NORTHEASTERN UNIVERSITY SCHOOL OF LAW

Property
2010
Prof. Mary E. O'Connell
First Syllabus
Sept. 1- October 5

Course Materials: The casebook for this course is Singer, *Property Law: Rules, Policies, and Practices*, Aspen Publishers, 5th ed., 2010. There is also a paperback book, William Cronin, *Changes in the Land: Indians, Colonists and the Ecology of New England.* Both of these books are available at the Northeastern bookstore. The Cronon book may also be available, used, from CISP (the law school's Co-op Income Sharing Program). Finally, substantial materials are posted on my WebCourse. Instructions for accessing the WebCourse can be found by logging on to "MyLaw", hitting "Department" and then "Library". A tab for ""Lexis Nexis WebCourses Enrollment Instructions" will appear on your screen.

UNIT 1: WHAT IS PROPERTY?

Wednesday, September 1, Friday, September 3, Tuesday, September 7 (Classes 1-3): Things, Rules, Relationships: What is Property?
Assignment: (Classes 1 - 3) WebCourse: "So What Is Property?"; *Moore v. Regents of the University of California;* A Guide to *Moore v. Regents.* (This material was also available on the Orientation Website).

Your first property case is *Moore v. Regents of the University of California.* This is a difficult case – and a rather long one, despite my best efforts at editing it (the full text is about twice as long as the excerpt I have provided.) I like the case because it presents quite starkly an issue fundamental to this course: when does, when should, the law define something as "property", and what consequences, legal, social, economic and moral, flow from that definition? Obviously, we won't resolve those weighty questions during the first week of law school, but we will begin a conversation about them that will continue over the next several weeks.

The assignment is the same for the first three classes. This is, in part, because I use *Moore* not only to begin our thinking about property, but also to work on both case reading, and the all important skill of understanding legal procedure. I think you will get the most out of these three sessions if you read the materials before the first class, and then re-read them before our third class, on Tuesday, Sept. 7. My hope and expectation is that our discussion in the first two classes will increase your comprehension of the case. You might also go on to the Cronon material, which we will take up on Wednesday, Sept. 8. Your assignment is to read Chapters 3 and 4, and the first section (6 pages) of Chapter 7.

UNIT 2: ACQUISITION OF PROPERTY: PRIMARY ACQUISITION

How does a person come to have property? Our first case allowed us to avoid that question by focusing on spleens and cells. The issue in *Moore* was Mr. Moore's right to control an organ

of his body. Where and how he got that organ wasn't the question. But how one gets property often *is* the question. This unit focuses (for the most part) on "primary acquisition", that is, creating property rights in the first instance (making property out of non-property), rather than acquiring them (as most of us do most of the time) by purchase, gift, inheritance or marriage.

Wednesday, September 8: (Class 4) Acquiring Land by Discovery and Conquest. Assignment: Casebook pp. 97-108; 125-129; Cronon, *Changes in the Land*, Chapters 3 and 4, and the first part of Chapter 7 (first 6 pages). WebCourse: Memo on *Johnson v. M'Intosh.*

All over the planet, there are people living on lands that formerly belonged to others, including me as I write this syllabus, and all of us during our class. At times, those others have used a legal forum to assert claims against the later occupants/intruders. Today's materials draw us into questions of "discovery" and "conquest". When something new is discovered, can the discoverer assert a right to it? Does this discovered thing become property? What if the discovered thing is land, and there are people living on it? If the discoverer subdues the former occupants, who owns the land? This question is as old as the European discovery of American (older, actually) and as contemporary as thinking about rights and obligations in Iraq.

Friday, September 10: (Class 5) Contemporary Issues in Discovery and (Mostly) Conquest. Assignment: Casebook pp. 109-119 (I will not cover the *Navajo Nation* case); 120-121 (notes; we will not cover the problem), 125-129. WebCourse: O'Connell, "Memo on *Tee-Hit-Ton Indians v. United States* and the Oneida cases"; d'Errico, "Sovereignty: A Brief History in the Context of U.S. "Indian Law".

Today's cases consider how the doctrine of "conquest" has continued to affect the lives and fortunes of members of American Indian tribes. Moving well forward in time from 1823 (the date of *Johnson v. M'Intosh),* these cases span the period from 1955 to 2005 (indeed, the final case we will consider, *Oneida Indian Nation of New York v. Madison County,* was affirmed by the U.S. Second Circuit Court of Appeals on April 27, 2010.)

