Selected Readings 03

EXAMPLES & EXPLANATIONS

Property

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The Law of Property

Introduction

Some courses on property law begin with the analysis of cases — sometimes they concern the acquisition of personal property, sometimes wild animals; and sometimes they introduce the subject with a U.S. Supreme Court case concerning the Fifth Amendment's takings clause or with a case about Native American claims to property that throws our own American system into perspective. Historical and philosophical readings about property law's development might also be used to gain perspective.

Different perspectives on the institution or the idea of property have been around for a long time. These perspectives have long been controversial. Plato and Aristotle disagreed as to property's role in society. Since that time, property has been viewed variously as the product of one's labor (John Locke), as an extension of one's will (Georg W. F. Hegel), as the product of a person's settled expectations (Jeremy Bentham), and as the foundation of capitalism and class conflict (Karl Marx). Anthropologists, psychologists, and social scientists from many disciplines have more recently taken a turn at assessing its function. If there ever was an idea that held society in a love-hate relationship, it is property; it is something that society lives with uneasily, but cannot live without. The Ten Commandments do not protect property, but do forbid the stealing of it. Neither does our federal Constitution endorse a right to property, but provides that the state may not take it without due process or payment of just compensation. Property rights have long been regulated, and are not absolute.

In the first year of law school, property is studied along with the two other wide-ranging areas of private and commercial law, the law of torts and the law of contracts. The three subjects are studied in separate classes, but even though the signs on the classroom doors are different, this curricular separation should not lead you to the conclusion that the three subjects are entirely distinct, or intended to baffle you in three distinct ways. They are not. They are constantly intersecting. Property and torts, for example, have in common an historic origin in the cause of action for trespass, and often a

substantive statement of a rule of property law begins or ends with the phrase "absent an agreement to the contrary" — meaning that persons involved are free to make a contract providing what the rule does not. In particular, the law of landlord and tenant (pertaining to leases) is a recently developed combination of contract and property law. As you will learn in your later elective courses, basic property, contract, and tort doctrines constantly arise and intersect in any law practice.

As the previous paragraph indicates, the subject matter of a course on property typically covers several topics. There may be a roadmap to your course in contracts, but with property there is no *one* roadmap; instead, there are at least six roadmaps. Thus, to the beginning student, the course's subject matter may seem huge. Personal property, common law estates and concurrent interests, landlord and tenant, real estate transactions, easements and covenants, and public land use regulation are the topics most frequently offered in the first-year course on property.

Although some of these subjects will be unfamiliar if you are reading this during your first semester or quarter of law study, once you delve into each of them you will quickly realize that each has its origins in a different historical era of our legal system's development. The economic and social context in which the rules of each arose shaped it in different ways: Each developed in spurts and at different times. For example, common law estates developed rapidly in the late middle ages, while the law of landlord and tenant developed most quickly over the past several decades. Our legal system's rules for real estate transactions developed in response first to the system of estates, then to the development of the executory contract in the eighteenth century, and finally to American modifications in the English system designed to suit our own needs. The law of easements and covenants developed rapidly in the nineteenth century in response to the industrialization and urbanization then taking place. Our system of land use regulation developed gradually over the last century, but did so more rapidly during some decades — the 1920s, the 1950s, and the 1970s — than during others.

Add to this variety of origins the many intersections of property law with that of torts and contracts, and the teaching and study of property law becomes a challenge of a different dimension than is encountered in teaching the latter subjects. As the topics change, beginning students need to treat each change as if it were the start of a new course, steeping themselves in both the context and the body of rules and doctrines governing each new topic.

Putting the various contexts you study into perspective should help you realize that the study of property is often the study of ***tenures*** — using an old-fashioned word for the study of the many ways in which property may be possessed or held — rather than the study of property itself. Thus the study of property is of the various interests that define the rights of its holder

and of the documents conveying various interests in property and defining how it may be used, kept, or sold. It is also the study of deeds, leases, and the various other documents that purport to create or transfer it or an interest in it.

Over the course of history people have wanted property of various kinds and in so many guises that one has to conclude that there is something basic and human at work in its creation and protection. Not every society has used a law of property during its development. China is an example of one that did not. However, there is a correlation between the development of some democratic, nontotalitarian societies and the degree of protection given property; one can't be said to cause the other, but they coexist well.

Property is not a thing wanted for itself, and property law is not about one person's relationship to a thing. Instead, it is about relationships between and among persons with regard to a thing. Put in a more humane way, property is derived from our wanting to be involved with others. Property permits one person to exclude another from using a thing; to use it himself; to gain rents, profits, or income from it; to sell it; or to give it by will to one relative and not another. All this is possible only when one's relationship to property is clear insofar as others are bound to respect it.

Property law is a series of rules defining a person's relationship to a thing that others must respect. The former is called an owner. The primary right of an owner is the right to exclude others from using or profiting from a thing. If the thing is movable, the thing becomes ***personal property.*** Land and the improvements on it become ***real property.*** The study of property generally includes both personal and real property.

Defining property as a three-way relationship (owner to thing, others to thing, others to owner) requires that the legal rules pertaining to it have widespread support. Support in this sense is the result of an appeal to the terms of a legal rule, its underlying policies and historical precedent, the judicial procedures in which the rule was formed, and the philosophy of law or jurisprudence underlying all of these.

Property law is the creation of society, useful to make society function, and not a product of natural law, although most would also say that property supports and enhances a person's identity and that a person's acquisitiveness is as close to a natural instinct as one can come.

Common Law Cases

Property law is largely ***state law.*** If the case concerned property, it typically arose in a state court. Each of our states, territories, and the District of Columbia, with the exception of Louisiana, adopted for its legal system the common law of England in all of the jurisdictional, decisional, and analytical senses in which that phrase was used previously. So property law is typically

state law, as opposed to federal law. As in the law of torts or contracts, courts often speak of the New York, the Pennsylvania, or the California rule. Such references make the point that, technically, it is too facile to speak of a law of property — instead, each state in our country has its own law. Even when a federal court decides a case involving property, it uses the law of the state whose law applies and, in the absence of a federal constitutional or statutory issue, must follow state court precedent.

A party who felt the trial court erred as to matter of law or finding of fact can appeal to an appeals or appellate court to review the challenged matter. Most cases reproduced in casebooks are appellate cases. Usually seven to nine judges sit together on a state's intermediate or highest appellate court, the latter typically called the state's supreme court or court of appeals.

An appellate opinion has four parts. First, there is a statement of the facts of the case. These are facts found as such by the jury or, in a nonjury matter, by the judge sitting as a fact-finder in the trial court, and accepted as such by the appellate court. In an appeal from the trial court's decision, the facts are not retried, unless they are so unreasonable that the record of the case in the trial court does not provide any basis for them. The facts recited in an appellate opinion typically accept the factual determinations of the trial court.

Second, there is a statement of the legal issues involved in the case, followed, third, by a statement of the rule(s) resolving the issues and applying the rules to the facts. This third portion may be brief, but sometimes is lengthened into a fourth part of the opinion. There the judge articulates a rationale for the rule — perhaps a public policy underlying it, and an explanation as to why it is fair to apply it to the case at hand; how it promotes ethical behavior in attorneys, litigants, or the public at large; or how it might be efficiently administered or used in the future. Articulating a rationale usually involves the application (or not) of cases with precedential value for the court. The judge here may explain what aspect of the facts is particularly important to the decision or what is not being decided (see below, dicta) in order to throw the decision itself into relief. Finally, the judge writing the opinion gives the holding and the decision in the case.

The cases in casebooks are selected for their facts and details, their analysis, their influence, or their widespread acceptance. They may have more than one opinion — they may produce a (1) majority opinion, in which most of the judges on the court agree on the statement of the law, the analysis, and the result — the judgment or other remedy given in the case; (2) a dissenting opinion, with which some but not most of the judges agree; or (3) a concurring opinion, in which some judges agree with the majority's result, but not with some other aspect of their opinion. If there is more than one, the comparisons and contrasts between them may produce interesting statements as to the law, analysis, or remedies involved.

The cases studied may not represent the law of the state in which you eventually will practice law, but not all judicial opinions are created equal. So hang in there. There are at least two reasons to do this. First, the United States' more than 50 common law systems have produced many fine judges and attorneys but, yesterday as today, some were and are more famous than others — Kent, Story, Shaw, Cooley, Holmes, and Cardozo, to name a few. Their influence goes beyond the borders of their states. Second, the ***precedential rules*** of authority — looking first to a judge's own state or jurisdiction, then for similar cases in other jurisdictions, then to secondary (or noncase) authorities such as law reviews and legal treatises — produce a tendency to make the law of many jurisdictions into one uniform body of law, and many opinions into works of considerable scholarship.

Amid the secondary authorities, some of the more formal organized methods of legal expression, backed by large sectors of the legal profession, also re-enforce this tendency to uniformity. First, there are the American Law Institute's ***Restatements of the Law***. Its first Restatement of the Law, Property, was published in 1944. Restatements of the Law (Second), Property, have been published more recently: for Landlord and Tenant in 1977, for Security (Mortgages) in 1996, and for Servitudes (Easements and Covenants) in 1998. Other property subjects are in draft. Restatements are secondary authorities publishing their drafters' versions of the rules of law taken from decided cases, although not always the rule settled by a majority of cases, deciding a particular issue. Sometimes drafters prefer what they see as a trend in the decided cases and extract their rule from the cases they see as representing that trend, rather than a rule representing the law established in a majority of states. Sometimes there is no majority; sometimes the law is unsettled or open. Whatever approach the Restatement takes, its decision is influential and its text will disclose the reasons and the authorities behind its choice.

Second, the Commissioners on ***Uniform State Laws*** have published Model Laws for adoption by American jurisdictions. The Uniform Commercial Code that you study in contracts class is the most successful of these laws. The Uniform Landlord Tenant Act, the Uniform Land Transactions Act, and the Uniform Probate Code are examples that have been influential, if not widely or completely adopted, in the law of property. Such laws may codify, modify, or repeal common law rules and, like the Restatements, may be cited by judges deciding common law cases as embodying a legal rule.

Third, there are ***treatises*** with discussions of the law attempting to make sense of seemingly disparate decisions and statutes. The *American Law of Property* (1952) is a collection of essays by (mostly) law professors specializing in the law of property. *Thompson on Real Property* (1994) is a more recent collection of such essays. More specialized treatises, such as *Friedman on Leases* and *Brown on Personal Property*, perform the same function within narrower limits.

Case Analysis

Much law is gleaned from the analysis of cases. Case analysis is an essential skill for attorneys. If the case is concerned with the substantive law of property, the case is probably one involving a common law rule — i.e., a rule formulated by judges for cases that they heard and decided. Case law or ***common law*** are rules established by court decisions, as opposed to those made by legislatures enacting a statute. A judge deciding a case tries to resolve the issues in the case by following or drawing from prior decisions by judges in his or her jurisdiction. This doctrine of precedent is unique to the common law as opposed to civil law or code systems of law used in other countries.

The ***doctrine of precedent*** (or stare decisis) is fundamental to case analysis. It rests on the idea that people in similar situations should receive similar treatment at the hands of a court. Similar cases should be decided in a similar way so that people are treated as equally and fairly as possible, and so that people not in court who find themselves in a situation similar to one that a court has decided may predict what the law will be if and when they go to court. A judicial decision, published or reported in an opinion, not only binds the parties to the litigation that produced it, but also has predictive value for others.

An opinion has predictive value only when another court is bound to follow it. At the state level, this means that the opinion of a state Supreme Court binds itself and all courts lower in the judicial hierarchy of the state, thus binding any intermediate appellate court and all trial courts. A trial court decision, at the other end of that hierarchy, is not binding outside the county or municipality in which the court sits, although it may be ***persuasive authority***.

The root idea is that of providing equality for persons in similar situations. Deciding who is in a similar situation — not an identical situation (that almost never happens) — involves analysis of a reported case. Appellate or reported cases may be distinguished — i.e., read narrowly to avoid their applications — or applied — i.e., read for similarities.

Distinguishing case precedent is often necessary because courts have no control over who brings a case to court. In formulating and enacting a regulation or a statute, a legislature or an administrative agency might consider all the possible or predictable situations to which its work product might apply and draft a regulation or statute encompassing them; a court has no such opportunity. If a judge in an opinion writes more generally about the law than the facts of the case require, that part of the opinion will be considered obiter dictum — Latin for a statement "made in passing" — a.k.a ***dicta***. Dicta may be included to explain a decision, or to limit its applicability to the facts found at trial — particularly when the facts were contested at trial. Dicta is not binding as legal precedent, but may be persuasive authority even so.

Lots of cases, with lots of rules, may eventually form a body of law encompassing most aspects of a subject (some attorneys refer to rules synthesized from many cases as legal ***doctrine*** — but such terms of art have various and variable meanings). From many cases, a synthesis of the law may emerge. Producing this synthesis is a form of inductive reasoning — deriving a general rule from the individual cases. The generalization takes place using the materials the judge finds at hand — case(s), statute(s), and secondary authorities. If necessary (nothing else being available), even one case might be generalized for use in an opinion in another case.

Application of a case to another situation is a process of making analogies between the case and the situation at hand. It is often arranged in an opinion as a syllogism, a form of deductive reasoning, as in the following:

(1) Possession of land is necessary to bring an action of trespass.
(2) Alex has possession of land.
(3) Alex may bring an action of trespass.

Here the first proposition (1) is a major or general premise or rule, (2) is a minor or factual premise, and (3) is a conclusion, permitting a general rule to be applied to a particular situation.

The reasoning found in judicial opinions is either deductive or inductive — not unlike the forms of reasoning in other modes of expression. Analysis of any one opinion involves separating it into its parts and extracting its reasoning, but this task is complicated by the use of citation to cases and other authorities as it proceeds, by the judge's doing two or more things at once, and by the opinion's haphazard or blurry organization, as in the following opinion written for illustrative purposes by one of the authors. (The facts in this opinion have been taken from the opening chapter of James Fenimore Cooper's novel *The Pioneers*, published in 1826.)

Alex Hunter, Plaintiff v. **Mo Montour,** Defendant

in the Supreme Court of the State of Grace

LEARNED, J., wrote the opinion of the Court.

The plaintiff, Alex Hunter, was deer hunting in unposted woods in the unincorporated portions of Green County. After spying a large buck, Hunter's son, accompanying him, accidentally tripped and discharged his rifle, grazing the buck's flank and startling it. Hunter aimed at the startled animal, fired and hit it, not where Hunter aimed, but as the buck started and jumped, putting a bullet in its lungs. As a result of being thus fatally hit, the deer ran onto the land of Owen Owner, who held it and reached for a hunting knife. Just as Owen was about to plunge the knife into the buck, it leaped up a final time and was just about to run into the roadway abutting

Owen's land when the passing defendant, Mo Montour, seeing the commotion of all this pursuit, brought his automobile to a halt and sprang from it. The defendant Montour then fired a pistol into the buck's head and seized it, carrying it off from the side of the road.

The plaintiff Hunter brought a complaint sounding in trespass[1] against the defendant Montour in order to recover the buck or its value. The defendant Montour moved to dismiss the case, but this motion was denied and it was tried before Judge George Judd, sitting in the Circuit Court of Green County. The Circuit Court jury rendered a verdict for the plaintiff and Judge Judd gave judgment accordingly. The defendant appealed to this court. We now reverse.

Trespass is an action brought for the taking of personal property. It involves carrying off the goods of another. Its first element is a showing that the "goods" in question are in the plaintiff's possession. Spying the buck by the plaintiff's son, for example, did not amount to possession because the son's spying the animal shows neither an intent to possess it nor an act of possession. Both are essential to sustain the plaintiff's complaint. That the buck was unintentionally and slightly wounded adds nothing to the plaintiff's case. However, the plaintiff's fatally wounding it is a different matter. If accomplished intentionally, it shows that the plaintiff did intend to kill the buck and, if pursuit ensues, the pursuit itself might be the functional equivalent of taking actual possession of the buck. Here, however, the wound was accidental, and so the ensuing pursuit proved nothing.

Owner by seizing the buck all but possessed it; but even here, when the animal is still capable of bolting as a wild animal might be expected to do, it is just as likely to regain its natural liberty as lose it. The defendant, seemingly on Owner's behalf, raises another claim: that Owner in any event has a better right to the buck than does the plaintiff. This other claim is to the animal, as one on Owner's land: A landowner has a right to start wild animals naturally on their land, ratione soli. However, here the animal was not naturally on Owner's land, having been pursued there by the plaintiff Hunter. Moreover, if the buck bolted onto the land of a neighbor, instead of going onto the roadway, Owner's right to it would likely end when Owner began his trespass onto the neighboring land — although this result would be stronger if the neighbor's land was posted, warning off hunters and trespassers. So Owner's claim to the animal by the landowner's right fails. In any event, this is not an argument open to the defendant to make. Owner is no part of this litigation and his rights may be asserted in a future case. The defendant must win this one on his own merits, not on the weakness of the plaintiff's.

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1. The phrase "sounding in trespass" may itself seem strange to you. It is lawyer talk, and means that the theory on which Hunter brought his lawsuit was trespass. Every course in law school is full of such talk, and getting comfortable with it will permit you to do what lawyers do with much of their time — talk about law.

Under the law of this state, it is an open and unsettled question as to whether the defendant interfered with the plaintiff's or Owner's hunt. This court need not resolve this issue, however, as the defendant, firing a fatal wound showing his intent to take the buck, was also the first to actually seize the animal. He there has its possession to a degree that trumps the plaintiff's, and so the plaintiff's right to bring an action of trespass.

The plaintiff's complaint is dismissed. Judgment reversed.

LIVINGOOD, J., dissenting. I respectfully dissent. If the plaintiff's pursuit was an active one and the defendant had notice of it, I see no reason in law or policy why the defendant should be privileged to interfere with the plaintiff's hunt. The plaintiff's activity is a lawful one, the land through which it was pursued was unposted, and the plaintiff was in full view of the defendant when he seized the buck. The defendant's interference is to me an event highly likely to result in a breach of the peace, even if it occurred by the side of a public road and did not disturb the rights of an abutting owner.

It might be said that the rule of actual possession laid down by the majority will give the law a crispness and ease of administration that is highly desirable where the public must know the rules of the hunt, but to my mind, the certainty of the law is in no way diminished if a pursuit in plain view of the defendant of a fatally wounded animal is found the equivalent of actual possession. The aim is the capture of the buck, and the animal must first be pursued in order to be captured; otherwise, hunters will go at it with ever more powerful rifles and guns, endangering us all. Finding a constructive possession in pursuit such as this will surely result in the capture of the buck, without the defendant firing an additional shot. That the additional shot prevented the buck from running onto a public roadway points out that, at the kill, the plaintiff had just as much right to be there as did the defendant.

Finally, if this suit fails as a proposition pled under the law of possession and property, I foresee it refiled as a tort suit in which the quantum of possession required may well be less and in which the plaintiff might well succeed. This being so, it seems to me that the law of property should conform itself to the expectations of the jury below.

I would affirm their verdict and the ensuing judgment of Judge Judd.

EXAMPLES

1. Is the *Hunter* opinion binding on the courts of another state deciding a case with similar facts? Would it matter whether the other court was a trial or an appellate court?

2. After Hunter v. Montour is decided, Owen Owner sues Mo Montour for the buck that the result in the *Hunter* opinion permitted him to keep. May Owen do so?

3. Suppose that Owner's land abutted not a road, but Larry Lander's land, and the buck escaped Owner and ran onto Larry's land. Would the *Hunter* opinion prevent Owner from pursuing the buck there?

EXPLANATIONS

1. The *Hunter* opinion is not binding on the courts of any other jurisdiction. It does not matter whether the other court is a trial court or an appellate court. The *Hunter* opinion is binding as legal precedent on all state courts in the State of Grace. The opinion is useful in other states, however, as persuasive authority. A judge in another state may read the opinion for its logic and reasoning, and may decide to agree with the *Hunter* opinion and adopt its reasoning as the judge's own.

