

Property
Law 104-004 (72277)

Prof. Claeys
Fall 2023
Section 4 (Flex JD Section)

Syllabus
Current as of August 11, 2023

Meeting Times: Tuesdays, Thursdays, 6:05-8:05 p.m.

Final exam: Monday, December 11, 6-10 p.m.

Office hours and contact information

My phone number is (703) 993-8247. My email address is eclaeys@gmu.edu. The course also has a TWEN site, and I am reachable on the discussion board of that site. (Please sign up for the TWEN site as soon as you can.)

Tentatively, I plan to conduct office hours by Zoom, and from 4:50 to 5:50 p.m. on Wednesdays. If that time slot is *not* convenient for most of you, I am happy to reconsider and schedule for another hour of the week. I will raise this issue on the first day of class. If we stick with office hours Wednesday late afternoons, they'll hold until Thanksgiving week. Thanksgiving week, office hours will be Monday, November 20, 4:50-5:50 p.m. I'll schedule office hours intermittently over review and exam periods, but I'll announce those hours closer before exams.

I expect that office hours will be conducted by Zoom. A link is available on the course TWEN site. My office hours are "drop-in" hours, meaning that I do not have any other appointments during them and you are free to join my Zoom session without appointment. However, I am happy to schedule appointments. There is no optimal time to schedule office hours for Flex JD students; most of you have jobs or family commitments. So please by all means ask to schedule an appointment if you like.

Expected learning outcomes

Learn basic principles of property law as applied to real estate and personal goods.

Learn policy arguments standard in property law and policy.

Learn basics of common law legal reasoning.

Learn basics of legal analysis of conveyances.

Receive an introduction to reading statutes.

Cancellations and make-up classes

I will need to cancel class Thursday evening, October 5, due to a previously-scheduled engagement. I will ask your opinions when is best to reschedule the makeup class. (I've prepared a poll on the TWEN site, and I'll launch the poll the first week of class.) I'll try to reschedule the class the week of October 2 or October 9 (but not during the fall break on the 9th).

Otherwise, I do not anticipate needing to cancel any of our scheduled classes. If I need to cancel class suddenly due to illness or some emergency, I will have my secretary post notices in the atrium and on the door of our classroom, and I will send an email to the class.

Class reading

Reading will vary anywhere from 5 pages per hour (10 pages per 2-hour class block) to 25 pages per hour (50 pages per class block). When I assign readings at the low end of this range, you should assume I'll parse the assigned readings very closely in class discussion and question students actively; when I assign readings at the high end of this range, you should assume I'll discuss the materials generally and lecture.

When you start reading materials from the course supplement, you'll find that they are not edited anywhere near as heavily as legal source materials in the casebook. As a general matter, you are responsible for figuring out which passages in those source materials are directly relevant to class discussions and which are not.

To help you read ahead, at the end of this Syllabus I forecast the reading I anticipate covering for the entirety of the course. However, this forecast is not a promise but a projection. I reserve the right to change the projected reading schedule depending on how fast or slow we are going. If you read more than a class ahead, you assume the risk of reading material I decide to leave on the cutting room floor.

Class attendance

Regulation 4.1-1 in the law school's Academic Regulations requires that students attend class at our law school on a regular basis. And it states: "If a student is absent for any reason for more than 20 percent of the sessions of a course, the student is not eligible for credit in that course." For a 4-hour course like Property, AR 4.1-1 requires that students not be absent for more than 12 hours of class (*i.e.*, 6 2-hour class sessions). I do not enforce this requirement when I need to reschedule class due to illness or non-GMU commitments. Otherwise, however, I do follow this regulation, and I will administer it by circulating a sign-in attendance sheet (if we're studying in person) or by printing an attendance report (if we're studying remotely).

AR 4.1-1 applies to absences "for any reason." In other words, it is your responsibility to keep track of your absences. It is also your responsibility to anticipate possible absences. You may

decide you need to be absent to explore professional opportunities, to observe holidays in your religion, or to take care of personal matters. It is your responsibility to limit the number of class days for which you're absent for such reasons, and also to factor in the possibility that you may be absent from class unexpectedly for illnesses or personal emergencies.

With one exception, I do not need to be notified in advance if you're going to be absent. The exception is if you contract a debilitating illness. If you do, please let me know, and please know that I'll probably request a confirming note from medical personnel.

