

# Open Source Property

## Volume I

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# Chapter 1

## About This Book

*Open Source Property* is a free casebook for the first-year Property Law course at American law schools, and anyone else with an interest in the subject. The contents of the book are available at [link](#).

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To help make different parts of the book easier to identify, two fonts are used throughout. Text in this serif font is used for cases, law review articles, and other readings drawn from other sources and included in this book. In these readings, not all alterations will necessarily be noted. In particular, citations will often be removed for ease of reading. To quote the policy of one of the casebook's authors:

My editorial technique is borrowed from Sweeney Todd: extensive and shocking cuts. These are pedagogical materials, not a legal brief. I have not put words in anyone else's mouth, but I have been unconcerned with the usual editorial apparatus of ellipses and brackets. I drop words from sentences, sentences from paragraphs, paragraphs from opinions – all with no indication that anything is gone. I also reorder paragraphs and sometimes sentences as needed to improve the readability of a passage. My goal is to make it easy for the reader. If it matters to you what the original said, consult the original.

JAMES GRIMMELMANN, PATTERNS OF INFORMATION LAW 32 (version 1.1 2017), *link*. Note the font used in this quote, since it is drawn from an external source.

Text in this sans serif font is “editorial content,” namely introductory or narrative material written by the authors and editors of the book. In some cases, this material is intended to elucidate the readings and provoke thoughts and questions. In other cases, the text summarizes key doctrinal or legal concepts, in order to be more efficient (i.e., so you have to read less).

The font convention is followed as rigorously as possible. In particular, some of the readings will include footnotes from the original text, as well as footnotes added by the editors. These footnotes can be distinguished by the font being used (as well as the notation “—Eds.” at the end of the footnote).

# **Part I**

# **Beginnings**



# Chapter 2

## Theory of Property

Welcome to property law! Of the standard first-year law school curriculum, property is arguably the subject with which you are already the most familiar, if only because property is everywhere. The textbook you’re reading: if it’s on paper, someone owns it (perhaps you); if it’s electronic, then someone owns the computer it’s being shown on; plus, isn’t there something called “copyright” in the words? The residence you live in, the buildings where you study, the food you eat, the clothes you wear, the devices you use for work and entertainment—all property. This is the law of the stuff that is yours, and stuff that is everyone else’s.

You enter the subject of property law filled with plenty of intuitions about how the law should work. Indeed, much of this course will be about wrapping a legal vocabulary around those intuitions. Are you annoyed that the landlord won’t fix the leak in your apartment? Take a look at the warranty of habitability. Arguing with your sibling over who gets to keep the baseball cards? Perhaps you have a question of first possession or finders’ rights. Neighbors’ loud parties keeping you up at night? Check out the doctrines on nuisance and zoning law. In large part, property law is about concepts that are already all too familiar.

But also in large part, property law is about pushing these familiar concepts into unfamiliar territory. For example, it may seem obvious beyond question that the law should protect property ownership. Even toddlers develop a concept of property, as they go around labeling toys as “mine.” But let’s ask the seemingly obvious question: Why does the law protect property ownership? Should we have property law in the first place? If so, what exactly are those laws and institutions that we call “property”? And how far can we stretch this idea of “property” beyond the conventional subject matter of land and objects?

This chapter introduces these high-level topics about the nature of property law. It is at the beginning of the book, to help set up a mental framework of tools and questions that you can use as you learn about the rules, doctrines, and cases in this book. And consider revisiting this chapter every once in a while, as you learn. If a doctrine strikes you as surprising or unexpected, the ideas in this chapter may give voice to those thoughts.

## 2.1 What Is Property?

To begin our journey into property law, the most basic starting point is, what is **property**? This might seem like a strange question to begin with—you’ve probably understand what people mean when they talk about “property”—but it’s worth beginning at the beginning.

Consider a distant planet with no humans or living beings on it. The planet has rocks, soil, water, perhaps even vegetation. On Earth, all of these things could be someone’s property, say a farmer’s. But on this distant planet, are they property? In other words, can there be property with no people?

If you at least hesitated in answering that question, you’ve reached a key insight about property law. *Property is not things, it requires people.* In fact, it requires more than one person. The sole survivor of a shipwreck on a deserted island has no need for property law; property ownership matters only if there’s someone to have a dispute with. Property is about legal relationships among people, relating to things.

The following readings are from the classic literature on the nature of property, and explore the nature of this relationship among people and things that we call “property.” Beware: they are difficult reading. A walk-through is given in the notes that follow, but try your best to work through them and get as much out of them as you can. A big part of the skill of being a lawyer is reading difficult texts, and the only way to develop that skill is to do it over and over again.

### **Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning***

26 Yale L.J. 710, 713-745 (1917)

The phrases *in personam* and *in rem*, in spite of the scope and variety of situations to which they are commonly applied, are more usually as-

sumed by lawyers, judges, and authors to be of unvarying meaning and free of ambiguities calculated to mislead the unwary. The exact opposite is, however, true; and this has occasionally been explicitly emphasized by able judges whose warnings are worthy of notice . . . .

A . . . right *in personam* . . . is either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a few fundamentally similar, yet separate, rights availing respectively against a few definite persons. A . . . right *in rem* . . . is always one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people.

Probably all would agree substantially on the meaning and significance of a right *in personam*, as just explained; and it is easy to give a few preliminary examples: If B owes A a thousand dollars, A has an *affirmative* right *in personam*, . . . that B shall transfer to A the legal ownership of that amount of money. If, to put a contrasting situation, A already has title to one thousand dollars, his rights against others in relation thereto are . . . rights *in rem*. In the one case the money is *owed* to A; in the other case it is *owned* by A. If Y has contracted to work for X during the ensuing six months, X has an *affirmative* right *in personam* that Y shall render such service, as agreed. Similarly as regards all other contractual or quasi-contractual rights of this character . . . .

In contrast to these examples are those relating to rights, or claims, *in rem* . . . . If A owns and occupies Whiteacre,\* not only B but also a great many other persons—not necessarily all persons—are under a duty, e.g., not to enter on A's land. A's right against B is a . . . right *in rem*, for it is simply one of A's class of *similar*, though separate, rights, actual and potential, against *very many* persons. The same points apply as regards A's right that B shall not commit a battery on him, A's right that B shall not alienate the affections of A's wife, and A's right that B shall not manufacture a certain article as to which A has a so-called patent . . . .

. . . [I]t seems necessary to show very concretely and definitely how, because of the unfortunate terminology involved, the expression "right

---

\*The study of property law was, for much of its history, mainly the study of land. As such, many teachers' and judges' hypotheticals required the identification of some fictional parcel of land. By tradition, these parcels take the name "Whiteacre," "Blackacre," "Greenacre," and so on.—Eds.

*in rem*" is all too frequently misconceived, and meanings attributed to it that could not fail to blur and befog legal thought and argument. Some of these loose and misleading usages will now be considered in detail, it being hoped that the more learned reader will remember that this discussion, being intended for the assistance of law school students more than for any other class of persons, is made more detailed and elementary than would otherwise be necessary.

(a) *A right in rem is not a right "against a thing": . . .* Any person, be he student or lawyer, unless he has contemplated the matter analytically and assiduously, or has been put on notice by books or other means, is likely, first, to translate right *in personam* as a right *against a person*; and then he is almost sure to interpret right *in rem*, naturally and symmetrically as he thinks, as a right *against a thing*. . . . Such a notion of rights *in rem* is, as already intimated, crude and fallacious; and it can but serve as a stumbling-block to clear thinking and exact expression. A man may indeed sustain close and beneficial *physical* relations to a given *physical thing*: he may *physically* control and use such thing, and he may *physically* exclude others from any similar control or enjoyment. But, obviously, such purely *physical* relations could as well exist quite apart from, or occasionally in spite of, the law of organized society: physical relations are wholly distinct from jural relations. The latter take significance from the law; and, since the purpose of the law is to regulate the conduct of human beings, all jural relations must, in order to be clear and direct in their meaning, be predicated of such human beings. . . .

What is here insisted on,—i.e., that all rights *in rem* are against persons,—is not to be regarded merely as a matter of taste or preference for one out of several equally possible forms of statement or definition. Logical consistency seems to demand such a conception, and nothing less than that. Some concrete examples may serve to make this plain. Suppose that A is the owner of Blackacre and X is the owner of Whiteacre. Let it be assumed, further, that, in consideration of \$100 *actually paid* by A to B, the latter agrees with A never to enter on X's land, Whiteacre. It is clear that A's right against B concerning Whiteacre is a right *in personam* . . . ; for A has no similar and separate rights concerning Whiteacre availing respectively against other persons in general. On the other hand, A's right against B concerning Blackacre is obviously a right *in rem* . . . ; for it is but one of a very large number of fundamentally similar (though separate) rights

which A has respectively against B., C, D, E, F, and a great many other persons. It must now be evident, also, that A's Blackacre right against B is, *intrinsically considered*, of the same general character as A's Whiteacre right against B. The Blackacre right differs, so to say, only *extrinsically*, that is, in having many fundamentally similar, though distinct, rights as its "companions." So, in general, we might say that a right *in personam* is one having few, if any, "companions"; whereas a right *in rem* always has many such "companions."

If, then, the Whiteacre right, being a right *in personam*, is recognized as a right against a *person*, must not the Blackacre right also, being, point for point, intrinsically of the same general nature, be conceded to be a right against a *person*? If not that, what is it? How can it be apprehended, or described, or delimited at all? . . .

(b) *A . . . right in rem is not always one relating to a thing, i.e., a tangible object: . . . [A] right in rem is not necessarily one relating to, or concerning, a thing, i.e., a tangible object. . . .* The term right *in rem* . . . is so generic in its denotation as to include: 1. . . [R]ights, or claims, relating to a definite *tangible object*: e.g., a landowner's right that any ordinary person shall not enter on his land, or a chattel owner's right that any ordinary person shall not physically harm the object involved,—be it horse, watch, book, etc. 2. . . [R]ights (or claims) relating neither to definite tangible object nor to (tangible) person, e. g., a patentee's right, or claim, that any ordinary person shall not manufacture articles covered by the patent; 3. . . [R]ights, or claims, relating to the holder's *own person*, e. g., his right that any ordinary person shall not strike him, or that any ordinary person shall not restrain his physical liberty, i.e., "falsely imprison" him; 4. . . [R]ights residing in a given person and relating to *another person*, e. g., the right of a father that his daughter shall not be seduced, or the right of a husband that harm shall not be inflicted on his wife so as to deprive him of her company and assistance; 5. . . [R]ights, or claims, not relating directly to either a (tangible) person or a tangible object, e. g., a person's right that another shall not publish a libel of him, or a person's right that another shall not publish his picture, the so-called "right of privacy" existing in some states, but not in all.

It is thus seen that some rights *in rem* . . . relate fairly directly to *physical objects*; some fairly directly to *persons*; and some fairly directly *neither to tangible objects nor to persons* . . .

### Notes and Questions

2.1. **Wait . . . what?** Reading legal texts is hard, academic ones even more so. Again, though, a key skill of a lawyer is gleaning information even from dense, complicated texts. The more you practice, the faster and better you will get at it.

Given that this is the beginning of the book, though, let's walk through it together. The excerpt starts with a complaint about the misuse of the terms *in personam* and *in rem*. So we're jumping into the middle of a debate, and don't even know what the debate is about! We could go to a dictionary to look up the terms, but let's see if the article itself defines them.

Sure enough, the next two paragraphs do that. An *in personam* right seems to be some sort of right "availing against a single person," while an *in rem* right is "against persons constituting a very large and indefinite class of people." What could these be? The third paragraph gives two examples: a debt between two people is a right *in personam*, while one's own money is a right *in rem*. How can a debt between two people arise? Usually by contract. Aha—an *in personam* right must be some sort of contract right, which is typically "against a single person," while an *in rem* right is something like "one's own money."

One's own money—that's what you'd typically call property. So Hohfeld seems to be talking about contract or tort rights on the one hand, which he seems to be calling *in personam*, and property rights on the other hand, which he is calling *in rem*.

2.2. But why is property a right against a "very large and indefinite class of people"? Look at the next paragraph: "If A owns and occupies Whiteacre, not only B but also a great many other persons . . . are under a duty, e.g., not to enter A's land." In other words, A has a legal right against B (to kick B out of Whiteacre), and has the same right against C, D, E, and anyone else. This may seem logical, but appreciate the conclusion: Hohfeld has just shown that property rights are basically super-contracts. Indeed, he emphasizes this later: "A's Blackacre right against B [based on property] is, intrinsically considered, of the same general character as A's Whiteacre right against B [based on contract]."

Now observe the logical magic in the paragraph labeled "(b)." So far, an *in rem* right is any right against a large and indefinite class of people. This obviously includes right to a physical object like a "horse, watch, book, etc.," but what else? How about a general right to be free from torts? Hohfeld specifically notes "right of privacy" torts—because these torts fit the definition of a right against an indefinite class of people, but involve no physical thing. If, as we deduced earlier, that *in rem*

rights are property rights, then Hohfeld has effectively proved that a property right can exist with no underlying physical thing.

So far, this may seem like an exercise in logical deduction. But now is a good time to look up *in rem*. (This is generally a good approach: Try to discern an important term in a text based on what the author says it means, and then look it up elsewhere to see if the author is pulling a fast one on you.) It's Latin for "against a thing," precisely the opposite of what Hohfeld says. And generally, that's probably what you thought property was in the first place—rights that one has over land or objects.

Now we have enough information to piece everything together. The misuse of terms that Hohfeld is complaining about is the treatment of property as rights over things. Hohfeld shows us that even the most quintessential property, like A owning Blackacre, is not that different from contracts. And there are other rights, like freedom from torts or privacy violations, that are indistinguishable from property in things insofar as all of them are against a large and indeterminate class of people. Thus, Hohfeld is essentially arguing, *any right against a large and indeterminate class* should be considered property.

**2.3. Property is anything?** This is a tremendously broad conception of property, potentially encompassing not just the traditional subject matter of land and physical objects, but also pure legal relationships, statutory and constitutional rights, entitlements to judicial remedies, rights in information, and more. If this is correct, then it makes learning about property law really useful! But are you skeptical? Is there something special about "property" that makes it distinct from other legal rights? That's what Merrill and Smith will argue next.

**2.4. Property versus possession.** Hohfeld further notes a key distinction between physical and legal relationships. A person's ability to "physically control and use such thing" and "physically exclude others" from it "could as well exist quite apart from, or occasionally in spite of, the law of organized society." In other words, whatever this "property" thing is, it's a relationship created by law that is distinct from physical control over property. We will call physical control **possession**, and carefully distinguish possession from property rights—something that you may not typically do in ordinary conversation.

**2.5. Hohfeld's legacy.** Generally, Hohfeld is cited for two major concepts. The first is the understanding of property as a collection of rights against others, typically an indeterminate class of third parties. Today, we often refer to this concept as the **bundle of rights**, or sometimes a metaphorical "bundle of sticks."

What's in that bundle of rights? We will find out through the case law and readings, of course. But for now, think about what rights you would expect to have over your own property against others. What do you expect other people not to do with respect to your house, your books, or your car? What do you expect that you yourself are allowed to do with them? Do you expect the list of rights to depend on whether the underlying thing being protected is land, objects, privacy rights, or something else?

Hohfeld's second concept, often called "Hohfeldian analysis," is a collection of terms that can be used to describe legal relationships between people. The full terminology is complex, but there is one important insight from it that shows up in the reading above. Read note 2.2 again—Hohfeld says that B and others "are under a **duty**, e.g., not to enter A's land," to explain why A has a **right in rem**. Duties and rights are "jural correlatives," as Hohfeld calls them: If A has a right with respect to B, then B owes a legal duty to A. The idea that, for every right, there is an equal and opposite duty, will be incredibly useful throughout property law (and all of law generally).

**Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*\***

111 Yale L. J. 357, 357-365 (2001)

It is a commonplace of academic discourse that property is simply a "bundle of rights," and that any distribution of rights and privileges among persons with respect to things can be dignified with the (almost meaningless) label "'property.'" By and large, this view has become conventional wisdom among legal scholars: Property is a composite of legal relations that holds between persons and only secondarily or incidentally involves a "thing." Someone who believes that property is a right to a thing is assumed to suffer from a childlike lack of sophistication—or worse.

... In other times and places, a very different conception of property has prevailed. In this alternative conception, property is a distinctive type of right to a thing, good against the world. This understanding of the *in rem* character of the right of property is a dominant theme of the civil law's "law of things." For Anglo-American lawyers and legal economists, however, such talk of a special category of rights related to things presum-

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\* Reproduced by permission of Henry E. Smith. —Eds.

ably illustrates the grip of conceptualism on the civilian mind and a slavish devotion to the gods of Roman law.

Or does it? In related work, we have argued that, far from being a quaint aspect of the Roman or feudal past, the *in rem* character of property and its consequences are vital to an understanding of property as a legal and economic institution.<sup>7</sup> Because core property rights attach to persons only through the intermediary of some thing, they have an impersonality and generality that is absent from rights and privileges that attach to persons directly. When we encounter a thing that is marked in the conventional manner as being owned, we know that we are subject to certain negative duties of abstention with respect to that thing—not to enter upon it, not to use it, not to take it, etc. And we know all this without having any idea who the owner of the thing actually is. In effect, these universal duties are broadcast to the world from the thing itself . . . .

Property rights historically have been regarded as *in rem*. In other words, property rights attach to persons insofar as they have a particular relationship to some thing and confer on those persons the right to exclude a large and indefinite class of other persons (“the world”) from the thing. In this sense, property rights are different from *in personam* rights, such as those created by contracts or by judicial judgments. *In personam* rights attach to persons as persons and obtain against one or a small number of other identified persons. A number of historically significant property theorists have recognized the *in rem* nature of property rights and have perceived that this feature is key because it establishes a base of security against a wide range of interferences by others . . . .

. . . Blackstone perceived that property rights are important because they establish a basis of security of expectation regarding the future use and enjoyment of particular resources. By establishing a right to resources that holds against all the world, property provides a guarantee that persons will be able to reap what they have sown . . . . In other words, property is important because it gives legal sanction to the efforts of the owner of a thing to exclude an indefinite and anonymous class of marauders, pilferers, and thieves, thereby encouraging development of the thing.

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<sup>7</sup>Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) . . . ; Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001) . . . .

. . . In contrast, the role of property emphasized in modern economic discussions—providing a baseline for contractual exchange and a mechanism for resolving disputes over conflicting uses of resources—was at most of secondary importance in these traditional accounts. . . . Early in the twentieth century, Wesley Hohfeld provided an account of legal relations that proved to be especially influential in transforming the underlying assumptions about property rights in Anglo-American scholarship. . . . Hohfeld noted . . . that in personam rights are unique rights residing in a person and avail against one or a few definite persons; in rem rights, in contrast, reside in a person and avail against “persons constituting a very large and indefinite class of people.”

Significantly, however, Hohfeld failed to perceive that in rem property rights are qualitatively different in that they attach to persons insofar as they have a certain relationship to some thing. Rather, Hohfeld suggested that in personam and in rem rights consist of exactly the same types of rights, privileges, duties, and so forth, and differ only in the indefiniteness and the number of the persons who are bound by these relations. To use a modern expression, Hohfeld thought that in rem relations could be “cashed out” into the same clusters of rights, duties, privileges, liabilities, etc., as are constitutive of in personam relations.

Hohfeld did not use the metaphor “bundle of rights” to describe property. But his theory of jural opposites and correlatives, together with his effort to reduce in rem rights to clusters of in personam rights, provided the intellectual justification for this metaphor, which became popular among the legal realists in the 1920s and 1930s. Different writers influenced by realism took the metaphor to different extremes. For some, the bundle-of-rights concept simply meant that property could be reduced to recognizable collections of functional attributes, such as the right to exclude, to use, to transfer, or to inherit particular resources. For others, property had no inherent meaning at all. As one pair of writers put it, the concept of property is nothing more than “a euphonious collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth.”<sup>36</sup>

Notwithstanding these variations, the motivation behind the realists’ fascination with the bundle-of-rights conception was mainly political.

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<sup>36</sup>Walton H. Hamilton & Irene Till, *Property*, in 12 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 528, 528 (Edwin R.A. Seligman ed., 1934).

They sought to undermine the notion that property is a natural right, and thereby smooth the way for activist state intervention in regulating and redistributing property. If property has no fixed core of meaning, but is just a variable collection of interests established by social convention, then there is no good reason why the state should not freely expand or, better yet, contract the list of interests in the name of the general welfare. The realist program of dethroning property was on the whole quite successful. The conception of property as an infinitely variable collection of rights, powers, and duties has today become a kind of orthodoxy. Not coincidentally, state intervention in economic matters greatly increased in the middle decades of the twentieth century, and the constitutional rights of property owners generally receded.

### **Notes and Questions**

2.6. This time, it's your turn to explain the reading. It should be easier, because you know what Merrill and Smith were responding to. Here's the key question: what is the defining right of property, according to Merrill and Smith? (*Hint:* it's in the paragraph that says "this feature is key.") Once you've found that, then follow the argument for why that feature is key, and why Merrill and Smith think Hohfeld was wrong in rejecting property as having any, let alone this particular, defining right..

2.7. Are you persuaded by Merrill's and Smith's critique of Hohfeld? Is their model of *in rem* rights compatible with Hohfeld's analysis, or are the two necessarily inconsistent with each other?

2.8. Consider the following two propositions:

- "Property" is a relationship between a person and a thing.
- "Property" is a set of rights and obligations among people with respect to things.

Do you think either of these propositions adequately describes what we mean by the word "property"? Do you think these two propositions are meaningfully different from one another? If so, what is the difference? Do you think the difference might have an effect on the outcome of legal disputes? If so, what effect? And if not, does the difference matter?

2.9. Are you persuaded by Merrill's and Smith's claim that treating property as an *in rem* right makes it more resistant to interference and degradation by the state? What feature(s) of their *in rem* conception might give rise to this resistance? If rejection of the *in rem* conception and weakening of private property rights have in fact

gone hand in hand, which account do you find more plausible: that lawyers' and scholars' rejection of the *in rem* conception of property facilitated increased state interference with property rights, or that state interference with property rights rendered the *in rem* conception untenable? Put another way, do you understand Merrill and Smith to be making an argument about what property *is* (or *was*), or about what it *should be*? If the latter, do you agree? Why or why not?

## 2.2 Why Have Property Law?

We have considered that, roughly speaking, property involves rights that a person has against third parties, perhaps with respect to some thing. (For purposes of this book, we'll take a middle ground between Hohfeld and Merrill/Smith, with property being a person's rights against others with respect to a thing, which may be tangible or intangible.)

Why are rights over things a good idea? What values do property rights serve? Who reaps the benefits of property rights, who is disadvantaged, and is society overall better off having property law? Scholars and philosophers have for centuries debated the justifications for having property.

This section provides a brief overview of some of those justifications. It is worth taking some time to understand them. These theories will help to shape how you think about issues in property law, and they will give you a vocabulary for arguing for or against rules and outcomes. Consider which of these theories resonates with you, which you would take issue with, and which strike you as new and unexpected.

**First possession.** Property law often favors first comers: The first person to come upon an open plot of land, a wild fox, or a seashell washed ashore can take possession, and the law will protect that first possession as a property right. Note that "possession" in property law means physical occupation of a resource (standing on the land, picking up the shell), which is different from the legal concept of property ownership.

On the one hand, first possession may seem like just a description of how property law works, rather than a justification for why there are property rights in the first place. Indeed, for one scholar, the best reason why the law should protect first possession is that the law has always protected first possession. See Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1241 (1979). There may be better reasons, though. For one thing, giving property ownership to the first possessor is a simple, easily administered rule that gives a single owner decisionmaking power over a resource, rather than relying on potentially complex and changing

rules and customs. See *id.* at 1235. Also, protecting first possession encourages first possessors to communicate their rights early, letting others know who owns what. See Carol M. Rose, *Possession as the Origin of Property*, 52 CHI. L. REV. 73, 82 (1985).

**Natural rights.** Perhaps the most famous defense of property rights comes from the 17th century philosopher John Locke's *Two Treatises of Government*. According to Locke, one has a right to one's body and one's labor; as a result, when one mixes labor with an unowned resource, then that resource becomes the property of the person. One who picks an apple from a tree, for example, has a natural right of ownership over the apple by virtue of having put in the labor to pick it.

There are plenty of difficulties with the Lockean natural rights justification. What is the scope of the mixing between labor and resources, for example? If one pours a can of tomato juice into the ocean, does that person now own the ocean? See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 175 (1974). And how does Locke's land of plentiful, unowned apple trees, which anyone can harvest, comport with the world of today? Nevertheless, there is a strong intuitive appeal to the idea that a person's labor should be protected from others freeloading off of it, and property law seems like a way of satisfying that intuition.

**Incentives to improve.** A partygoer who rents a hotel room might very well trash the place—it's someone else's mess to clean up, after all. A few years later, that same person buys a home. As a homeowner, that person trims the hedges, mows the lawn, renovates the kitchen, and repaints the walls. This is a key virtue of property ownership: It gives the owner a stake in the value of the resource, and thus gives the owner reason to maintain and improve it.

This justification of property is an economic one. By giving individuals property ownership rights, those individuals have incentives to make their property worth as much as possible. This can be simply a matter of increasing the property's resale value in the case of home ownership, but it can also be commercial production. Land can be used to build factories, office buildings, and research laboratories that create value for society. Without stable expectations of ownership in that land, it might be argued, no one would invest in building those factories, offices, or laboratories.

How far can you push this "stable expectations of ownership" argument? Could SpaceX argue that without a stable expectation of ownership of space travel, it would not invest in developing new spacecraft technology, and therefore it should have an exclusive property right to space?

**Efficient allocation.** Closely related to the incentive justification is another economic justification for property rights: They ensure that resources make their

way to whoever can make the best use of them. This justification is sometimes called the “Coase Theorem” after the law and economics scholar Ronald Coase, and it works in the following way.

Say that there are a couple of fine flutes, and a few people who are especially good flutists. How will the flutes get to the right people? One answer is to have the government hold a big talent contest and award the flutes to the best player. That would be expensive and time-consuming. And who should judge the “best flute player”?

Here's another way: The government gives property rights in the flutes to anyone arbitrarily (say, based on first possession). Having a property right allows the flute owners to sell the flutes to the highest bidder. The best flutists, being able to profit the most off of having the best flutes (they can put on concerts, for example), will be willing to pay the most for them. So assuming that there are no transaction costs (a big assumption), property ownership and pure economics allocate resources efficiently.

Do you think that efficient allocation works in practice? Is there some reason that society might not always want property to go to whoever is the most willing to pay for it?

**Personhood interests.** Margaret Jane Radin observes:

Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house. . . .

Once we admit that a person can be bound up with an external “thing” in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that “thing.”

Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–60 (1982). Consider also this story about cities providing free storage services to those experiencing homelessness:

For the homeless, simply being able to store belongings can be transformative. Storage bins or storage units allow them to safeguard important documents, especially identification and

other paperwork that can be hard or expensive to replace, as well as sentimental items and keepsakes, which can't be replaced at all. At the First United Church facility, users tend to check in sleeping equipment during the morning—things like blankets, sleeping bags, and pillows—and check them out again at night. This frees people to pursue medical check-ups, job interviews, and housing appointments during the day: normal activities that are off limits for anyone who has to protect his or her things around the clock.

Kriston Capps, *Can Cities Ease Homelessness with Storage Units?*, BLOOMBERG (Aug. 25, 2014), [link](#). How does this idea of property as personality compare to the economic justifications for property above?

**Political self-governance.** Can property ownership advance democracy? At first, the two may seem unrelated: Property is about economic wealth and status, while governance is about civic duties and liberties. But perhaps there is a connection. In a 1996 article, Professor Carol Rose identifies and critiques seven possible reasons why property might be the keystone right safeguarding all other political rights and liberties. Among these:

The Power-Spreading Argument . . . . Wealth is an alternative source of power to politics, and as long as many people can own property and attempt to earn money, power—including political power—will necessarily remain more or less diffused. Money talks, and in a free market economy, the freedom that everyone has to own property or enter the market, in any way that she chooses, means that many people can talk, and they can and will resist the political temptations to suppress other rights.

The Independence Argument . . . . All people should have a voice in the political order, but to acquire that voice they need a secure baseline of property—and if necessary, this baseline must be secured by redistribution.

The Distraction Argument . . . . The pursuit of property can open up competing attractions to passion-driven political feuds, and thus safeguard all the other rights. Why muck about in politics to try to destroy the rights of others, when money-making and business are so vastly more exciting?

The Luxury-Good Argument . . . Most liberties are luxury goods—they follow after wealth is secured. On this argument, property and the resultant prosperity may not be *sufficient* for the enjoyment of liberties, but they are certainly *necessary*; without property and prosperity, other rights are in danger.

Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996). Do you agree with these? Do you think that, on these arguments or others, property rights could *detract* from self-governance?

**Human flourishing.** The modern “progressive property” academic school posits that property serves underlying human and social values, including “life and human flourishing, the protection of physical security, the ability to acquire knowledge and make choices, and the freedom to live one’s life on one’s own terms. They also include wealth, happiness, and other aspects of individual and social well-being.”

By incorporating these values into the fabric of property, the proponents of the progressive property school push back on the economic welfare-maximization views of property, including the incentives and efficiency rationales described above, deeming those views too focused on individual autonomy. Instead, they place “community life” and human relationships at the center of the objectives that property law should serve. Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009).

Although progressive property has largely remained a theory within academic circles, at least one scholar has argued that it has application to contemporary real-world problems such as residential zoning law and rent control. See Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. IRVINE L. REV. 21 (2019). Another critiques the theory, arguing that it should be extended to address historical inequities and wrongdoing in the acquisition of property. See Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107 (2013).

## 2.3 Subject Matter

Consider the various types of things that attract the legal label “property.” Let us begin with some examples to pump our intuitions. In light of our discussion of what it means to own something, which of the following things can be usefully thought of as your “property”?

- your home or apartment
- your car or bike
- your computer
- the software on your computer
- the emails stored on your computer
- the emails stored on your cloud-based email service
- your bank account
- the money in your bank account
- the money you lent to your friend that hasn't been repaid
- the money your friend lent to you that you haven't paid back
- the things you bought with the money your friend lent to you that you haven't paid back
- your pet dog
- the rats in your animal research lab
- your dairy cow
- the pig you're raising for meat
- your prescription medications
- your doctor's/pharmacist's/insurance company's records of your prescription medications
- your handwritten diary
- your unpublished novel
- your published novel
- your social media profiles and content

- your password-protected blog

Does categorizing any of these items as “property” or “not property” meaningfully assist in the analysis of any legal problems? Particularly legal disputes that arise over questions of access to or use of any of these things? Why might we choose to recognize (or refuse to recognize) these or other items as “property”?

You may notice there is something of a chicken-and-egg problem here. Is the label “property” a premise or a conclusion? Can we arrive at the label without resorting to circular reasoning? When we say something is a person’s property, or that someone has a “property right,” is that because we have examined the qualities and characteristics of the thing and its relation to the person, and *determined* that they are all consistent with some coherent notion of property ownership? Or is calling something “property” a mere *assertion*, unconstrained by circumstances, that we make because we want the *consequences* of the label “property” to attach to that thing for independent reasons? Is there a difference?

***United States v. Turoff***  
701 F. Supp. 981 (E.D.N.Y. 1988)

**GLASSER, District Judge:**

Defendants have moved to dismiss the indictment in this case on the ground that . . . it fails to allege a violation of the mail fraud statute, 18 U.S.C. § 1341.

For the reasons stated below, defendants’ motion is denied.

**Facts**

According to the indictment, in late 1978, the [Taxi and Limousine Commission, abbreviated as] TLC, which regulates the City’s medallion taxicabs, authorized the issuance of 100 temporary taxi medallions to a corporation (“Research Cab Corporation”) to be formed by defendant Donald Sherman. The purpose of the temporary medallions was to test the feasibility of diesel engines in New York City taxicabs.

The indictment alleges that in late 1980, the TLC’s chairman, defendant Turoff, caused an additional 23 unauthorized medallions to be diverted to his codefendants and placed on gasoline- and diesel-powered taxicabs registered to Research Cab and to Tulip Cab Corporation. These taxicabs allegedly operated in the City from late 1980 to early 1985. Defendants Donald and Ronald Sherman allegedly deposited the proceeds from those

taxicabs, which exceeded \$500,000, in the bank account of a shell corporation (“Exdie Cab Corporation”).

Allegedly, defendants never paid the TLC the annual license renewal fees for the unauthorized medallions. In connection with the conspiracy, the defendant Turoff allegedly gave false and misleading information to the TLC Commissioners and the Mayor’s office, and destroyed TLC records on the Tulip Cab Corporation and all the defendants allegedly gave false and misleading information to the New York State Commission of Investigation. The indictment alleges fourteen instances in which the mails were used to effectuate the scheme.

### **Discussion**

#### **I.**

[The relevant mail fraud statute makes it a crime to use the Postal Service for various forms of fraud and counterfeiting. The court explains that, under the case *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court has interpreted this mail fraud statute such that it applies only to defrauding someone out of property (as opposed to, say, defrauding the public out of a properly functioning political process). You might question that outcome, but accept it as a given for purposes of this case.

Under this rule, the defendants have committed mail fraud only if the defendants defrauded New York City, as a property holder, out of its property. The court first observes that the city lost license renewal fees, which are money, which are the city’s property. That’s enough to overcome the motion to dismiss. But the court goes on:]

As regards the medallions, the court concludes that the fraudulent misappropriation of them deprived the City of a property interest cognizable under the mail fraud statute.

Defendants cite *United States v. Evans*, 844 F.2d 36 (2d Cir. 1988) for the proposition that the City’s interest in the medallions “is ancillary to a regulation, not to property.” *Id.*, 844 F.2d at 42. Evans concerned a scheme to transfer arms regulated by the federal government from various foreign nations to Iran. The scheme required defendants to deceive the government about the true identity of the purchasing country in order to obtain the necessary approval for the transaction. The government’s right to regulate such transfers arose either from a statutorily-required clause in the

contract between the United States and the original foreign buyer, or by regulation.

The Second Circuit, affirming the district court's dismissal of the mail and wire fraud counts against defendants, held that the government had not shown that it had some property interest in the arms. Furthermore, the court rejected the government's contention that "the right of the United States Government to prevent the resale or retransfer of U.S. military weaponry from foreign nations to other, unacceptable foreign powers" constituted "an interest in, and a right to exercise control over, property" for purposes of the mail fraud statute. *Id.*, 844 F.2d at 40.

In addressing the latter argument, the court rejected the government's analogies to common law property rights. The court reasoned that, while a right to control the future alienation and use of a thing can be a traditional property right (e.g., the fee simple determinable, the fee simple subject to a condition subsequent, the possibility of reverter, and the power of termination), that does not mean that every such right is cognizable under the mail and wire fraud statutes.<sup>4</sup> Specifically, the court noted that the government's right to control arms transfers between foreign powers would never permit the United States to possess the weapons in question, and had no effect on the purchaser's title to the arms or the seller's right to profits from the sale. Rather, the regulatory scheme governing such transfers "substitutes for the traditional property remedies of replevin, damages or specific performance, a substitution that is further proof that the right is not property." *Id.*, 844 F.2d at 41. Moreover, the court expressed its reluctance to

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<sup>4</sup>I note that the possessory and future interests named are not intrinsically "devices through which a nonpossessor controls land" or "control[s] alienation." 844 F.2d at 41. The estates in land described are expressions of the extent of one's present interest in property measured in terms of time. The owner of a fee simple determinable has a present, possessory interest in property which will continue "until" or "so long as" a specified event does or does not occur. The possibility of reverter is the present interest one has in the future use and enjoyment of the property when the fee simple determinable ends. The owner of a fee simple subject to a condition subsequent has a present possessory interest in property "upon condition that" or "provided that" a specified event does or does not occur. The power of termination is the present interest one has in the future use and enjoyment of that property upon the exercise of his power to terminate the possessory estate. All the estates described are present property interests in the sense that they are all descendible, devisable and alienable. N.Y. Est. Powers & Trusts Law § 6–5.1 (McKinney 1967). That a person who acquired either of those estates in property by or through a scheme or artifice to defraud would acquire a present interest in property is beyond cavil.

apply common law property rules in the fundamentally different context of weapons transfers, which are governed by foreign policy and human rights considerations in addition to the usual economic laws of supply and demand.

The court summed up by finding that the government's interest in the weapons was essentially regulatory:

All of these distinctions suggest to us that the government's interest here is ancillary to a regulation, not to property. A law prohibiting a particular use of a commodity that the government does not use or possess ordinarily does not create a property right. If it did, many government regulations would create property rights. For example, laws preventing the sale of heroin or the dumping of toxic waste would create government property rights in the drugs or chemicals. Admittedly, the line between regulation and property is difficult to draw with scientific precision . . . and we do not mean to imply that the government never has a property interest in the limits it imposes on property use.

*Id.*, 844 F.2d at 42 (citation omitted).

*Evans* is distinguishable. As discussed above, in *Evans* the United States had no possessory interest in the weapons, nor did the deception practiced by the defendants affect the purchaser's title to the weapons or the seller's right to profit from the sale of the weapons. Here, defendants are accused of taking 23 items of tangible personal property from the City's possession. Title to those medallions in the hands of third persons would be affected. Citation of authority is not required for the principle that a thief cannot transfer title even to a bona fide purchaser for value. While the government in *Evans* had no possessory interest in the weapons, the TLC in this case did have a possessory interest in the medallions. It maintained them under lock and key at its offices. It had title to them. An action for conversion of those medallions would lie and either replevin or damages would be an available and appropriate remedy. . . . Given the impetus to return to the arcane learning of the law of property prompted by McNally, a quotation from Book III of Blackstone's Commentaries on the Laws of England (Lewis' Ed. 1902) seems appropriate. At pages 145–46 that venerable author wrote:

The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the Law of England has given for it. And this is, in the first place, the restitution of the goods themselves so wrongfully taken, with damages for the loss sustained by such unjust invasion; which is effected by action of replevin; . . .

That the medallions themselves are a valuable, marketable commodity was adverted to years ago by Professor Charles A. Reich in his seminal article entitled *The New Property*, 73 YALE L.J. 733 (1964). He wrote, at page 735:

A New York City taxi medallion, which costs very little when originally obtained from the city, can be sold for over twenty thousand dollars.

In a footnote at that point, the author observed:

7. A New York Taxi Medallion is a piece of tin worth 300 times its weight in gold. No new transferable medallions have been issued since 1937. Their value in 1961 was estimated at \$21,000 to \$23,000; banks will lend up to \$13,000 on one. The cabbie pays the City only \$200 a year for his medallion. There is a brisk trade in them: out of 11,800, about 600 changed hands in 1961. One company, National Transportation Co., sold 100 medallions at \$21,000 each, a transaction totaling \$2,100,000. A non-transferable license, of which there are a few, has no market value. *N.Y. Times*, Dec. 5, 1961, p. 46, col. 3.

The government also contends that the medallion is, in essence, the equivalent of an easement to use the city streets. At the risk of dwelling too long on the esoterica of property, the medallions could not properly be equated with easements [for reasons that will make more sense after the chapter on Easements].

The government's contention would have been more technically correct had it characterized the medallion as a "special franchise" which confers a right to do something in the public highway which, except for the grant, would be a trespass.

A franchise is property. It is assignable, taxable and transmissible. *Hatfield v. Straus*, 82 N.E. 172 (1907). A mere license, on the other hand, is nothing more than a personal, revocable privilege. See, e.g., *Brooklyn Heights R.R. Co. v. Steers*, 106 N.E. 919 (1914). It would not be seriously disputed that a taxicab “license” is, accurately speaking, a special franchise which is not revocable at will and may not be taken away except by due process. *Hecht v. Monaghan*, 121 N.E.2d 421 (1954). See also, *Wignall v. Fletcher*, 303 N.Y. 435 (1952). The resolution of this motion will not be dependent, however, upon the technically correct characterization of the matter in issue as being either a franchise, license, or easement.

The government also contends that the physical medallions themselves are “property” for purposes of the mail fraud statute. The defendants ridicule that contention by deprecatingly referring to the medallions as nothing more than “23 pieces of tin”. Thus, the defendants impliedly, but never explicitly, assert a *de minimis* qualification to the tort of conversion or the crime of larceny. No authority is cited to support that oblique assertion, nor is the court aware of any. In his dissenting opinion in *McNally*, Justice Stevens was prescient when he expressed doubt about the gravity of the ramifications of the Court’s decision and said that “Congress can, of course, negate it by amending the statute.” As has already been noted, Congress did exactly that. Justice Stevens went on, however, to observe that:

Even without Congressional action, prosecutions of corrupt officials who use the mails to further their schemes may continue since it will frequently be possible to prove *some* loss of money or property.

*Id.* (emphasis added). In this respect Justice Stevens was also prescient. The medallion is a tangible, physical object. The Administrative Code of the City of New York § 19–502(h) provides as follows:

“Medallion” means the metal plate issued by the commission for displaying the license number of a licensed taxicab on the outside of the vehicle.

By charging the defendants with obtaining by false and fraudulent representations and promises 23 unauthorized taxi medallions, the government is seeking to prosecute these defendants by attempting to prove they caused some loss of property as alleged.

In *Evans*, upon which the defendants so heavily rely, the defendants were charged with making false statements to United States agencies to obtain approval to export arms. Here, the defendants are accused of taking 23 items of tangible personal property (the metal plates) from the City of New York in which the City did have a possessory interest. This is not a case where it is alleged that the citizenry is merely deprived of the honest services of a public official. This is a case where the public official is accused of conspiring with others to misappropriate tangible personal property. To view this case otherwise would be to hold, in effect, that a City cashier who embezzled money merely deprived the City of her honest and faithful services to which the embezzled money is an inconsequential appurtenance. . . .

Whether the medallions are tangible property or not to support a charge of mail fraud may also be discerned by asking whether the wrongful taking of the medallions from the offices of the TLC would be larceny. Defendants advise that a state prosecution has been commenced on that ground. See N.Y. Penal Law § 155.00(1) (McKinney 1988), defining property for purpose of state larceny statute as “any article, substance or thing of value”. Thus, the reluctance of the *McNally* Court to read the mail fraud statute as criminalizing conduct on the part of a state official which is not otherwise prohibited by state law need not deter here. . . .

Mindful that “an overspeaking judge is no well-tuned cymbal,” I nevertheless make several additional observations.

The rule announced in *McNally* was that the mail fraud statute is applicable only to “frauds involving money or property” and not to schemes relating to good government. It logically followed, said the Court in *Evans*, 844 F.2d at 39, “that the deceived party must lose some money or property.” *Carpenter* explained that *McNally* did not limit the scope of the mail fraud statute “to tangible as distinguished from intangible property rights.” From those pronouncements, the view has been expressed that obtaining from a sovereign by means of a fraudulent scheme utilizing the mails, a license to engage in a business, profession or occupation is not a violation of the mail fraud statute because the license, although property in the hands of the licensee is not property in the hands of the licensor. Upon reflection, the view is that A has nothing which, when he gives it to B, becomes something. This brings to mind L. CARROLL, THROUGH THE LOOKING GLASS, Ch. V (Modern Library Ed. at p. 200):

... the Queen remarked ... "I'm just one hundred and one, five months and a day."

"I can't believe *that*" said Alice.

"Can't you?" the Queens said in a pitying tone. "Try again; draw a long breath and shut your eyes."

Alice laughed. "There's no use trying," she said: "one *can't* believe impossible things."

"I daresay you haven't had much practice," said the Queens. "When I was your age, I always did it for half-an-hour a day, why, sometimes I've believed as many as six impossible things before breakfast."

To view the sovereign's power to grant licenses, or franchises, or easements as being something other than money or property is to equate, erroneously in my view, the sovereign with an individual or corporation. What the latter sells, buys, creates or manufactures and the proceeds derived from those activities is money or property in the traditional sense. The sovereign can buy and sell and manufacture and derive proceeds from those activities only by virtue of the power it possesses as sovereign—namely its police power, its power to tax, etc. It is only through the exercise of those powers that the sovereign obtains the revenues which enable it to function at all and acquire, if it chooses, "property" in the traditional sense. To rob the sovereign of the due exercise of that power by schemes or artifices to defraud, is to rob it of "property" as surely as the goods or chattels or money obtained from a private person by similar schemes or artifices.

The view of cases that licenses are only property in the hands of the licensee, but never in the hands of the government represents an inversion of historical fact. In the seminal article to which reference has already been made, which urged that various important government benefits (including licenses) be accorded a status akin to "property," Professor Charles Reich noted that traditionally, just the opposite was true—licenses, and all other forms of government largess were considered government property long before the property rights of the licensee or recipient were accorded legal recognition:

The chief obstacle to the creation of private rights in [government] largess [e.g., licenses, welfare benefits, services, contracts and franchises] has been the fact that *it is originally pub-*

*lic property, comes from the state, and may be withheld completely.* But this need not be an obstacle. *Traditional property also comes from the state, and in much the same way.* Land, for example, traces back to grants from the sovereign. In the United States, some was the gift of the King of England, some that of the King of Spain. The sovereign extinguished Indian title by conquest, became the new owner, and then granted title to a private individual or group. Some land was the gift of the sovereign under laws such as the Homestead and Preemption Acts. Many other natural resources—water, minerals and timber, passed into private ownership under similar grants. In America, land and resources all were originally government largess. In a less obvious sense, personal property also stems from government. Personal property is created by law; it owes its origin and continuance to laws supported by the people as a whole. These laws “give” the property to one who performs certain actions. Even the man who catches a wild animal “owns” the animal only as a gift from the sovereign, having fulfilled the terms of an offer to transfer ownership.

Reich, *The New Property*, 73 YALE L.J. 733, 778 (1964) (footnotes omitted; emphasis added).

The salutary fact that, in modern times, courts have recognized the property rights of licensees<sup>5</sup> need not blind us to the equally compelling fact that licenses, like other forms of public largess, originate in the state and are “public property,” in the first instance. . . .

### Notes and Questions

2.10. Reich’s article is closely linked with *Goldberg v. Kelly*, 397 U.S. 254 (1970), which held that welfare benefits could not be terminated without notice and a hearing. In a footnote, the Court quoted *The New Property* and added, “It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’

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<sup>5</sup>See, e.g., *Bell v. Burson*, 402 U.S. 535 (1971) (driver’s license); *Dixon v. Love*, 431 U.S. 105 (1977) (same); *Mackey v. Montrym*, 443 U.S. 1 (1979) (same); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (license to practice optometry); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963) (license to practice law); *Barry v. Barchi*, 443 U.S. 55 (1979) (horse trainers’ harness racing license).

Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property.” *Id.* at 262 n.8. Two years later, in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), the Court held that a state college professor on a renewable one-year contract did not have a “property” interest in continued employment, so he had no Fourteenth Amendment right to a statement of reasons for the nonrenewal of his contract.<sup>1</sup> The court had this to say about the nature of “property”:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

*Id.* at 577. Does this formulation work for all property, all intangible property, or just for government benefits? What do you make of its thoughts about where property comes from?

2.11. Money is property because it is “concrete and tangible,” says the court in *Turoff*. Really? What if medallion owners pay their license renewal fees by check? By credit card? Is it more or less tangible than the “piece of tin” that is a taxicab medallion, the public’s right to honest services, or the franchise of operating a taxicab?

2.12. The Springfield Athletic Commission regulates boxing in the sense that boxing for money or charging admission to a boxing match within the state of

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<sup>1</sup>The court had previously held that written contracts or state tenure law could create the necessary interest to trigger due process protections, see *Slochower v. Board of Higher Ed. of New York City*, 350 U.S. 551 (1956), and a companion case to *Roth* held that a professor might be entitled to due process protections when he alleged the existence of an implicit understanding that professors who had been employed for seven years would be dismissed only for cause. *Perry v. Sindermann*, 408 U.S. 593, 601–03 (1972),

Springfield is prohibited unless the match takes place under regulations promulgated by the Commission. Some of the Commission's rules establish a system of weight classes and determine who is the "World" champion within each of those classes. Vinnie Watson is the current World Heavyweight Boxing Champion, as determined by the Commission, whose rules allow it to revoke his title unless he "defends his title against a suitable challenger" at least once per year. Watson was been challenged to a match by Drederick Tatum, but declined the challenge. The Commission then voted to revoke Watson's title and award it to Tatum instead; Watson has sued the Commission, claiming that Tatum's poor win-loss record makes him not a "suitable" challenger. Do the Commission's actions deny him "property, without due process of law" within the meaning of the Fourteenth Amendment? Is his title property? Does it matter whether the Commission has demanded that he return the ceremonial belt that new champions hold over their heads?

2.13. Taxicab medallions typically can be sold on the open market. Liquor licenses typically require a hearing before a local alcoholic beverages commission before they can be transferred. A license to practice law is personal and cannot be transferred at all. Does this mean that liquor licenses and law licenses are not "property?"

2.14. Is a franchise excludable? If someone steals the medallion from off your taxicab, can you sue for replevin or conversion? What are the damages? Does possession of the medallion give them the right to operate a taxicab on the streets of New York? What are you to do in the meantime—in fact, what if you never find the thief? Is your franchise gone? Now suppose that instead of stealing your medallion, a fraudster forges one, using your medallion number. Presumably this is an offense under state law, but does it invade your property rights in your franchise? What if the fraudster forges a medallion using an unassigned number?

2.15. If Uber starts operating in your city without the approval of the TLC, does that violate your property rights in your franchise? If the TLC doesn't take action, can you sue the city for failing to enforce its franchise laws? Does it matter whether you have an exclusive franchise—e.g., to be the only operator of shuttle van service at an airport—or a nonexclusive franchise—e.g., to be one of a number of operators of shuttle van service at the airport? Or, from the other side, can the *denial* of a franchise invade property rights? Is there a "property" interest in being allowed to operate a taxicab for hire, such that a city government triggers the Fourteenth Amendment when it refuses to allow Uber-dispatched cars to pick up passengers within city limits?

# Chapter 3

## Intellectual Property

This section takes up **intellectual property**: rights governing the ownership of information. There is no one distinctive set of doctrines governing all intellectual property in the same way that the law of finders applies to all (well, most) personal property or the law of trespass applies to all (well, most) real property. Instead, the name “intellectual property” is a catch-all used to group several related sets of legal rights, each of which gives the rightsholder an exclusive right to use certain information in certain ways. A defendant who uses that information in that way without the rightsholder permission is said to be an *infringer*.

It is common, and in some respects accurate, to describe the rightsholder as the “owner” of the information, but keep in mind that only certain specified uses count as infringement. There is no body of intellectual property law that prohibits possessing or thinking about information, for example. Instead, different bodies of intellectual property law restrict different kinds of uses. In each case, the scope of the owner’s rights is closely tied to what kinds of information that body of law protects and to the rules governing when someone becomes a rightsholder. The latter is a familiar question: just as first possession gives initial title to personal property, and conquest is at the root of title to real property, creation can provide intellectual property rights. But the former is a new kind of question; we have taken it largely for granted that land is proper subject matter for real property and other tangible things are proper subject matter for personal property. Intellectual property is different, because not every kind of information qualifies. In copyright, for example, processes are not proper subject matter: as a consequence, the list of ingredients in a recipe and the steps for combining them are not copyrightable—even if they meet all of copyright law’s other requirements.



**Figure 3.1:** Left: Sarah Scurr. Right: Marisol Ortiz Elfeldt

Learning a body of intellectual property law, therefore, requires learning its subject matter, its rules of initial ownership, and its rules of infringement. In this section, we will study three such bodies from the federal level: copyrights, patents, and trademarks. We will study copyright in more detail as an example, and then examine patents and trademarks to see how they are both similar to and different from copyright's model. But there are other systems of intellectual property law as well. Here are a few of the most important ones.

## 3.1 Overview of Types

Federal **copyright** law protects “original works of authorship,” like novels, biographies, songs, screenplays, paintings, blueprints, and sculptures. Copyright law has a very low threshold for protection: a work must merely display a “modicum of creativity” and have been written down (“fixed in a tangible medium of expression”). The copyright so obtained is valid during its author’s lifetime, and for the next seventy years after that. It gives copyright owners the exclusive right to reproduce their works, to make adaptations of them, to distribute them to the public, and to perform or display them publicly—but this right only applies against people who copy from the owner. Someone who independently and coincidentally comes up with similar expression is an author in her own right, not an infringer. In Figure 3.1, for example, are two photographs of the same iceberg, taken by different photographers from nearby locations at almost exactly the same time. Neither infringes on the other.

Federal **patent** law protects “any new and useful process, machine, manufacture, or composition of matter.” Examples include mechanical devices like tractor



**Figure 3.2:** A few IP-protected things that you might know.

plows and can openers, chemical processes used to refine oil, pharmaceutical products like anti-HIV drugs, and, a little infamously, a “Method and apparatus for automatically exercising a curious animal” by encouraging it to chase a laser pointer. See U.S. Pat. No. 6,701,872. To obtain a patent, an inventor must go through a detailed and expensive application process, which involves convincing the U.S. Patent and Trademark Office (USPTO) that her invention is genuinely new (“novel”), that it represents a sufficient advance on previous inventions (that it be “nonobvious”), and that it has some practical use in the world, however slight (“utility”). She must also disclose to the public, in detail, how her invention works and how best to use it. Once the USPTO issues a patent, it gives the owner the exclusive right for twenty years (from the date she filed her application with the USPTO) to make, use, offer to sell, or sell the invention. (This means that anyone is free to copy or to study the *patent* on a new kind of steering wheel, but they cannot make, use, or sell *steering wheels* as described in the patent.)

**Trademark** law is a hybrid of state and federal rights. Its basis for protection is a little different. A trademark is a word or symbol, like NIKE or the “swoosh” logo in Figure 3.2 that distinguishes goods or services in the marketplace. One gains trademark rights by using a mark on goods so that consumers associate the mark with a particular source—i.e., they know that NIKE shoes come from one company (Nike) and not another (Adidas or Reebok). These associations are called “goodwill” and it is common to say that what a trademark owner owns is the goodwill (even though it exists only in consumers’ minds). These rights exist under state common law as soon as the goodwill exists; trademark owners can also register their marks with the USPTO, which gives nationwide and not just local rights. Trademark law gives a trademark owner the right to prevent uses of the mark that cause “consumer confusion” about the source of goods: a consumer who sees non-Nike shoes falsely labeled NIKE and who mistakenly believes they come from Nike has been confused

about the origin of the goods, and Nike can sue the company slapping its trademark on ersatz shoes.

State-created **rights of publicity**, discussed in more detail below, protect against the commercial use of one's name, picture, voice, or other indicia of identity without permission. For example, photoshopping a celebrity's face onto a model wearing one of your company's sweaters and using the photograph in an ad for those sweaters is likely to trigger the right of publicity. Some states require that one's identity have "commercial value" to bring a right of publicity suit, others do not. (How would one build up commercial value in one's identity? It is something one can do deliberately, or does it just happen to some people and not others?) The federal trademark law, the Lanham Act, provides a closely related cause of action for false claims about endorsement: quoting a person as saying "I always shop at Acme Hardware" is actionable if the person didn't say it and you don't have their permission to quote them as saying it.