Does the *Tee-Hit-Ton* case apply the doctrine of "conquest"? What is the argument that it does not? The case includes a dissent. Did the dissenters disagree with the majority's concept of "Indian title", or was their dissent based on some other ground?

Moving to the more recent cases, where do they leave us? Are modern courts moving away from the doctrine of "conquest"? If they are, what are they moving toward? A notion of guardianship/fiduciary responsibility? A movement to recognize Indian sovereignty?

The readings that begin on p. 125 are an interesting footnote to *Johnson v. M'Intosh.* As they point out, the federal government's edict that Indian land could be transferred only to it resulted in the government's owning quite a lot of land. As the book explains, the government proceeded to give a great deal of this land away, with the railroads as the favorite recipient. Land was also sold to individual purchasers. At first, as the book explains, these sales were of large tracts at high prices. But much of the land was already occupied by white settlers who had moved west in the period following the Revolutionary War, and settled on land to which they held no title. These settlers pressured the federal government to give them the right to acquire title to the land they were occupying. The government acquiesced, though with certain strings attached. The land could only be acquired by U.S. citizens (or those who had declared their intention to

become citizens) who were over 21 or heads of families. Those who qualified could claim "a quarter section". Apparently, it was the practice to lay out a town as a square, six miles to a side. This square was then broken up into 36 squares, like a checkerboard, each square one mile on a side. This one mile square contained 640 acres. A person could apply to occupy ¼ of this square, or 160 acres. Settlers were required to build a house on the property and to break at least 10 acres of land for agriculture before they could apply for a title – referred to as a "patent" at the time. They were also required to live on the land for 5 years in order to take title free of charge, though they could often buy the land at a very low price prior to that time. The federal government envisioned a systematic process: land would be surveyed, townships laid out, tracts purchased, etc. But the settlers jumped the gun again and again. Rather than punishing them, the government tended to acquiesce in their claims.

Your casebook editor also offers materials which make the point that while the Indians' lands were confiscated, those of the landowners in the rebellious South were not , despite the Union's victory in the Civil War. Certainly what we know about conquest at this point suggests that the victorious Union could easily have decided to confiscate the rebels' lands, and, indeed, the freed slaves heard many rumors to that effect. But conquest, it seems, provides the conqueror with all the options – including those in which race may have played a more important role than treason.

We will be back to the notion of "discovery" later on. Is this doctrine at all likely to have a renaissance? We seem unlikely to discover new continents any time soon, but might this doctrine have a new life in some other context?

Tuesday, September 14: (Class 6): The Concept of "Capture":
Assignment: Casebook pp. 152-159; 175 (notes 1 and 2). WebCourse: from Berger, "It's Not about the Fox: The Untold History of *Pierson v. Post"* 55 *Duke L. J.* 1089 (2006); from John Locke's *Second Treatise of Government* ; from Hardin, "The Tragedy of the Commons", 162 *Science* 1243 (1968); from Posner, *Economic Analysis of Law* (1973); Canfield, "Lobstermen Claw for Control of Fishery, *Newark Star-Ledger*, September 6, 2009"; O'Connell, "A Note on Legal History and the Courts of Equity".

We begin today with one of property law's most famous cases, *Pierson v. Post*, a case about, of all things, the capture of a fox. Is a wild animal like the unclaimed land we discussed in *Johnson v. M'Intosh?* Who "owns" the creatures of the wild? Does anyone? Should anyone? What is the basis for Mr. Post's claim that he owned the fox taken by Mr. Pierson? Surely he doesn't claim to own all the foxes in the woods. Was the fox on Mr. Post's land? Would it have mattered if it were? Why?

Before you come to class, decide which party seems to you to be the more deserving of taking this poor fox. (No, you can't vote for the fox, though I suspect many of you would if you could.) Be ready to make the argument for your chosen victor.

Let's accept what seems to have been the prevailing sentiment of the time – that exterminating foxes was socially beneficial. Which of the competing rules announced in this case (that of Tompkins on p. 153 and that of Livingston on p. 154) would better achieve that end? Why? The reading from John Locke suggests an answer to this question lying in the application of labor to things in a natural state. We might think about what Locke would do with the facts of *Moore.* Was the majority in *Moore* following Locke's reasoning in awarding the cell line to the researchers?