If a student misses more classes than allowed by AR 4.1-1, the student is not eligible to sit for this course's examination. In extraordinary circumstances, I reserve discretion to have a student ineligible for the exam under 4.1-1 perform substitute work equivalent to class attendance ... as long as the student does not miss more than 16 hours of class (8 2-hour class sessions) total. Students who believe they are eligible for this exception should petition me in writing and explain why (AR 4.1-2) they "have merit" in their request to substitute work for class lectures missed over the 6-hour limit. Generally, I am disinclined to grant AR 4.1-2 exemptions, but I will do so for absences due to debilitating illnesses when documented.

If a student misses more classes than allowed by AR 4.1-1, and does not receive the benefit of an exemption consistent with AR 4.1-2, I notify the law school's administration and the student is not eligible to sit for this course's final examination.

Class preparation and participation

I expect you to be prepared for class. For any case excerpted at any length longer than a page, I expect you to understand the facts, the lawsuit, the theories of the case adopted in the majority and any separate opinions.

When I or the casebook presents a "squib" case—that is, a case consolidated into a paragraph or so, I expect you to know the facts, the holding, the rationale, and the contribution to the general line of doctrine covered in class.

When the casebook or excerpted cases refer to statutes, I expect you to read them closely enough to answer questions about them.

I call on students during class, to discuss material that a lawyer should have been able to digest from the reading without much assistance. The first week of class, I will circulate a sign-up sheet. I'll expect you to sign up to be on call for 4 classes this semester. You should space out your sign-ups so you're on call once in each of the four quarters of the semester. (The sign-up sheet will explain.)

Students who have signed up will be expected to answer questions about the cases and statutes assigned for reading that day. I reserve authority to take disciplinary action if a student does not answer questions when called on and/or is not being prepared for class. Although the disciplinary action will be tailored to the student conduct, the most likely action is to lower the student's grade by one third of a letter.

During class, I expect you to be generally respectful to me and your classmates. Imagine the standards of comportment you would use if you were a lawyer, sitting in front of a judge, watching as the judge engages another lawyer in the proceeding. Please treat me and any of your colleagues with whom I am conversing with the same professional courtesy.

Recording classes

I reserve all property rights in my class lectures, presentations, and discussions. As a general rule, I prefer that classes not be recorded. I like to encourage free and frank discussions of class materials, and in my experience the recording of class tends to chill class discussions. However, I will grant permission in specific cases when a student can demonstrate a special need. If you think you have such a need, please inquire.

How you should inquire depends on the nature of the need. If you think you have a disability-related need, please contact GMU's [Office of Disability Services](#). ODS has a process for administering disability-related requests for accommodations, and in that process ODS serves as a go-between between a student-applicant and that student's instructor. If your need is not disability-related, you are free to ask me or ask me anonymously. To make an anonymous request, please contact Annamaria Niels, Associate Dean for Student Affairs (ანიელს@gmu.edu). Dean Niels will be happy to explain the bases for anonymous recording requests to me.

Virtual Classroom Management and Logistics

Property is an in-class course. But the make-up class will be online, and we'll study online in case of emergency. If we shift to online:

- I'll teach on Zoom, on meeting links I'll set up for class.
- On your videoconference platform account, please make sure that your first name, last name, and school profile picture are all uploaded.
- When class is in session, you are expected to have your computer camera ON and your microphone OFF. (Of course, please do turn your microphone on when you participate in class discussion.)
- When you want to ask a question or discuss materials, please send me a message via Zoom's chat function. I prefer that you send a short message that you have a question, and that you ask the question orally. (If you don't, I'll read your question back to the class anyway before answering it.)
- You are encouraged (though not mandated) to use a microphone or earphone/mike headset during class.

- To a large extent, we'll need to play things by ear if we need to go to remote learning for the whole class. That said, it is very likely that, for reading assignments that DON'T already have problems assigned, I'll construct problems in advance of class and we'll discuss those in addition to the materials assigned in the reading schedule below.

Grading

The grade for this class will be based on a final examination. The exam will probably be 3 hours long, but I reserve the right to make it run 4 hours long.

If you have the option to take the examination in person, it will be administered by the Records Office. If you take the exam in person, it will be closed-book, closed-note, closed access to phones or any other tools besides your laptop, and run with ExamPro or some other software that keeps a firewall between the programs you use to type your exam answer and all other files on your laptop.

If examinations need to be administered remotely, the Records Office will administer the exam. Remotely-administered exams in my class will be open-book and -note. If at all feasible, Records will administer the exams (again, during remote administration) at the times indicated on page 1 of this exam. If that administration strategy turns out not to be feasible, Records will give you an opportunity to take the exam remotely during the exam date, and it will be your responsibility to complete the exam within the time limits described on page 1.

I do not increase student grades on the basis of class participation. Pursuant to the policies described above on class preparation and participation, I reserve authority to lower student grades for repeated lack of preparation or refusal to participate.