**Trade secret** law was previously almost entirely a matter of common law, but now almost all states have adopted a version of the Uniform Trade Secrets Act, and the federal Defend Trade Secrets Act of 2016 substantially incorporates the UTSA's definitions. To be protected as a trade secret, information must be valuable because it is secret. Canonical examples of trade secrets include chain restaurants' secret sauces, customer lists, business plans, manufacturing designs, information on the location of valuable resources like shipwrecks and oil fields, and inventions in the development stage before they are ready to be patented. (Because obtaining a patent involves extensive disclosure, it is impossible to have a patent and a trade secret on exactly the same information; one of the major strategic decisions inventors must make when they apply for a patent is how much to include in the application to obtain a stronger or broader patent, and how much to try to hold back as a trade secret.) In general, a defendant is liable only for obtaining a trade secret through "improper means." Breach of a duty of confidentiality is far and away the most common such means – such as when employees take company documents stamped "CONFIDENTIAL" with them to their new jobs at a competitor. More colorfully, industrial espionage, such as breaking into labs or hacking into computers, is also improper means. Note that trade secret law, like copyright law, protects only against infringers who obtain the secret information, directly or indirectly, from the owner: independent rediscovery of the same information is a complete defense. So is reverse engineering, in which a defendant takes publicly available information (including legally obtained copies of the owner's goods containing or made using with the trade secret) and studies it to understand how the secret works.

In addition to the patents discussed above (technically, “utility patents”), the federal government also issues **design patents** on “any new, original, and ornamental design for an article of manufacture” and **plant patents** for “any distinct and new variety of plant.” Design patents have become big business, particularly in the technology world where the shape of a device and its user interface are crucial aspects in selling it to consumers. Apple, for example, sued Samsung for infringing several design patents on elements of the iPhone design in Figure 3.2.

## 3.2 Copyrights

### *Feist Publications, Inc. v. Rural Telephone Service Co.*

499 U.S. 340 (1991)

**JUSTICE O’CONNOR delivered the opinion of the Court.**

This case requires us to clarify the extent of copyright protection available to telephone directory white pages.

#### I

Rural Telephone Service Company, Inc., is a certified public utility that provides telephone service to several communities in northwest Kansas. It is subject to a state regulation that requires all telephone companies operating in Kansas to issue annually an updated telephone directory. Accordingly, as a condition of its monopoly franchise, Rural publishes a typical telephone directory, consisting of white pages and yellow pages. The white pages list in alphabetical order the names of Rural’s subscribers, together with their towns and telephone numbers. The yellow pages list Rural’s business subscribers alphabetically by category and feature classified advertisements of various sizes. Rural distributes its directory free of charge to its subscribers, but earns revenue by selling yellow pages advertisements.

[Feist published a telephone directory, containing both white and yellow pages, covering a much larger geographic area. It contained 46,878 white-pages listings. Feist requested a license to Rural’s listings; Rural refused.]

Unable to license Rural’s white pages listings, Feist used them without Rural’s consent. Feist began by removing several thousand listings that fell outside the geographic range of its area-wide directory, then hired person-

nel to investigate the 4,935 that remained. These employees verified the data reported by Rural and sought to obtain additional information. As a result, a typical Feist listing includes the individual's street address; most of Rural's listings do not. Notwithstanding these additions, however, 1,309 of the 46,878 listings in Feist's 1983 directory were identical to listings in Rural's 1982-1983 white pages. Four of these were fictitious listings that Rural had inserted into its directory to detect copying.

Rural sued for copyright infringement in the District Court for the District of Kansas taking the position that Feist, in compiling its own directory, could not use the information contained in Rural's white pages. Rural asserted that Feist's employees were obliged to travel door-to-door or conduct a telephone survey to discover the same information for themselves. Feist responded that such efforts were economically impractical and, in any event, unnecessary because the information copied was beyond the scope of copyright protection. The District Court granted summary judgment to Rural . . . . In an unpublished opinion, the Court of Appeals for the Tenth Circuit affirmed . . . .

## II

### A

This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are. Each of these propositions possesses an impeccable pedigree. . . .

The key to resolving the tension lies in understanding why facts are not copyrightable. The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990) (hereinafter Nimmer). To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be. Id., § 1.08[C][1]. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the

similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable. . . .

Originality is a constitutional requirement. The source of Congress' power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to "secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings." In two decisions from the late 19th century—*The Trade-Mark Cases*, 100 U. S. 82 (1879); and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53 (1884)—this Court defined the crucial terms "authors" and "writings." In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality. . . .

It is this bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations. "No one may claim originality as to facts." Nimmer, § 2.11[A], p. 2-157. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. . . .

Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. . . .

This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. . . .

## **B**

As we have explained, originality is a constitutionally mandated prerequisite for copyright protection. The Court's decisions announcing this rule predate the Copyright Act of 1909, but ambiguous language in the 1909 Act caused some lower courts temporarily to lose sight of this requirement. . . .

Making matters worse, these courts developed a new theory to justify the protection of factual compilations. Known alternatively as “sweat of the brow” or “industrious collection,” the underlying notion was that copyright was a reward for the hard work that went into compiling facts. The classic formulation of the doctrine appeared in *Jeweler’s Circular Publishing Co.*, 281 F. at 88:

“The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris*, or whether such materials show literary skill or *originality*, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author” (emphasis added).

. . . Without a doubt, the “sweat of the brow” doctrine flouted basic copyright principles. Throughout history, copyright law has “recognize[d] a greater need to disseminate factual works than works of fiction or fantasy.” *Harper & Row*, 471 U. S., at 563. But “sweat of the brow” courts took a contrary view; they handed out proprietary interests in facts and declared that authors are absolutely precluded from saving time and effort by relying upon the facts contained in prior works. . . .

## C

. . . In enacting the Copyright Act of 1976, Congress dropped the reference to “all the writings of an author” and replaced it with the phrase “original works of authorship.” 17 U. S. C. § 102(a). . . .

As discussed earlier, however, the originality requirement [for compilations] is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i.e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent. Such works are incapable of sustaining a valid copyright. . . .

In summary, the 1976 revisions to the Copyright Act leave no doubt that originality, not “sweat of the brow,” is the touchstone of copyright protection in directories and other fact-based works. . . . The revisions explain with painstaking clarity that copyright requires originality, § 102(a); that facts are never original, § 102(b); that the copyright in a compilation does not extend to the facts it contains, § 103(b); and that a compilation is copyrightable only to the extent that it features an original selection, coordination, or arrangement, § 101. . . .

### III

. . . The selection, coordination, and arrangement of Rural’s white pages do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural’s white pages are entirely typical. Persons desiring’ telephone service in Rural’s service area fill out an application and Rural issues them a telephone number. In preparing its white pages, Rural simply takes the data provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.

Rural’s selection of listings could not be more obvious: It publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service. This is “selection” of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original.

We note in passing that the selection featured in Rural’s white pages may also fail the originality requirement for another reason. Feist points out that Rural did not truly “select” to publish the names and telephone numbers of its subscribers; rather, it was required to do so by the Kansas Corporation Commission as part of its monopoly franchise. Accordingly, one could plausibly conclude that this selection was dictated by state law, not by Rural.

Nor can Rural claim originality in its coordination and arrangement of facts. The white pages do nothing more than list Rural’s subscribers in alphabetical order. This arrangement may, technically speaking, owe its origin to Rural; no one disputes that Rural undertook the task of alphabetizing the names itself. But there is nothing remotely creative about ar-

ranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess the minimal creative spark required by the Copyright Act and the Constitution. . . .

Because Rural's white pages lack the requisite originality, Feist's use of the listings cannot constitute infringement. This decision should not be construed as demeaning Rural's efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort. As this Court noted more than a century ago, “‘great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way.’” *Baker v. Selden*, 101 U. S., at 105.

### Notes and Questions

3.1. Even on a sweat-of-the-brow theory, there is a decent argument that Rural didn't have to sweat very much. But if originality rather than investment of labor is the basis for copyright protection, then some who labor will not be rewarded with a copyright. Take Jeweler's Circular Publishing Co., quoted in *Feist*. The plaintiff published a 326-page directory of jewelers, *Trade-Marks of the Jewelry and Kindred Trades*. It obtained the information in the directory at great effort, by writing to a large number of jewelers. The defendant—according to the court, at least—skipped this work by copying from the plaintiff's book rather than by doing its own research. Presumably, after *Feist*, there is no copyright in books like *Trade-Marks of the Jewelry and Kindred Trades*. Does this result make sense? Without copyright, will telephone books and jewelers' directories cease to exist because no one will invest in creating them?

## 3.3 Patents

Patents are a form of intellectual property, but are they “property”? In this case, the Supreme Court considers the constitutionality of administrative agency process, called “inter partes review,” in which administrative judges at the U.S. Patent and Trademark Office decide whether a patent was erroneously granted and have the power to revoke it. As part of its analysis of the constitutional issue, the Court

must consider whether patents are more like government benefits, or more like private property.

***Oil States Energy Services, LLC v. Greene's Energy Group, LLC***

138 S. Ct. 1365 (2018)

**Justice THOMAS delivered the opinion of the Court.**

[The constitutional issue is not the focus of this excerpt of the case, but here is a brief summary. To get a patent, an inventor files an application with the U.S. Patent and Trademark Office, describing the invention. The agency examines the application, and if it determines that the invention is patentable, it issues a patent to the inventor. Of course, the Patent Office makes mistakes during examination, so what happens if it issues a patent wrongly? Typically a court would decide this, when the patent holder sues someone for infringement, and the accused infringer argues to the court that the patent is invalid.

In 2011, Congress enacted the America Invents Act, creating an administrative proceeding in which an arm of the Patent Office, called the “Patent Trial and Appeal Board,” had the power to reconsider granted patents and effectively revoke those that it deemed wrongly granted. The purpose of this new procedure was to create a faster, cheaper way of reviewing the correctness of issued patents, in part by avoiding the costliness of federal court litigation.

This case is a constitutional challenge to that new proceeding, called “inter partes review.” The basic outline of the challenge is as follows. Article III of the Constitution, which vests judicial power in the courts, implies that Congress and the executive branch cannot conduct adjudication. Standing alone, that makes inter partes review unconstitutional—along with a huge swath of federal agency powers. But the Supreme Court has recognized an exception: Administrative agencies are constitutionally allowed to adjudicate “public rights.”

What counts as a “public right”? As Justice Thomas acknowledges, Supreme Court “precedents applying the public-rights doctrine have not been entirely consistent.” Very roughly speaking, though, public rights are meant to be “new” benefits created by the government, like social security benefits. “Private” rights, by contrast, are traditional rights from common

law. This hopefully makes some intuitive sense. Congress is under no obligation to create programs like social security, so when it does create them, it is free to create them with strings attached including administrative adjudication. But it would be really weird for Congress to create the “federal tort agency” to decide private lawsuits—those cases seem like they belong in courts.

Private property is, of course, the subject of traditional common law. So if revoking a patent is like revoking private property, then it must be adjudicated in court, and inter partes review is unconstitutional. But if revoking a patent is more like denying a government benefit, then there is nothing wrong with an agency deciding patent revocation. Which is it?]

## 1

This Court has long recognized that the grant of a patent is a “matter involving public rights.” *United States v. Duell*, 172 U.S. 576, 582–583 (1899) (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272 (1856)). It has the key features to fall within this Court’s longstanding formulation of the public-rights doctrine.

*Ab initio*, the grant of a patent involves a matter arising between the government and others. As this Court has long recognized, the grant of a patent is a matter between the public, who are the grantors, and . . . the patentee. By issuing patents, the PTO takes from the public rights of immense value, and bestows them upon the patentee. Specifically, patents are “public franchises” that the Government grants “to the inventors of new and useful improvements.” The franchise gives the patent owner the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States. That right did not exist at common law. Rather, it is a creature of statute law. . . .

## 2

Inter partes review involves the same basic matter as the grant of a patent. So it, too, falls on the public-rights side of the line.

Inter partes review is a second look at an earlier administrative grant of a patent. The Board considers the same statutory requirements that the PTO considered when granting the patent. Those statutory requirements prevent the “issuance of patents whose effects are to remove existent knowledge from the public domain.” *Graham v. John Deere Co. of Kansas*

*City*, 383 U.S. 1, 6 (1966). So, like the PTO’s initial review, the Board’s inter partes review protects the public’s paramount interest in seeing that patent monopolies are kept within their legitimate scope. Thus, inter partes review involves the same interests as the determination to grant a patent in the first instance.

The primary distinction between inter partes review and the initial grant of a patent is that inter partes review occurs *after* the patent has issued. But that distinction does not make a difference here. Patent claims\* are granted subject to the qualification that the PTO has the authority to reexamine—and perhaps cancel—a patent claim in an inter partes review.

This Court has recognized that franchises can be qualified in this manner. For example, Congress can grant a franchise that permits a company to erect a toll bridge, but qualify the grant by reserving its authority to revoke or amend the franchise. See, e.g., *Louisville Bridge Co. v. United States*, 242 U.S. 409, 421, (1917) (collecting cases). Even after the bridge is built, the Government can exercise its reserved authority through legislation or an administrative proceeding. See, e.g., *id.*, at 420-421. The same is true for franchises that permit companies to build railroads or telegraph lines. See, e.g., *United States v. Union Pacific R. Co.*, 160 U.S. 1, 24-25 (1895).

Thus, the public-rights doctrine covers the matter resolved in inter partes review. The Constitution does not prohibit the Board from resolving it outside of an Article III court.

## B

Oil States challenges this conclusion, citing three decisions that recognize patent rights as the “private property of the patentee.” *United States v. American Bell Telephone Co.*, 128 U.S. 315, 370 (1888); see also *McCormick Harvesting Machine Co. v. Aultman*, 169 U.S. 606, 609 (1898) (“[A granted patent] has become the property of the patentee”); *Brown v. Duchesne*, 19 How. 183 (1857) (“[T]he rights of a party under a patent are his private property”). But those cases do not contradict our conclusion.

Patents convey only a specific form of property right—a public franchise. And patents are “entitled to protection as any other property, con-

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\*A “claim” is the legally operative part of a patent, which specifies the class of inventions that the patent covers. Because patents can contain more than one claim, each giving rise to independent legal rights, courts that are being very precise will refer to determinations about “patent claims” rather than “patents” overall. —Eds.

*sisting of a franchise.*" *Seymour*, 11 Wall. at 533 (emphasis added). As a public franchise, a patent can confer only the rights that the statute prescribes. It is noteworthy that one of the precedents cited by Oil States acknowledges that the patentee's rights are "derived altogether" from statutes, "are to be regulated and measured by these laws, and cannot go beyond them." *Brown, supra*, at 195.<sup>3</sup>

One such regulation is inter partes review. The Patent Act provides that, subject to the provisions of this title, patents shall have the attributes of personal property. This provision qualifies any property rights that a patent owner has in an issued patent, subjecting them to the express provisions of the Patent Act. Those provisions include inter partes review.

Nor do the precedents that Oil States cites foreclose the kind of post-issuance administrative review that Congress has authorized here. To be sure, two of the cases make broad declarations that "[t]he only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent." *McCormick Harvesting Machine Co., supra*, at 609; accord, *American Bell Telephone Co.*, 128 U.S., at 364. But those cases were decided under the Patent Act of 1870. That version of the Patent Act did not include any provision for post-issuance administrative review. Those precedents, then, are best read as a description of the statutory scheme that existed at that time. They do not resolve Congress' authority under the Constitution to establish a different scheme.<sup>4</sup>

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<sup>3</sup>This Court has also recognized this dynamic for state-issued franchises. For instance, States often reserve the right to alter or revoke a corporate charter either in the act of incorporation or in some general law of the State which was in operation at the time the charter was granted. That reservation remains effective even after the corporation comes into existence, and such alterations do not offend the Contracts Clause of Article I, § 10.

<sup>4</sup>The dissent points to *McCormick*'s statement that the Patent Office Commissioner could not invalidate the patent at issue because it would "deprive the applicant of his property without due process of law, and would be in fact an invasion of the judicial branch." But that statement followed naturally from the Court's determination that, under the Patent Act of 1870, the Commissioner "was *functus officio*" and "had no power to revoke, cancel, or annul" the patent at issue.

Nor is it significant that the *McCormick* Court "equated invention patents with land patents" [quoting the dissent]. *McCormick* itself makes clear that the analogy between the two depended on the particulars of the Patent Act of 1870. Modern invention patents, by contrast, are meaningfully different from land patents. The land-patent cases invoked by the dissent involved a transaction in which all authority or control' over the lands has

....

## E

We emphasize the narrowness of our holding. We address the constitutionality of inter partes review only. We do not address whether other patent matters, such as infringement actions, can be heard in a non-Article III forum. And because the Patent Act provides for judicial review by the Federal Circuit, we need not consider whether inter partes review would be constitutional without any sort of intervention by a court at any stage of the proceedings. Moreover, we address only the precise constitutional challenges that Oil States raised here. Oil States does not challenge the retroactive application of inter partes review, even though that procedure was not in place when its patent issued. Nor has Oil States raised a due process challenge. Finally, our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.

....

## V

Because inter partes review does not violate Article III or the Seventh Amendment, we affirm the judgment of the Court of Appeals.

*It is so ordered.*

[A concurrence by Justice Breyer, joined by Justices Ginsburg and Sotomayor, is omitted.]

**Justice GORSUCH, with whom THE CHIEF JUSTICE joins, dissenting.**

After much hard work and no little investment you devise something you think truly novel. Then you endure the further cost and effort of applying for a patent, devoting maybe \$30,000 and two years to that process alone. At the end of it all, the Patent Office agrees your invention is novel and issues a patent. The patent affords you exclusive rights to the fruits of your labor for two decades. But what happens if someone later emerges from the woodwork, arguing that it was all a mistake and your patent should be canceled? Can a political appointee and his administra-

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passed from ‘the Executive Department. Their holdings do not apply when the Government continues to possess some measure of control over the right in question. And that is true of modern invention patents under the current Patent Act, which gives the PTO continuing authority to review and potentially cancel patents after they are issued.

tive agents, instead of an independent judge, resolve the dispute? The Court says yes. Respectfully, I disagree.

....

Patents began as little more than feudal favors. The crown both issued and revoked them. And they often permitted the lucky recipient the exclusive right to do very ordinary things, like operate a toll bridge or run a tavern. But by the 18th century, inventors were busy in Britain and invention patents came to be seen in a different light. They came to be viewed not as endowing accidental and anticompetitive monopolies on the fortunate few but as a procompetitive means to secure to individuals the fruits of their labor and ingenuity; encourage others to emulate them; and promote public access to new technologies that would not otherwise exist. The Constitution itself reflects this new thinking, authorizing the issuance of patents precisely because of their contribution to the “Progress of Science and useful Arts.” Art. I, § 8, cl. 8. In essence, there was a change in perception—from viewing a patent as a contract between the crown and the patentee to viewing it as a “social contract” between the patentee and society. And as invention patents came to be seen so differently, it is no surprise courts came to treat them more solicitously.

....

Any lingering doubt about English law is resolved for me by looking to our own. While the Court is correct that the Constitution’s Patent Clause was written against the backdrop of English practice, it’s also true that the Clause sought to *reject* some of early English practice. Reflecting the growing sentiment that patents shouldn’t be used for anticompetitive monopolies over goods or businesses which had long before been enjoyed by the public, the framers wrote the Clause to protect only procompetitive invention patents that are the product of hard work and insight and “add to the sum of useful knowledge. In light of the Patent Clause’s restrictions on this score, courts took the view that when the federal government grants a patent the grantee is entitled to it *as a matter of right*, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor. *James v. Campbell*, 104 U.S. 356 (1882) (emphasis added). As Chief Justice Marshall explained, courts treated American invention patents as recognizing an “inchoate property” that exists “from the moment of invention.” *Evans v. Jordan*, 8 F.Cas. 872, 873 (No. 4,564) (C.C.D.Va.1813). American patent holders thus were thought to hold a property in their in-

ventions by as good a title as the farmer holds his farm and flock. And just as with farm and flock, it was widely accepted that the government could divest patent owners of their rights only through proceedings before independent judges.

....

With so much in the relevant history and precedent against it, the Court invites us to look elsewhere. Instead of focusing on the revocation of patents, it asks us to abstract the level of our inquiry and focus on their issuance. Because the job of issuing invention patents traditionally belonged to the Executive, the Court proceeds to argue, the job of revoking them can be left there too. But that doesn't follow. Just because you give a gift doesn't mean you forever enjoy the right to reclaim it. And, as we've seen, just because the Executive could *issue* an invention (or land) patent did not mean the Executive could *revoke* it. To reward those who had proven the social utility of their work (and to induce others to follow suit), the law long afforded patent holders more protection than that against the threat of governmental intrusion and dispossession. The law requires us to honor those historical rights, not diminish them.

Still, the Court asks us to look away in yet another direction. At the founding, the Court notes, the Executive could sometimes both dispense and revoke public franchises. And because, it says, invention patents are a species of public franchises, the Court argues the Executive should be allowed to dispense and revoke them too. But labels aside, by the time of the founding the law treated patents protected by the Patent Clause quite differently from ordinary public franchises. Many public franchises amounted to little more than favors resembling the original royal patents the framers expressly refused to protect in the Patent Clause. The Court points to a good example: the state-granted exclusive right to operate a toll bridge. By the founding, courts in this country (as in England) had come to view anticompetitive monopolies like that with disfavor, narrowly construing the rights they conferred. By contrast, courts routinely applied to invention patents protected by the Patent Clause the liberal common sense construction that applies to other instruments creating private property rights, like land deeds. As Justice Story explained, invention patents protected by the Patent Clause were not to be treated as mere monopolies odious in the eyes of the law, and therefore not to be favored. For precisely these reasons and as we've seen, the law traditionally treated patents issued under the Patent

Clause very differently than monopoly franchises when it came to governmental invasions. Patents alone required independent judges. Nor can simply invoking a mismatched label obscure that fact. The people's historic rights to have independent judges decide their disputes with the government should not be a constitutional Maginot Line, easily circumvented by such simple maneuvers.

Today's decision may not represent a rout but it at least signals a retreat from Article III's guarantees. Ceding to the political branches ground they wish to take in the name of efficient government may seem like an act of judicial restraint. But enforcing Article III isn't about protecting judicial authority for its own sake. It's about ensuring the people today and tomorrow enjoy no fewer rights against governmental intrusion than those who came before. And the loss of the right to an independent judge is never a small thing. It's for that reason Hamilton warned the judiciary to take "all possible care . . . to defend itself against" intrusions by the other branches. *The Federalist No. 78*, at 466. It's for that reason I respectfully dissent.

### Notes and Questions

3.2. The Supreme Court calls patents a "franchise," which it agrees are a type of property right but not one that get private-rights treatment like land. What's the difference? In what ways do you expect the law to treat "franchises" differently from "property" beyond the public/private rights distinction here?

3.3. In *Turoff*, above, the court deemed a government-issued taxicab medallion to be a franchise, and thus property. In *Oil States*, though, the Supreme Court deemed a government-issued patent to be a franchise, and thus not property. Are these decisions just inconsistent? Here are some possible explanations:

- The courts meant different things when they said "franchise" between the two cases.
- Something can be property for one statute, and not property for another.
- Taxicab medallions and patents grant different rights, and therefore receive different legal treatment even if both are "property" (or "franchises").
- "Property" is just a legal conclusion. Courts first determine whether the law gives rights to the holder of a thing, and then calls those rights "property" where the rights exist.

How satisfying are these explanations to you?

3.4. What else might you call a “franchise”? Here are some ideas:

- Approval by the U.S. Food and Drug Administration to sell a pharmaceutical on the market.
- *Exclusive* FDA approval to sell a pharmaceutical on the market, such that the FDA is prohibited from approving any other sellers for a period of time.
- A health inspection grade of “A” from the local health inspector.
- A tax credit for installing solar panels.
- A research grant from the National Institutes of Health.

What difference does it make if the above are property, franchises, or simply government benefits?

3.5. Consider the real property analogy to this case. A politically appointed city administrator decides that your title to your house is defective, and takes away your house with no compensation. On the assumption that your title *is* defective (for example, the person who sold you the land didn’t actually own it), how do you feel? Would you feel differently if a court had adjudicated your house’s title (with the same result)? What systems should be in place to prevent this result?

Now translate this back to patents. Do you expect that patent holders feel similarly when the PTO cancels their patents? (Maybe you’re a patent holder, how would you feel?) Is there something different about patents?

3.6. Here’s one possible difference. In the early 2000s, there was a wave of patent lawsuits, often over basic technologies like scanning documents to email or displaying electronic restaurant menus. The defendants were often small businesses like restaurants and florists, who could not afford to litigate these patents, and often paid nuisance settlements. Larger companies could afford litigation and in fact invalidated many of these patents, but only after millions of dollars of litigation fees. Congress created inter partes review in large part to provide a lower-cost, more efficient pathway for dealing with this activity, disparagingly called “patent trolling.”

Does this background affect whether you think patents should be property? Can one engage in land trolling?

3.7. Here’s another possible difference. If you write a computer program, build a machine, or do any other sort of activity, you may infringe a patent even without knowing that the patent exists. As patent lawyers like to say, independent invention is no defense. By contrast, generally when you’re walking on someone else’s land, you know it. Does this make a difference in whether patents are property?

3.8. Justice Thomas's opinion ends with a slew of caveats. In particular, note the discussion about "property for purposes of the Due Process Clause or the Takings Clause." We'll consider these constitutional issues in greater detail in our unit on Takings, but for now, just consider that something like a patent can be property for one legal doctrine but not for others. Does that strike you as odd? What else might be property in some situations but not others? What does that tell you about the concept of "property" as a unified whole?

3.9. Justice Gorsuch draws a distinction between early English patents as "feudal favors" on the one hand, and U.S. patents that "the grantee is entitled to . . . as a matter of right." Putting aside the legal accuracy of that statement,<sup>1</sup> do inventors have a natural right in their inventions? Which of the justifications for property rights strike you as applicable or inapplicable to patents? What are the pros and cons of treating patents as a "matter of grace and favor" from the government?

For that matter, is all property a "matter of grace and favor" from the government?

## 3.4 Publicity Rights

Perhaps names, faces, or parts of people can be property. Among other questions we will want to ask: Is labor necessary to create property rights? In the phenomenon known as "accession," it's not: a cow's owner automatically owns her calf, whether or not the owner invested anything in the calf. Is labor sufficient to create property rights? Again, the answer elsewhere is: not always.

Property is often called on to decide issues of morality. Concepts of unjust enrichment, in which someone wrongfully benefits from another's efforts, often play a role in resolving property disputes, as we see in the following case about owning attributes of identity, distinguishable from a physical body.

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

#### **GOODWIN, Senior Circuit Judge:**

This case involves a promotional "fame and fortune" dispute. In running a particular advertisement without Vanna White's permission, defen-

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<sup>1</sup>The Constitution permits Congress to grant patents, but is generally not understood to require Congress to grant them as a matter of right.

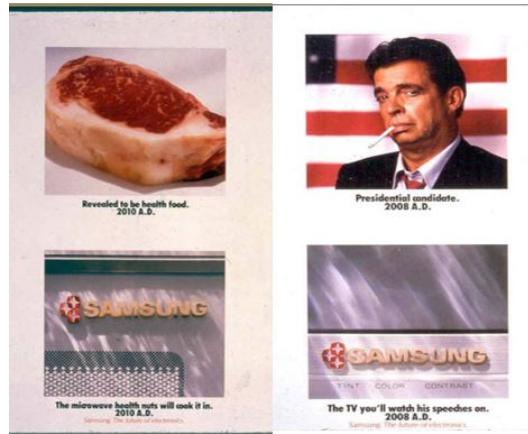
dants Samsung Electronics America, Inc. (Samsung) and David Deutsch Associates, Inc. (Deutsch) attempted to capitalize on White's fame to enhance their fortune. White sued, alleging infringement of various intellectual property rights, but the district court granted summary judgment in favor of the defendants. We affirm in part, reverse in part, and remand.

Plaintiff Vanna White is the hostess of "Wheel of Fortune," one of the most popular game shows in television history. An estimated forty million people watch the program daily. Capitalizing on the fame which her participation in the show has bestowed on her, White markets her identity to various advertisers.

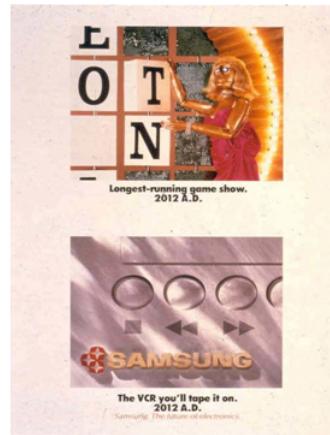
The dispute in this case arose out of a series of advertisements prepared for Samsung by Deutsch. The series ran in at least half a dozen publications with widespread, and in some cases national, circulation. Each of the advertisements in the series followed the same theme. Each depicted a current item from popular culture and a Samsung electronic product. Each was set in the twenty-first century and conveyed the message that the Samsung product would still be in use by that time. By hypothesizing outrageous future outcomes for the cultural items, the ads created humorous effects. For example, one lampooned current popular notions of an unhealthy diet by depicting a raw steak with the caption: "Revealed to be health food. 2010 A.D." Another depicted irreverent "news"-show host Morton Downey Jr. in front of an American flag with the caption: "Presidential candidate. 2008 A.D."

The advertisement which prompted the current dispute was for Samsung video-cassette recorders (VCRs). The ad depicted a robot, dressed in a wig, gown, and jewelry which Deutsch consciously selected to resemble White's hair and dress. The robot was posed next to a game board which is instantly recognizable as the Wheel of Fortune game show set, in a stance for which White is famous. The caption of the ad read: "Longest-running game show. 2012 A.D." Defendants referred to the ad as the "Vanna White" ad. Unlike the other celebrities used in the campaign, White neither consented to the ads nor was she paid.

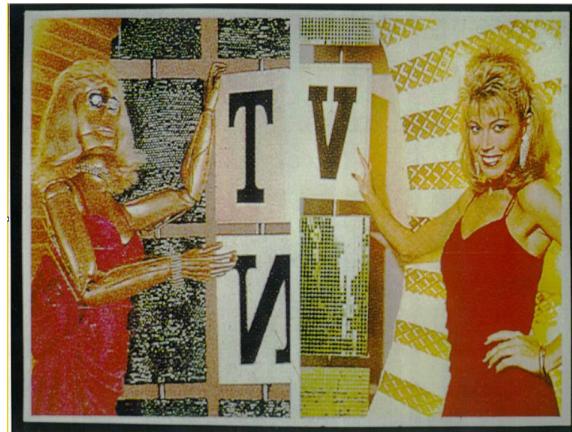
Following the circulation of the robot ad, White sued Samsung and Deutsch in federal district court . . . . The district court granted summary judgment against White on each of her claims. White now appeals. . . .



**Figure 3.3:** Other advertisements in Samsung's campaign.



**Figure 3.4:** The advertisement in dispute.



**Figure 3.5:** Side-by-side comparison of robot and White.

## II. Right of Publicity

White next argues that the district court erred in granting summary judgment to defendants on White's common law right of publicity claim. In *Eastwood v. Superior Court*, 149 Cal.App.3d 409, 198 Cal.Rptr. 342 (1983), the California court of appeal stated that the common law right of publicity cause of action "may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." The district court dismissed White's claim for failure to satisfy *Eastwood's* second prong, reasoning that defendants had not appropriated White's "name or likeness" with their robot ad. We agree that the robot ad did not make use of White's name or likeness. However, the common law right of publicity is not so confined.

... [T]he common law right of publicity reaches means of appropriation other than name or likeness, but that the specific means of appropriation are relevant only for determining whether the defendant has in fact appropriated the plaintiff's identity. The right of publicity does not require that appropriations of identity be accomplished through particular means to be actionable....

As the *Carson* court explained:

[t]he right of publicity has developed to protect the commercial interest of celebrities in their identities. The theory of the right is 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 . . . . If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his "name or likeness" is used.

It is not important how the defendant has appropriated the plaintiff's identity, but whether the defendant has done so. . . . A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.

Indeed, if we treated the means of appropriation as dispositive in our analysis of the right of publicity, we would not only weaken the right but effectively eviscerate it. The right would fail to protect those plaintiffs most in need of its protection. Advertisers use celebrities to promote their products. The more popular the celebrity, the greater the number of people who recognize her, and the greater the visibility for the product. The identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice . . . .

Viewed separately, the individual aspects of the advertisement in the present case say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict. . . . Indeed, defendants themselves referred to their ad as the "Vanna White" ad. We are not surprised.

Television and other media create marketable celebrity identity value. Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit. The law protects the celebrity's sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof. We decline Samsung and Deutch's invitation to permit the evisceration of the common law right of publicity through means as facile as those in this case. Because White has alleged facts showing that Samsung and Deutsch had appropriated her identity, the district court erred by rejecting, on summary judgment, White's common law right of publicity claim.

[The court rejected First Amendment claims because the Samsung ad was commercial speech, which generally receives less constitutional protection than noncommercial speech. The court also allowed White's Lanham Act claim, alleging that the ad caused confusion about whether White sponsored or was affiliated with Samsung, to continue.] . . .

[The partial dissent of Judge Alarcon is omitted.]

**White v. Samsung Electronics America, Inc., 989 F.2d 1512 (9th Cir. 1993)**

**Kozinski, J., dissenting from denial of rehearing en banc.**

Saddam Hussein wants to keep advertisers from using his picture in unflattering contexts.<sup>1</sup> Clint Eastwood doesn't want tabloids to write about him.<sup>2</sup> Rudolf Valentino's heirs want to control his film biography.<sup>3</sup> The Girl Scouts don't want their image soiled by association with certain activities.<sup>4</sup> George Lucas wants to keep Strategic Defense Initiative fans from calling it "Star Wars."<sup>5</sup> Pepsico doesn't want singers to use the word "Pepsi" in their songs.<sup>6</sup> Guy Lombardo wants an exclusive property right to ads that

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<sup>1</sup>See Eben Shapiro, *Rising Caution on Using Celebrity Images*, N.Y. Times, Nov. 4, 1992, at D20 (Iraqi diplomat objects on right of publicity grounds to ad containing Hussein's picture and caption "History has shown what happens when one source controls all the information").

<sup>2</sup>*Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 198 Cal. Rptr. 342 (1983).

<sup>3</sup>*Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 160 Cal. Rptr. 352, 603 P.2d 454 (1979) (Rudolph Valentino); see also *Maheu v. CBS, Inc.*, 201 Cal. App. 3d 662, 668, 247 Cal. Rptr. 304 (1988) (aide to Howard Hughes). Cf. Frank Gannon, *Vanna Karenina*, in *Vanna Karenina and Other Reflections* (1988) (A humorous short story with a tragic ending. "She thought of the first day she had met VR\_SKY. How foolish she had been. How could she love a man who wouldn't even tell her all the letters in his name?").

<sup>4</sup>*Girl Scouts v. Personality Posters Mfg.*, 304 F.Supp. 1228 (S.D.N.Y.1969) (poster of a pregnant girl in a Girl Scout uniform with the caption "Be Prepared").

<sup>5</sup>*Lucasfilm Ltd. v. High Frontier*, 622 F.Supp. 931 (D.D.C.1985).

<sup>6</sup>Pepsico Inc. claimed the lyrics and packaging of grunge rocker Tad Doyle's "Jack Pepsi" song were "offensive to [it] and [ . . . ] likely to offend [its] customers," in part because they "associate [Pepsico] and its Pepsi marks with intoxication and drunk driving." Deborah Russell, *Doyle Leaves Pepsi Thirsty for Compensation*, Billboard, June 15, 1991, at 43. Conversely, the Hell's Angels recently sued Marvel Comics to keep it from publishing a comic book called "Hell's Angel," starring a character of the same name. Marvel settled by paying \$35,000 to charity and promising never to use the name "Hell's Angel" again in connection with any of its publications. Marvel, *Hell's Angels Settle Trademark Suit*, L.A. Daily J., Feb. 2, 1993, § II, at 1.

show big bands playing on New Year's Eve.<sup>7</sup> Uri Geller thinks he should be paid for ads showing psychics bending metal through telekinesis.<sup>8</sup> Paul Prudhomme, that household name, thinks the same about ads featuring corpulent bearded chefs.<sup>9</sup> And scads of copyright holders see purple when their creations are made fun of.<sup>10</sup>

Something very dangerous is going on here. Private property, including intellectual property, is essential to our way of life. It provides an incentive

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Trademarks are often reflected in the mirror of our popular culture. See Truman Capote, *Breakfast at Tiffany's* (1958); Kurt Vonnegut, Jr., *Breakfast of Champions* (1973); Tom Wolfe, *The Electric Kool-Aid Acid Test* (1968) (which, incidentally, includes a chapter on the Hell's Angels); Larry Niven, *Man of Steel*, *Woman of Kleenex*, in *All the Myriad Ways* (1971); *Looking for Mr. Goodbar* (1977); *The Coca-Cola Kid* (1985) (using Coca-Cola as a metaphor for American commercialism); *The Kentucky Fried Movie* (1977); *Harley Davidson and the Marlboro Man* (1991); *The Wonder Years* (ABC 1988-present) ("Wonder Years" was a slogan of Wonder Bread); Tim Rice & Andrew Lloyd Webber, *Joseph and the Amazing Technicolor Dream Coat* (musical).

Hear Janis Joplin, *Mercedes Benz*, on *Pearl* (CBS 1971); Paul Simon, *Kodachrome*, on *There Goes Rhymin' Simon* (Warner 1973); Leonard Cohen, *Chelsea Hotel*, on *The Best of Leonard Cohen* (CBS 1975); Bruce Springsteen, *Cadillac Ranch*, on *The River* (CBS 1980); Prince, *Little Red Corvette*, on *1999* (Warner 1982); dada, *Dizz Knee Land*, on *Puzzle* (IRS 1992) ("I just robbed a grocery store—I'm going to Disneyland / I just flipped off President George—I'm going to Disneyland"); Monty Python, *Spam*, on *The Final Rip Off* (Virgin 1988); Roy Clark, *Thank God and Greyhound [You're Gone]*, on *Roy Clark's Greatest Hits Volume I* (MCA 1979); Mel Tillis, *Coca-Cola Cowboy*, on *The Very Best of* (MCA 1981) ("You're just a Coca-Cola cowboy / You've got an Eastwood smile and Robert Redford hair . . .").

*Dance* to Talking Heads, *Popular Favorites 1976-92: Sand in the Vaseline* (Sire 1992); Talking Heads, *Popsicle*, on *id. Admire* Andy Warhol, *Campbell's Soup Can*. Cf. REO Speedwagon, 38 Special, and Jello Biafra of the Dead Kennedys.

The creators of some of these works might have gotten permission from the trademark owners, though it's unlikely Kool-Aid relished being connected with LSD, Hershey with homicidal maniacs, Disney with armed robbers, or Coca-Cola with cultural imperialism. Certainly no free society can *demand* that artists get such permission.

<sup>7</sup>*Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977).

<sup>8</sup>*Geller v. Fallon McElligott*, No. 90-Civ-2839 (S.D.N.Y. July 22, 1991) (involving a Timex ad).

<sup>9</sup>*Prudhomme v. Procter & Gamble Co.*, 800 F.Supp. 390 (E.D.La.1992).

<sup>10</sup>E.g., *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429 (6th Cir.1992); *Cliffs Notes v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490 (2d Cir.1989); *Fisher v. Dees*, 794 F.2d 432 (9th Cir.1986); *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir.1981); *Elsmere Music, Inc. v. NBC*, 623 F.2d 252 (2d Cir.1980); *Walt Disney Prods. v. The Air Pirates*, 581 F.2d 751 (9th Cir.1978); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.1964); *Lowenfels v. Nathan*, 2 F.Supp. 73 (S.D.N.Y.1932).

for investment and innovation; it stimulates the flourishing of our culture; it protects the moral entitlements of people to the fruits of their labors. But reducing too much to private property can be bad medicine. Private land, for instance, is far more useful if separated from other private land by public streets, roads and highways. Public parks, utility rights-of-way and sewers reduce the amount of land in private hands, but vastly enhance the value of the property that remains.

So too it is with intellectual property. Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.

The panel's opinion is a classic case of overprotection. Concerned about what it sees as a wrong done to Vanna White, the panel majority erects a property right of remarkable and dangerous breadth: Under the majority's opinion, it's now a tort for advertisers to remind the public of a celebrity. Not to use a celebrity's name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity's image in the public's mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense allow. . . .

## II

. . . Under California law, White has the exclusive right to use her name, likeness, signature and voice for commercial purposes. But Samsung didn't use her name, voice or signature, and it certainly didn't use her likeness. The ad just wouldn't have been funny had it depicted White or someone who resembled her—the whole joke was that the game show host(ess) was a robot, not a real person. No one seeing the ad could have thought this was supposed to be White in 2012. . . .

## III

. . . Intellectual property rights aren't like some constitutional rights, absolute guarantees protected against all kinds of interference, subtle as well as blatant. They cast no penumbras, emit no emanations: The very point of intellectual property laws is that they protect only against certain specific kinds of appropriation. I can't publish unauthorized copies of, say,

*Presumed Innocent*; I can't make a movie out of it. But I'm perfectly free to write a book about an idealistic young prosecutor on trial for a crime he didn't commit. So what if I got the idea from *Presumed Innocent*? So what if it reminds readers of the original? Have I "eviscerated" Scott Turow's intellectual property rights? Certainly not. All creators draw in part on the work of those who came before, referring to it, building on it, poking fun at it; we call this creativity, not piracy.

The majority isn't, in fact, preventing the "evisceration" of Vanna White's existing rights; it's creating a new and much broader property right, a right unknown in California law. . . . Instead of having an exclusive right in her name, likeness, signature or voice, every famous person now has an exclusive right to anything that reminds the viewer of her. After all, that's all Samsung did: It used an inanimate object to remind people of White, to "evoke [her identity]."<sup>17</sup>

Consider how sweeping this new right is. What is it about the ad that makes people think of White? . . . Remove the game board from the ad, and no one would think of Vanna White. But once you include the game board, anybody standing beside it—a blonde woman, a man wearing women's clothes, a monkey in a wig and gown—would evoke White's image, precisely the way the robot did. It's the "Wheel of Fortune" set, not the robot's face or dress or jewelry that evokes White's image. The panel is giving White an exclusive right not in what she looks like or who she is, but in what she does for a living.

This is entirely the wrong place to strike the balance. Intellectual property rights aren't free: They're imposed at the expense of future creators and of the public at large. Where would we be if Charles Lindbergh had an exclusive right in the concept of a heroic solo aviator? If Arthur Conan Doyle had gotten a copyright in the idea of the detective story, or Albert Einstein had patented the theory of relativity? If every author and celebrity had been given the right to keep people from mocking them or their work?

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<sup>17</sup>Some viewers might have inferred White was endorsing the product, but that's a different story. The right of publicity isn't aimed at or limited to false endorsements; that's what the Lanham Act is for.

Note also that the majority's rule applies even to advertisements that unintentionally remind people of someone. California law is crystal clear that the common-law right of publicity may be violated even by unintentional appropriations.

Surely this would have made the world poorer, not richer, culturally as well as economically.

This is why intellectual property law is full of careful balances between what's set aside for the owner and what's left in the public domain for the rest of us: The relatively short life of patents; the longer, but finite, life of copyrights; copyright's idea-expression dichotomy; the fair use doctrine; the prohibition on copyrighting facts; the compulsory license of television broadcasts and musical compositions; federal preemption of overbroad state intellectual property laws; the nominative use doctrine in trademark law; the right to make soundalike recordings. All of these diminish an intellectual property owner's rights. All let the public use something created by someone else. But all are necessary to maintain a free environment in which creative genius can flourish.

The intellectual property right created by the panel here has none of these essential limitations: No fair use exception; no right to parody; no idea-expression dichotomy. It impoverishes the public domain, to the detriment of future creators and the public at large. Instead of well-defined, limited characteristics such as name, likeness or voice, advertisers will now have to cope with vague claims of "appropriation of identity," claims often made by people with a wholly exaggerated sense of their own fame and significance. Future Vanna Whites might not get the chance to create their personae, because their employers may fear some celebrity will claim the persona is too similar to her own. The public will be robbed of parodies of celebrities, and our culture will be deprived of the valuable safety valve that parody and mockery create.

Moreover, consider the moral dimension, about which the panel majority seems to have gotten so exercised. Saying Samsung "appropriated" something of White's begs the question: Should White have the exclusive right to something as broad and amorphous as her "identity"? Samsung's ad didn't simply copy White's schtick—like all parody, it created something new. True, Samsung did it to make money, but White does whatever she does to make money, too; the majority talks of "the difference between fun and profit," but in the entertainment industry fun is profit. Why is Vanna White's right to exclusive for-profit use of her persona—a persona that might not even be her own creation, but that of a writer, director or producer—superior to Samsung's right to profit by creating its own inventions? Why should she have such absolute rights to control the

conduct of others, unlimited by the idea-expression dichotomy or by the fair use doctrine?

To paraphrase only slightly *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), it may seem unfair that much of the fruit of a creator's labor may be used by others without compensation. But this is not some unforeseen byproduct of our intellectual property system; it is the system's very essence. Intellectual property law assures authors the right to their original expression, but encourages others to build freely on the ideas that underlie it. This result is neither unfair nor unfortunate: It is the means by which intellectual property law advances the progress of science and art. We give authors certain exclusive rights, but in exchange we get a richer public domain. The majority ignores this wise teaching, and all of us are the poorer for it. . . .

### Notes and Questions

3.10. Kozinski's dissent is often quoted because of its eloquence (not to mention its witty if now somewhat dated cultural references). Is it persuasive?

Consider the following argument: Property needs boundaries. With intangible rights, those boundaries may be difficult to determine—though as you will see, it may not be all that simple to determine the appropriate boundaries of physical property either. Kozinski argues that the difficulty of determining where celebrity identity ends and general cultural reference or invention begins is a reason to reject a right of publicity. But the majority concludes that commercial speech—here, advertising—provides an acceptable boundary. Why isn't that a legitimate response? Among other things, celebrities were not satisfied with a right of publicity that only covered advertising, and courts proved responsive to their desires. Subsequent cases extended California's right of publicity to art, video games, and even a *Cheers*-themed bar featuring animatronic robots. (As Judge Kozinski said, “Robots again!”)

3.11. Another recurring issue raised by Kozinski's dissent is the way in which one person's property claims can interfere with another's. Giving Vanna White a property right in her identity means that Samsung, which owns the copyright in its ad, can't freely run its ad. In the *Cheers* case, two actors who had appeared on the television show were able to prevail against the *Cheers*-themed bar even though the bar had a license from the owner of the copyright in the television show. Thus, granting publicity rights directly decreased the scope of the rights conferred by the

copyright in *Cheers*, which otherwise would have extended to allow the creation of such “derivative works” as character-imitating robots.

3.12. Does it matter if we call the right of publicity a “property” right? Consider the following: “[I]n addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture . . . . Whether it be labelled a ‘property’ right is immaterial; for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.” *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953). Suppose we characterized all privacy rights as property rights. Would the label “property” make any difference to how the law ought to treat invasions of privacy, such as the surreptitious recording of women trying on clothes in changing rooms?



# **Part II**

# **Exclusion**



# Chapter 4

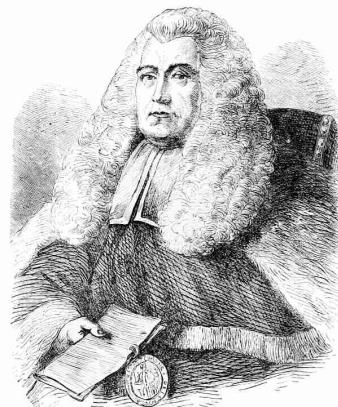
## The Right to Exclude

William Blackstone, *Commentaries on the Laws of England*

Vol. 1, pp. 131–136 (1765); vol. 2, p. 2

THE third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land . . . .

SO great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged,



**Figure 4.1:** William Blackstone. Source: 6 CASSELL'S ILLUSTRATED HISTORY OF ENGLAND 582 (1865), [link](#).

that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this, and similar cases the legislature alone, can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform. . . .

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

***Jacque v. Steenberg Homes, Inc.***

563 N.W.2d 154 (Wis. 1997)

**WILLIAM A. BABLITCH, Justice.**

Plaintiffs, Lois and Harvey Jacques, are an elderly couple, now retired from farming, who own roughly 170 acres near Wilke's Lake in the town of Schleswig. The defendant, Steenberg Homes, Inc. (Steenberg), is in the business of selling mobile homes. In the fall of 1993, a neighbor of the Jacques purchased a mobile home from Steenberg. Delivery of the mobile home was included in the sales price.

Steenberg determined that the easiest route to deliver the mobile home was across the Jacques' land . . . because the only alternative was a private road which was covered in up to seven feet of snow and contained a sharp curve which would require sets of "rollers" to be used when maneuvering the home around the curve. Steenberg asked the Jacques on several separate occasions whether it could move the home across the Jacques' farm field. The Jacques refused. . . . On the morning of delivery, . . . the assistant manager asked Mr. Jacque how much money it would take to get permission. Mr. Jacque responded that it was not a question of money; the Jacques just did not want Steenberg to cross their land. . . .

At trial, one of Steenberg's employees testified that, upon coming out of the Jacques' home, the assistant manager stated: "I don't give a ---- what [Mr. Jacque] said, just get the home in there any way you can." . . . The employees, after beginning down the private road, ultimately used a "bobcat" to cut a path through the Jacques' snow-covered field and hauled the home across the Jacques' land to the neighbor's lot. . . . Mr. Jacque called the Manitowoc County Sheriff's Department. After interviewing the parties and observing the scene, an officer from the sheriff's department issued a \$30 citation to Steenberg's assistant manager.

The Jacques commenced an intentional tort action in Manitowoc County Circuit Court, Judge Allan J. Deehr presiding, seeking compensatory and punitive damages from Steenberg. . . . [Q]uestions of punitive and compensatory damages were submitted to the jury. The jury awarded the Jacques \$1 nominal damages and \$100,000 punitive damages. Steenberg filed post-verdict motions claiming that the punitive damage award must be set aside because Wisconsin law did not allow a punitive damage award unless the jury also awarded compensatory damages. Alternatively, Steenberg asked the circuit court to remit the punitive damage award. The circuit

court granted Steenberg's motion to set aside the award. Consequently, it did not reach Steenberg's motion for remittitur . . . .

## II.

. . . Steenberg argues that, as a matter of law, punitive damages could not be awarded by the jury because punitive damages must be supported by an award of compensatory damages and here the jury awarded only nominal and punitive damages. The Jacques contend that the rationale supporting the compensatory damage award requirement is inapposite when the wrongful act is an intentional trespass to land. We agree with the Jacques.

. . . The rationale for the compensatory damage requirement is that if the individual cannot show actual harm, he or she has but a nominal interest, hence, society has little interest in having the unlawful, but otherwise harmless, conduct deterred, therefore, punitive damages are inappropriate. . . . The Jacques argue that both the individual and society have significant interests in deterring intentional trespass to land, regardless of the lack of measurable harm that results. We agree with the Jacques . . . .

We turn first to the individual landowner's interest in protecting his or her land from trespass. The United States Supreme Court has recognized that the private landowner's right to exclude others from his or her land is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S.Ct. 2309, 2316, 129 L.Ed.2d 304 (1994). This court has long recognized "[e]very person['s] constitutional right to the exclusive enjoyment of his own property for any purpose which does not invade the rights of another person." *Diana Shooting Club v. Lamoreux*, 114 Wis. 44, 59, 89 N.W. 880 (1902) (holding that the victim of an intentional trespass should have been allowed to take judgment for nominal damages and costs). Thus, both this court and the Supreme Court recognize the individual's legal right to exclude others from private property.

Yet a right is hollow if the legal system provides insufficient means to protect it. Felix Cohen offers the following analysis summarizing the relationship between the individual and the state regarding property rights:

[T]hat 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

Felix S. Cohen, *Dialogue on Private Property*, IX Rutgers Law Review 357, 374 (1954). Harvey and Lois Jacque have the right to tell Steenberg Homes and any other trespasser, "No, you cannot cross our land." But that right has no practical meaning unless protected by the State . . . .

The nature of the nominal damage award in an intentional trespass to land case further supports an exception to [the compensatory damage requirement]. Because a legal right is involved, the law recognizes that actual harm occurs in every trespass. The action for intentional trespass to land is directed at vindication of the legal right. . . . Thus, in the case of intentional trespass to land, the nominal damage award represents the recognition that, although immeasurable in mere dollars, actual harm has occurred.

The potential for harm resulting from intentional trespass also supports an exception to [the compensatory damage requirement]. A series of intentional trespasses, as the Jacques had the misfortune to discover in an unrelated action, can threaten the individual's very ownership of the land. The conduct of an intentional trespasser, if repeated, might ripen into prescription or adverse possession and, as a consequence, the individual landowner can lose his or her property rights to the trespasser.

In sum, the individual has a strong interest in excluding trespassers from his or her land. Although only nominal damages were awarded to the Jacques, Steenberg's intentional trespass caused actual harm. We turn next to society's interest in protecting private property from the intentional trespasser.

Society has an interest in punishing and deterring intentional trespassers beyond that of protecting the interests of the individual landowner. Society has an interest in preserving the integrity of the legal system. Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished. When landowners have confidence in the legal system, they are less likely to resort to "self-help" remedies. . . . [O]ne can easily imagine a frustrated landowner taking the law into his or her own hands when faced with a brazen trespasser, like Steenberg, who refuses to heed no trespass warnings.

People expect wrongdoers to be appropriately punished. Punitive damages have the effect of bringing to punishment types of conduct that,

though oppressive and hurtful to the individual, almost invariably go unpunished by the public prosecutor. . . . If punitive damages are not allowed in a situation like this, what punishment will prohibit the intentional trespass to land? Moreover, what is to stop Steenberg Homes from concluding, in the future, that delivering its mobile homes via an intentional trespass and paying the resulting [\$30] forfeiture, is not more profitable than obeying the law? Steenberg Homes plowed a path across the Jacques' land and dragged the mobile home across that path, in the face of the Jacques' adamant refusal. A \$30 forfeiture and a \$1 nominal damage award are unlikely to restrain Steenberg Homes from similar conduct in the future. An appropriate punitive damage award probably will.

In sum, as the court of appeals noted, the [compensatory damage] rule sends the wrong message to Steenberg Homes and any others who contemplate trespassing on the land of another. It implicitly tells them that they are free to go where they please, regardless of the landowner's wishes. As long as they cause no compensable harm, the only deterrent intentional trespassers face is the nominal damage award of \$1 . . . and the possibility of a Class B forfeiture under Wis. Stat. § 943.13. We conclude that both the private landowner and society have much more than a nominal interest in excluding others from private land. Intentional trespass to land causes actual harm to the individual, regardless of whether that harm can be measured in mere dollars. Consequently, the [compensatory damage] rationale will not support a refusal to allow punitive damages when the tort involved is an intentional trespass to land. Accordingly, assuming that the other requirements for punitive damages have been met, we hold that nominal damages may support a punitive damage award in an action for intentional trespass to land. . . . Accordingly, we reverse and remand to the circuit court for reinstatement of the punitive damage award.

Reversed and remanded with directions.

### **Notes and Questions**

- 4.1. Would (or should) the result in *Jacque* have been different if, instead of a mobile home seller making a scheduled delivery to a customer, the defendant had been an ambulance company responding to a call of a suspected heart attack? Of a broken leg? What if the snow-covered private road had instead been a recently

collapsed bridge? What if Steenberg had tried to take the road despite the risks, and the truck had accidentally tipped and fallen onto the Jacques' land?

