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Cases and Text on Property 6th Ed.

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ASPEN CASEBOOK SERIES

**Cases and Text on
PROPERTY**

Sixth Edition

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ABOUT THE AUTHORS

Susan F. French, Reporter for the *Restatement, Third, of Property, Servitudes*, taught Property, Wills and Trusts, Land Use, and Community Association Law at the University of California, Davis from 1975 until 1988 and at the University of California, Los Angeles School of Law, from 1989 through 2014. She served as an Adviser to Professor Casner on the *Restatement, Second, Donative Transfers*, and as an Adviser to the *Restatement, Third, of Property, Donative Transfers*. Her publications include articles on powers of appointment, class gifts, lapse and survival problems, and perpetuities, in addition to works on servitudes and common interest communities. She is co-author (with Wayne S. Hyatt) of the casebook *Community Association Law* (2d Ed. 2008). She also publishes a biennial edition of *A California Companion for the Course in Wills, Trusts & Estates*.

Gerald Korngold is Professor of Law at New York Law School. After private practice in the area of real estate law, he entered law teaching and focuses on the fields of property, real estate transactions, conservation law and policy, and international real estate transactions. Professor Korngold has published books and articles on real estate transactions, commercial lending, landlord and tenant, estates and future interests, servitudes and covenants, conservation easements, homeowner associations, and real property taxation. He is an elected member of the American Law Institute and the American College of Real Estate Lawyers. Professor Korngold served as an Adviser to the *Restatement, Third, of Property, Servitudes*, and is a Visiting Fellow at the Lincoln Institute of Land Policy in Cambridge, Massachusetts.

The original authors of this casebook were A. James Casner and W. Barton Leach, who published the first edition in 1951.

A. James Casner (1907-1990) began his teaching career at the University of Illinois, joined the Harvard Law School faculty in 1938 as a visiting lecturer, and became a regular faculty member in 1940. In 1930, Professor Casner began a long association with the American Law Institute, working with Richard Powell, the Reporter for the first Restatement of Property. Casner became associate reporter for chapter 23 of that Restatement (gifts to heirs and the like), and went on to serve as adviser and reporter for many projects. He was the Reporter for the Restatement, Second, of Property, Landlord Tenant, and Donative Transfers. Professor Casner was the general editor of the American Law of Property (1952-54).

Professor Casner pioneered the use of revocable inter vivos trusts to avoid the expense, delay, and publicity of probate. It became the centerpiece of his treatise on estate planning, first published as a single volume in 1953, and expanded to six volumes by the fifth edition published in 1984. By the time of his death,

the revocable *intervivos* trust had become a standard tool of estate planners throughout the United States.

W. Barton Leach (1900-1971) clerked for Justice Oliver Wendell Holmes and then taught at the Harvard Law School from 1929 until his retirement in 1969. He was a Special Reporter for the chapters on powers of appointment and the statute of limitations in the first Restatement of Property and contributed the chapters on powers and the common law rule against perpetuities in the American Law of Property (published 1952). Perhaps his best known pieces are the classic *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638 (1938) and *Perpetuities: The Nutshell Revisited*, 78 Harv. L. Rev. 973 (1965). Leach was a great teacher, a great wit, and a talented musician who played the accordion. He was a tireless campaigner for law reform, and almost single-handedly advanced the wait and see doctrine that ultimately prevailed, under Professor Casner's leadership, in the Restatement, Second, of Property, Donative Transfers.

Professors Leach and Casner both served in the Air Force during World War II. They returned to law teaching after the war and decided to pool their resources and develop a new basic property casebook. A temporary edition was published in 1947 and the first standard edition in 1951. *Cases and Text on Property* has been a leading casebook ever since.

*For my husband, Tom Rowe,
my daughter Sarah,
and my grandchildren Ellie and Dylan*
—SFF

*For
My father of blessed memory,
David,
Ethan, Ellie, Gabriel and Benjamin,
Margaret and Matt,
and, especially, Alice*
—G.K.