Course materials and first day's assignment

To study this course, you will need three materials. The first is a hardbound casebook:

Thomas W. Merrill, Henry E. Smith & Maureen E. Brady, *Property: Principles and Policies*, 4th edition, 2022, Foundation Press, ISBN-13: 978-63658-367-8.

The second is a paperback textbook:

Owen L. Anderson, *A Student's Guide to Estates in Land and Future Interests*, 4th edition, 2020, Carolina Academic Press, ISBN-13: 978-1-5310-1881-8, and e-ISBN: 978-1-5310-1882-5.

On the first day of class, I will distribute a course supplement.

The casebook and estates/future interests workbook should both be available in the university bookstore in Van Metre Hall. I will bring the supplement to class on the first day and then make

it available on a desk outside the faculty offices on the third floor, on the side of the building facing Van Metre Hall.

For Tuesday August 23, please read units 1 and 2 below.

Course reading

References to “MSB” are to Merrill, Smith & Brady, *Property, Principles, and Policies*, 4th ed. All references to Merrill, Smith & Brady are to pages. If an assignment reads “1-5 end n.2,” you do not need to read any materials on page 5 after the end of case note 2.

References to “Anderson” are to *A Student’s Guide to Estates in Land*.

References to “Supp.” are to the supplement. When it is complete, the course supplement will have its own internal page numbering. References to that supplement will be to that internal pagination.

1. Ch. 2. Acquisition and claim scope. The legal interest in practicing a calling. The rule for capture for personal goods. Read for T 8/22.

MSB 61-64. *Keeble*.

MSB 54-61. *Pierson*.

2. Ch. 2. Acquisition and claim-scope. Variations on the rule of capture. Read for T 8/22.

MSB 255-60. *Ghen v. Rich*.

MSB 73-81. Discussions of sunken vessels, treasure trove, and oil and gas.

3. Ch. 2. Acquisition and claim-scope. Land, the rule of occupancy, and the rule of discovery.

Supp. __. *Brumagim*.

MSB 82-99. *Johnson*, note on land grants from the federal public domain.

4. Ch. 2. Acquisition and claim-scope. *Res* composition and accession.

MSB 124-38, 144-51. Doctrines of crops, increase, and fixtures, and the *ad coelum* maxim. (*Edwards* and *Strain*.)

Supp. __. *Stoltzfus v. Covington County Bank*.

5. Ch. 2. Acquisition and claim-scope. The concept of possession, and issues in sequential possession.

MSB 113-24. *Haslem, Armory, Clark* and *Anderson*.

6. Ch. 2. Acquisition and claim-scope. What happens different theories of acquisition, claim-scope, and possession point in different directions?

MSB 187-200. *Briggs, Goddard*.

MSB 373-76. *Fisher*.

Supp. __. *Stone*.

7. Ch. 3. Public property.

MSB 276-80. Introduction to navigable waters.

MSB 291-309. Introduction to the public trust doctrine, *Oregon ex rel. Thornton v. Hay*, excerpt from Rose, “Comedy of the Commons.”

Supp. __. Passages from Justinian’s *Institutes* and from international law treatises.

8. Chs. 1, 4: The possessory interest in control over land (and its limits): The *prima facie* action for trespass to land.

MSB 1-9 end n. 5. *Jacque*.

MSB 335-343. Criminal and civil actions protecting property.

9. Chs. 1, 4: The possessory interest in control over land (and its limits): trespass and airspace

MSB 369. The paragraph after the marker for “Section B.” Introduction to limits on the right to exclude.

MSB 10-16 end n.6. *Hinman*.

MSB 280-81. Note on navigable airspace and *Causby*.

10. Chs. 1, 4: The possessory interest in control over land (and its limits): Necessity, rights of way implied for sustenance, and public policy limitations.

MSB 369-72. *Ploof*.

Supp. __. *McKee v. Gratz*.

MSB 379-86. *Shack*.

11. Ch. 2. Acquisition: The possessory interest in control over land (and its limits). Adverse possession (1/2).

MSB 155-68. *Scott*, purposes of adverse possession.

MSB 175-82. *Howard*, note on disabilities.

12. Ch. 2. Acquisition: The possessory interest in control over land (and its limits). Adverse possession (2/2).

Supp. _____. *Mannillo v. Gorski, O'Keefe v. Snyder*.

13. Chs. 1, 4: The possessory interest in control over land (and its limits): Damages and the basis for injunctions

Supp. _____. *Crook v. Sheehan Enterps.*

MSB 44-46, 417-25. *Baker* and introduction to equity.