4.2. Would (or should) the result in *Jacque* have been different if, instead of steadfastly refusing to permit Steenberg's delivery truck to cross their land, the Jacques had demanded a large sum of money as a condition of permitting the crossing, which Steenberg refused to pay? Would the ultimate monetary award have been different? If so, what incentive does this case give property owners facing requests from third parties for the use of their otherwise idle resources? Would Steenberg have been better off not asking permission in the first place?

4.3. Blackstone's description of "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" is one of the most famous—and quotable—definitions of property ever written in English. But it is also widely acknowledged to be hyperbolic to the point of falsity. Can you see why? What aspects of Blackstone's own discussion of the "absolute right" of property are inconsistent with the "total exclusion of the right of any other individual in the universe"?

4.4. Would we really want our system of property to give private owners such "sole and despotic dominion . . . over the external things of the world"? The kind of dominion exercised by the Jacques? No matter what? Consider this: what kinds of problems could a motivated and unscrupulous property owner armed with such awesome power cause?

## 4.1 Terminology

The original *Open Source Property* module on property torts provides a wonderfully detailed history of the causes of action based on property. In modern practice, the key terminology for you to know is as follows.

Terminology-wise, property is divided into **real property**, which refers to rights in land and things like houses attached to it, and **personal property**, which refers to rights in all other physical objects. (Property in intangibles has no conventional general name.) The terms **realty** and **personalty** (note the missing "i" in each) are synonymous; they are also sometimes called "immovable" and "movable" property as well.<sup>1</sup> Personal property is also called "chattels," though that term has a problematic history.

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<sup>1</sup>Classic law school question: what is a mobile home?

For real property, the primary tort is **trespass**. The traditional remedy for trespass is money damages for injuries caused by the trespass. If a landowner hopes to have an intruder removed from the land, the cause of action was traditionally called **ejectment**.<sup>2</sup>

For personal property, the tort of **conversion** refers to the wrongdoer taking possession of another's property. The term is commonly used today, and probably originates based on the theory that the wrongdoer has "converted" the property to another use. A less common synonym for conversion is **trover**. If the wrongdoer damages the property without appropriating it, then the action is for **trespass to chattels**. Traditionally, these were both actions for damages, since the property might have been used up, say by being eaten. Recovery of the taken object itself was by the action of **replevin**.

Today, courts have more freedom to award legal and equitable remedies regardless of the phrasing of the complaint—this was the major Civil Procedure reform of 1938. The terminology distinctions are thus generally not controlling. Nevertheless, they are useful terms to know because they will show up in cases and other sources.

Two other terms are important. If there is a dispute over who owns something and a court is called in to decide, that is an action for **quiet title**. Finally, **infringement** is a general-purpose term for any violation of a property right, but it is specifically used to refer to intellectual property violations.

The following table summarizes these torts.

<b>Preferred Remedy</b>	<b>Type of Property:</b>	
	<b>Real Property</b>	<b>Chattels</b>
<b>Damages</b>	Trespass	Conversion (or Trover); Trespass to Chattels
<b>Possession</b>	Ejectment	Replevin
<b>Declaration of Rights</b>	<b>Quiet Title</b>	

<sup>2</sup>For historical reasons, ejectment was a cause of action that only a lease tenant could bring, not the actual landowner. As a result, landowners seeking ejectment would (and were allowed to) invent a fictional lessee to be the "plaintiff" in the ejectment case. If you see a case with a caption like *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), that's what the "lessee" was for.

## 4.2 Limits

### *Marsh v. Alabama*

326 U.S. 501 (1946)

**Mr. Justice BLACK delivered the opinion of the Court.**

In this case we are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Appellant, a Jehovah's Witness, came onto the sidewalk we have just described, stood near the post-office and undertook to distribute religious literature. In the stores the corporation had posted a notice which read

as follows: "This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted." Appellant was warned that she could not distribute the literature without a permit and told that no permit would be issued to her. She protested that the company rule could not be constitutionally applied so as to prohibit her from distributing religious writings. When she was asked to leave the sidewalk and Chickasaw she declined. The deputy sheriff arrested her and she was charged in the state court with violating Title 14, Section 426 of the 1940 Alabama Code which makes it a crime to enter or remain on the premises of another after having been warned not to do so. Appellant contended that to construe the state statute as applicable to her activities would abridge her right to freedom of press and religion contrary to the First and Fourteenth Amendments to the Constitution. This contention was rejected and she was convicted. The Alabama Court of Appeals affirmed the conviction, holding that the statute as applied was constitutional because the title to the sidewalk was in the corporation and because the public use of the sidewalk had not been such as to give rise to a presumption under Alabama law of its irrevocable dedication to the public. The State Supreme Court denied certiorari, and the case is here on appeal. . . .

Had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company-town it would have been clear that appellant's conviction must be reversed. . . . [N]either a state nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places or make the right to distribute dependent on a flat license tax or permit to be issued by an official who could deny it at will. We have also held that an ordinance completely prohibiting the dissemination of ideas on the city streets can not be justified on the ground that the municipality holds legal title to them. And we have recognized that the preservation of a free society is so far dependent upon the right of each individual citizen to receive such literature as he himself might desire that a municipality could not without jeopardizing that vital individual freedom, prohibit door to door distribution of literature. From these decisions it is clear that had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with suf-

ficient power to pass an ordinance completely barring the distribution of religious literature. Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town? For it is the state's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms.

We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We can not accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation . . . .

Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The "business block" serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people

of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men" and we must in all cases "weigh the circumstances and appraise . . . the reasons . . . in support of the regulation of (those) rights." *Schneider v. State*, 308 U.S. 147, 161, 60 S. Ct. 146, 151, 84 L.Ed. 155. In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute. Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand. The case is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

[Concurring opinion of Justice FRANKFURTER omitted.]

**Mr. Justice REED, dissenting.**

Former decisions of this Court have interpreted generously the Constitutional rights of people in this Land to exercise freedom of religion, of speech and of the press. It has never been held and is not now by this opinion of the Court that these rights are absolute and unlimited either in respect to the manner or the place of their exercise. What the present decision establishes as a principle is that one may remain on private property against the will of the owner and contrary to the law of the state so long as the only objection to his presence is that he is exercising an asserted right to spread there his religious views. This is the first case to extend by law the privilege of religious exercises beyond public places or to private places without the assent of the owner.

As the rule now announced permits this intrusion, without possibility of protection of the property by law, and apparently is equally applicable

to the freedom of speech and the press, it seems appropriate to express a dissent to this, to us, novel Constitutional doctrine. Of course, such principle may subsequently be restricted by this Court to the precise facts of this case—that is to private property in a company town where the owner for his own advantage has permitted a restricted public use by his licensees and invitees. Such distinctions are of degree and require new arbitrary lines, judicially drawn, instead of those hitherto established by legislation and precedent. While the power of this Court, as the interpreter of the Constitution to determine what use of real property by the owner makes that property subject, at will, to the reasonable practice of religious exercises by strangers, cannot be doubted, we find nothing in the principles of the First Amendment, adopted now into the Fourteenth, which justifies their application to the facts of this case.

Both Federal and Alabama law permit, so far as we are aware, company towns . . . . These communities may be essential to furnish proper and convenient living conditions for employees on isolated operations in lumbering, mining, production of high explosives and large-scale farming. The restrictions imposed by the owners upon the occupants are sometimes galling to the employees and may appear unreasonable to outsiders. Unless they fall under the prohibition of some legal rule, however, they are a matter for adjustment between owner and licensee, or by appropriate legislation.

Alabama has a statute generally applicable to all privately owned premises. It is Title 14, Section 426, Alabama Code 1940 which so far as pertinent reads as follows:

Trespass after warning. —Any person who, without legal cause or good excuse, enters into the dwelling house or on the premises of another, after having been warned, within six months preceding, not to do so; or any person, who, having entered into the dwelling house or on the premises of another without having been warned within six months not to do so, and fails or refuses, without legal cause or good excuse, to leave immediately on being ordered or requested to do so by the person in possession, his agent or representative, shall, on conviction, be fined not more than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than three months.

Appellant was distributing religious pamphlets on a privately owned passway or sidewalk thirty feet removed from a public highway of the State of Alabama and remained on these private premises after an authorized order to get off. We do not understand from the record that there was objection to appellant's use of the nearby public highway and under our decisions she could rightfully have continued her activities a few feet from the spot she insisted upon using. An owner of property may very well have been willing for the public to use the private passway for business purposes and yet have been unwilling to furnish space for street trades or a location for the practice of religious exhortations by itinerants. The passway here in question was not put to any different use than other private passways that lead to privately owned areas, amusement places, resort hotels or other businesses . . . .

A state does have the moral duty of furnishing the opportunity for information, education and religious enlightenment to its inhabitants, including those who live in company towns, but it has not heretofore been adjudged that it must commandeer, without compensation, the private property of other citizens to carry out that obligation. . . . In the area which is covered by the guarantees of the First Amendment, this Court has been careful to point out that the owner of property may protect himself against the intrusion of strangers. Although in *Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313, an ordinance forbidding the summonsing of the occupants of a dwelling to receive handbills was held invalid because in conflict with the freedom of speech and press, this Court pointed out . . . that after warning the property owner would be protected from annoyance. The very Alabama statute which is now held powerless to protect the property of the Gulf Shipbuilding Corporation, after notice, from this trespass was there cited . . . to show that it would protect the householder, after notice . . . .

Our Constitution guarantees to every man the right to express his views in an orderly fashion. An essential element of "orderly" is that the man shall also have a right to use the place he chooses for his exposition. The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech. We cannot say that Jehovah's Witnesses can claim the privilege of a license, which has never been granted, to hold their meetings in other private places, merely

because the owner has admitted the public to them for other limited purposes. Even though we have reached the point where this Court is required to force private owners to open their property for the practice there of religious activities or propaganda distasteful to the owner, because of the public interest in freedom of speech and religion, there is no need for the application of such a doctrine here. Appellant, as we have said, was free to engage in such practices on the public highways, without becoming a trespasser on the company's property.

The CHIEF JUSTICE and Mr. Justice BURTON join in this dissent.

***State of New Jersey v. Shack***

58 N.J. 297, 277 A.2d 369 (1971)

**WEINTRAUB, C.J.**

Defendants entered upon private property to aid migrant farmworkers employed and housed there. Having refused to depart upon the demand of the owner, defendants were charged with violating N.J.S.A. 2A:170–31 which provides that “[a]ny person who trespasses on any lands . . . after being forbidden so to trespass by the owner . . . is a disorderly person and shall be punished by a fine of not more than \$50.” Defendants were convicted in the Municipal Court of Deerfield Township and again on appeal in the County Court of Cumberland County on a trial *de novo*. We certified their further appeal before argument in the Appellate Division.

Before us, no one seeks to sustain these convictions. The complaints were prosecuted in the Municipal Court and in the County Court by counsel engaged by the complaining landowner, Tedesco. However Tedesco did not respond to this appeal, and the county prosecutor, while defending abstractly the constitutionality of the trespass statute, expressly disclaimed any position as to whether the statute reached the activity of these defendants.

Complainant, Tedesco, a farmer, employs migrant workers for his seasonal needs. As part of their compensation, these workers are housed at a camp on his property.

Defendant Tejeras is a field worker for the Farm Workers Division of the Southwest Citizens Organization for Poverty Elimination, known by the acronym SCOPE, a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C. §§ 2861–2864.

The role of SCOPE includes providing for the “health services of the migrant farm worker.”

Defendant Shack is a staff attorney with the Farm Workers Division of Camden Regional Legal Services, Inc., known as “CRLS,” also a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C.A. § 2809(a)(3). The mission of CRLS includes legal advice and representation for these workers.

Differences had developed between Tedesco and these defendants prior to the events which led to the trespass charges now before us. Hence when defendant Tejeras wanted to go upon Tedesco’s farm to find a migrant worker who needed medical aid for the removal of 28 sutures, he called upon defendant Shack for his help with respect to the legalities involved. Shack, too, had a mission to perform on Tedesco’s farm; he wanted to discuss a legal problem with another migrant worker there employed and housed. Defendants arranged to go to the farm together. Shack carried literature to inform the migrant farmworkers of the assistance available to them under federal statutes, but no mention seems to have been made of that literature when Shack was later confronted by Tedesco.

Defendants entered upon Tedesco’s property and as they neared the camp site where the farmworkers were housed, they were confronted by Tedesco who inquired of their purpose. Tejeras and Shack stated their missions. In response, Tedesco offered to find the injured worker, and as to the worker who needed legal advice, Tedesco also offered to locate the man but insisted that the consultation would have to take place in Tedesco’s office and in his presence. Defendants declined, saying they had the right to see the men in the privacy of their living quarters and without Tedesco’s supervision. Tedesco thereupon summoned a State Trooper who, however, refused to remove defendants except upon Tedesco’s written complaint. Tedesco then executed the formal complaints charging violations of the trespass statute.

## I.

The constitutionality of the trespass statute, as applied here, is challenged on several scores.

It is urged that the First Amendment rights of the defendants and of the migrant farmworkers were thereby offended. Reliance is placed on *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) [and its progeny.]

Those cases rest upon the fact that the property was in fact opened to the general public. There may be some migrant camps with the attributes of the company town in *Marsh* and of course they would come within its holding. But there is nothing of that character in the case before us, and hence there would have to be an extension of *Marsh* to embrace the immediate situation.

Defendants also maintain that the application of the trespass statute to them is barred by the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and this on the premise that the application of the trespass statute would defeat the purpose of the federal statutes, under which SCOPE and CRLS are funded, to reach and aid the migrant farmworker. . . .

These constitutional claims are not established by any definitive holding. We think it unnecessary to explore their validity. The reason is that we are satisfied that under our State law the ownership of real property does not include the right to bar access to governmental services available to migrant workers and hence there was no trespass within the meaning of the penal statute. The policy considerations which underlie that conclusion may be much the same as those which would be weighed with respect to one or more of the constitutional challenges, but a decision in nonconstitutional terms is more satisfactory, because the interests of migrant workers are more expansively served in that way than they would be if they had no more freedom than these constitutional concepts could be found to mandate if indeed they apply at all.

## II.

Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.

Here we are concerned with a highly disadvantaged segment of our society. We are told that every year farmworkers and their families numbering more than one million leave their home areas to fill the seasonal demand for farm labor in the United States. The migrant farmworkers come to New Jersey in substantial numbers. . . . The migrant farmworkers are

a community within but apart from the local scene. They are rootless and isolated. Although the need for their labors is evident, they are unorganized and without economic or political power. It is their plight alone that summoned government to their aid. In response, Congress provided under Title III—B of the Economic Opportunity Act of 1964 (42 U.S.C.A. § 2701 et seq.) for “assistance for migrant and other seasonally employed farmworkers and their families.” . . . As we have said, SCOPE is engaged in a program funded under this section, and CRLS also pursues the objectives of this section although, we gather, it is funded under s 2809(a)(3), which is not limited in its concern to the migrant and other seasonally employed farmworkers and seeks “to further the cause of justice among persons living in poverty by mobilizing the assistance of lawyers and legal institutions and by providing legal advice, legal representation, counseling, education, and other appropriate services.”

These ends would not be gained if the intended beneficiaries could be insulated from efforts to reach them. It is in this framework that we must decide whether the camp operator’s rights in his lands may stand between the migrant workers and those who would aid them. . . .

A man’s right in his real property of course is not absolute. It was a maxim of the common law that one should so use his property as not to injure the rights of others. Broom, Legal Maxims (10th ed. Kersley 1939), p. 238; 39 Words and Phrases, “*Sic Utere Tuo ut Alienum Non Laedas*,” p. 335. Although hardly a precise solvent of actual controversies, the maxim does express the inevitable proposition that rights are relative and there must be an accommodation when they meet. Hence it has long been true that necessity, private or public, may justify entry upon the lands of another . . . .

We see no profit in trying to decide upon a conventional category and then forcing the present subject into it. That approach would be artificial and distorting. The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing facility.

Thus approaching the case, we find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker’s well-being. The farmer, of course, is entitled to pursue his farming activities without interference, and this defendants readily concede. But we see no legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, State, or

local services, or from recognized charitable groups seeking to assist him. Hence representatives of these agencies and organizations may enter upon the premises to seek out the worker at his living quarters. So, too, the migrant worker must be allowed to receive visitors there of his own choice, so long as there is no behavior hurtful to others, and members of the press may not be denied reasonable access to workers who do not object to seeing them.

It is not our purpose to open the employer's premises to the general public if in fact the employer himself has not done so. We do not say, for example, that solicitors or peddlers of all kinds may enter on their own; we may assume or the present that the employer may regulate their entry or bar them, at least if the employer's purpose is not to gain a commercial advantage for himself or if the regulation does not deprive the migrant worker of practical access to things he needs.

And we are mindful of the employer's interest in his own and in his employees' security. Hence he may reasonably require a visitor to identify himself, and also to state his general purpose if the migrant worker has not already informed him that the visitor is expected. But the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties.

It follows that defendants here invaded no possessory right of the farmer-employer. Their conduct was therefore beyond the reach of the trespass statute. The judgments are accordingly reversed and the matters remanded to the County Court with directions to enter judgments of acquittal.

### **Notes and Questions**

4.5. Why did the property owner win in *Jacque* but lose in *Marsh* and *Shack*? Isn't the property right at issue in each of these cases the same—i.e., isn't it the right to exclude?

4.6. What types of competing principles, policies, or interests will justify a limit on the right to exclude? Who should decide when such a limit is justified, and how? Who decided in *Marsh*? In *Shack*?

4.7. While *Shack* presents a limitation on the right to exclude by judicial analysis, legislatures can also limit the right to exclude by statute. The Civil Rights Act of 1964, for example, provides:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

The term “place of public accommodation” includes hotels, restaurants, theaters, and entertainment venues, among other places, but excludes any “private club or other establishment not in fact open to the public.” 42 U.S.C. § 2000a.

Similarly, the Americans with Disabilities Act of 1990 prohibits discrimination “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.” In addition to this restriction on the right to exclude, the statute requires covered property owners to take affirmative steps to make their facilities accessible. 42 U.S.C. §§ 12182–12183.

One way of thinking of these statutes is that they are interventions to the property right to exclude, serving different normative values like equality and nondiscrimination that otherwise conflict with property ownership. Is that conflict necessary? Could you imagine a concept of “property” that incorporates these values?

### 4.3 Intellectual Property

#### *Campbell v. Acuff-Rose Music, Inc.*

510 U.S. 569 (1994)

**JUSTICE SOUTER delivered the opinion of the Court.**

We are called upon to decide whether 2 Live Crew’s commercial parody of Roy Orbison’s song, “Oh, Pretty Woman,” may be a fair use within the meaning of the Copyright Act of 1976, 17 U. S. C. § 107 . . . .

#### I

In 1964, Roy Orbison and William Dees wrote a rock ballad called “Oh, Pretty Woman” and assigned their rights in it to respondent Acuff-Rose

Music, Inc. See Appendix A, *infra*, at 594. Acuff-Rose registered the song for copyright protection.

Petitioners Luther R. Campbell, Christopher Wongwon, Mark Ross, and David Hobbs are collectively known as 2 Live Crew, a popular rap music group. In 1989, Campbell wrote a song entitled “Pretty Woman,” which he later described in an affidavit as intended, “through comical lyrics, to satirize the original work . . . .” [Negotiations between 2 Live Crew and Acuff-Rose failed.]

Almost a year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skyywalker Records, for copyright infringement. . . .

## II

It is uncontested here that 2 Live Crew’s song would be an infringement of Acuff-Rose’s rights in “Oh, Pretty Woman,” under the Copyright Act of 1976, but for a finding of fair use through parody. From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, “[t]o promote the Progress of Science and useful Arts . . . .” U. S. Const., Art. I, § 8, cl. 8.<sup>6</sup> For as Justice Story explained, “[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.” *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845). . . .

In *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (CCD Mass. 1841), Justice Story distilled the essence of law and methodology from the earlier cases: “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” Thus expressed, fair use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act, in which Justice Story’s summary is discernible:

### § 107. Limitations on exclusive rights: Fair use

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<sup>6</sup>The exclusion of facts and ideas from copyright protection serves that goal as well. See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U. S. 340, 359 (1991) . . . .

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

#### 17 U. S. C. § 107.

Congress meant § 107 “to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way” and intended that courts continue the common-law tradition of fair use adjudication. The fair use doctrine thus permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.

The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. . . .<sup>11</sup>

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<sup>11</sup>Because the fair use enquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the copyright law, to stimulate the creation and publication of edifying matter, are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.

**A**

The first factor in a fair use enquiry is “the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes.” The central purpose of this investigation is to see whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.” Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990). Such works lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use. . . .

The germ of parody lies in the definition of the Greek *parodeia*, quoted in Judge Nelson’s Court of Appeals dissent, as “a song sung alongside another.” Modern dictionaries accordingly describe a parody as a “literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule,” or as a “composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous.” For the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works. If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger. Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.<sup>16</sup>

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<sup>16</sup>Satire has been defined as a work “in which prevalent follies or vices are assailed with ridicule,” or are “attacked through irony, derision, or wit.”

The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioners' suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair. The Act has no hint of an evidentiary preference for parodists over their victims, and no workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and nonparodic elements. Accordingly, parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.

.... The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.” *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 251 (1903) ....

While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naivete of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.

The Court of Appeals, however, immediately cut short the enquiry into 2 Live Crew's fair use claim by confining its treatment of the first factor essentially to one relevant fact, the commercial nature of the use. .... [But] the

language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character. . . . The mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities “are generally conducted for profit in this country.” Congress could not have intended such a rule . . . .

**B**

The second statutory factor, “the nature of the copyrighted work,” . . . calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. We agree with both the District Court and the Court of Appeals that the Orbison original’s creative expression for public dissemination falls within the core of the copyright’s protective purposes. This fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.

**C**

The third factor asks whether “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” . . . Here, attention turns to the persuasiveness of a parodist’s justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use. . . .

Parody presents a difficult case. Parody’s humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to “conjure up” at least enough of that original to make the object of its critical wit recognizable. What makes

for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided.

....

Suffice it to say here that, as to the lyrics, we think the Court of Appeals correctly suggested that no more was taken than necessary, but just for that reason, we fail to see how the copying can be excessive in relation to its parodic purpose, even if the portion taken is the original's heart. As to the music, we express no opinion whether repetition of the [original song's] bass riff is excessive copying, and we remand to permit evaluation of the amount taken, in light of the song's parodic purpose and character, its transformative elements, and considerations of the potential for market substitution sketched more fully below.

## D

The fourth fair use factor is the effect of the use upon the potential market for or value of the copyrighted work. It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original. The enquiry must take account not only of harm to the original but also of harm to the market for derivative works.

... When a commercial use amounts to mere duplication of the entirety of an original, it clearly supersedes the objects of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it. This is so because the parody and the original usually serve different market functions.

We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. . . . This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectible derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. . . .<sup>23</sup>

[Here,] 2 Live Crew's song comprises not only parody but also rap music, and the derivative market for rap music is a proper focus of enquiry. Evidence of substantial harm to it would weigh against a finding of fair use, because the licensing of derivatives is an important economic incentive to the creation of originals. Of course, the only harm to derivatives that need concern us, as discussed above, is the harm of market substitution. The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright than the like threat to the original market.

[The Court remanded the case to determine whether 2 Live Crew's song harmed "the market for a non-parody rap version" of the original song, and for further determinations on other issues identified above. Justice Kennedy's concurrence is omitted.]

### **Notes and Questions**

4.8. The Supreme Court's original opinion contained an appendix reprinting the lyrics of both the original Roy Orbison song and 2 Live Crew's version. They are omitted from the text to save space, but are worth a look if you're interested.

Was it copyright infringement for the Court to reprint the lyrics? Try applying the fair use doctrine.

4.9. As this case makes clear, copyright protection can exclude not just exact copies of a work, but also "derivative works" like translations, movie adaptations,

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<sup>23</sup>We express no opinion as to the derivative markets for works using elements of an original as vehicles for satire or amusement, making no comment on the original or criticism of it.

summaries, or sequels. That copyright protection extends beyond exact copying ought to be intuitive: Others should not be able to get around a copyright just by changing a few words or paint strokes. But it presents a tremendous boundary problem for copyright. How does one know where infringement ends and permissible uses begin? What's the difference between plagiarism and research?

The answer to the copyright boundary question is a complex mix of statutory and case law, which is beyond the scope of a survey text on property. But what does the vagueness of copyright boundaries tell you about copyright as a species of property? Are property boundaries similarly vague for other types of property? Should uncertainty about how far any given copyright reaches affect the right to exclude?

4.10. The fair use doctrine has been used in a wide range of seemingly unrelated situations. Consider the following activities that courts have considered fair use:

- Recording a television show to videocassette, in order to watch it later. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
- Libraries scanning and digitizing books for full-text searching and accessibility for print-disabled patrons. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).
- Replicating key parts of a copyright-protected package of computer software, in order to make it easier for third-party programmers to switch from one software package to the other one. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).
- Collecting student essays to build a plagiarism detection system. *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

4.11. In patent law, if a patent holder is denied injunctive relief, it is still possible for a court to award a “reasonable royalty” payment. If a copyright holder cannot exclude another’s use due to the fair use doctrine, should the copyright holder receive a reasonable royalty or other compensation for the use?

4.12. Copyright law’s right to exclude proscribes speech. Why doesn’t copyright run afoul of the First Amendment? In *Golan v. Holder*, the Supreme Court observed that the fair use doctrine helps to resolve the tension between copyright law and freedom of speech. See 565 U.S. 302 (2012). Similarly, in *Marsh*, we saw how the right to exclude from real property can conflict with the First Amendment. What other constitutional rights might come into conflict with intellectual property rights, or property rights generally?

4.13. In several of the footnotes, Justice Souter carefully distinguishes parody, which (roughly) mocks the original work, from satire, which (again roughly) uses a spin on the original work to make other commentary. What do you think of this distinction? Should satire be fair use? Should it be within the scope of a copyright holder's right to exclude?

Consider, in particular, the mashup book *Oh, the Places You'll Boldly Go!*, which cast the classic Dr. Seuss picture book *Oh, the Places You'll Go!* in combination with elements from the television show *Star Trek*. The Ninth Circuit appellate court held the mashup not to be fair use. See *Dr. Seuss Enters., LP v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020). Do you agree? What justifications or theories of property ownership explain the estate of Dr. Seuss wielding veto power over mashups? Are there countervailing policy concerns?



# Chapter 5

## Property Boundaries

Where does one person's property end, and another's begin? For some things, this is an easy question. A pen and a desk, for example, have distinct boundaries, defined by the surfaces of the objects. So if Alice owns a pen and places the pen on Bob's desk, it is clear what belongs to Alice and what belongs to Bob. Or is it so clear? What if Alice draws on Bob's desk, depositing a trail of ink from the pen?

Defining the boundaries of things is fundamental to property law, and unclear boundaries are classic subjects of property disputes. Land is the most common example. The lateral boundaries of land, of course, but what about vertical? How far into the sky do a landowner's rights reach? And for intangible property, these questions are even more difficult. At least for tangible things, humans can perceive their size and shape; how does one do the same for the intangible?

### 5.1 Land

#### *Walters v. Tucker*

281 S.W.2d 843 (Sup. Ct. Mo. 1955)

This is an action to quiet title to certain real estate situate in the City of Webster Groves, St. Louis County, Missouri. Plaintiff and defendants are the owners of adjoining residential properties fronting northward on Oak Street. Plaintiff's property, known as 450 Oak Street, lies to the west of defendants' property, known as 446 Oak Street. The controversy arises over their division line. Plaintiff contends that her lot is 50 feet in width, east and west. Defendants contend that plaintiff's lot is only approximately 42

feet in width, east and west. The trial court, sitting without a jury, found the issues in favor of defendants and rendered judgment accordingly, from which plaintiff has appealed.

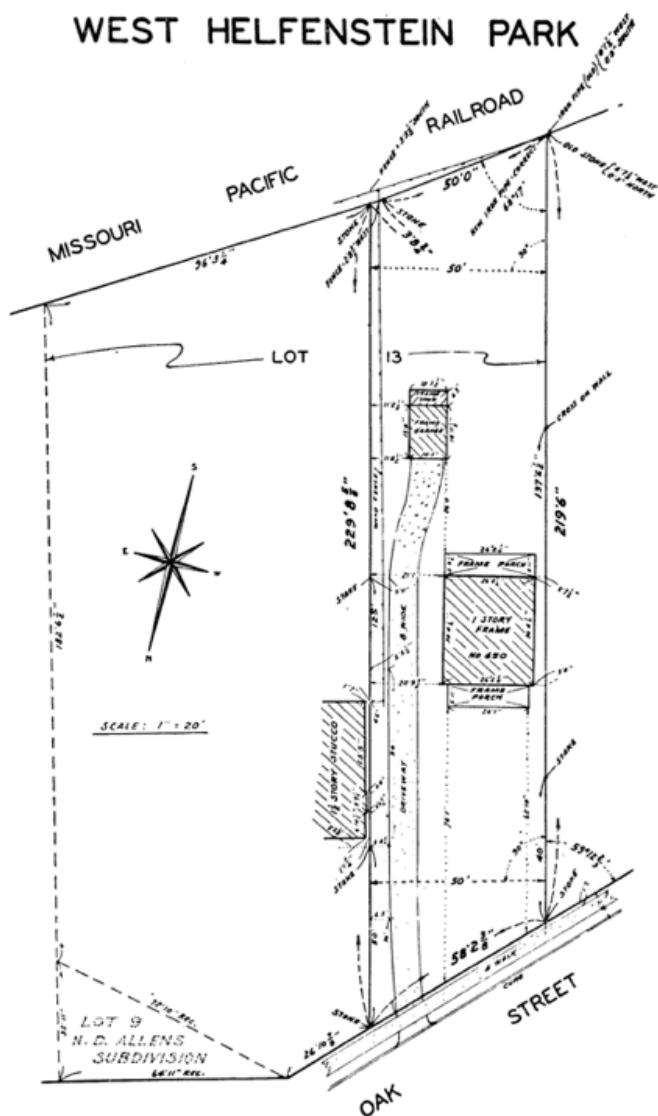
The common source of title is Fred F. Wolf and Rose E. Wolf, husband and wife, who in 1922 acquired the whole of Lot 13 of West Helfenstein Park, as shown by plat thereof recorded in St. Louis County. In 1924, Mr. and Mrs. Wolf conveyed to Charles Arthur Forse and wife the following described portion of said Lot 13:

The West 50 feet of Lot 13 of West Helfenstein Park, a Sub-division in United States Survey 1953, Twp. 45, Range 8 East, St. Louis County, Missouri . . . .

Plaintiff, through mesne conveyances carrying a description like that above, is the last grantee of and successor in title to the aforesaid portion of Lot 13. Defendants, through mesne conveyances, are the last grantees of and successors in title to the remaining portion of Lot 13.

At the time of the above conveyance in 1924, there was and is now situate on the tract described therein a one-story frame dwelling house (450 Oak Street), which was then and continuously since has been occupied as a dwelling by the successive owners of said tract, or their tenants. In 1925, Mr. and Mrs. Wolf built a 1 1/2-story stucco dwelling house on the portion of Lot 13 retained by them. This house (446 Oak Street) continuously since has been occupied as a dwelling by the successive owners of said portion of Lot 13, or their tenants.

Despite the apparent clarity of the description in plaintiff's deed, extrinsic evidence was heard for the purpose of enabling the trial court to interpret the true meaning of the description set forth therein. At the close of all the evidence the trial court found that the description did not clearly reveal whether the property conveyed "was to be fifty feet along the front line facing Oak Street or fifty feet measured Eastwardly at right angles from the West line of the property . . . "; that the "difference in method of ascertaining fifty feet would result in a difference to the parties of a strip the length of the lot and approximately eight feet in width"; that an ambiguity existed which justified the hearing of extrinsic evidence; and that the "West fifty feet should be measured on the front or street line facing Oak Street." The judgment rendered in conformity with the above finding had the effect of fixing the east-west width of plaintiff's tract at about 42 feet.



**Figure 5.1:** The plaintiff's survey plat of the land in question.

Plaintiff contends that the description in the deed is clear, definite and unambiguous, both on its face and when applied to the land; that the trial court erred in hearing and considering extrinsic evidence; and that its finding and judgment changes the clearly expressed meaning of the description and describes and substitutes a different tract from that acquired by her under her deed. Defendants do not contend that the description, on its face, is ambiguous, but do contend that when applied to the land it is subject to "dual interpretation"; that under the evidence the trial court did not err in finding it contained a latent ambiguity and that parol evidence was admissible to ascertain and determine its true meaning; and that the finding and judgment of the trial court properly construes and adjudges the true meaning of the description set forth in said deed.

[The plaintiff and defendants introduced dueling survey plats. The one included here is the plaintiff's. North is at the bottom. Note in particular the locations of the two houses and of the driveway. It may help to mark on the plat where the defendant's proposed line would fall.]

It is seen that Lot 13 extends generally north and south. It is bounded on the north by Oak Street (except that a small triangular lot from another subdivision cuts off its frontage thereon at the northeast corner). On the south it is bounded by the Missouri Pacific Railroad right of way. Both Oak Street and the railroad right of way extend in a general northeast-southwest direction, but at differing angles. . . .

Both plats show a concrete driveway 8 feet in width extending from Oak Street to plaintiff's garage in the rear of her home, which, the testimony shows, was built by one of plaintiff's predecessors in title. The east line of plaintiff's tract, as measured by the Joyce (plaintiff's) survey, lies 6 or 7 feet east of the eastern edge of this driveway. Admittedly, the driveway is upon and an appurtenance of plaintiff's property. On the Elbring (defendants') plat, the east line of plaintiff's lot, as measured by Elbring, is shown to coincide with the east side of the driveway at Oak Street and to encroach upon it 1.25 feet for a distance of 30 or more feet as it extends between the houses. Thus, the area in dispute is essentially the area between the east edge of the driveway and the line fixed by the Joyce survey as the eastern line of plaintiff's tract. . . .

The description under which plaintiff claims title, to wit: "The West 50 feet of Lot 13 . . . ", is on its face clear and free of ambiguity. It purports to convey a strip of land 50 feet in width off the west side of Lot 13. So clear

is the meaning of the above language that defendants do not challenge it and it has been difficult to find any case wherein the meaning of a similar description has been questioned.

The law is clear that when there is no inconsistency on the face of a deed and, on application of the description to the ground, no inconsistency appears, parol evidence is not admissible to show that the parties intended to convey either more or less or different ground from that described. But where there are conflicting calls in a deed, or the description may be made to apply to two or more parcels, and there is nothing in the deed to show which is meant, then parol evidence is admissible to show the true meaning of the words used.

No ambiguity or confusion arises when the description here in question is applied to Lot 13. The description, when applied to the ground, fits the land claimed by plaintiff and cannot be made to apply to any other tract. When the deed was made, Lot 13 was vacant land except for the frame dwelling at 450 Oak Street. The stucco house (446 Oak Street) was not built until the following year. Under no conceivable theory can the fact that defendants' predecessors in title (Mr. and Mrs. Wolf) thereafter built the stucco house within a few feet of the east line of the property described in the deed be construed as competent evidence of any ambiguity in the description. . . .

Whether the above testimony and other testimony in the record constitute evidence of a mistake in the deed we do not here determine. Defendants have not sought reformation, and yet that is what the decree herein rendered undertakes to do. It seems apparent that the trial court considered the testimony and came to the conclusion that the parties to the deed did not intend a conveyance of the "West 50 feet of Lot 13", but rather a tract fronting 50 feet on Oak Street. And, the decree, on the theory of interpreting an ambiguity, undertakes to change (reform) the description so as to describe a lot approximately 42 feet in width instead of a lot 50 feet in width, as originally described. That, we are convinced, the courts cannot do.

#### **Notes and Questions**

- 5.1. Why does the court apply such a strict integration rule?

5.2. The boundary line as enforced by the court comes within inches of the defendants' house. This does not seem like an ideal state of affairs. (Then again, the defendant's theory would have drawn the boundary line through the plaintiffs' driveway.) Are there any doctrines that can clean up the messes that result when (by accident or otherwise) strict interpretation of deeds produces results at odds with natural features, structures, or uses of land?

5.3. The deed here used three different techniques to describe the land. Start at the end. "United States Survey 1953, Twp. 45, Range 8 East, St. Louis County, Missouri" is a reference to a government survey. Townships are standard 36-square-mile tracts established by federal government survey; "Twp. 45, Range 8 East" identifies a specific township in Missouri. Next, "of Lot 13 of West Helfenstein Park" is a reference to the *subdivision plat* filed by the developer who laid out the neighborhood; the plat is a survey map filed in the county recording office that shows the boundaries of individual parcels. Finally, "The West 50 feet" is a (crude attempt at) a *metes and bounds* description of the property in terms of its boundaries. Metes and bounds descriptions may refer to geospatial coordinates (e.g. latitude and longitude as measured by GPS), to natural landmarks ("Millers' Creek"), artificial markers ("the survey stake labelled G34"), and distances and directions ("300 feet along a course at 45°"). How precise are these various means of description? Which of them strike you as most prone to error?

5.4. Note that the boundary lines as shown on the survey map are at an angle to the north-south axis. Does this affect how the court should interpret the deed?

## 5.2 Airspace

### ***Hinman v. Pacific Air Transport***

84 F.2d 755 (9th Cir. 1936)

**HANEY, Circuit Judge.**

Appellants allege . . . that they are the owners and in possession of 72 1/2 acres of real property in the city of Burbank, Los Angeles county, Cal., "together with a stratum of air-space superjacent to and overlying said tract . . . and extending upwards . . . to such an altitude as plaintiffs . . . may reasonably expect now or hereafter to utilize, use or occupy said airspace. Without limiting said altitude or defining the upward extent of said stratum of airspace or of plaintiff's ownership, utilization and possession thereof, plaintiffs allege that they \* \* \* may reasonably expect now and hereafter to

utilize, use and occupy said airspace and each and every portion thereof to an altitude of not less than 150 feet above the surface of the land . . . .”

It is then alleged that defendants are engaged in the business of operating a commercial air line, and that at all times “after the month of May, 1929, defendants daily, repeatedly and upon numerous occasions have disturbed, invaded and trespassed upon the ownership and possession of plaintiffs’ tract”; that at said times defendants have operated aircraft in, across, and through said airspace at altitudes less than 100 feet above the surface; that plaintiffs notified defendants to desist from trespassing on said airspace; and that defendants have disregarded said notice, unlawfully and against the will of plaintiffs, and continue and threaten to continue such trespasses . . . . The prayer asks an injunction restraining the operation of the aircraft through the airspace over plaintiffs’ property and for [damages].

Appellees contend that it is settled law in California that the owner of land has no property rights in superjacent airspace, either by code enactments or by judicial decrees and that the ad coelum doctrine does not apply in California. We have examined the statutes of California, . . . but we find nothing therein to negative the ad coelum formula . . . . If we could accept and literally construe the ad coelum doctrine, it would simplify the solution of this case; however, we reject that doctrine. We think it is not the law, and that it never was the law.

This formula “from the center of the earth to the sky” was invented at some remote time in the past when the use of space above land actual or conceivable was confined to narrow limits, and simply meant that the owner of the land could use the overlying space to such an extent as he was able, and that no one could ever interfere with that use.

This formula was never taken literally, but was a figurative phrase to express the full and complete ownership of land and the right to whatever superjacent airspace was necessary or convenient to the enjoyment of the land.

In applying a rule of law, or construing a statute or constitutional provision, we cannot shut our eyes to common knowledge, the progress of civilization, or the experience of mankind. A literal construction of this formula will bring about an absurdity. The sky has no definite location. It is that which presents itself to the eye when looking upward; as we ap-

proach it, it recedes. There can be no ownership of infinity, nor can equity prevent a supposed violation of an abstract conception.

The appellants' case, then, rests upon the assumption that as owners of the soil they have an absolute and present title to all the space above the earth's surface, owned by them, to such a height as is, or may become, useful to the enjoyment of their land. This height, the appellants assert in the bill, is of indefinite distance, but not less than 150 feet.

If the appellants are correct in this premise, it would seem that they would have such a title to the airspace claimed, as an incident to their ownership of the land, that they could protect such a title as if it were an ordinary interest in real property. Let us then examine the appellants' premise. They do not seek to maintain that the ownership of the land actually extends by absolute and exclusive title upward to the sky and downward to the center of the earth. They recognize that the space claimed must have some use, either present or contemplated, and connected with the enjoyment of the land itself.

Title to the airspace unconnected with the use of land is inconceivable. Such a right has never been asserted. It is a thing not known to the law.

Since, therefore, appellants must confine their claim to 150 feet of the airspace above the land, to the use of the space as related to the enjoyment of their land, to what extent, then, is this use necessary to perfect their title to the airspace? Must the use be actual, as when the owner claims the space above the earth occupied by a building constructed thereon; or does it suffice if appellants establish merely that they may reasonably expect to use the airspace now or at some indefinite future time?

This, then, is appellants' premise, and upon this proposition they rest their case. Such an inquiry was never pursued in the history of jurisprudence until the occasion is furnished by the common use of vehicles of the air.

We believe, and hold, that appellants' premise is unsound. The question presented is applied to a new status and little aid can be found in actual precedent. The solution is found in the application of elementary legal principles. The first and foremost of these principles is that the very essence and origin of the legal right of property is dominion over it. Property must have been reclaimed from the general mass of the earth, and it must be capable by its nature of exclusive possession. Without possession, no right in it can be maintained.

The air, like the sea, is by its nature incapable of private ownership, except in so far as one may actually use it. This principle was announced long ago by Justinian. It is in fact the basis upon which practically all of our so-called water codes are based.

We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land. This right is not fixed. It varies with our varying needs and is coextensive with them. The owner of land owns as much of the space above him as he uses, but only so long as he uses it. All that lies beyond belongs to the world. . . . Any use of such air or space by others which is injurious to his land, or which constitutes an actual interference with his possession or his beneficial use thereof, would be a trespass for which he would have remedy. But any claim of the landowner beyond this cannot find a precedent in law, nor support in reason.

. . . We cannot shut our eyes to the practical result of legal recognition of the asserted claims of appellants herein, for it leads to a legal implication to the effect that any use of airspace above the surface owner of land, without his consent would be a trespass either by the operator of an airplane or a radio operator. We will not foist any such chimerical concept of property rights upon the jurisprudence of this country . . . .

Appellants are not entitled to injunctive relief upon the bill filed here, because no facts are alleged with respect to circumstances of appellants' use of the premises which will enable this court to infer that any actual or substantial damage will accrue from the acts of the appellees complained of.

The case differs from the usual case of enjoining a trespass. Ordinarily, if a trespass is committed upon land, the plaintiff is entitled to at least nominal damages without proving or alleging any actual damage. In the instant case, traversing the airspace above appellants' land is not, of itself, a trespass at all, but it is a lawful act unless it is done under circumstances which will cause injury to appellants' possession.

Appellants do not, therefore, in their bill state a case of trespass, unless they allege a case of actual and substantial damage. The bill fails to do this. It merely draws a naked conclusion as to damages without facts or circumstances to support it. It follows that the complaint does not state a case for injunctive relief . . . .

### Notes and Questions

5.5. Did the court in *Hinman* “find” the law of property as it applies to the airspace above land? Did it “change” the law in this regard? Or did it, as Felix Cohen has argued, “create and distribute a new source of economic wealth or power”? Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

5.6. Does the court say that Hinman will never be able to obtain the relief sought? Are there any circumstances in which an injunction to restrict overflights to an altitude of over 150 feet (or any altitude) could be awarded under the court’s analysis?

5.7. The court justified its ruling in *Hinman*, at least in part, by reference to the “practical result” that would follow a finding in the landowner’s favor. What would that “practical result” be, and why did the court feel the need to avoid it? Is avoiding such undesirable “practical results” an acceptable basis for making a determination as to whether something is a person’s “property”?

5.8. **Drones.** The increasing availability of personal aerial robots (“drones”) is threatening to bring *Hinman* back into the spotlight. In November of 2014, a hobbyist was flying a custom-built “hexacopter” over his parents’ farm in California, when a neighbor’s son shot it out of the sky with a shotgun. The neighbor claimed the drone had been flying over his land, though the drone owner disputed this. In any event, the drone owner demanded compensation for damage to the drone, and the neighbor refused. They ended up in small claims court where the neighbor was held liable for \$850 in damages and court costs, on grounds that he “acted unreasonably in having his son shoot the drone down regardless of whether it was over his property or not.” See Jason Koebler, *The Sky’s Not Your Lawn: Man Wins Lawsuit After Neighbor Shotgunned His Drone*, VICE: MOTHERBOARD (June 28, 2015), [link](#).

Imagine that instead of (or in addition to) having his son use the drone for target practice, the farmer had called the police to make a complaint of criminal trespass, or sued the drone owner for trespass. What result? Would it matter how high the drone was flying? Would it matter whether the drone was equipped with a camera? (Recall that the right to exclude is not the only right of owners; trespass may not be our farmer’s only recourse. We will consider some analogous factual scenarios in our unit on Nuisance.)

5.9. Would the “practical result” of a finding for the landowner in *Hinman* necessarily be the same as the “practical result” of a finding in favor of a landowner

suing the operator of a drone in the airspace over her land? Again, would it matter how high the drone was flying, or whether it was equipped with a camera?

## 5.3 Radio Spectrum

### ***Tribune Co. v. Oak Leaves Broadcasting Station***

68 Cong. Rec. 216 (Cook Cty. Cir. Ct. Ill. Nov. 17, 1926)

#### **Decision of Judge Wilson on Defendants' Motion to Dissolve Temporary Injunction**

... The bill very briefly charges that the complainant is and has been for some time a corporation organized under the laws of the State of Illinois, with its principal place of business in the city of Chicago, and is engaged in the publication of a newspaper known as the Chicago Daily Tribune, and that it has an average daily paid circulation of several hundred thousand subscribers.

It further charges that since March 29, 1924, it has been engaged in broadcasting by radio of daily programs of information, amusement, and entertainment to the general public, and particularly to that part of the general public residing in and in the vicinity of the city of Chicago, and for that purpose the complainant operates an apparatus generally known as a broadcasting station located on the Drake Hotel and another such broadcasting station operated near the city of Elgin.

The bill further charges that it has been the custom for several years for persons engaged in broadcasting to designate their certain stations by certain combinations of letters known as call letters, and that these call letters serve to enable persons using radio receiving sets to identify the particular station, and in this instance the complainant has been using the letters WGN, which stand for the abbreviation of the World's Greatest Newspaper which appears to have been adopted by the complainant as a sort of trade name indicating the Chicago Daily Tribune.

It is further charged in the bill that it is the custom for such newspapers owning and operating broadcasting stations to make announcements of their programs in the daily editions of the paper, and that the complainant has, since March 29, 1924, used the designation WGN, and further charges that its program is of a high-class character, and that by reason of its broadcasting it has built up a good will with the public, which is of great value

to the complainant, in that it has enhanced the value of the newspaper and increased the profits.

Further charges, on information and belief, that the number of persons who listen to the said broadcasting of the complainant is in excess of 500,000 and that these persons are educated to listen in or tune in on the wave length of the complainant for the purpose of hearing and enjoying the programs so broadcasted.

The bill further charges that, when two stations are broadcasting on the same or nearly the same wave length, the result will be that the users of the radio will either hear one of the stations to the exclusion of the other or hear both of the stations at the same time, which will cause confusion to the listener, or will hear one to the exclusion of the other but accompanied by a series of noises, such as whistles and roars, which render the program practically useless.

The bill further charges that for several years the broadcasting in the United States and Canada has been done on sending wave lengths varying from 201 meters to 550 meters, inclusive, the United States Government, by an enactment of Congress, having forbidden to private and commercial broadcasters the use of wave lengths from 601 meters to 1,600 meters, and the use of wave lengths under 200 meters because of the impracticability of the use of said wave lengths under 200 meters by reason of natural causes and because of the fact that this field is open to amateurs and used by a large number of the same.

Furthermore, that most of the radio receiving sets are so constructed it to be adapted to the receiving of broadcasting within this band of wave lengths included above the 200 meters and under 500 meters.

The bill further charges that the sending waves used by broadcasting stations are also classified by the number of kilocycles denoting the frequency of vibration per second characteristic of each wave. The higher the wave length the less is the number of kilocycles, and a definite number of kilocycles is characteristic of each wave.\*

Further charges that the radio receiving sets in general use in the United States and Canada are scaled and marked with numerical divisions and that by means of dials or indicators persons receiving over radio can set

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\*The formula is  $f = c/\lambda$ , where  $\lambda$  is the wavelength in meters,  $f$  is the frequency in cycles per second, and  $c$  is the speed of light (299,792,458 meters per second). So, for example, to use WGN's numbers,  $299,792,458 / 990 = 302,820$  cycles per second, or 302.8 kilocycles per second. —Eds.

such dials or indicators at particular points and hear the particular broadcasting station over the particular wave length that they desire.

Further charges that the users of radios have become familiar with the different wave lengths and broadcasting stations designated by the particular letters employed and that this fact is of value to the broadcaster because the public has been educated to their particular wave length and their particular designation.

The bill also charges that knowledge of this particular wave length by a broadcaster is of great value to the broadcaster because the person receiving through the radio has been educated to know when to place his dials or indicators in order to receive a particular station and that the public generally in the locality of the complainant has become familiar with the wave length of the complainant and that its loss by interference would work great damage to the complainant.

The complainant further charges that on the 14th of December, 1925, it did, and ever since then has, broadcast on a sending wave length of 302.8 meters (the kilocycles characteristic of such wave length being 990) and that it broadcasts from both the Drake Hotel and from its Elgin broadcasting station and that, at that time, no other broadcasting station in the city of Chicago or in the entire State of Illinois was using said wave length or any wave length sufficiently near to interfere with complainant's broadcasting and that this fact was generally known to the public and that the public had access by reason thereof to the programs of the complainant as broadcast over the same wave length from the two broadcasting stations and which programs were announced at different periods of time by arrangement of the complainant.

Further charges that the complainant has expended large sums of money during said period of time in the building up and betterment of said broadcasting stations and in the furnishing of high-class talent for its programs and in the payment of salaries and expenses in its business of broadcasting. . . .

That the defendants, the Oak Leaves Broadcasting Station (Inc.), and the Coyne Electrical School (Inc.) are corporations existing under and by virtue of the laws of Illinois, and that the defendant, Guyon, is a resident of Chicago, Ill., engaged in business in said city under the name of Guyon's Paradise Ball Room, and operates a dance hall in the city of Chicago.

The bill further charges that the broadcasting station, heretofore used and operated by the defendants, Oak Leaves Broadcasting Station (Inc.), and Coyne Electrical School (Inc.), which had been operated from Oak Park, a suburb of the city of Chicago, was moved to 124 North Crawford Avenue, where Guyon's Paradise Ball Room is located, and is being now operated from that point, and charges that the said defendant, Guyon, became the owner and operator of said broadcasting station and that the other defendants have some interest in saint station which is unknown to the complainant, but which is charged to be true on information and belief.

The bill further charges that said station of the defendants had originally used a wave length of 220 meters (1,350 kilocycles) . . . and that, later, it changed its wave length to 249.9 meters (1,200 kilocycles), which it continued to use until on or about September 7, 1926, and further charges that the defendants had never enjoyed any considerable degree of the good will of the public, nor was it popular with the users of radio receiving sets, but was comparatively unknown in Chicago or its vicinity.

That on or about September 7, 1926, the said Guyon's Paradise Broadcasting Station, used and operated by the defendants, changed its sending wave length to a wave length either the same as that of the complainant (i.e. 302.8) or one having a frequency of considerably less than 50 kilocycles different than that of the complainant, and that it is now using said wave length and has from that time until the date of the filing of the bill herein . . . .

The bill further charges that the defendants have, since September 7, 1926, used the said new wave length during the hours of the day when complainant is broadcasting, and that by reason thereof said broadcasting by the said defendants has interfered with and destroyed complainant's broadcasting to the public in the city of Chicago and throughout the region where complainant's newspaper circulates, and that by reason thereof radio receivers have been unable to hear the programs of the complainant, and that if it is allowed to continue it will work incalculable damage and injury to the good will of the complainant's broadcasting, and consequently will injure the circulation of the complainant so far as its newspaper is concerned and deprive it of great profits.

Further charges that there are other wave lengths which are usable by the defendants and that this wave length can be changed with practically no expense and within a short period of time.

The bill prays for an order restraining the defendants from broadcasting from said station in such a manner as to interfere with the broadcasting of the complainant, and more particularly from using any wave length within 100 miles of the city of Chicago having a frequency of less than 1,040 kilocycles per second, or more than 940 kilocycles per second, charging, in effect, that any wave length within that designated number of kilocycles would necessarily cause an interference with the broadcasting of the complainant.

The answer . . . admits that where a broadcasting station is operating on a wave length the frequency of which is within 50 kilocycles per second of the number of kilocycles per second characteristic of the wave length of the first station, that some interference will result but that such interference is natural where stations are operating in close proximity one to the other, but that where two broadcasting stations in the same locality are properly constructed and operated and the wave length employed sharply defined and the power of sold stations substantially equal there will be no appreciable interference by the stations if they are separated by 40 kilocycles. . . .

The answer admits that on September 7, 1926, the said defendants' station changed its wave length, but denies that they are broadcasting over the same wave length as that of the complainant, but state that they are sending over a wave length which is removed 40 kilocycles from the wave length used by the complainant, and that said wave being used is 315.6 meters with a frequency of 950 kilocycles.

The answer further admits that the defendant . . . has since about September, 1926, used and operated the broadcasting station described in the bill of complaint Guyon's Paradise Broadcasting Station, but denies that they are drowning out the hearers of WGN, and state that, if such is the fact, it is because said complainant's broadcasting station is improperly constructed and operated.

The answer further admits that on or about September 7, 1926, there was available to them a wave length of 249.9 metres with a frequency of 1,200 kilocycles, but state that said wave length is not desirable for the purpose of broadcasting and that its use would render WGES of little or no value as a broadcasting station.

And further sets forth that there are other wave lengths which would be usable by the defendants, but states that their use would cause greater in-

terference to other broadcasters than the interference now caused to WGN by the use of the present wave length now employed by them.

The defendants further charge that they have invested large sums of money in and about their plant and will suffer damage in the event the temporary injunction heretofore issued should not be dissolved.

The facts in this case, as charged by the bill and admitted by the answer, together with the additional facts set out in the bill as matters of defense, disclose a situation new and novel in a court of equity and a consideration of the law applicable to the facts requires an understanding of the present conditions for the purpose of ascertaining whether or not the old adage of "Old laws should be adapted to new facts" should be applied and for that reason a short statement of general existing conditions is not out of order at this time before considering the legal and equitable aspects of the cause.

It is a matter of general knowledge that in the last few years there has grown up in the United States, as well as abroad, a well recognized calling or business known as broadcasting which consists in sending from a central station, electrically equipped, programs of music and amusement, speeches by men of prominence, news of the day and items of interest taking place in the world, and that these various programs are received by the public over radio receiving sets which have been installed in homes, hotels, and various other places, and that a large industry has grown up and developed in the making and manufacturing of radio sets, so that in the United States, at this time, there are millions of dollars invested by the public at large, which has made the investment for the purpose of and with the knowledge that they could receive these programs, speeches, and items of interest from various broadcasting stations located in various parts of the United States and in other countries.

