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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.