2. Yes. Owen Owner's rights, including the right to sue, are unaffected by a lawsuit to which he was not made a party. If the court never gained jurisdiction over Owner, its judgment does not bind him. As the facts are stated in the opinion, for example, it is unclear whether Owen's lands were posted, and so it is also unclear whether Mo and Alex were trespassers at the time of the hunt and the kill. Whether Mo was a trespasser would affect his rights to the buck. Moreover, the effect of any trespass, if found, would make the case sufficiently different from the precedent established in the *Hunter* opinion, so even if found to be binding on the court in which Owner sues, it need not control the outcome of Owner's suit.

3. Once Owen Owner joins the hunt, as the opinion suggested in dicta, his trespass on the land of another might well prevent him from obtaining legal possession of the buck. The discussion in *Hunter* as to Owner is dicta, and while persuasive authority to courts in the state of Grace, it is still merely persuasive and not binding authority. Moreover, the *Hunter* dicta may not apply to Owner's situation perfectly. For example, Owen might be asserting not only his right to hunt, but also his right to take game from his own lands and, by extension of that right, to take game found on his land that, when pursued there, went elsewhere. If Larry's land were posted, that might prevent Mo and Alex from starting their hunt there, but might not prevent Owen from continuing an ongoing hunt there, pursuing an already wounded animal. So Owen Owner's position is distinguishable from Alex and Mo's: Owner is participating in a hunt that started rightfully, while Alex and Mo's hunt was tainted, with regard to Owner's rights, from the moment they entered the boundaries of Owner's land. Property rights are relative to the rights of other people, particular people, people finding themselves in a context laden with facts. However, if Larry Lander's land were posted — i.e., had signs saying "No trespassing or hunting: Keep out" — the posting would affect Owner's rights.

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Personal Property and Possession

Introduction and Definitions

Personal property does not mean property that somebody owns, though a person may own personal property. In first-year Property classes, property falls into two categories: real property and personal property. ***Real Property*** or ***realty*** refers to land and improvements attached to the land. Buildings, fences, and dams, for example, are included with land as real property. ***Personal property*** or ***personalty*** is all property other than real property. Automobiles, books, tables, clothes, computers, and corporate stock are examples of personal property.

Other law school courses introduce the ***fixture***, which is personalty that has been permanently attached to real property, but that could be removed. A dishwasher installed into a kitchen cabinet is a fixture, for example. Fixtures' hybrid nature subjects them to rules applicable to personal property and sometimes to rules applicable to real property.

Property may change character. For example, trees and crops in the field are real property. When cut or harvested, the cut trees become personal property. Cut trees turned into lumber are personal property, but once incorporated into a building become real property.

Personal property may be tangible personal property or intangible personal property. ***Tangible personal property*** includes property of a physical nature. You can see it and touch it. Examples include automobiles, books, clothing, lumber, jewelry, paintings, furniture, and coins. Intangible personal property includes assets that cannot be touched or seen but that have value nonetheless. Examples include stock in corporations, bonds, patents, copyrights, notes or accounts receivable, goodwill, and contract rights. Intangible personal property often is represented by a writing — tangible property — but the asset itself — a patent, corporate stock, or a note receivable — is an intangible asset. Recently recognized intangible assets are the rights of

publicity and privacy that prohibit others from using a person's name, face, or other attribute of that person for commercial purposes without permission.

Possession, Relativity of Title, and First-in-Time

As discussed in Chapter 1, supra page 5 the word "property" has multiple connotations. It may be the thing itself; or it may define relationships and priorities, rights, and obligations among persons with respect to a thing. The study of the relationships among persons with respect to personal property is helpful in understanding three basic concepts: possession, relativity of title, and first-in-time.

Possession is the controlling or holding of personal property, with or without a claim of ownership. It has two elements: (1) an intent to possess on the part of the possessor, and (2) his or her actual controlling or holding of the property. As to the second element, control is key. Both the intent and the control elements must be present to acquire the rights of a possessor. Possession need not be actual possession. More on this later.

A court's definition of possession can vary according to the type of litigation in which it is used as well as the ends the judge sees it serving. Thus, for example, possession can be good against all except those with a better right, sufficient to permit a person to recover possession of an item of personal property, or sufficient to recover damages for its injury or destruction. A court will manipulate the two elements of possession according to the needs of the case.

Possession is basic to our law of personal property. Because proving ownership is so difficult and burdensome, we rely on possession as a surrogate for ownership and title. You probably own a wristwatch, for example, but how would you prove it if you were asked to do so?

Relativity of title is the idea that a person can have a relatively better title or right to possession than another, while simultaneously having a right inferior to yet another person. This doctrine is necessary because, in a common law system, few acquire a perfect title. That would require that the person acquiring title litigate its relative strength against all other persons who have, or might conceivably have, any right or interest. Thus, an attorney speaks of a relatively better right to possession, or of a superior title or right.

One way of prioritizing several individuals' rights is accomplished by a rule of ***first-in-time***, first-in-right, establishing a priority of rights based on the time of acquiring the right in question. Under such a rule, all other things being equal, the chronologically first possessor has the better title.

However, all things are not always equal. So a rule of priority based on time is not always the way the law arranges several rights in personalty.

Sometimes subsequent possessors prevail over prior possessors: A good faith purchaser and adverse possessor can acquire title superior to those who came into possession before they did. In contrast, persons taking their interests from a thief acquire no title to the thing: Title from a thief is a void title.

Actual Possession and the Fox Case

This chapter will discuss wild animal cases, using them as the prototypes for problems in other areas of property law. Hunters of wild game provide a seemingly endless number of situations in which one or the other elements is present — or missing. Whether a hunter has taken "possession" of an animal is the issue here.

The leading case in American law is Pierson v. Post, 3 Cai. Rptr. 175 (N.Y. Sup. Ct. 1805). Post was hunting on a beach. While he was in pursuit of a fox, Pierson intervened, shot the fox being chased by Post, and carried the animal off.

Post sued Pierson, and won in the lower or trial court. Pierson appealed. Post lost on appeal because he did not physically seize the animal before another (the original defendant and appellant Pierson) shot and carried it off. So the second element of possession (called ***occupancy*** in parts of this opinion) was not present. Without it, the plaintiff does not have a sufficient interest in the thing sued for to warrant the court's hearing his complaint.

Pierson involved a rule of possession formulated so that the first hunter to capture a fox wins. This is a rule of first-in-time, first-in-right. It is into this rule of priority in time, reworded for the situation of two or more claimants for the same thing, that the concept of possession fits — as in, first-to-possess, first-in-right.

However, the hunter's race for the fox is without a fixed starting line — that is, without a starting line that all the racers share. So we have Post, huffing and puffing over a distance longer than Pierson's, but Pierson wins. Put this way, the outcome hardly seems fair. Post expends considerably more effort and labor, and still he loses! Why? One answer is that there are no rules about the permissible gear that a hunter can use — more precisely, no restrictions on gear. One hunter can carry a high-powered rifle, another a pistol. Why is this? One answer might be that the courts think it a bad idea for the law to have such restrictions; they might be taken for an attempt to make one set of laws for the hunter rich enough to afford the rifle, and another for the hunter using the cheaper pistol. Another answer might be that the cheaper pistol can be more accurately used than the more expensive rifle — and the outcome of the hunt may change accordingly.

Yet another answer might be one of necessity — if the law is to devise a rule for a race without a common starting line, then the end of the race is all that matters because it is all the court has to work with. Add to that the

majority opinion's own justifications — wanting a rule that keeps the peace, damps down litigation, and is clear and easy to administer — and you have the justifications for the majority's decision.

Another version of the holding found in Pierson v. Post is in the opinion's discussion of several writers of legal treatises; that is, close pursuit after a ***mortal wounding*** gives a hunter a right to possession of the fox that is superior to another hunter's intervention. In the hypothetical opinion Hunter v. Montour in Chapter 1, Alex Hunter had the same argument in his favor, and it was no more successful for him than it was for Post. A "mortal wound" is one that, (1) on an objective basis, is likely to prove fatal to the animal — it will, given time, "deprive the fox of his natural liberty" — and (2) shows subjectively a "manifest intention" to seize the animal — that the pursuer intended to follow the hunt with a kill and is not just out for the enjoyment of the chase. Again, as with mere pursuit, intention alone will not do — or else Owen Owner would have won the hypothetical lawsuit whose opinion you read earlier. Instead, the intention must be manifest, or clearly shown by the wound. With this discussion of wounding, the court shows the two elements of possession coming together. In a sense, a mortal wounding is a constructive control of the animal.

The Pierson v. Post holding accepts as public policy that killing foxes is a socially useful enterprise. The dissenting judge in *Pierson* elaborates on this idea by saying that killing foxes saves chickens or, more precisely, protects the activities of chicken farmers. Look for public policy reasons to adopt a rule of law in controversies you study in Property and other courses.

The underlying ideas of both the majority and the dissenting opinions are not far apart, except that dissent would define possession in order to protect Post's pursuit of the fox. For both the majority and the dissent, the underlying rationale for the case drives their definition of "possession." Both the majority's rule of capture and the dissent's rule of pursuit are means to the same end — as are the ideas of "possession" and its kin, "constructive possession."

Constructive Possession

Constructive possession denotes possession that has the same effect in law as actual possession, although it is not actual possession in fact.[1] The dissent in *Pierson* argued in effect that Post's pursuit put him in constructive possession of the fox, in that it gave him a right to possession than was not yet actual possession. In the context of natural resources law, constructive

1. The word "constructive" means "established by construing the facts of a case so that the facts give rise to an inference of [whatever — here, possession]." Attorneys also speak of constructive bailments, conversion, delivery, fraud, and larceny; and that is just a limited sample of constructive legal concepts, limited to the course on real property. You will encounter the same word in other courses as well.

possession has also proven useful: The owners of land with unextracted oil, gas, or other minerals lying beneath its surface might not be in actual possession of those minerals, but they are often said to be in prior constructive possession of them. Hence, the legal maxim is that whoever owns the surface also owns to the depths of the earth.

The *Pierson* opinion says that prior cases involving hunters were decided under some type of regulation or statute, or involved litigation between hunters and the owners of private land on which the hunter captured the wild animal and in which the landowner usually prevailed. These factors are all potentially limiting facts in this case.

An English version of *Pierson* is the case of Young v. Hichens, 115 Eng. Rep. 228 (Queen's Bench, 1844). The plaintiff, from his boat, had enclosed a very large quantity of mackerel worth £2000 sterling in his net 140 fathoms long, drawn in a semicircle completely around the fish, with the exception of a space five to seven fathoms wide. Before the plaintiff could completely encircle the fish using a second net, the defendant's boat rowed through the gap, enclosed the fish, and captured them.

The court gave judgment for the defendant, except that the defendant had to pay a nominal amount for damage to the plaintiff's net: The court held that the plaintiff had not yet taken actual possession; neither did the plaintiff have constructive possession, because "all but reducing to possession" is not the same as possession. Were it otherwise, the plaintiff would be able to allege that he had a property interest sufficient to protect the fish in an action of conversion or trespass.

Custom

In the Hunter v. Montour opinion you read in the first chapter, the hunt began on unposted lands. The traditional rule in many regions of this country is that when a landowner has not otherwise notified hunters with "no hunting" signs, hunters are free to roam unimproved lands in search of game: by ***custom***, sometimes by statute, unposted land becomes fair game, and entry upon it is not a trespass to land.

Pierson may also have been decided in a way that most hunters in the locale might have found offensive. Judge Livingston suggests by dissenting that Post's hotfooted pursuit may have given him possession of the animal pursued according to the custom of local hunters. Used in this way, the custom of the locale is another basis for awarding possession. The majority of the court chose to ignore this basis. For example, the custom might be that the first hunter to put a bullet into an animal has the right to pursue it and reduce it to possession. Or, the custom might be that the hunter eventually taking possession of an animal must split the animal with the first shooter, so that the possessor and the shooter share the spoils. However,

whatever the form of the custom, unless the first wound produced is a mortal wounding, it will typically not be seen by other hunters, who (assuming they recognize the custom) then will not know whether to observe it.

Customs are market or locale specific. For example, among hunters pursuing wild animals with a bow and arrow, the custom like the ones described may be somewhat more workable — an animal with an arrow sticking out of its body may be assumed to be an animal that is being pursued. In addition, in the whaling industry the use of harpoons makes the custom still easier to observe.

One court, Ghen v. Rich, discussing a segment of the nineteenth-century whaling industry, suggested that the custom of any group or industry should be recognized only under certain circumstances, to wit:

> when its application is limited to the industry and limited to those working in it,
>
> when the custom is recognized by the whole industry (or fishery in *Ghen*),
>
> when the custom "requires in the first taker the only act of appropriation that is possible" (the type of whale discussed in *Ghen*, once harpooned and dead, immediately sinks to the ocean bottom),
>
> when the custom is necessary to the survival of the industry, and
>
> when the custom "works well in practice."

Although custom dictated the result in *Ghen*, not many customs are likely to survive all these tests. In this sense, when setting out so many tests, the *Ghen* opinion really represents a triumph of the common law over custom in our legal system. Why is the court so suspicious of custom? A first answer might be that the custom of the industry will be formulated for the benefit of the industry, not for society as a whole. Second, although of benefit to an industry, a custom might be dangerous to those employed in it and the courts should consider that as well. Third, the custom can be wasteful of the resource; some of the whales in the Cape Cod finback fishery "floated out to sea and" were "never recovered." Finally, a custom can lead to overinvestment in technology — the bomb-lance here. A bigger bomb-lance, with a rope attached to a bigger boat, could have meant immediate capture of the whale, but at what cost? The rule of capture taken from Pierson v. Post might lead to both waste and overinvestment.

In *Ghen*, the custom along Cape Cod's whaling areas required specially made equipment. Whaling ships elsewhere, using a harpoon with a rope attached to strike the whale, required a different custom. In Herman Melville's novel *Moby-Dick*, in chapter 89 describes various rules in the industry. Those other customs, untested in court, were not given the force of law; no custom should be imposed on wider regions or for a longer time than its use coincides with the law's needs.

The Doctrine of Custom Giving Access

Custom has not just been used in cases involving the creation of property by capture; it has also been used to create a common law right of access to certain types of real property. When, for example, a beach has been considered accessible to persons in a locale, their access may be said to arise by custom. A custom giving rise to access must be long-continued, uninterrupted, and reasonably asserted as a right. It is an inheritance from English common law, used to permit a local population to cut peat from a certain bog, use a certain spring for drinking water, or harvest timber for firewood in a certain forest, although the customary right to take away a substance will be more limited than the landowner's right to do so. Limitations for domestic or personal uses were often customary, and assertions of the custom in excess of that were regarded as unreasonable.

Blackstone said that the access must be so long continued "that the mind of man runs not to the contrary." In the United States, the custom must typically have been exercised from the beginning of the state's existence within the Union, and uninterrupted thereafter. However long, this is known as the doctrine's antiquity requirement. See State ex rel. Haman v. Fox, 594 P.2d 1093 (Idaho 1979) (finding 60 years insufficient). The state was created subject to the preexisting custom, and so the persons benefitting from the custom have a right prior to any power of the state. As the examples from England have indicated, the custom must also be certain and reasonable as to place, subject matter, and persons benefitting from it.

Natural Resources and Other Concerns

First to possess, first in right, and rules of capture have proven useful to attorneys in at least two other contexts — in the law of natural resources and in water law. As to natural resources, a surface owner also owns the minerals underneath, such as coal or gold. Two minerals — oil and gas — are found in "pools" and flow through the ground to points of low pressure, much as water does. The first driller to tap and produce oil or natural gas from a pool underlying the lands of several owners has acquired possession of the resource brought to the surface, even though it may drain the pool under the other's lands. Whereas lateral drilling is a trespass, drilling straight down from one's surface is not, no matter that it is conducted close to a surface boundary line. Because this first-in-time rule resulted in inefficient overproduction of oil and gas, today state statutes and regulations allocate common pools of an oil or gas resource. Actions against lateral drillers, trespass, and conversion are permitted.

Water Law

The second use of a rule of first-in-time, first-in-right, in the context of natural resources concerns water. Water rights can be divided into rights to surface water (lakes, rivers, and streams) and those to underground or groundwater.

(a) Surface Waters

First-in-time applies to the acquisition of ***surface water***, but the application of the rule differs in different parts of the country. Roughly divided, the eastern states are known as ***riparian states***. Each person with land abutting a flowing surface water may take water from the river or stream for ***reasonable use***. Many riparian states limit the use of the water to benefit the land abutting the surface water. In times of scarcity, a riparian landowner cannot use the water to benefit his nonriparian lands.

Because water is more scarce in western states, water is allocated based on ***prior appropriation***. While initially developed by custom and common law, most prior appropriation laws are controlled by statute today. Under a prior appropriation system, the first person to make beneficial use of water gains a vested right to continue that use. The easiest way to prove first-in-time benefit is to file with the local water agency. The first person to file has the first priority, the second person to file has the second priority, and so on. In cases of drought, persons with lower priorities may be prohibited from using any water until those whose claims have higher priority have satisfied their needs.

(b) Groundwater

Groundwater (subsurface water) can be classified into two categories. Groundwater that flows in a channel is called an underground stream. The rules on use of water from underground streams generally follow the same first-in-time rules applied to surface water.

The second type of groundwater is water not in a channel. These are known as ***percolating waters***. As with oil and natural gas, the owner of the property had an absolute right to withdraw percolating water and use it as he willed, either on the land or elsewhere. The absolute rule has been supplanted by a ***reasonable use doctrine***, also known as the American rule. Under the reasonable use doctrine, the water must be used solely on the overlying land if use elsewhere would cause hardship to other landowners with access to the common underground pool of water.

Some states follow a rule that dispenses with first-in-time and allocates the water equally to all owners of land overlying the common pool. The

equal sharing is based on land acreage owned, not a per owner equality. This is known as the ***correlative rights doctrine***.

The Restatement Second of Property § 858 combines these approaches and allows a person to withdraw and use percolating groundwater unless the withdrawal unreasonably harms neighboring lands by lowering the water table or decreasing the water pressure; exceeds the landowner's reasonable share of the water; or reduces the level of surface lakes, harming users of the lakes.

As water becomes more scarce, state and local laws will become more technical and sophisticated. We only introduce water rights in this book. Your school may offer an upper division–level course in this area of growing importance.

Actionable Interference

Keeble v. Hickeringill, 103 Eng. Rep. 1127, 11 Mod. 74 (Queen's Bench 1707), involved a decoy pond for ducks. Plaintiff Keeble brought an action against the defendant for discharging guns with the object of frightening the ducks away from the plaintiff's pond. The jury found for the plaintiff and awarded him £20 sterling. On appeal, defendant argued that there was no cause of action to redress the actions of which the plaintiff complained since the plaintiff did not own the ducks. Rejecting this argument, the appellate court held that the plaintiff had a cause of action. The court stated that "the true reason [for this holding] is that this action is not brought to recover damage for loss of the fowl, but for the disturbance" of the plaintiff's taking possession of them.

The opinion of Judge Holt in 103 Eng. Rep. makes three points. First, the plaintiff is a tradesman, using the decoy pond in a lawful manner for his business; second, the defendant, even as a competitor of the plaintiff, was acting illegally; and third, the general welfare is best served by promoting the social goal of providing ducks for English dinner tables. The first two points are related and do not depend necessarily on who owns land or who owns the ducks. The issue for lawyers reading the case is whether the earlier ones are preconditions (e.g., having a trade to protect, or being a competing tradesman) for a plaintiff's bringing and winning this action. If so, they discuss factors limiting the pool of future plaintiffs in these actions. If, however, the third paragraph is the dispositive one, then it makes no difference whether the plaintiff is a tradesman. Whether the three points are equally crucial to the holding, or whether the last point is "where the judge is going" and so controls all others, depends on whether you take a formalistic or a functional approach to the law of this case. An attorney must learn to treat the case both ways, both as a way of defining possession and as a method of achieving some greater social good.