14. Chs. 1, 4: The possessory interest in control over land (and its limits): Undue hardship, and mistaken improvements.

MSB 432-42. *Pile* litigation, *Golden Press*, note on the *ex post/ex ante* problem.

15. Ch. 4: The possessory interest in control of personal goods: the *prima facie* action for conversion.

Review MSB 335-343, particularly the passages on criminal and civil actions protecting property in personal goods.

Supp. _____. *Russell-Vaughan Ford v. Rouse; Lawyers' Mortgage Inv. Co. v. Paramount Laundries*.

16. Ch. 4: The possessory interest in control of personal goods: the *prima facie* action for trespass to chattels.

Supp. _____. *Restatement (Second) of Torts* § 218 & cmt. e; *Blondell v. Consolidated Gas*.

17. Ch. 4. The possessory interest in control of personal goods: the good faith purchaser defense, and monetary relief.

Reread (from unit 16) *Russell-Vaughan Ford* and *Lawyers' Mortgage*. What kind of monetary remedies are awarded in those cases and why? Reread RST § 218. What compensatory damages seem appropriate for each of the trespasses to chattels described in subsections (a), (b), and (c) of § 218?

MSB 880-86. UCC § 2-403, *Kotis*.

18. Ch. 4. The possessory interest in control of personal goods: equitable remedies.

MSB 46-51. *Pardee v. Camden Lumber*.

MSB 138-44. *Wetherbee*.

19. Ch. 4. Personal goods and the right to dispose: licenses

MSB 450-59. *Wood, Marrone* (455 n.3).

20. Ch. 4. Personal goods and the right to dispose: bailments

MSB 465-75. *Allen*, discussion of duties of care in *Coggs* and *Story's Commentaries*.

21. Estates and future interests. The basic present possessory estates.

Anderson, ch. 1. D all problems at the end of the chapters. Please email me or post a comment on the TWEN discussion board, *the night before class*, if you want me to analyze any specific problems in class.

22. Estates and future interests. Future interests pre-1536.

Anderson, ch. 2. D all problems at the end of the chapter. Please email me or post a comment on the TWEN discussion board, *the night before class*, if you want me to analyze any specific problems in class.

23. Estates and future interests. Remainders.

Anderson, ch. 3. D all problems at the end of the chapter. Please email me or post a comment on the TWEN discussion board, *the night before class*, if you want me to analyze any specific problems in class.

24. Estates and future interests. Present estates and future interests post-1536.

Anderson, ch. 4. D all problems at the end of the chapter. Please email me or post a comment on the TWEN discussion board, *the night before class*, if you want me to analyze any specific problems in class.

25. Estates and future interests. Modifications to the common law rules post-1536.

Anderson, ch. 5. D all problems at the end of the chapter. Please email me or post a comment on the TWEN discussion board, *the night before class*, if you want me to analyze any specific problems in class.

26. Estates and future interests. Review.

Do all the problems in Appendix II of Anderson, except for problems [*to be removed later*]. We'll discuss as many problems as you want to discuss in 55'. As with the other material in this section, email me or post a TWEN comment to identify specific problems you want to discuss.

27. Estates and future interests: doctrines relevant to interpreting conveyances.

MSB 523-28. *Williams*.

MSB 532-36. *Charles*.

28. Estates and future interests: The doctrine of waste

MSB 547-58. Overview of the 3 forms of waste, *Brokaw*.

29. Ch. 5. Tenancies in common and joint tenancies: Creation, basic structure, and concurrent rights.
MSB 597-601, 609-14. Basic cotenancy arrangements, *Gillmor*.
30. Ch. 5. Tenancies in common and joint tenancies: dissolution, and severance in joint tenancies.
MSB 602-09, 614-20. *Delfino, Harms*.
31. Ch. 6. Landlord/tenant law. Introduction to leases, and the *caveat lessee* model.
MSB 636-42, 646-47 (the 1-paragraph summary of *Sutton v. Temple*). Basic types of leases, *Sutton*, and the *caveat lessee* model. Be sure to do the problems p. 642.
32. Ch. 6. Landlord/tenant law. Limits on the *caveat lessee* model and implied warranties.
MSB 649-61, 668-76. *Blackett v. Olanoff, Gotlieb, and Javins*.
33. Ch. 6. Landlord/tenant law. Discussion of a form lease.
MSB 713-17. Be prepared to discuss in class the questions on pp. 716-17 about the form lease on pp. 713-16.
34. Ch. 7. Security interests. Overview of liens and mortgages.
MSB 791-807. The concept of collateral, *Timmer*, discussion of M.S.A. § 514.18.
35. Ch. 7. Security interests. Foreclosures.
MSB 808-18. *Murphy*.
36. Ch. 4. Personal goods and the right to dispose: gifts
MSB 847-62. Gifts. *Irons, Foster, Gilbert*.
37. Ch. 8. Recordation and transfer. Basics.
MSB 862-69. Overview of real estate transactions. *Wood v. Donohue*.
MSB 873-80. The *nemo dat* principle and the *Elicofon* case.
38. Ch. 8. Recordation and transfer. Recordation statutes and their operation.
MSB 908-25. Do and be prepared to discuss the problems on pp. 924-25. I'll probably lecture about *Hood*.