It might also be stated that, so far as broadcasting stations are concerned, there has almost grown up a custom which recognizes the rights of the various broadcasters, particularly in that certain broadcasters use certain hours of the day, while the other broadcasters remain silent during that particular period of time. Again, in this particular locality, a certain night is set aside as silent night, when all local broadcasters cease broadcasting in order that the radio receivers may be able to tune in on outside distant stations.

Wave lengths have been bought and sold and broadcasting stations have changed hands for a consideration. Broadcasting stations have con-

tracted with each other so as to broadcast without conflicting and in this manner be able to present their different programs to the waiting public. The public itself has become educated to the use or its receiving sets so as to be able to obtain certain particular items of news, speeches, or programs over its own particular sets.

The theory of the bill in this case is based upon the proposition that by usage of a particular wave length for a considerable length of time and by reason of the expenditure of a considerable amount of money in developing its broadcasting station and by usage of a particular wave length educating the public to know that that particular wave length is the wave length of the complainant and by furnishing programs which have been attractive and thereby cause a great number of people to listen in to their particular programs that the said complainant has created and carved out for itself a particular right or easement in and to the use of said wave length which should be recognized in a court of equity and that outsiders should not be allowed thereafter, except for good cause shown, to deprive them of that right and to make use of a field which had been built up by the complainant at a considerable cost in money and a considerable time in pioneering. . . .

The defendants further insist that a wave length can not be made the subject of private control and, further and lastly, that as a matter of fact they are not interfering with the complainant by the use of the present wave length employed by them from their broadcasting station. . . .

[The court discussed the 1912 federal statute which required a license to broadcast by radio and restricted the wavelengths available, as discussed above. It concluded that the statute did not displace state law.]

In the first place, it is argued that there are no rights in the air and that the law has no right or authority to restrict the using of wave lengths or to exclude others from their use. In answer to this it might be said that Congress has already attempted to regulate the use of the air in its enactment of August 13, 1912, by providing that only certain strata of the air or ether may be used for broadcasting purposes and, further, requiring persons to take out a license before they are permitted to exercise the use of the air or ether. Moreover, it appears to this court that the situation is such from the past development of the industry of broadcasting and radio receiving and from the apparent future, as indicated by the past, that, unless some regulatory measures are provided for by Congress or rights

recognized by State courts, the situation will result in chaos and a great detriment to the advancement of an industry which is only in its infancy.

While it is true that the case in question is novel in its newness, the situation is not devoid, however, of legal equitable support. The same answer might be made, as was made in the beginning; that there was no property right, or could be, in a name or sign, but there has developed a long line of cases, both in the Federal and State courts, which has recognized, under the law known as the law of unfair competition, the right to obtain a property right in a name or word or collection of names or words<sup>†</sup> which gives the person who first made use of the same a property right therein, provided that by reason of their use, he has succeeded in building up a business and created a good will which has become known to the public and to the trade and which has served as a designation of some particular output so that it has become generally recognized as the property of such person. The courts have held that persons who attempt to imitate or to make use of such trade name or names or words evidently do so for the purpose of enriching themselves through the efforts of some other person who by the investment of money and time has created something of value. Equity has invariably protected the rights of such persons in the use of said names.

It is also true that the courts have recognized, particularly in the west, the right to the use of running water for the purposes of mining and other uses. (*Atchison v. Peterson*, 20 Wall. 507; *Cache La Poudre Reservoir v. Water Supply & Storage Co.*, 25 Colo. 161.)

Some of the States have also recognized the rights of telephone and telegraph companies in the operation of their lines free from interference by lines of other companies placed in such close proximity as to create confusion by reason of electrical interference. (*Western Union Telegraph Co. v. Los Angeles Electric Co.*, 70 Fed. 178; *Northwestern Telephone Exchange Co. v. Twin City Telephone Co.*, 89 Minn. 4115; and other cases.)

It is argued that the electrical cases generally involve a franchise and thereby a property right, but the cases on electrical interference are cited more particularly for the purpose of their analogy to the case at bar and not as authorities on the question.

In regard to the water cases, counsel for the defendants call our attention to the rule in this State, as set forth in the case of *Druley v. Adam* (102 Ill. 177), where the court says in its opinion, page 193,

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<sup>†</sup>I.e., a trademark. —Eds.

The law has been long settled in this State that there can be no property merely in the water of a running stream. The owner of land over which a stream of water flows has, as incident to his ownership of the land, a property right in the flow of the water at that place for all the beneficial uses that may result from it, whether for motive power in propelling machinery or in imparting fertility to the adjacent soil, etc.; in other words, he has a usufruct in the water while it passes; but all other riparian proprietors have precisely the same rights in regard to it and, apart from the right of consumption for supplying natural wants, neither can, to the injury of the other, abstract the water or divert or arrest its flow.

The same court, however, in its opinion, on page 201, while holding that the western water cases are not applicable, recognized the law as laid down in those cases and distinguished them on the ground that it is apparent that the law necessarily arose in those cases by reason of the peculiar circumstances and necessities existing in those countries at the time.

It is the opinion of the court that, under the circumstances as now exist, there is a peculiar necessity existing and that there are such unusual and peculiar circumstances surrounding the question at issue that a court of equity is compelled to recognize rights which have been acquired by reason of the outlay and expenditure of money and the investment of time and that the circumstances and necessities are such, under the circumstances of this case, as will justify a court of equity in taking jurisdiction of the cause. Such being the case, it becomes the duty of the court to consider the last question, namely, whether or not there is such an interference by the defendants with the broadcasting station of complainant that the temporary injunction heretofore granted should be kept in force until a final hearing of the cause.

[W]e believe that the equities of the situation are in favor of the complainant on the facts as heretofore shown, particularly in that the complainant has been using said wave length for a considerable length of time and has built up a large clientele, whereas the defendants are but newly in the field and will not suffer as a result of injunction in proportion to the damage that would be sustained by the complainant after having spent a much greater length of time in the education of the general radio-receiving public to the wave length in question.

We are of the opinion further that, under the circumstances in this case, priority of time creates a superiority in right, and the fact of priority having been conceded by the answer it would seem to this court that it would lie only just that the situation should be preserved in the status in which it was prior to the time that the defendants undertook to operate over or near the wave length of the complainant. . . .

It is difficult to determine at this time how a radio station should be properly run, but it is, also, true that the science of broadcasting and receiving is being subject every day to change and it is possible that within it short time this may be accomplished, although it is the opinion of the court from an examination of the affidavits and exhibits in the cause that 40 kilocycles is not at this time recognized as a safe limitation for the prevention of interference between stations located in the same locality. It is true that stations sufficiently removed from each other can broadcast even over the same wave length, but it necessarily follows that they must be so far apart that the wave lengths do not reach or come in contact with each other to the extent of creating interference.

In the case at bar the contestants are so located with reference to each other that the court does not feel that 40 kilocycles is sufficient. The court is of the opinion, however, that until there has been a final hearing of this cause no order prohibiting the defendants from the use of any particular wave length should be entered and to that extent the order heretofore entered will be modified so that it will read that the defendants are restrained and enjoined from broadcasting over a wave length sufficiently near to the one used by the complainant so as to cause any material interference with the programs or announcements of the complainant over and from its broadcasting station to the radio public within a radius of 100 miles, and in order that the defendants may be apprised of the feeling of the court in this regard, while the order is not expressly one of exact limitation, nevertheless the court feels that a distance removed 50 kilocycles from the wave length of the complainant would be a safe distance and that if the defendants use a wave length in closer proximity than the one stated it must be at the risk of the defendants in this cause.

### **Notes and Questions**

5.10. *Oak Leaves* is a road not taken. This report of the case comes from the *Congressional Record*. Senator Clarence Dill (D-WA) had it read into the record on December 10, 1926 (i.e. the month after it was decided) because of its bearing on a radio regulation bill he co-sponsored.<sup>1</sup> That bill became the Radio Act of 1927, which established the licensing system whose essentials are still in force today. Broadcasters require a license from the Federal Communications Commission; those licenses specify, in some detail, the frequency on which they can broadcast, the locations of their transmitters, and the power they can use. The licenses started out being heavily regulated to ensure that each broadcaster's programs served the public interest, but over time the licensing process has become far more ministerial. Subject to some concentrated-ownership restrictions and a few miscellaneous content rules (e.g. compliance with the Emergency Broadcasting System and some rules on children's programming), a broadcaster is free to transmit whatever programming it wants as long as it complies with the FCC's technical requirements. The result is a system that divides the airwaves into geographic and frequency blocks, and gives each of these blocks an exclusive licensee. Anyone else broadcasting on these frequencies in these places is violating the law. Similar systems hand out the right to use other frequencies for other purposes (e.g. mobile phone towers, police radios, satellite communications, etc.). In effect, any unauthorized use of someone else's assigned spectrum is illegal.

Compare this system with the common-law process illustrated by *Oak Leaves*. One obvious difference is how one acquires rights in a frequency: prior use versus governmental assignment. Which of the two seems more likely to lead to an efficient allocation of resources to those best able to make good use of them? Which is fairer to participants? Which is more likely to serve the interests of the listening public? Another evident difference is the different tests for violation of another's rights. Is it fair to say that the FCC exclusive licensing are protected by a kind of right against trespass, while *Oak Leaves* more closely resembles the test for nuisance? Are there any other relevant differences?

The change in the FCC's policies over time is interesting, too. If broadcasting is to be based on licenses, how ought those licenses be given out? And should the FCC care what a licensee does with a license after that? There was a time when lis-

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<sup>1</sup>Being read into the record is not necessarily a sign of importance. Five pages later, Senator Byron Harrison (D-MS) had one of Aesop's fables read into the record to make a point about Republican political maneuvering.

teners' groups routinely filed lawsuits to keep radio stations from changing their formats. See, e.g., *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F. 2d 926 (D.C. Cir. 1973) (remanding to FCC for hearing on whether to allow WGLN to change from "progressive rock" to "middle of the road"). Would that be a better system? Or should the FCC get even further out of the business and not care how licensees use their assigned spectrum at all—e.g., if a licensee wants to stop transmitting FM radio and use the spectrum for mobile phone calls, why should the FCC care? Does calling broadcasting licenses "property" do anything to answer these questions?

Here's another alternative: no licenses at all, and let anyone use the spectrum however they see fit. Before you scoff at this "commons" approach to spectrum allocation, consider that this is how WiFi works. You don't need an FCC license to plug in a home wireless router. The frequency range from 2.4 gigahertz (i.e. 2.4 billion cycles per second) to 2.5 gigahertz is "unlicensed"; the FCC regulates the maximum power that a device can emit, but otherwise, anyone is basically free to use any device they want however they want. How well does your WiFi connection typically work? What about the chaos of interference *Oak Leaves* feared? Would this approach work on a wider scale?

5.11. *Oak Leaves* presents its holding as an almost inevitable consequence of the nature of spectrum. But what is spectrum? Radio broadcasting works by running an electric current through the right kind of circuit, which results in electromagnetic radiation spreading in certain ways that people with the right kinds of devices can detect. Why isn't the relevant "property" here the transmitter and the receiver (both tangible personal property), or the land over which the radiation passes (real property)? So why not handle broadcasting cases using personal property torts ("You damaged my radio tower by interfering with its transmissions") or real property torts ("You trespassed by sending electromagnetic radiation over my land")? Consider this passage from Ronald Coase, *The Federal Communications Commission*, 2 J. L. ECON. 1 (1959):

What does not seem to have been understood is that what is being allocated by the Federal Communications Commission, or, if there were a market, what would be sold, is the right to use a piece of equipment to transmit signals in a particular way. Once the question is looked at in this way, it is unnecessary to think in terms of ownership of frequencies or the ether. Earlier we discussed a case in which it had to be decided whether a confectioner had the right to use machinery which caused noise and vibrations in a neighboring house. It would not have facilitated

our analysis of the case if it had been discussed in terms of who owned sound waves or vibrations or the medium (whatever it is) through which sound waves or vibrations travel. Yet this is essentially what is done in the radio industry. The reason why this way of thinking has become so dominant in discussions of radio law is that it seemed to have developed by using the analogy of the law of airspace. In fact, the law of radio and television has been commonly treated as part of the law of the air. It is not suggested that this approach need lead to the wrong answers, but it tends to obscure the question that is being decided. Thus, whether we have the right to shoot over another man's land has been thought of as depending on who owns the airspace over the land. It would be simpler to discuss what we should be allowed to do with a gun. . . . The problem confronting the radio industry is that signals transmitted by one person may interfere with those transmitted by another. It can be solved by delimiting the rights which various persons possess.

Is this any more helpful than *Oak Leaves*'s analogies to trademarks and water rights?

A related argument is that "spectrum" is the wrong abstraction for regulating multiple people's simultaneous broadcasting. It is true that given the amplitude-modulating radio technology of 1926, WGN's and WGES's broadcasts on nearby frequencies from nearby locations were likely to cause frustrating interference for listeners. But technology changes, and more broadcast technologies don't depend on exclusive assignments of slices of spectrum. One approach is "spread-spectrum," in which a device transmits at a given frequency only for a very short burst and then "hops" to a different frequency for the next bit of its transmission, and so on. This is basically how modern cell phones communicate with towers; the system allows many devices to "share" the same nominal slice of spectrum. Another emerging technology is "ultra-wideband," in which a device transmits on an immensely wide range of frequencies but with very low power—so low that it interferes only minimally with other spectrum users. There are also techniques that involve shaping the geometry of a transmission so it travels only in desired directions. What would *Oak Leaves* have to say about these new technologies? Is it more or less accommodating of them than the FCC's regulatory system?

5.12. What do you make of the defendant's argument that WGN's station was "improperly constructed and operated?" If WGES is causing interference to WGN's signal, should it matter that WGN could avoid the problem by fixing its equipment?

Should it matter how much the changes would cost? On how well-established the appropriate technical standards are?

For that matter, what about better receivers? If more modern radios would allow people in the Chicago area to tune in to WGN at 990 kilohertz without hearing interference from WGES at 950 kilohertz (and vice versa), should WGN really be able to push WGES off the airwaves just because some listeners have antiquated radios? (To borrow the court's analogy to trademarks, what if some people are just confused all the time about everything?)

These can be high-stakes fights. The company LightSquared wanted to build a nationwide wireless network using a mixture of cell towers and satellites. It had FCC permission to use frequencies between 1525 and 1559 megahertz, but the next spectrum band up, from 1559 to 1610 megahertz, was allocated to "radionavigation satellite services"—i.e., GPS. Technical reports agreed with the arguments of GPS makers that LightSquared's proposed transmissions would cause many GPS units, including some on airplanes, to stop working. LightSquared argued that this was not because it would be improperly transmitting outside its assigned band, but because GPS units would be improperly *listening* to transmissions outside of their assigned band. According to LightSquared, inexpensive filters in GPS units would have fixed the problem—but there are millions of GPS units already out there in the world without those filters. In the end, the FCC scrapped LightSquared's plan. Would you have? LightSquared spent three years in bankruptcy following the FCC's decision, and racked up nearly \$2 billion in losses. Could a better system of property rights in spectrum have avoided the conflict entirely?

5.13. Does *Oak Leaves* give legal recognition to property that already exists or create property where none existed before? Or is "property" the wrong way to refer to WGN's rights here?

## 5.4 Intellectual Property

Walters exemplifies **peripheral claiming**, in which the owned property is defined based on the positions of its edges (the "periphery" of the property). The other option for describing property boundaries is **central claiming**, in which the owner places a stake in the ground and asserts ownership in anything sufficiently close to the stake. (You might have seen this idea in movies about the old American West.) For real property, peripheral claiming is used almost exclusively today, as it has the tremendous advantage of precision.

With intellectual property, though, it is often not so simple to identify the boundaries. Patents rely on peripheral claiming: The text of a patent document contains paragraphs called “patent claims” that lay out, in detailed legal and technical terminology, the boundaries of what the patent holder considers the “invention,” such that products or services falling within those boundaries are infringing. Here’s an example of one such patent claim, from U.S. Patent No. 6,004,596:

1. A sealed crustless sandwich, comprising:
  - a first bread layer having a first perimeter surface coplanar to a contact surface;
  - at least one filling of an edible food juxtaposed to said contact surface;
  - a second bread layer juxtaposed to said at least one filling opposite of said first bread layer, wherein said second bread layer includes a second perimeter surface similar to said first perimeter surface;
  - a crimped edge directly between said first perimeter surface and said second perimeter surface for sealing said at least one filling between said first bread layer and said second bread layer;
  - wherein a crust portion of said first bread layer and said second bread layer has been removed.

You can think of the patent claim as a checklist. A sandwich meeting all the listed requirements (first bread layer, filling of an edible food, etc.) would “fall within the scope of the patent claim,” and thus infringe the patent holder’s rights.

Despite the seeming complexity of the words in patent claims, they are a far cry from the precision of real estate boundaries. In the sandwich patent claim, for example, what’s “bread”? Does a cracker count? There’s a “first bread layer” and a “second bread layer,” but what about three-layer club sandwiches? Does a hot dog bun count as one bread layer or two? The process of a court resolving these ambiguities and determining what exactly a patent claim covers is called *claim construction*, and it is one of the most difficult and uncertain parts of patent litigation.

There is a limit on how much ambiguity a patent claim can have. According to 35 U.S.C. § 112(b), a patent claim must “particularly point[] out and distinctly claim[] the subject matter which the inventor or a joint inventor regards as the invention.” A patent claim that fails this requirement is considered “indefinite” and invalid. In *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898 (2014), the Supreme Court in-

terpreted this provision generously, holding that a patent claim need only provide “reasonable certainty” and not absolute precision.

What are the arguments for and against greater precision in patent claims? Think from the perspective of a manufacturer trying to avoid infringing a patent—does it seem unfair that the manufacturer can’t know without expensive litigation? Could ambiguity in patent claims be exploited in problematic ways? On the other hand, do you see any difficulties in requiring inventors to find precise words to describe their inventions?

Peripheral claiming is difficult for patents, but virtually impossible for copyrights and trademarks. Could you describe, in precise words, the extent of things that are too much like *Harry Potter* or the Nike swoosh? As a result, central claiming is necessary for these. A copyright, for example, creates a right to exclude other works that are “substantially similar” to the copyright-protected one—a form of central claiming. A trademark similarly blocks “confusingly similar” marks and uses. That means, however, that the task of determining infringement of these centrally-claimed forms of intellectual property is a fact-intensive, difficult question for courts, often involving fuzzy multi-factor tests.

***Steinberg v. Columbia Pictures Industries, Inc.***

663 F.Supp. 706 (S.D.N.Y. 1987)

**STANTON, District Judge.**

In these actions for copyright infringement, plaintiff Saul Steinberg is suing the producers, promoters, distributors and advertisers of the movie “Moscow on the Hudson” (“Moscow”). Steinberg is an artist whose fame derives in part from cartoons and illustrations he has drawn for *The New Yorker* magazine. . . . Plaintiff alleges that defendants’ promotional poster for “Moscow” infringes his copyright on an illustration that he drew for *The New Yorker* and that appeared on the cover of the March 29, 1976 issue of the magazine, in violation of 17 U.S.C. §§ 101-810. Defendants deny this allegation and assert the affirmative defenses of fair use as a parody, estoppel and laches.

Defendants have moved, and plaintiff has cross-moved, for summary judgment. For the reasons set forth below, this court rejects defendants’ asserted defenses and grants summary judgment on the issue of copying to plaintiff.



**Figure 5.2:** Steinberg's copyrighted magazine cover, and the accused movie poster.

## II

The essential facts are not disputed by the parties despite their disagreements on nonessential matters. On March 29, 1976, *The New Yorker* published as a cover illustration the work at issue in this suit, widely known as a parochial New Yorker's view of the world. The magazine registered this illustration with the United States Copyright Office and subsequently assigned the copyright to Steinberg. Approximately three months later, plaintiff and *The New Yorker* entered into an agreement to print and sell a certain number of posters of the cover illustration.

It is undisputed that unauthorized duplications of the poster were made and distributed by unknown persons, although the parties disagree on the extent to which plaintiff attempted to prevent the distribution of those counterfeits. Plaintiff has also conceded that numerous posters have been created and published depicting other localities in the same manner that he depicted New York in his illustration. These facts, however, are irrelevant to the merits of this case, which concerns only the relationship between plaintiff's and defendants' illustrations.

Defendants' illustration was created to advertise the movie "Moscow on the Hudson," which recounts the adventures of a Muscovite who defects in New York. In designing this illustration, Columbia's executive art director, Kevin Nolan, has admitted that he specifically referred to Steinberg's poster, and indeed, that he purchased it and hung it, among others, in his office. Furthermore, Nolan explicitly directed the outside artist whom he retained to execute his design, Craig Nelson, to use Steinberg's poster to achieve a more recognizably New York look. Indeed, Nelson acknowledged having used the facade of one particular edifice, at Nolan's suggestion that it would render his drawing more "New York-ish." Curtis Affidavit ¶ 28(c). While the two buildings are not identical, they are so similar that it is impossible, especially in view of the artist's testimony, not to find that defendants' impermissibly copied plaintiff's.<sup>1</sup>

To decide the issue of infringement, it is necessary to consider the posters themselves. Steinberg's illustration presents a bird's eye view across a portion of the western edge of Manhattan, past the Hudson River and a telescoped version of the rest of the United States and the Pacific Ocean, to a red strip of horizon, beneath which are three flat land masses labeled China, Japan and Russia. The name of the magazine, in *The New Yorker*'s usual typeface, occupies the top fifth of the poster, beneath a thin band of blue wash representing a stylized sky.

The parts of the poster beyond New York are minimalized, to symbolize a New Yorker's myopic view of the centrality of his city to the world. The entire United States west of the Hudson River, for example, is reduced to a brown strip labeled "Jersey," together with a light green trapezoid with a few rudimentary rock outcroppings and the names of only seven cities and two states scattered across it. The few blocks of Manhattan, by contrast, are depicted and colored in detail. The four square blocks of the city, which occupy the whole lower half of the poster, include numerous buildings, pedestrians and cars, as well as parking lots and lamp posts, with water towers atop a few of the buildings. The whimsical, sketchy style and spiky lettering are recognizable as Steinberg's.

The "Moscow" illustration depicts the three main characters of the film on the lower third of their poster, superimposed on a bird's eye view of

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<sup>1</sup>Nolan claimed also to have been inspired by some of the posters that were inspired by Steinberg's; such secondary inspiration, however, is irrelevant to whether or not the "Moscow" poster infringes plaintiff's copyright by having impermissibly copied it.

New York City, and continues eastward across Manhattan and the Atlantic Ocean, past a rudimentary evocation of Europe, to a clump of recognizably Russian-styled buildings on the horizon, labeled "Moscow." The movie credits appear over the lower portion of the characters. The central part of the poster depicts approximately four New York city blocks, with fairly detailed buildings, pedestrians and vehicles, a parking lot, and some water towers and lamp posts. Columbia's artist added a few New York landmarks at apparently random places in his illustration, apparently to render the locale more easily recognizable. Beyond the blue strip labeled "Atlantic Ocean," Europe is represented by London, Paris and Rome, each anchored by a single landmark (although the landmark used for Rome is the Leaning Tower of Pisa).

The horizon behind Moscow is delineated by a red crayoned strip, above which are the title of the movie and a brief textual introduction to the plot. The poster is crowned by a thin strip of blue wash, apparently a stylization of the sky. This poster is executed in a blend of styles: the three characters, whose likenesses were copied from a photograph, have realistic faces and somewhat sketchy clothing, and the city blocks are drawn in a fairly detailed but sketchy style. The lettering on the drawing is spiky, in block-printed handwritten capital letters substantially identical to plaintiff's, while the printed texts at the top and bottom of the poster are in the typeface commonly associated with *The New Yorker* magazine.<sup>2</sup>

### III

To succeed in a copyright infringement action, a plaintiff must prove ownership of the copyright and copying by the defendant. *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.1976); *Durham Industries*, 630 F.2d at 911; *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir.1977). There is no substantial dispute concerning plaintiff's ownership of a valid copyright in his illustration. Therefore, in order to prevail on liability, plaintiff need establish only the second element of the cause of action.

"Because of the inherent difficulty in obtaining direct evidence of copying, it is usually proved by circumstantial evidence of access to the copyrighted work and substantial similarities as to protectible material in the

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<sup>2</sup>The typeface is not a subject of copyright, but the similarity reinforces the impression that defendants copied plaintiff's illustration.

two works.” *Reyher*, 533 F.2d at 90, *citing Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir.1946). *See also Novelty Textile Mills*, 558 F.2d at 1092. “Of course, if there are no similarities, no amount of evidence of access will suffice to prove copying.” *Arnstein v. Porter*, 154 F.2d at 468. *See also Novelty Textile Mills*, 558 F.2d at 1092 n. 2.

Defendants’ access to plaintiff’s illustration is established beyond per-adventure. Therefore, the sole issue remaining with respect to liability is whether there is such substantial similarity between the copyrighted and accused works as to establish a violation of plaintiff’s copyright. The central issue of “substantial similarity,” which can be considered a close question of fact, may also validly be decided as a question of law. *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir.1985), *citing Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157 (9th Cir.1977).

“Substantial similarity” is an elusive concept. This circuit has recently recognized that

[t]he “substantial similarity” that supports an inference of copying sufficient to establish infringement of a copyright is not a concept familiar to the public at large. It is a term to be used in a courtroom to strike a delicate balance between the protection to which authors are entitled under an act of Congress and the freedom that exists for all others to create their works outside the area protected by infringement.

*Warner Bros.*, 720 F.2d at 245.

The definition of “substantial similarity” in this circuit is “whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.” *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir.1966); *Silverman v. CBS, Inc.*, 632 F.Supp. at 1351-52. A plaintiff need no longer meet the severe “ordinary observer” test established by Judge Learned Hand in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir.1960). *Uneeda Doll Co., Inc. v. Regent Baby Products Corp.*, 355 F.Supp. 438, 450 (E.D.N.Y.1972). Under Judge Hand’s formulation, there would be substantial similarity only where “the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.” 274 F.2d at 489.

Moreover, it is now recognized that “[t]he copying need not be of every detail so long as the copy is substantially similar to the copyrighted work.” *Comptone Co. v. Rayex Corp.*, 251 F.2d 487, 488 (2d Cir. 1958). See also *Durham Industries*, 630 F.2d at 911-12; *Novelty Textile Mills*, 558 F.2d at 1092-93.

In determining whether there is substantial similarity between two works, it is crucial to distinguish between an idea and its expression. It is an axiom of copyright law, established in the case law and since codified at 17 U.S.C. § 102(b), that only the particular expression of an idea is protectible, while the idea itself is not. See, e.g., *Durham Industries*, 630 F.2d at 912; *Reyher*, 533 F.2d at 90, citing *Mazer v. Stein*, 347 U.S. 201, 217, 74 S.Ct. 460, 470, 98 L.Ed. 630 (1954); *Baker v. Selden*, 101 U.S. (11 Otto) 99, 25 L.Ed. 841 (1879). See also *Warner Bros.*, 720 F.2d at 239.

“The idea/expression distinction, although an imprecise tool, has not been abandoned because we have as yet discovered no better way to reconcile the two competing societal interests that provide the rationale for the granting of and restrictions on copyright protection,” namely, both rewarding individual ingenuity, and nevertheless allowing progress and improvements based on the same subject matter by others than the original author. *Durham Industries*, 630 F.2d at 912, quoting *Reyher*, 533 F.2d at 90.

There is no dispute that defendants cannot be held liable for using the *idea* of a map of the world from an egocentrically myopic perspective. No rigid principle has been developed, however, to ascertain when one has gone beyond the idea to the expression, and “[d]ecisions must therefore inevitably be ad hoc.” *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (L. Hand, J.). As Judge Frankel once observed, “Good eyes and common sense may be as useful as deep study of reported and unreported cases, which themselves are tied to highly particularized facts.” *Couleur International Ltd. v. Opulent Fabrics, Inc.*, 330 F.Supp. 152, 153 (S.D.N.Y. 1971).

Even at first glance, one can see the striking stylistic relationship between the posters, and since style is one ingredient of “expression,” this relationship is significant. Defendants’ illustration was executed in the sketchy, whimsical style that has become one of Steinberg’s hallmarks. Both illustrations represent a bird’s eye view across the edge of Manhattan and a river bordering New York City to the world beyond. Both depict approximately four city blocks in detail and become increasingly minimalist

as the design recedes into the background. Both use the device of a narrow band of blue wash across the top of the poster to represent the sky, and both delineate the horizon with a band of primary red.<sup>3</sup>

The strongest similarity is evident in the rendering of the New York City blocks. Both artists chose a vantage point that looks directly down a wide two-way cross street that intersects two avenues before reaching a river. Despite defendants' protestations, this is not an inevitable way of depicting blocks in a city with a grid-like street system, particularly since most New York City cross streets are one-way. Since even a photograph may be copyrighted because "no photograph, however simple, can be unaffected by the personal influence of the author," *Time Inc. v. Bernard Geis Assoc.*, 293 F.Supp. 130, 141 (S.D.N.Y. 1968), quoting *Bleistein, supra*, one can hardly gainsay the right of an artist to protect his choice of perspective and layout in a drawing, especially in conjunction with the overall concept and individual details. Indeed, the fact that defendants changed the names of the streets while retaining the same graphic depiction weakens their case: had they intended their illustration realistically to depict the streets labeled on the poster, their four city blocks would not so closely resemble plaintiff's four city blocks. Moreover, their argument that they intended the jumble of streets and landmarks and buildings to symbolize their Muscovite protagonist's confusion in a new city does not detract from the strong similarity between their poster and Steinberg's.

While not all of the details are identical, many of them could be mistaken for one another; for example, the depiction of the water towers, and the cars, and the red sign above a parking lot, and even many of the individual buildings. The shapes, windows, and configurations of various edifices are substantially similar. The ornaments, facades and details of Steinberg's buildings appear in defendants', although occasionally at other locations. In this context, it is significant that Steinberg did not depict any buildings actually erected in New York; rather, he was inspired by the general appear-

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<sup>3</sup>Defendants claim that since this use of thin bands of primary colors is a traditional Japanese technique, their adoption of it cannot infringe Steinberg's copyright. This argument ignores the principle that while "[o]thers are free to copy the original ... [t]hey are not free to copy the copy." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250, 23 S.Ct. 298, 300, 47 L.Ed. 460 (1903) (Holmes, J.). Cf. *Dave Grossman Designs, Inc. v. Bortin*, 347 F.Supp. 1150, 1156-57 (N.D.Ill.1972) (an artist may use the same subject and style as another "so long as the second artist does not substantially copy [the first artist's] specific expression of his idea.")

ance of the structures on the West Side of Manhattan to create his own New York-ish structures. Thus, the similarity between the buildings depicted in the “Moscow” and Steinberg posters cannot be explained by an assertion that the artists happened to choose the same buildings to draw. The close similarity can be explained only by the defendants’ artist having copied the plaintiff’s work. Similarly, the locations and size, the errors and anomalies of Steinberg’s shadows and streetlight, are meticulously imitated.

In addition, the Columbia artist’s use of the childlike, spiky block print that has become one of Steinberg’s hallmarks to letter the names of the streets in the “Moscow” poster can be explained only as copying. There is no inherent justification for using this style of lettering to label New York City streets as it is associated with New York only through Steinberg’s poster.

While defendants’ poster shows the city of Moscow on the horizon in far greater detail than anything is depicted in the background of plaintiff’s illustration, this fact alone cannot alter the conclusion. “Substantial similarity” does not require identity, and “duplication or near identity is not necessary to establish infringement.” *Krofft*, 562 F.2d at 1167. Neither the depiction of Moscow, nor the eastward perspective, nor the presence of randomly scattered New York City landmarks in defendants’ poster suffices to eliminate the substantial similarity between the posters. As Judge Learned Hand wrote, “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.” *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir.), cert. denied, 298 U.S. 669, 56 S.Ct. 835, 80 L.Ed. 1392 (1936).

Defendants argue that their poster could not infringe plaintiff’s copyright because only a small proportion of its design could possibly be considered similar. This argument is both factually and legally without merit. “[A] copyright infringement may occur by reason of a substantial similarity that involves only a small portion of each work.” *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 624 n. 14 (2d Cir.1982). Moreover, this case involves the entire protected work and an iconographically, as well as proportionately, significant portion of the allegedly infringing work. Cf. *Mattel, Inc. v. Azrak-Hamway Intern., Inc.*, 724 F.2d 357, 360 (2d Cir.1983); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F.Supp. 741, 744 (S.D.N.Y.), aff’d, 623 F.2d 252 (2d Cir. 1980) (taking small part of protected work can violate copyright).

The process by which defendants' poster was created also undermines this argument. The "map," that is, the portion about which plaintiff is complaining, was designed separately from the rest of the poster. The likenesses of the three main characters, which were copied from a photograph, and the blocks of text were superimposed on the completed map. Nelson Deposition at 21-22; Nolan Deposition at 28.

I also reject defendants' argument that any similarities between the works are unprotectible *scènes à faire*, or "incidents, characters or settings which, as a practical matter, are indispensable or standard in the treatment of a given topic." *Walker*, 615 F.Supp. at 436. *See also Reyher*, 533 F.2d at 92. It is undeniable that a drawing of New York City blocks could be expected to include buildings, pedestrians, vehicles, lampposts and water towers. Plaintiff, however, does not complain of defendants' mere use of these elements in their poster; rather, his complaint is that defendants copied his *expression* of those elements of a street scene.

While evidence of independent creation by the defendants would rebut plaintiff's *prima facie* case, "the absence of any countervailing evidence of creation independent of the copyrighted source may well render clearly erroneous a finding that there was not copying." *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir.1970). *See also Novelty Textile Mills*, 558 F.2d at 1092 n. 2.

Moreover, it is generally recognized that "... since a very high degree of similarity is required in order to dispense with proof of access, it must logically follow that where proof of access is offered, the required degree of similarity may be somewhat less than would be necessary in the absence of such proof." 2 Nimmer § 143.4 at 634, *quoted in Krofft*, 562 F.2d at 1172. As defendants have conceded access to plaintiff's copyrighted illustration, a somewhat lesser degree of similarity suffices to establish a copyright infringement than might otherwise be required. Here, however, the demonstrable similarities are such that proof of access, although in fact conceded, is almost unnecessary.

# **Part III**

# **Possession**



# Chapter 6

## Possession of Personal Property

Property ownership is distinct from physical **possession**. Someone other than the owner of land may be standing on it, occupying space and preventing the owner from using the land; someone other than the owner of personal property may be holding it, preventing the owner from accessing and using it. This other person may possess the property with permission from the owner, against the owner's will, or without the owner's knowledge.

Physical possession may seem irrelevant for property law—after all, isn't the whole point of the rule of law that legal rights, not physical might, are determinative? And yet possession alone can, in some situations, give rise to legal rights over things, rights that can properly be deemed "property rights." With respect to land, as we will learn, physical possession in the right conditions can turn into actual ownership by the doctrine of adverse possession.<sup>1</sup> And the story for personal property is even more interesting, because of the number of ways in which movable items can come into someone else's possession. They can be lost, found, borrowed, stored, stolen, mixed up with other things, and more.

This chapter will consider three ways in which possession can give rise to property rights in personality: finding lost items, improvements, and bailment arrangements such as lending. In each of these situations, identify the circumstances that give the physical possessor rights, what rights the possessor has, and against whom those rights apply. What legal relationship does the possessor have with respect to the true owner, and what rights does the possessor have against third parties?

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<sup>1</sup>Adverse possession of personal property is also possible, though somewhat more complicated. See *O'Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980).

## 6.1 Finders

Finders keepers, losers weepers?

### *Armory v. Delamirie*

(1722) 1 Strange 505, 93 Eng. Rep. 664 (K.B.)

The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.
2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.
3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

### Notes and Questions

6.1. One way of describing the holding of *Armory* is that it sets out the rights of finders. Suppose that the “rightful owner” of the jewel, Lord Hobnob, had shown up in the shop while the chimney-sweep and the apprentice were arguing over the jewel. Who would have been entitled to the jewel? If the chimney-sweep is not the “rightful owner,” why does he still win the case? What kind of interest does he have in the jewel?

6.2. A second way of describing the holding of *Armory* is that it illustrates “relativity of title.” As between the plaintiff and the defendant, the party

with the relatively better claim to title wins, even if their title is in some sense defective in an absolute sense. Relativity of title is intimately connected to the idea of “chains of title”: competing claimants to a piece of property each do their best to trace their claims back to a rightful source. What is the source of the chimney-sweep’s claim to the jewel? And the jeweler’s? Does this explain the outcome of the case? What result if the jeweler had proven that he had signed a contract to purchase the jewel from Lord Hobnob but that Lord Hobnob had lost the jewel before delivering it?

6.3. A third way of describing the holding of *Armory* is that it rejects the jeweler’s attempt to assert a *jus tertii* (Latin for “right of a third party”) defense. The defendant cannot defeat the plaintiff’s otherwise-valid claim to the jewel by arguing that a third party – Lord Hobnob – has an even better claim. Put differently, we might say that “as against a wrongdoer, possession is title.” *Jeffries v. Great W. Ry. Co.*, (1856) 119 Eng. Rep. 680, 681 (Q.B.). Does this narrowing of focus to the parties before the court make sense?

Here is one way to think about it. Suppose that Lord Hobnob shows up in court while *Armory* is being argued and explains that the jewel slipped from his finger while he was strolling in Lincoln’s Inn Fields. Who is entitled to the jewel? What if Lord Hobnob shows up and explains that he tossed the jewel aside in the mud, saying “I have become tired of this bauble; it bores me and I no longer wish to have it.” What if he explains that he handed it to the chimney-sweep, saying “I wish you to have this jewel; may it serve you better than it has me.” But recall that in the actual case, Lord Hobnob was nowhere to be found; no one even knew his identity. Does it matter to the outcome of *Armory v. Delamirie* how the jewel passed from Lord Hobnob’s hands to the chimney-sweep’s?

If you are still not convinced, consider this. If the jeweler could set up Lord Hobnob’s title to show that the chimney-sweep’s title was defective, would the chimney-sweep be entitled to present evidence that Lord Hobnob’s title was defective, say because Lord Hobnob stole the jewel from a visiting Frenchman in 1693? Cutting off inquiry into third parties’ claims also helps cut off inquiry into old claims. Can you see why this might be an appealing choice for a system of property law?

6.4. We are not quite done with Lord Hobnob. Consider the remedy the plaintiff obtains: an award of the value of the jewel, rather than the jewel itself. This is in effect a forced sale of the jewel, which the defendant can keep after paying the plaintiff’s damage award. Now who owns the jewel? What if Lord Hobnob shows up now? Can he also bring trover, and if so, will the jeweler be forced to pay out a second time? In fact, why is Paul de Lamerie, the goldsmith whose name the court

mangles, on the hook for his apprentice's wrongdoing? What if the apprentice pocketed the jewel and never turned it over to the master?

6.5. About that damage award. Why is the jury instructed to presume that the jewel was "of the finest water?" (i.e. highest quality)?

## Other Variations on *Armory*

Just how far does the holding of *Armory v. Delamirie* ("That the finder of [property], though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner") go? Consider three nineteenth-century cases about lost lumber. Are they required by *Armory*? Consistent with *Armory*? Consistent with each other? Which is most persuasive?

In *Clark v. Maloney*, 3 Del. 68 (1840), the plaintiff found ten logs floating in a bay after a storm. He tied them up in the mouth of a creek, but they (apparently) got free again and the defendants (apparently) found them floating up the creek. *Held*, the plaintiffs were entitled to the logs:

Possession is certainly *prima facie* evidence of property. It is called *prima facie* evidence because it may be rebutted by evidence of better title, but in the absence of better title it is as effective a support of title as the most conclusive evidence could be. It is for this reason, that *the finder of a chattel, though he does not acquire an absolute property in it, yet has such a property, as will enable him to keep it against all but the rightful owner*. The defence consists, not in showing that the defendants are the rightful owners, or claim under the rightful owner; but that the logs were found by them adrift in Mispillion creek, having been loosened from their fastening either by accident or design, and they insist that their title is as good as that of the plaintiff. But it is a well settled rule of law that the loss of a chattel does not change the right of property; and for the same reason that the original loss of these logs by the rightful owner, did not change his absolute property in them, but he might have maintained trover against the plaintiff upon refusal to deliver them, so the subsequent loss did not divest the *special* property of the plaintiff. It follows, therefore, that as the plaintiff has shown a special property in

these logs, which he never abandoned, and which enabled him to keep them against all the world but the rightful owner, he is entitled to a verdict.

In *Anderson v. Gouldberg*, 53 N.W. 636 (Minn. 1892), the defendants took ninety-three logs from the plaintiff's mill. The defendants claimed that the plaintiff had cut the logs on their land, but the plaintiff replied (and a jury agreed) that he had actually cut the logs by trespassing on the land of a third party. *Held:* the plaintiff was entitled to the logs:

Therefore the only question is whether bare possession of property, though wrongfully obtained, is sufficient title to enable the party enjoying it to maintain replevin against a mere stranger, who takes it from him. We had supposed that this was settled in the affirmative as long ago, at least, as the early case of *Armory v. Delamirie*, so often cited on that point. When it is said that to maintain replevin the plaintiff's possession must have been lawful, it means merely that it must have been lawful as against the person who deprived him of it; and possession is good title against all the world except those having a better title. Counsel says that possession only raises a presumption of title, which, however, may be rebutted. Rightly understood, this is correct; but counsel misapplies it. One who takes property from the possession of another can only rebut this presumption by showing a superior title in himself, or in some way connecting himself with one who has. One who has acquired the possession of property, whether by finding, bailment, or by mere tort, has a right to retain that possession as against a mere wrongdoer who is a stranger to the property. Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner.

*Anderson* states what is overwhelmingly the majority rule. Seven years after *Anderson*, North Carolina took the opposite course. In *Russell v. Hill*, 34 S.E. 640 (N.C. 1899), two different people held what appeared to be state grants to the same tract of land, and the plaintiff cut timber on the land with the wrong one's permission. While the logs were floating in a river, the defendants—unconnected with either of

the purported landowners—took them away and sold them. *Held:* the defendants were entitled to the logs (internal quotation marks omitted):

In some of the English books, and in some of the Reports of our sister states, cases might be found to the contrary, but that those cases were all founded upon a misapprehension of the principle laid down in the case of *Armory v. Delamirie*. There a chimney sweep found a lost jewel. He took it into his possession, as he had a right to do, and was the owner, because of having it in possession, unless the true owner should become known. That owner was not known, and it was properly decided that trover would lie in favor of the finder against the defendant, to whom he had handed it for inspection, and who refused to restore it. But the court said the case would have been very different if the owner had been known.

Is this an accurate reading of *Armory*? The court also expressed concern about the defendant's potential liability to the true owner:

It is true that, as possession is the strongest evidence of the ownership, property may be presumed from possession.... But if it appears on the trial that the plaintiff, although in possession, is not in fact the owner, the presumption of title inferred from the possession is rebutted, and it would be manifestly wrong to allow the plaintiff to recover the value of the property; for the real owner may forthwith bring trover against the defendant, and force him to pay the value the second time, and the fact that he paid it in a former suit would be no defense. Consequently trover can never be maintained unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant.

Is the fear of double liability sufficient reason to allow the defendant to escape liability entirely? Based on a review of the court records in the case, John V. Orth writes that the true owner in *Russell v. Hill* was “no bodiless abstraction but had in fact a name and identity: [Fabius Haywood] Busbee, one of the state’s leading lawyers, a man well known to every member of the supreme court that decided the case.” John V. Orth, *Russell v. Hill (N.C. 1899): Misunderstood Lessons*, 73 N.C. L. Rev. 2031, 2034 (1995). Does this help explain *Russell*?

Professor Orth, arguing for a middle ground between *Anderson* and *Russell*, argues that *Armory* should protect only prior possessors who took the property in good faith: "A technical wrongdoing, such as an innocent trespass, as the source of possession should not disable the possessor from securing judicial protection against an unauthorized taking, but a willful trespass at the root of title should. Plaintiff in *Russell*, in other words, deserved a new trial at which to show, not his title, but his *bona fides*." *Id.* at 2060. Is this a better rule?

***McAvoy v. Medina***

93 Mass. (11 Allen) 548 (1866)

TORT to recover a sum of money found by the plaintiff in the shop of the defendant.

[I]t appeared that the defendant was a barber, and the plaintiff, being a customer in the defendant's shop, saw and took up a pocket-book which was lying upon a table there, and said, "See what I have found." The defendant came to the table and asked where he found it. The plaintiff laid it back in the same place and said, "I found it right there." The defendant then took it and counted the money, and the plaintiff told him to keep it, and if the owner should come to give it to him; and otherwise to advertise it; which the defendant promised to do. Subsequently the plaintiff made three demands for the money, and the defendant never claimed to hold the same till the last demand. It was agreed that the pocket-book was placed upon the table by a transient customer of the defendant and accidentally left there, and was first seen and taken up by the plaintiff, and that the owner had not been found. . . .

**DEWEY, J.**

It seems to be the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule.

But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the

shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe keeping of the same until the owner should call for it. In the case of *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. R. 424, the property, although found in a shop, was found on the floor of the same, and had not been placed there voluntarily by the owner, and the court held that the finder was entitled to the possession of the same, except as to the owner. But the present case more resembles that of *Lawrence v. The State*, 1 Humph. (Tenn.) 228, and is indeed very similar in its facts. The court there take a distinction between the case of property thus placed by the owner and neglected to be removed, and property lost. It was there held that “to place a pocket-book upon a table and to forget to take it away is not to lose it, in the sense in which the authorities referred to speak of lost property.”

We accept this as the better rule, and especially as one better adapted to secure the rights of the true owner.

In view of the facts of this case, the plaintiff acquired no original right to the property, and the defendant’s subsequent acts in receiving and holding the property in the manner he did does not create any.

### Notes and Questions

6.6. In *Lawrence v. State*, on which *McAvoy* relies, the customer did come back for his lost pocketbook containing \$480 in bank notes, which he had left on a table while the barber went out to make change. To quote the court: “The barber left the shop to get the bill changed, and, a fight occurring in the streets, the [customer’s] attention was arrested thereat and he left the shop, his pocket-book lying on the table.” When he returned, the barber “denied all knowledge of the pocket-book” but then “expended [the bank notes] in the purchase of confections, etc.” A criminal prosecution for grand larceny followed, and the barber argued that the pocketbook had been lost because larceny only applies when the defendant takes property from the possession of the victim. The court held that because the pocketbook on a table was merely *mislaid*, rather than “lost,” it was still within the customer’s “constructive possession.” First of all, is this plausible? And second, is this a good fit for the facts of *McAvoy*?

6.7. By way of contrast, in *Bridges v. Hawkesworth*, which *McAvoy* distinguishes, the plaintiff found a small parcel on the floor of the defendant’s shop and immediately showed it to the defendant’s employee. The parcel contained bank notes; the

plaintiff “requested the defendant to deliver them to the owner.” Three years later, with no owner having returned, the court held the plaintiff as finder was entitled to the notes. “If the notes had been accidentally kicked into the street, and then found by someone passing by, could it be contended that the defendant was entitled to them, from the mere fact of their having been dropped in his shop? . . . Certainly not. The notes were never in the custody of the defendant, nor within the protection of his house before they were found, as they would have had they been intentionally deposited there, and the defendant has come under no responsibility.” First, what do you make of the *Bridges* court’s argument that the shopkeeper’s entitlement to the notes should turn on whether he would have been held responsible to the true owner for losing them? And second, is this any better a fit for the facts of *McAvoy*?

6.8. What do you make of the argument that awarding the pocket-book to the shopkeeper is “one better adapted to secure the rights of the true owner?”

6.9. In addition to lost and mislaid property, there is also abandoned property: property which the owner has voluntarily relinquished with no intent to reclaim. Since abandoned property is again unowned, the usual rules of first possession apply. (As you will see in *Pierson v. Post*, these rules themselves are not as simple as “first possessor wins.”). How easy is it to tell the three apart? Why?

6.10. In *Benjamin v. Lindner Aviation*, 534 N.W.2d 400 (Iowa 1995) in which an airplane inspector found \$18,000 in cash inside the wing of an airplane in 1992 while the plane was parked in his employer’s hangar for maintenance. The money, which consisted primarily of \$20 bills dating to the 1950s and 1960s, was in two four-inch packets wrapped in handkerchiefs and tied with string and then wrapped again in aluminum foil. The packets were inserted behind a panel on the underside of the plane’s wing; the panel was secured with rusty screws that had not been removed in several years. The inspector, the employer, and the bank that owned the plane (after repossessing it from a prior owner who had defaulted on a loan) all made claims to the money. Was it lost, mislaid, or abandoned, and who was entitled to it?

6.11. Another category sometimes mentioned in the found-property caselaw is treasure trove: money, gold, or silver intentionally placed underground, which is found long enough later that it is likely the owner is dead or will never return for it. At common law in England, treasure trove belonged to the King. Most American states now treat treasure trove like any other found property. Is this a sensible rejection of an archaic and pointless quirk of the common-law, or was there something to the doctrine?

6.12. In *Hannah v. Peel*, [1945] K.B. 509, the British government requisitioned Gwernhaylod House in 1940 for use during World War II and paid the owner, Major

Hugh Edward Ethelston Peel £250 per year. The house had been conveyed to Major Peel in 1938 but it was unoccupied from then until when it was requisitioned. Duncan Hannah, a lance-corporal with the Royal Artillery, was stationed in the house and was adjusting a blackout curtain in August 1940 when he found something loose in a crevice on top of the window-frame. It turned out to be a brooch covered in cobwebs and dirt; he informed his commanding officer and then turned it over to the police. Two years later, the police gave it to Major Peel, who sold it for £66. Lance-Corporal Hannah sued and was awarded the value of the brooch. The court discussed numerous cases, including *Bridges v. Hawkesworth and South Staffordshire Water Co. v. Sharman*, [1896] 2 Q.B. 44, which awarded two rings found by a workman embedded in the mud at the bottom of a pool to the company that owned the land. From them, it extracted a rule that “a man possesses everything which is attached to or under his land.” Since Major Peel “was never physically in possession of these premises” and hence had no “prior possession” of the brooch, Lance-Corporal Hannah was entitled to it as a finder. Is this possession-based approach a better way of analyzing found-property cases than the categorical lost-vs-mislaid American approach exemplified by *McAvoy*? Or is *Hannah* an oddball outlier driven by the court’s desire to do right by a wartime serviceman “whose conduct was commendable and meritorious,” especially as against an absentee landlord from the local gentry?

## 6.2 Improvers

A chimney-sweep finds a jewel. He gives it to his friend, a jeweler, who designs and crafts a gold ring around the jewel’s unique shape. One day, Jeremiah Hobnob recognizes the jewel he lost last month and demands it back. As against the chimney-sweep, this is an easy case; nowhere near enough time has passed to satisfy the statute of limitations, even in a jurisdiction that imposes a stringent duty of diligent search on owners. But the question is more difficult with respect to the jeweler, who has invested gold and labor to turn the jewel into a ring. If Hobnob is entitled to the now-improved jewel, the jeweler will end up poorer, while Hobnob will receive a windfall.

The common law mitigated the harshness of this result with the rule of *accession*, which provides that someone who sufficiently improves another person’s property is allowed to keep it. Importantly, the hornbook rule is that accession only operates in favor of *good-faith* improvers; someone who knows the property is not hers acts at her own peril when she combines it with her own property or labor. The

jeweler is potentially protected by accession. Also, observe that while ownership of the property may be the primary question in these cases, it is often not the only issue. Once ownership is allocated, courts often require restitutionary payments to shift losses from more innocent to more culpable parties.

***Wetherbee v. Green***

22 Mich. 311 (1871)

This was an action of replevin, brought by George Green, Charles H. Camp and George Brooks, in the circuit court for the county of Bay, against George Wetherbee, for one hundred and fifty-eight thousand black ash barrel-hoops, alleged to be of the value of eight hundred dollars. . . .

**COOLEY, J.:**

The defendants in error replevied of Wetherbee a quantity of hoops, which he had made from timber cut upon their land. Wetherbee defended the replevin suit on two grounds. First, he claimed to have cut the timber under a license from one Sumner, who was formerly tenant in common of the land with Green, and had been authorized by Green to give such license. [This defense failed; Sumner was not authorized to let Wetherbee cut timber on the land.]

But if the court should be against him on this branch of the case, Wetherbee claimed further that replevin could not be maintained for the hoops, because he had cut the timber in good faith, relying upon a permission which he supposed proceeded from the parties having lawful right to give it, and had, by the expenditure of his labor and money, converted the trees into chattels immensely more valuable than they were as they stood in the forest, and thereby he had made such chattels his own. And he offered to show that the standing timber was worth twenty-five dollars only, while the hoops replevied were shown by the evidence to be worth near seven hundred dollars; also [facts tending to show Wetherbee's lack of knowledge of Sumner's duplicity]. The evidence offered to establish these facts was rejected by the court, and the plaintiffs obtained judgment.

The principal question which, from this statement, appears to be presented by the record, may be stated thus: Has a party who has taken the property of another in good faith, and in reliance upon a supposed right, without intention to commit wrong, and by the expenditure of his money or labor, worked upon it so great a transformation as that which this timber

underwent in being transformed from standing trees into hoops, acquired such a property therein that it cannot be followed into his hands and reclaimed by the owner of the trees in its improved condition?

The objections to allowing the owner of the trees to reclaim the property under such circumstances are, that it visits the involuntary wrong-doer too severely for his unintentional trespass, and at the same time compensates the owner beyond all reason for the injury he has sustained. In the redress of private injuries the law aims not so much to punish the wrong-doer as to compensate the sufferer for his injuries; and the cases in which it goes farther and inflicts punitive or vindictive penalties are those in which the wrong-doer has committed the wrong recklessly, willfully, or maliciously, and under circumstances presenting elements of aggravation. Where vicious motive or reckless disregard of right are not involved, to inflict upon a person who has taken the property of another, a penalty equal to twenty or thirty times its value, and to compensate the owner in a proportion equally enormous, is so opposed to all legal idea of justice and right and to the rules which regulate the recovery of damages generally, that if permitted by the law at all, it must stand out as an anomaly and must rest upon peculiar reasons.

As a general rule, one whose property has been appropriated by another without authority has a right to follow it and recover the possession from any one who may have received it; and if, in the mean time, it has been increased in value by the addition of labor or money, the owner may, nevertheless, reclaim it, provided there has been no destruction of substantial identity. So far the authorities are agreed. A man cannot generally be deprived of his property except by his own voluntary act or by operation of law; and if unauthorized parties have bestowed expense or labor upon it, that fact cannot constitute a bar to his reclaiming it, so long as identification is not impracticable. But there must, nevertheless, in reason be some limit to the right to follow and reclaim materials which have undergone a process of manufacture. Mr. Justice Blackstone lays down the rule very broadly, that if a thing is changed into a different species, as by making wine out of another's grapes, oil from his olives, or bread from his wheat, the product belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials converted: 2 Bl. Com., 404. We do not understand this to be disputed as a general proposition, though there are some authorities which hold that, in the case of a willful

appropriation, no extent of conversion can give to the willful trespasser a title to the property so long as the original materials can be traced in the improved article. The distinction thus made between the case of an appropriation in good faith and one based on intentional wrong, appears to have come from the civil law, which would not suffer a party to acquire a title by accession, founded on his own act, unless he had taken the materials in ignorance of the true owner, and given them a form which precluded their being restored to their original condition: 2 Kent, 363. While many cases have followed the rule as broadly stated by Blackstone, others have adopted the severe rule of the civil law where the conversion was in willful disregard of right. The New York cases of *Betts v. Lee*, 5 Johns., 348; *Curtis v. Groat*, 6 Johns., 168, and *Chandler v. Edson*, 9 Johns., 362, were all cases where the willful trespasser was held to have acquired no property by a very radical conversion, and in *Silsbury v. McCoon*, 3 N. Y., 378, 385, the whole subject is very fully examined . . . . [In *Silsbury*, a thief who turned the plaintiff's corn into whiskey did not thereby acquire ownership of it.] But we are not called upon in this case to express any opinion regarding the rule applicable in the case of a willful trespasser, since the authorities agree in holding that, when the wrong had been involuntary, the owner of the original materials is precluded, by the civil law and common law alike, from following and reclaiming the property after it has undergone a transformation which converts it into an article substantially different.