I have included in today's readings a portion of Garrett Hardin's famous *The Tragedy of the Commons* as a counterpoint to Locke. Yet another perspective is offered by Judge Richard Posner, whose influential *Economic Analysis of Law* was published in 1973. I don't have permission to reproduce any of Posner's work, but I have included a memo written by me which introduces you to some of Posner's basic assertions about the need for a law of private property.

On p. 156, your book introduces a much more contemporary case, *Popov v. Hayashi,* a 2002 dispute over a baseball hit by Barry Bonds, a famous baseball player. The ball was hit for a home run, causing Bonds to break the record for most home runs in a season. Like Mr. Moore, Mr. Popov filed a conversion claim, asserting a property right in the ball Mr. Bonds hit, even though Popov's possession of the ball was, arguably, never secure. What is the major difference between the property in the *Popov* case and that in *Moore, M'Intosh* and *Pierce* (especially *Moore* and *Pierce)*? Judge Kevin McCarthy (wrongly identified as "Patrick" by Prof. Singer) decided this case in a California trial court (the event occurred in San Francisco). What rule did he adopt for deciding who had possession of the ball, and why did he pick this rule?

If Mr. Popov never had possession of the ball, why did he win his case? What would happen in *Pierson v. Post* if Judge McCarthy's rule were applied to that case?

Wednesday, September 15 and Friday, September 17 (Classes 7 and 8) Riparian Rights, Prior Appropriation and the World of Water Rights.

Assignment: Casebook pp. 164-167 (omit problems on p. 167); WebCourse: *Evans v. Merriweather; Coffin v. Left Hand Ditch.* "U.N. to Vote on Right to Water", *Toronto Star,* July 27, 2010; Mchangama, "Safe Drinking Water Is Not a Right", *The Australian,* August 12, 2010; Dempsey, "Despite Federal Protection, Great Lakes Remain Troubled Waters", *Detroit News,* August 6, 2009; Dewan, "A Dispute over a River Basin Is Pitting Atlanta Against Its Neighbors", *The New York Times*, August 16, 2009; Ingold, "Rain Law Wetting Appetites", *The Denver Post,* August 5, 2009; Poling, "Water As Collateral", *San Antonio Express-News,* July 18, 2007; Bunch, "The Water Is Much, Much More Valuable than the Land", *Denver Post,* July 11, 2004; "Editorial: Water Ruling Right on Target", *Denver Post,* July 10, 2004; Haight, "Foundation Helps NW Rivers Keep on Rolling", *The Oregonian,* September 24, 2009.

Who owns the water? There may, literally, be no more important question in the 21st century. The legal treatment of water is nothing if not complex. As your casebook points out, an initial division separates "groundwater" (literally, water trapped underground) from "flowing water", i.e., all rivers and streams. Rivers and streams are then divided between the "navigable" (i.e., large enough for waterborne commerce) and the "nonnavigable". The former are controlled by the federal government, the latter are subject to state law. Then we layer on the fact that in the United States, two dramatically different sorts of water law apply to both groundwater and flowing water. We will spend these two classes learning the rules of riparian rights and prior appropriation. But does either system really tell us who owns the water? The recent U.N. resolution described in the first two newspaper articles on the WebCourse proclaims that access to clean water is a "human right". But what does that mean?

Thinking about riparian rights vs. prior appropriation, which system would John Locke endorse? Under riparian law, is water a "commons"? If so, does Garrett Harding's dire warning suggest that riparian law should change in order to avoid the "Tragedy of the Commons"? Or is Harding all wet (sorry – couldn't resist) when it comes to water?

The newspaper articles give us a glimpse of some major, on-going water battles, and some proposed solutions. Georgia is truly engaged in a "water war" with Alabama and Florida, and has only 2 years to figure things out before a federal court order almost literally turns off the taps in Atlanta. The Great Lakes states recently entered into a compact – approved by the U.S. Congress – by which they agreed not to export water outside the Great Lakes Basin. (The catalyst was a plan to begin to run tankers full of Great Lakes water to Asia). There are a lot of details to be worked out on that one! And Colorado, one of the driest U.S. states (two lists I consulted put it 7th driest, behind Arizona, Nevada, New Mexico, Montana and Wyoming, and after either Idaho or Utah), has one of the strictest versions of prior appropriation, which seems to wind it up in the news a lot. For an easterner like me, the concept of the rain being owned as it falls is mind-blowing. The theory supporting prior appropriation law is that it will maximize the beneficial use of water. Do you feel it's working?