Compare *Keeble* with Pierson v. Post. Post's hunt in Pierson v. Post was ostensibly for sport, while the plaintiff in *Keeble* had improved the pond for his particular purposes and was hunting ducks there as his trade or business. The court recognizes that certain types of activity in competition with another business are acceptable while others are not, even though the end result of each may be to cause one competitor to be no longer able to conduct his business profitably (or at all). The stark example given by the court is that one person may (and is even encouraged to) set up a new school to compete with an established school, even if the new school recruits faculty and students such that the old school must close. In contrast, the court deems it impermissible (in fact, do not ever advise anyone to do this) to "lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither."[2]

In contrast to Post, who was hunting on "wild lands," Keeble was in possession of Minott's Meadow, where his pond was. Thus, Keeble was in possession ratione soli — a term meaning that the owner of land has sufficient possession of the wild animals on the land to start a hunt for them, as well as the right to pursue them while on that land. Possession ratione soli is a specific instance of constructive possession — again, not actual possession, but a type of possession treated as if it were actual possession. In other words, a legal fiction. This is the rationale for the case as reported in 11 Mod. 74, a case report available and cited by the majority in *Pierson*, and on the basis of which the majority distinguished the *Keeble* case. Why would a judge treat a situation as if it were enough like another situation that both should be handled in the same way by the law? In this instance, the judge might wish to deter poaching and to discourage the trespasses of hunters on private land.

The Eng. Rptr. opinion concludes that "decoy ponds and decoy ducks have been used . . . whereby the markets of the nation may be furnished." Whether the case involves ducks or venison, the opinions in both *Keeble* and *Pierson* define "possession" in such a way as to get each type of animal to market. To do that, constructive possession suffices for the plaintiff in *Keeble*, while actual possession is required in *Pierson*.

Misappropriation

Taking possession of an already existing object of personalty is not the only way to acquire the thing as property. A person might invent or create a thing, and be entitled to obtain a patent or copyright under federal law, or a right

2. Your law school offers several upper division courses, such as Business Organizations, Antitrust, and Securities Regulations, that explore the differences between fair and unfair competition and business conduct. We recommend such courses.

to sue to prevent its misappropriation generally. See ***International News Service v. Associated Press***, 248 U.S. 215 (1918) (holding that as between two competing news services, the systematic misappropriation of "hot news" stories by one competitor (the INS) was sufficient to justify an injunction against the INS until the commercial value of the stories dissipated). The opinion's ***doctrine of misappropriation*** has been used and discussed in many judicial opinions. See National Basketball Ass'n, Inc. v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997) (discussing and confirming the doctrine, for a "sports score" reporting service). So when a plaintiff has by substantial investment created an intangible thing of value not protected by patent, copyright, or other intellectual property law, and the defendant appropriates the intangible at little cost so that the plaintiff is injured and plaintiff's continued use of the intangible is jeopardized, an action for misappropriation will lie. Some courts are hostile to the doctrine because copying many things results in useful competition and lower prices, and often respects the limits of existing patent and copyright statutes. See Cheney Brothers v. Doris Silk Co., 35 F.2d 279 (2d Cir. 1929) (refusing to use misappropriation doctrine against dress-design copiers).

EXAMPLES

Post–*Pierson* Problems

1. Assume the facts of Pierson v. Post: Post chasing the fox on horseback and with hounds leading the way.

   (a) Suppose further that the record at the trial in Pierson v. Post proved that Post's hunt was interrupted by nightfall, and he camped and slept while his dogs continued to pursue the fox overnight. Post resumed the hunt in the morning, and thereafter the facts of *Pierson* are the same as reported in the opinion. Pierson happened by as Post closed in on the fox, and Pierson killed the fox before Post did. Would this proof change the outcome of the case?

   (b) Suppose that the record at the trial in Pierson v. Post proved that Pierson saw Post running after the fox, and just as Post closed in on the animal, Pierson muttered, "That no-good Post can't have that fox," and that, just after saying that, Pierson shot the fox and carried it off right under Post's nose. Would this proof change the outcome of the case?

   (c) Suppose Pierson captured and caged the fox. A week later the fox escaped the cage. The next day Post killed the fox. Pierson sues for damages. What result?

   (d) Suppose Pierson captured and caged the fox. Under cover of darkness, Post then entered Pierson's land and took the fox from the cage. Pierson discovered what happened and sued Post to recover the fox. What result?

(e) What types of pursuit — short of actually resulting in possession — do you think might give rise to a judicial finding of possession?

Custom-Made Law

2. (a) Ghen is a whaler pursuing a finback whale off Cape Cod. He shoots a bomb-lance and hits the whale, which instantly dies of the wound. The whale (as whales do when dying) sinks and two days later is discovered on a beach by Ellis, who sells it to Rich. Who owns the whale? See Ghen v. Rich, 8 F. 159 (D. Mass. 1881).

(b) Why wouldn't the *Ghen* court decide its case just on the basis of the law as stated in *Pierson*? (And why wasn't *Pierson* decided according to the custom of hunters, as Judge Livingston suggested in his dissent in Pierson v. Post?)

(c) The *Ghen* opinion states: "Neither the respondent (Rich) nor Ellis knew the whale had been killed by [Ghen], but they knew or might have known, if they had wished, that it had been shot and killed with a bomb-lance, by some person engaged in this species of business." What do you think might have been the effect of this trial court finding in *Ghen* on a case like *Pierson*?

Ownership of Fish in a Creek

3. A manufacturing company discharges chemicals from its plant into a nearby creek, causing a fish kill. The state attorney general's office sues the company for the value of the fish, alleging a property interest in the fish. In this suit, what result and why?

Oil Depletion

4. Who has possession of the empty underground space left after mining or after the extraction of oil or gas from a cavity in the earth? If oil or gas was injected into the cavity, would the surface owner have a trespass action against the injecting party?

Running Interference

5. Today, almost all states have enacted hunter harassment statutes, making it at least a misdemeanor to interfere intentionally with lawful hunting, and including in the definition of "interference" actions that are intended to affect the natural behavior of a hunted wild animal. What is the likely effect of such a statute on the outcome in *Pierson*?

EXPLANATIONS

Post–*Pierson* Problems

1. (a) No. The only difference is the interruption in Post's hunt — and, if anything, that interruption seems to give the result in favor of Pierson more, rather than less, support. Post would likely argue that his dogs carried on the hunt for him, so the hunt never really was interrupted, and that the dogs put Post in constructive pursuit all the while. But pursuit is not possession.

   (b) It might. With this additional proof, Pierson's intent is not to seize the fox, but to deprive Post of it. A court that considers the subjective intent or an objective manifestation of spite or maliciousness might rule in Post's favor, or more specifically might rule against Pierson because of Pierson's bad conduct. Alternatively, a court may conclude Pierson does not have the requisite intent to possess that the law requires for legal possession — i.e., two requirements are necessary for possession: intents to possess and control. Control by itself is not enough. Other courts may not look to Pierson's motives but may conclude his action of picking up the fox exhibited the requisite intent to possess and control.

   (c) Post owes no damages. An escaped wild animal is deemed to have returned to nature and once more belongs to no one. There are exceptions. If the animal is not native to the area such that a reasonable person would gather that the animal belonged to someone, the original owner remains the owner. A person seeing a kangaroo hopping though the streets of San Francisco, for example, should expect that the kangaroo belongs to someone. Second, under the doctrine of *animus revertendi*, a person does not lose his interest in an animal that has the habit of returning to its owner's property. This usually applies to domesticated animals, and is easy to apply to cats, dogs, horses, and cattle. The doctrine is less predictable for traditionally wild animals such as deer and raccoons.

   (d) Easy question. Post must return the fox. Pierson's property interest in the fox remains in full force as long as the fox is caged. Post's unlocking the cage is a wrongful interference with Pierson's rightful possession.

   Post's trespass onto Pierson's land, moreover, factors against Post. The law frowns on trespassers, with the result that trespassers usually lose out to landowners.

   (e) It might be a pursuit (1) halted by an interference that gives rise to tort liability; or (2) halted by a person like Pierson, but whose actions also violate the hunting regulations of the state; or (3) halted by a person who commits a crime or violates some other public

policy by interfering. That is, the interference by an outside party might be of such a nature as to render his activity illegal, tainting his acts from the start and so focusing the court's attention on the actions of the inter-meddler, rather than the rights of the plaintiff claiming possession.

As indicated in dicta in Pierson v. Post, use of traps or nets or wounding such that escape is highly improbable might constitute constructive possession, which results in possession being in the owner of the traps or nets, or whoever did the wounding.

Custom-Made Law

2. (a) Ghen inflicted a mortal wound and so arguably has constructive possession of the whale at that point, even though he did not actually seize the whale. See Ghen v. Rich, 8 F. 159 (D. Mass. 1881) (reaching this result on another ground). The trial judge in *Ghen* reported: "The usage on Cape Cod, for many years, has been that the person who kills a whale in the manner and under the circumstances described, owns it. . . ." The custom of the industry as quoted is the ground on which *Ghen* was decided.

(b) The court could have followed Pierson v. Post, but the holding would have upset an entire industry that had operated successfully under the custom of awarding the whale to the person whose iron holds the whale, with a finder receiving a salvage (a reward). The judge limited the custom-as-law holding to cases where the custom had been recognized and acquiesced in for many years, and that undoing the custom may destroy the industry. It also helped that the finder received a salvage for finding the whale and notifying the whaler.

Why wasn't Pierson v. Post decided by custom? The dissent in *Pierson* wanted to do just that. One argument may be that the custom should be limited to issues unique to an industry, and Pierson and Post were not professional fox hunters. It may be that this custom was not essential to the survival of fox-hunting businesses, even if there was one at the time, or that fox hunting was not critical to the economy of the region. It may be that no one presented evidence as to what the custom was in the area. It may be that, as the majority stressed, the first to kill (or take actual possession) is easier to apply in practice. The custom of hunters, moreover, may not be in the best interests of the wider society — farmers, families, and so on.

(c) The judges in *Pierson*, relying on *Ghen*, might have said that while in pursuit Post was in constructive possession of the fox for purposes of protecting his right to hunt that fox. If so, the court would have

ruled in favor of Post this time. More likely, the majority in *Pierson* would have distinguished *Ghen* on the grounds that in *Ghen* the plaintiff killed the whale. Mere pursuit of a whale conferred no benefit. Pierson's majority opinion, in dicta (or nonbinding aspects of the opinion), said that intercepting an animal (fox or whale) so as to deprive it of its natural liberty and make its escape impossible may be considered possession. Using this logic, harpooning and killing a whale is much like "intercepting" it, but not sighting and chasing it.

Ownership of Fish in a Creek

3. A state government may have sufficient "possession" of wild animals to regulate the hunting of them. Geer v. Conn., 161 U.S. 519 (1896). Yet this possession is for regulatory rather than hunting purposes, and so may be insufficient to justify the state's bringing an action based on its ownership of the fish. Commonwealth v. Agway, Inc., 232 A.2d 69 (Pa. Super. Ct. 1967). The state might be authorized by statute to do so, and this case shows the need for statutes governing water pollution and protection of wild animals, fish, and fowl.

Oil Depletion

4. The surface owner regains "possession" of the mined-out space after the minerals have been extracted. It may be a trespass, therefore, when already captured oil or gas is pumped back into the cavity for storage. Another thought, following the rule of wild animals, is that the oil has returned to its natural state (given its "natural liberty" again, if you will), and thus is owned by the first landowner to pump it back out. In that case, the injecting party does not have sufficient possession of it to commit a trespass with it — or, put another way, the surface owner could claim ownership by drilling for the oil himself. Compare Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204, 206 (Ky. 1934) (holding that the injecting party does not have possession after the injection), with Texas American Energy Corp. v. Citizens Fidelity Bk. & Tr. Co., 736 S.W.2d 25 (Ky. 1987) (overruling *Hammonds*). *Hammonds* is not the law in the major oil-producing states.

Running Interference

5. As between two outcomes, both seem reasonable here. First, the purpose behind these statutes may be to resolve disputes between hunters and nonhunters (environmentalists and animal rights advocates), so that disputes between two hunters, such as is presented in Pierson v. Post, would

be unaffected and the outcome the same as under the common law. Second, and more broadly, Post would win if the effect of such a statute was to extend the unlawful interference policy in *Keeble* to the facts of *Pierson*. Pierson's actions may reasonably be argued to have influenced the behavior of the hunted animal, and so the statutory definition of interference is met and the statute applies. The policy behind these harassment statutes further argues that the "interference" cause of action recognized in *Keeble* should be extended to the facts of *Pierson* and that the factual distinctions between the two cases — e.g., between sportsmen and commercial hunters — should be ignored today. Viewed in the light of the policy and provisions of these statutes, the plaintiffs in both cases should be seen as having a "possession" sufficient to bring their actions.

CONCISE HORNBOOKS

PRINCIPLES OF

Property Law

SIXTH EDITION

HERBERT HOVENKAMP
SHELDON F. KURTZ

THOMPSON
WEST

Chapter 1

PERSONAL PROPERTY: RIGHTS OF SOME POSSESSORS

Table of Sections

SUMMARY

§ 1.1 Introductory Principles

1. A legal determination that a person owns personal property is difficult to make because proof of ownership of personal property often is not evidenced by a writing. As a result, the law places great weight on the observable fact of possession.

2. To say that a person has "possession" of personal property is to state either an observable fact or a legal conclusion or both. A person can be deemed to have possession of property as a legal conclusion even though she does not have actual possession of the property as an observable fact. In such case the person is said to have "constructive possession."

3. To say that a person has "title" to or "owns" personal property is to state a legal conclusion. A person can be deemed to have title to property as a legal conclusion even though he or she does not have actual possession of the property as an observed fact. Conversely, to conclude that a person is entitled to possession of personal property does not necessarily mean that the person has title to or owns the property.

4. Title, as all property rights, is a relative concept. A person may have "title" to property as against one person (A) but not another person (B).

5. If it is determined that a person is entitled to the legal possession of personal property, that person has the right to:

a. Continue the possession against everyone except those persons, if any, who have a better right to the property;

b. Recover possession of the property if it is wrongfully taken; and

c. Recover damages to the property from a wrongdoer.

6. To constitute possession, there must be:

a. a certain amount of actual control over the property; and

b. an intent to possess the property and exclude others.

§ 1.2 Wild Animals and the Rule of Capture

Title to wild animals is initially acquired by taking possession of the wild animal.

a. The mere chasing of an animal, although in hot pursuit, does not give the pursuer a right to possession against another who captures it by intervening.

b. If an animal is mortally wounded, or caught in a trap so that its capture is certain, the hunter acquires a right to possession and title which may not be defeated by another's intervention.

c. Title acquired by possession can be lost if the wild animal escapes and returns to its natural habitat.

§ 1.3 Finders

1. A finder is a person who rightfully acquires possession of the property of another that has been lost, misplaced, abandoned, or hidden so as to be classified as treasure trove.

2. Lost property consists of personal property whose possession has been parted with casually, involuntarily, or unconsciously.

3. Misplaced property refers to personal property which has been intentionally placed somewhere and then unintentionally left or forgotten.

4. Abandoned property consists of property that is no longer in the possession of the prior possessor who has intentionally relinquished, given up, or released the property.

5. Treasure trove consists of coin or money concealed in the earth or another private place, with the owner presently unknown.

6. Rights of a Finder at Common Law:

a. A finder of lost property acquires title to the property as against all but the true owner. The rights of the true owner, of course, are superior to the rights of the finder. Since the

concept of title is relative, for this purpose a true owner could include a prior possessor.

b. The prevailing rule is that if a person finds personal property on the land of another, the finder is entitled to the personal property unless the finder is a trespasser.

c. The finder is in a relationship with the true owner similar to that of bailor-bailee. Therefore, a finder can be guilty of conversion if the finder appropriates the property to his own use, or if he is reasonably able to discover the true owner and fails to do so.

d. The finder of misplaced property is not entitled to retain the possession of the property as against the owner of the land on which the property was found. Rather, the owner of the "locus in quo" is deemed to be the bailee of the goods for the true owner.

e. The finder of abandoned property generally is entitled not only to possession but also to ownership as against all others. In the case of abandoned shipwrecks within the territorial waters of a state, however, there is a conflict of authority—some states holding that such property belongs to the state, and the others holding that it belongs to the finder.

f. In England, treasure trove escheated to the crown. In the United States, it is treated as lost property and belongs to the finder.

7. Many states have enacted statutes which give the finder greater rights to found property than the finder had at common law. While these statutes differ widely, generally they eliminate the distinction between lost, misplaced and abandoned property and treasure trove, and award the found property to the finder in most cases. Frequently the statutes require the finder to deposit the found property with local authorities, post a notice attempting to advise the true owner the property has been found, and award ownership to the finder if the true owner does not claim the property after some period of time.

§ 1.4 Human Embryos

1. At common law, a person generally had no property right in the body or remains of himself or another and, as such, a person had no right to gift or bequeath his body. Actions for damages to one's body typically were managed through the tort system rather than the property law system. Thus, tort law rather than trespass law controlled the right to damages for either the intentional or negligent infliction of damages to a person's body.

2. Surviving family members had a limited right to direct how a decedent's body should be disposed of at death.

3. Under the National Organ Transplant Act, it is illegal to sell human organs such as kidneys, hearts and livers.

4. Under the Uniform Anatomical Gift Act which has been adopted throughout the United States, a person or the person's family following the person's death may donate his body for research purposes and gift organs for purposes of transplantation.

5. Human embryos that are in storage could be regarded either as property in the traditional sense, human life, or even quasi-property. The courts to date have tended to characterize human embryos as quasi-property.

§ 1.5 Human Likeness

1. Many states have adopted a so-called "right of publicity."

2. The "right of publicity" protects persons against the unauthorized use of their likeness or voice, typically for a commercial advantage.

3. This common-law right of publicity can be in addition to rights provided by statute.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 1.2 Wild Animals and the Rule of Capture

PROBLEM 1.1: A was engaged in hunting a fox with his dogs and hounds on state-owned land. While in hot pursuit of the fox but before A could capture it, B killed it and kept it for himself. A sued B for the value of the fox? What result?[1]

Applicable Law: Title to wild animals can be acquired by reducing them to possession. Possession requires both an intent and a certain amount of physical control over the animal. Pursuit of the animal is not sufficient to constitute possession unless the animal is either mortally wounded or so spent that actual occupation is inevitable. Thus, a hunter in pursuit of a fox has no claim against a third person who interferes, shoots the fox, and actually captures it.

Answer and Analysis

B should win. Wild animals in a state of nature, like abandoned property, are owned by no one. The first person who takes possession or occupancy of them becomes the owner of that property. The

1. Pierson v. Post, 3 Caines 175 (N.Y.1805). See also, Ghen v. Rich, 8 F. 159 (D.Mass.1881) (fisherman gains property right in hunted whale through customary method of killing rather than by rule of capture).

mere chase of a wild animal will not give possessory rights to the hunter. However, actual possession or occupancy of the wild animal is not necessary to obtain title. It is sufficient if the animal be mortally wounded so that actual possession by the hunter is inevitable or that the animal be caught in a trap or net of the owner. Once this occurs the hunter has a property interest which cannot be wrongfully divested by another. Here, A was merely in pursuit of the fox and had not wounded it. Therefore, A's possession was not certain and B, even though perhaps acting in an unsportsmanlike manner, did not wrongfully obtain possession and, ultimately, title to the fox. While is could be argued that A should prevail if A had a reasonable likelihood of capturing the fox, the prevailing case law is to the contrary. The more stringent rule of capture is designed to assure greater certainty in establishing property rights by eliminating quarrels and litigation in which dubious claims of entitlement are made based on claimed facts of possession that, unlike actual possession, are difficult to prove.