The cases of confusion of goods are closely analogous. It has always been held that he who, without fraud, intentional wrong, or reckless disregard of the rights of others, mingled his goods with those of another person, in such manner that they could not be distinguished, should, nevertheless, be protected in his ownership so far as the circumstances would permit. The question of motive here becomes of the highest importance; for, as Chancellor Kent says, if the commingling of property "was willfully made without mutual consent, \* \* the common law gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed: Popham's Rep. 38, Pl. 2. If A will willfully intermix his corn or hay with that of B, or casts his gold into another's crucible, so that it becomes impossible to distinguish what belonged to A from what belonged to B, the whole belongs to B. But this rule only applies to wrongful or fraudulent intermixtures. There may be an intentional intermingling, and yet no wrong intended, as where a man mixes two parcels

together, supposing both to be his own; or, that he was about to mingle his with his neighbor's, by agreement, and mistakes the parcel. In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust that he should lose his own or be obliged to take and pay for his neighbor's, as he would have been under the civil law: In many cases there will be difficulty in determining precisely how he can be protected with due regard to the rights of the other party; but it is clear that the law will not forfeit his property in consequence of the accident or inadvertence, unless a just measure of redress to the other party renders it inevitable.

The important question on this branch of the case appears to us to be, whether standing trees, when cut and manufactured into hoops, are to be regarded as so far changed in character that their identity can be said to be destroyed within the meaning of the authorities. And as we enter upon a discussion of this question, it is evident at once that it is difficult, if not impossible, to discover any invariable and satisfactory test which can be applied to all the cases which arise in such infinite variety. "If grain be taken and made into malt, or money taken and made into a cup, or timber taken and made into a house, it is held in the old English law that the property is so altered as to change the title." 2 Kent, 363. But cloth made into garments, leather into shoes, trees hewn or sawed into timber, and iron made into bars, it is said may be reclaimed by the owner in their new and original shape: Some of the cases place the right of the former owner to take the thing in its altered condition upon the question whether its identity could be made out by the senses. But this is obviously a very unsatisfactory test, and in many cases would wholly defeat the purpose which the law has in view in recognizing a change of title in any of these cases. That purpose is not to establish any arbitrary distinctions, based upon mere physical reasons, but to adjust the redress afforded to the one party and the penalty inflicted upon the other, as near as circumstances will permit, to the rules of substantial justice[.]

It may often happen that no difficulty will be experienced in determining the identity of a piece of timber which has been taken and built into a house; but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might, perhaps, be traced without trouble into a church organ, or other equally valuable article; but no one would defend a rule of law which, because the identity could be determined by the senses, would permit the owner of the wood to appropriate

a musical instrument, a hundred or a thousand times the value of his original materials, when the party who, under like circumstances, has doubled the value of another man's corn by converting it into malt, is permitted to retain it, and held liable for the original value only. Such distinctions in the law would be without reason, and could not be tolerated. When the right to the improved article is the point in issue, the question, how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached, and the musical instrument belongs to the maker rather than to the man whose timber was used in making it—not because the timber cannot be identified, but because, in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original materials. The labor, in the case of the musical instrument, is just as much the principal thing as the house is in the other case instanced; the timber appropriated is in each case comparatively unimportant.

No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstance of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundred-fold, is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expensive to the party making it, nor adds materially to the value. There may be complete changes with so little improvement in value, that there could be no hardship in giving the owner of the original materials the improved article; but in the present case, where the defendant's labor—if he shall succeed in sustaining his offer of testimony—will appear to have given the timber in its present condition nearly all its value, all the grounds of equity exist which influence the courts in recognizing a change of title under any circumstances.

We are of opinion that the court erred in rejecting the testimony offered. The defendant, we think, had a right to show that he had manufactured the hoops in good faith, and in the belief that he had the proper authority to do so; and if he should succeed in making that showing, he was entitled to have the jury instructed that the title to the timber was changed

by a substantial change of identity, and that the remedy of the plaintiff was an action to recover damages for the unintentional trespass. . . .

### Notes and Questions

6.13. What factors matter most to the court's holding? Is this a case about the relative value contributed by the plaintiff and defendant, about the difficulty of identifying the plaintiff's original property, about the difficulty of separating it, or about the degree to which it has been physically altered? Consider *Atlas Assurance Co. v. Gibbs*, 183 A. 690 (Conn. 1936), which involved the engine from a damaged car (the Hibben car) that had been properly sold and the body of a car (the Sherline car) that had been stolen. The defendant's predecessor in title combined the two to make one working car. In an action for replevin by the assignee of title to the Sherline car, who should get what?

6.14. How important is Wetherbee's good faith? What if he had been told by Green that Sumner lacked authority, but had examined Sumner's title in some detail and concluded that Green was wrong? What if Wetherbee steals a set of paints and uses it to create a portrait that sells for \$500,000?

6.15. Note that Green retains "an action to recover damages for the unintentional trespass." What is the measure of those damages? Given that Wetherbee owns the hoops via accession, why does he need to pay? Or, to look at it another way, why doesn't an adverse possessor need to pay for the value of the property he retains after the statute of limitations has run?

6.16. Sometimes property transforms itself. A cow from Farmer Jones's herd wanders onto Farmer Smith's land, where it is impregnated by Farmer Smith's bull. Who owns the calf? Does it matter where the cow gives birth? Felix Cohen, in *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954), claimed that every legal system in human history appears to have resolved these cases in the same way. Compare the case in which Farmer Smith's bull kicks Farmer Jones's cow and badly injures it. What result then?

6.17. Another theme in confusion cases involves the distinction between unique and fungible property. If I mistakenly pour your 55-gallon drum of water into my storage tank, you are entitled to draw 55 gallons of water from the tank, even though it is astoundingly improbable that you will get back the same water molecules you started with. Water is water. If I mistakenly mix your bottle of 1967 Chateau de Snoot wine with my bottle of 2015 Rotgut Red, I can't give you a bottle of the resulting mixture and call it even. (What are you entitled to?)

But note that uniqueness is something courts create as well as discover. At the start of the 19th century, wheat and other grains were stored and sold as though they were unique goods; each farmer's and merchant's sacks of grain were treated as distinct from each other's. Today, grain has been standardized and is sold as a commodity: a merchant could order 100 bushels of U.S. No. 1 Hard Red Spring Wheat without needing to specify or worry about what particular farms it came from. A key to this shift was courts' willingness to treat grain (and many other agricultural commodities) as fungible. A merchant whose sacks of wheat were dumped into a grain elevator without his consent would be entitled to the same quantity of wheat of the same standard class, not to his specific sacks or even to wheat with the same more specific characteristics. What was gained and what was lost in this shift?

## 6.3 Bailments

A **bailment** is an arrangement where the owner of personal property entrusts the property to another. The owner is called the **bailor**, while the recipient is called the **bailee**. Common bailees include delivery services, dry cleaners, and friends who borrow others' casebooks. These arrangements split full ownership from physical possession, and raise several issues regarding the parties' respective rights. What are the duties between the bailor and bailee? And what rights and duties do each of them have with respect to third parties?

### *Allen v. Hyatt Regency-Nashville Hotel* 668 S.W.2d 286 (Tenn. 1984)

**HARBISON, Justice.**

In this case the Court is asked to consider the nature and extent of the liability of the operator of a commercial parking garage for theft of a vehicle during the absence of the owner. Both courts below, on the basis of prior decisions from this state, held that a bailment was created when the owner parked and locked his vehicle in a modern, indoor, multi-story garage operated by appellant in conjunction with a large hotel in downtown Nashville. We affirm.

There is almost no dispute as to the relevant facts. Appellant is the owner and operator of a modern high-rise hotel in Nashville fronting on the south side of Union Street. Immediately to the rear, or south, of the main

hotel building there is a multi-story parking garage with a single entrance and a single exit to the west, on Seventh Avenue, North. As one enters the parking garage at the street level, there is a large sign reading "Welcome to Hyatt Regency-Nashville." There is another Hyatt Regency sign inside the garage at street level, together with a sign marked "Parking." The garage is available for parking by members of the general public as well as guests of the hotel, and the public are invited to utilize it.

On the morning of February 12, 1981, appellee's husband, Edwin Allen, accompanied by two passengers, drove appellee's new 1981 automobile into the parking garage. Neither Mr. Allen nor his passengers intended to register at the hotel as a guest. Mr. Allen had parked in this particular garage on several occasions, however, testifying that he felt that the vehicle would be safer in an attended garage than in an unattended outside lot on the street.

The single entrance was controlled by a ticket machine. The single exit was controlled by an attendant in a booth just opposite to the entrance and in full view thereof. Appellee's husband entered the garage at the street level and took a ticket which was automatically dispensed by the machine. The machine activated a barrier gate which rose and permitted Mr. Allen to enter the garage. He drove to the fourth floor level, parked the vehicle, locked it, retained the ignition key, descended by elevator to the street level and left the garage. When he returned several hours later, the car was gone, and it has never been recovered. Mr. Allen reported the theft to the attendant at the exit booth, who stated, "Well, it didn't come out here." The attendant did not testify at the trial.

Mr. Allen then reported the theft to security personnel employed by appellant, and subsequently reported the loss to the police. Appellant regularly employed a number of security guards, who were dressed in a distinctive uniform, two of whom were on duty most of the time. These guards patrolled the hotel grounds and building as well as the garage and were instructed to make rounds through the garage, although not necessarily at specified intervals. One of the security guards told appellee's husband that earlier in the day he had received the following report:

He said, "It's a funny thing here. On my report here a lady called me somewhere around nine-thirty or after and said that there was someone messing with a car."

The guard told Mr. Allen that he closed his office and went up into the garage to investigate, but reported that he did not find anything unusual or out of the ordinary.

Customers such as Mr. Allen, upon entering the garage, received a ticket from the dispensing machine. On one side of this ticket are instructions to overnight guests to present the ticket to the front desk of the hotel. The other side contains instructions to the parker to keep the ticket and that the ticket must be presented to the cashier upon leaving the parking area. The ticket states that charges are made for the use of parking space only and that appellant assumes no responsibility for loss through fire, theft, collision or otherwise to the car or its contents. The ticket states that cars are parked at the risk of the owner, and parkers are instructed to lock their vehicles. The record indicates that these tickets are given solely for the purpose of measuring the time during which a vehicle is parked in order that the attendant may collect the proper charge, and that they are not given for the purpose of identifying particular vehicles.

The question of the legal relationship between the operator of a vehicle which is being parked and the operator of parking establishments has been the subject of frequent litigation in this state and elsewhere. The authorities are in conflict, and the results of the cases are varied.

It is legally and theoretically possible, of course, for various legal relationships to be created by the parties, ranging from the traditional concepts of lessor-lessee, licensor-licensee, bailor-bailee, to that described in some jurisdictions as a "deposit." Several courts have found difficulty with the traditional criteria of bailment in analyzing park-and-lock cases. One of the leading cases is *McGlynn v. Parking Authority of City of Newark*, 432 A.2d 99 (N.J. 1981). There the Supreme Court of New Jersey reviewed numerous decisions from within its own state and from other jurisdictions, and it concluded that it was more "useful and straightforward" to consider the possession and control elements in defining the duty of care of a garage operator to its customers than to consider them in the context of bailment. That Court concluded that the "realities" of the relationship between the parties gave rise to a duty of reasonable care on the part of operators of parking garages and parking lots. It further found that a garage owner is usually better situated to protect a parked car and to distribute the cost of protection through parking fees. It also emphasized that owners usually expect to receive their vehicles back in the same condition in which

they left them and that the imposition of a duty to protect parked vehicles and their contents was consistent with that expectation. The Court went further and stated that since the owner is ordinarily absent when theft or damage occurs, the obligation to come forward with affirmative evidence of negligence could impose a difficult, if not insurmountable, burden upon him. After considering various policy considerations, which it acknowledged [to] be the same as those recognized by courts holding that a bailment is created, the New Jersey Court indulged or authorized a presumption of negligence from proof of damage to a car parked in an enclosed garage.

Although the New Jersey Court concluded that a more flexible and comprehensive approach could be achieved outside of traditional property concepts, Tennessee courts generally have analyzed cases such as this in terms of sufficiency of the evidence to create a bailment for hire by implication. We believe that this continues to be the majority view and the most satisfactory and realistic approach to the problem, unless the parties clearly by their conduct or by express contract create some other relationship.

The subject has been discussed in numerous previous decisions in this state. One of the leading cases is *Dispeker v. New Southern Hotel Co.*, 373 S.W.2d 904 (Tenn. 1963). In that case the guest at a hotel delivered his vehicle to a bellboy who took possession of it and parked it in a lot adjoining the hotel building. The owner kept the keys, but the car apparently was capable of being started without the ignition key. The owner apparently had told the attendant how to so operate it. Later the employee took the vehicle for his own purposes and damaged it. Under these circumstances the Court held that a bailment for hire had been created and that upon proof of misdelivery of the vehicle the bailee was liable to the customer.

In the subsequent case of *Scruggs v. Dennis*, 440 S.W.2d 20 (Tenn. 1969), upon facts practically identical to those of the instant case, the Court again held that an implied bailment contract had been created between a customer who parked and locked his vehicle in a garage. Upon entry he received a ticket dispensed by a machine, drove his automobile to the underground third level of the garage and parked. He retained his ignition key, but when he returned to retrieve the automobile in the afternoon it had disappeared. It was recovered more than two weeks later and returned to the owner in a damaged condition.

In that case the operator of the garage had several attendants on duty, but the attendants did not ordinarily operate the parked vehicles, as in the instant case.

Although the Court recognized that there were some factual differences between the *Scruggs* case and that of *Dispeker v. New Southern Hotel Co.*, *supra*, it concluded that a bailment had been created when the owner parked his vehicle for custody and safe keeping in the parking garage, where there was limited access and where the patron had to present a ticket to an attendant upon leaving the premises.

A bailment relationship was also found in *Jackson v. Metropolitan Government of Nashville*, 483 S.W.2d 92 (Tenn. 1972), when faculty members of a high school conducted an automobile parking operation for profit upon the high school campus. A customer who parked his vehicle there was allowed recovery for theft, even though he had parked the vehicle himself after paying a fee, had locked the vehicle and had kept the keys.

On the contrary, in the case of *Rhodes v. Pioneer Parking Lot, Inc.*, 501 S.W.2d 569 (Tenn. 1973), a bailment was found not to exist when the owner left his vehicle in an open parking lot which was wholly unattended and where he simply inserted coins into a meter, received a ticket, then parked the vehicle himself and locked it.

Denying recovery, the Court said:

In the case at bar, however, we find no evidence to justify a finding that the plaintiff delivered his car into the custody of the defendant, nor do we find any act or conduct upon the defendant's part which would justify a reasonable person believing that an obligation of bailment had been assumed by the defendant. 501 S.W.2d at 571.

In the instant case, appellee's vehicle was not driven into an unattended or open parking area. Rather it was driven into an enclosed, indoor, attended commercial garage which not only had an attendant controlling the exit but regular security personnel to patrol the premises for safety.

Under these facts we are of the opinion that the courts below correctly concluded that a bailment for hire had been created, and that upon proof of nondelivery appellee was entitled to the statutory presumption of negligence provided in T.C.A. § 24-5-111.

We recognize that there is always a question as to whether there has been sufficient delivery of possession and control to create a bailment when

the owner locks a vehicle and keeps the keys. Nevertheless, the realities of the situation are that the operator of the garage is, in circumstances like those shown in this record, expected to provide attendants and protection. In practicality the operator does assume control and custody of the vehicles parked, limiting access thereto and requiring the presentation of a ticket upon exit. As stated previously, the attendant employed by appellant did not testify, but he told appellee's husband that the vehicle did not come out of the garage through the exit which he controlled. This testimony was not amplified, but the attendant obviously must have been in error or else must have been inattentive or away from his station. The record clearly shows that there was no other exit from which the vehicle could have been driven.

Appellant made no effort to rebut the presumption created by statute in this state (which is similar to presumptions indulged by courts in some other jurisdictions not having such statutes). While the plaintiff did not prove positive acts of negligence on the part of appellant, the record does show that some improper activity or tampering with vehicles had been called to the attention of security personnel earlier in the day of the theft in question, and that appellee's new vehicle had been removed from the garage by some person or persons unknown, either driving past an inattentive attendant or one who had absented himself from his post, there being simply no other way in which the vehicle could have been driven out of the garage.

Under the facts and circumstances of this case, we are not inclined to depart from prior decisions or to place the risk of loss upon the consuming public as against the operators of commercial parking establishments such as that conducted by appellant. We recognize that park-and-lock situations arise under many and varied factual circumstances. It is difficult to lay down one rule of law which will apply to all cases. The expectations of the parties and their conduct can cause differing legal relationships to arise, with consequent different legal results. We do not find the facts of the present case, however, to be at variance with the legal requirements of the traditional concept of a bailment for hire. In our opinion it amounted to more than a mere license or hiring of a space to park a vehicle, unaccompanied by any expectation of protection or other obligation upon the operator of the establishment.

The judgment of the courts below is affirmed at the cost of appellant. The cause will be remanded to the trial court for any further proceedings which may be necessary.

**DROWOTA, Justice, dissenting.**

In this case we are asked to consider the nature and extent of liability of the operator of a commercial “park and lock” parking garage. In making this determination, we must look to the legal relationship between the operator of the vehicle and the operator of the parking facility. The majority opinion holds that a bailment contract has been created, and upon proof of non-delivery Plaintiff is entitled to the statutory presumption of negligence provided in T.C.A. § 24-5-111. I disagree, for I find no bailment existed and therefore the Plaintiff does not receive the benefit of the presumption. Consequently, the Plaintiff had the duty to prove affirmatively the negligence of the operator of the parking facility and this Plaintiff failed to do.

The majority opinion states that “courts have found difficulty with the traditional criteria of bailment in analyzing park and lock cases.” The majority discusses the case of *McGlynn v. Parking Authority of City of Newark*, 86 N.J. 551, 432 A.2d 99 (1981), which suggests that bailment is an outmoded concept for analyzing parking lot and garage cases. In *Garlock v. Multiple Parking Services, Inc.*, 427 N.Y.S.2d 670, 677 (1980), the court stated that “the ‘bailment theory’ as a basis for recovery in parking lot cases is no longer appropriate.” That court concluded that since the concept of bailment is no longer a viable theory in application to a very real modern problem that the proper standard to be followed in such cases is “reasonable care under the circumstances whereby foreseeability shall be a measure of liability.” *Id.*, 427 N.Y.S.2d at 678.

Even though some courts now suggest that the theory of bailment is an archaic and inappropriate theory upon which to base liability in modern park and lock cases, the majority opinion states that “Tennessee courts generally have analyzed cases such as this in terms of sufficiency of the evidence to create a bailment for hire by implication,” and concludes that this is “the most satisfactory and realistic approach to the problem.” I do not disagree with the longstanding use of the bailment analysis in this type of case. I do disagree, however, with the majority’s conclusion that a bailment for hire has been created in this case.

The record shows that upon entering this parking garage a ticket, showing time of entry, is automatically dispensed by a machine. The ticket states that charges are made for the use of a parking space only and that the garage assumes no responsibility for loss to the car or its contents. The ticket further states that cars are parked at the risk of the owner, and parkers are instructed to lock their vehicles. The majority opinion points out that it is not insisted that this language on the ticket is sufficient to exonerate the garage, since the customer is not shown to have read it or to have had it called to his attention. *Savoy Hotel Corp. v. Sparks*, 421 S.W.2d 98 (Tenn. Ct. App. 1967). The ticket in no way identifies the vehicle, it is given solely for the purpose of measuring the length of time during which the vehicle is parked in order that a proper charge may be made.

In this case Mr. Allen, without any direction or supervision, parked his car, removed his keys, and locked the car and left the parking garage having retained his ignition key. The presentation of a ticket upon exit is for the sole purpose of allowing the cashier to collect the proper charge. The cashier is not required to be on duty at all times. When no cashier is present, the exit gate is opened and no payment is required.<sup>1</sup> As the majority opinion states, the ticket is "not given for the purpose of identifying particular vehicles." The ticket functioned solely as a source of fee computation, not of vehicle identification.

The majority opinion states: "[W]e do not find the facts of the present case to be at variance with the legal requirements of the concept of a bailment for hire." I must disagree, for I feel the facts of the present case are clearly at variance with what I consider to be the legal requirements of the traditional concept of a bailment for hire.

Bailment has been defined by this Court in the following manner:

The creation of a bailment in the absence of an express contract requires that possession and control over the subject matter pass from the bailor to the bailee. In order to constitute a sufficient delivery of the subject matter there must be a full transfer, either actual or constructive, of the property to the bailee so as to exclude it from the possession of the owner and

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<sup>1</sup>Between one or two in the morning and six or seven a.m., the garage is entirely open without a cashier to collect parking fees. During the day if the cashier leaves his or her post on a break, the exit gate is opened and the vehicle owner may exit without payment.

all other persons and give to the bailee, for the time being, the sole custody and control thereof.

In parking lot and parking garage situations, a bailment is created where the operator of the lot or garage has knowingly and voluntarily assumed control, possession, or custody of the motor vehicle; if he has not done so, there may be a mere license to park or a lease of parking space.

*Rhodes v. Pioneer Parking Lot, Inc.*, 501 S.W.2d 569, 570 (Tenn. 1973).

From its earliest origins, the most distinguishing factor identifying a bailment has been delivery. Our earliest decisions also recognize acceptance as a necessary factor, requiring that possession and control of the property pass from bailor to bailee, to the exclusion of control by others. The test thus becomes whether the operator of the vehicle has made such a delivery to the operator of the parking facility as to amount to a relinquishment of his exclusive possession, control, and dominion over the vehicle so that the latter can exclude it from the possession of all others. If so, a bailment has been created.

When the automobile began replacing the horse and buggy, our courts allowed bailment law to carry over and govern the parking of vehicles. In cases such as *Old Hickory Parking Corp. v. Alloway*, 177 S.W.2d 23 (Tenn. Ct. App. 1943), and *Savoy Hotel v. Sparks*, 421 S.W.2d 98 (Tenn. Ct. App. 1967), where the operator of the vehicle left his vehicle with an attendant and left the keys for the attendant to move the vehicle as he wished, the bailment relationship was evident for we had a clear delivery, acceptance of possession, control, and exercise of dominion over the vehicle—all the traditional elements of a bailment. In *Dispeker v. New Southern Hotel Company*, 373 S.W.2d 904 (Tenn. 1963), a bellboy parked plaintiff's car, plaintiff retained the keys but explained to the bellboy that the car could be operated without the key, and apparently showed him how to operate it. The bellboy went off duty, then returned and stole the car. Once again, the traditional elements of delivery and control were present.

These cases involving parking attendants and personalized service have caused us no problems. The problem arises in this modern era of automated parking, when courts have attempted to expand the limits of existing areas of the law to encompass technological and commercial advances. Such is the case of *Scruggs v. Dennis*, 440 S.W.2d 20 (Tenn. 1969), relied upon in the majority opinion. In *Scruggs*, as in this case, the entire operation is

automated, with the exception of payment upon departure. The operation bears little, if any, resemblance to the circumstances found in *Old Hickory Parking Corp.*, *Savoy Hotel*, and *Dispeker*. Yet the Court in Scruggs, in quoting extensively from the *Dispeker* opinion, states that “There are some minute differences of fact . . .” Id., 440 S.W.2d at 22. As pointed out above, the differences of fact in *Dispeker* are not minute or so similar as the Scruggs court would suggest. Delivery, custody and control are clearly present in *Dispeker*. I fail to find such delivery, custody and control in *Scruggs* or in the case at bar. In *Dispeker*, the vehicle was actually taken from the owner by an attendant. I believe the Scruggs court and the majority opinion today attempt to apply bailment law in situations where there is not a true bailment relationship. . . .

The majority opinion, as did the Scruggs court, finds custody and control implied because of the limited access and because “the presentation of a ticket upon exit” is required. I cannot agree with this analysis as creating a bailment situation. I do not believe that based upon the fact that a ticket was required to be presented upon leaving, that this factor created a proper basis upon which to find a bailment relationship. The ticket did not identify the vehicle or the operator of the vehicle, as do most bailment receipts. The cashier was not performing the traditional bailee role or identifying and returning a particular article, but instead was merely computing the amount owed and accepting payment due for use of a parking space. I do not believe the Defendant exercised such possession and control over Plaintiff’s automobile as is necessary in an implied bailment. . . .

The full transfer of possession and control, necessary to constitute delivery, should not be found to exist simply by the presentation of a ticket upon exit. In the case at bar, I find no such delivery and relinquishment of exclusive possession and control as to create a bailment. Plaintiff parked his car, locked it and retained the key. Certainly Defendant cannot be said to have sole custody of Plaintiff’s vehicle, for Defendant could not move it, did not know to whom it belonged, and did not know when it would be reclaimed or by whom. Anyone who manually obtained a ticket from the dispenser could drive out with any vehicle he was capable of operating. Also, a cashier was not always on duty. When on duty, so long as the parking fee was paid—by what means could the Defendant reasonably exercise control? The necessary delivery and relinquishment of control by

the Plaintiff, the very basis upon which the bailment theory was developed, is missing.

We should realize that the circumstances upon which the principles of bailment law were established and developed are not always applicable to the operation of the modern day automated parking facility. The element of delivery, of sole custody and control are lacking in this case.

### **Notes and Questions**

6.18. Bailments raise interesting issues about the bailor's and bailee's relationships with third parties. Suppose Lord Hobnob takes a valuable jewel to a jewelry shop for repair. While it is there, a chimney-sweep smashes the window and runs off with it. Obviously Lord Hobnob can presently sue the chimney-sweep to recover the jewel or its value. (*Is this so obvious?*) But what about the jeweler? He's admittedly not the owner of the jewel. Should he nonetheless be allowed to sue the chimney-sweep? If the answer is yes, and he wins damages, can he keep the money? If the jeweler wins damages from the chimney-sweep, can the chimney-sweep be held liable in a subsequent suit by Lord Hobnob for the same amount?

6.19. Here's another variation. Suppose a chimney-sweep finds a jewel and gives it to a jeweler for safekeeping. Lord Hobnob, the true owner, shows up in a carriage and a huff, and demands the jewel from the jeweler. Can the jeweler turn it over? Must he? If he does, is he liable to his bailor, the chimney-sweep, for mis-delivery? Consider *The Winkfield*, [1902] P. 42 (C.A. 1901), in which the *Winkfield*, a government ship carrying mail, was damaged in a collision with the *Mexican*. The government sued the owners of the *Mexican* and included a claim for mail lost as a result of the collision. The *Mexican*'s owners responded that the government was not liable to the parties whose mail was lost, and so had suffered no compensable damages. Is this a persuasive objection?

6.20. For time immemorial, potential bailees have attempted to limit their potential liability by contract. Why didn't the ticket in *Allen* suffice to protect the hotel from liability for the lost car?

6.21. A common concern of bailees is taking responsibility for unexpectedly valuable items. In *Peet v. Roth Hotel*, 253 N.W. 546 (Minn. 1934), the plaintiff left her engagement ring with a hotel employee with instructions to give it to a jeweler who paid regular visits to the hotel and was known to its employees. She testified:

I had it [the ring] on my finger, and took it off my finger. The Cashier—I told the Cashier that it was for Mr. Ferdinand Hotz.

She took out an envelope and wrote “Ferdinand Hotz.” I remember spelling it to her, and then I left. . . . I handed the ring to the Cashier, and she wrote on the envelope. . . . The only instructions I remember are telling her that it was for Mr. Ferdinand Hotz who was stopping at the hotel.

The ring was stolen while in the hotel’s possession and a jury awarded \$2,140.66 in damages. The hotel objected, arguing that plaintiff “failed to divulge the unusual value of her ring when she left it with [the cashier, who] testified that, at the moment, she did not realize its value.” The court was unsympathetic, writing, “No decision has been cited and probably none can be found where the bailee of an article of jewelry, undeceived as to its identity, was relieved of liability because of his own erroneous underestimate of its value.” Is this fair? Compare Minnesota’s modern statute on innkeepers’ liability, in Minn. Stat. § 327.71(1):

No innkeeper who has in the establishment a fireproof, metal safe or vault, in good order and fit for the custody of valuables, and who keeps a copy of this subdivision clearly and conspicuously posted at or near the front desk and on the inside of the entrance door of every bedroom, shall be liable for the loss of or injury to the valuables of a guest unless: (1) the guest has offered to deliver the valuables to the innkeeper for custody in the safe or vault; and (2) the innkeeper has omitted or refused to take the valuables and deposit them in the safe or vault for custody and to give the guest a receipt for them. Except as otherwise provided in subdivision 6, the liability of an innkeeper for the loss of or injury to the valuables of a guest shall not exceed \$1,000. No innkeeper shall be required to accept valuables for custody in the safe or vault if their value exceeds \$1,000, unless the acceptance is in writing.

Would this statute have changed the result in *Peet*? How does it alter the relationship between hotels and guests? Does it explain why hotel rooms typically have a statement of this sort posted on the inside of their doors?

Here is part of the Uniform Commercial Code’s take on the issue (in the context of carriers’ liability for lost or damaged goods given to them for delivery):

Damages may be limited by a term in the bill of lading or in a transportation agreement that the carrier’s liability may not exceed a value stated in the bill or transportation agreement if the

carrier's rates are dependent upon value and the consignor is afforded an opportunity to declare a higher value and the consignor is advised of the opportunity. However, such a limitation is not effective with respect to the carrier's liability for conversion to its own use. . . .

UCC § 7-309(b). What do you think of this solution?



# Chapter 7

## Adverse Possession

Few doctrines taught in the first year of law school make a worse first impression than adverse possession. **Adverse possession** enables a non-owner to gain title to land (or personal property, but we will focus here on land) after the expiration of the statute of limitations for the owner to recover possession. That sounds bad, and the thought of “squatters” becoming owners gets its share of bad press. But historically the doctrine has performed, and continues to serve, important functions.

The basic requirements, if not their wording and application, are common from state to state. As one treatise summarizes, an adverse possessor must prove possession that is:

- hostile (perhaps under a claim of right);
- exclusive;
- open and notorious;
- actual; and
- continuous for the requisite statutory period.

16 POWELL ON REAL PROPERTY § 91.01. States routinely add to the list. California law, for example, requires that

the claimant must prove: (1) possession under claim of right or color of title; (2) actual, open, and notorious occupation of the premises constituting reasonable notice to the true owner; (3) possession which is adverse and hostile to the true owner; (4)

continuous possession for at least five years; and (5) payment of all taxes assessed against the property during the five-year period.

*Main St. Plaza v. Cartwright & Main, LLC*, 124 Cal. Rptr. 3d 170, 178 (Cal. App. 2011) (citations and quotations omitted).

## 7.1 Adverse Possession Rationales

But why allow adverse possession? One court summarized the doctrine's history and purposes as follows:

. . . a brief history of adverse possession may be of assistance. After first using an amalgamation of Roman and Germanic doctrine, our English predecessors in common law later settled upon statutes of limitation to effect adverse possession. See Axel Teisen, *Contributions of the Comparative Law Bureau*, 3 A.B.A. J. 97, 126, 127, 134 (1917). In practice, the statutes eliminated a rightful owner's ability to regain possession after the passing of a certain number of years, thereby vesting de facto title in the adverse possessor. For example, a 1623 statute of King James I restricted the right of entry to recover possession of land to a period of twenty years. Essentially, in England, the “[o]riginal policy supporting the development of adverse possession reflected society's unwillingness to take away a ‘right’ which an adverse possessor thought he had. Similarly, society felt the loss of an unknown right by the title owner was minimal.” William G. Ackerman & Shane T. Johnson, Comment, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 Land & Water L. Rev. 79, 83 (1996). . . .

In the United States, although the 1623 statute of King James I “came some years after the settling of Jamestown (the usual date fixed as the crystalizing of the common law in America), its fiat is generally accepted as [our] common law. Hence ‘adverse possession’ for 20 years under the common law in this country passes title to the adverse possessor with certain stated qualifications.” 10 *Thompson on Real Property* §

87.01 at 75. Today, all fifty states have some statutory form of adverse possession . . . .

. . . . Courts and commentators generally ascribe to “four traditional justifications or clusters of justifications which support transferring the entitlement to the [adverse possessor] after the statute of limitations runs: the problem of lost evidence, the desirability of quieting titles, the interest in discouraging sleeping owners, and the reliance interests of [adverse possessors] and interested third persons.” Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 Nw. U. L. Rev. 1122, 1133 (1984). Effectively, our society has made a policy determination that “all things should be used according to their nature and purpose” and when an individual uses and preserves property “for a certain length of time, [he] has done a work beneficial to the community.” Teisen, 3 A.B.A. J. at 127. For his efforts, “his reward is the conferring upon him of the title to the thing used.” *Id.* Esteemed jurist Oliver Wendell Holmes, Jr. went a step further than Teisen, basing our society’s tolerance of adverse possession on the ideal that “[a] thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.” *O Centro Espírito Beneficente União Do Vegetal v. Ashcroft*, 389 F.3d 973, 1016 (10th Cir. 2004) (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 477 (1897)).

Regardless of how deeply the doctrine is engrained in our history, however, courts have questioned “whether the concept of adverse possession is as viable as it once was, or whether the concept always squares with modern ideals in a sophisticated, congested, peaceful society.” *Finley*, 160 Cal. Rptr. at 427. Commentators have also opined that, along with the articulated benefits of adverse possession, numerous disadvantages exist including the “infringement of a landowner’s rights, a decrease in value of the servient estate, and the encouraged [over]exploitation and [over]development of land. In addition, they . . . [include] the generation of animos-

ity between neighbors, a source of damages to land or loss of land ownership, and the creation of uncertainty for the landowner.”\* Ackerman, 31 Land & Water L. Rev. at 92. In reality, “[a]dverse possession ‘[i]s nothing more than a person taking someone else’s private property for his own private use.’ It is hard to imagine a notion more in contravention of the ideals set forth in the U.S. Constitution protecting life, liberty and property.” Ackerman, 31 Land & Water L. Rev. at 94-95 (quoting 2 C.J.S. Adverse Possession § 2 (1972)).

Although this Court duly recognizes its role as the judicial arm of government tasked with applying the law, rather than making law, it is not without an eyebrow raised at the ancient roots and arcane rationale of adverse possession that we apply the doctrine to this modern property dispute.

*Cahill v. Morrow*, 11 A.3d 82, 86-88 (R.I. 2011). Do you share the court’s skepticism? Consider the rationales discussed above against the following case.

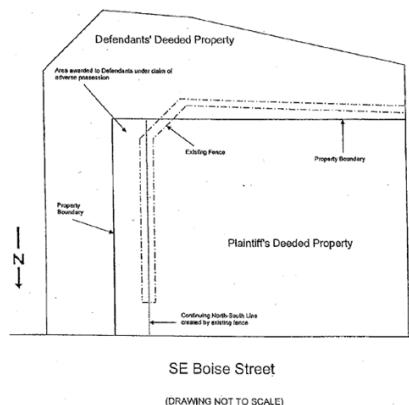
***Tieu v. Morgan***  
265 P.3d 98 (Or. Ct. App. 2011)

**HADLOCK, J.**

The parties dispute ownership of a strip of land that runs parallel to defendants’ driveway. Plaintiff, who owns residential property adjoining that strip of land, filed suit seeking (1) a declaration that he owns the disputed strip and (2) an injunction prohibiting defendants from trespassing on that property. Defendants counterclaimed, asserting that they acquired the disputed strip through adverse possession, and subsequently moved for summary judgment on that counterclaim. The trial court granted defendants’ motion and entered a judgment declaring that defendants had acquired the strip through adverse possession. Plaintiff appeals, and we affirm. . . .

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\*The modifications to the quotation from Ackerman are ours, not the court’s. —Eds.



The two parcels subject to this appeal are adjoining residential tax lots in a Portland subdivision. Tax lot 3100 is rectangular, with its north side fronting Southeast Boise Street. Tax lot 3200 is a flag lot that is situated largely south of lot 3100; its driveway (the "flagpole") runs north from the main portion of the lot (the "flag") to Southeast Boise Street, parallel to the eastern edge of lot 3100. The disputed three-foot-wide strip lies between lot 3200's driveway and lot 3100. Defendants own lot 3200. Plaintiff owns lot 3100 and also is the record owner of the disputed strip.

A north-south stretch of fence on plaintiff's property runs along the western boundary of the disputed strip, parallel to defendants' driveway. The fence starts roughly halfway down the driveway from Southeast Boise Street, running south, then turns 45 degrees to the southwest, cutting off the southeast corner of lot 3100, then makes another 45-degree turn before continuing west, roughly following the east-west boundary between lots 3100 and 3200. The diagonal portion of the fence that cuts the corner of lot 3100 includes a gate wide enough to accommodate a boat trailer. As noted, the disputed three-foot-wide strip lies between defendants' driveway and the north-south fence on lot 3100; its practical effect is to widen the "flagpole" portion of lot 3200.

The fencing that separates the two properties has existed for decades. As of 1984, the two lots were owned by Robert Stevens, who installed most of the fencing that year, including about half of the north-south stretch located west of lot 3200's driveway. In 1994, Robert Stevens sold lot 3200 to his son, James Stevens, believing that the deed he conveyed to James included all property on the east side of a north-south line defined by that

portion of the fence, *i.e.*, the disputed strip. Although he never specifically discussed the issue with his father, James also believed that his purchase of the flag lot included the disputed strip along his driveway. James explained that he had “no reason to know—to think [that the fence] would be in the wrong location.”

During the four years that James owned the flag lot, he granted Robert permission to occasionally use James’s driveway and the disputed strip, so that Robert could drive a large vehicle and boat trailer through the diagonal gate into Robert’s back yard. In 1996, James installed a sewer line in the center of the disputed strip, running all the way from Southeast Boise Street to the house on lot 3200. When James later put lot 3200 on the market, he advertised it as having a “fully fenced yard,” based on his belief that his ownership included the disputed strip.

James sold lot 3200 to defendants in 1998. The lot was not surveyed in conjunction with that sale; nor did the parties to the sale discuss the lot’s recorded boundaries, review paperwork or maps, or perform any investigation specifically related to that subject.

Defendants have made use of the disputed strip since they purchased lot 3200. Defendant Francine Morgan runs a daycare business from her home, and parents regularly use the disputed strip when dropping off and picking up their children. In 1999, defendants extended the fence paralleling the strip north by roughly 40 feet, choosing not to extend the fence all the way to Southeast Boise Street after Robert suggested that they leave that area unfenced to accommodate maneuvering large vehicles in and out of their driveways. Defendants have laid gravel and bark dust on the disputed strip a number of times and have maintained the fence by replacing posts and fence boards. While Robert still owned lot 3100, he specifically asked defendants’ permission each time he wanted to use the disputed strip to access or move his boat, and defendants granted that permission.

Plaintiff bought lot 3100 from Robert in early 2006. Before purchasing the property, plaintiff had it surveyed and learned that the north-south fence was not located on the deeded boundary between lots 3100 and 3200. A survey pin marking the recorded boundary was placed at that time. Plaintiff claims that he told defendant Francine Morgan soon after the survey was completed that he planned to move the fence to the deeded property line within two years. According to plaintiff, Francine neither disputed plaintiff’s right to move the fence nor claimed ownership of land between

the survey marker and the fence. Defendants deny that such a conversation occurred.

In 2008, plaintiff attempted to remove the north-south portion of the fence. After defendants protested, plaintiff initiated this action, seeking a declaration that he owned the disputed strip. As noted, defendants asserted in a counterclaim that they had acquired the strip through adverse possession. The trial court ultimately granted summary judgment to defendants, ruling that the undisputed facts established that defendants had acquired the disputed strip through adverse possession. . . .

ORS 105.620 codifies the common-law elements of adverse possession, requiring a claimant to prove by clear and convincing evidence that the claimant or the claimant's predecessors in interest maintained actual, open, notorious, exclusive, hostile, and continuous possession of the property for ten years. In addition to those common-law elements, the statute also requires the claimant to have had an honest belief of actual ownership when he or she entered into possession of the property.

Plaintiff makes arguments related to each of the statutory elements, first claiming that defendants did not establish actual, open, notorious, exclusive, or continuous possession of the entire disputed strip. We recently summarized what proof is required to satisfy those elements of an adverse-possession claim:

“The element of actual use is satisfied if a claimant established a use of the land that would be made by an owner of the same type of land, taking into account the uses for which the land is suited. To establish a use that is open and notorious, plaintiffs must prove that their possession is of such a character as to afford the owner the means of knowing it, and of the claim. The exclusivity of the use also depends on how a reasonable owner would or would not share the property with others in like circumstances. A use is continuous if it is constant and not intermittent. The required constancy of use, again, is determined by the kind of use that would be expected of such land.”

*Stiles v. Godsey*, 233 Or. App. 119, 126, 225 P.3d 81 (2009) (internal quotations and citations omitted).

Here, the land in question is a three-foot-wide strip, covered mostly with gravel or bark dust, adjacent to a narrow driveway. Defendants and

their predecessor have used the strip as an extension of that driveway since 1994, both to accommodate wide vehicles and to provide additional loading room for defendant Francine Morgan's daycare clients. That use is consistent with ownership and with the land's character. Moreover, that use was "open" and "notorious," particularly when considered together with James's act of locating his sewer line on the strip and, later, defendants' maintenance of and improvements to the fence. Finally, defendants and their predecessor used the strip continuously from 1994 (when James bought the lot) to at least 2006 (when plaintiff bought lot 3100 from Robert), *i.e.*, for longer than the statutory 10-year adverse-possession period. Thus, the undisputed facts establish defendants' actual, open, notorious, exclusive, and continuous use of the property.

Plaintiff's contrary argument rests on the fact that the disputed strip is not completely separated from his residential lot by a fence; he emphasizes that the fence at issue does not extend all the way to Southeast Boise Street, but starts partway down the driveway. . . . Here, even though the fence does not extend to the street, it adequately defines the entire disputed strip, indicating that it is separate from the land that abuts it to the west.

Plaintiff also contends that defendants' use of the disputed strip was not "exclusive" because Robert sometimes used the property even after the fence was built. But adverse-possession claimants are allowed the freedom to allow others to occasionally use their property, in the manner that neighbors are wont to do, without thereby abandoning their claim. In this case, Robert asked permission of defendants and their predecessors each time that he used the disputed strip; that permissive use was consistent with defendants' ownership of the land and does not defeat their claim to it.

We also reject plaintiff's argument that defendants' use of the disputed strip was not "hostile" because, he claims, defendants had a conscious doubt regarding the property line. Under ORS 105.620(2)(a), a claimant "maintains 'hostile possession' of property if the possession is under claim of right or with color of title." A "claim of right" may be established through proof of an honest but mistaken belief of ownership, resulting, for example, from a mistake as to the correct location of a boundary. The mistaken belief must be a "pure" mistake, however, and not one based upon "conscious doubt" about the true boundary. Furthermore, ORS 105.620(1)(b) requires that the claimants (or their predecessors) have had an "honest belief" of

actual ownership that (1) continued through the vesting period, (2) had an objective basis, and (3) was reasonable under the circumstances.

In *Mid-Valley Resources, Inc. v. Engelson*, 170 Or. App. 255 (2000), we concluded that the defendants had failed to establish pure mistake about the location of a boundary line because one of the defendants had a conscious doubt on that subject. That *Mid-Valley* defendant had testified that she had not known where the property line was when she was a child, and she still did not know at the time of trial whether a particular fence was located on that boundary. That defendant's uncertainty about the property line's location defeated the defendants' adverse-possession claim.

Here, by contrast, the undisputed evidence clearly establishes that defendants and their predecessor, James, always believed that the fence marked the north-south line between lots 3200 and 3100. James assumed when he bought lot 3200 in 1994 that the fence was on the property line, and he perpetuated that belief in defendants by telling them, when they bought the property, that it was "fully fenced." Robert, then the record owner of the disputed strip, confirmed those mistaken beliefs when he did not object to installation of the sewer line, to defendants' use of the strip, or to defendants' extension of the fence. No evidence in the record supports plaintiff's assertion that defendants had a "conscious doubt" about whether the fence was actually located on the line separating their property from plaintiff's. Defendants did suggest in their depositions that they had not given much thought to the property line's location until the dispute arose with plaintiff. Read in context, however, those statements simply confirm defendants' *certainty* that the property line was the same as the fence line; the statements do not indicate that defendants had any conscious doubt as to the boundary's location.

Moreover, no evidence calls into question the reasonableness of defendants' belief that they owned the disputed strip. That strip of land is small in relation to the size of lots 3200 and 3100, it regularly has been used as an extension to the width of an existing driveway, it is well suited to that purpose, and it is partly fenced off from plaintiff's property. Under the circumstances, defendants' belief that they owned the disputed strip was reasonable.

In sum, the undisputed evidence establishes clearly and convincingly that defendants and their predecessor, James, had an "honest belief" that the disputed strip was part of lot 3200 and that they continuously main-

tained actual, open, notorious, exclusive, and hostile possession of that strip for well over 10 years, from 1994 at least until plaintiff bought lot 3100 in 2006.<sup>6</sup> We conclude that defendants' adverse-possession claim to the disputed strip vested in 2004, giving them title and extinguishing any claim that plaintiff might otherwise have had to that land.

### Notes and Questions

7.1. Does the result in *Tieu* jibe with the rationales for adverse possession recited in the note preceding it? Which ones? *Cahill* suggests that these rationales are less relevant today than in the past. Do you agree? Should the defendants in *Tieu* have been without recourse?

7.2. *Tieu* involves an error in a conveyance. The parties' predecessors in interest thought they had bargained to transfer land that they didn't. This is a common source of adverse possession litigation. Other recurring fact patterns include mistaken deed descriptions, surveying errors, and accidental encroachments by neighbors. Adverse possession claims may also follow the souring of relationships, perhaps between cotenants or one involving permissive land use. None of these cases necessarily involve bad faith actors; although the doctrine may indeed be applied in favor of the mere trespasser, depending on the jurisdiction's interpretation of the state of mind required to satisfy the "hostility" element. We will discuss this issue further below.

7.3. Title based on adverse possession is as good as any. To think through the implications of that observation, imagine the following facts. Neighbor A mistakenly builds a fence on her neighbor's land and gains title to the enclosed land by adverse possession. Neighbor B then notices the encroachment and demands that A move the fence. She agrees, but changes her mind two years later and rebuilds it. B sues for trespass. Who wins?

7.4. **Open and notorious possession.** Whatever its merits, adverse possession is strong medicine. The doctrine therefore provides safeguards to prevent a title

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<sup>6</sup>We reject plaintiff's argument that defendants cannot satisfy the 10-year adverse-possession period by tacking their possession to that of James. An adverse-possession claimant may tack his possessory interests to those of a predecessor "if there is evidence that the predecessor intended to transfer whatever adverse possessory rights he or she may have acquired." *Fitts v. Case*, 243 Or. App. 543, 549, 267 P3d 160 (2011). Here, James clearly intended his transfer of lot 3200 to defendants to include the disputed strip, given his belief that the fence marked the boundary line and his advertisement of lot 3200 as "fully fenced."

owner from losing her property without adequate notice by, for example, requiring that the possession be open and notorious—it has to be the kind of act that an owner would notice.

But even overt acts may not be obvious threats to ownership rights. A fence on someone else's property certainly seems open and notorious, but what if it is just an inch or two over the border? What about the three-foot incursion at issue in *Tieu*? What if it had been built while the plaintiff was in occupation of his lot? Do we expect owners to commission surveys anytime a neighbor builds near the property line?

For some courts, the answer is no. *Mannillo v. Gorski*, 255 A.2d 258, 264 (N.J. 1969), for example, holds that minor encroachments are not open and notorious without actual knowledge on the part of the title owner. But where would that leave an innocent encroacher, whose trespass may be costly to remedy? In *Mannillo*, the court balked at placing the trespasser, whose steps and concrete walk extended 15 inches into the plaintiffs' property, at her neighbor's mercy.

It is conceivable that the application of the foregoing rule may in some cases result in undue hardship to the adverse possessor who under an innocent and mistaken belief of title has undertaken an extensive improvement which to some extent encroaches on an adjoining property. In that event . . . equity may furnish relief. Then, if the innocent trespasser of a small portion of land adjoining a boundary line cannot without great expense remove or eliminate the encroachment, or such removal or elimination is impractical or could be accomplished only with great hardship, the true owner may be forced to convey the land so occupied upon payment of the fair value thereof without regard to whether the true owner had notice of the encroachment at its inception. Of course, such a result should eventuate only under appropriate circumstances and where no serious damage would be done to the remaining land as, for instance, by rendering the balance of the parcel unusable or no longer capable of being built upon by reason of zoning or other restrictions.

*Id.*<sup>1</sup> Is this result—a forced transaction in which the innocent trespasser becomes the owner, but must pay—the best accommodation of the relevant interests? If the true owner wasn’t on notice of the incursion, why can she be forced to surrender her land, even for payment?

**7.5. Adverse possession and the property owner.** State-to-state variation about whether encroachments need to be obvious may reflect a deeper question about the purpose of adverse possession. Some authorities view the doctrine as having an object of punishing inattentive owners who sleep on their rights. If so, then perhaps it makes sense to require an incursion to be sufficiently obvious that a property owner would not need to conduct a survey to determine the existence of a violation.

But should sleeping owners be the target of the doctrine? Are property owners who fail to assert their rights also less likely to develop their property (or sell it to someone who will)? And if that is the underlying end, are there any problems with using adverse possession doctrine as a means to it?

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<sup>1</sup>As *Manillo*’s resort to equity shows, adverse possession is not the only way to address boundary disputes. Other options include the equitable doctrine of acquiescence, see, e.g., *Hamlin v. Niedner*, 955 A.2d 251, 254 (Me. 2008) (“To prove that title or a boundary line is established by acquiescence, a plaintiff must prove four elements by clear and convincing evidence: (1) possession up to a visible line marked clearly by monuments, fences or the like; (2) actual or constructive notice of the possession to the adjoining landowner; (3) conduct by the adjoining landowner from which recognition and acquiescence, not induced by fraud or mistake, may be fairly inferred; and (4) acquiescence for a long period of years[.]”); the doctrine of agreed boundaries, *Finley v. Yuba Cnty. Water Dist.*, 160 Cal. Rptr. 423, 428 (Cal. App. 1979); estoppel, see, e.g., *Douglas v. Rowland*, 540 S.W.2d 252 (Tenn. App. 1976), and laches. See generally L. C. Warden, *Mandatory injunction to compel removal of encroachments by adjoining landowner*, 28 A.L.R.2d 679 (Originally published in 1953) (discussing factors influencing issuance of an injunction).

Laches raises a conceptual difficulty, as it seems to cover some of the same ground as adverse possession. Laches is an equitable defense analogous to the legal defense provided by a statute of limitations: if a plaintiff unreasonably delays in bringing suit and the defendant is prejudiced by the delay, laches will bar the suit as a matter of equity. But if an owner tries to recover land within the limitations period, doesn’t that imply that there has been no unreasonable delay? *Clanton v. Hathorn*, 600 So. 2d 963, 966 (Miss. 1992) (observing that the adverse possession statute “would seem to occupy the field”); *Kelly v. Valparaiso Realty Co.*, 197 So. 2d 35, 36 (Fla. Dist. Ct. App. 1967) (where adverse possession was unavailable due to failure to pay taxes on the land “we do not feel that equity can be invoked to circumvent the statutory law of adverse possession”); see generally 27A AM. JUR. 2D EQUITY § 163 (“Only rarely should laches bar a case before the statute of limitations has run.”). But see *Pufahl v. White*, No. 2050-S, 2002 WL 31357850, at \*1 (Del. Ch. Oct. 9, 2002) (although laches claim cannot lead to title, the “laches defense may, however, be applicable to the plaintiffs’ request to enjoin the defendants to remove the encroachment”).

7.6. **Adverse possession as reward.** The reciprocal view—that adverse possession exists to reward the possessors—has two flavors. One is externally focused. The possessor, by putting the land to productive use, “has done a work beneficial to the community.” Axel Teisen, 3 A.B.A. J. 97, 127 (1917). The other is more internal:

A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. It is only by way of reply to the suggestion that you are disappointing the former owner, that you refer to his neglect having allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another.

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897). Do either of these views resonate? What does this rationale tell you about what the state of mind of the adverse possessor should be?

#### 7.7. **Third-party interests.**

The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.

Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918) (footnotes omitted). By providing stability to existing property arrangements after the passage of time, adverse possession simplifies transactions by relieving purchasers and mortgagees of the risk that they are dealing with title founded on a long-ago mistake or trespass. The doctrine is a healing mechanism that realigns possession and paperwork when they’ve gotten too badly out of sync. The benefit extends to the legal system as well by relieving courts of the need to delve into the details of long-forgotten events.

7.8. **Adverse possession’s information function.** Adverse possession also enables rights that exist as a matter of custom (e.g., “the Smiths always farm that strip of land”) to receive legal status. A banker in a distant city may not understand (or trust) allocations based on local understandings, but that doesn’t matter if the

claims are translated into recordable title.<sup>2</sup> The land may now serve as the object of a sale or collateral for a loan for an expanded audience, enhancing its value. Adverse possession's role in converting informal understandings into formal rights illustrates law's ability to facilitate the aggregation and dissemination of information across society. Can you think of others?

7.9. **Tacking.** What happens if a series of possessors occupy a property, but none of them are present long enough for the limitations period to run? *Tieu* notes in passing the concept of tacking, which enables a succession of adverse possessors to collectively satisfy the statutory period. The usual approach is to allow tacking so long as the successive possessors are in "privity": a relationship in which the prior possessor knowingly and intentionally transfers whatever interest she holds to the subsequent possessor. See, e.g., *Stump v. Whibco*, 715 A.2d 1006 (N.J. Super. Ct. App. 1998) ("Tacking is generally permitted "unless it is shown that the claimant's predecessor in title did not intend to convey the disputed parcel.") (citations and quotation omitted). So the clock continues to run if one possessor sells or leases the occupied land, but there is no privity if one trespasser wanders onto the lot after another leaves (or worse, dispossesses the earlier trespasser by force).

Recall the question of whether adverse possession doctrine is more properly focused on rewarding deserving possessors or punishing inattentive owners. Does the U.S. approach to tacking shed light on our answer? The English view is to allow tacking without privity. Cf. James Ames, *LECTURES ON LEGAL HISTORY* 197 (1913) ("English lawyers regard not the merit of the possessor, but the demerit of the one out of possession. The statutes of limitation provide . . . not that the adverse possessor shall acquire title, but that the one who neglects for a given time to assert his right shall thereafter not enforce it.").