Tuesday, September 21 (Class 9): A Slight Detour: The Public Trust Doctrine.
Assignment: Casebook pp. 56-65; WebCourse: Note on Dedication, Prescription and Custom; Sax, "The Public Trust Doctrine", 68 *Michigan Law Review* 471 (1970) (excerpt); Barringer, "Bottling Plan Pushes Groundwater to Center Stage in Vermont", *The New York Times,* August 21, 2008; 10 V.S.A. §1390; *Greater Providence Chamber of Commerce v. State of Rhode Island*, 657 A. 2d 1038 (R.I., 1995); *Glass v. Goeckel*, 473 Mich. 667, 703 N.W.2d 58 (2005).

To this point, we have been thinking about how property comes into being. We have considered the fact that something considered valueless (a removed spleen) can suddenly be perceived in a new way – with the result that property claims arise with regard to it. We have also seen that both land and products of nature (as represented, so far, by foxes and water) can be claimed, the former by suddenly being "discovered" (or conquered) and the latter by capture. But might there be something else? Does *Mathews v. Bay Head Improvement Association* suggest that, as members of the public, we own some sort of property right called "the public trust"?

Can you use note 2 on pages 63-64 and the Sax article to state the narrowest plausible version of "the public trust"? What rights does this doctrine give to the public under this narrow version, and where do those rights come from?

If you are a resident of New Jersey (or, indeed, just visiting) what does the public trust doctrine allow you to do? What about in Massachusetts? How are the two states' rules different? Be ready to articulate the argument for the New Jersey rule, and the argument for the Massachusetts rule.

Greater Providence Chamber of Commerce and *Glass* raise a different but critically important question: can the public trust be extinguished? What did the plaintiffs in *Greater Providence* want the court to do? Most civil cases involve a claim for money damages, but that's not what is going on in either *Greater Providence Chamber* or *Glass.* What did *Glass* conclude about extinguishing the public trust doctrine? Are *Glass* and *Greater Providence* distinguishable? If you were a Rhode Island lawyer and a client came to you planning to purchase some reclaimed tideland, what advice would you give him/her?

For some time, most of the litigation on "public trust" issues involved beaches and tidelands, but that is rapidly (and recently) changing. (It is no accident that these were serious concerns, particularly along the east coast. If you are reading this syllabus in the law school building, you are in the Back Bay. Before 1880, you would have been either on a tidal mud flat, or under

water. Indeed, Boston consists of more made land than original land. (There is a fun map here http://www.iboston.org/rg/backbayImap_1890.htm if you are interested). The *New York Times* story on the WebCourse is about a use of the public trust doctrine having nothing to do with tidelands or navigation. Vermont, the *Times* tells us, and a growing number of other states, have passed legislation making their groundwater a public trust. Wow. What's happening here? What would it mean for groundwater to be part of the "public trust"?

The history memo assigned for class 6 explained that a trust is a very important mechanism for dividing the ownership of property between two people. One of those people, the trustee, actually holds the legal title to the property, but he does so solely for the (legally enforceable) benefit of another person, the beneficiary. As you will learn in trusts and estates, in essence the "real" owner of property held in trust is the beneficiary.

When property is held under the public trust doctrine, who holds the title, (i.e., who is the trustee)? And who is the beneficiary? If the state owns public trust property for the benefit of the public, does that mean the state may never change the use of the property? May never sell it? Just what would it mean for a state to own all of the groundwater in trust? If I have a private well in Vermont, can I use it?

Wednesday, September 22 (Class 10): Capturing Oil and Gas and Considering Blown Out Wells.
Assignment: Casebook pp. 160-164; WebCourse: Salcido, "Law Applicable on the Outer Continental Shelf and in the Exclusive Economic Zone", 58 *Am. J. Comp. L.* 407 (2010); Olson, "Fracking Puts State at Risk for Another Disaster", *Detroit Free Press,* August 8, 2010.