The general proposition that title to personalty is established through possession is extremely useful because of the difficulties, administrative and otherwise, that would arise if proof of title by a writing, as typically the case for real property, were otherwise required. It is also consistent with the needs of modern commerce in which billions of transactions occur without written proof of title.

If A had been hunting on A's land but the facts were otherwise the same, A would prevail against B. Otherwise, B would be rewarded for B's wrongful trespass on A's land.

If A had captured the wild animal and B had wrongfully taken the animal from A's possession, or if the animal escaped and B, who later captured the animal, had reason to know the animal belonged to another, then, notwithstanding the general rule that an escaped wild animal that returns to the state of nature belongs to the next possessor, A could sue B and recover the animal or its value.

Note: Scarce Resources and the Rule of Capture

The rule of capture was originally applied to wild animals because they were "fugitive"—i.e., they moved about and ignored private property lines—and they were not owned by anyone, unless the sovereign itself. But in the nineteenth century the rule was expanded to include "fugitive" minerals, such as oil and natural gas. These minerals, like wild animals, move about but under the ground and without regard for property lines. Under the rule of capture, the property owner who drilled for and obtained, say, oil was entitled to keep it even if the oil flowed out from under the property of one or more nearby property owners.

But the rule of capture proved not to work very well for scarce resources, such as oil and gas. The cost of pumping the oil and gas was much less than its market value. Furthermore, if A's neighbor was pumping oil, that meant that A was facing "drainage"—that is, the oil was likely flowing out from under A's land, as well as the land of other neighbors, toward the working oil well. A would be obliged to drill a well too, and pump as rapidly as possible. Anything A did not get for herself today might go to someone else tomorrow.

It is easy to see that the rule of capture had a role in serious problems of overproduction of oil that plagued the industry in the United States around the turn of the century. Today, the rule of capture is seldom applied to fugitive minerals. Rather, their removal is subject to extensive state and federal regulation.

§ 1.3 *Finders*

PROBLEM 1.2: A found a diamond ring on a public street and takes it to a local jewelry store to be appraised. An employee of the store owner removed the diamond from the setting while pretending to weigh it. The employee then refused to return the diamond to A. A sues the store owner to recover the value of the diamond. May A recover?[2]

Applicable Law: The finder of lost property has the right to possess the property against all the world but the true owner. Thus, if a third party wrongfully converts the property, the finder may recover the property if it is still in the possession of the wrongdoer, or the finder may recover the full value of the property from the wrongdoer.

Answer and Analysis

As a general rule, a finder has good title against all the world but the true owner. As to the true owner (who could be a prior possessor), a finder is in a position, similar to that of a bailee, with all the rights and duties of a bailee. While a finder does not attain absolute ownership of the lost property, the finder does have the right of ownership against all other persons but the true owner. Thus, if the finder subsequently loses the found property, the finder may reclaim it from a subsequent finder.

Here, the finder of the diamond ring was entitled to its possession as against all the world but the true owner. Therefore, the finder has a superior claim as against another who wrongfully takes the diamond from the finder. An employer (store owner in this case) is responsible for the wrongful acts of its employees committed during the course of the employment. The store owner,

2. Cf. Armory v. Delamire, King's Bench, 1 Strange 505 (1722).

therefore, is liable to A for the full value of the diamond taken from the ring.

Suppose, after A recovers, O, the true owner, of the diamond ring sues the store owner to recover the value of the diamond. If the wrongdoer is liable to O, then effectively the wrongdoer pays twice, once to the finder and once to O. To avoid the wrongdoer having to pay twice, a court could hold that the wrongdoer, having paid the finder, has a defense as against the true owner and that the true owner should recover from the finder.[3] This rule would penalize the true owner if the finder, who had been paid by the store owner, could not be found.

On the other hand, suppose O sues the store owner to recover possession of the diamond. Here again, if the store owner is liable, the store owner pays twice. But, if O wants the diamond rather than money damages, shouldn't O be permitted to sue the wrongdoer since pursuing the finder will not get O what O wants?

PROBLEM 1.3: A, a young child, picked up a stocking stuffed with soft material that was knotted at both ends. A and A's friends began playing with it. The stocking passed from friend to friend until, as one child was striking another with it, the stocking burst and a large amount of money fell out. A claims the money. Is A entitled to it?

Applicable Law: Physical control alone is not sufficient to constitute possession or a finding. Possession and finding both require a certain amount of intent, a conscious desire to control the object, to possess it, and to exclude others. Thus, if one child found a stuffed stocking and joined with friends in using it as a plaything until it burst open revealing a roll of money, all of the friends formulated the intent to possess the money at the same time. Since they had mutual control, they all were entitled to the money as co-finders.

Answer and Analysis

A is not entitled to the money exclusively. All of the friends are entitled to a *pro rata* share. A did not have exclusive possession and must share the money with the other children. A finder, subject to certain exceptions noted in the following problems, is entitled to possession as against all but the true owner who, in this case, is unknown. To become a finder, however, one must acquire possession. This requires more than physical control. Possession consists of physical control of property coupled with an intent to assume dominion over it. At the time of discovery, A lacked an intent to

3. Cf., Berger v. 34th Street Garage Inc., 274 App.Div. 414, 84 N.Y.S.2d 348 (1st Dept. 1948).

take dominion over the stocking and its contents. A merely wanted to use it as a plaything with her friends. The other children had similar ideas. None of the children desired or attempted to exercise possession or exclusive control over the stocking until the money was discovered. When the stocking burst, all the children formulated the intent to possess the money at the same time, and since they were all collectively in physical control, they became co-finders. Other rationales, such as that A did take possession of the stocking but that she acquiesced in the co-possession of the friends, are possible.

PROBLEM 1.4: F, a prominent archaeologist, went on O's land, but without O's permission, to search for ancient lost artifacts. F dug up a valuable mask from O's land which F then sought to sell to the X Museum, subject to F having good title to the mask. F then instituted a suit against O to establish that as between them F has the better title. Who wins?

Applicable Law: Unless the trespass is trivial, a trespassing finder does not have good title against the owner of the locus in quo. Otherwise, the law favoring finders against all but the true owner would reward trespassers and perhaps even encourage trespassing.

Answer and Analysis

O wins. Because A was a trespasser when entering O's land and finding the mask, F's claim is inferior to that of O who prevails against the trespassing finder.[4] O's claim can be based on the theory that O, the owner of the land on which goods were embedded, owns the land and all that is part of the land.[5] If the law were otherwise, persons would be encouraged to trespass on the land of others.

F cannot prevail by alleging that he was motivated to trespass upon O's land in order to do historical research for a charitable institution. Even such a possibly worthwhile motive does not excuse F's unlawful act. F should have asked O for permission to enter O's land.

PROBLEM 1.5: A went into a barber shop owned by B to get a haircut. On the table next to the chair in which A sat A found a wallet containing $500 in cash. B claimed that B was entitled

4. Favorite v. Miller, 176 Conn. 310, 407 A.2d 974 (1978).

5. See also, Goodard v. Winchell, 86 Iowa 71, 52 N.W. 1124 (1892) (An meteorite weighing 60 pounds, which falls from the sky and is imbedded in the soil to a depth of three feet, is the property of the owner of the land on which it falls, rather than of the first person who finds it and digs it up).

to the money in the wallet even though A found the wallet. If B sues A to recover the money, can B win?[6]

Applicable Law: If a finder finds lost property on the land of another and the land is not generally open to the public, as between the owner of the land and the finder, the owner of the land prevails. Otherwise, the finder would be rewarded for trespassing on another's land. However, at common law if the finder finds lost property on land that is open to the public, such as a commercial establishment, the finder is entitled to the property as against the owner of the land unless the property is mislaid.

Answer and Analysis

A person loses property when the person parts with its possession involuntarily. Typically, in the case of lost property the possessor is unaware that he is parting with possession. Mislaid property, on the other hand, is property which has been intentionally placed somewhere and then its whereabouts forgotten. Here, the wallet found on the table beside the chair appears to have been placed there intentionally, in all likelihood by a customer who was previously in the shop to get a haircut. Thus, the money is classified as mislaid property and not as lost or abandoned property.

As a general proposition the finder of lost property has the right to retain possession as against everybody except the true owner. If the true owner never materializes, the finder keeps the property effectively as a reward for his efforts in taking possession of the property and caring for it. Absent this reward, the finder might not take the time to retrieve the property and care for it. This result generally is viewed as the best way to assure that the property will be reunited with its owner.

Generally, in the case of mislaid property, the owner of the locus in quo where the property is found is entitled to retain possession as against the finder. The rationale for this holding is that the owner of the mislaid property is likely to remember where he placed it and return for it. If a casual finder were entitled to keep it, so the argument goes, it would be more difficult for the owner to recover it. Alternatively, the owner of the locus in quo is likely to still be there when the owner of the mislaid property remembers where he placed it, and thus there is a greater likelihood that the property will be returned to its true owner.

This rationale favoring the owner of the locus in quo against the finder of mislaid property, however, is suspect. The apparent purpose of the rule is to protect the true owner. However, if finders believe that the rule unjustifiably rewards the owner of the locus in

6. McAvoy v. Medina, 93 Mass. 548, 11 Allen (Mass.) 548 (1866).

quo in the event the true owner never materializes, then to avoid that result, finders who are otherwise willing to recognize their claim as subservient to the true owner might be unwilling to tell the owner of the locus in quo that they found the mislaid property. This makes it more difficult for true owners to recover the property.

Furthermore, the characterization of found property as either lost or mislaid is dubious and thus suspect as a device to sort out the competing claims of the finder and the owner of the locus in quo. The characterization depends on the intent of the prior possessor and ascertaining that intent merely from the location of the property is highly suspect. For example, if the wallet had been found under the chair, it arguably was lost rather than mislaid because most people do not intentionally place their wallets under a chair. On the other hand, if the true owner's intent governs the characterization of property as either lost or mislaid, is it not possible that the true owner placed the wallet on the table, that another customer knocked it onto the floor and that a third customer unknowingly kicked it under the chair? If so, the property should be viewed more as mislaid rather than lost.

Many state statutes eliminate the distinction between lost and mislaid property and award possession to the finder who complies with the statute's notification requirements. During a defined period the true owner may appear and claim the mislaid property, but after the statutory period has passed, it belongs to the finder.

PROBLEM 1.6: A was employed as a room cleaner by B hotel to clean guest rooms. While cleaning one guest room, A discovered $800 in cash concealed under the lining of a bureau drawer. A delivered the money to B's manager who attempted without success to find the owner. A claims to be entitled to the cash as against A's employer. Is A correct?[7]

Applicable Law: Certain employees, such as hotel room cleaners, are usually obligated as a part of their employment duties to deliver found articles to their employer. Accordingly, the possession of articles found during and within the scope of one's employment is generally awarded to the employer and not to the finder.

Answer and Analysis

A is not entitled to the money. B could prevail on the theory that the property was mislaid and therefore as between the finder and the owner of the locus in quo the owner wins.

7. Jackson v. Steinberg, 186 Or. 129, 200 P.2d 376 (1948).

Alternatively, the finder in this case is a hotel employee whose general duties include the obligation to deliver to the employer all articles left in the hotel rooms by its guests. The finding occurred in the course of this employment and the finder has a duty to surrender the money to the hotel. Thus, B could also argue that it has a better right to possess the found money than the finder, A, without regard to the characterization of the property as lost or mislaid.

Suppose A was employed by the hotel in a job which did not include, expressly or impliedly by virtue of the job description, a requirement of delivering found property to the employer. Would the result change? Probably not. There are at least two arguments to suggest B would be entitled to the money. First, A, as an employee, is an agent of B and thus acts for the benefit of B when finding the money. Second, if A's finding of the money is outside of the scope of A's employment, then A's possession on the property when finding the property might be viewed as a trespass. In this case, A loses under the general rule that the owner of the locus in quo prevails against a trespasser.

PROBLEM 1.7: A and B, ages eight and ten respectively, were employed by C to clean out C's henhouse. C's home and henhouse had changed hands frequently. A and B found a tin can full of gold buried in a corner of the henhouse in such a condition to suggest that it had been buried there for quite some time. C took the coins from the boys claiming them as hers because they were found in her henhouse. A and B file suit. May A and B recover the coins?[8]

Applicable Law: Treasure trove refers to gold and silver coins, bar, plate, or other valuable objects intentionally hidden or secreted, usually in the earth, but the concept is frequently applied to valuables wherever hidden. The owner is usually unknown and not likely to appear. Under the English common law treasure trove belonged to the Crown, but in the United States it belongs to the finder.

Answer and Analysis

Yes. At early common law lost articles found concealed in the earth or other private places were called treasure trove. Treasure trove usually consisted of coins or money intentionally hidden for safety and with the owner being either dead or unknown at the time of discovery. This is contrasted with lost property which is defined as chattels found on the surface of the earth the possession of which the owner had casually and involuntarily parted. Treasure

8. Danielson v. Roberts, 44 Or. 108, 74 P. 913 (1904).

trove belonged to the Crown in England, but in the United States treasure trove merged with the law of lost property.

The general rule of lost property gives the finder the right to retain it against all persons except the true owner. If the true owner never claims it, as is most likely in the case of treasure trove, then the property becomes that of the finder. Under the doctrine of treasure trove, A and B are entitled to recover possession of the coins. The claim of A and B is fortified by the fact that they are not trespassers, although in some instances even technical trespassers have been allowed to retain treasure trove. Further, the master-servant relationship should not diminish the value of the finders' claim since they were only hired to clean the henhouse. It can hardly be expected that turning in discovered articles, as in the case of the hotel cleaning personnel, would be in the normal course of their employment.

Of course, there is a contrary argument. First, one might imply an obligation on the part of the hired servant to turn over found property to the master. Alternatively, one might characterize A and B as trespassers or wrongdoers with respect to their finding and retention of the gold. Here the argument would be that A and B were hired for a specific purpose—to clean the hen house—and that their presence on C's premises was limited solely to that purpose. Thus, to the extent they do things inconsistent with that purpose, they act outside of the scope of the permission granted to them and, as such, are wrongdoers. To further illustrate, suppose O invites F to her home for dinner and while F is sitting on the sofa puts her hand behind a cushion and finds a ring. Should F be entitled to retain the ring as against O who claims to be entitled to the ring because it was found in O's home. Arguably no on the grounds that F was invited to O's home to eat dinner not find lost property. Admittedly, however, this might be a close question.

PROBLEM 1.8: A trespassed on the land of O and cut ninety-three pine logs without the consent of the owner. A hauled these logs, marked with his initials to a mill, where B converted them to his own use. A now sues B for their market value. What result?[9]

Applicable Law: A possessor, even a wrongful possessor or thief, has the right to possession as against all but the true owner and is entitled to recover either the thing or its value from a converter.

Answer and Analysis

A should recover. It is a generally recognized rule that possession is a protected property right. Thus, a possessor, whether a

9. Anderson v. Gouldberg, 51 Minn. 294, 53 N.W. 636 (1892).

finder, a bailee, or a person who takes possession of previously unowned property or even a converter who had stolen the goods, may recover for their damage, conversion or theft while in her possession. As between a possessor and a wrongdoer, possession is a sufficient title, and only someone with a superior title may contest the possessor's right. The rationale behind the rule is the protection of property and the discouragement of breaches of the peace. B's conduct is wrongful and should be discouraged, not encouraged. B should not be allowed to raise the issue of lack of title in the possessor as this would dilute the law's protection whenever goods were not in the immediate possession of their owner. The defendant can only raise the issue of title when the defendant has a superior title to that of the possessor or can connect herself to someone with a superior title. Here A was clearly the possessor of the logs, and although A acquired possession wrongfully, B is not able to raise the issue of A's lack of title. Therefore A should recover.

The rule that possession is good title against all but the true owner also resolves an administrative difficulty associated with the proof of the ownership of personal property. Since the fact of possession may be provable, rights in property not otherwise evidenced by a writing can be established if possession is the basis for establishing the title.

This example highlights the concept of the relatively of title. Here A's title based on possession is superior to that of B who wrongfully converted the goods to his own use. But, if O had sued A to recover the logs A wrongfully took from O's land, O, as the prior possessor, would prevail as against A who, as against O, was a trespasser.

PROBLEM 1.9: A owned a house which she had never occupied. The house was requisitioned for military use, and B, an enlisted man who was stationed in the house, found a brooch on the top of a window frame behind the blackout curtains and in a crevice. The brooch was unpackaged and covered with cobwebs. The owner of the brooch was not found, and it was turned over to A who sold it and kept the money. B now sues A for the value of the brooch. May B recover?[10]

Applicable Law: This problem can be used to summarize briefly the classification of found property, i.e., lost, mislaid, abandoned, and treasure trove, and gives the basic rules relating to the rights of the finder. A finder of lost articles on the land of another who is not a trespasser is entitled to possession of the article found as against everybody but the true owner of the article, including the owner of the land who never had been in possession of the land.

10. Hannah v. Peel, 1 K.B. 509 (1945).

Answer and Analysis

Yes, although the problem is attended by some difficulty. According to the traditional approach, the found property is first categorized as lost, mislaid, abandoned or treasure trove. Taking up the various categories in reverse order, the item is clearly not treasure trove. First, it is a single item of jewelry and the circumstances of finding preclude any inference that it was carefully secreted or hidden there. The item was not wrapped or enclosed in a container but instead it was uncovered and unprotected from dirt and filth. Although it is not necessary under some authorities that treasure trove be buried in the ground, it is necessary that it be intentionally hidden or secreted.

The brooch was not abandoned. The value of the item and its location refute any likelihood of abandonment. If a person were to abandon such a piece of jewelry, the person would likely throw it in the trash, not in a crevice on top of a window frame.

The two probable categories are those of mislaid or lost property and the two seem almost equally plausible. Someone wearing the pin could have been adjusting the curtains, cleaning the windows or performing some other chore at some distant time in the past. The pin could have fallen off a wearer's clothing without her noticing it, in which case it would be lost—the possession being casually and involuntarily parted. On the other hand, she could have voluntarily removed the pin and placed it on the frame until her task was completed, and then gone off and forgotten about it—in which case it would be mislaid property. Under the traditional rules, A would be entitled to the jewelry and the proceeds of the sale if it were mislaid, but if it were lost, then B would be entitled to the property.

Under the particular circumstances of this case where the owner of the pin is very unlikely to reclaim it, where the owner of the house had never lived there and knew nothing about it, where the finder is an honest serviceman whose conduct should be rewarded and encouraged, the better solution is to classify the jewelry as lost property and let B recover.

Once the item is classified as lost property, it is fairly easy to resolve the dispute—recite the general rule that the finder of lost property acquires rights superior to all except the true owner, and then assert that the place of finding makes no difference. Nevertheless, a few other matters and cases should be considered. Frequently when property is found imbedded in the soil, the owner of the locus in quo is preferred over the finder. In this case, it cannot be said that the pin became a part of the soil or even appurtenant to the house. It was found on a ledge in the building, not embedded in the soil. Similarly, the cases dealing with findings by employees should have no bearing. Although B was there as a special type of

employee of the government, B had no duties as to finding and surrendering items such as this in the usual course of his employment. Thus, B is not precluded from keeping the item as a result of the employee status. Additionally, B should not be precluded from keeping the item as a trespasser as his presence on the premises was lawful and B was not a trespasser.