7.10. **Adverse possession and the environment.** An underlying premise of the rationales discussed above is that land should be used. For an argument that this tilt makes adverse possession doctrine environmentally harmful, see John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 840 (1994) (arguing that "American adverse possession law is fundamentally hostile to the private preservation of wild lands" and proposing exemption to doctrine for privately held wild lands).

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<sup>2</sup>"Quiet title" suits perform this function. They are actions that establish the claimant's title to land and foreclose the ability of others to contest it. Although quiet title suits are not necessary to gain rights under adverse possession doctrine, they are very important to adverse possessors. Do you see why? If you cannot answer the question, ask yourself whether you would ever buy property from an adverse possessor.

## 7.2 "Hostility" and Intent

Adverse possession requires possession that is "hostile" and, often, "under a claim of right." Hostility is not animosity. "Hostile possession can be understood as possession that is opposed and antagonistic to all other claims, and that conveys the clear message that the possessor intends to possess the land as his or her own." 16 POWELL ON REAL PROPERTY § 91.01[2]. The requirement thus prevents permissive occupancy from ripening into ownership; a lessor need not worry that the tenant will claim title by adverse possession. See, e.g., *Rise v. Steckel*, 652 P.2d 364, 372 (1982) ("[T]he ten-year statutory period for adverse possession did not begin to run until defendant asserted to plaintiff that he was possessing the property in his own right, rather than as a tenant at sufferance."). A "claim of right," sometimes called claim of title,<sup>3</sup> means that the possessor is holding the property as an owner would. This could be seen as synonymous with the hostility requirement, but not all jurisdictions treat the concept this way. The Powell treatise states that the predominant view in the United States is that good faith is not required for adverse possession, 16 POWELL § 91.01[2], but as you may have already noticed in the *Tieu* case above, intent often matters.

### ***Cahill v. Morrow*** 11 A.3d 82 (R.I. 2011)

**INDEGLIA, J.**

The property in dispute is located on Gooseberry Road in the Snug Harbor section of South Kingstown, Rhode Island. Identified as lot 19 on assessor's plat 88-1, the land is sandwiched between lot 20, currently owned by Cahill, and lot 18, formerly coowned by members of the Morrow family. Morrow is the record owner of the subject property, lot 19.

In 1969, Morrow's husband, George Morrow, purchased lot 19, and the same year George and his brothers jointly purchased lot 18. At the time of lot 19's purchase, it was largely undeveloped, marked only by a preexisting clothesline, grass, and trees. Since that time, the Morrows have not improved or maintained lot 19, but have paid all property taxes assessed to it. As such, instead of vacationing on their lot 19, the Morrows annually spent two weeks in the summer at the cottages on the adjacent lot 18. During these vacations, the Morrow children and their cousins played on lot

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<sup>3</sup> Which is not the same thing as "color of title," as discussed below.

19's grassy area. Around 1985, the Morrows ceased summering on Gooseberry Road,<sup>3</sup> but continued to return at least once a year to view the lot. Morrow stopped visiting lot 19 in October 2002, after her husband became ill, and she did not return again until July 2006.

In 1971, two years after George Morrow purchased lot 19, Cahill's mother bought the land and house designated as lot 20 as a summer residence. Between 1971 and 1975, Cahill and her brother did some work on lot 19. They occasionally cut the grass, placed furniture, and planted trees and flowers on it.

Cahill's mother passed away in 1975, and in 1977, after purchasing her siblings' shares, Cahill became the sole record owner of the lot 20 property. Once she became lot 20's owner, Cahill began living in the house year-round. From that time through 1991, she and her boyfriend, James M. Cronin, testified that they continued to mow lot 19's grass on occasion. In addition, she hung clothing on the clothesline, attached flags to the clothesline pole, used the picnic table, positioned a bird bath and feeder, and planted more flowers and trees. Cahill placed Adirondack chairs on lot 19 and eventually replaced the clothesline and picnic table. In 1987, Cahill held the first annual "cousins' party" allowing her relatives free rein with respect to her property and lot 19 for playing, sitting, and car parking. She also entertained friends and family on lot 19 during other summer days. Mary Frances McGinn, Cahill's cousin, likewise recalled that lot 19 was occupied by Cahill kindred during various family functions throughout this time period. Cahill admitted that she never objected to neighborhood children using lot 19, however.

During the period of 1991 through 1997, Cahill testified that she planted more flowers and trees, in addition to cutting the grass occasionally. Cahill also stored her gas grill and yard furniture on the lot and had her brother stack lobster pots for decorative purposes. In 1991 or 1992, she began hosting the annual "Cane Berry Blossom Festival," another outdoor event that used both her lot and lot 19 as the party venue. Like the other gatherings, the festival always took place on a day during a warm-weather month. In 1997 or 1998, she installed a wooden border around the flower beds.

On July 22, 1997, Cahill wrote to George Morrow expressing an interest in obtaining title to lot 19. In the 1997 letter, Cahill stated: "I am interested in learning if your narrow strip of property is available for sale. If so, I would

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<sup>3</sup>In 1991, George Morrow and his joint-owner brothers sold lot 18.

be interested in discussing purchasing it from you." Cahill continued: "If there is a possibility that you would like to sell it, could you please either call me or send me a note?" Cahill did not receive a response.

In the "late 1990s," though Cahill is unclear whether this occurred before or after the 1997 letter, a nearby marina sought permission to construct and elevate its property. Cahill attended the related zoning board hearings and expressed her concerns about increased flooding on lot 19 due to the marina elevation. She succeeded in having the marina developer grade part of lot 19 to alleviate flooding. Additionally, Cahill instituted her own trench and culvert drainage measures to divert water off of lot 19 and then reseeded the graded area. By Cahill's own admission, however, her trenching and reseeding work occurred in 1999 or 2000.

Subsequent to 2001, the new owners of lot 18<sup>5</sup> stored their boat on lot 19 and planted their own flowers and small trees on the property. In 2002, when the town (with approval from George Morrow) erected a stone wall and laid a sidewalk on the Gooseberry Road border of lot 19, Cahill loamed and planted grass on that portion of the lot. Also in 2002, Cahill asked Morrow's two sisters on separate occasions whether George Morrow would be interested in selling lot 19. The Morrows gave no response to her 2002 inquiries. In 2003, George Morrow passed away.

After making her third inquiry concerning the purchase of lot 19 in 2002, Cahill testified, she continued using the property in a fashion similar to her prior practice until December 2005, when she noticed heavy-machinery tire marks and test pits on the land. Thereafter, she retained counsel and authorized her attorney to send a letter on January 10, 2006 to Morrow indicating her adverse possession claim to a "20-foot strip of land on the northerly boundary" of lot 19. According to a survey of the disputed property, however, the width of lot 19 from the northerly boundary (adjacent to Cahill's property) to lot 18 is 49.97 feet and therefore, more than double what Cahill originally claimed in this letter. Nonetheless, on April 25, 2006, Cahill instituted a civil action requesting a declaration that based on her "uninterrupted, quiet, peaceful and actual seisin and possession" "for a period greater than 10 years," she was the true owner of lot 19 in its entirety. On July 25, 2007, the trial justice agreed that Cahill had

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<sup>5</sup>In approximately 2001, new owners purchased lot 18 from the Morrow brothers' successor.

proved adverse possession under G.L. 1956 § 34-7-1 and vested in her the fee simple title to lot 19. . . .

In Rhode Island, obtaining title by adverse possession requires actual, open, notorious, hostile, continuous, and exclusive use of property under a claim of right for at least a period of ten years.

Here, the trial justice recited the proper standard of proof for adverse possession and then found that Cahill had

“met her burden of establishing all of the elements of an adverse possession claim to lot 19 by her and her mother’s continuous and uninterrupted use of the parcel for well in excess of ten years. She maintained the property, planted and improved the property with shrubs, trees, and other plantings, sought drainage control measures, and used the property as if it were her own since 1971. She established that use not only by her own testimony, but as corroborated by other witnesses, photographs, and expert testimony relative to the interpretation of aerial photographs.”

At trial, as here on appeal, Morrow argued that Cahill’s offers to purchase the property invalidated her claim of right and the element of hostile possession. To dispose of that issue, the trial justice determined that “even assuming that [Cahill’s] inquiry is circumstantial evidence of her knowledge that George Morrow, and subsequently Margaret [Morrow], were the legal title holders of [lot] 19, that does not destroy the viability of this adverse possession claim.” The trial justice relied upon our opinion in *Tavares*, 814 A.2d at 350, to support his conclusion. Recalling that this Court stated in *Tavares* that “even when the claimants know they are nothing more than black-hearted trespassers, they can still adversely possess the property in question under a claim [of] right to do so if they use it openly, notoriously, and in a manner that is adverse to the true owner’s rights for the requisite ten-year period,” the trial justice found that Cahill’s outward acknowledgement of Morrow’s record title did not alone “negate her claim of right.” He further found that “even if somehow the expression of interest in purchasing lot 19, made initially in 1997, stopped the running of the ten[-]year period under . . . § 34-7-1, the evidence was overwhelming that [Cahill] and her predecessor in title had commenced the requisite ten-year period beginning in 1971.”

## C.

On appeal, Morrow challenges the trial justice's legal conclusion that Cahill's offers to purchase lot 19 did not extinguish her claim of right, hostile possession, and ultimately, the vesting of her title by adverse possession. Morrow also contends that the trial justice erred in finding that Cahill's testimonial and demonstrative evidence was sufficient to prove adverse possession under the clear and convincing burden of proof standard. We agree that as a matter of law the trial justice failed to consider the impact of Cahill's offers to purchase on the prior twenty-six years of her lot 19 use. As a result, we hold that this failure also affects his factual determinations.

### 1. 1997 Offer-to-Purchase Letter

In *Tavares*, this Court explained that "requir[ing] adverse possession under a claim of right is the same as requiring hostility, in that both terms simply indicate that the claimant is holding the property with an intent that is adverse to the interests of the true owner." *Tavares*, 814 A.2d at 351 (quoting 16 Powell on Real Property, § 91.05[1] at 91-28 (2000)). "Thus, [we said] a claim of right may be proven through evidence of open, visible acts or declarations, accompanied by use of the property in an objectively observable manner that is inconsistent with the rights of the record owner." Here, the first issue on appeal is how an offer to purchase has an impact on these elements. . . .

. . . . [I]n *Tavares*, 814 A.2d at 351, with regard to "establishing hostility and possession under a claim of right," we explained that "the pertinent inquiry centers on the claimants' *objective manifestations* of adverse use rather than on the claimants' *knowledge* that they lacked colorable legal title." (Emphases added.) Essentially, *Tavares* turned on the difference between the adverse possession claimant's "knowledge" regarding the owner's title and his "objective manifestations" thereof. In that case, the adverse-possession claimant surveyed his land and discovered "that he did not hold title to the parcels in question." After such enlightenment, however, the claimant objectively manifested his claim of ownership to the parcels by "posting no-trespass signs, constructing stone walls, improving drainage, and wood cutting." This Court explained that simply having knowledge that he was not the title owner of the parcels was not enough to destroy his claim of right given his objective, adverse manifestations

otherwise. In fact, we went so far as to state that “even when claimants know that they are nothing more than black-hearted trespassers, they can still adversely possess the property in question under a claim of right to do so if they use it openly, notoriously, and in a manner that is adverse to the true owner’s rights for the requisite ten-year period.” This statement is legally correct considering that adverse possession does not require the claimant to make “a good faith mistake that he or she had legal title to the land.” 16 Powell on Real Property § 91.05[2] at 91-23. However, to the extent that *Tavares*’s reference to “black-hearted trespassers” suggests that this Court endorses an invade-and-conquer mentality in modern property law, we dutifully excise that sentiment from our jurisprudence.

In the case before this Court, Cahill went beyond mere knowledge that she was not the record owner by sending the offer-to-purchase letter. As distinguished from the *Tavares* claimant who did not communicate his survey findings with anyone, Cahill’s letter objectively declared the superiority of George Morrow’s title to the record owner himself. *See also* Shanks v. Collins, 1989 OK 115, 782 P.2d 1352, 1355 (Okla. 1989) (“A recognition by an adverse possessor that legal title lies in another serves to break the essential element of continuity of possession.”).

In the face of this precedent, Cahill contends that the trial justice accurately applied the law by finding that an offer to purchase does not automatically negate a claim of right in the property. While we agree that this proposition is correct with respect to offers made in an effort to make peace in an ongoing dispute, we disagree that this proposition applies in situations, as here, where no preexisting ownership dispute is evident. . . . Her offer was not an olive branch meant to put an end to pending litigation with the Morrows. Rather, it was a clear declaration that Cahill “wanted title to the property” from the record owner. By doing so, she necessarily acknowledged that her interest in lot 19 was subservient to George Morrow’s. . . .

Accordingly, the trial justice erred by considering any incidents of ownership exhibited by Cahill after the 1997 letter to George Morrow interrupted her claim. . . .

## **2. The Impact of Cahill's Offer to Purchase on her Pre-1997 Adverse-Possession Claim**

Furthermore, we also conclude that the trial justice should not have assumed that even if Cahill's "inquiry is circumstantial evidence of her knowledge that George Morrow, and subsequently [Morrow], were the legal title holders of [lot] 19, that does not destroy the viability of this adverse possession claim." We agree that an offer to purchase does not automatically invalidate a claim already vested by statute, but we nonetheless hold that the objective manifestations that another has superior title, made after the statutory period and not made to settle an ongoing dispute, are poignantly relevant to the ultimate determination of claim of right and hostile possession during the statutory period. . . .

## **3. Questions of Fact Remain**

Despite the significant deference afforded to the trial justice's findings of fact, such findings are not unassailable. Here, we find clear error in the trial justice's conclusion that "even if somehow the expression of interest in purchasing [lot] 19, made initially in 1997, stopped the running of the ten[-]year period . . . the evidence was overwhelming that [Cahill] and her predecessor in title had commenced the requisite ten-year period beginning in 1971." Given our opinion that some of Cahill's lot 19 activities cannot be considered because of the time frame of their occurrence, we disagree that the trial record can be classified as presenting "overwhelming" evidence of adverse possession.

. . . On remand, the trial justice is directed to limit his consideration to pre-1997 events and make specific determinations whether Cahill's intermittent flower and tree planting, flag flying, clothesline replacing, lawn chair and beach-paraphernalia storing, and annual party hosting are adequate. Furthermore, given our ruling today, the trial court must evaluate the nature of Cahill's and her predecessor's twenty-six-year acts of possession in the harsh light of the fact that Cahill openly manifested the existence of George Morrow's superior title on three occasions. . . .

### **FLAHERTY, J., dissenting.**

. . . Simply put, I do not agree that the correspondence between plaintiff and defendant in which plaintiff offers to purchase defendant's interest in lot 19 is the smoking gun the majority perceives it to be. As is clear

from a fair reading of plaintiff's testimony, she believed that she owned the property as a result of her longtime use of and dominion over it. But her testimony also demonstrates that she drew a crisp distinction between whatever ownership rights she may have acquired and record title, which she recognized continued to reside in the Morrows . . . . Even if that letter were as significant as the majority contends, there is no doubt that it was sent after the statutory period had run. It is beyond dispute that plaintiff's correspondence could not serve to divest her of title if she had already acquired it by adverse possession . . . . There certainly was credible evidence for the trial justice to find that plaintiff had used the property as her own for well over twenty years before she corresponded with Mr. Morrow in 1997. . . .

### Notes and Questions

7.11. **Doctrine v. practice.** Richard Helmholtz has argued that though adverse possession doctrine generally does not require the adverse possessor to plead good faith, judicial practice is to disfavor those who know they are trespassing compared to those acting out of a good faith mistake. Richard H. Helmholtz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 332 (1983). Is *Cahill* an example of this dynamic?

In recent decades, state legislatures have increasingly demanded good faith on the part of the possessor (the Oregon statute in *Tieu* requiring honest belief in ownership, for example, was passed in 1989). See 16 POWELL ON REAL PROPERTY § 91.05 (collecting examples).

7.12. Should good faith be required? And if so, what is good faith? Is it an honest belief about the facts on the ground (e.g., whether the fence builder is correct that his fence is on the right side of the boundary line)? Or is it an attitude about one's potential adversary (a willingness to move the fence if wrong)? Either view creates evidentiary difficulties.

Even when good faith is not part of the analysis as a formal matter, Helmholtz argues that judges and juries often cannot help but "prefer the claims of an honest man over those of a dishonest man." Helmholtz, *supra*, at 358. Might this be a satisfactory middle ground? Are there advantages to having courts officially ignore intent while applying a de facto bar to the bad faith possessor when there is evidence of dishonesty? Or is it problematic to have legal practice depart from official doctrine?

Perhaps another way to reconcile the benefits of adverse possession with the distaste for bad faith possessors would be to allow dishonest possessors to keep the land, but pay for the privilege. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 Nw. U. L. REV. 1122, 1126 (1984) (suggesting “requiring indemnification only in those cases where the [true owner] can show that the [adverse possessor] acted in bad faith.”). As Merrill notes, a California appellate court required such payment in a case concerning a prescriptive easement (which is similar to adverse possession except that it concerns the *right to use* someone else’s land rather than its ownership), only to be overturned by the state supreme court. *Id.* (discussing *Warsaw v. Chicago Metallic Ceilings, Inc.*, 676 P.2d 584 (Cal. 1984)). The proposal may remind you of the *Manillo* case discussed above. How does it differ?

7.13. A minority of states require adverse possessors to prove their subjective intent to take the land without regard to the existence of other ownership interests. This is sometimes referred to as the “aggressive trespass” standard: “I thought I did not own it [and intended to take it].” Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 746 (1986) (brackets in the original). Is there a reason to prefer it? Lee Anne Fennell argues for a knowing trespass requirement that requires the adverse possessor to document her knowledge:

[A] documented knowledge requirement facilitates rather than punishes efforts at consensual dealmaking. One of the most definitive ways of establishing that a possessor knew she was not the owner of the disputed land is to produce evidence of her purchase offer to the record owner. Currently, such an offer often destroys one’s chance at adverse possession because it shows one is acting in bad faith if one later trespasses; one does far better to remain in ignorance (or pretend to) and never broach the matter with the record owner. Under my proposal, such offers would go from being fatal in a later adverse possession action to being practically a prerequisite. As a result, it would be much more likely that any resulting adverse possession claim will occur only where a market transaction is unavailable. A documented knowledge requirement would also reduce litigation costs and increase the certainty of land holdings. Actions or records establishing that the trespass was known at the time of entry, necessary if the possessor ever wishes to gain title under my approach, would serve to streamline trespass ac-

tions that occur before the statute has run. Moreover, an approach that refuses to reward innocent mistakes would be expected to reduce mistake-making.

Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 Nw. U. L. REV. 1037, 1041-44 (2006) (footnotes omitted). One’s position on these matters may depend on which scenarios one believes are most common in adverse possession cases and adjust the state of mind required to include or exclude them accordingly. Should the state of mind required depend on the context? A state might, for example, require good faith for encroachments, but bad faith or color of title if the possessor seeks to own the parcel as a whole. Is this a good idea?

### 7.3 Finer Points of Adverse Possession Law

**Actual and Continuous Possession.** Adverse possessors are not required to live on the occupied property, what matters is acting like a true owner would. That use, however, must be continuous, not sporadic. *Compare*, e.g., *Lobdell v. Smith*, 690 N.Y.S.2d 171, 173 (N.Y. App. Div. 3d Dep’t 1999) (although undeveloped land “does not require the same quality of possession as residential or arable land,” no adverse possession where claimant “seldom visited the parcel except to occasionally pick berries or hunt small game”), *with Nome 2000 v. Fagerstrom*, 799 P.2d 304, 310 (Alaska 1990) (claimants of a rural parcel suitable for recreational and subsistence activities “visited the property several times during the warmer season to fish, gather berries, clean the premises, and play.... That others were free to pick berries and fish is consistent with the conduct of a hospitable landowner, and undermines neither the continuity nor exclusivity of their possession.”). Regular use of a summer home may constitute continuous use. See, e.g., *Nechow v. Brown*, 120 N.W.2d 251, 252 (Mich. 1963).

**Color of title.** Claim of title, an intent to use land as one’s own, is distinct from color of title, which describes taking possession under a defective instrument (like a deed based on a mistaken land survey). States often apply more lenient adverse possession standards to claims made under color of title. *Compare*, e.g., FL ST. § 95.16, *with id.* § 95.18. Why do you think that is?

Entry under color of title may also affect the scope of the land treated as occupied by the adverse possessor. 2 C.J.S. *Adverse Possession* § 252 (“Adverse possession under color of title ordinarily extends to the whole tract described in the instrument constituting color of title.”). *But see Wentworth v. Forne*, 137 So. 2d 166,

169 (Miss. 1962) (“In brief, when the land involved is, in part, occupied by the real owner, the adverse possession, even when this possessor has color of title, is confined to the area actually possessed.”).

**Adverse possession by and against the government.** Although government agencies may acquire title by adverse possession, the general rule is that public property held for public use is not subject to the doctrine. Why do you think that is?

**Disabilities.** The title owner of land may be subject to a disability (e.g., status as a minor, mental incapacity) that may extend the time to bring an ejectment action against an unlawful occupant. States generally spell out such exceptions by statute.

**A Moving Target.** States vary their adverse possession rules to take into account a variety of factors (e.g., claim under color of title, payment of property taxes, enclosure or cultivation of land, etc.). These factors may change with the times. In the aftermath of the financial crisis, for example, reports of trespassers occupying foreclosed, vacant properties with the goal of acquiring title via adverse possession prompted renewed attention to the doctrine. Florida enacted legislation that requires those seeking adverse possession without color of title to pay all outstanding taxes on the property within one year of taking possession and disclose in writing the possessor’s identity, date of possession, and a description of the property sufficient to enable the identification of the property in the public records. Local officials are then required to make efforts to contact the record owner of the property. FL. ST. § 95.18. The form created under the statute is reprinted in Figure 7.1. Are measures like these useful? Consider the problem of “zombie foreclosures.” A property may be vacant because the owners received a notice of foreclosure and left. Sometimes the lenders never complete the foreclosure process, perhaps to avoid the costs that come with ownership of the property. Title therefore remains with the out-of-possession owners, who remain responsible for taxes, association fees, and the like. What outcome should adverse possession law seek to promote in such cases?

 <b>RETURN OF REAL PROPERTY IN ATTEMPT TO ESTABLISH ADVERSE POSSESSION WITHOUT COLOR OF TITLE</b> Section 95.18, Florida Statutes		DR-452 R. 07/13 Provisional Effective 01/14
<b>THIS RETURN DOES NOT CREATE ANY INTEREST ENFORCEABLE BY LAW IN THE DESCRIBED PROPERTY</b>		
<p>For residential structures, a person who occupies or attempts to occupy a residential structure solely by claim of adverse possession prior to making a return, commits trespass under s. 810.08, F.S. A person who occupies or attempts to occupy a residential structure solely by claim of adverse possession and offers the property for lease to another commits theft under s. 812.014, F.S.</p>		
<b>COMPLETED BY ADVERSE POSSESSION CLAIMANT</b>		
<p>The person claiming adverse possession (claimant) must file this return with the property appraiser in the county where the property is located as required in <a href="#">s. 95.18(1), F.S.</a></p>		
Name of claimant(s)		
Mailing address	Phone	
	Parcel ID, if available	
<input type="checkbox"/> the property claimed is only a portion of this parcel ID		
Date of filing	Date claimant entered into possession of property	
<p>Legal description of property claimed <span style="float: right;">Fields will expand online, or you may add pages. Must be full and complete. If the property appraiser cannot identify the property from the legal description, you may be required to obtain a survey.</span></p>		
<p>This property has been: <input type="checkbox"/> protected by substantial enclosure <input type="checkbox"/> cultivated, maintained, or improved in a usual manner            (Check all that apply.)</p>		
<p>Describe your use of the property, in detail below.</p>		
<p>Dates of payments of any outstanding taxes or liens levied by the state, county or municipality:</p>		
<p>Under penalty of perjury, I declare that I have read the foregoing return and that the facts stated in it are true and correct. I further acknowledge that the return does not create any interest enforceable by law in the described property.</p>		
<p>Signature of claimant(s) _____</p>		
<p>State of Florida _____            County of _____</p>		
<p>This instrument was sworn to and subscribed before me on _____ by _____            personally known to me or who produced _____ as identification.</p>		
<p>_____            Signature and seal, notary public</p>		
<b>COMPLETED BY PROPERTY APPRAISER</b>		
<p>Received in the office of the property appraiser of _____ County, Florida, on _____            A signed copy of this return has been delivered to the claimant(s). A copy will be sent to the owner of record.</p>		
<p>_____            Signature, property appraiser or deputy _____ Date _____</p>		
<b>TO THE OWNER OF RECORD</b>		
<p>A tax payment made by the owner of record before April 1 the year after the taxes were assessed will have priority over a payment made by the claimant. An adverse possession claim will be removed if the owner of record or tax collector furnishes a receipt to the property appraiser showing payment of taxes by the owner of record during the period of the claim. (S. 95.18, F.S.)</p>		
<p><b>This return is a public record and may be inspected by any person under s. 119.01, F.S.</b></p>		

**Figure 7.1:** Florida's adverse possession form.

## 7.4 Adversely Possessing Trademarks?

### *Freecycle Network v. Oey*

505 F.3d 898 (9th Cir. 2007)

#### **HAWKINS, Circuit Judge:**

Tim Oey appeals a preliminary injunction preventing him from making any comments that could be construed as to disparage upon The Freecycle Network's possible trademark and logo and requiring that he remove all postings from the Internet and any other public forums that he has previously made that disparage The Freecycle Network's possible trademark and logo. We have jurisdiction under 28 U.S.C. § 1291 and, for the following reasons, vacate the injunction and remand.

#### I.

The Freecycle Network ("TFN") is a nonprofit Arizona corporation "dedicated to encouraging and coordinating the reusing, recycling, and gifting of goods." Through its website, <http://www.freecycle.org>, TFN coordinates the efforts of over 3,700 Freecycle groups worldwide. Via the local groups' webpages, individuals can post goods they no longer want. If another member wants the item offered, an exchange is arranged between the parties and the item thus avoids the landfill.

Although TFN claims to have consistently used the marks FREECYCLE and THE FREECYCLE NETWORK, and "The Freecycle Network" logo since May 2003 to refer to TFN, it also admits that it initially used the term "freecycle" and its various derivations (e.g., freecycling, freecyclers) to refer more generally to the act of recycling goods for free via the Internet. In 2004, based on the advice of then-member Oey, TFN decided to more actively police its use of the term "freecycle" and to formally pursue trademark protection for it, filing a trademark registration application on August 27, 2004. Shortly thereafter, TFN instituted a strict usage policy, drafted by Oey, preventing use of the term "freecycle" in any sense other than to refer to TFN or TFN's services. On January 17, 2006, TFN's proposed mark was published for opposition in the Official Gazette. An opposition was filed the next day and the mark currently remains unregistered.

A member of TFN since February 2004 and active in the corporation's early development, Oey initially supported TFN's claim to the FREECYCLE mark. Experiencing a change of heart and convinced that the term should

remain in the public domain, Oey later urged TFN to abandon its efforts to secure the mark, conveying his feelings in an August 8, 2005, email to fellow TFN group moderators.<sup>3</sup> In the following weeks, Oey made various statements on the Internet that TFN lacked trademark rights in “freecycle” because it was a generic term, and he encouraged others to use the term in its generic sense and to write letters to the United States Patent and Trademark Office (“PTO”) opposing TFN’s pending registration.

Not surprisingly, TFN took issue with Oey’s views and, on September 16, 2005, asked him to sever ties with the company. . . .

[The Ninth Circuit held that Oey’s actions were not likely to constitute trademark infringement.]

### C) Genericide

Although we do not reach the question of the validity of TFN’s claimed mark, the crux of TFN’s complaint is that Oey should be prevented from using (or encouraging the use of) TFN’s claimed mark FREECYCLE in its generic sense. However, TFN’s asserted mark—like all marks—is always at risk of becoming generic and thereby losing its ability to identify the trademark holder’s goods or services. *See, e.g., Mattel, Inc.*, 296 F.3d at 900 (“Some trademarks enter our public discourse and become an integral part of our vocabulary.”); 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 12:1 (2007) (hereinafter “McCarthy”). Where the majority of the relevant public appropriates a trademark term as the name of a product (or service), the mark is a victim of “genericide” and trademark rights generally cease. McCarthy § 12:1.

Such genericide can occur “as a result of a trademark owner’s failure to police the mark, resulting in widespread usage by competitors leading to a perception of genericness among the public, who sees many sellers using the same term.” *Id.* (footnotes omitted). Alternatively, “a term intended by the seller to be a trademark for a new product[can be] taken by the public as a generic name because customers have no other word to use to name this new thing.” *Id.* Genericide has spelled the end for countless formerly

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<sup>3</sup>In this email, Oey urged abandonment of TFN’s trademark pursuit, contending that forcing the term “freecycle” into the public domain “fits well with a ‘viral’ marketing approach to freecycle . . . which will lead back to [TFN] . . . [and] generate lots of goodwill.” He also recommended that TFN “maintain the trademark on the full name ‘The Freecycle Network’ . . . [and] take credit for birthing[the] freecycle [concept].”

trademarked terms, including “aspirin,” “escalator,” “brassiere,” and “cellophane.” *See id.* § 12:18 (list of terms held to be generic).

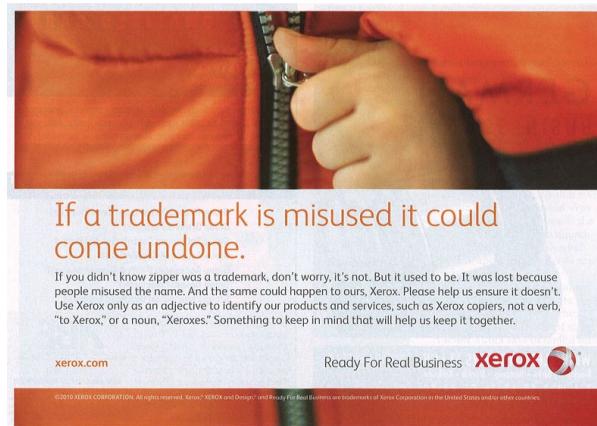
“Although there is a social cost when a mark becomes generic—the trademark owner has to invest in a new trademark to identify his brand—there is also a social benefit, namely the addition to ordinary language.” *Ty Inc. v. Perryman*, 306 F.3d 509, 514 (7th Cir.2002). Furthermore, when a trademark becomes generic, “it reduces the cost of communication by making it cheaper for competitors to inform consumers that they are selling the same kind of product” or providing the same kind of service. McCarthy § 12:2; *see also Mattel, Inc.*, 296 F.3d at 900 (“Trademarks often fill in gaps in our vocabulary and add a contemporary flavor to our expressions. Once imbued with such expressive value, the trademark becomes a word in our language and assumes a role outside the bounds of trademark law.”).

Of course, trademark owners are free (and perhaps wise) to take action to prevent their marks from becoming generic and entering the public domain—e.g., through a public relations campaign or active policing of the mark’s use. The Lanham Act itself, however, contains no provision preventing the use of a trademarked term in its generic sense. *Cf. Ty Inc.*, 306 F.3d at 513-14 (rejecting an attempt to extend the Lanham Act’s antidilution provisions “to enjoin uses of their mark that, while not confusing, threaten to render the mark generic”).

Nor does the Act prevent an individual from expressing an opinion that a mark should be considered generic or from encouraging others to use the mark in its generic sense. Rather, the use of a mark in its generic sense is actionable under the Lanham Act only when such use also satisfies the elements of a specified cause of action—e.g., infringement, false designation of origin, false advertising, or dilution. TFN’s mere disagreement with Oey’s opinion and frustration with his activities cannot render Oey liable under the Lanham Act.

### **Notes and Questions**

7.14. How many genericized trademarks can you think of? Why don’t you google it? Maybe you can make a powerpoint of the ones you find, even with some cleverly photoshopped graphics. If you do, zoom me so I can see it, or you can write a few examples onto post-its and rollerblade over to my office with them.



**Figure 7.2:** An advertisement by Xerox, run in the ABA Journal. Via Eric E. Johnson, *Please Help, if You Can*, PRAWFSBLAWG (June 29, 2010), *link*.

7.15. The author of these notes is unaware of any other property textbook that identifies trademark genericide as related to adverse possession, although the idea is not unknown. Laura A. Heymann, *The Grammar of Trademarks*, 14 LEWIS & CLARK L. REV. 1313, 1318 (2010); cf. Jake Linford, *Trademark Owner as Adverse Possessor: Productive Use and Property Acquisition*, 63 CASE W. L. REV. 703 (2013). How do the two doctrines compare? Look at the list of elements for adverse possession, and see if you can find an analogue (or lack thereof) for trademarks.

7.16. Quoting Judge Posner's opinion in *Ty Inc. v. Perryman*, 306 F.3d 509 (7th Cir. 2002), Judge Hawkins observes that genericide has both a "social cost" and "a social benefit, namely the addition to ordinary language." Can you find a "social benefit" in adverse possession of real property? Which doctrine do you find more socially justified, and why?

7.17. The risk that a trademark will become generic leads some trademark holders to campaign vigorously to protect their trademarks. Some, like Xerox, run advertisements like the one shown in Figure 7.2. Others litigate even the most minor uses of their trademarks, in order to show that they are actively defending their rights—or, perhaps, using the risk of genericide as a pretext for vigorous enforcement. Is this a desirable outcome? Would it be better if it were harder for trademarks to become genericized?

# **Part IV**

# **Transfers**



# Chapter 8

## Formalities

Arguably the most quintessential feature of property is **alienability**: the ability of ownership to change hands. Most obviously, property can be sold. A property owner can also dispose of property by donative transfer: giving it away as a gift, or by leaving the property to friends or relatives, either through a written will or in accordance with state intestacy laws.

Just because a property owner has a right to alienate, however, does not mean that the property owner's wishes control. An effective transfer of property rights must follow rules created by law. There are only certain ways people can rearrange property relations. Some rearrangements happen even if the people involved don't want them, and some don't happen even if the people involved do want them. Knowing the rules is a way to understand which transfers work and why.

The next two chapters will explore the rules that govern voluntary transfers of property. This chapter will consider several types of **formalities**, namely technical and procedural requirements that must be complied with for a property transfer to be effective. The next chapter will consider ways in which a buyer may question, or even invalidate, a property transfer.

Consider why these rules are necessary—why shouldn't the property owner's intentions always control? One way of answering this question is by considering the interests at stake:

- Buyers, who perhaps deserve protection from shady sellers who misrepresent the property being sold—or who don't even own the property at all.
- Third parties, who might benefit from public records or evidence of transactions in property.

- Sellers, who might be deceived into unwittingly selling or giving away their property.

As you read, pay close attention to the type of transfer (sale, gift, will) and the type of property involved (real, personal). The problems that courts and lawmakers are grappling with are often universal and cross-cutting, but the legal doctrines are specific: Rules about gifts do not necessarily apply to wills, and rules for recordation of real estate titles do not necessarily apply to personal property, for example. When you observe a discrepancy, ask yourself whether there is a good justification for the difference.

## 8.1 Deeds

In 1250, to transfer ownership of land, the grantor and grantee would physically go to the land. The grantor would physically (or perhaps metaphysically) put the grantees in possession by handing over a clod of dirt. The grantees would swear homage to the grantor, and the grantor would swear to defend the grantees's title. This was a public ceremony, performed in front of witnesses who could later be called on to recall what had happened if necessary. In contrast, written conveyances—called “charters”—were treated with skepticism; they were considered an inferior form of evidence because of the risk of forgery.

In the seven and a half centuries since, this attitude has completely flipped. Now, land transactions are paper transactions: the Statute of Frauds almost always requires a written conveyance—now called a **deed**—to transfer an interest in real property. In addition, land transactions are influenced by the common law's attitude that land is of distinctive importance, so that parties dealing with it need especial clarity about their rights, and by the fact that land transactions are often high-stakes, with hundreds of thousands, millions, or sometimes even billions of dollars at issue. This section focuses on the written instruments at the heart of land transactions. Consider, as you read, what value the written deed serves, and how it interacts with the parties' intentions.

## Indiana Code

### **§ 32-21-1-1—Requirement of written agreement; agreements or promises covered**

- (a) This section does not apply to a lease for a term of not more than three (3) years.
- (b) A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing the promise, contract, or agreement on which the action is based, is in writing and signed by the party against whom the action is brought or by the party's authorized agent: . . .
- (4) An action involving any contract for the sale of land.

### **§32-21-1-13—Conveyance of land; written deed required**

Except for a bona fide lease for a term not exceeding three (3) years, a conveyance of land or of any interest in land shall be made by a deed that is:

- (1) written; and  
(2) subscribed, sealed, and acknowledged by the grantor . . . or by the grantor's attorney.

### **Notes and Questions**

8.1. What is the difference between these two sections? Why are both necessary?

8.2. Consider the following sequence of text messages:

- **A:** still want apt 4C @ 321 sesame st?
- **B:** \$450,000 ok?
- **A:** deal. :-) -A
- **B:** yay! kthx bai

Can either of the parties treat this as an enforceable contract for the sale of land?

*Loughran v. Kummer*

146 A. 534 (Pa. 1929)

**KEPHART, J.**

Appellee, a bachelor 67 years of age, conveyed, for \$1, land in Pittsburgh to Mrs. Kummer, appellant, who was one of his tenants. A bill was filed to set aside this deed; the grounds laid were confidential relationship, undue influence, and impaired mentality. Inasmuch as the facts must again be considered, we will mention only such as raise the legal question on which the case was decided; we venture no opinion on the other facts.

The court below found from the evidence that a deed absolute on its face had been executed, acknowledged, and delivered to appellant by appellee, on condition that it should not be recorded until the latter's death; that undoubtedly in his mind this meant that the deed was not to take effect until after his death; and that he, demanding the return of the deed within a very few days after the delivery, thus revoked it and with that revocation revoked the gift. Appellant deceived appellee when she stated the deed had been destroyed. The excuse given was appellee was worried and she wanted to ease his mind by making him believe that it had been destroyed. . . .

The question we are asked to consider is whether a deed absolute on its face, acknowledged, executed, and delivered under circumstances as here indicated, vested such title in the grantee as could be revoked for the above reasons. It amounts in substance to this, that the grantor said the deed should not be recorded until after his death, and the grantee in accepting the deed took it on that condition. The evidence on which this finding was based was all oral, and the scrivener and defendant denied any such condition was imposed when the deed was delivered. All control over the deed was relinquished when it was handed appellant. The presumption must be that at that time it was the intention to pass title. "The general principle of law is that the formal act of signing, sealing and delivering is the consummation of the deed, and it lies with the grantor to prove clearly that appearances are not consistent with truth. The presumption stands against him, and the burden is on him to destroy it by clear and positive proof that there was no delivery and that it was so understood at the time. . . . Where we have, as here, a deed, absolute and complete in itself, attacked as being in fact otherwise intended, . . . there is a further presumption that the title is in conformity with the deed, and it should not be dislodged except by

clear, precise, convincing and satisfactory evidence to the contrary." *Cragin's Estate*, 117 A. 445 (Pa. 1922).

The gift here was executed, and that defendant was not to record it was not of the slightest consequence when viewed as against these major actions, delivery and passing of title. It was merely a promise the keeping of which lay in good faith, the breach of which entailed no legal consequences. To have effected the grantor's purpose, the intervention of a third party was absolutely essential. There are circumstances where acknowledgement, together with physical possession of the deed in the grantee, does not conclusively establish an intention to deliver, and the presumption arising from signing, sealing, and acknowledging, accompanied by manual possession of the deed by the grantee, is not irrebuttable, but this presumption can be overcome only by evidence that no delivery was in fact intended and none made. Such evidence is not present in this case. Here the grantor by his own testimony intended the grantee to get the land. The only question was when it was to take effect.

Here is one of the instances in which the law fails to give effect to the honest intention of the parties, for the reason that they have not adopted the proper legal means of accomplishing their object. Therefore the legal effect of such delivery is not altered by the fact that both parties suppose the deed will not take effect until recorded, and that it may be revoked at any time before record, or by contemporaneous agreements looking to the reconveyance of the property to the grantor or to the third party upon the happening of certain contingent events or the nonperformance of certain conditions.

The reason for these rules is obvious. It is quite possible to prove in most deliveries that some parol injunction was attached to the formal delivery of the deed; if they are to be given the effect her[e] contended, there would be no safety in accepting a deed under most circumstances. It opens the door to the fabrication of evidence that would inevitably be appalling and go far toward violating the security of written instruments. We have so held in matters of less import than the conveyance of land. The rule must not be relaxed as to realty. Such conveyances are vastly more important, as they involve instruments of title and ownership which are used as a means of extending credit. Title to land ought not to be exposed to the peril of successful attack except where the right is clear and undoubted, and whatever may be our desire to recognize circumstances argued as unfortunate,

we cannot go to the extent of overthrowing principles of law governing conveyances of real estate that have stood the test of ages.

In *Cragin's Estate*, supra, the deeds were in a tin box for more than 23 years in an envelope indorsed with the words: "To be recorded upon Mrs. Cragin's death, if before me." The deed was in grantee's possession, and it was urged the delivery was conditional. We said that indorsement may have been placed on the envelope for other reasons than to defer the transfer of title. In the present case it was evident appellee did not want his relatives to learn of the conveyance. Recording would be necessary to pass a title examiner's inspection, but nonrecording did not prevent the title from passing. It has been quite generally held that an oral understanding on the delivery of a deed that it should not be recorded will not affect the absolute character of the conveyance if free of other conditions. An agreement to deliver a deed in escrow to the person in whose favor it is made, and who is likewise a party to it, will not make the delivery conditional. If delivered under such an agreement, it will be deemed an absolute delivery and a consummation of the execution of the deed. . . .

### **Notes and Questions**

8.3. The old phrase is that a deed was effective when it was "signed, sealed, and delivered." But the seal is obsolete, so the principal elements are that it be a sufficient writing (discussed above), that it be signed, and that it be delivered. Delivery of deeds has much in common with delivery in the law of gifts; it too can be a subtle question. In a famous passage of his landmark 17th-century treatise, *Institutes of the Lawes of England*, Edward Coke wrote, "As a deed may be delivered to a party without words, so may a deed be delivered by words without any act of delivery." That sounds paradoxical, but Coke continued, "as if the writing sealed lies upon the table, and the [grantor] says to the [grantee], 'Go and take up that writing, it is sufficient for you;' or 'it will serve your turn;' or 'Take it as my deed;' or the like words; either is a sufficient delivery." Is that better?

8.4. In *Wiggill v. Cheney*, 597 P.2d 1351 (Utah 1979), Lillian Cheney executed a deed to Flora Cheney and put it in a safety deposit box in the names of Lillian Cheney and Francis E. Wiggill. Lillian told Francis that his name was on the box, that on her death he would be granted access to the box, and that "in that box is an envelope addressed to all those concerned. All you have to do is give them that envelope and

that's all." On her death, he gained access to the box, took the deed, and gave it to Flora. Delivery?

8.5. There are at least two ways to do delivery "right." One is to sign and hand over a deed at closing, when all of the necessary parties are in the same room and can execute all of the appropriate documents effectively simultaneously. Another is to use an escrow: a third party who receives custody of the signed deed along with instructions to deliver it to the grantee when appropriate events have taken place. What if the escrow agent disregards her instructions and hands over the deed early? Can a grantor who is concerned the transaction will fall through demand the deed back from the escrow agent?

8.6. *Loughran* is more complicated because the parties intended a conditional gift that would take effect at Loughran's death, rather than immediately. Grantors often try to put other kinds of conditions on transfers. In *Martinez v. Martinez*, 678 P.2d 1163 (N.M. 1984), Delfino and Eleanor Martinez gave their son Carlos and his wife Sennie a deed to a property in exchange for assuming a mortgage in it. Delfino and Eleanor instructed Carlos and Sennie to take the deed to the bank to be held in escrow until Carlos and Sennie had paid off the mortgage, but they recorded it first. Carlos and Sennie had marital difficulties and fell behind on the mortgage; eventually Delfino and Eleanor paid off the balance. Who owns the property?

8.7. The *Loughran* court says the parties "have not adopted the proper legal means of accomplishing their object." What does it mean? Is there anything they could have done differently that would avoided this mess?

## 8.2 Wills and Intestacy

Because property in the material world is probably not of much use after death, the law has rules for the disposal of property of the deceased. Generally, those rules seek to effect the desires and intentions of the now-deceased owner, either expressed in a written document called a **will** or according to statutory rules in the absence of a will.

The following is a brief summary of the concepts and terminology used in the law of wills and estates. It is not intended to be comprehensive; a more advanced law school course is required for that. But it should provide a general sense for the questions and issues that need to be dealt with in the process of managing property after death.

A **grant** or **conveyance** is a transfer of an interest in property. The person making the grant is the **grantor** (or **transferor**); the person receiving the grant is the

**grantee** (or **transferee**). If the grant is made during the life of the grantor, it is said to be an **inter vivos** conveyance (literally, “between the living”). If in a will, it is said to be a **testamentary** conveyance. A testamentary conveyance of real property is called a **devise**. A testamentary conveyance of personal property is called a **bequest** (or sometimes a **legacy**).

When a person dies, they will either have left a valid will or not. A person who dies with a valid will dies **testate**; one who dies without a valid will dies **intestate**. Either way, the dead person can be referred to as a **decedent**. If the decedent did leave a valid will, they may also be referred to as a **testator** if male, or a **testatrix** if female.

The assets that a decedent owned at her death are collectively referred to as the decedent’s **estate**. An estate can sometimes take on the qualities of a legal person—it is not uncommon to say that a certain asset is owned by “the estate of O.” The property rights of this fictional legal person are managed by an actual person whose title depends on whether the decedent left a will. The instructions in a will are carried out by an **executor** (if male) or **executrix** (if female), designated as such in the will itself. An intestate estate is disposed of by a court-appointed **administrator** (if male) or **administratrix** (if female).

The authority of an administrator or executor to dispose of the estate’s assets is conferred by a **probate court**. When a valid will is filed with the probate court and deemed valid, the court will **admit the will to probate** (or **probate the will**), and will issue **letters testamentary** to the executor authorizing him to take possession of the estate’s assets and dispose of them according to the will’s instructions. If the decedent died intestate, the court will issue **letters of administration** to an administrator authorizing him to take possession of the estate’s assets and dispose of them according to the laws of intestate succession.

If the decedent did leave a valid will, it will typically contain instructions for transferring assets to various identified people or entities. The parties receiving the bequests are referred to as the will’s **beneficiaries**, **devisees** (for real property), or **legatees** (for personal property). When a decedent passes property by will he or she is said to have **devised** that property. A property interest that the decedent has the power to transfer by will is said to be **devisable**.

Sometimes a will fails to provide instructions for all the assets owned by the testator at death; in this case the unallocated assets are said to create a **partial intestacy**. When this happens, assets designated in the will are distributed according to the will’s terms, while the estate’s remaining assets are distributed according to the laws of intestate succession. In order to avoid partial intestacy, it is good prac-

tice to include a **residuary clause** in a will, disposing of all the assets of the decedent not devised through specific bequests. Such unenumerated assets are referred to as the **residuary estate**.

If the decedent did not leave a valid will, her property will pass to her **heirs** (sometimes referred to as **heirs at law**). Heirs are those who are designated by law as successors to property that passes by intestate succession rather than by will. When heirs take such property, they are said to **inherit** it. A property interest that can pass by intestate succession is said to be **descendible**.

Note that until the decedent actually dies, we don't know who her heirs are; rights of inheritance are allocated only to relatives of the decedent who **survive** her—who are still alive when the decedent dies. Thus, until a property owner dies, her relatives have no legally enforceable rights in her property under the laws of intestate succession. It is sometimes said that such relatives have a mere **expectancy**, and they are sometimes referred to as **heirs apparent**.

Heirs under intestacy laws are drawn from various categories of relatives. In addition to spouses, there are **issue**: the direct descendants of the decedent (children, grandchildren, great-grandchildren, etc.); **ancestors** (parents, grandparents, great-grandparents, etc.); and **collaterals**: relatives who are not direct ancestors or descendants (siblings, aunts, uncles, nieces, nephews, cousins).

If a person dies without a will and without any heirs at law, any property in their estate **escheats** to the state, which becomes its owner.

## **Lon L. Fuller, *Consideration and Form***

41 COLUM. L. REV. 799 (1941)

**§ 2. The Evidentiary Function.**—The most obvious function of a legal formality is, to use Austin's words, that of providing "evidence of the existence and purport of the contract, in case of controversy." The need for evidentiary security may be satisfied in a variety of ways: by requiring a writing, or attestation, or the certification of a notary. It may even be satisfied, to some extent, by such a device as the Roman stipulatio, which compelled an oral spelling out of the promise in a manner sufficiently ceremonious to impress its terms on participants and possible bystanders.

**§ 3. The Cautionary Function.**—A formality may also perform a cautionary or deterrent function by acting as a check against inconsiderate action. The seal in its original form fulfilled this purpose remarkably well. The affixing and impressing of a wax wafer-symbol in the popular mind of

legalism and weightiness-was an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future. To a less extent any requirement of a writing, of course, serves the same purpose, as do requirements of attestation, notarization, etc.

§ 4. *The Channeling Function.*— . . . That a legal formality may perform a function not yet described can be shown by the seal. The seal not only insures a satisfactory memorial of the promise and induces deliberation in the making of it. It serves also to mark or signalize the enforceable promise; it furnishes a simple and external test of enforceability. . . . The thing which characterizes the law of contracts and conveyances is that in this field forms are deliberately used, and are intended to be so used, by the parties whose acts are to be judged by the law. To the business man who wishes to make his own or another's promise binding, the seal was at common law available as a device for the accomplishment of his objective. In this aspect form offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention.

**John H. Langbein, *Substantial Compliance with the Wills Act***

88 HARV. L. REV. 489 (1975)

4. *The Protective Function.*—Courts have traditionally attributed to the Wills Act the object “of protecting the testator against imposition at the time of execution.” The requirement that attestation be made in the presence of the testator is meant “to prevent the substitution of a surreptitious will.” Another common protective requirement is the rule that the witnesses should be disinterested, hence not motivated to coerce or deceive the testator.

***Stevens v. Casdorph***  
203 W. Va. 450 (1988)

**PER CURIAM: . . .**

On May 28, 1996, [Patricia Eileen Casdorph and Paul Douglas Casdorph] took Mr. Homer Haskell Miller to Shawnee Bank in Dunbar, West Virginia, so that he could execute his will. Once at the bank, Mr. Miller

asked Debra Pauley, a bank employee and public notary, to witness the execution of his will. After Mr. Miller signed the will, Ms. Pauley took the will to two other bank employees, Judith Waldron and Reba McGinn, for the purpose of having each of them sign the will as witnesses. Both Ms. Waldron and Ms. McGinn signed the will. However, Ms. Waldron and Ms. McGinn testified during their depositions that they did not actually see Mr. Miller place his signature on the will. Further, it is undisputed that Mr. Miller did not accompany Ms. Pauley to the separate work areas of Ms. Waldron and Ms. McGinn.

Mr. Miller died on July 28, 1996. The last will and testament of Mr. Miller, which named Mr. Paul Casdorph as executor, left the bulk of his estate to the Casdorphs. The Stevenses, nieces of Mr. Miller, filed the instant action to set aside the will. . . .<sup>4</sup>

The Stevenses' contention is simple. They argue that all evidence indicates that Mr. Miller's will was not properly executed. Therefore, the will should be voided. The procedural requirements at issue are contained in W.Va. Code § 41-1-3 (1997). The statute reads:

No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly in the handwriting of the testator, *the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, and of each other*, but no form of attestation shall be necessary.  
(Emphasis added.)

The relevant requirements of the above statute calls for a testator to sign his/her will or acknowledge such will in the presence of at least two witnesses at the same time, and such witnesses must sign the will in the presence of the testator and each other. In the instant proceeding the Stevenses assert, and the evidence supports, that Ms. McGinn and Ms. Waldron did not actually witness Mr. Miller signing his will. Mr. Miller made no acknowledgment of his signature on the will to either Ms. McGinn or Ms.

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<sup>4</sup>As heirs, the Stevenses would be entitled to recover from Mr. Miller's estate under the intestate laws if his will is set aside as invalidly executed. . . .

Waldron. Likewise, Mr. Miller did not observe Ms. McGinn and Ms. Waldron sign his will as witnesses. Additionally, neither Ms. McGinn nor Ms. Waldron acknowledged to Mr. Miller that their signatures were on the will. It is also undisputed that Ms. McGinn and Ms. Waldron did not actually witness each other sign the will, nor did they acknowledge to each other that they had signed Mr. Miller's will. . . .

Our analysis begins by noting that "the law favors testacy over intestacy." However, we clearly held in syllabus point 1 of *Black v. Maxwell*, 131 W. Va. 247, 46 S.E.2d 804 (1948), that "testamentary intent and a written instrument, executed in the manner provided by [W.Va. Code § 41-1-3], existing concurrently, are essential to the creation of a valid will." *Black* establishes that mere intent by a testator to execute a written will is insufficient. The actual execution of a written will must also comply with the dictates of W.Va. Code § 41-1-3. The Casdorphs seek to have this Court establish an exception to the technical requirements of the statute. In *Wade v. Wade*, 119 W. Va. 596 (1938), this Court permitted a narrow exception to the stringent requirements of the W.Va. Code § 41-1-3. This narrow exception is embodied in syllabus point 1 of *Wade*:

Where a testator acknowledges a will and his signature thereto in the presence of two competent witnesses, one of whom then subscribes his name, the other or first witness, having already subscribed the will in the presence of the testator but out of the presence of the second witness, may acknowledge his signature in the presence of the testator and the second witness, and such acknowledgment, if there be no indicia of fraud or misunderstanding in the proceeding, will be deemed a signing by the first witness within the requirement of Code, 41-1-3, that the witnesses must subscribe their names in the presence of the testator and of each other. . . .

*Wade* stands for the proposition that if a witness acknowledges his/her signature on a will in the physical presence of the other subscribing witness *and the testator*, then the will is properly witnessed within the terms of W.Va. Code § 41-1-3. In this case, none of the parties signed or acknowledged their signatures in the presence of each other. This case meets neither the narrow exception of *Wade* nor the specific provisions of W.Va. Code § 41-1-3.

**WORKMAN, J., dissenting:**

The majority once more takes a very technocratic approach to the law, slavishly worshiping form over substance. In so doing, they not only create a harsh and inequitable result wholly contrary to the indisputable intent of Mr. Homer Haskell Miller, but also a rule of law that is against the spirit and intent of our whole body of law relating to the making of wills.