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PREFACE

First published in 1951 by Harvard Professors A. James Casner and W. Barton Leach, *Cases and Text on Property* established the contours of the modern Property course, integrating into one casebook material previously taught in separate courses including personal property, estates in land, future interests, conveyancing, and landlord and tenant. Through subsequent editions, the book has evolved to reflect continuing changes in property law and the society it serves. The increasing importance of intellectual property, common interest communities, and constitutional limits on the ability of government to acquire and regulate property, as well as other changes, are reflected in the materials included in this sixth edition.

This edition also responds to changes in the first year curriculum that have cut the number of hours devoted to Property and increased student options to pursue, or opt out of, studying land transactions, zoning, marital property, and trusts and wills. We have cut back from 1,370 pages in the fifth edition to 944 in this sixth edition. Chapters on medieval land law and zoning have been cut entirely and coverage of marital property is limited to a note that covers the differences between community and common law property regimes, the question whether professional degrees, celebrity status, and frozen ova, sperm, and embryos are marital property subject to division on divorce, rights of the surviving spouse on death of the first spouse, and pre-marital agreements. We have also replaced a number of principal cases with notes and have ruthlessly edited those that remain.

Major changes in this edition include beginning with a new chapter that introduces basic terminology and ideas about property and three causes of action that vindicate rights to possess, use and enjoy property: trespass, nuisance, and conversion. We have added exciting new cases on intellectual property: *Keller v. Electronic Arts, Inc.* (right of publicity), *American Broadcasting Cos. Inc. v. Aereo Inc.* (copyright), *Toyota Motor Sales, USA, Inc. v. Tobari, Inc.* (nominative fair use of trademarks). We have also added the latest cases from the U.S. Supreme Court on patentable subject matter: *Bilski v. Kappos*, *Association for Molecular Pathology v. Myriad Genetics, Inc.*, and *Alice Corporation Pty. Ltd. v. CLS Bank International*. *Bowman v. Monsanto* on infringing use of patented seeds rounds out Chapter 4.

In other changes, nuisance coverage is split between Chapter 1, which covers nasty neighbor disputes, and Chapter 11, which covers conflicting land use cases. New cases on landlord tenant law are *Providence Land Services LLC v. Jones* (lease with no end date), *Miller v. David Grace, Inc.* (landlord tort liability), *Elk Creek Management Co. v. Gilbert* (retaliatory eviction), and *Austin Hill Country Realty, Inc. v. Palisades Plaza* (landlord's duty to mitigate). Chapter 7 adds new cases on tenancy in common, an increasingly important way of holding title: *Estate of Hughes v. Patton* (ouster), and *Leg Investments v. Boxler* (effect of right of first refusal on ability to partition). Two new cases have been added to Chapter 9 on real estate transactions: *Genovese Drug Stores, Inc. v. Conn. Packing Co.* (chain of title), and *Commonwealth Electric Co. v. MacCardell* (Torrens system).

Finally, Chapter 13 now combines eminent domain and regulatory takings. Several older cases have been removed to make way for *Kelo v. City of New London*, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, *Arkansas Game and Fish Commission v. United States*, *Lingle v. Chevron U.S.A.*, and *Koontz v. St. Johns River Water Management District*.

Despite the cuts, which make this book well suited for a four-unit course, it can also be readily adapted for a five- or six-unit course. Most of the fifth edition cases that have been cut will be available on our website along with supplemental materials.

Professors Casner and Leach ended their Preface to the second edition of this book, in 1969, by saying: "*We wonder why all of our colleagues are not fighting to get a chance to teach the first-year property course. We can only surmise that they want to live more sheltered lives. We do not envy them.*" We, too, would not trade places with our colleagues. Property is a fascinating and ever-evolving subject.