Elliff is a case about an oil and gas well that "blew out". The plaintiffs in the case are the Elliffs. What is it that they own? And what, do you suppose, is a "mineral estate"?

You have been studying landlord/tenant law in your LR&W course, and so you know something about leases. This case, of course, involves leases, but who was leasing what? And how was the lessor paid?

The defendants in the case were drilling an "offset well". This means that they already had an oil well in another location. This offset well might be dug for any of several reasons, but the most common one is to prevent gas and oil from draining away from the already producing well.

The well in this case blew when the drillers reached a depth of 6800 feet. Compare that to the Deepwater Horizon well which was 35,000 feet deep when it blew, reportedly the deepest well ever drilled.

What happened to the plaintiffs in *Elliff* as a result of the blowout? And what is it they are asking the Texas courts to do? Why did the Court of Civil Appeals (the intermediate appellate court) conclude that the plaintiffs could not be awarded damages for lost gas and oil?

Can you explain how the Texas rule on the ownership of oil and gas, which is described in *Elliff*, is different from the Louisiana rule (also described in *Elliff*)?

The Salcido article goes much more deeply into the law of the oceans than is customary in a first year property course. You are NOT responsible for all of the many, many federal statutes mentioned in the article; you will not be tested on them. Instead, please read this very informative article for three larger themes: (1) *Sovereignty.* Prof. Salcido discusses this concept in her article. Recall that notions of sovereignty played a major role in *Johnson v. M'Intosh.* Which sovereign controls the Outer Continental Shelf (OCS)? Why does it matter? (2) *Property rights.* At two or three places in her article, Prof. Salcido notes either that property rights have

been recognized as a way of controlling or managing access to the oceans, or that it has been proposed that such rights be recognized. Please locate those discussions and be prepared to talk about the pluses and minuses of a recognition of property rights in these contexts. (3) *Public Trust Doctrine.* Should the OCS be considered part of the public trust? What is the argument for such a conclusion? The argument against? What effects do you envision if a court were to rule that the OCS is held as a public trust?

Finally, I've included the brief "fracking" article. The drive to exploit new sources of petroleum is so strong that more and more ways (creative if you approve of them; dangerous if you do not) are being devised to capture oil. "Fracking" sort of brings our water issues and our oil and gas issues together. Enormous amounts of water are needed for fracking, and as a result of the process, the water is contaminated. Note that in the leases the fracking companies use to purchase rights from landowners the water rights of the landowners are subordinated to the rights of the lessees. Note the article's reference to "the public trust in our shared water commons".

Friday, September 24: (Class 11) Our Last Look at Acquisition by Capture: "Capturing" Ideas and Inventions.
Assignment: Casebook pp. 131-144; WebCourse: *International News* additional text.

As we move on in the course, we will begin to focus heavily on land, simply because so much of American property law was forged in allocating land and adjudicating disputes over it. We are all well aware, however, that in the 21st century, much of what has value has no connection to land at all. Today's case is a quite famous one – and in some ways a precursor of disputes like Napster. The case asks the intriguing question: can news be property? Clearly, the reporters who gathered, recorded and communicated news for the Associated Press invested enormous effort in their news-gathering task. In John Locke's terms, they added their labor to a resource, turning it, perhaps, into something else. (Shades of John Moore, I think.) Does the labor of the news-gatherers turn what they produced into property?

I consider *International News* one of our harder cases. Can you articulate what it is that the majority held? In his dissent, Justice Brandeis argues that any remedy in this area should be legislative, not judicial. Do you agree? Would you have found for the Associated Press? If so, what remedy do you think would have been appropriate?

This case allows us to ponder the tremendously interesting question of the connection between legal protection and value. We said at the very beginning of the course that something that lacks value (like dryer lint) is probably not "property", even though it is tangible, transferable, etc. But can't this get quite circular? That is, whether an item has value might well depend on how it is treated by the law. So if the law determines whether something is property by asking it if has value, *but* the law can also confer (or not) value, doesn't whether the law should recognize something as property depend on whether the law recognizes it as property? …Yes, it probably is time to go to sleep...

The *International News* majority talks a good deal about equity, and, of course, the plaintiff in the case is asking for an injunction, i.e., an equitable remedy. The WebCourse includes a paragraph of text that your casebook editor chose to omit. The paragraph would appear on p. 135 of your text, just before the paragraph that runs over from 135 to 136. (after "business…" and before "The contention"). Does this added paragraph help to explain why the majority concludes that there has been an invasion of AP's property rights?