There is absolutely no claim of incapacity or fraud or undue influence, nor any allegation by any party that Mr. Miller did not consciously, intentionally, and with full legal capacity convey his property as specified in his will. The challenge to the will is based solely upon the allegation that Mr. Miller did not comply with the requirement of West Virginia Code 41-1-3 that the signature shall be made or the will acknowledged by the testator in the presence of at least two competent witnesses, present at the same time. The lower court, in its very thorough findings of fact, indicated that Mr. Miller had been transported to the bank by his nephew Mr. Casdorph and the nephew's wife. Mr. Miller, disabled and confined to a wheelchair, was a shareholder in the Shawnee Bank in Dunbar, West Virginia, with whom all those present were personally familiar. When Mr. Miller executed his will in the bank lobby, the typed will was placed on Ms. Pauley's desk, and Mr. Miller instructed Ms. Pauley that he wished to have his will signed, witnessed, and acknowledged. After Mr. Miller's signature had been placed upon the will with Ms. Pauley watching, Ms. Pauley walked the will over to the tellers' area in the same small lobby of the bank. Ms. Pauley explained that Mr. Miller wanted Ms. Waldron to sign the will as a witness. The same process was used to obtain the signature of Ms. McGinn. Sitting in his wheelchair, Mr. Miller did not move from Ms. Pauley's desk during the process of obtaining the witness signatures. The lower court concluded that the will was valid and that Ms. Waldron and Ms. McGinn signed and acknowledged the will "in the presence" of Mr. Miller. . . .

The majority embraces the line of least resistance. The easy, most convenient answer is to say that the formal, technical requirements have not been met and that the will is therefore invalid. End of inquiry. Yet that result is patently absurd. That manner of statutory application is inconsistent with the underlying purposes of the statute. Where a statute is enacted to protect and sanctify the execution of a will to prevent substitution or fraud, this Court's application of that statute should further such underlying policy, not impede it. When, in our efforts to strictly apply legislative

language, we abandon common sense and reason in favor of technicalities, we are the ones committing the injustice.

### Notes and Questions

8.8. **Wills Act Formalities.** The requirements to make a valid will vary from state to state, but in general a will must be in writing, signed by the testator, and attested by two witnesses. How well do these formalities serve the various purposes identified by Fuller and Langbein? Which of them failed in *Stevens v. Casdorph*? How? Why is the court so stringent about enforcing the formalities?

8.9. **Informal Wills.** Whether out of ignorance about the law, skittishness in thinking about their own death, or bad advice, people do all kinds of things that blatantly fail to qualify as wills under the traditional test. They write chatty emails to family members explaining what they want to happen to their property after their death; they scrawl marginalia on old wills, crossing out specific bequests and adding new ones; they leave behind multiple conflicting undated “last” wills. What should courts do in such cases? In one memorably tragic case, Cecil George Harris used his pocketknife to scratch the words, “In case I die in this mess, I leave all to the wife. Cecil Geo Harris” into the fender of a tractor he was fatally pinned under. It was upheld as a valid *holographic will*: a will that has been handwritten and signed by the testator. A majority of states recognize holographic wills, although their specific requirements vary and an estates attorney should never rely on the validity of one. (For example, Maryland recognizes holographic wills only by testators serving in the armed services abroad. Md. CODE ESTATES & TRUSTS § 4-103(a)).

8.10. **Interpretive Problems.** The general interpretive rule for wills is the “intent of the testator.” Is there any reason this might be a harder problem for wills than for other types of legal instruments? Consider:

- T’s will leaves “all my property to my daughters A and B.” Five years after making the will but ten years before his death, T and his wife have another child, C.
- T’s will leaves “my red Toyota to my nephew A.” After making the will, T wrecks the red Toyota and buys a blue Toyota to replace it.
- T’s will leaves \$10,000 to A, \$10,000 to B, and his antique writing desk to C. After expenses, T’s estate consists of \$5,000 in cash and the writing desk.
- T’s will leaves his estate equally to his sisters A and B. A dies in the same car accident as T. She leaves behind two children, C and D. T has one child of his own, E, from whom he is estranged.

## **Maryland Code, Estates and Trusts**

### **§3-101. Order of distribution of net intestate estate**

Any part of the net estate of a decedent not effectively disposed of by his will shall be distributed by the personal representative to the heirs of the decedent in the order prescribed in this subtitle.

### **§3-102. Share of surviving spouse**

(a) In general.—The share of a surviving spouse shall be as provided in this section.

(b) Surviving minor child.—If there is a surviving minor child, the share shall be one-half.

(c) No surviving minor child, but surviving issue.—If there is no surviving minor child, but there is surviving issue, the share shall be the first \$ 15,000 plus one-half of the residue.

(d) No surviving issue, but surviving parent.—If there is no surviving issue but a surviving parent, the share shall be the first \$ 15,000 plus one-half of the residue.

(e) No surviving issue or parent.—If there is no surviving issue or parent, the share shall be the whole estate. . . .

### **§3-103. Division among surviving issue**

The net estate, exclusive of the share of the surviving spouse, or the entire net estate if there is no surviving spouse, shall be divided equally among the surviving issue. . . .

### **§3-104. Distribution when there is no surviving issue**

. . . .

(b) Parents and their issue.—. . . it shall be distributed to the surviving parents equally, or if only one parent survives, to the survivor; or if neither parent survives, to the issue of the parents, by representation.

(c) Grandparents and their issue.—. . .

(d) Great-grandparents and their issue.—. . .

(e) No surviving blood relative.—If there is no surviving blood relative entitled to inherit under this section, it shall be divided into as many equal shares as there are stepchildren of the decedent. . . .

### Notes and Questions

8.11. If you don't make a will, the state will make one for you. This portion of the Maryland Code describes the default inheritance rules for people who die domiciled in Maryland without a will. How well do you think they track people's expectations about what will happen to their property after they die? In addition to *total intestacy*—dying without a will—the intestacy statute also applies in cases of *partial intestacy*—dying with a will that fails to dispose of all of one's property. How might that happen?

## 8.3 Gifts

In order for a valid gift to occur, three elements must be present: (1) the donor must *intend* to give the property as a gift; (2) the donor must *deliver* the property to the donee; and (3) the donee must *accept* the gift. We won't spend much time on the third element, because when the property has some value, acceptance will generally be presumed in the absence of an explicit rejection.

Unlike a sale or a contract, a gift does not require consideration. This leads to concerns that often shape judicial doctrine. First, without tangible consideration, we need to keep people from lying about what was given to them. Because gift issues often arise after the alleged donor died, courts have been concerned to protect the donor's heirs from having the donor's estate stripped by people who claim to be donees.

Second and relatedly, we desire to protect the system of written wills and to encourage its use. A standard will must be signed and witnessed. A system that easily allows pre-mortem gifts might undermine people's incentives to take the time to write a will—they might think they can always just give their property away when death approaches—and also harm the legitimate expectations of those who are named in a will. If the person who writes a will, known as the testator, identifies specific property in her will, but sells it or gives it away before she dies, the devise in the will is nullified; it's no longer her property to give away when she dies. Although people named as devisees in a will have no *legal* rights to the property before the testator dies, they might nonetheless have practically and morally compelling expectations—especially if we worry about the people surrounding a dying person exercising undue influence and extracting gifts that the dying person wouldn't give if she were thinking more clearly. Thus, by making it more difficult to give gifts, we may protect the overall system of property transfers. This concern

can lead courts to find that no gift has been made even when the would-be donor very clearly wanted to give the property away. Consider as you read whether this overall structural concern is justified.

***In re Estate of Evans***  
356 A.2d 778 (Pa. 1976)

**Nix, Justice.**

Appellant, Vivian Kellow, objected to the inventory, proposed schedule of distribution and final accounting of the executor of the estate of Arthur Evans. After appellant finished the presentation of her case, the lower court granted appellees' motion to dismiss appellant's objections. . . . The thrust of her appeal to this Court is that certain contents of a safe deposit box were the subject of an *inter vivos* gift to her from Arthur Evans, the deceased, and, consequently, should not have been included in his estate.

Appellant, the niece of Arthur Evans' deceased wife, began working for the Evans family when she was 16. For several years she took care of Mrs. Evans who for some years prior to death was an invalid. Appellant cooked meals for the Evanses, cleaned their house, did their laundry and generally cared for Mrs. Evans. She received adequate compensation for performing these needed services. When Mrs. Evans died, appellant continued to cook at least one hot meal a day for Mr. Evans, do his laundry and make sure his house was tidy. After appellant was married, she continued to perform these same services and visited Mr. Evans once a day. In May of 1971, following one of his four hospitalizations, the deceased moved into appellant's home.

Although at times Mr. Evans was confined to his bed because of water in his legs, he frequently took walks, had visits with his lawyers and made trips to his bank. On October 22, 1971, appellant's husband drove Mr. Evans and a friend of his, Mr. Turley, to town so that Mr. Evans might go to the bank. Turley testified that Mr. Evans spent about one hour going through the contents of his safe deposit box. Before leaving the bank, the deceased obtained both keys to the box.

Various witnesses presented by appellant testified to seeing the keys to the safe deposit box beneath appellant's mattress and to statements by Mr. Evans to the effect that the contents of the safe deposit box had been given to appellant. Mr. Evans entered the hospital for the last time on November

5, 1971. During this last hospital stay, Reverend Cummings visited with him and was told that Mr. Evans was giving the Reverend's church \$10,000.00 and that he had given the rest of his possessions and the keys to his safe deposit box to appellant. Mr. Evans expired on November 23, 1971.

Appellant relinquished the keys to the safe deposit box to a bank officer, but not without protesting that the contents of the box were hers. The box revealed a holographic will of Mr. Evans dated September 16, 1965, and approximately \$800,000.00 in bonds, preferred and common stock and several miscellaneous items.<sup>1</sup>

The lower court correctly noted that the requirements for a valid *inter vivos* gift were donative intent and delivery, actual or constructive. With respect to donative intent, the court found:

Turning to the facts of this case, certainly no one can reasonably argue that Arthur Evans lacked sufficient motive to make a gift to Vivian. The record clearly manifests, both by his conduct and his statements, donative intent, the first prerequisite.

Nevertheless, the court ruled that no delivery had been made. This result was predicated upon a finding that the deceased had not divested himself of complete dominion and control over the safe deposit box. After properly noting that constructive delivery is sufficient when manual delivery is impractical or inconvenient, the court reasoned:

The record contains no evidence of circumstances which were such that it was impractical or inconvenient to deliver the contents of this box into the actual possession or control of Vivian.

Arthur Evans, although suffering physical infirmities and apprehensive of death, was nonetheless ambulatory. On October 22, 1971, he appeared at the Nanticoke National Bank in the company of Harold Turley and Leroy Kellow and spent approximately one hour going over the contents of his safe deposit box in a cubicle provided in the bank for that purpose. He left the bank after redepositing the contents and took with him only the keys which independent testimony indicates he delivered to Vivian the next day. There was no manual delivery of the contents. The contents of the box

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<sup>1</sup>The will was uncontested and under its terms provided for a \$1,000.00 bequest to appellant.

remained undisturbed. The box, and its contents, were registered in the name of the decedent at the date of his death. The objects of the gift were not placed in the hands of Vivian, nor was there placed within her power the means of obtaining the contents. . . .

A claim of a gift *inter vivos* against the estate of the dead must be supported by clear and convincing evidence. In order to effectuate an *inter vivos* gift there must be evidence of an intention to make a gift and a delivery, actual or constructive, of a nature sufficient not only to divest the donor of all dominion over the property but also invest the donee with complete control over the subject-matter of the gift.

[*Tomayko v. Carson*, 368 Pa. 379, 385 (1951).]

In the instant case, the controversy focuses on whether there was an adequate delivery. . . . :

"If there remains something for the donor to do before the title of the donee is complete, the donor may decline the further performance and resume his own." . . . "[I]t is not possible that a chancellor would compel an executor or administrator to complete a gift by the doing of any act which the alleged donor if living might have refused to do, and thereby revoked his purpose to give." . . . "Though every other step be taken that is essential to the validity of the gift, if there is no delivery, the gift must fail. Intention cannot supply it; words cannot supply it; actions cannot supply it. It is an indispensable requisite, without which the gift fails, regardless of consequence." The consequence is that no matter how often or how emphatically the desire or intention of the donor to make the gift has been expressed, upon his death before delivery has been completed, the promise or purpose to give is revoked.

We have recognized that in some cases due to the form of the subject matter of the gift or due to the immobility of the donor actual, manual delivery may be dispensed with and constructive or symbolic delivery will suffice. In *Ream Estate*, 413 Pa. 489, 198 A.2d 556 (1964), for example, the Court found there had been a valid constructive delivery of an automobile

where the donor gave the keys to the alleged donee and also gave him the title to the car after executing an assignment of it leaving the designation of the assignee blank. The assignment was executed in the presence of a justice of the peace and the evidence was overwhelming that the name of the donee was to be inserted upon the death of the decedent. . . .

Appellant relies heavily on *Leadenham's Estate*, 289 Pa. 216, 137 A. 247 (1927), and *Leitch v. Diamond National Bank*, 234 Pa. 557, 83 A. 416 (1912). These decisions, however, support the Court's finding that there was no delivery in the instant case. In *Leadenham's Estate, supra*, the donor had rented a separate safe deposit box in the name of the intended donee, put the contents of his box into the newly rented one and delivered the keys to it to the donee. On those facts we held that the constructive delivery of the keys was sufficient to sustain the *inter vivos* gift because the donor had divested himself of dominion and control and invested the donee with complete dominion and control.

In *Leitch v. Diamond National Bank, supra*, the donor and donee were husband and wife and had lived together harmoniously for many years. The husband had three safe deposit boxes registered in his name and the name of his wife and he designated one of them as his wife's. He gave her the keys to that box. The Court found that she had complete control over that box and that he only entered it with her permission. Since she had complete control over the access to the box the Court found there was a valid delivery of the contents of the box to her.

In both of these cases, the determinative factor was that the donee had complete dominion and control over the box and its contents. In that posture we ruled that giving the keys to the box to the donee was a valid constructive delivery. In the instant case, appellant did not have dominion and control over the box even though she was given the keys to it. The box remained registered in Mr. Evans' name and she could not have gained access to it even with the keys. Mr. Evans never terminated his control over the box, consequently he never made a delivery, constructive or otherwise.

Although appellant suggests that it was impractical and inconvenient for Mr. Evans to manually deliver the contents of his box to her because of his physical condition and the hazards of taking such a large sum of money out of the bank to her home, we need only note that the deceased was obviously a shrewd investor, familiar with banking practices, and could have made delivery in a number of simple, convenient ways. First, he was

not on his deathbed. He was ambulatory and not only went to the bank on October 22, 1971, but took walks thereafter and did not enter the hospital until November 5, 1971. On the day he went to the bank he could have rented a second safe deposit box in appellant's name, delivered the contents of his box to it and then given the keys to appellant. He could have assigned the contents of his box to appellant. For that matter, he could have written a codicil to his will.

The lower court noted that the deceased was an enigmatic figure. It is not for us to guess why people perform as they do. On the record before us it is clear that regardless of Mr. Evans' intention to make a gift to appellant, he never executed that intention and we will not do it for him. On these facts, we are constrained to hold that there was not an *inter vivos* gift to appellant and that the contents of the safe deposit box were properly included in the inventory of Mr. Evans' estate . . . .

**ROBERTS, Justice (dissenting).**

I dissent. The central issue in this case is whether donor made an adequate delivery of the gift to donee. The majority finds that adequate delivery was not made because the safe deposit box was leased solely in donor's name and supports this conclusion by pointing out that there were several alternative means of delivering the gift which would have been adequate. I believe that the inquiry should not be what form of delivery would have been clearly sufficient, but rather whether the delivery made by donor was adequate. I believe that it was.

In *Rynier Estate*, 349 Pa. 471, 32 A.2d 736 (1943), we said that delivery is determined on the facts of each case, with reference to the donor's intent.

As the chief factor in the determination of the question whether a legal delivery has been effected is the intention of the donor to transfer title to the donee, as manifested by his words and actions and by the circumstances surrounding the transaction, it is evident that each case must depend largely upon its own facts.

The majority suggests that donor was "obviously a shrewd investor, familiar with banking practices. . . ." From this "familiar(ity) with banking practices," which is nowhere shown on the record, and the absence of a joint lease for the box, it apparently concludes that donor did not intend a gift. There are two reasons why this result is not correct.

First, there is no doubt in this case that donor intended a gift. He told many people that he had given the contents of the box to appellant. In fact, there is competent testimony that donor directed donee to display the keys, hidden under her mattress, to several witnesses.

Second, it is apparent from the record that donor believed undisputed and unconditional delivery of the keys to be sufficient to complete the gift. Most of this Court's cases dealing with *inter vivos* gifts of the contents of safe deposit boxes turn on the delivery or nondelivery of the keys to the box to the donee. If the key was delivered, the gift was normally upheld; if the key was not delivered, the gift was set aside, whether or not the box was jointly leased. I have found no case which turned on the presence or absence of a joint lease. Given this line of authority, and accepting the majority's conclusion that donor was sophisticated in these matters, it must be concluded that donor believed delivery of the keys to the box completed the gift. If this were not so, why would donor cause donee to take several witnesses into her bedroom to show them that she had the keys and why would he speak in terms that indicated a completed gift—"I gave to Vivian . . . the keys and the contents *are* hers." Because it is donor's intention to transfer title which is crucial to a valid delivery, and because this donor intended to transfer title, I dissent from the majority's conclusion . . . .

### **Notes and Questions**

8.12. The majority writes, "regardless of Mr. Evans' intention to make a gift to appellant, he never executed that intention and we will not do it for him." But it also quotes approvingly the lower court's statement that "[t]he record clearly manifests, both by his conduct and his statements, [Mr. Evans'] donative intent." Has the court contradicted itself, or can these statements be squared?

8.13. Why does the court note that Vivian Kellow "received adequate compensation" for the services she provided to Arthur Evans? What were his motivations for the attempted gift, and why are the appellees contesting it? Does the family setting shed any light on the positions of the majority and dissent?

8.14. The common law required manual delivery of personal property for a valid gift unless the object was too big to move. See, e.g., *Newman v. Bost*, 20 S.E. 848 (N.C. 1898) (symbolic delivery insufficient where objects were small items that could easily have been physically delivered, even though would-be donor was ill in bed). If the object was too big to move, substitutes for physical delivery were accept-

able. Keys are a classic example: handing over car keys is “constructive” or “symbolic” delivery of the car. The keys symbolize the car (symbolic delivery) and provide the means for exercising dominion and control over it (constructive delivery). Today, because all states require car owners to register the title to their cars, many states require that a gift of a car is not complete unless the donor also hands over the title documents. Why would the law require delivery of the title documents? What happens when someone who doesn’t know this rule hands over only the keys, and then a year later changes her mind and demands the car back? (You should see here how a title system can both make it easier to determine who owns property and easier for legally unsophisticated people to make significant mistakes.)

Why isn’t saying “I give you this car” without delivery enough to complete the gift? The keys could be handed over later, after all. If there’s a present donative intent, what further purpose does a delivery requirement serve? Most answers focus on the evidentiary role played by delivery: possession of the property by the putative donee is strong evidence that the putative donor really did make a gift. This is especially important because most gift disputes arise after the putative donor’s death. Notice to third parties who deal with the property and need to know who owns it is another common rationale. But when might a putative donee’s possession not be particularly probative of whether a gift had occurred? Suppose a father allows his daughter to use his second car when she moves to town, and that this continues for six months. If, after they have a falling out, the father sought to retrieve the car, how would you figure out whether this was a loan or a gift?

8.15. Modern courts often relax the delivery requirement to allow constructive or symbolic delivery even of smaller, more portable items, but some delivery requirement remains. Suppose the would-be donor signed a document in front of two witnesses saying “I now give my daughter \$100,000,” and gave the document to his daughter. But the donor didn’t actually deliver the money. Should we relax the delivery requirement because we are very confident that a gift was intended? Or does delivery still serve an important purpose? See *Devol v. Dye*, 24 N.E. 246 (Ind. 1890) (“The intention of a donor in peril of death, when clearly ascertained and fairly consummated within the meaning of well-established rules, is not to be thwarted by a narrow and illiberal construction of what may have been intended for and deemed by him a sufficient delivery.”); *Ferrell v. Stinson*, 11 N.W.2d 701 (Iowa 1943) (deed made out to intended donee was kept in box in donor’s house, and recorded after grantor’s death; held: delivered given strong evidence of donor’s intent and fact that seriously ill grantor was physically unable to access box after executing deed); cf. *Hocks v. Jeremiah*, 759 P.2d 312 (Or. App. 1988) (bonds and diamond ring placed

over a period of years in a safe deposit box held jointly with putative grantee were not properly delivered). What should have happened in the *Ferrell* case if the grantor had made out the deed, put it in the box, and then a week later, still in her sickbed, made out a deed to another person and handed *that* second deed to the intended grantee?

8.16. The RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 6.2, cmt. yy, takes the position that personal property can be validly given without delivery “if the donor’s intent to make a gift is established by clear and convincing evidence.” Is this the right rule?

# Chapter 9

## Protecting Buyers

Famed con artist George C. Parker specialized in selling the Brooklyn Bridge. Parker and other con artists working in New York around the start of the 20th century would convince victims that they stood to make a fortune charging tolls. Unfortunately, the buyers obtained nothing, no matter how fancy the paperwork Parker offered them, because Parker did not own the bridge. *Nemo dat quod non habet* was the Latin motto of the common law: “No man can give what he does not have.” Parker, having no title, could give none to his buyers.

Today, “I’ve got a bridge to sell you” is a punchline: only an incredible rube, we like to believe, could be so gullible as to think that a man in the street with a “Bridge for Sale” sign is actually its owner. But the problem arises even in less dramatic cases. Suppose Dorothy Dupe is scheduled to buy Blackacre on Wednesday from Sadie Scamalot. What if on Tuesday Scamalot sells Blackacre to Charles Clueless first? Then on Wednesday before the “sale,” Scamalot is no longer the owner of Blackacre, and under *nemo dat*, Dupe owns nothing after the “sale.” Sometimes, equity would intervene to protect a second buyer who lacked notice of the prior sale—but such doctrines have serious risks for Clueless, who may have no idea that Scamalot is about to turn around and “sell” Blackacre again.

The heart of the problem here is that Clueless and Dupe don’t know enough about potential conflicting claims to Blackacre. Dupe can’t find Clueless to confirm that she should be dealing with him rather than with Scamalot, and Clueless can’t find Dupe to warn her off from buying something Scamalot no longer owns.

Despite that other common law maxim *caveat emptor*—let the buyer beware—the law of property transfers offers buyers multiple protections against fraud and mistakes by sellers. This chapter considers several such protections.

First, there are rules protecting the so-called **good faith purchaser for value** of property, who buys from someone with less than perfect title to that property. For this doctrine, pay close attention to what makes a buyer a good faith purchaser, and also to the circumstances that allow a good faith purchaser to take title. It is hornbook law that “a thief takes no title and can give none,” so can a good faith purchaser receive title from a thief? A forger? A fraudster?

Second, real property title deeds can include **warranties of title** that provide buyers with protection against defects in ownership. Here, consider carefully what defects are covered, and what recourse the buyer will have in case a problem arises.

Third, we will look at **recordation** of property ownership of real estate. Having a public record of who owns what can be immensely helpful to buyers, but it can also raise difficult questions if records conflict with each other.

## 9.1 Good Faith Purchasers

### Uniform Commercial Code

#### § 2-312. Warranty of title

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

- (a) The title conveyed shall be good, and its transfer rightful; and
- (b) The goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have. . . .

#### § 2-403. Power to transfer; good faith purchase of goods; “entrusting”

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for

value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

- (a) The transferor was deceived as to the identity of the purchaser, or
  - (b) The delivery was in exchange for a check which is later dishonored, or
  - (c) It was agreed that the transaction was to be a "cash sale," or
  - (d) The delivery was procured through fraud punishable as larcenous under the criminal law.
- (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.
- (3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

### **Notes and Questions**

9.1. What do these two provisions have to do with each other? Hint: think about circumstances in which the warranty of § 2-312 would be violated and consider whether § 2-403 comes into play, and vice-versa.

### ***Kotis v. Nowlin Jewelry, Inc.***

844 S.W.2d 920 (Tex. Ct. App. 1992)

#### **DRAUGHN, Justice.**

Eddie Kotis appeals from a judgment declaring appellee, Nowlin Jewelry, Inc., the sole owner of a Rolex watch, and awarding appellee attorney's fees. Kotis raises fourteen points of error. We affirm.

On June 11, 1990, Steve Sitton acquired a gold ladies Rolex watch, President model, with a diamond bezel from Nowlin Jewelry by forging a check belonging to his brother and misrepresenting to Nowlin that he had his brother's authorization for the purchase. The purchase price of the watch, and the amount of the forged check, was \$9,438.50. The next day, Sitton telephoned Eddie Kotis, the owner of a used car dealership, and asked Kotis if he was interested in buying a Rolex watch. Kotis indicated interest

and Sitton came to the car lot[.] Kotis purchased the watch for \$3,550.00. Kotis also called Nowlin's Jewelry that same day and spoke with Cherie Nowlin.

Ms. Nowlin told Kotis that Sitton had purchased the watch the day before. Ms. Nowlin testified that Kotis would not immediately identify himself. Because she did not have the payment information available, Ms. Nowlin asked if she could call him back. Kotis then gave his name and number. Ms. Nowlin testified that she called Kotis and told him the amount of the check and that it had not yet cleared. Kotis told Ms. Nowlin that he did not have the watch and that he did not want the watch. Ms. Nowlin also testified that Kotis would not tell her how much Sitton was asking for the watch.

John Nowlin, the president of Nowlin's Jewelry, testified that, after this call from Kotis, Nowlin's bookkeeper began attempting to confirm whether the check had cleared. When they learned the check would not be honored by the bank, Nowlin called Kotis, but Kotis refused to talk to Nowlin. Kotis referred Nowlin to his attorney. On June 25, 1990, Kotis' attorney called Nowlin and suggested that Nowlin hire an attorney and allegedly indicated that Nowlin could buy the watch back from Kotis. Nowlin refused to repurchase the watch.

After Sitton was indicted for forgery and theft, the district court ordered Nowlin's Jewelry to hold the watch until there was an adjudication of the ownership of the watch. Nowlin then filed suit seeking a declaratory judgment that Nowlin was the sole owner of the watch. Kotis filed a counterclaim for a declaration that Kotis was a good faith purchaser of the watch and was entitled to possession and title of the watch. After a bench trial, the trial court rendered judgment declaring Nowlin the sole owner of the watch. The trial court also filed Findings of Fact and Conclusions of Law.

In point of error one, Kotis claims the trial court erred in concluding that Sitton did not receive the watch through a transaction of purchase with Nowlin, within the meaning of Tex.Bus. & Com.Code Ann. § 2.403(a). Where a party challenges a trial court's conclusions of law, we may sustain the judgment on any legal theory supported by the evidence. Incorrect conclusions of law will not require reversal if the controlling findings of facts will support a correct legal theory.

Kotis contends there is evidence that the watch is a “good” under the UCC, there was a voluntary transfer of the watch, and there was physical delivery of the watch. Thus, Kotis maintains that the transaction between Sitton and Nowlin was a transaction of purchase such that Sitton acquired the ability to transfer good title to a good faith purchaser under § 2.403 [which was identical in relevant part to the UCC excerpt quoted above]. . . .

Neither the code nor case law defines the phrase “transaction of purchase.” “Purchase” is defined by the code as a “taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property.” Tex. Bus. & Com. Code Ann. § 1.201(32) (Vernon 1968). Thus, only voluntary transactions can constitute transactions of purchase.

Having found no Texas case law concerning what constitutes a transaction of purchase under § 2.403(a), we have looked to case law from other states. Based on the code definition of a purchase as a voluntary transaction, these cases reason that a thief who wrongfully takes the goods against the will of the owner is not a purchaser. *See Suburban Motors, Inc. v. State Farm Mut. Automobile Ins. Co.*, 268 Cal. Rptr. 16, 18 (Cal. Ct. App. 1990); *Charles Evans BMW, Inc. v. Williams*, 395 S.E.2d 650, 651-52 (Ga. Ct. App. 1990); *Inmi-Etti v. Aluisi*, 492 A.2d 917 (Md. Ct. App. 1985). On the other hand, a swindler who fraudulently induces the victim to deliver the goods voluntarily is a purchaser under the code.

In this case, Nowlin’s Jewelry voluntarily delivered the watch to Sitton in return for payment by check that was later discovered to be forged. Sitton did not obtain the watch against the will of the owner. Rather, Sitton fraudulently induced Nowlin’s Jewelry to deliver the watch voluntarily. Thus, we agree with appellant that the trial court erred in concluding that Sitton did not receive the watch through a transaction of purchase under § 2.403(a). We sustain point of error one.

In point of error two, Kotis contends the trial court erred in concluding that, at the time Sitton sold the watch to Kotis, Sitton did not have at least voidable title to the watch. In point of error nine, Kotis challenges the trial court’s conclusion that Nowlin’s Jewelry had legal and equitable title at all times relevant to the lawsuit. The lack of Texas case law addressing such issues under the code again requires us to look to case law from other states to assist in our analysis.

In *Suburban Motors, Inc. v. State Farm Mut. Automobile Ins. Co.*, the California court noted that § 2.403 provides for the creation of voidable title where there is a voluntary transfer of goods. Section 2.403(a)(1)-(4) set forth the types of voluntary transactions that can give the purchaser voidable title. Where goods are stolen such that there is no voluntary transfer, only void title results. Subsection (4) provides that a purchaser can obtain voidable title to the goods even if “delivery was procured through fraud punishable as larcenous under the criminal law.” This subsection applies to cases involving acts fraudulent to the seller such as where the seller delivers the goods in return for a forged check. Although Sitton paid Nowlin’s Jewelry with a forged check, he obtained possession of the watch through a voluntary transaction of purchase and received voidable, rather than void, title to the watch. Thus, the trial court erred in concluding that Sitton received no title to the watch and in concluding that Nowlin’s retained title at all relevant times. We sustain points of error two and nine.

In point of error three, Kotis claims the trial court erred in concluding that Kotis did not give sufficient value for the watch to receive protection under § 2.403, that Kotis did not take good title to the watch as a good faith purchaser, that Kotis did not receive good title to the watch, and that Kotis is not entitled to the watch under § 2.403. In points of error four through eight, Kotis challenges the trial court’s findings regarding his good faith, his honesty in fact, and his actual belief, and the reasonableness of the belief, that the watch had been received unlawfully.

Under § 2.403(a), a transferor with voidable title can transfer good title to a good faith purchaser. Good faith means “honesty in fact in the conduct or transaction concerned.” Tex.Bus. & Com. Code Ann. § 1.201(19) (Vernon 1968). The test for good faith is the actual belief of the party and not the reasonableness of that belief. *La Sara Grain v. First Nat’l Bank*, 673 S.W.2d 558, 563 (Tex.1984).

Kotis was a dealer in used cars and testified that he had bought several cars from Sitton in the past and had no reason not to trust Sitton. He also testified that on June 12, 1990, Sitton called and asked Kotis if he was interested in buying a Ladies Rolex. Once Kotis indicated his interest in the watch, Sitton came to Kotis’s place of business. According to Kotis, Sitton said that he had received \$18,000.00 upon the sale of his house and that he had used this to purchase the watch for his girlfriend several months before. Kotis paid \$3,550.00 for the watch. Kotis further testified that he then

spoke to a friend, Gary Neal Martin, who also knew Sitton. Martin sagely advised Kotis to contact Nowlin's to check whether Sitton had financed the watch. Kotis testified that he called Nowlin's after buying the watch.

Cherie Nowlin testified that she received a phone call from Kotis on June 12, 1990, although Kotis did not immediately identify himself. Kotis asked if Nowlin's had sold a gold President model Rolex watch with a diamond bezel about a month before. When asked, Kotis told Ms. Nowlin that Sitton had come to Kotis' car lot and was trying to sell the watch. Ms. Nowlin testified that Kotis told her he did not want the watch because he already owned a Rolex. Ms. Nowlin told Kotis that Sitton had purchased the watch the day before. Kotis asked about the method of payment. Because Ms. Nowlin did not know, she agreed to check and call Kotis back. She called Kotis back and advised him that Sitton had paid for the watch with a check that had not yet cleared. When Ms. Nowlin asked if Kotis had the watch, Kotis said no and would not tell her how much Sitton was asking for the watch. Ms. Nowlin did advise Kotis of the amount of the check.

After these calls, the owner of Nowlin's asked his bookkeeper to call the bank regarding Sitton's check. They learned on June 15, 1990 that the check would be dishonored. John Nowlin called Kotis the next day and advised him about the dishonored check. Kotis refused to talk to Nowlin and told Nowlin to contact his attorney. Nowlin also testified that a reasonable amount to pay for a Ladies President Rolex watch with a diamond bezel in mint condition was \$7,000.00–\$8,000.00. Nowlin maintained that \$3,500.00 was an exorbitantly low price for a watch like this.

The trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Kotis testified that he lied when he spoke with Cherie Nowlin and that he had already purchased the watch before he learned that Sitton's story was false. The judge, as the trier of fact, may not have believed Kotis when he said that he had already purchased the watch. If the judge disbelieved this part of Kotis' testimony, other facts tend to show that Kotis did not believe the transaction was lawful. For example, when Kotis spoke with Nowlin's, he initially refused to identify himself, he said that he did not have the watch and that he did not want the watch, he refused to divulge Sitton's asking price, and he later refused to talk with Nowlin and advised Nowlin to contact Kotis' attorney. Thus, there is evidence supporting the trial court's finding that Kotis did not act in good faith.

There are sufficient facts to uphold the trial court's findings even if the judge had accepted as true Kotis' testimony that, despite his statements to Nowlin's, he had already purchased the watch when he called Nowlin's. The testimony indicated that Kotis was familiar with the price of Rolex watches and that \$3,550.00 was an extremely low price for a mint condition watch of this type. An unreasonably low price is evidence the buyer knows the goods are stolen. Although the test is what Kotis actually believed, we agree with appellee that we need not let this standard sanction willful disregard of suspicious facts that would lead a reasonable person to believe the transaction was unlawful. Thus, we find sufficient evidence to uphold the trial court's findings regarding Kotis' lack of status as a good faith purchaser. We overrule points of error three through eight. . . .

We affirm the trial court's judgment.

### Notes and Questions

9.2. The common-law baseline is *nemo dat quod non habet*: no man can give what he does not have. If I "give" you a car I don't own, you don't own it either. If I sell you a tract of land encumbered by a mortgage and an easement, you receive only as much as I owned, so you take the land subject to the mortgage and the easement. This *nemo dat* baseline is the source of the maxim that a thief cannot give good title. So if Sitton had held up Nowlin's at gunpoint, how would the case have come out, and on what reasoning?

§ 2-403(1), as applied in *Kotis*, distinguishes the thief's "void" title from merely "voidable" title: the quality of title obtained by the buyer in a transaction that is for some reason defective. If the seller in that defective transaction discovers the problem, she has a right to unwind the transaction (and get her stuff back). But until she does, the buyer has the power to convey not just his own, voidable title, but something even better. A good-faith purchaser for value receives good title, even *as against the original seller*. Her right to unwind the transaction has been cut off. This is a harsh way to treat an innocent victim of fraud or mistake. Why would property law do something like that?

9.3. How did the parties get into this mess? Obviously Sitton is most to blame, but is there anything Kotis or Nowlin could have done? Who is left holding the bag and why? Is there anything Kotis can do to recover his \$3,550.00?

9.4. § 2-403 provides for two tests that the buyer must meet to be protected (in addition to the threshold question of whether his seller had voidable title): he

must act in good faith and he must give “value.” Which of these tripped up Kotis? And what is the reason for not protecting donees along with buyers?

## Note on Negotiability

Another version of the good-faith purchaser doctrine developed in the law of intangible property called “negotiable instruments.” In the centuries before the development of good national and international banking systems, merchants commonly did business by passing around various promises or instructions to pay. So, for example, Abel might buy a cartload of barrels of wine from Baker on March 1 by giving Baker a signed promise to pay £200 on June 1. Baker could in theory sit on this *promissory note* until June 1 and then demand payment from Abel. But instead, Baker was more likely to use the note to pay his own debts: he might, for example, give it to Crumleigh on April 1 to buy a gold chain. Baker would sign, or *indorse*, the note, making Crumleigh an assignee of Baker’s right to collect from Abel, so that come June 1, Crumleigh could present the note to Abel and demand payment. Of course, there was no need to stop there: Crumleigh could indorse the note over to Daniels, and so on. In such a way, credit became a kind of currency, with the note (collecting indorsements as it went) functioning as a token to indicate who currently held the right to collect when the debt came due on June 1.

Another kind of signed promise, the *bill of exchange*, functioned similarly. The difference was where Abel’s note was a promise by Abel to pay, a bill of exchange would be an instruction from Abel to a third party to pay. Perhaps the bill would be “drawn on” Abel’s business partner Absalom, or perhaps more usefully it would be drawn on another merchant who had agreed to extend Abel credit or make payments against amounts Abel had deposited with him. If this sounds a bit like banking, it is not a coincidence; the modern check is a direct descendent of the medieval bill of exchange.

Now back to our story. Suppose that Abel discovers that the wine Baker sold him was rotten, good only as vinegar. Abel chases down Baker, only to learn that Baker has already indorsed the note over to Crumleigh, who has already done the same to Daniels. Come June 1, Daniels demands payment, but Abel refuses, pointing to the worthless vinegar. Baker didn’t hold up his side of the deal; why should Abel have to do the same? In *Miller v Race*, (1758) 97 Eng. Rep. 398 (K.B.), the great commercial jurist Lord Mansfield gave an answer:

After stating the case at large, he declared that at the trial, he had no sort of doubt, but this action was well brought, and

would lie against the defendant in the present case; upon the general course of business, and from the consequences to trade and commerce: which would be much incommoded by a contrary determination. . . . A bank-note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received, as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured.

The point is that if Daniels needs to check the details of the Abel-Baker transaction—including inspecting the wine—to determine whether he will be paid on Abel's note, he will refuse. He doesn't know Abel; he doesn't even know Baker. The doctrine of *Miller v. Race* is a good-faith-purchaser doctrine for negotiable instruments; it lets Daniels rely on the note itself, rather than inspecting the details over the underlying transaction. That in turn lets the note circulate as money, enabling other transactions that otherwise would have frozen up for lack of financing.

The doctrine of negotiability—“negotiation” being the act of assigning the promise to pay from one recipient to another, typically by indorsing the note and/or physically handing it over—took root in the United States. Indeed, *Swift v. Tyson*—famous for being the case overruled in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“There is no federal general common law.”)—was a case about negotiability. Norton and Keith convinced Tyson to sign a bill of exchange for \$540.30, made payable to Norton, who then negotiated it to Swift to pay off a preexisting debt. But when Swift demanded payment from Tyson, Tyson replied that he had given it to Norton and Keith “as part consideration for the purchase of certain lands in the state of Maine, which Norton and Keith represented themselves to be the owners of” but were not. The case turned on whether Swift was a “bona fide holder for a valuable consideration, without notice,” in which case he was entitled to collect from Tyson regardless of the land fraud Norton and Keith had perpetrated on Tyson. The only issue there was whether cancellation of the preexisting debt to Swift meant that Swift had given “valuable consideration” for the note, and again Justice Story’s reasoning was pragmatic:

And we have no hesitation in saying, that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. . . . It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the

credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. . . . But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuitry to apply the proceeds to the payment of his debts. . . . Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.

Today, negotiability shows up in many areas of commercial law. One good illustration comes from Article 3 of the Uniform Commercial Code. A person is a “holder in due course” of a negotiable instrument (and here, think “check” or “promissory note”) if

(1) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(2) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument [either to recover the instrument after a theft or to rescind the transaction in which it was transferred], and (vi) without notice that any party has a defense or claim in recoupment . . .

UCC § 3-302(a). That’s a long list of circumstances, but they’re what you’d expect. In addition to the usual requirement that the holder in due course give value (and hence have a reliance interest in being paid), these are all issues that either affect

the authenticity of the instrument itself (paragraph (1)) or go to the holder's notice that something sketchy is afoot. But if a person qualifies as a holder in due course, she receives extensive protections:

(a) Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:

(1) A defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;

(2) A defense of the obligor stated in another section of this title or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract; and

(3) A claim in recoupment of the obligor against the original payee of the instrument . . . .

(b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1), but is not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment stated in subsection (a)(3) against a person other than the holder.

UCC § 3-305. Notice the difference between the unconditional defenses in (a)(1) and the "personal" defenses in (a)(2) and (a)(3). Only a few of the contract defenses—infancy, incapacity, fraud in the factum, and bankruptcy – are available against a holder in due course. Something like Baker's delivery of spoiled wine, even though it would give Abel a right to refuse payment against Baker, will not be effective against a holder in due course like Daniels. The effect is to turn a promise to pay into something stronger. It is freely transferrable and it is no longer subject to the individual defenses of the original promisor. In other words, assignability plus negotiability turn an *in personam* contract right into something that looks much more like an *in*

*rem* property right. (Does this remind you at all of how the courts turned unique things into fungible commodities in note 6.17 after *Wetherbee*? It should.)

Negotiability is a powerful doctrine, and it can be a dangerous one. It can be hard on promisors, particularly when they are the victims of fraud that doesn't appear on the face of the negotiable instrument itself. In particular, negotiability can be highly dangerous for consumers. If the promissory notes for their debts have been sold by the initial creditor to another financial institution, that institution may be able to collect on the debt even if the initial transaction was fraudulent, unconscionable, or even criminal. For that reason, the Federal Trade Commission's Holder in Due Course Rule, 16 C.F.R. pt. 433, requires consumer credit contracts to include language specifically disclaiming negotiability. But the rule does not apply to mortgage loans, see, e.g., *Johnson v. Long Beach Mortg. Loan Trust* 2001-4, 451 F. Supp. 2d 16, 54-55 (D.D.C. 2006). We will see some of the mischief and misdeeds that resulted from the serial negotiation of residential mortgages in the section on the mortgage crisis. For a sustained argument that the doctrine of negotiability has long outlived its original purpose and does more harm than good in an age of robust financial infrastructure, see JAMES STEVEN ROGERS: THE END OF NEGOTIABLE INSTRUMENTS: BRINGING PAYMENT SYSTEMS LAW OUT OF THE PAST (2011).

## 9.2 Theft and Fraud

### *Harding v. Ja Laur*

315 A.2d 132 (Md. Ct. Spec. App. 1974)

**GILBERT, Judge:** . . .

The bill alleged that a deed had been obtained from the appellant through fraud practiced upon her by the agent of Ja Laur Corporation. The bill further averred that the paper upon which the appellant had affixed her signature was "falsely and fraudulently attached to the first page of a deed identified as the same deed" through which the appellee, Ja Laur Corporation, and its assigns, the other appellees, claim title. . . .

There is no dispute that the appellant signed some type of paper. Her claim is not that her signature was forged in the normal sense, i.e., someone copied or wrote it, but rather that the forgery is the result of an alteration. Mrs. Harding alleges that at the time that she signed a blank paper she was told that her signature was necessary in order to straighten out a boundary

line. She represents that she did not know that she was conveying away her interest in and to a certain 1517 acres of land in Montgomery County.

The parcel of land that was conveyed by the allegedly forged deed is contiguous to a large tract of real estate in which Ja Laur and others had “a substantial interest.” It appears from the bill that Mrs. Harding’s land provided the access from the larger tract to a public road, so that its value to the appellees is obvious. Mrs. Harding excuses herself for signing the “blank paper” by averring that she did so at the instigation of an attorney, an agent of Ja Laur, who had “been a friend of her deceased husband, and . . . represented her deceased husband in prior business and legal matters, and that under [the] circumstances [she] did place her complete trust and reliance in the representations made to her . . .” by the attorney. The “blank paper” was signed “on or about April 2, 1970.” Mrs. Harding states that she did not learn of the fraud until the “summer of 1972.” At that time an audit, by the Internal Revenue Service, of her deceased husband’s business revealed the deed to Ja Laur, and its subsequent conveyance to the other appellees.

In *Smith v. State*, 256 A.2d 357, 360 (1970), we said that:

Forgery has been defined as a false making or material alteration, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. More succinctly, forgery is the fraudulent making of a false writing having apparent legal significance. It is thus clear that one of the essential elements of forgery is a writing in such form as to be apparently of some legal efficacy and hence capable of defrauding or deceiving.

Perkins, *Criminal Law* ch. 4, § 8 (2d ed. 1969) states, at 351:

A material alteration may be in the form of (1) an addition to the writing, (2) a substitution of something different in the place of what originally appeared, or (3) the removal of part of the original. The removal may be by erasure or in some other manner, such as by cutting off a qualifying clause appearing after the signature.

A multitude of cases hold that forgery includes the alteration of or addition to any instrument in order to defraud. That a deed may be the subject of a forgery is beyond question.

The Bill of Complaint alleges that the signature of Mrs. Harding was obtained through fraud. More important, however, to the issue is whether or not the bill alleges forgery. In our view the charge that appellant's signature was written upon a paper, which paper was thereafter unbeknown to her made a part of a deed, if true, demonstrates that there has been a material alteration and hence a forgery. . . .

We turn now to the discussion of whether *vel non* the demurrsers of Macro Housing, Inc. and Montgomery County, the other appellees, should have been sustained. There was no allegation in the bill that their agent had perpetrated the fraud upon Mrs. Harding. If they are to be held in the case, it must be on the basis that they are not *bona fide* purchasers without notice. The title of a *bona fide* purchaser, without notice, is not vitiated even though a fraud was perpetrated by his vendor upon a prior title holder. A deed obtained through fraud, deceit or trickery is voidable as between the parties thereto, but not as to a *bona fide* purchaser. A forged deed, on the other hand, is void *ab initio*. . . .

[T]he common law rule that a forger can pass no better title than he has is in full force and effect in this State. A forger, having no title can pass none to his vendee. Consequently, there can be no *bona fide* holder of title under a forged deed. A forged deed, unlike one procured by fraud, deceit or trickery is void from its inception. The distinction between a deed obtained by fraud and one that has been forged is readily apparent. In a fraudulent deed an innocent purchaser is protected because the fraud practiced upon the signatory to such a deed is brought into play, at least in part, by some act or omission on the part of the person upon whom the fraud is perpetrated. He has helped in some degree to set into motion the very fraud about which he later complains. A forged deed, on the other hand, does not necessarily involve any action on the part of the person against whom the forgery is committed. So that if a person has two deeds presented to him, and he thinks he is signing one but in actuality, because of fraud, deceit or trickery he signs the other, a *bona fide* purchaser, without notice, is protected. On the other hand, if a person is presented with a deed, and he signs that deed but the deed is thereafter altered e.g. through a change in the description or affixing the signature page to another deed, that is forgery and a subsequent purchaser takes no title.

In the instant case, the Bill of Complaint, for the reasons above stated, alleged a forgery of the deed by which Ja Laur took title from Mrs. Harding.

This allegation, if true, renders that deed a nullity. Ja Laur could not have passed title to the other appellees, Macro Housing, Inc. and Montgomery County. Those two appellees would therefore have no title to the land of Mrs. Harding. . . .

#### **Notes and Questions**

9.5. What is the point of the distinction between forging a deed (sometimes called “fraud in the factum”) and tricking someone into signing it (“fraud in the inducement”)? As between the fraudster and the victim, is there a significant difference? What about once third parties get involved?

9.6. Mrs. Harding signs a blank piece of paper, which Ja Laur then staples to a deed. Forgery? What if she signs the same piece of paper *after* it is stapled to the deed? Do the policy reasons for distinguishing forgery from fraud provide a convincing reason to treat these cases differently?

### **9.3 Warranties of Title**

#### **New York Real Property Law**

##### **§258—Short forms of deeds and mortgages.**

The use of the following forms of instruments for the conveyance and mortgage of real property is lawful, but this section does not prevent or invalidate the use of other forms:

##### **Statutory Form A (Individual)**

##### **DEED WITH FULL COVENANTS.**

This indenture, made the \_\_\_\_\_ day of \_\_\_\_\_ nineteen hundred and \_\_\_\_\_, between \_\_\_\_\_ (insert residence) party of the first part, and \_\_\_\_\_ (insert residence) party of the second part,

Witnesseth, that the party of the first part, in consideration of \_\_\_\_\_ dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, \_\_\_\_\_ and assigns forever, all \_\_\_\_\_ (descrip-

tion), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises,

To have and to hold the premises herein granted unto the party of the second part, \_\_\_\_\_ and assigns forever. And said \_\_\_\_\_ covenants as follows:

First. That said \_\_\_\_\_ is seized of said premises in fee simple, and has good right to convey the same;

Second. That the party of the second part shall quietly enjoy the said premises;

Third. That the said premises are free from incumbrances;

Fourth. That the party of the first part will execute or procure any further necessary assurance of the title to said premises;

Fifth. That said \_\_\_\_\_ will forever warrant the title to said premises.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

In presence of:

#### **Statutory Form D. (Individual)**

#### **QUITCLAIM DEED.**

This indenture, made the \_\_\_\_\_ day of \_\_\_\_\_ nineteen hundred and \_\_\_\_\_ between \_\_\_\_\_ (insert residence), party of the first part, and \_\_\_\_\_ (insert residence), party of the second part:

Witnesseth, that the party of the first part, in consideration of \_\_\_\_\_ dollars, lawful money of the United States, paid by the party of the second part, does hereby remise, release, and quitclaim unto the party of the second part, \_\_\_\_\_ and assigns forever, all (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises.

To have and to hold the premises herein granted unto the party of the second part, \_\_\_\_\_ and assigns forever.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

In presence of:

**Notes and Questions**

9.7. What is the difference between these two deed forms? Why would a grantee ever accept a quitclaim deed?

***McMurray v. Housworth***  
638 S.E.2d 421 (Ga. Ct. App. 2006)

**PHIPPS, Judge:**

Michael and Deborah Housworth sold a 24-acre tract of land which the purchasers—Lance and Melanie McMurray, and James and Alberta McMurray—subdivided into two tracts. A lake created by a dam is situated on the property. The McMurrays brought this suit against the Housworths for breach of their general warranty of title upon discovering after purchasing the property that the owner and operator of the dam holds a floodwater detention easement that burdens the tract. The superior court awarded summary judgment to the Housworths on the ground that this easement is not such an encumbrance on the property as breaches the title warranty. We disagree and reverse.

Lance and Melanie McMurray purchased one of the twelve-acre parcels from the Housworths for \$120,000 in 2004. On the same date, James and Alberta McMurray purchased the other parcel for the same price. The parcels were conveyed by warranty deeds that contained general warranties of title without any limitations applicable here. The McMurrays informed the Housworths that they were buying the property to build single-family residences on each parcel.

Apparently, however, the McMurrays failed to discover that recorded within the chain of title to their property in 1962 was a “floodwater retarding structure” easement which had been granted to the Oconee River Soil Conservation District. This easement is for construction, operation, and maintenance of a floodwater retarding structure or dam; for the flowage of waters in, over, upon, or through the dam; and for the permanent storage and temporary detention of any waters that are impounded, stored, or detained by the dam. It also reserved in the grantor and his successors the right to use the easement area for any purpose not inconsistent with full use and enjoyment of the grantee’s rights and privileges, i.e., it is nonexclusive. After learning of the easement following their purchase of the prop-

erty, the McMurrays demanded that the Housworths compensate them for the damages they would suffer as a result of the restrictions thereby placed on their usage.

Because the Housworths failed to comply with these demands, the McMurrays brought this suit against them seeking damages for breach of their warranties of title. ...

1. The McMurrays contend that the superior court erred in analogizing the floodwater detention easement to a public roadway easement or zoning regulation and in thereby concluding that a floodwater detention easement is not the type of easement that breaches a general warranty of title.

(a) Each of the deeds in this case contained a general warranty of title in which the grantors agreed to “defend the right and title to the above described property, unto [the grantees], their heirs, assigns, and successors in title, against the claims of all persons.” Under OCGA § 44-5-62, “[a] general warranty of title against the claims of all persons includes covenants of a right to sell, of quiet enjoyment, and of freedom from encumbrances.” “An incumbrance has been defined as ‘Any right to, or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of the fee,’ and this definition . . . encompasses an easement or right of way.” OCGA § 44-5-63 provides that “[i]n a deed, a general warranty of title against the claims of all persons covers defects in the title even if they are known to the purchaser at the time he takes the deed.”

(b) The rule in Georgia, as established in the early case of *Desvergers v. Willis*, 56 Ga. 515 (1876), is that the existence of a public road on land, of which the purchaser knew or should have known at the time of the purchase, is not such an encumbrance as would constitute a breach of a general warranty of title. The *Desvergers* rule is thus an exception to the general rule stated in OCGA § 44-5-63 that a general warranty of title by deed covers even defects known to the purchaser at the time he takes the deed.

Although the *Desvergers* rule is not uniform throughout the country, it is the majority rule. In adopting the rule, the court in *Desvergers* concluded that a contrary holding would produce a “crop of litigation” that would be “almost interminable.” The reason, as later explained by the Supreme Court of Iowa in *Harrison v. The Des Moines & Ft. Dodge R. Co.*, was that the immense number of warranty deeds then in existence rarely contained exceptions as to public roadways because of the universal belief that road-

way access was a benefit rather than a burden to land. Therefore, a determination that public roadway easements were warranty-breaching encumbrances would have created innumerable liabilities where none had been thought to exist.

Courts in other states have also based their adoption of the *Desvergers* rule on the broader ground that where easements are open, notorious, and presumably known to the purchaser at the time of the purchase, that knowledge will exclude the easement from operation of a title warranty. These courts have reasoned that where the encumbrance involves an open and obvious physical condition of the property, the purchaser is presumed to have seen it and fixed his price with reference to it. In view, however, of the Georgia rule that knowledge of a title defect will not exclude it from operation of a general warranty of title, creation of an exception for easements for public roadways or other purposes must be based on other grounds. And courts in other states have ultimately concluded that public roadway easements should not be regarded as encumbrances on the additional ground that “public highways are not depreciative, but, on the contrary, they are highly appreciative, of the value of the lands on which they constitute an easement, and are a means without which such lands are not available for use, nor sought after in the markets.”

For a number of reasons, we do not find the floodwater detention easement in this case analogous to a public roadway easement. (1) We do not anticipate that we would open the litigation floodgates, so to speak, by holding that a floodwater detention easement breaches a general title warranty. (2) Moreover, a floodwater detention easement does not benefit the land to which it is subject. Although the property is benefitted by the lake or other body of water that creates the need for the easement (to the extent that the one enhances the value or enjoyment of the other), the easement burdens the property by permitting the impoundment of water on it to prevent flooding or increased water runoff on other property located downstream. (3) The McMurrays brought this action for damages because of the easement, not the lake. And even though the lake is certainly open and obvious, the same cannot necessarily be said of the easement. Although the superior court found that the dam is visible on the McMurrays’ property, the McMurrays correctly point out that there is no evidence of record to support this finding. As argued by the McMurrays, not every lake is created by a dam or burdened by a floodwater detention easement. (4) And

although the McMurrays' constructive notice of the easement by reason of its recordation within their chains of title would provide a compelling reason for exempting the easement from operation of the warranty deed, OCGA § 44-5-63 provides otherwise. (5) The recording of the easement certainly renders it binding on the McMurrays insofar as concerns the rights of the easement holder; but the question here is whether the existence of the easement gives rise to a claim against the grantor for breach of the warranty against encumbrances. For these reasons, the superior court erred in concluding that the floodwater detention easement should be excepted from the rule of OCGA § 44-5-63 in view of the exception for public roadways.

(c) The McMurrays also contend that the superior court erred in equating floodwater detention easements with zoning regulations, which have been held not to breach a general warranty of title. Because the floodwater detention easement does not function in the same manner as a zoning regulation in all respects, we agree with this contention.