Finally, although a possessor or owner of land may be regarded as in possession of everything attached to or under the land, that person is not necessarily in possession of everything lying unattached on its surface.[11] Further, A was not in possession at the time of finding, and in fact had never been in possession of this land. Thus, B is entitled to recover the value of the brooch.

PROBLEM 1.10: In the summer of 1622, a fleet of Spanish galleons, heavily laden with bullion exploited from the mines of the New World, set sail for Spain. As the fleet entered the straits of Florida, it was met by a hurricane which drove it into the reef-laced waters off the Florida Keys. A number of vessels went down, including the richest galleon in the fleet, Nuestra Senora de Atocha. Five hundred and fifty persons perished, and cargo with a contemporary value of perhaps $250,000,000 was lost. A later hurricane shattered the Atocha and buried her beneath the sands.

For well over three centuries the wreck of the Atocha lay undisturbed beneath the wide shoal west of the Marquesas Keys. Then in 1971, after an arduous search aided by survivors' accounts of the 1622 wrecks, and an expenditure of more than $2,000,000, P, a salvage corporation, located the Atocha.

P retrieved gold, silver, artifacts, and armament valued at $6,000,000. P's costs have included four lives, among them, the son and daughter-in-law of P's president and leader of the expedition.

P filed suit to retain possession and confirm title in itself to the wrecked and abandoned vessel. The United States government also claimed title. Who has the superior title, P or the United States government?[12]

Applicable Law: Under the law of finders the title to the wreck of a vessel which rests on the continental shelf outside the territorial waters of the United States, where such vessel has been abandoned, vests in the person who reduces that

11. There is some authority for the proposition that personal property found on the real property of another belongs to the finder if it is on the surface, but to the owner of the real property if it is "embedded." Chance v. Certain Artifacts Salvaged from the Nashville, 606 F.Supp. 801 (S.D.Ga.1984).

12. Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir.1978).

property to his or her possession. Where the wreck or abandoned property, however, rests within the territorial waters of a state, there is a conflict. Some jurisdictions hold that the property belongs to the sovereign state if it has not been reclaimed within a year and a day of its abandonment. Other jurisdictions follow the law of finders and allow the finder to keep it. Federal law may preempt state law on this question.

Answer and Analysis

Under finder's law, the vessel and its cargo belong to the finder rather than to the Government. Insofar as sovereignty claims are concerned, however, there is a conflict of authority, and when the treasure or abandoned ship is found in territorial waters, depending upon state law, it is sometimes awarded to the state. In some cases, ownership may be regulated by a federal statute that preempts conflicting state law.

The Atocha was clearly an abandoned vessel and the court applied the law of finders. The claim of the United States was based on either or both of the following: (1) the Antiquities Act;[13] or (2) the right of the United States, as heir to the sovereign prerogative asserted by the Crown of England, to goods abandoned at sea and found by its citizens. The *Treasure Salvors'* court concluded that the Antiquities Act applies by its terms only to lands owned or controlled by the government of the United States, and since the wreck rested on the continental shelf beyond the territorial waters of the United States, that Act did not apply.

The right of sovereignty refers to the right of the sovereign under ancient Roman and early English law to wrecked and derelict property on the seas. Originally, the right was absolute, even to the exclusion of the original owner. However, by the time of Edward I, the rule had been softened so that the owner could reclaim such property within a year and a day of its abandonment. Thereafter, it belonged absolutely to the Crown. Thus, under such a rule of sovereignty, the wrecked vessel and its proceeds belong to the United States government since it was found beyond the territorial waters and after a year and one day of its abandonment. However, since there was no specific act of Congress declaring the right of the United States to such finds, the court decided to follow what it termed the American view and applied the law of finders. Therefore, the company which discovered the wreck and salvaged it was entitled to its contents and the proceeds thereof.

13. 16 U.S.C.A. § 431–433. The act is primarily concerned with designation of historic landmarks and related activity. The law of salvage was also discussed at length in *Treasure Salvors* case, supra.

There is some authority to the contrary. For example, in *State of Florida v. Massachusetts Company*,[14] the "finder" salvage company discovered and removed from time to time various parts of a sunken and abandoned battleship within the territorial waters of the State of Florida. The court held that the State of Florida, which had adopted the English common law, in effect had succeeded to the sovereign rights of the Crown of England, and that the battleship and its contents belonged to the State rather than to the finder.

PROBLEM 1.11: F was employed by the L corporation to service airplanes. L was retained by O, the owner of a single engine plane, to service a plane. In the course of servicing the plane F found $18,000 in cash hidden in one of the plane's wings 30 years ago. F, L and O are all residents of State B the laws of which provide that "lost property shall become the absolute property of the finder if the true owner does not claim the property within 1 year after the property is found" One year after F finds the cash, F, L and O each claim to be entitled to the cash? Who wins.

Applicable Law: At common law the competing rights of F, L and O could be determined by the characterization of the property as lost or mislaid or by whether F was a trespasser or an employee. The common law applies absent a superceding statute that governs the rights of the parties. Here, State B has a statute that purports to give the finder of lost property title to the property if the true owner does not claim the property within one year after it is found. If the statute applies F prevails. But the statute may not apply.

Answer and Analysis

F wins if the statute awarding title to lost property to the finder applies. On the face of the statute, the finder is only entitled to "lost property." Two questions arise: (1) Did the legislature, in enacting the statute, intend the phrase "lost property" to encompass both lost and mislaid property or only lost property? If the latter, is the property characterized as lost or mislaid property and if it is mislaid property, is the finder still entitled to the property?

If a legislature intended to abolish the common law distinctions between lost and mislaid property, a well drafted statute would have defined "lost property" to include both lost property and mislaid property. In the absence of such, there is an ambiguity regarding legislative intent, and courts are divided on whether the

14. 95 So.2d 902 (Fla.1956), cert. denied 355 U.S. 881, 78 S.Ct. 147, 2 L.Ed.2d 112 (1957).

legislature intended to include mislaid property as well as lost property within the statutory phrase "lost property." Most courts hold that absent an express rejection of the distinction between the two, the phrase "lost property" is limited to "lost property" and does not include "mislaid property."[15] Under that rule, F would prevail under the statute only if the cash were characterized as lost property. However, the placement of the cash in the wing of the airplane suggests that the property was mislaid and not lost because money could not have casually dropped in an airplane wing but could only have been intentionally placed there. As mislaid property, the money would go to the owner of the "locus in quo." While the "locus in quo" ordinarily is land, it is not necessarily limited to land and it can include the owner of other personal property in which the mislaid property is found. Under this rationale, O is entitled to the money.

§ 1.4 *Human Embryos*

PROBLEM 1.12: H and W were married to each other. After repeatedly failing to conceive a child by coitus they consulted a fertility clinic and ultimately agreed to participate in an assisted reproduction program. H's sperm was injected into W's eggs and the resulting embryos were stored pending implantation into W's uterus. Prior to implantation H and W agreed to divorce. W now claims that she is entitled to the embryos and seeks to have them implanted in her. H objects and claims that the embryos are his property? Who is right?

Applicable Law: Human embryos are neither persons nor property but share some characteristics of each in that they are not yet human life but have the potential to become human life if implanted and carried to term. As such, rights to stored embryos cannot be determined under a family law standard such as best interest of the child or under a property law standard relating to either prior possession or acquisition of property rights through time and effort which would permit them to be equitably apportioned upon divorce in the same manner as real property or stocks and bonds might be.

Answer and Analysis

In the first reported case involving a dispute over embryos, a married couple brought an action to recover the possession of their embryos in the possession of a fertility clinic which refused to transfer the embryos to another clinic at the couple's request. The court, in *York v. Jones*[16] appeared to treat the embryos as property

15. See Benjamin v. Lindner Aviation, Inc., 534 N.W.2d 400 (1995).

16. 717 F.Supp. 421 (E.D. Va. 1989). But see, Moore v. Regents of University

by finding the couple had a cause of action in conversion. However the characterization of embryos as property was expressly rejected in the later case of *Davis v. Davis*[17] on which the fact of this problem are based.

In *Davis* the court refused to characterize the embryos as either persons or property. However, they were entitled to "special respect" because they had the potential to become human life. Then, the court held that the embryos should be allocated in accordance to the terms of any contract the spouses signed before or after the embryos were created.[18] Absent such a contract, the embryos should be allocated taking into account the relative interests of the spouses "in using or not using the ... embryos."[19] The court then adopted the rule that the interest of the spouse wishing to avoid procreation should trump the interest of the other spouse so long as the other spouse has a reasonable chance of parenting a child without the use of the embryo or does not wish to have a child. If the other spouse would need the embryo to have a child, then that spouse's wishes controls.

In *Davis,* the court observed that the parties were free to contract between themselves for the disposition of the embryos in the case of divorce. However, in a recent Massachusetts case[20] that court held such a contract void as a matter of public policy, at least where it was executed five years before the couple divorced. In doing so, the court indicated the importance of respecting a person's right to be, or not to be, a parent. Such respect did not warrant giving effect to a contract which would have awarded embryos to the wife who wanted to implant them to have a child when the contract was executed long before the parties even contemplated a divorce.

§ 1.5 Human Likeness

PROBLEM 1.13: Teen Idol was a famous rock-and-roll singer known not only for singing songs with seductive lyrics but also wearing flamboyant costumes that accentuated her physique. Over a ten-year period she cultivated her image by carefully selected endorsements of commercial products and through well-timed releases of her albums. By the time she was 30 she was simply known worldwide as "Teen." A major automobile

of California, 51 Cal.3d 120, 271 Cal. Rptr. 146, 793 P.2d 479 (1990) (patient has no property right in removed cancerous spleen).

17. 842 S.W.2d 588 (Tenn.1992).

18. For example, in Kass v. Kass, 91 N.Y.2d 554, 673 N.Y.S.2d 350, 696 N.E.2d 174 (1998) the court found that the divorcing couple had agreed that in the event of their divorce the embryos be used for research and such agreement controlled the embryos' disposition.

19. Id. at 604.

20. A.Z. v. B.Z., 431 Mass. 150, 725 N.E.2d 1051 (2000).

manufacturer began marketing a new car through advertisements placed on television and in magazines targeted at young buyers. These ads show the car being driven by a cartoonish character closely resembling Teen in dress and appearance singing a jingle in Teen's familiar vocal style. Teen sued to enjoin the use of the ad and for damages claiming that she had a property right in her likeness that the automobile company had misappropriated.

Applicable Law: In addition to statutes that may address this problem, courts in recent years have adopted as a new property right the so-called right of publicity—effectively a property right a person has in the person's likeness.

Answer and Analysis

Many stars in the sports and entertainment world have sought to capitalize on their likeness, voice, or mannerisms or upon the fictional character they have created. It is not uncommon for others, recognizing the financial worth of that likeness, to attempt, without permission, to copy it or to create alternative characters based upon it. While some protection might arguably be extended to protecting one's likeness under federal or state statutes, the focus of the courts has been on the recognition of a so-called common-law "right of publicity." This right recognizes that a "celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity."[21] The right of publicity is a valuable property right that, according to some courts, is freely transferable and survives the death of the celebrity.[22] Where the right is recognized the celebrity must establish that the defendant appropriated the celebrity's identity for the defendant's advantage, "commercial or otherwise" and without consent. Furthermore, the celebrity must establish injury.[23]

However, to recognize a right of publicity does not mean that every appropriation of a likeness is actionable. The courts have not yet worked out all of the nuances of this right. For example, does the right apply to political commentary where arguably the right of publicity butts up against the First Amendment's protection of

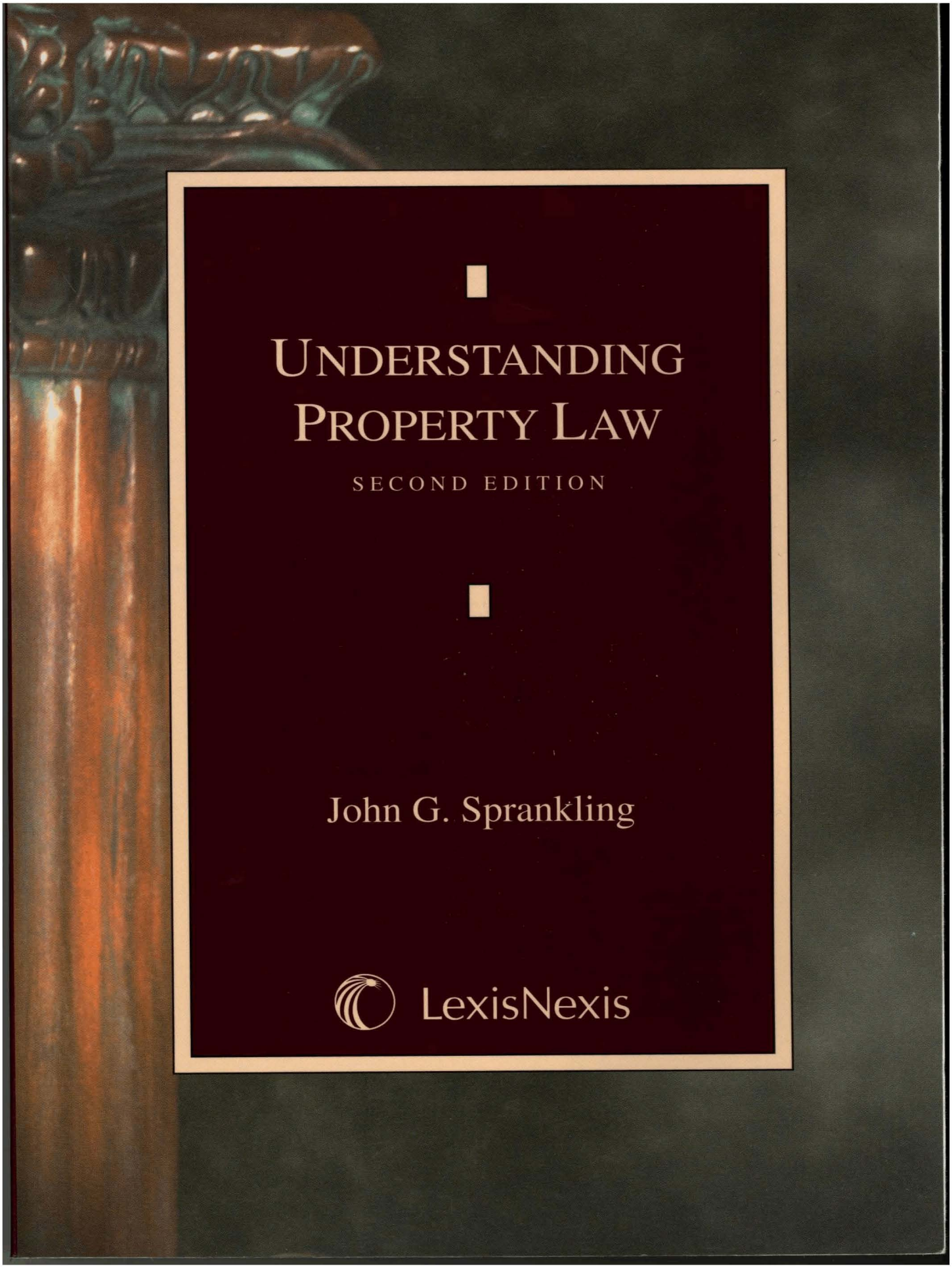
21. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983).

22. Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978).

23. See, White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir. 1992).

political speech? Does the fact that the right is descendible mean that the heirs of John Wilkes Booth could enjoin a handgun manufacture from using his image to promote its products?[24]

24. Cf. Maritote v. Desilu Productions, Inc., 345 F.2d 418, cert. denied, 382 U.S. 883, 86 S.Ct. 176, 15 L.Ed.2d 124 (1965) ("denying heirs of Al Capone a right to recover for an appropriation of this famous mobster's image.")



UNDERSTANDING PROPERTY LAW

SECOND EDITION

John G. Sprankling

LexisNexis

Chapter 1

WHAT IS "PROPERTY"?

SYNOPSIS

§ 1.01 An "Unanswerable" Question?

What is "property"?[1] The term is extraordinarily difficult to define. One of America's foremost property law scholars even asserts that "[t]he question is unanswerable."[2] The problem arises because the legal meaning of "property" is quite different from the common meaning of the term. The ordinary person defines property as *things*, while the attorney views property as *rights*.

Most people share an understanding that property means: "*things* that are *owned* by persons."[3] For example, consider the book you are now reading. The book is a "thing." And if you acquired the book by purchase

[1] *See generally* John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. Ill. L. Rev. 1; Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. Pa. L. Rev. 691 (1938); Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964); Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 Wash. L. Rev. 481 (1983); Jeremy Waldron, *What Is Private Property?*, 5 Oxford J. Legal Stud. 313 (1985).

[2] John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. Ill. L. Rev. 1, 1.

[3] Thomas C. Grey, *The Disintegration of Property, in* Nomos XXII 69, 69 (J. Roland Pennock & John W. Chapman eds., 1980).

or gift, you presumably consider it to be "owned" by you. If not, it is probably "owned" by someone else. Under this common usage, the book is "property."

In general, the law defines property as rights[4] among people[5] that concern things. In other words, property consists of a package of legally-recognized rights held by one person in relationship to others with respect to some thing or other object. For example, if you purchased this book, you might reasonably believe that you own "the book." But a law professor would explain that technically you own legally-enforceable rights concerning the book.[6] For example, the law will protect your right to prevent others from reading this particular copy of the book.

Notice that the legal definition of "property" above has two parts: (1) *rights* among people (2) that concern *things*. The difficulty of defining "property" in a short, pithy sentence is now more apparent. Both parts of the definition are quite vague. What are the possible *rights* that might arise concerning things? Suppose, for example, that A "owns" a 100-acre tract of forest land. What does it mean to say that A "owns" this land? Exactly what are A's rights with respect to the land? The second part of the definition is equally troublesome. What are the *things* that rights may permissibly concern? For example, could A own legal rights in the airspace above the land, in the wild animals roaming across the land, or in the particular genetic code of the rare trees growing on the land? Indeed, can A own rights in an idea, in a graduate degree, in a job, or in a human kidney? In a sense, this entire book is devoted to answering these and similar questions.

§ 1.02 Property and Law

[A] Legal Positivism

Law is the foundation of property rights in the United States. Property rights exist only if and to the extent they are recognized by our legal system. As Jeremy Bentham observed: "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."[7] Professor Felix Cohen expressed the same thought more directly: "That is property to which the following label can be attached. To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The state."[8] This view that rights, including property rights, arise only through government is known as *legal positivism*.

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[4] While property is commonly discussed in terms of "rights," perhaps "relationships" would be a better term. *See* § 1.03[C], *infra*.

[5] "People" is used here in a broad sense to include business and governmental entities as well as individuals.

[6] Still, even attorneys and legal scholars loosely refer to someone "owning" a particular parcel of land or other thing if the person owns *all* the legal rights to it. While convenient, this shorthand adds to the semantic confusion.

[7] Jeremy Bentham, The Theory of Legislation 69 (Oceana Publications, Inc. 1975) (1690).

[8] Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 374 (1954).

[B] An Illustration: *Johnson v. M'Intosh*

The Supreme Court's 1823 decision in *Johnson v. M'Intosh*[9] reflects this approach. Two Native American tribes sold a huge parcel of wilderness land to a group of private buyers for $55,000. The federal government later conveyed part of this property to one M'Intosh, who took possession of the land. Representatives of the first buyer group leased the tract to tenants, and the tenants sued in federal court to eject M'Intosh from the land. The case revolved around a single issue: did Native Americans have the power to convey title that would be recognized by the federal courts? The Court held the tribes lacked this power and ruled in favor of M'Intosh.