- Property law engages some of the most important and contentious topics of our time including allocation, use, and conservation of natural resources; protection of and access to the fruits of intellectual and creative activity; land use regulation; condemning land for private industry; privatizing local government through common-interest communities; improving substandard housing; and eliminating discrimination in housing.
- Property law involves some of the most immediate and personal of human interactions such as buying a house or renting an apartment; fighting with neighbors over noise, smells, pets, water, and boundaries; protecting property against trespassers; making gifts; providing for the family on death; dividing property on divorce.
- Property law draws the attention of some of the most interesting legal thinkers of our time, as it has in prior generations. The literature is rich.

The materials in this book are designed to expose students to the broad sweep of property law and to allow them to gain the basic knowledge critical to understanding property issues and relationships. They engage students in searching analysis of the policy choices that face judges and legislatures, and help them move along the road to becoming lawyers and scholars. The materials have been selected not only for their ability to teach law, lawyering, and legal analysis, and to highlight significant policy issues, but also with an eye to the human dramas and real-life consequences that make studying Property so interesting, as well as so important. The style and presentation are designed to be user-friendly with informative notes, examples, and charts. Questions and problems throughout the book focus attention in the soundness of rulings, examine the underlying policy issues, and encourage students to think beyond the decided cases.

To improve readability of the materials, we have sometimes omitted citations, corrected apparent typographical and spelling errors and broken up or combined paragraphs in opinions without noting the intervention. Footnotes by the court or a quoted author retain their original numbers; footnotes we have added are numbered consecutively throughout a chapter. Textual omissions are indicated by ellipses.

Susan F. French
Gerald Korngold

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PART I

INTRODUCTION TO PROPERTY: BASIC IDEAS, LEGAL PROTECTIONS, ACQUISITION BY CAPTURE, CONQUEST, ADVERSE POSSESSION, AND CREATIVE ACTIVITY

To achieve proper self-development—to be a person—an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights.

Margaret Jane Radin, *Property and Personhood*,
34 Stan. L. Rev. 957 (1982)

[I]n a state in which private property does not exist, citizens are dependent on the good will of government officials Whatever they have is a privilege and not a right. . . . Any challenge to the state may be stifled or driven underground by virtue of the fact that serious challenges could result in the withdrawal of the goods that give people basic security.

Cass R. Sunstein, *On Property and Constitutionalism*,
14 Cardozo L. Rev. 907, 915 (1993)

Property plays a fundamental role in our society, providing us with the material things we need to sustain life and a base from which we can participate in civic life. For most of us it does much more. We use our clothes, cars, and personal possessions to differentiate ourselves from one another; we use our property to shelter and nurture our families; and we use our wealth to support causes we want to support. Protection of our property is vital to our sense of security and is a core function of our legal system. But property law does not just protect pre-existing entitlements. It mediates disputes among those with too little property and those who have “too much,” sometimes forcing reallocations for private or public good. It also resolves disputes among public-minded folks who claim that owners of historic sites and buildings, wetlands, wildlife habitat, rain forests, and the like should be regulated to protect public interests and the owners who want to stay in control of “their” property. Other disputes involve community claims of rights to regulate development in the interests of planning to meet community objectives for safety, traffic control, amenities, and fiscal support,

and more contentiously, claims of the government to take private property for economic development. Property lies at the core of our society. Throughout history disputes over property have been some of the most contentious and they remain so today.

In the first four chapters of this book we introduce you to four very fundamental aspects of this critical subject: (1) the basic causes of action available to protect interests in property; (2) acquiring property by capture, finds, and salvage; (3) acquiring property by conquest, adverse possession, and prescription; and (4) protecting property acquired by creative activity (herein of intellectual property).

To illustrate the very broad range of property law, we have included cases ranging from land to human body parts, with stops for wild animals, oil and gas, water, cash, sunken treasure, stolen art, human cannonball performances, celebrity personas, copyrights, trademarks, and patents. We also introduce you to a variety of perspectives on the role of property—particularly private property.