, not definitive, and the purpose of the questions is to stimulate your thinking, not to give you exercise in the use of the library.

2. Throughout the materials you will find recommendations of secondary sources you may wish to consult. Although your teacher may have different views on this, I do not recommend the use of treatises and law review articles until after a topic has been covered in class and you have had an opportunity to reread and outline the material. When dealing with real legal issues, the reading of secondary material should never substitute for the reading of primary material, constitutions, cases and statutes.

3. Granted my mistrust of secondary authority, I am uncomfortable that many of the notes in this book had to contain summaries of doctrine. The survey nature of the course, however, requires that some doctrinal points be made in note form. To have a principal case for every major doctrinal point would lead to a book much larger than this one and to having to spend a considerable amount of class time on cases that are not worth the effort. I have, however, supported our doctrinal statements with citations of authority so that you will know what I am relying on. You should ask yourself with these notes whether their purpose is: (a) to explain something in the principal case, (b) tell you how the ideas in the principal case are used or neglected in other contexts, or (c) to introduce you to the succeeding materials. Sometimes more than one purpose is served by the note, but I have tried to make it clear, frequently in the questions posed, which purpose or combination of purposes is being served in the note.

4. As we have noted above, the property course consists of a series of closely interrelated questions. This characteristic frequently means that any given section or chapter must be seen as a whole before all its various elements become clear. The Tables of Contents and the Index are designed to give you road maps into the material as are many of the textual introductions and the catch-phrases found at the beginnings of the subheadings. I recommend that you skim through any assigned section or subsection to get an overview before undertaking to analyze the material in depth. I have also included an unusually large number of cross-references in this book, and I hope that these will aid you in putting the materials together.

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I have benefitted enormously from students' suggestions in preparing this book. Please don't hesitate to drop me a note if you have any suggestion, large or small, which might help me in preparing possible future editions of this book.