Writing for the Court, Chief Justice Marshall stressed that under the laws of the United States, only the federal government held title to the land before the conveyance to M'Intosh, while the Native Americans merely held a "right of occupancy" that the federal government could extinguish. The title to lands, he explained, "must be admitted to depend entirely on the law of the nation in which they lie."[10] The Court's decision could not rely merely on "principles of abstract justice" or on Native American law, but rather must rest upon the principles "which our own government has adopted in the particular case, and given us as the rule for our decision."[11] In short, under the laws established by the United States, must a United States court hold that the United States owned the land? For Marshall, the answer was easy: "Conquest gives a title which the Courts of the conqueror cannot deny."[12] Property rights, in short, are defined by law.

[C] Natural Law Theory

In contrast to legal positivism, *natural law theory* posits that rights arise in nature as a matter of fundamental justice, independent of government. As John Locke observed, "[t]he Law of Nature stands as an Eternal Rule to all Men, *Legislators* as well as others."[13] The role of government, Locke argued, was to enforce natural law, not to invent new law. Natural law was a central strand in European philosophy for millennia, linking together Aristotle, Christian theorists, and ultimately Locke, and heavily influencing American political thought during the eighteenth century. As the Declaration of Independence recited, the "unalienable Rights" of "Life, Liberty, and the Pursuit of Happiness" were endowed upon humans "by their Creator"; governments exist merely "to secure these rights."

The Declaration of Independence was the high-water mark of natural law theory in the United States. The Constitution firmly directed the young

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[9] 21 U.S. (8 Wheat.) 543 (1823). *See also* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (holding federal government was not obligated to pay for removal of timber from lands claimed by Native Americans).

[10] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572 (1823).

[11] *Id.*

[12] *Id.* at 588.

[13] John Locke, Two Treatises of Government 358 (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

American legal system toward legal positivism, subject only to the Ninth Amendment's vague assurance that certain rights are "retained by the people." The influence of natural law theory steadily diminished thereafter. By 1823, when deciding *Johnson v. M'Intosh*,[14] the Supreme Court could easily dismiss the natural law argument that "abstract justice" required recognition of Native American land titles.

§ 1.03 Defining Property: What Types of "Rights" Among People?

[A] Scope of Property Rights

Suppose that O "owns" a house commonly known as Redacre. If we asked an ordinary person what O can legally do with Redacre, the response might be something like this: "O can do anything he wants. After all, it's *his* property. A person's home is his castle." This simplistic view that property rights are *absolute*—that an owner can do "anything he wants" with "his" property—is fundamentally incorrect.

Under our legal system, property rights are the product of human invention. As one court explained: "Property rights serve human values. They are recognized to that end, and are limited by it."[15] Thus, property rights are inherently *limited* in our system. They exist *only to the extent* that they serve a socially-acceptable justification.

As discussed in Chapter 2, the existence of private property rights is supported by a diverse blend of justifications. These justifications share two key characteristics. Each recognizes the value of granting broad decision-making authority to the owner. Under our system, a high degree of owner autonomy is both desirable and inevitable. But none of these justifications supports unfettered, absolute property rights. On the contrary, each requires clear limits on the scope of owner autonomy. Indeed, in a sense we can view property law as a process for reconciling the competing goals of individual owners and society in general. Society's concerns for free alienation of land, stability of land title, productive use of land, and related policy themes sometimes outweigh the owner's personal desires.

[B] Property as a "Bundle of Rights"

[1] Overview

It is common to describe property as a "bundle of rights"[16] in relation to things. But which "sticks" make up the metaphorical bundle? We

[14] 21 U.S. (8 Wheat.) 543 (1823).

[15] State v. Shack, 277 A.2d 369, 372 (N.J. 1971).

[16] *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (referring to the "bundle of rights that are commonly characterized as property"). However, the bundle of rights metaphor has been criticized by some scholars. *See, e.g.*, Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 Harv. Envtl. L. Rev. 281 (2002); Hanoch Dagan, *The Craft of Property*, 91 Cal. L. Rev. 1517 (2003).

traditionally label these sticks according to the *nature* of the right involved. Under this approach, the most important sticks[17] in the bundle are:

(1) the right to exclude;

(2) the right to transfer; and

(3) the right to possess and use.

The rights in the bundle can also be divided in other ways, notably by *time* and by *person*. For example, consider how we could subdivide the right to possess and use based on time (*see* Chapters 8–9, 12–14). Tenant T might have the right to use and possess Greenacre for one year, while landlord L is entitled to use and possession when the year ends. Or we could split up the same right based on the identity of the holders (*see* Chapters 10–11). Co-owners A, B, and C might each hold an equal right to simultaneously use and possess all of Blueacre.

[2] Right to Exclude

One stick in the metaphorical bundle is the right to exclude others from the use or occupancy of the particular "thing." If O "owns" Redacre, O is generally entitled to prevent neighbors or strangers from trespassing (*see* Chapter 30).[18] In the same manner, if you "own" an apple, you can preclude others from eating it. Of course, the right to exclude is not absolute. For example, police officers may enter Redacre in pursuit of fleeing criminals; and O probably cannot bar entry to medical or legal personnel who provide services to farm workers who reside on Redacre.[19]

Is the right to exclude a necessary component of property? Not at all. O might own title to Redacre subject to an easement that gives others the legal right to cross or otherwise use the land (*see* Chapter 32). Or O might lease Redacre to a tenant for a term of years (*see* Chapter 15), thus surrendering the right to exclude. Similarly, a local rent control law might prevent O from ever evicting his tenant from Redacre, absent good cause (*see* § 16.03[B][2], *infra*).

[3] Right to Transfer

A second stick in the "bundle of rights" is the right to transfer the holder's property rights to others. O, our hypothetical owner of Redacre, has broad power to transfer his rights either during his lifetime or at death. For example, O might sell his rights in Redacre to a buyer, donate them to a charity, or devise them to his family upon his death. In our market economy, it is crucial that owners like O can transfer their rights freely (*see* § 9.08[A], *infra*).

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[17] The right to destroy may also be part of the metaphorical bundle of sticks. *See* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 Yale L.J. 781 (2005); *see also* Carter v. Helmsley-Spear, Inc., 71 F.3d 77 (2d Cir. 1995) (owner of sculpture could modify or destroy it, despite objections by sculptors).

[18] *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997).

[19] State v. Shack, 277 A.2d 369 (N.J. 1971).

But the law imposes various restrictions on this right. For example, O cannot transfer title to Redacre for the purpose of avoiding creditors' claims. Nor is O free to impose any condition he wishes incident to the transfer; thus, a conveyance "to my daughter D on condition that she never sell the land" imposes an invalid condition (*see* § 9.08[B], *infra*). Similarly, for example, O cannot refuse to sell his rights in Redacre because of the buyer's race, color, national origin, religion, or gender (*see* § 34.06, *infra*).[20] Some types of property are *market-inalienable*,[21] essentially meaning that they cannot be sold at all (e.g., human body organs),[22] while other types of property cannot be transferred at death (e.g., a life estate).

Is the right to transfer essential? No. For example, although certain pension rights and spendthrift trust interests cannot be transferred, they are still property.[23]

[4] Right to Possess and Use

A third stick is the right to possess and use. As owner of Redacre, O has broad discretion to determine how the land will be used. For example, he might live in the house, plant a garden in the backyard, play tag on the front lawn, install a satellite dish on the roof, and host weekly parties for his friends, all without any intervention by the law. Similarly, if you "own" an apple, you can eat it fresh, bake it in a pie, or simply let it rot.

Traditional English common law generally recognized the right of an owner to use his land in any way he wished, as long as (a) the use was not a nuisance (*see* Chapter 29) and (b) no other person held an interest in the land (*see* Chapters 8–19, 32–34). Today, however, virtually all land in the United States is subject to statutes, ordinances, and other laws that substantially restrict its use (*see* Chapter 36). For example, local ordinances typically provide that only certain uses are permitted on a particular parcel; if Redacre is located in a residential zone, O cannot operate a store or factory there. If the Redacre home is a historic structure, the local historic preservation ordinance may bar O from destroying the building or even altering its appearance.[24] Similarly, Redacre might be subject to private restrictions that dramatically curtail permitted uses; for example, such restrictions might ban gardens, satellite dishes, or even noisy games of tag (*see* Chapter 35).

The right to possess and use is a common—but not a necessary—component of property. If O leases Redacre to tenant T for a 20-year term,

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[20] *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (upholding constitutionality of statute prohibiting racial discrimination in sale or other transfer of property).

[21] *See* Margaret J. Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987).

[22] *See also* Andrus v. Allard, 444 U.S. 51 (1979) (upholding constitutionality of statute prohibiting sale of endangered species).

[23] *See, e.g.*, Broadway Nat'l Bank v. Adams, 133 Mass. 170 (1882) (holding beneficiary's interest in spendthrift trust was not transferable).

[24] *See also* Eyerman v. Mercantile Trust Co., 524 S.W.2d 210 (Mo. Ct. App. 1975) (refusing to enforce instructions in decedent's will that her home be destroyed).

O temporarily surrenders his right to possess and use the land; but O still holds property rights in Redacre.

[C] From "Rights" to "Relationships"

Attorneys, judges, and even law professors customarily define property in terms of *rights*. But what about *duties*? Suppose landowner L is required by law to preserve the habitat of endangered species, even though this limits her ability to use the land. We might explain this requirement either as a restriction on L's rights or as a duty that L owes. In recent decades, the law has increasingly recognized that property owners both hold rights and owe duties. Perhaps it is more accurate to define property as *relationships* among people that concern things.

Professor Wesley Newcomb Hohfeld revolutionized property law theory in the early twentieth century by envisioning property as a complex web of legally-enforceable relationships.[25] He developed an analytical framework for precisely classifying these relationships. Under this view, a property owner may hold four distinct entitlements: rights, privileges, powers, and immunities. Each entitlement is linked to a "correlative" counterpart: right-duty; privilege-no right; power-liability; and immunity-disability. Although Hohfeld's system was partially adopted by the first Restatement of Property in 1936, it enjoys less influence today. His insight that property consists of relationships among people, however, remains important.

§ 1.04 Defining Property: Rights in What "Things"?

[A] The Problem

What can permissibly be the subject of property rights? In other words, if "property" consists of legal rights or relationships among people that concern "things," what is the universe of "things"?

The concepts of *value* and *scarcity* are useful tools in thinking about these questions, but do not go far enough. An ordinary person might define property as "things worth money"—land, jewels, cars, and so forth. Yet property rights can exist in things that have no monetary value (e.g., letters from a loved one) or even a negative value (e.g., land heavily contaminated with toxic wastes). Scarcity is a more promising theme. Indeed, one scholar defines property as "a system of rules governing access to and control of scarce material resources."[26] Certainly, property rights are more likely to develop in things that are scarce (e.g., paintings by Leonardo da Vinci) than in things that are common (e.g., mosquitos).[27] Yet scarce things may remain

[25] *See* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913).

[26] Jeremy Waldron, *What Is Private Property?*, 5 Oxford J. Legal Stud. 313, 318 (1985).

[27] *See generally* Harold Demsetz, *Toward A Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967).

unowned (e.g., an idea for a new television series), while property rights might exist in ubiquitous things (e.g., air space).

So what "things" can be the subject of property rights? The law's traditional reply to this question is simple: all property is divided into two categories, *real property* (rights in land) and *personal property* (rights in things other than land). Yet this reply is remarkably unhelpful. The universe of "things" in which property rights can exist does not extend to all "land" or to all "things other than land."

[B] Real Property

Real property consists of rights in land and anything attached to land (e.g., buildings, signs, fences, or trees).[28] It includes certain rights in the land surface, the subsurface (including minerals and groundwater), and the airspace above the surface (*see* Chapter 31).

But how extensive are these rights? If F owns exclusive property rights in 100 acres of land known as Greenacre, does he also own rights in all the airspace 1,000 miles above the land? Or in the soil 1,000 miles below Greenacre? If the wind blows across Greenacre, does F own rights in the wind? Or in the wild bee hive in a Greenacre tree?

Historically, property law was almost exclusively concerned with real property. In feudal England—the birthplace of our property law system—land was the source of political, social, and economic power (*see* Chapter 8). Control over land provided the basis for political sovereignty, the foundation of social status, and the principal form of wealth; accordingly, disputes concerning real property were resolved in the king's courts. Personal property, in contrast, was relatively unimportant in the feudal era; when a person died, the distribution of his personal property was supervised by church courts. Under these conditions, two distinct branches of property law evolved. Real property law, the dominant branch, became complex and often arcane; in contrast, personal property law remained relatively simple and straightforward. Thus, the property law that the new United States inherited from England mainly consisted of real property law.

Even today, the standard first-year law school course on "property" mainly examines real property law. This focus may appear anachronistic in our technological age; stocks, bonds, patents, copyrights, and other forms of intangible personal property are increasingly valuable. Yet land remains the single most important resource for human existence. All human activities must occur somewhere. As our population increases and environmental concerns continue, disputes about property rights in our finite land supply will escalate.

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[28] *But see* Wood v. Wood, 183 P.2d 889 (Colo. 1947) (holding that mature corn crop was personal property).

[C] Personal Property

[1] Chattels

Items of tangible, visible personal property—such as jewelry, livestock, airplanes, coins, rings, cars, and books—are called *chattels*. Virtually all of the personal property in feudal England fell into this category. Today, property rights can exist in almost any tangible, visible "thing." Thus, almost every moveable thing around you now is a chattel owned by someone. There are two particularly prominent exceptions to this general observation. Even though human kidneys, fingers, ova, sperm, blood cells, and other body parts might be characterized as "tangible, visible things," many courts and legislatures have proven reluctant to extend property rights this far (*see* Chapter 7). Similarly, deer, foxes, whales, and other wild animals in their natural habitats are deemed unowned (*see* Chapter 3).

[2] Intangible Personal Property

Rights in intangible, invisible "things" are classified as intangible personal property. Stocks, bonds, patents,[29] trademarks, copyrights, trade secrets, debts, franchises, licenses, and other contract rights are all examples of this form of property.[30] The importance of intangible personal property skyrocketed during the twentieth century, posing new challenges that our property law system was poorly equipped to handle.[31]

What are the other intangible "things" in which property rights may exist? The answer to this question is changing quickly. Consider the example of a person's name. Traditionally, property rights could not exist in a name, unless it was used in a special manner (e.g., as a trademark). Today, however, the law protects a celebrity's "right of publicity"—the right to the exclusive use of the celebrity's name and likeness for commercial gain (*see* Chapter 6).[32] But the answers to other questions are less clear. If spouse A works to finance spouse B's law school education, is B's law degree deemed marital "property" such that A is entitled to a share if he and B divorce? If A works for C for 30 years, does A have a property right in his job?[33] Upon retirement, does A have a property right in social security benefits?[34] The universe of intangible things is seemingly endless, and the law in this area will continue to evolve rapidly.

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[29] *See, e.g.*, Hughes Aircraft Co. v. United States, 717 F.2d 1351 (Fed. Cir. 1983).

[30] The fact that intangible personal property is sometimes evidenced by a document (e.g., a stock certificate or promissory note) does not convert it into a chattel.

[31] For example, can property rights exist in computer time? *See* Lund v. Commonwealth, 232 S.E.2d 745 (Va. 1977) (overturning defendant's conviction for larceny on the basis that computer time is not a "good" or "chattel").

[32] *See, e.g.*, Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

[33] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972); Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980); *see generally* Joseph W. Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 614 (1988).

[34] *See* Flemming v. Nestor, 363 U.S. 603 (1960) (finding no property right in social security benefits for purposes of Due Process Clause). *But cf.* Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973) (holding tenant in federally-subsidized apartment had property right to continue occupancy, absent good cause for eviction, for purposes of Due Process Clause).

Chapter 2

JURISPRUDENTIAL FOUNDATIONS OF PROPERTY LAW

SYNOPSIS

§ 2.01 Why Recognize Private Property?

Consider a 100-acre tract of prairie grassland in the American Midwest known as Goldacre, the perfect site for a wheat field. What alternative models of ownership might apply to this land? One option might be called *no property*: no one has any rights in the parcel. Another possibility is *common property*: every person holds equal rights in the land. A third model is *state property*: the state owns all rights in the tract. The final option is *private property*: one or more persons hold rights in the land. Under our legal system, Goldacre is probably governed by the private property model.

Why does American law recognize private property?[1] We view property as a cluster of legally enforceable rights among people concerning things.[2] But why should government enforce those rights in the first place? In other

[1] *See generally* Lawrence C. Becker, Property Rights: Philosophic Foundations (1977); Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315 (1993); Carol M. Rose, *Property as the Keystone Right?*, 71 Notre Dame L. Rev. 329 (1996).

[2] *See generally* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 Cornell L. Rev. 531 (2005).

words, what is the *justification* for private property? The answer to this question is crucial because the *justification* for private property will necessarily affect the *substance* of property law. For example, suppose that we recognize private property solely in order to reward useful labor; if so, all property law rules will be devoted toward implementing this end. In short, the scope and extent of property rights logically turn on the underlying justification for private property.[3]

In reality, American property law is based on a subtle blend of different—and somewhat conflicting—theories. No single approach is accepted as the complete justification for private property. The dominant theory is undoubtedly traditional utilitarianism (*see* § 2.04). However, other major theories—including first occupancy (*see* § 2.02), labor-desert theory (*see* § 2.03), the law and economics variant of utilitarianism (*see* § 2.05), civic republican theory (*see* § 2.06), and personhood theory (*see* § 2.07)—also influence the evolution of property law. Of course, this is far from a complete list. A variety of other perspectives—including such diverse examples as libertarian theory,[4] Immanuel Kant's categorical imperative approach,[5] natural law theory,[6] the "green property" movement,[7] the critical legal studies approach,[8] and John Rawls' theory of distributive justice[9] —are also important.

Rather than a uniform theory of property, these diverse approaches form a kind of jigsaw puzzle whose pieces do not fit neatly together. As Lawrence Becker laments, each approach is "typically embedded in a general moral theory which makes it difficult to use one argument to support, augment, or restrict another."[10] Accordingly, while these theories all support the existence of private property in the abstract, they differ widely on how property rights should be defined and allocated.

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[3] Jurisprudential approaches to property divide into two groups: (a) teleological (or consequentialist) theories and (b) deontological theories. *Teleological* theories (e.g., utilitarianism) support private property because of the beneficial results that property provides. *Deontological* theories (e.g., natural law theory), in contrast, endorse private property because it is inherently right or just, regardless of the results it produces.

[4] *See generally* Robert Nozick, Anarchy, State, and Utopia (1974).

[5] *See, e.g.*, Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 Iowa L. Rev. 1331, 1350-57 (1996).

[6] *See* § 1.02[C], *supra*.

[7] *See, e.g.*, J. Peter Byrne, *Green Property*, 7 Const. Commentary 239 (1990); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972); *see also* Sierra Club v. Morton, 405 U.S. 727 (1972) (Douglas, J., dissenting) (arguing that concern for environmental protection should lead to the conferral of standing upon "environmental objects" such as trees, rivers, and valleys to sue for their own preservation).

[8] *See, e.g.*, Roberto M. Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983).

[9] *See generally* John Rawls, A Theory of Justice (1971).

[10] Lawrence C. Becker, Property Rights: Philosophic Foundations 3 (1977).

§ 2.02 First Occupancy (aka First Possession)

[A] Nature of Theory

Who was first? The first occupancy theory reflects the familiar concept of first-in-time: the first person to take occupancy or possession of something owns it.[11] Suppose fisherman A uses his fishing gear to catch a wild fish. Under this approach, A owns property rights in the fish simply because he was the first person to capture it. Or suppose F, a farmer in the nineteenth-century West, diverts irrigation water to her land from a nearby river; over time, F acquires water rights under the prior appropriation doctrine merely because she used the water first.