This case will allow us to talk very briefly about copyright. There is an upper level course devoted to this very interesting and important topic, so our look at it will be brief.

UNIT 3: OTHER WAYS TO ACQUIRE PROPERTY: ACQUISITION BY ADVERSE POSSESSION

Tuesday, Sept. 28: (Class 12) Introduction to Adverse Possession
Assignment: Casebook 281-287; 294-302. WebCourse: Some adverse possession problems.

In our previous unit, we saw more than a bit of alchemy: the parties to the cases we read (or, more properly, the courts hearing the parties' cases) created property where none had existed before. In each case, someone claimed that because of certain actions or facts, a new property right had been born: land had been discovered and was the property of the discoverer; a fox had been captured; water, previously in the ground or flowing in a stream, had become the property of a certain individual; human tissue had been turned into a valuable "cell line", etc. Primary acquisition cases are some of the most interesting in property law, since they, in essence, demarcate the ever-changing boundaries of what constitutes "property".

Today, we begin a shift to more pedestrian (but equally important) methods of acquiring property. In these cases, the fact that property exists is a given. The question is whether the current claimant has managed to acquire ownership of it. And we start our exploration with the doctrine of adverse possession. Here's the scenario: what if I buy some land, but then proceed to do nothing at all with it? I let a house on the land fall into ruin, and the land itself become overgrown with weeds and brush. Let's make it worse. Assume that I know that my next door neighbor is using my land, but, again, I do nothing at all to assert my ownership or care for my property? Should my failure to use and care for my land and the structures on it affect my ownership? Remember that one of the justifications in *Johnson* for taking title from the Indians was that they failed to properly develop and enhance the value of the land.

Adverse possession is a rule that shifts the ownership of land from a person who holds the title to the land, but is not occupying it, to a person who is occupying the premises, but holds no title.

Who brought the action in *Brown v. Gobble* (p. 281), and what do these plaintiffs want? Who raised the issue of adverse possession in this case? Was the case tried to a jury?

As the case tells us, adverse possession must be established by "clear and convincing evidence". This is a higher standard than the usual civil standard of proof, which is "preponderance of the evidence", though it is lower than the criminal standard ("beyond a reasonable doubt"). Why is this higher standard of proof applied in adverse possession cases? What is the law assuming about adverse possession in applying this standard?

What did the law of adverse possession empower the Gobbles to do?

Why is adverse possession called "adverse", and was the possession by the Gobbles in this case "adverse"?

When the Gobbles bought their land in 1984, their deed said that they were buying a tract that ran to the fence (see footnote 2, p. 282). Why doesn't this settle the issue?

On p. 284, the West Virginia court tells us that the doctrine of adverse possession "enables one who has been in possession of a piece of real property for more than 10 years to bring an action asserting that he is now the owner of that piece of property even when title rests in

another." Had the Gobbles owned their property for 10 years at the time of this action? The court suggests this might be irrelevant. Why?

The upshot of this case is that the appellate court reverses the lower court. Why?

Adverse possession is a heavily "elements laden" doctrine. It gives us an opportunity to practice the skill of identifying what needs to be proven in order to establish the plaintiff's case. To this end, the notes beginning on p. 294, while perhaps a bit confusing at first, are actually enormously helpful. Reading them should help you to analyze the problems posted on the WebCourse. We will try to get to some of the problems today, and the TA's will review the remaining problems with you during TA hours. Don't get too hung up on "color of title". It's important, but our cases for next time will help us to better understand that aspect of adverse possession.

As you think about the problems, recall that *analyzing a legal problem does NOT mean finding the answer, it means identifiying the questions!* What issues does each of these problems raise, and what does the material in the casebook allow you to say about each problem? What questions are left unanswered?

Wednesday, September 29 (Class 13): Adverse Possession of Real Property Concluded.

Assignment: Casebook: 287-294; 302-31.

Two final adverse possession cases will allow us to complete our study of this doctrine. Former students (and T.A.s) have advised me that the *Romero* case on p. 287 is tricky. The plaintiff in the case is Ms. Romero, and she has filed what is called a "quiet title" action. What was Ms. Romero asking the trial court to do? What did she allege?