39. Ch. 9.A. Nuisance. Overview, and the role of reasonability in nuisance.

MSB 933-41. *Jost*.

MSB 950-61 end n.6. *Adams*.

40. Ch. 9.A. Nuisance. The role of reasonability in nuisance, and the locality rule.

941-49 end n.4. *Campbell*.

Supp. __. *Bamford v. Turnley, Gilbert v. Showerman*.

41. Ch. 9.A. Nuisance. Coming to the nuisance and noninvasive nuisances.

Read MSB 949 n. 5, and the passages from *Campbell*, MSB 944-45, on equity and the claim that the defendant started his noxious activity first.

Read MSB 960-62 nn. 5-7.

Supp. __. *Myrick v. Peck Electric. Ensign v. Walls*.

42. Ch. 9.A. Nuisance. Remedies.

Supp. __. *Estancias v. Schultz, Madison v. Ducktown Sulphur*.

Reread the passages from *Campbell*, MSB 943-44 and 945-46. Read 966-68 n.2.

43. Ch. 9.B.1. Easements. Overview.

MSB 979-88. *Bruton*, easements appurtenant and in gross, overview on creation of easements.

44. Ch. 9.B.1. Easements. Methods for creation besides express creation, and methods for termination.

MSB 988-95, 1007-12, 1019-25. *Schwab, Holbrook*, note on termination, and *Penn Bowling*.

45. Ch. 9.B.2. Running covenants. Introduction.

MSB 1025-31, 1039-41. *Tulk*, requirements for real covenants and equitable servitudes.

46. Ch. 9.B.2. Running covenants. The intent to run and touch-and-concern requirements.

MSB 1031-39, 1043-47. *Neponsit Property Owners' Ass'n, Eagle Enterprises*, copious notes on covenant doctrine, and note on conservation easements.

47. Ch. 9.B.2. Running covenants. Practical problems.

Supp. __. Sample problems on covenants.

48. Ch. 9.B.2. Running covenants. Practical problems, and termination doctrines.

MSB 1052-61. *Bolotin, Peckham*.

49. Ch. 9.C. Zoning. Historical origins, and its status as a field of administrative land use law.

MSB 1065-78. *Euclid*, note on zoning policy.

Supp. __. *Ambler Realty Co. v. Euclid*.

50. Ch. 10. Eminent domain. Overview, “private property,” and the problem of inverse condemnation.

MSB 1165-68. U.S. Const. amend. V and overview.

MSB p. 1139, 1309-13. Pp. 1309-13 discuss the meaning of “private property.” P. 1139 is a passage from *Board of Regents v. Roth*, first full paragraph. (Starts with “Property interests, of course ...”)

Supp. __. *Pumpelly v. Green Bay Co.*

MSB 1277. The last paragraph of the page (from the Court opinion in *Cedar Point Nursery*, discussing *Arkansas Game & Fish Commission*).

MSB 1212-18 end n. 4. *Mahon*.

51. Ch. 10. Eminent domain. Regulatory takings: *Penn Central* interest balancing.

MSB 1230-47. *Penn Central*.

52. Ch. 10. Eminent domain. *Per se* regulatory takings by physical invasion or occupation.

MSB 1250-58 end n.2, 1259-61, 1269-91. *Loretto*, note on *Horne, Cedar Point Nursery*.

53. Ch. 10. Eminent domain. *Per se* regulatory takings by deprivation of all use.

MSB 1291-1309. *Lucas, Tahoe-Sierra*, note on the “denominator problem”.

54. Ch. 10. Eminent domain. Takings by exaction.

MSB 1261-69. *Dolan*, and *Koontz*. Be sure to track mentions of the *Nollan* case in the materials excerpted from *Dolan* and *Koontz*.

55. Ch. 10. Eminent domain. Public use limitations.

MSB 1168-92. *Kelo* and the public use requirement.

Supp. __. Memo on “public use” doctrines.