First occupancy theory seeks to explain how rights of private property arise in unowned natural resources. William Blackstone—whose *Commentaries on the Laws of England* quickly became the most popular legal treatise in the young United States—described the process as follows. When the world was in a state of nature, blessed with abundant food and other natural resources but only a small human population, everything was held "in common" by the inhabitants as "the immediate gift of the creator"; thus, any person could take "from the public stock to his own use such things as his immediate necessities required."[12] If early inhabitant A was hungry, for example, he could simply eat a wild nut from any tree. In a second phase, Blackstone argued, "by the law of nature and reason, he who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer."[13] Thus, if A picked nuts off the tree, and sat down to eat them, he acquired property rights in the nuts for as long as he continued eating them. Blackstone concluded that as the human population increased, this custom of first occupancy ripened into permanent property rights. Now, if A labored to pick nuts off the tree, he owned the nuts, whether he ate them immediately or stored them for future use. The same principle applies to property rights in land. Person P acquires ownership rights in the 100-acre prairie tract known as Goldacre simply by occupying it first.

The principle of first occupancy is a fundamental part of American property law today, though in practice it is often blended together with other theories, particularly utilitarianism and the labor theory. First occupancy theory was particularly influential during the nineteenth century, when it was used to allocate property rights in such diverse resources as wild animals and fish (*see* § 3.02), oil and gas (*see* § 31.06[B]) and surface water (*see* § 31.02[A]). Even today, the first-in-time principle is still the basic rule for determining the respective priority of competing title claims to real property (*see* § 24.02).

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[11] *See, e.g.*, Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805) (discussing rights in wild fox); *cf.* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (discussing rights as among European nations to conquer lands occupied by non-Europeans).

[12] 2 William Blackstone, Commentaries on the Laws of England *3 (Bell ed., 1771).

[13] *Id.*

[B] Critique of Theory

Most legal scholars hold the same opinion of first occupancy theory: while it helps to *explain* how property rights evolved, it does not adequately *justify* the existence of private property. Suppose vagrant V accidentally kicks over a rock and discovers a gold mine. V's claim is first in time, but why should this make a difference? Why should V own the gold, rather than, for example, the residents of the region or the parents of handicapped children?

Further, the first occupancy approach is counterproductive because it encourages the waste of natural resources. Consider hunting. If property rights in wild animals are allocated to the first successful hunter, then long-term conservation is impossible. Because no hunter can control the conduct of other hunters, each hunter has an incentive to protect his or her individual self-interest by killing as many animals as possible as quickly as possible. What about oil? If property rights in subsurface oil are acquired by the first person to pump it out of the ground, then no one has an incentive to preserve oil resources for future use. Suppose A, B, and C all own parcels of land overlying an underground oil deposit. If A begins to pump out oil, B and C will rationally do the same; otherwise, A will pump out all the oil, leaving B and C with no rights at all.

Richard Epstein offers at least a lukewarm defense. Assuming that some system of property rights is necessary, "if only to organize the world in ways that all individuals know the boundaries of their own conduct,"[14] he argues that first occupancy is superior to a system that recognizes original common ownership in all citizens. First, it places wealth in private hands, which leads to more efficient utilization of resources. Second, the first occupancy rule has become a well-established custom for centuries; whatever its original merits may be, any attempt to abandon the rule now would upset the stability of private property ownership.

The first occupancy approach is a valuable tool in one setting: it serves as a low-cost "tie breaker." All other things being equal, it offers a quick, clear, and inexpensive method to resolve competing claims to property rights and thereby avoid conflict.[15] In other words, if the positions of two competing claimants are otherwise identical, the law usually breaks the tie by recognizing the rights of the first-in-time claimant.

§ 2.03 Labor-Desert Theory

[A] Nature of Theory

The labor-desert theory posits that people are entitled to the property that is produced by their labor. Under this approach, fisherman A owns property rights in the fish he caught because the catch resulted from his labor; A baited the hook, waited patiently, and reeled in the fish. Or suppose sculptor B utilizes her creative powers to transform unowned clay into a

[14] Richard A. Epstein, *Possession as the Root of Title*, 13 Ga. L. Rev. 1221, 1238 (1979).

[15] *See* Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73 (1985).

valuable statue; again, B owns rights in the statue because of her labor. The respective property rights of A and B arise as a matter of natural justice because they mixed their labor with unowned raw materials, not simply because they were first in time.

As developed by its foremost exponent, the seventeenth-century philosopher John Locke, the labor theory assumes a world in a state of nature, without private property ownership.[16] It seeks to explain how unowned natural resources (e.g., wild nuts, game, or unoccupied land) are transformed into private property owned by one person. The theory proceeds in four basic steps:

(1) every person owns his body;

(2) thus, each person owns the labor that his body performs;

(3) so, when a person labors to change something in nature for his benefit, he "mixes" his labor with the thing; and

(4) by this mixing process, he thereby acquires rights in the thing.

Consider an example. P owns his body, and thus owns his own labor. When P picks wild nuts from a tree and places them in his sack, he mixes his labor (which he owns) with the nuts (which are unowned), and thereby obtains property rights in the resulting mixture (nuts in the sack). In the same fashion, Locke concludes: "*As much Land* as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his *Property*. He by his Labour does, as it were, enclose it from the Common."[17] Thus, P can acquire ownership rights in our hypothetical prairie tract, Goldacre, simply by cultivating and harvesting wheat on the land.

Strong traces of the labor theory linger in American property law today, often intermixed with first occupancy theory.[18] Perhaps the clearest example is accession: one who in good faith applies labor to another's chattel receives title to the resulting product if, for example, the labor greatly increases the value of the original item (*see* § 7.01). Other examples include adverse possession (*see* Chapter 27), the good faith improver doctrine (*see* § 30.07), and various intellectual property rules (*see* Chapter 6).

[B] Critique of Theory

Legal scholars are almost uniformly critical of Lockean labor theory as a justification for private property rights.[19] At best, critics observe, the theory should permit a person to receive the value that his or her labor adds to a thing, not title to the thing itself. If P's labor adds only 1% to

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[16] *See generally* Walton H. Hamilton, *Property—According to Locke*, 41 Yale L.J. 864 (1932).

[17] John Locke, Two Treatises of Government 290–91 (Peter Laslett ed., student ed. 1988) (3rd ed. 1698).

[18] *Cf.* Haslem v. Lockwood, 37 Conn. 500, 507 (1871) (holding that plaintiff, who raked abandoned horse manure into piles and thus "greatly increase[d] its value by his labor," could recover the value of the manure from the defendant who carried away the piles).

[19] *See generally* Lawrence C. Becker, Property Rights: Philosophic Foundations 36–56 (1977).

the value of a thing, why should P receive 100% of the thing? Similarly, if P plants, nurtures, and harvests wheat on unowned land commonly known as Goldacre, at most P should hold rights to the resulting wheat, not to the land itself.

Another line of attack focuses on time. Suppose P acquires title to Goldacre through his labor. P then hires farm workers F and G to grow the next wheat crop on the land. Even though F and G mix their labor with the land, they cannot acquire ownership, because the land is already owned by P. Thus, the labor theory honors only first labor, not all labor. In this sense, it seems to suffer from the same defects as first occupancy theory.

Finally, the labor theory assumes an unlimited supply of land and other natural resources. Thus, if P appropriates Goldacre through his labor, he theoretically causes no harm to other people. Assuming an infinite supply of natural resources, F, G and others could freely occupy unowned land. However, the twentieth century has taught us that the world is finite. Thus, if the law recognizes P's title to Goldacre, F, G, and others do suffer harm.

§ 2.04 Utilitarianism: Traditional Theory

[A] Nature of Theory

Utilitarian theory views property "as a means to an end."[20] This is—by far—the dominant theory underlying American property law. Under this approach, private property exists in order to maximize the overall happiness or "utility" of all citizens. Accordingly, property rights are allocated and defined in the manner that best promotes the general welfare of society. As the New Jersey Supreme Court observed in *State v. Shack*: "Property rights serve human values. They are recognized to that end, and are limited by it."[21]

The modern father of utilitarianism was Jeremy Bentham, an eighteenth-century English philosopher. For Bentham, property rights stemmed not from morality or natural justice, but rather from human invention. Mankind recognizes the existence of private property, he suggested, simply as a convention that promotes social utility. He observed: "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."[22] In crafting property law, the role of the legislator was to do "what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil."[23]

Suppose fisherman A catches a wild fish. According to utilitarian theory, society recognizes that A owns rights in the fish because this result promotes overall public happiness. In general, fishermen derive pleasure

[20] Lawrence C. Becker, Property Rights: Philosophic Foundations 57 (1977).

[21] 277 A.2d 369, 372 (N.J. 1971).

[22] Jeremy Bentham, The Theory of Legislation 69 (Oceana Publications, Inc. 1975) (1802).

[23] *Id.*

from catching fish, and obtain sustenance from eating the fish they catch. Accordingly, society recognizes the ownership rights of all fishermen who successfully catch fish. Perhaps catching the fish made A grumpy or even mad. But the facts relating to A's personal situation are irrelevant. A's property rights stem from a general rule applicable to all citizens. Conversely, human happiness might require that society restrict or ban fishing, in order to allow an endangered species to recover from over-fishing and thus be available for future generations of fishermen.

The same analysis applies to our hypothetical wheat field, Goldacre. The law recognizes farmer P as the owner of property rights in Goldacre because this result best promotes overall societal happiness, not because P has any natural or moral entitlement. How so? In general, recognizing private property rights in land produces public benefits. Without private property rights, farmers in general could not bar trespassers from removing their crops; under these conditions, farmers would not invest the time, money, and energy needed to supply society with wheat. Property rights thus provide farmers with the investment security that induces them to grow wheat to help feed the public. And—as a general matter—farmers presumably derive personal satisfaction and pleasure from owning and farming their lands.

[B] Critique of Theory

How can human happiness be measured? Are the appropriate yardsticks love, wealth, respect, intelligence, leisure time, dignity, self-esteem, health, or other factors? Critics charge that utilitarian theory is effectively meaningless because it is impossible to assess happiness. For example, a particular law might bring more wealth to one group of citizens, but lessen the self-esteem of another equal-sized group. Alternatively, a law might increase the dignity, but impair the health, of all citizens. Although there is widespread agreement that utilitarian theory supports the existence of private property as a general matter, critics argue that it offers no guidance about how property rights should be allocated or defined.

One important implication of utilitarian theory is that property rights are not "written in stone," but rather are subject to change. If property is merely a tool used to engineer maximum human happiness, then new social, economic, or political conditions may require that property rights be reallocated or redefined. Even assuming that happiness can be measured, are courts and other governmental institutions competent to decide what changes in traditional property rights are necessary or appropriate for the welfare of society?

§ 2.05 Utilitarianism: Law and Economics Approach

[A] Nature of Theory

The law and economics approach incorporates economic principles into utilitarian theory.[24] While traditional utilitarianism defines human happiness in rather vague terms, the law and economics view essentially assumes that happiness may be measured in dollars. Under this view, private property exists in order to maximize the overall wealth of society.

Richard Posner, the preeminent law and economics scholar, begins by defining property as "rights to the exclusive use of valuable resources."[25] The law enforces property rights in order to motivate individuals to utilize resources "efficiently." In this sense, an "efficient" allocation of resources is one in which "value"—defined as an individual's willingness to pay—is maximized. For example, if A is willing to pay $100 for a particular widget, while B is willing to pay only $30, value is maximized if A obtains the widget. For Posner, the key to efficient allocation is a truly free market in goods and services. Accordingly, the principal role of property law is to foster voluntary commercial transactions among private parties.

Posner postulates a world filled with economically-rational actors, all constantly seeking to maximize their self-interests. In this setting, an efficient property law system must have three central components: universality, exclusivity, and transferability. *Universality* simply means that all property is owned by someone. The second component, *exclusivity*, denotes that the law recognizes the absolute right of an owner to exclude all members of society from the use or enjoyment of the owned resource. Finally, *transferability* means that property rights are freely transferable, so that a resource can be devoted to the most highly-valued use. Of course, even if these components are present, the free exchange of property rights may be impaired by *transaction costs* (e.g., the costs of investigating a potential purchase, negotiating a purchase contract, or dealing with the *free rider*—the group member who receives benefit but refuses to pay). The Coase Theorem holds that property will eventually be devoted to its highest value use, regardless of how property rights are initially allocated, if no transaction costs exist.

Consider again our hypothetical prairie tract Goldacre. Farmer P is deciding whether to plant wheat on Goldacre. Society will gain wheat—and thus added wealth—if P and similarly-situated farmers have adequate incentive to invest the time, energy, and money necessary to raise crops. In a world without property law, P will worry: strangers might appropriate the harvest, or P might fall ill and be unable to tend the crop. How can property law encourage P to grow wheat? Posner would answer the question

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[24] *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960); Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967).

[25] Richard A. Posner, Economic Analysis of Law 31 (6th ed. 2003).

in three steps. First, recognize that P holds property rights in Goldacre. Second, define P's rights so that P has the exclusive right to the use and enjoyment of Goldacre; in this manner, the law will enforce P's exclusive rights to the wheat he grows. Third, allow P to freely transfer his rights in Goldacre to others, so that illness or other calamity does not impair wheat production.

The law and economics approach to utilitarian theory has been quite influential in recent decades, affecting academic debate (and, to a lesser extent, case law) in areas ranging from tenants' rights to land use law.[26] In particular, the concept of *externalities*—that is, economic costs or benefits caused by a person's failure to consider the full impacts of his use of resources—has offered important insights into nuisance law (*see* Chapter 29).

[B] Critique of Theory

The law and economics approach is, to put it mildly, controversial.[27] One major concern is its assumption that social utility or value is appropriately measured by willingness to pay. Not all human desires or satisfactions can be quantified in dollar terms. Such basic human needs as dignity, love, self-esteem, respect, and honor carry no price tag.

Even if all human happiness could be reduced to dollars, the "willingness to pay" standard is still fundamentally flawed. Why? The existing distribution of wealth in our society is unequal. Posner tells a parable of two families, each interested in purchasing a very expensive type of pituitary extract that increases the height of children. The poor family is unable to afford the extract, even though without it their son will be a dwarf forever. Conversely, the rich family can afford to purchase the extract, so that their son—a boy of otherwise normal height—can grow a few inches above normal. For Posner, the rich family places more "value" on the extract because it is willing to pay more than the poor family. Thus, value is maximized by allowing the rich family to receive the extract.

Implicit in the law and economics approach is an assumption that increasing overall social wealth will benefit all members of society, a view characterized by some critics as "trickle-down economics." In other words, if the size of the "pie" increases, the size of each piece of the pie will also increase. However, critics charge that the minimal government intervention championed by law and economics advocates tends to perpetuate the existing unequal distribution of wealth.

Even Posner acknowledges that law and economics theory presents profound moral questions. He concedes that economic analysis cannot answer "the ultimate question of whether an efficient allocation of resources

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[26] *See, e.g.*, Chicago Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732 (7th Cir. 1987) (Posner, J., concurring).

[27] *See, e.g.*, Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 Or. L. Rev. 147 (2000).

would be socially or ethically desirable."[28] Still, Posner insists that efficiency should be considered an important factor in legal decision making.

§ 2.06 Liberty or Civic Republican Theory

[A] Nature of Theory

Liberty theory argues that the ownership of private property is necessary for democratic self-government.[29] As it developed before the American Revolution, this approach posited that property rights provided citizens with the economic security that allowed independent political judgment. Citizen C1, owning 1,000 acres of land, could support his family by farming his own land, without any external assistance. He was accordingly free to serve the common good through voting, political discussion, holding office, and so forth. In contrast, landless citizen C2 would be dependent on the good will of others for sustenance, somewhat like the feudal serf; C2 was thus subject to manipulation, bribery, or other economic pressure. If offered a bribe to vote for a particular candidate, for example, C2 might well prefer his private self-interest over the common good.

For this reason, Thomas Jefferson advocated the distribution of federally-owned public lands to landless citizens.[30] Jefferson envisioned a nation of yeoman farmers, virtuous and independent enough to pursue the public good. His dreams contributed to the generous federal land distribution policies of the eighteenth and nineteenth centuries—notably the Homestead Act of 1862—by which most of the lands now comprising the United States were transferred into private ownership.[31]

[B] Critique of Theory

The influence of liberty theory waned during the nineteenth century in the face of changing economic, political, and social conditions. Modern scholars are skeptical of the original assumption that property ownership is essential to political freedom. Developments over the last 40 years—notably the civil rights movement—demonstrate that even our poorest citizens have the political courage to fight for the common good. Moreover, even assuming that economic security is vital for political independence, today most citizens derive that security not from "property" in the traditional sense, but rather from wages earned through relatively secure employment.

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[28] Richard A. Posner, Economic Analysis of Law 14 (6th ed. 2003).

[29] *See generally* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. Rev. 273 (1991); William H. Simon, *Social-Republican Property*, 38 UCLA L. Rev. 1335 (1991).

[30] *See* Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & Econ. 467 (1976).

[31] *Cf.* Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973) (holding tenant in quasi-public housing had property right to continue occupancy there even after termination of lease absent good cause for eviction).

Further, taken to its logical conclusion, liberty theory seems to support a redistribution of property from the rich to the poor. If property exists only to ensure democratic government, then each citizen must be allocated a share of society's wealth.[32] Yet the Takings Clause of the Fifth Amendment—included in the Constitution partly in response to Madison's concerns about potential wealth redistribution (*see* § 39.02[B])—bars this outcome.

§ 2.07 Personhood Theory

[A] Nature of Theory

Personhood theory justifies private property as essential to the full development of the individual. Under this approach, certain things—for example, a wedding ring—are seen as so closely connected to a person's emotional and psychological well-being that they virtually become part of that person.[33] Thus, a person should have broad property rights over such things.

Over two centuries ago, the German philosopher Georg Hegel argued that a "person has as his substantive end the right of putting his will into any and every thing and thereby making it his."[34] More recently, Margaret Radin addressed the same theme; she observed that most people "possess certain objects they feel are almost part of themselves," objects that are "closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world."[35] In short, people define their selves through objects. The emotional and psychological link between a person and certain "things"—for example, a love letter or a family home—is so great, Radin suggests, that a person should be able to control the thing through enhanced property rights.

[B] Critique of Theory

Personhood theory might be classified as a variant on utilitarian theory. It seeks to maximize utility by protecting a person's emotional or psychological happiness. Yet, at best, it explains the existence of private property rights only in those "things" seen as central to personhood. It does not seek to justify the existence of what Radin terms "fungible property," that is, rights in money, stocks, bonds, commercial real estate, and other "things" that are less connected to personhood.

Like traditional utilitarian theory, the personhood approach also offers little guidance on the allocation or definition of property rights. Radin argues that when a property right is personal, a prima facie case exists that

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[32] *Cf.* Frank I. Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097 (1981); Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964).

[33] *Cf.* Joseph W. Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 614 (1988) (stressing the importance of individual reliance as a basis for recognizing property rights).

[34] Georg W. F. Hegel, The Philosophy of Right 23 (T. Knox ed., 1952) (1821).

[35] Margaret J. Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 959 (1982).

it should be protected to some extent against conflicting fungible property rights held by others. To what extent? Suppose landlord A leases one of the apartments in his 10-unit building to tenant B on a month-to-month basis. Two years later, A seeks to evict B in order to sell the land to a computer manufacturing company, which will build a factory on the site and provide jobs for 400 neighborhood residents. Assuming the apartment unit is "personhood" property, is B entitled to reside there for as long as she pays rent and otherwise performs the lease terms? In other words, will B's personhood interest override A's "fungible" interest?

Chapter 3

PROPERTY RIGHTS IN WILD ANIMALS

SYNOPSIS

§ 3.01 The Origin of Property Rights

Property courses often begin with a surprising topic—ownership of wild animals. In a sense, the topic seems almost irrelevant. Modern disputes about who owns a particular squirrel or fish, for example, are uncommon. And it is simply too expensive to litigate the rare dispute that does arise. So why study the topic?