The facts tell us that Ms. Romero and her late husband bought 13 acres of land from the husband's parents, Mr. and Mrs. Garcia. The Garcias gave Ms. Romero and her husband (their son, Octaviano Garcia) a deed to the land, which only Mr. Antonio Garcia signed. Can you figure out why that is a problem?

We know from the facts that Octaviano Garcia and Ms. Romero moved onto the 13 acres in 1947, and, with Mr. Garcia's parents' help, built a house. They lived in the house till 1962, when Octaviano Garcia died, and Ms. Romero moved away.

The case talks about two problems with the deed from the Garcias to their son and Ms. Romero. One is the claim that the deed "was inadequate for color of title… because it lacks the signature of a member of the community". (Page 287). "The community" is a reference to *community property,* which is the legal scheme in effect in New Mexico (and 7 other U.S. states: Arizona, California, Idaho, Louisiana, Nevada, Texas, Washington and Wisconsin). A "marital community" is a new legal entity which forms (in community property states only) when two people marry. The marital community is not only capable of owning property, in fact, it owns all of the property that a married person earns (but not gifts or inheritances) during his/her marriage. Knowing this, can you figure out what was wrong with the deed Antonio Garcia signed?

The *Romero* Court tells us that it doesn't really matter that the deed from Antonio Garcia was void. Why not?

The deed also had a second problem, having to do with the adequacy of the description of the property conveyed. (Note the separate conveyance of water rights in the language at the bottom of p. 287. In New Mexico, of course, water is conveyed separately from the land).

Why did Ms. Romero claim "color of title" in this case? The doctrine is not discussed in the case, but it is described by Prof. Singer on p. 301. What advantages can a claimant enjoy by having color of title? Under what sorts of circumstances does a "color of title" claim arise?

In *Nome 2000 v. Fagerstrom,* what is the plaintiff requesting? What is the relevance of the fact that the defendants, the Fagerstroms, were native Alaskans? Did the Fagerstroms possess the land they were claiming under "color of title"? What difference did that make? Which elements of an adverse possession claim are implicated in *Fagerstrom?* The court says that "[w]hat the Fagerstroms believed or intended has nothing to do with the question whether their possession has been hostile". (bottom of p. 293). Why? *Fagerstrom* was remanded to the trial court. Why did the Fagerstroms' claim to the southern part of the parcel fail? Were the boundaries of the Fagerstroms' parcel less clear than those of Ms. Romero in *Romero v. Garcia?* What is the trial court to do on remand?

Friday, October 1 and Tuesday, October 5 (Classes 14 and 15): Adverse Possession Concluded: Adverse Possession of Chattels.

Assignment: Casebook 330-331; WebCourse: *O'Keeffe v. Snyder;* Memo on *O'Keeffe v. Snyder;* Coslovich, "Picking up Paintings for a Steal", *The Age (*Melbourne, Australia), May 8, 2010; "Canada Hot for Stolen Art", *Toronto Star,* March 27, 2010; Murphy and Saltzman, "Reward, Return now the Focus of Case", *Boston Globe,* March 14, 2010; Contreras, "French Painting Sparks International Brouhaha", *San Antonio Express-News,* January 4, 2010; Hurst, "The Worldwide Iraqi Treasure Hunt", *Toronto Star,* August 9, 2009. Optional: "O'Keeffe and Stieglitz" available at http://www.ellensplace.net/okeeffe3.html.

We know that the law of adverse possession can effect a transfer of the ownership of real property from the holder of title to a possessor. Do these rules work for personal property as well? This issue has arisen with a number of kinds of personal property, but most especially with works of art. Today's case asks a court to apply the doctrine of adverse possession to aid the current possessor of a painting by the famous American artist Georgia O'Keeffe. There is a lot in this case, both doctrinally and procedurally, and the issues it raises are both very interesting and very current, as the newspaper articles demonstrate. Indeed, some experts assert that art theft and art smuggling are the third most lucrative form of international crime, trailing only drugs and arms trafficking.

As the casebook materials explain, courts have taken quite divergent approaches to cases like *O'Keeffe v. Snyder.* As a part of our discussion of this very complex case, we will consider the pluses and minuses of the approaches to adverse possession of chattels listed on pages 330 and 331.

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