The law governing ownership of wild animals helps answer a key question—how do property rights originate?[1] Today, virtually everything around us is owned by someone. But because wild animals in nature are considered unowned, they occupy a unique niche in property law. The legal principles governing acquisition of title to wild animals shed light on the policies that influenced the development of American property law. More directly, the principles governing ownership of wild animals were

[1] *See generally* Richard A. Epstein, *Possession as the Root of Title*, 13 Ga. L. Rev. 1221 (1979); Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73 (1985).

ultimately extended by analogy to the ownership of other resources, including water, oil, and natural gas (*see* Chapter 31).

§ 3.02 The Capture Rule in General

[A] Basic Rule

As a general principle, no one owns wild animals—in Latin, *ferea naturae*—in their natural habitat.[2] Under the common law "capture rule," property rights in wild birds, fish, and other animals are obtained only through physical possession. The first person to capture or kill a wild animal acquires title to it.[3] For example, suppose that F finds and pursues a deer, only to have it escape; F has no rights to the deer. If G now traps the deer in a net, he "owns" the deer. But even G's ownership rights are limited. If the deer escapes from the net, G loses his rights and another hunter may acquire title through capture.

Understandably, this rule does not apply to domesticated or tame animals (*domitae naturae*). Suppose that F's cow strays onto G's land, where G captures it. Because the cow is considered a domestic animal, the capture is irrelevant. The rules concerning domestic animals are grounded in policies quite different from those relevant to wild animals. F still owns the cow, absent adverse possession by G.[4]

[B] *Pierson v. Post*

[1] Facts

The landmark case illustrating the capture rule—and much more—is *Pierson v. Post*.[5] It is still celebrated as one of the most famous decisions in American law. The facts of the case are deceptively simple. One day in the early 1800s, Post was hunting in the New York wilderness with his dogs. On a patch of "unpossessed" land, he found and pursued a fox. Pierson, fully aware that Post was chasing the fox, killed it himself to prevent Post from catching it. Although not clear from the case, this incident sparked or worsened a feud between the Post and Pierson families. The ensuing litigation was more about offended honor than the monetary value of the fox carcass.

Post sued Pierson for the value of the fox, claiming trespass on the case. Post won and Pierson appealed to the New York Supreme Court. Both parties agreed that property rights in wild animals were obtained only by

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[2] Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 284 (1977).

[3] *See, e.g.*, Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805); Missouri v. Holland, 252 U.S. 416, 434 (1920) ("Wild birds are not in the possession of anyone; and possession is the beginning of ownership.").

[4] *See, e.g.*, Conti v. ASPCA, 353 N.Y.S.2d 288 (City Civ. Ct. 1974) (owner still held title to trained parrot after its escape, because parrot was a domesticated animal).

[5] 3 Cai. R. 175 (N.Y. 1805).

"occupancy," that is, by first possession. Thus, as the court phrased it, the issue was "what acts amount to occupancy" of a wild animal?[6] Pierson maintained that only killing or other *actual capture* of the animal constituted possession. Post argued for what might be called a *probable capture* standard: a pursuing hunter with a reasonable chance of success has sufficient "possession" to create ownership. No prior English or American decision had addressed the issue.

[2] Majority Opinion

The majority adopted the actual capture test in a somewhat mechanical opinion. Writing for the court, Justice Tompkins examined ancient treatises on Roman, European, and English law to locate an applicable rule. Finding that these authorities uniformly endorsed the actual capture standard, he concluded that the fox "became the property of Pierson, who intercepted and killed him."[7] To a lesser degree, Tompkins also relied on public policy factors. He suggested that the actual capture standard rewarded successful hunters, ensured certainty in property rights, and minimized quarrels.

[3] Dissent

In his sometimes facetious dissent, Justice Livingston criticized the majority's blind application of ancient rules to the fundamentally different conditions prevailing in the United States: "[I]f men themselves change with the times, why should not laws also undergo an alteration?"[8] He observed that the fox was a "noxious beast," akin to a pirate, that caused damage to farmers. Viewing the law as an instrument of social change, he argued that the court should select the standard that provided "the greatest possible encouragement"[9] for the destruction of foxes. He reasoned that the better rule required only continued pursuit together with a "reasonable prospect . . . of taking" the fox (i.e., a probable capture standard).

[4] *Pierson* in Context

Pierson is important at several levels. It established the actual capture rule as the American standard for acquiring title to wild animals. As a prominent decision in a legal system with little case law, it also provided a bridge for extending the capture rule by analogy to other natural resources.[10] More fundamentally, *Pierson* symbolizes the struggle between

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[6] *Id.* at 177.

[7] *Id.* at 178.

[8] *Id.* at 181 (Livingston, J., dissenting).

[9] *Id.* at 180 (Livingston, J., dissenting).

[10] *See, e.g.*, Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204 (Ky. Ct. App. 1934); Elliff v. Texon Drilling Co., 210 S.W.2d 558 (Tex. 1948). Indeed, one modern decision extended the *Pierson* standard to a new situation: ownership of a baseball used to set a home-run record. In Popov v. Hayashi, 2002 WL 31833731, the trial court held that the capture rule would apply ("A person who catches a baseball that enters the stands is its owner."), but found on the facts that the plaintiff had not "achieved complete control of the ball." *See generally* Patrick Stoklas, Comment, Popov v. Hayashi, *A Modern Day* Pierson v. Post: *A Comment on What the Court Should Have Done with the Seventy-third Home Run Baseball Hit by Barry Bonds*, 34 Loy. U. Chi. L.J. 901 (2003).

two theories of jurisprudence—formalism and instrumentalism. The majority opinion reflects the older, formalistic approach to judging; the judge mechanically derives the appropriate rule from existing authorities, however remote. The dissent represents the then-emerging view of the American judiciary that the law should serve as an instrument of social change. The dissent's insistence that law must "change with the times" still resonates today.

[C] Defining "Capture"

[1] The Actual Capture Standard

Pierson recognizes that a hunter who actually kills or captures a wild animal, and immediately takes possession of it, acquires title. It also suggests that the mortal wounding of an animal "by one not abandoning his pursuit"[11] may constitute capture.[12] Later decisions have somewhat relaxed the *Pierson* standard. For example, if F sets a trap that catches a wild muskrat in his absence, the muskrat still belongs to F. Similarly, if G begins chopping down a tree housing a wild bee hive, he has acquired sufficient title to the hive to prevail over H, a stranger who drives him away.[13]

[2] Two Fish Stories

A well-known pair of decisions involving ownership of fish illustrates the capture standard. In *State v. Shaw*,[14] a long funnel-shaped net directed fish into a holding net about 28 feet square; the narrow end of the funnel entering the holding net was less than 3 feet wide. Although fish could both enter and exit the holding net through this opening, under normal conditions few, if any, fish actually escaped. Finding that it was "practically . . . impossible" for fish to escape, the *Shaw* court held that the net owners had captured the fish.

Conversely, in *Young v. Hichens*,[15] the court held that plaintiff did not possess a school of fish that was virtually surrounded by his net. The lengthy net was drawn around the fish in almost a complete circle, leaving a gap of only about 40 feet. Before plaintiff's employees could close the gap with a second net, defendant's boat sailed through the gap into the circle and captured the fish. Lord Denman concluded that even though it was "almost certain" plaintiff *would have* obtained possession but for

[11] Pierson v. Post, 3 Cai. R. 175, 178 (N.Y. 1805).

[12] *See also* Dapson v. Daly, 153 N.E. 454 (Mass. 1926) (hunter who merely wounded and pursued deer did not obtain ownership); Buster v. Newkirk, 20 Johns. 75 (N.Y. Sup. Ct. 1822) (where first hunter wounded deer but abandoned pursuit, and deer ran six miles before second hunter killed it, second hunter owned deer).

[13] Adams v. Burton, 43 Vt. 36 (1870).

[14] 65 N.E. 875 (Ohio 1902).

[15] 115 Eng. Rep. 228 (Q.B. 1844).

defendant's intervention, it was "quite certain" that plaintiff *did not* actually obtain possession.[16]

Both decisions turn on the likelihood that fish might escape from the net. In *Shaw*, the facts established that fish rarely escaped from the trap. But the net circle in *Young* was incomplete, creating a small risk that fish could escape before the gap was plugged.

[3] Role of Custom

Custom may also help define capture, as reflected in a series of decisions concerning property rights in whales, notably *Ghen v. Rich*.[17] There, Ghen shot a bomb lance into a fin-back whale off the Cape Cod coast, killing it instantly. The whale immediately sank, presumably to the sea bottom. Three days later a beachcomber found the carcass stranded on a beach 17 miles away, and sold it to Rich who extracted its valuable oil. *Pierson* might suggest that Ghen had no rights in the whale. Although he killed it, he failed to take immediate possession of the carcass and in fact left the area, thus arguably "abandoning his pursuit."

The custom in the Cape Cod region, however, was that a whale killed in this manner belonged to the fisherman, while the finder of the carcass received a small reward for his help. Judicial acceptance of this custom was critical to the survival of the local whaling industry.[18] The court awarded the value of the whale to Ghen under the custom, noting that if a fisherman does "all that it is possible to do to make the animal his own, that would seem to be sufficient."[19]

[D] Release or Escape After Capture

In general, ownership rights end when a wild animal escapes or is released into the wild.[20] Suppose K captures a wild rabbit; one week later, the rabbit escapes back into the forest, where it is instantly killed by L. L owns the rabbit. Once K's qualified property rights lapsed, the rabbit was again unowned and subject to capture by another. If the law were otherwise, hunters like L might be deterred from hunting at all. How could they distinguish an "owned" rabbit from an "unowned" rabbit?

But suppose a wild animal escapes onto land that is far from its native habitat. If O's giraffe flees into the Colorado mountains, for example, P cannot acquire title by capturing it. The exotic nature of the animal

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[16] *Id.* at 230.

[17] 8 F. 159 (D. Mass. 1881).

[18] *See* Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. Econ. & Org. 83 (1989).

[19] Ghen v. Rich, 8 F. 159, 162 (D. Mass. 1881).

[20] *See, e.g., In re* Oriental Republic Uruguay, 821 F. Supp. 950 (D. Del. 1993) (owner who released wild ducks into marshland could not obtain damages when they were later killed by an oil spill); Mullett v. Bradley, 53 N.Y.S. 781 (App. Div. 1898) (owner's rights ended when undomesticated sea lion escaped).

effectively puts P on notice that it is already owned by another.[21] O's investment in the giraffe is protected.

An interesting problem arises when a captured wild animal is tamed and then released back into nature. For example, suppose that K allows his captured rabbit to roam the forest during the daytime, knowing that it will faithfully return each night. L cannot shoot the rabbit. A captured animal that has the habit of occasionally returning to its captor (*animus revertendi*) is still considered property. In this instance, the law's interest in motivating owners to tame wild animals for productive use outweighs the concern for certainty.

§ 3.03 Evaluation of the Capture Rule

[A] Rationale for the Rule

American law has traditionally viewed wild animals in nature as either dangerous or worthless. The primary policy underlying the capture rule is to encourage the killing or capture of wild animals for the benefit of society, consistent with utilitarian theory. For example, if H is aware that he can acquire title to any deer he can kill, he has an incentive to invest his money and time in deer hunting. As a result, society will obtain additional venison and skins. But if title could be obtained merely by chasing deer, H might not be willing to devote his time to hunting. Any wild deer H finds might be already owned by someone else who had pursued it unsuccessfully. If H killed the deer, the prior pursuer might claim it as his property. Thus, the capture rule rewards success, not mere effort.

In addition, the rule creates a clear, "bright line" standard for determining ownership which provides several benefits. Possession provides notice to the world of the owner's rights. Consider the example of property rights in a wild duck. Under the capture rule, it is simple to determine who has possession of—and thus owns—the duck. Accordingly, the rule tends to avoid disagreement and thus prevent quarrels which may erupt into violence. Further, from the perspective of law and economics, the rule is an efficient mechanism for resolving any disputes that do occur; ownership can be established with minimal expenditure of society's resources (e.g., attorneys fees, judicial time). Finally, the certainty of title stemming from the rule encourages an owner to invest time and energy in making the captured animal more useful to society (e.g., training a wild parrot to perform tricks).

[B] Criticism of the Rule

Today the capture rule is uniformly condemned by legal scholars for the very reason that once supported it: the rule encourages the destruction of

[21] The classic illustration is E.A. Stephens & Co. v. Albers, 256 P. 15 (Colo. 1927), where the court held that the escape of a non-native silver fox in Colorado did not end the owner's rights.

wild animals. It is seen as an anachronism from the era when the United States was a vast wilderness.[22]

Advocates of the law and economics movement observe that the capture rule results in over-intensive hunting.[23] Because no person can control hunting by others, each person has an incentive to protect his or her individual self interest by killing animals as rapidly as possible. As Harold Demsetz observed in a landmark article, "it is in no person's interest to invest in increasing or maintaining the stock of game."[24] Under such a system, conservation of wild animals for prudent, long-term human use is impossible.

Environmental law scholars view the capture rule—and the ethic it reflects—as an unmitigated tragedy that devastates natural ecosystems.[25] They observe that the modern capture rule threatens the continued existence of uncounted species, just as unregulated nineteenth-century hunting eradicated the American passenger pigeon.

§ 3.04 Rights of Landowners

[A] No Ownership of Animals

Does the owner of land also own the wild animals on the land? Under the English doctrine of *ratione soli*, wild animals were considered to be in the "constructive possession" of the landowner. But the landowner did not acquire title to such an animal until and unless it was captured, whether by the landowner or by someone else. Thus, if poacher P killed a deer on O's land, O now owned the deer.[26] Yet attempts to transplant the *ratione*

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[22] *See generally* Michael C. Blumm & Lucus Ritchie, *The American Rule of Capture and State Ownership of Wildlife*, 35 Envtl. L. 673 (2005); John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. Chi. L. Rev. 519 (1996).

[23] A related law and economics theme is that the capture rule encourages overinvestment, which wastes societal resources.

[24] Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347, 351 (1967); *see also* Garrett Hardin, *The Tragedy of the Commons*, 162 Sci. 1243 (1968); Richard A. Posner, Economic Analysis of Law (6th ed. 2003); Richard J. Agnello & Lawrence P. Donnelley, *Property Rights and Efficiency in the Oyster Industry*, 18 J.L. & Econ. 521 (1975).

[25] *See, e.g.*, Lynton K. Caldwell, *Land and the Law: Problems in Legal Philosophy*, 1986 U. Ill. L. Rev. 319; Eric T. Freyfogle, *Ownership and Ecology*, 43 Case W. Res. L. Rev. 1269 (1993); Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 Envtl. L. 1 (1994); Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. Envtl. Aff. L. Rev. 471 (1996).

[26] Keeble v. Hickeringill, 103 Eng. Rep. 1127 (Q.B. 1707), was cited by the *Pierson* court as illustrating the *ratione soli* principle. In *Keeble*, the plaintiff owned a "decoy pond"—a pond specially constructed to lure wild ducks so that plaintiff could capture them. On three occasions, the defendant discharged guns near the pond for the purpose of frightening away the wild ducks that had landed there. Yet the *ratione soli* principle does not satisfactorily explain why plaintiff prevailed in his later damages action. Although the ducks were in his constructive possession, he had not yet captured them and thus did not own them. *Keeble* is best explained under tort law, not property law: defendant maliciously interfered with the plaintiff's business.

soli principle to the United States were ineffective. Early American courts viewed the rule as both undemocratic and inconsistent with the policies underlying the capture rule.

Accordingly, in the United States a landowner generally owns no rights in wild animals on the land. For example, in one case[27] a group of Wyoming landowners asserted that the state's refusal to grant them licenses to hunt elk and other wild animals on their own lands was an unconstitutional "taking" of property. The court reasoned, however, that mere ownership of the animals' habitat did not confer property rights in the animals: "[N]o one 'owns' wild animals, in the proprietary sense, when they are in their natural habitat unless and until the animals are reduced to something akin to possession."[28] The relatively narrow exception to this rule involves immobile animals such as clams, mussels, and oysters. Permanently affixed to the land (much like trees and other vegetation), these immobile animals are usually deemed the property of the landowner.[29]

[B] Right to Exclude Hunters

The trespass doctrine provides an American landowner with protection similar to *ratione soli*. A landowner may bar hunters and others from trespassing on his land.[30] As a practical matter, to the extent consistent with hunting laws, this doctrine gives the landowner the exclusive opportunity to capture wild animals on the property.[31]

§ 3.05 Regulation by Government

[A] State and Federal Restrictions

Modern game laws and other government restrictions have substantially eroded—though not erased—the capture rule. States routinely regulate hunting and fishing within their borders to protect wild animals on behalf of the public in general. For example, under the police power, states may ban hunting altogether, or regulate its frequency, duration, and manner.[32]

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[27] Clajon Prod. Corp. v. Petera, 854 F. Supp. 843 (D. Wyo. 1994).

[28] *Id.* at 852.

[29] *See, e.g.*, McKee v. Gratz, 260 U.S. 127, 135 (1922) (mussels in stream bed with "a practically fixed habitat" were held possessed by landowner).

[30] In order to bar hunting on undeveloped land, statutes in most states require that the owner "post" appropriate "no hunting" signs on his land. The lack of such posting may imply permission from the owner to use his land for hunting. McKee v. Gratz, 260 U.S. 127 (1922). *See also* Mark R. Sigmon, Note, *Hunting and Posting on Private Land in America*, 54 Duke L.J. 549 (2004).

[31] Some decisions suggest that a landowner is entitled to wild animals killed on his land by a trespasser. *See, e.g.*, State v. Repp, 73 N.W. 829 (Iowa 1898).

[32] *See generally* George C. Coggins & Robert L. Glicksman, Public Natural Resources Law § 18.01 *et seq.* (2006); *see also* Bilida v. McCleod, 211 F.3d 166 (1st Cir. 2000) (person who illegally possessed wild raccoon could not maintain due process challenge to government's seizure of animal because she did not own it).

Federal law similarly protects wild animals to some extent; for example, the Endangered Species Act[33] prohibits the killing of certain protected species. When hunting is permitted, government regulations are usually consistent with the capture rule—the first successful captor acquires title to the wild animal.

[B] No Proprietary Ownership of Animals

Despite the breadth of these regulatory powers, state and federal governments do not "own" wild animals in a proprietary sense. During the nineteenth century, states uniformly declared ownership over the wild animals within their territories, usually by enacting statutes to the effect that the state held wildlife in trust for its residents. A substantial body of case law embraced this state ownership theory. With its 1977 decision in *Douglas v. Seacoast Products, Inc.*,[34] however, the Supreme Court rejected this claim as "no more than a 19th-century legal fiction."[35] Writing for the Court, Justice Brennan restated the capture rule: "Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture."[36] Thus, most courts hold that government entities are not liable for damage to private property caused by wild animals.[37] For example, if wild turkeys eat O's corn crop, O cannot obtain damages from the government.

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[33] 16 U.S.C. §§ 1531–1544.

[34] 431 U.S. 265 (1977).

[35] *Id.* at 284.

[36] *Id. See also* Hughes v. Oklahoma, 441 U.S. 322 (1979) (an Oklahoma statute barring transportation of lawfully-caught wild minnows out of state violated the Commerce Clause; because Oklahoma had never owned the minnows, it did not have a special right to the property within its jurisdiction); North Dakota v. Dickinson Cheese Co., 200 N.W.2d 59 (N.D. 1972) (North Dakota did not have a sufficient property interest in wild fish to recover damages from polluter who killed fish).

[37] *See, e.g.*, Sickman v. United States, 184 F.2d 616 (7th Cir. 1950), *cert. denied*, 341 U.S. 939 (1951) (geese); Moerman v. State, 21 Cal. Rptr. 2d 329 (Ct. App. 1993) (elk).