The floodwater detention easement does more than impose zoning-type restrictions on development activities on the property. It also grants the county soil and water conservation district rights for the storage and detention of impounded waters on the property. And it grants the district a right of ingress and egress upon the property. Easement rights such as these constitute an interest in property that must be acquired either by agreement of the property owner or by condemnation. And although the easement does impose limitations on the McMurrays' use of their property that duplicate restrictions imposed under zoning-type regulations applicable to the property, the two do not appear to be coextensive. ...

Where an encumbrance is a servitude or easement which can not be removed at the option of either the grantor or grantee, damages will be awarded for the injury proximately caused by the existence and continuance of the encumbrance, the measure of which is deemed to be the difference between the value of the land as it would be without the easement and its value as it is with the easement.

### **Notes and Questions**

9.8. Even the general warranty given by the Housworths is subject to significant exceptions, including one for public roadways and one for zoning regulations. What

is the point of these exceptions? Did the court correctly interpret those underlying policies as not covering the floodwater detention easement?

9.9. The exception for zoning regulations can be tricky. Suppose that the property is a vacant lot and that local zoning laws restrict houses to 15 feet in height? Is this an encumbrance? What if the property contains a house 30 feet high? Would it make a difference in either case if the restriction came from a private neighborhood covenant rather than a public zoning law?

9.10. What should the Housworths (or rather, their attorney) have done? Presumably, the Oconee River Soil Conservation District is not interested in terminating its easement. Are the Housworths stuck with an unsaleable tract of land?

9.11. Warranties of *title* are distinct from warranties on the safety or quality of the underlying resource. One can convey perfectly good title to a house with a crumbling foundation. A way of thinking of the difference is that warranties of title guarantee the right to exclude; the latter would be warranties on the right to possess or use the property.

Traditionally, the rule was that property was sold as-is and it was the buyer's responsibility to inspect before buying—hence the phrase *caveat emptor*, or “buyer beware.” Today, many states impose mandatory disclosures on real property sellers, or require new homebuilders to give a non-waivable “warranty of habitability.” For more information on this, see the original Land Transactions module of *Open Source Property*, which discusses *Engelhart v. Kramer*.

Which do you think is the better rule? To what extent can private insurance solve the problems of disclosure?

9.12. Typically, there is a period of time between execution of a contract for property sale and the “closing” in which the deed is actually conveyed. What happens if the property is damaged during that interim “executory period”? Absent agreements otherwise, the doctrine of equitable conversion holds that the contract renders the buyer the equitable owner of the land, such that the buyer must pay for and take the property. This rule is very much in question across the states. See *Brush Grocery Kart, Inc. v. Sure Fine Mkt., Inc.*, 47 P.3d 680 (Colo. 2002).

Who do you think should bear liability during the executory period? Should it depend on whether the buyer has possession during that period, as some courts (including *Brush Grocery Kart*) have held? What role does private insurance play here as well?

## 9.4 Recordation

Recall the messy situation between Dorothy Dupe and Charles Clueless from the beginning of this chapter, in which Sadie Scamalot purportedly sells the same real estate to both of them. Recording systems try to prevent some of these messes by making available better information about who owns what. If Clueless recorded his interest in Blackacre by making it a matter of public record, then it becomes reasonable to treat Dupe as having *constructive notice* of Clueless's claim of ownership: even if she didn't check the records, she should have. Conversely, if Clueless fails to record, there is much less Dupe can do to protect herself, so it becomes reasonable to let Dupe take title free and clear of Clueless's claim. Thus, the system gives Clueless a strong incentive to record and gives Dupe a strong incentive to check the records. As a result, there are good records of people's property claims. Clueless and Dupe never get into this mess in the first place, and Scamalot's scheme fails.

Recording systems are useful even in the absence of fraud; they create the trust and certainty needed to make land transactions common and reliable. Most home sales today happen between people who do not otherwise know each other and don't otherwise expect to transact again. How can the buyer be sure the seller is really the owner? A recording system provides the answer. Perhaps more importantly, a recording system gives *lenders* sufficient assurance that they'll be able to recover something in case of a loan default; with that security, they are willing to loan more and at lower rates.

For this and other reasons, a recording system can be a vital part of a large-scale, modern economy. According to the *New York Times*, for example, the absence of a functioning recording system in Greece "scares off foreign investors; makes it hard for the state to privatize its assets, as it has promised to do in exchange for bailout money; and makes it virtually impossible to collect property taxes." Suzanne Daley, *Who Owns This Land? In Greece, Who Knows?*, NEW YORK TIMES, May 26, 2013. Clear title is often important for access to government services and even water and electricity connections: otherwise it's not clear where the checks and bills should go.

***Argent Mortgage Co. v. Wachovia Bank N.A.***

52 So. 3d 796 (Dist. Ct. App. 2010)

**GRiffin, J.**

Argent Mortgage Company, LLC [“Argent”] appeals the trial court’s entry of judgment in favor of Wachovia Bank National Association, as Trustee Under Pooling and Servicing Agreement Dated as of November 1, 2004, Asset Backed Pass–Through Certificates Series 2004–WWF1 [“Wachovia”]. Argent argues that the trial court erred by finding that the mortgage now owned by Wachovia has priority over Argent’s mortgage. We reverse.

On August 31, 2004, Gene M. Burkes and Ann Burkes [“the Burkes”] as borrower/mortgagor and Olympus Mortgage Company as lender/mortgagee executed a mortgage [“the Olympus Mortgage”] on real property as security for a \$90,000.00 loan. The Olympus Mortgage was recorded on January 5, 2005. Subsequently, the Olympus Mortgage was assigned to Wachovia. As a result of default, Wachovia filed a complaint to foreclose the Olympus Mortgage and to enforce lost loan documents. Wachovia joined Argent as a defendant, alleging that Argent might claim some interest in or lien upon the subject property by virtue of a recorded mortgage.

On December 10, 2004, the Burkes as borrower/mortgagor and Argent as lender/mortgagee executed a mortgage [“the Argent Mortgage”] as security for a \$65,000.00 loan on the same real property that is the subject of the Olympus Mortgage. The Argent Mortgage was recorded on January 31, 2005. Subsequently, Wells Fargo Bank became the owner of the Argent Mortgage. An action to foreclose the Argent Mortgage was initiated as a result of default.

[Argent and Wachovia filed cross motions for summary judgment.] Ultimately, the trial court deemed “the Florida statutes on recordation,” namely sections 695.01 and 695.11, Florida Statutes, “to be of the race-notice variety,” found that the Olympus Mortgage should have priority over the Argent Mortgage, and entered a partial final judgment in favor of Wachovia.

On appeal, . . . Argent asserts that section 695.01, Florida Statutes, alone determines which mortgage has priority, that section 695.01 is, and, for over a century, has been recognized to be a “notice” statute, not a “race-

notice" statute and that, under section 695.01, the Argent Mortgage has priority over the Olympus Mortgage.

Wachovia acknowledges that section 695.01, Florida Statutes, is a "notice" type of recording statute. However, Wachovia contends that amendments made to section 695.11, Florida Statutes, have converted Florida into a "race-notice" state.

As an initial matter, it bears explaining that recording statutes are classified into three categories: race, notice, and race-notice. These can generally be described as follows:

- Under a *race* recording statute, a subsequent mortgagee of real property will prevail against a prior mortgagee of the said real property if the subsequent mortgage is recorded before the prior mortgage.
- Under a *notice* recording statute, a subsequent mortgagee of real property for value and without notice (actual and constructive) of a prior mortgage of the said real property will prevail against the prior mortgagee.
- Under a *race-notice* recording statute, a subsequent mortgagee of real property for value and without notice (actual and constructive) of a prior mortgage of the said real property will prevail against the prior mortgagee if the subsequent mortgage is recorded before the prior mortgage.

Importantly, under either a notice or a race-notice recording statute, the subsequent mortgagee cannot be without constructive notice if the prior mortgage has been recorded as of the time of execution of the subsequent mortgage.

Application of each type of recording statute to the undisputed facts here yields the following results:

- Wachovia prevails under a race recording statute because the Olympus Mortgage was recorded before the Argent Mortgage;
- Argent prevails under a notice recording statute because it is a subsequent mortgagee for value and did not have notice of the Olympus Mortgage at the time of execution of the Argent Mortgage; and

- Wachovia prevails under a race-notice recording statute because, although Argent is a subsequent mortgagee for value and did not have notice of the Olympus Mortgage at the time of execution of the Argent Mortgage, the Olympus Mortgage was recorded before the Argent Mortgage.

Commentators appear uniformly to categorize section 695.01 as a “notice” type of recording statute. *See* 2–26 RALPH E. BOYER, FLORIDA REAL ESTATE TRANSACTIONS §26.02 (Matthew Bender & Co., Inc. 2010) (“Florida has a notice type recording statute, the primary function of which is to protect subsequent purchasers (which for purposes of this discussion includes mortgagees and creditors who are within the statute’s protection) against claims arising from prior unrecorded instruments . . . ”).

Florida courts over time have described and applied Florida’s recording statute in a manner that is consistent with a “notice” type of recording statute. [citing cases] Florida’s approach to the problem was succinctly described by the Florida Supreme Court in *Van Eepoel Real Estate Co. v. Sarasota Milk Co.*, 100 Fla. 438, 129 So. 892, 895 (1930):

[I]t is generally held, in states having recording statutes similar to ours, that if A conveys lands to B, a bona fide purchaser for value, who does not go into possession and who failed to record his deed until after A conveys the same land to C, a second bona fide purchaser for value without notice of B’s interest, and B then records his deed before C records his, the title of C shall nevertheless prevail as between C and B, because it is the fault of B that he did not immediately record his deed, thereby permitting C to deal with the property and part with his consideration without knowledge of B’s interest. So B is estopped and the equities are with C.

Section 695.01, notwithstanding, the trial court accepted Wachovia’s argument that a 1967 amendment to a different statute, section 695.11, Florida Statutes, entitled, “Instruments deemed to be recorded from time of filing” converted Florida from a “notice” to a “race-notice” jurisdiction.\*

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\* Section 695.11 reads, “All instruments which are authorized or required to be recorded in the office of the clerk of the circuit court of any county in the State of Florida, . . . and which are filed for recording on or after the effective date of this act, shall be deemed to have been officially accepted by

The earliest version of section 695.11 dates back to 1885. Examination of the language of the 1906, 1920, and 1935 iterations of section 695.11, make clear that this statute was intended to provide a mechanism for determining the time at which an instrument was deemed to be recorded. Nothing in the case law suggests that section 695.11 modifies section 695.01. . . .<sup>3</sup>

Wachovia relies on an earlier opinion of this Court, *Rice v. Greene*, 941 So.2d 1230 (Fla. 5th DCA 2006), in support of its contention that Florida has a race-notice type of recording statute. In *Rice*, this Court . . . found:

In other words, an unrecorded deed is not good or effectual in law or equity against creditors or subsequent purchasers for valuable consideration who are without notice of the transaction. Therefore, *because Mr. Greene had no notice* of the earlier warranty deed between Mr. Rice and Mrs. Schwartz *and paid valuable consideration* for the property, *Mr. Greene's recording of his warranty deed before Mr. Rice gives Mr. Greene priority to the property.*

*Id.* at 1232 (emphasis added). According to Wachovia, this language proves that priority in recording is key. Notably, however, *Rice* does not mention section 695.11 and recording was not an issue. The subsequent purchaser in *Rice* (Mr. Greene) had priority to the property under a notice type of recording statute because he paid value for the property and did not have notice (actual or constructive) of the earlier warranty deed at the time of the conveyance. The fact that Mr. Greene's deed was recorded before Mr. Rice's does not affect the outcome under a notice type of recording statute. Although a portion of the sentence in *Rice*, on which Wachovia relies, mentions recording, in that case, it was superfluous.

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the said officer, and officially recorded, at the time she or he affixed thereon the consecutive official register numbers . . . and at such time shall be notice to all persons. The sequence of such official numbers shall determine the priority of recordation. An instrument bearing the lower number in the then-current series of numbers shall have priority over any instrument bearing a higher number in the same series." —Eds.

<sup>3</sup>Case law confirms that the purpose of section 695.11 is to determine the time at which an instrument is deemed to be recorded and to serve as notice. [citing cases] Section 695.11 has an important purpose to determine the priority between judgment liens. [citing cases] Because a certified copy of a judgment must be recorded in order to create a lien on real property, a judgment that is recorded earlier in time, namely one that bears a lower official register number, will win priority.

We conclude that Florida is, and remains, a “notice” jurisdiction, and notice controls the issue of priority. Since Argent is a subsequent mortgagee for value and did not have notice of the Olympus Mortgage at the time of execution of the Argent Mortgage, the Argent Mortgage has priority over the Olympus Mortgage. As such, the trial court erred by entering partial summary final judgment in favor of Wachovia on the issue of priority.

## **Recordation Statutes**

### **Fla. Stat. § 695.01**

No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law . . . .

### **N.C. Stat. §47-18**

No (i) conveyance of land, or (ii) contract to convey, or (iii) option to convey, or (iv) lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainer or lesser but from the time of registration thereof in the county where the land lies . . . .

### **Alaska Stat. §40.17.080**

. . . A conveyance of real property in the state, other than a lease for a term of less than one year, is void as against a subsequent innocent purchaser in good faith for valuable consideration of the property or a part of the property whose conveyance is first recorded. . . .

### **Notes and Questions**

9.13. What kind of recording acts are the three state statutes listed above? Explain how the categorization – race, notice, or race-notice – follows from the text of the statute.

9.14. Who would have won in *Argent* if Argent had recorded on January 3 instead of on January 31? What about in a race jurisdiction? In a race-notice jurisdiction?

9.15. Who would have won in *Argent* if the Burkes had disclosed the existence of the Olympus Mortgage to Argent on December 6? On December 16? What about in a race jurisdiction? In a race-notice jurisdiction?



# **Part V**

# **Operation of Law**



# Chapter 10

## Estates and Future Interests

All land under the dominion of the English crown is held “mediately or immediately, of the king”—that is, the crown has “radical title” to all land under its political dominion. William the Conqueror declared that all land in England was literally the king’s property; everyone else had to settle for the privilege of holding it for him—the privilege of *tenure* (from the Norman French word “tenir”—to hold). Tenurial rights were intensely personal in early feudal society: the right to hold land was a privilege granted by the crown in exchange for an oath of allegiance and a promise of military service by the tenant—the oath of homage. The word homage derives from the French word *homme*—literally “man”—precisely because the ceremony surrounding the oath created not only the right of tenure, but a political and military relationship between “lord and man.”<sup>1</sup> In exchange for the tenant’s loyal sup-

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<sup>1</sup>The ceremony of homage, recorded by the 13th-century jurist and ecclesiastic Henry de Bracton, required the tenant to come to the lord in a public place, and there

to place both his hands between the two hands of his lord, by which there is symbolized protection, defense and warranty on the part of the lord and subjection and reverence on that of the tenant, and say these words: “I become your man with respect to the tenement which I hold of you . . . and I will bear you fealty in life and limb and earthly honour . . . and I will bear you fealty against all men . . . saving the faith owed the lord king and his heirs.” And immediately after this [to] swear an oath of fealty to his lord in these words: “Hear this, lord N., that I will bear you fealty in life and limb, in body, goods, and earthly honour, so help me God and these sacred reliques.”

2 HENRY BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 232 (Samuel E. Thorne trans., 1968) (c. 1230). The Anglo-Saxon Chronicle contains a remarkable and much-debated passage in which William the Conqueror is said to have held court at Salisbury twenty years into his reign, and there



**Figure 10.1:** Homage Ceremony. From JAMES HENRY BREASTED & JAMES HARVEY ROBINSON, 1 OUTLINES OF EUROPEAN HISTORY 399 (1914).

port, or *fealty*, the lord warranted the tenant's right to hold a plot of land, called a fief, or fee.

Acceptance of this form of military tenure obligated the tenant to provide a certain number of knights when called on by the king, and the land held by the tenant was supposed to provide sufficient material support to enable him to meet this military obligation. Sometimes, by the process of *subinfeudation*, the King's direct tenants (or "tenants-in-chief") could spread this burden around by in turn accepting homage from other, lesser nobles and freemen, each of whom would be responsible to the tenant-in-chief for a portion of the tenant-in-chief's obligation to provide knight-service. The tenants-in-chief thereby became "mesne lords" in their own right ("mesne" being Norman French for "middle" or "intermediate"). There could be several layers of mesne lords (i.e., "land lords") in the feudal hierarchy, at the bottom of which were "tenants in demesne" ("demesne" being Norman French for "domain" or "dominion")—who actually held the land rather than subinfeudating it further. Of course, holding land did not mean one actually worked it; a tenant in demesne often left the cultivation and productive use of land to those of lower social status. These could be "villeins"—serfs legally bound to the land by birth—or "leasehold" tenants—a leasehold being a right to hold land for a term of years

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summoned and taken direct oaths of homage and fealty from every landowner "of any account" in the whole of England. See H. A. Cronne, *The Salisbury Oath*, 19 HISTORY 248 (1934); J.C. Holt, 1086, in COLONIAL ENGLAND, 1066-1215, at 31 (1997).

in exchange for payment of rent in cash or (more often) kind, and of lesser status than the “freehold” estate held by feudal tenants tracing their rights up the feudal pyramid to the crown.

Because a feudal tenant’s land rights were intimately connected to this web of personal, political, and military relationships, there was no logical reason why the tenant ought to be free to transfer those rights to anyone else—and good reason for the lords to resist such alienation of the fee by their tenants. Indeed, fees could be forfeited to the lord for the tenant’s breach of the homage relationship or commission of some other “felony,” and on the tenant’s death it was not clear that his family members had the right to inherit the fee. The king was assumed to have the right to retake the fee and re-grant it to a preferable new tenant upon his displeasure with or the death of the old tenant (it was his land, after all). Within a century, however, the dynastic ambitions of the baronage compelled King Henry I to concede (in his Coronation Charter of 1100) that a recently deceased baron’s heir could redeem his fee upon payment of “a just and lawful relief”—i.e., a payment of money to the crown, as a kind of inheritance tax. Under the principle of primogeniture that took hold in England around this time, the lord’s heir was his eldest son; landowners were not free to choose who would take over their tenancy after their death. Thus, subject to the payment of a relief, the fee became *descendible*—capable of being inherited from one generation to the next—and the grant of a descendible tenancy by the crown was now made not “to Lord Hobnob,” but “to Lord Hobnob *and his heirs*.” To this day, the latter phrase remains the classic common-law formula for creating the broadest interest in land that the law will recognize: the *fee simple absolute*.

Descendibility of the fee simple having been settled early in the history of English land law, the broader question of full alienability took several more centuries to work out. The history of medieval English land law is a history of tenants trying to secure their families’ wealth and power by expanding alienability and evading tenurial obligations to their lords and the crown, while the crown and higher nobility tried to adapt the law to preserve their status and prevent such evasions. There is a dialectical quality to this history. For example: for complicated reasons subinfeudation quickly came to present a greater threat to the economic interests of the higher ranks of the feudal hierarchy than simple substitution of one tenant for another. Thus, in 1290 the Statute of Quia Emptores banned subinfeudation. But in doing so it validated substitution, and with it the practice of selling an entire fee in exchange for money during the life of the tenant. Similarly, in 1536, at the insistence of King Henry VIII, the Statute of Uses abolished many clever schemes adopted by tenants to use intermediaries to direct the disposition of real property interests af-

ter death and to put those interests outside the reach of the law courts (and of the crown's feudal authority). But in doing so, the statute validated one type of flexible property arrangement we have come to know as a *trust*. Moreover, the removal of the primary mechanism lawyers had developed to meet tenants' demand for intergenerational planning was sufficiently unpopular that Henry felt compelled to consent to the enactment of the Statute of Wills in 1540—finally permitting tenants to pass their legal estates in land by will rather than being at the whim of the rule of primogeniture. Finally, since the 16th century, primogeniture has given way to a more complex system of default inheritance rights for various relatives of the deceased who leaves no will; these rights are designed to try to approximate what legislatures think the *decedent* would have wanted, not necessarily what is best for the government. This set of default rights comprises the law of *intestate succession*, which we will discuss in a separate unit (or which you may study in a separate course on trust and estates law).

Various other statutes and common-law developments over the centuries culminated in the system of possessory estates and future interests that were imported into the North American English colonies, and thus into the independent American states (excluding Louisiana). Underlying them all is a fundamental distinction that traces back to the "radical title" asserted by William the Conqueror in 1066: **there is a conceptual difference between the ownership of land and the ownership of a legal interest in that land.** This distinction remains important to modern property law, and this unit will introduce you to the types of legal interests in land that American law will recognize. In particular, it examines how the common law divides up legal interests in land among successive owners over time.

Before delving into this material, we should warn you that the estates system has limited relevance even for the practicing real estate lawyer of today. The study of estates and future interests remains in property courses for three primary reasons: (1) the estates are still legally valid property interests, and their complexity can therefore be a danger to lawyers who encounter them and are unfamiliar with them; (2) some of the legal estates and future interests in real property can be usefully extended to *equitable* interests in property held in trust; and (3) the bar examiners are fond of testing aspirant attorneys on future interests—perhaps simply because they are fairly mechanical and therefore highly testable. To be sure, mastering the system of estates and future interests requires considerable exercise of the lawyerly skills of close reading, logical reasoning, and breaking down a big problem into lots of smaller problems. But there are other ways of learning those things, and a contemporary lawyer whose client wanted to divide up interests in property

would be courting malpractice by relying on legal estates and future interests in land (which makes the bar examiners' continued affection for them even more baffling). Instead, the modern lawyer should look to the much more flexible law of trusts and to the various forms of business associations—such as corporations—that can own property in their capacity as fictional legal “persons.”

## 10.1 Concepts, Vocabulary, and Conventions

To begin understanding how the law divides up interests in land over time, we begin with the fundamental distinction between possessory estates and future interests. A **possessory estate** is a legal interest that confers on its owner *the right to present possession* of some thing. A **future interest** is a legal interest *that exists in the present*, but does not entitle the owner to possession until some point *in the future*.

This may sound confusing, but you are probably already familiar with an arrangement that follows this pattern: a lease. A lease is a transaction in which the landlord gives the tenant a possessory estate (a leasehold estate), and *retains* a future interest—the right to retake possession after the lease term ends. This retained future interest—an unqualified right to future possession retained by the party who created the possessory interest that precedes it—is called a **reversion**. (Landlord-tenant relationships are obviously more complicated than this—they entail a number of contractual rights and obligations and are heavily regulated by statutory and decisional law and, in many cases, administrative codes.)

The idea that both landlord and tenant can have legal interests in the same parcel of land at the same time, even though only one of them has the right to possess the land at any given time, is a good introduction to the concept of future interests. If you think about it, you will probably recognize that the basic idea of a lease implies certain rights and powers of a landlord in the leased premises even *during* the term of the lease. The most important one is the reversionary right itself: the right to take possession at some point in the future. That's a right the tenant can't take away, even while the tenant has the right to possession. The landlord might be interested in selling (or mortgaging) this reversionary right, even before the lease ends. And if she does sell or mortgage her interest (which she may, subject to the tenant's interest), the thing sold is not “the property”; it is *the landlord's reversion*: a legal interest in real property *that exists in the present* but will not entitle its holder to possession of that real property until some point *in the future*.

When learning about estates and future interests, we will follow some conventions that will simplify our discussion as much as possible. Most of our problems will involve an owner of land transferring some interest in that land to one or more other parties. Following longstanding tradition in the study of Anglo-American property law, we will refer to the parcel of land in question as “Blackacre” (or “Whiteacre,” “Greenacre,” “Ochreacre,” etc. if more than one parcel is at issue). We will refer to the original owner as O, and the other parties as A, B, C, etc.

## 10.2 Basic Estates and Future Interests

We will begin by examining two possessory estates—the fee simple absolute and the life estate—and two future interests (one of which you have already encountered)—the reversion and the remainder.

### 10.2.1 The Fee Simple Absolute

The **fee simple absolute** is the most complete interest in land that the law will recognize. When we say that “O owns Blackacre” without any further qualification, what we actually mean is that O owns a *presently possessory fee simple absolute* in Blackacre. The key distinguishing characteristic of the fee simple absolute is that it has no inherent end—it is an estate of *indefinite duration*. It is descendible, devisable, and alienable *inter vivos*; so it can be *transferred* to a new owner, but it cannot be destroyed. At most, it can be carved up into lesser estates and interests for a while, and we will spend most of the rest of this chapter understanding how that happens.

At common law, as previously noted, the fee simple absolute was created by the formula: “to A and his heirs.” That formula still works, but in modern usage it is sufficient to simply say “to A,” and the use of such language in a conveyance from the owner of a fee simple absolute will be presumed to create a fee simple absolute in A.

### 10.2.2 The Life Estate

The **life estate** is just what it sounds like: an estate that confers a right to possession for the life of its owner. The owner of a life estate is referred to as a **life tenant**. The life estate terminates by operation of law upon the owner’s death (i.e., it

ceases to exist). It is created by the formula: “to A for life.” Because it must by definition end—we all have to die sometime—any land held by a life tenant must also be subject to a *future interest* in some other person. We’ll explore what those future interests might be shortly.

Recall the legal principle of *nemo dat quod non habet* (or *nemo dat* for short), which we encountered in our discussion of good faith purchasers: a grantor cannot convey title to something she doesn’t herself own. Following this principle, life estates are alienable *inter vivos* during the life of the life tenant, but obviously not devisable or descendible by the life tenant: they cease to exist upon the death of their owner, so the life tenant’s estate has nothing to convey.<sup>2</sup> *Nemo dat* also implies that the owner of an interest in real property cannot convey *more* than their interest; a life tenant cannot convey a fee simple absolute, for example. More to the point, if a life tenant A transfers their life estate to a grantee B, B cannot receive anything more than what A owns: a possessory estate that will terminate by operation of law *when A dies*. Because such an interest is measured by the life of someone other than its owner, it is called a **life estate pur autre vie** (literally, in Law French, “for another life”). A life estate *pur autre vie* can also be created explicitly, as by a grant “to A for the life of B.”

We’ll hold off on any further illustrative problems at this point, because we still need some exposition of what happens *after* a life tenant dies. The answer, as we’ve already noted, involves *future interests*.

### 10.2.3 The Reversion

We encountered the reversion once before, when discussing leases as an introduction to the concept of a future interest. But reversions often arise in non-leasehold contexts too. Consider what happens when A, owning a life estate in Blackacre, dies. A’s life estate terminates by operation of law; it simply ceases to exist and disappears. Who “owns” Blackacre now? It seems obvious that *somebody* must have a right to possession of the land, but it seems equally obvious that whoever that somebody is, they had *no right to possession* before A died. Whoever they are, during the term of A’s life estate they must have held an interest that would entitle them to take possession at *some point in the future* (that is, a *future interest*).

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<sup>2</sup>A life estate can theoretically be devised or inherited in the (perhaps contrived) situation where the life tenant conveys to a third party, who dies before the life tenant; the third party’s heirs or devisees would receive the estate insofar as the original life tenant is still alive.

There are two candidates for such an interest. We will begin with the most basic: the **reversion**. Suppose that O, owning a fee simple absolute in Blackacre, conveys Blackacre “to A for life,” and says nothing more? What is the legal effect of this grant?

Based on the formula we just learned, it should be clear that A receives a life estate in Blackacre. But what other effects does the grant have on the legal rights of the parties? Think about the interest O held prior to the conveyance: the fee simple absolute. Remember that a fee simple absolute is an interest of *infinite duration*—it never ends. So when O starts with a possessory interest of infinite duration, and then gives away a life estate—whose duration is limited by a human lifespan—to A, *something was left over*. Specifically, O never gave away the right to possession of Blackacre from the day of A’s death to the end of time. Whether meaning to or not, O gave away less of an interest in Blackacre than what he owned, meaning *he still holds some interest*. We call this type of interest—the residual interest left over when a grantor gives away less than they have—a *retained interest*.

This retained interest can’t entitle O to possession during A’s life—A has the exclusive right to possession as the life tenant. So O’s interest must be a *future interest* during the term of A’s life estate: an interest that will entitle O to possession *after the natural termination of the life estate*. As we discussed in the example of the lease, we call this kind of future interest a **reversion**. It is a *retained interest in the grantor*—created when a grantor conveys less than his entire interest—that will become possessory by operation of law upon the *natural termination* of the preceding estate. Colloquially, we say that Blackacre “reverts” to O. In some opinions, you will see the holder of a reversion referred to as a “reversioner.”

A reversion can of course also be created explicitly, for example, if O conveys Blackacre “to A for life, then to O.” In this case, O has explicitly created a life estate in A followed by a reversion in O.

#### 10.2.4 The Remainder

A **remainder** is a type of future interest created in someone *other than* the grantor. The distinguishing characteristic of the remainder is that—like a reversion—it *cannot cut short or divest any possessory estate*. (We will later encounter other future interests that can.) A remainder simply “remains,” sitting around and waiting for the natural termination of the preceding possessory estate (be it a life estate or a lease), at which point the remainder will become possessory by operation of law. Suppose that O, owning a fee simple absolute in Blackacre, conveys Blackacre “to A for life, and then to B.” Again, A would have a life estate, but

now O has also affirmatively created a future interest in B. Because the future interest is created in someone *other than* the grantor, it isn't a reversion. And because it cannot cut short A's life estate (note the "and then" language), it must therefore be a **remainder**. Due to the persistence of dated gendered terms in legal discourse, you will often see the holder of a remainder referred to as a "remainderman," even today, regardless of that person's gender.

Future interests get a lot more complicated than this, but you now have enough to begin examining some problems that can arise from even this limited set of interests.

### Notes and Questions

10.1. O, owner of a fee simple absolute in Blackacre, conveys Blackacre "to A for life, then to B for life." (Assume that both A and B are alive at the time of the grant.) What is the state of title in Blackacre?

- What will be the state of title if A dies, survived by B and O?
- What will be the state of title if B dies, survived by A and O?
- What will be the state of title if O dies, then A dies, then B dies?

10.2. What will be the state of title if, while O, A, and B are still alive, B conveys her interest to C?

- What will be the state of title if, after B conveys her interest to C, A dies, survived by B, C, and O?
- What will be the state of title if, after B conveys her interest to C, C dies, leaving D as his heir, and is survived by A, B, and O?
- What will be the state of title if, after B conveys her interest to C, B dies, survived by A, C, and O?

## 10.3 Working Out Problems

To grasp how they system of estates works, **you must work out problems on your own**. It is not enough to read the text passively here. (That's why you have so few pages to read for this chapter.) You should do all the problems given above, and also try to construct some hypothetical scenarios of your own.

The reason you need to work out problems on your own is that you need to develop a method for notating the property interests involved in any given prob-

lem. I will show you one way of keeping track of the interests; you are free to come up with your own if it works better for you. Whatever you choose, though, must be precise enough to track each interest by name, holder, and relationship with other interests.

Consider, for example, a situation where O conveys Blackacre “to A for life, then to B.” You might say that A holds a life estate and B has a remainder, but that description has plenty of ambiguity. Whose life does A’s life estate depend upon? What does B’s remainder follow? And when B’s future interest converts to a possessory estate, which one does it become? In this simple example the answers might be obvious, but throw in a more complicated conveyance and several property transfers, and the exact nature of the interests can easily become lost.

A more complete description of the interests is:

- A has a life estate in Blackacre for the life of A.
- B has a remainder, following the life estate in Blackacre for the life of A, which will become fee simple absolute in Blackacre.

This is complete and unambiguous, but also pretty wordy for purposes of notetaking and working out problems. We can omit “Blackacre” given that only one property is involved (but don’t omit it if there are more!). We’ll give the interests identifiers (interest #1, interest #2) to make them easier to talk about. Let’s also introduce some abbreviations.

FSA	Fee simple absolute
LE(P)	Life estate for the life of person P
Rem(#I, E)	Remainder following interest #I, which will become estate E
Rev(#I, E)	Reversion following interest #I, which will become estate E

Now we can fully characterize the interests in Blackacre as follows:

- A has interest #1: LE(A)
- B has interest #2: Rem(#1, FSA)

Even better, let’s put it in tabular form:

Event	A	B
Grant from O	#1: LE(A)	#2: Rem(#1, FSA)

At this point, the table and abbreviations may seem unnecessarily cryptic. Again, feel free to choose abbreviations that work best for you. But the value of this structure comes when the interests start moving around. Say that A decides to move to Hawaii, and gifts Blackacre to her sister C. What does C have? All we need to do is to copy A's property interest over to a new column for C:

Event	A	B	C
Grant from O	#1: LE(A)	#2: Rem(#1, FSA)	
A to C		#2: Rem(#1, FSA)	#1: LE(A)

The notation makes clear that C's interest is based on A's life, not C's; that is, C has a life estate pur autre vie for the life of A. If C dies, leaving all her property to D:

Event	A	B	C	D
Grant from O	#1: LE(A)	#2: Rem(#1, FSA)		
A to C		#2: Rem(#1, FSA)	#1: LE(A)	
C dies		#2: Rem(#1, FSA)		#1: LE(A)

The table thus makes clear that C's death only causes a transfer of the life estate, but does not change the interest or any other interests.

What happens when A dies? We just follow two rules:

- When person P dies, LE(P) terminates.
- When interest #I terminates, then Rem(#I, E) or Rev(#I, E) turns into E.

Applied to the table, that means that when A dies, the life estate disappears, and the remainder converts as follows:

Event	A	B	C	D
Grant from O	#1: LE(A)	#2: Rem(#1, FSA)		
A to C		#2: Rem(#1, FSA)	#1: LE(A)	
C dies		#2: Rem(#1, FSA)		#1: LE(A)
A dies		#2: FSA		[terminated]

Let's now work out a more complex problem, the third question in note 10.1. (Try to work it out yourself first.) Initially, we need to translate the conveyance "O to A for life, then to B for life" into our notation. A has a life estate for the life of A, which we will call #1: LE(A). B's interest follows A's, so it is a remainder that will become a life estate for the life of B, which we notate #2: Rem(#1, LE(B)). This gives the following table:

Event	A	B
Grant from O	#1: LE(A)	#2: Rem(#1, LE(B))

Are we done? A good check, which works for any row of these tables, is to start with the possessory estate and follow the chain of interests. The last one must be, or be convertible to, fee simple absolute—otherwise the property might have no one entitled to possess it at some point. Here, we start with A's interest #1, which is followed by B's interest #2 that can convert into a life estate, and then what? Since the grant from O specifies nothing else, we infer a reversion following the last interest in the chain:

Event	A	B	O
Grant from O	#1: LE(A)	#2: Rem(#1, LE(B))	#3: Rev(#2, FSA)

Now there is a complete chain of future interests, ending with someone receiving fee simple absolute ownership.

Next in the problem, O dies. None of the life estates are based on O's life, so no interests need to be converted. But O does own something, because O has an entry in the table. That entry needs to go to someone else now, since O, being dead, can't own property. We'll call this recipient of O's property "O's heir":

Event	A	B	O	O's heir
Grant	#1: LE(A)	#2: Rem(#1, LE(B))	#3: Rev(#2, FSA)	
O dies	#1: LE(A)	#2: Rem(#1, LE(B))		#3: Rev(#2, FSA)

(Challenge question: What happens if A is O's heir?)

Next, the problem says that A dies. There is a life estate for the life of A, so we apply the conversion rules to interests #1 and #2:

Event	A	B	O	O's heir
Grant	#1: LE(A)	#2: Rem(#1, LE(B))	#3: Rev(#2, FSA)	
O dies	#1: LE(A)	#2: Rem(#1, LE(B))		#3: Rev(#2, FSA)
A dies	[term.]	#2: LE(B)		#3: Rev(#2, FSA)

Finally, B dies. Again, since a life estate depends on B's life, we apply the conversion rules, now to interests #2 and #3:

Event	A	B	O	O's heir
Grant	#1: LE(A)	#2: Rem(#1, LE(B))	#3: Rev(#2, FSA)	
O dies	#1: LE(A)	#2: Rem(#1, LE(B))		#3: Rev(#2, FSA)
A dies	[term.]	#2: LE(B)		#3: Rev(#2, FSA)
B dies		[term.]		FSA

The result, as the table makes clear, is that O's heir takes Blackacre in fee simple absolute.

## 10.4 Stepping Back

Whew! It's easy to get bogged down in the intricacies of the system of estates, which is full of odd terminology, tricky mechanics, and a generally archaic objective of family property management. It is necessary that you become familiar with the terms and the mechanics. In part this is because it's on the bar exam, and in part it is because the procedural rule-based thinking required to work out estates problems is generally useful in the practice of law.

But there is something deeper at work here. Strip away the particulars and the medieval phrasing from life estates and future interests, and a general framework appears. For a single piece of land or other property, there can be a someone with a current possessory interest, and others with future interests in the property that are *also property rights*—their interests can be transferred to others, and the future interest holders have rights over the property against the world. A key event occurs, such as the death of a relevant person for a life estate. Upon that event occurring, a cascade of legal consequences follow, which can change the nature of those property interests automatically, perhaps even without the intervention of a court.

This pattern—a key event causes automatic conversion of property rights—is what is meant by “operation of law.” It is the basic pattern for the more exotic possessory estates and future interests that were not presented in this chapter, and it is the pattern for far more of property law too. A tenant who leases an apartment has a possessory estate, with the landlord holding a future interest; the key events might include expiration of the lease or nonpayment of rent. We will study other property arrangements that fit this pattern, including mortgages, security interests, and joint tenancies.

All this is to say that this material is no doubt some of the most difficult to conceptualize. But if you can grasp the concepts here, that work will pay off as you start to see similar patterns arise everywhere else.



# Chapter 11

## Issues with Estates

### 11.1 Construing Ambiguous Grants

We've recited a few formulas for creating the small number of common-law interests you've encountered. For example, "to A and his heirs" creates a fee simple absolute in A; "to B for life, then to C" creates a life estate in B and a remainder in C. But the actual language of documents conveying legal interests in real property don't always stick to the formula—especially (but unfortunately not exclusively) when they are drafted without the assistance of counsel. Consider the following case.

***In the Estate of Dalton Edward Craigen***  
305 S.W.3d 825 (Ct. App. Tex. 2010)

**HOLLIS HORTON, Justice.**

We are asked to determine whether the trial court properly interpreted the dispository language in a holographic will. If the will is ambiguous, the applicable rules of will construction yield one result. If the will is unambiguous, the trial court was required to give effect to the express language of the will, and arguably should have reached a different result.

The trial court, in construing the testator's intentions under the will, found "[t]hat it was the intent of the [t]estator to leave his entire estate to his surviving wife in full." The trial court further found "[t]hat there was no intention to leave a life estate to her." In a single issue on appeal, the testator's adult children contend the testator intended to leave a life estate

to his wife, and they argue that the remainder of the estate passed to them through the laws of descent and distribution. We find the will is ambiguous and hold that under the appropriate rules of will construction, the trial court properly construed the will. Accordingly, we affirm the judgment.

### The Will

Dalton Edward Craigen left a holographic will that in its entirety stated:

Last Will & testament

Debbie gets everything till  
she dies.

Being of sound mind & this  
is my w. last will & testament.

I leave to my Wife Daphne  
Craigen all p. real & personal property.

12-17-99 Dalton Craigen

### Contentions of the Parties

The parties stipulated “[t]hat Debbie and Daphne named in Dalton Craigen’s will are one and the same person.” Brian Craigen and Sabrina Brumley, Craigen’s adult children, argue that the testator’s intent under the will is “crystal clear—the testator left everything (all of his real and personal property, his definition of ‘everything’) to his wife for as long as she lived.” According to Brian and Sabrina, the dominant provision of the will (the first sentence) creates a life estate, and the will’s third sentence can be harmonized with the will’s first sentence by construing the third sentence to define the property that Craigen intended to include in his wife’s life estate. Brian and Sabrina ask that we render a judgment in their favor by holding that Daphne received only a life estate under Craigen’s will.

Daphne died on January 17, 2009. Yvonne Christian, the independent administratrix of Daphne’s estate, argues we should affirm the trial court’s judgment. According to Christian, the will is not ambiguous as it reflects Craigen’s intent to leave his entire estate to Daphne.

### Rules of Construction

The rules involved in construing wills are well settled. “The primary object of inquiry in interpreting a will is determining the intent of the testator.” *Gee v. Read*, 606 S.W.2d 677, 680 (Tex.1980). “The [testator’s] intent must be drawn from the will, not the will from the intent.” *Id.* We ascertain intent from the language found within the four corners of the will. “In construing the will, all its provisions should be looked to, for the purpose of ascertaining what the real intention of the [testator] was; and, if this can be ascertained from the language of the instrument, then any particular paragraph of the will which, considered alone, would indicate a contrary intent, must yield to the intention manifested by the whole instrument.” *McMurray v. Stanley*, 69 Tex. 227, 6 S.W. 412, 413 (1887).

When a will has been drafted by a layperson who is not shown to be familiar with the technical meanings of certain words, courts do not place “too great emphasis on the precise meaning of the language used where the will is the product of one not familiar with legal terms, or not trained in their use.” *Gilkey v. Chambers*, 146 Tex. 355, 207 S.W.2d 70, 71 (1947) (quoting 69 C.J. Wills § 1120 (1934)). Instead, in arriving at the meaning intended by the layman-testator, courts refer to the popular meaning of the words the testator chose to use. In summary, the testator’s intent, as gathered from the will as a whole, prevails against a technical meaning that might be given to certain words or phrases, unless the testator intended to use the word or phrase in the technical sense.

With respect to the creation of a life estate, no particular words are needed to create a life estate, but the words used must clearly express the testator’s intent to create a life estate. A very strong presumption arises that when a person makes a will, the testator intended a complete disposition of his property. “[T]he very purpose of a will is to make such provisions that the testator will not die intestate.” *Gilkey*, 207 S.W.2d at 73. When faced with ambiguity, and in applying that presumption, courts generally interpret wills to avoid creating an intestacy.

... In reconciling different parts of a will, the Texas Supreme Court has explained:

Where, however, the language of one part of a will is not easily reconciled with that used in another, the principal and subordinate provisions should be construed in their due relation to

each other, and the intent which is disclosed in the express clause ought to prevail over the language used in subsidiary provisions, unless modified or controlled by the latter. And a clearly expressed intention in one portion of the will will not yield to a doubtful construction in any other portion of the instrument.

*Heller v. Heller*, 114 Tex. 401, 269 S.W. 771, 774 (1925).

### Analysis

A will is ambiguous if it is capable of more than one meaning. Because Debbie and Daphne are in fact the same person, the ambiguity in Craigen's will becomes apparent. Why would Craigen in the first sentence grant his wife a life estate, but then in the concluding sentences bestow upon her all of his property? The resolution of that question by Craigen's children seems reasonable, as the last sentence could be construed to merely describe the property that Craigen intended to include in Daphne's life estate.

On the other hand, Craigen did not mention his children in his will and he made no provisions to expressly benefit them. Moreover, Brian and Sabrina's construction of Craigen's will would, if adopted, allow all of Craigen's property to pass under the laws of intestacy at Daphne's death. Brian and Sabrina's construction assumes that Craigen, when writing his will, did not intend to completely dispose of his estate. The rule that Craigen did not likely intend to create an intestacy favors the construction of the will that the trial court adopted.

Brian and Sabrina contend that the will gave Daphne a life estate, but Craigen did not utilize those exact words in his will. Although no particular words are needed to create a life estate, the words used must clearly express the testator's intent to create one. In the absence of a remainderman clause, we are skeptical that Craigen used the phrase "till she dies" in a technical sense to create a life estate. Instead, Craigen likely intended to limit Daphne's use of his property; nevertheless, the will manifests an intent that she have his property in fee simple absolute. Consequently, although the first sentence in the will is susceptible to the interpretation that Craigen created a life estate, the will becomes ambiguous when, in the will's third sentence, Craigen expressly names Daphne as the beneficiary

of all of his property and he makes no further provision for his estate upon her death.

We conclude that the will is reasonably capable of more than one meaning; therefore, we resort to the rules of construction that apply to ambiguous wills . . . . Craigen's will can be interpreted to avoid the intestacy certain to result under Brian and Sabrina's construction of the will. The potential intestacy is avoided if the phrase "till she dies" is interpreted as a conditional bequest. The third sentence then functions as intended to give Daphne all of Craigen's property in fee simple. The immediate vesting construction favors Daphne, the sole beneficiary named in Craigen's will. It also affords the phrase "till she dies" a nontechnical meaning.

We decline to apply the presumption that Craigen did not intend to disinherit his children when the will expressly states that Craigen gave all of his real and personal property to Daphne and when Brian and Sabrina offered no evidence regarding Craigen's situation and the circumstances surrounding the execution of the will. Taking the will as a whole, the dominant gift is all of Craigen's real and personal property, and he made that gift to his wife. As this is the dominant clause, Craigen's expressed intention prevails.

We hold that under the appropriate rules of will construction, the trial court correctly construed the will. We overrule the issue and affirm the judgment.

AFFIRMED.

### Notes and Questions

**11.1. Holographic Wills.** A holographic will—a will handwritten by the testator—often presents a particular challenge for courts attempting to interpret it. Indeed, they are thought to be so problematic that about half of American jurisdictions refuse to recognize them as valid wills at all. See Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, REAL PROPERTY, TRUST AND ESTATE LAW JOURNAL 27 (2008) (arguing that the defects of holographic wills, though real, are overstated). Lay testators attempting to settle their affairs without assistance of counsel often make legal or technical errors of various kinds, including errors of ambiguity such as the one that generated the litigation in *Craigen*.

**11.2. Presumptions and Rules of Construction.** The court reviews a number of rules of construction applied by courts in construing ambiguous grants. Most jurisdictions have similar rules of construction—sometimes promulgated by statute, other times judge-made. In *Craigen*, two rules in particular do considerable work: the presumption against intestacy and the clear-statement rule for creation of a life estate. The latter rule is sometimes expressed in other jurisdictions as a presumption in favor of the largest estate the grantor could convey. See, e.g., *White v. Brown*, 559 S.W.2d 938, 939 (Tenn. 1977) (quoting Tenn. C. Ann. § 32-301) (“Every grant or devise of real estate, or any interest therein, shall pass all the estate or interest of the grantor or devisor, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of the instrument.”).

What justification is there for presuming that an ambiguous grant conveys a fee simple absolute rather than a life estate? Is it any different for the justification underlying the presumption against intestacy? Was *Craigen* an appropriate case for the application of these presumptions?

**11.3. Finding Ambiguity.** Are you convinced by the court’s arguments that the language “till she dies” does not “clearly express the testator’s will to create a life estate”? What do you think Dalton Craigen meant by this phrase?

**11.4. Dueling Presumptions.** The court mentions another rule of construction—the presumption against disinheritance—but declines to apply it. Why? Is its reason for following the presumption against intestacy but declining to follow the presumption against disinheritance persuasive? How is a court to decide when a presumption or other rule of construction applies and when it doesn’t?

## 11.2 Present vs. Future: The Doctrine of Waste

Even if we are very clear on the nature and allocation of possessory and future interests in a parcel of land, we soon run into a practical problem: it can be difficult to protect the value of a future interest while someone else is in possession of the land, acting for most purposes as its owner. What if a life tenant burns down the structures on the parcel? Or decides to undertake a remodeling project that would make the parcel less desirable to future renters? Or fails to do anything about a leaky pipe, leading to a costly mold infestation? What if the possessor uses the property in such a way as to maximize its current value at the expense of its future value—

depleting natural resources, wearing out buildings and fixtures without repairing or maintaining them—in ways that can't be recovered? Can it be wrongful—as a matter of property law—for a lawful possessor to use the possessed premises however they wish, for good or for ill?

The common law recognized that it *could* be wrongful for a present lawful possessor to take (or fail to take) certain acts with respect to land in their possession—if those acts affected the ability of a *future* possessor to enjoy their interest when their turn came around. To vindicate the rights of these future interest holders, the common law gave them a private right of action to enjoin, and obtain damages for, the acts and omissions of possessors that permanently decrease the value of the future interest. This was the action for waste.

### ***Jackson v. Brownson***

7 Johns. 227 (N.Y. Sup. Ct. 1810)

... This was an action of ejectment for a farm in Whitestown. The cause was tried at the Oneida circuit, the 5th June, 1809, before Mr. Justice Yates.

At the trial, the plaintiff gave in evidence the counterpart of a lease, dated the 3d September, 1790, from Philip Schuyler,\* of Albany, to the defendant, for the premises in question, for the lives of the defendant, his wife, and Samuel Shaw, respectively. The farm contained 133 acres and a half. The lease contained various covenants, reservations and conditions, among which was the following: ... “And it is further conditioned on the part of the said lessee, that neither the said lessee, his executors, &c., ... shall, at any time hereafter, commit any waste.”

“And in case the said lessee, his, &c., shall not perform, fulfil, abide by, and keep all and every of the covenants and conditions herein covenanted and conditioned, &c., then in each of the said cases, it shall thenceforth be lawful for the lessor, his, &c., into the whole of the said premises, or into any part thereof, in the name of the whole, to reenter, and the same to have again, repossess and enjoy, as his or their former estate,” &c.

The lessors were the heirs of Philip Schuyler; this action was brought to recover the possession of the south half of the premises, on the ground of forfeiture by a breach of the covenant; the lessee or his assigns having committed waste thereon by clearing and draining off the land more than

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\*Yes, that Philip Schuyler. See *The Schuyler Sisters*, in Lin Manuel-Miranda, *Hamilton* (2015). — Eds.

a reasonable and due proportion of the wood. It was admitted that, at the date of the lease, the premises were wild and uncultivated, and covered throughout with a forest of heavy timber.

The plaintiff proved that the defendant occupied the south half of the premises, which were entirely cleared of wood, before the commencement of the suit; and that on the north half occupied by Shaw, the whole was cleared except about six or eight acres, on which more than half the wood and timber had been cut down and removed, before the commencement of the suit.

It was also proved, that a permanent supply of fuel, timber for buildings, and wood for fences, for the use of the demised premises, would require that, at least, thirty acres should have been preserved in wood.

. . . It was also proved, that about 12 years since, there were 35 acres of land covered with wood and timber on the premises, and about 12 acres of woodland, on that part in the possession of the defendant, only half of which was good for timber, . . . that the defendant had cut no wood or timber on the part in his possession, except for fuel, fences, and building for the use of the farm, and which had been gradually cut, . . . [that] the defendant had built a house on the premises, which was completed about four years since; and had used the farm in a husbandlike manner, and had carried on more materials for fences than he had taken off; that . . . cleared land was of much greater value than land covered with wood and timber; and that good farms in the vicinity of the premises had not reserved more than 12 acres of woodland out of 100 acres . . .

The judge was of opinion, . . . that the gradual clearing of that part in possession of the defendant, . . . did not, in law, amount to waste; and he directed the jury to find a verdict for the defendant; and the jury found accordingly.

A motion was made to set aside the verdict and for a new trial, for the misdirection of the judge. . . .

#### VAN NESS, J.

. . . It is a general principle, that the law considers every thing to be waste which does a permanent injury to the inheritance. Now, to say that cutting down the wood on almost every acre of the demised premises is not waste, within the spirit and meaning of the covenant in the case, is to say that no waste, by the destruction of wood, can be committed at all. We are bound to give effect to this covenant if we can, but to decide that

the facts stated in the case do not constitute waste, would be destroying it almost altogether. That the destruction of the timber is a lasting injury to the reversion cannot be disputed. For this injury the lessors of the plaintiff may, at their election, bring covenant, or enter as for condition broken.

... It is true, that what would in England be waste, is not always so here. The covenant must be construed with reference to the state of the property at the time of the demise. The lessee undoubtedly had a right to fell part of the timber, so as to fit the land for cultivation; but it does not follow that he may, with impunity, destroy all the timber, and thereby essentially and permanently diminish the value of the inheritance. Good sense and sound policy, as well as the rules of good husbandry, require that the lessee should preserve so much of the timber as is indispensably necessary to keep the fences and other erections upon the farm in proper repair. The counsel for the defendant is mistaken when he says that lessees in England are prohibited from cutting wood upon the demised premises altogether; the prohibition, in principle, extends no further, in this respect, than it does here. In England, that species of wood which is denominated timber shall not be cut down, because felling it is considered as an injury done to the inheritance, and therefore waste. Here, from the different state of many parts of our country, timber may, and must be cut down to a certain extent, but not so as to cause an irreparable injury to the reversioner. To what extent wood may be cut before the tenant is guilty of waste, must be left to the sound discretion of a jury, under the direction of the court, as in other cases. ... The principle upon which all these cases were decided is that which I have before stated, namely, that whenever wood has been cut in such a manner as materially to prejudice the inheritance, it is waste; and that is the principle upon which I place the decision of this cause.

... My opinion, therefore, is, that the motion for setting aside the non-suit, and granting a new trial, ought to be granted.

KENT, Ch. J., and THOMPSON, J., were of the same opinion.

SPENCER, J.

... The land was covered with heavy timber; and, for the use of it, the lessee was to pay a rent. The parties must, therefore, have intended that the lessee should be at liberty to fell the timber to a certain extent, at least, for agricultural purposes.

If the restriction to commit waste would operate to restrain the lessee from the use of the premises, it would be void, as repugnant to the grant. I

shall have no difficulty in maintaining that, according to the common law of England, the lessee could not enjoy the land, nor derive any benefit from it, without the commission of waste; and should that point be established, this covenant must be rejected. The general definition of waste is, that it is a destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him in remainder or reversion. It is not every injury to lands that the law considers as waste, nor every act which injures the remainder-man, or the reversioner. To test this supposed waste, by considering the reversioner injured by the acts done, is not warranted by law; and, in point of fact, when the premises were cleared of the timber, cleared land was more valuable than wood land. . . . I insist that, according to the common law of England, no tenant can cut down timber, &c., or clear land for agricultural purposes; and that the quantity of timber cut down never enters into the consideration whether waste has or has not been committed; but that it is always tested by the fact of cutting timber, without the justifiable excuse of having done it . . . . A single tree cut down, without such justifiable cause, is waste as effectually as if a thousand had been cut down; and the reason is this, that such trees belong to the owner of the inheritance, and the tenant has only a qualified property in them for shade and shelter.

The doctrine of waste, as understood in England, is inapplicable to a new, unsettled country. . . . The rule furnished by the common law is fixed and certain; and the lessor knows what wood he may cut, and for what purposes; but if a covenant not to commit waste is hereafter to be considered as a covenant to leave a sufficient quantity of land in wood, no lessee is safe. If the act of cutting timber on the premises, without the justifiable excuse already stated, was not waste, cutting more or less was immaterial. Under the covenant not to commit waste, we have no right to say some waste might be committed, and other waste might not; the covenant is inapt to the case, and if any remedy exists, it must lie in covenant. I am, therefore, against granting a new trial.

**YATES, J., was of the same opinion.**

Rule granted.

### Notes and Questions

11.5. What exactly is the dispute between the majority and the dissent? Do they agree on the existence of a remedy for waste under New York law? On the definition of waste? On the applicability of waste doctrine to the lease before the court? On the remedy for waste?

11.6. Although this case deals with a lease for life—a peculiar hybrid estate that is not recognized in many jurisdictions—the doctrine of waste applies between freehold possessory estate holders and future interest holders just as it applies between leasehold tenants and landlords. Thus, even in the absence of a lease contract, Brownson could have been held liable for damages, or enjoined from felling any further timber, in an action for waste by the reversioners (if the jury concluded that it would indeed be waste for a possessor in Brownson’s position to fell such timber).

11.7. **Forms of Waste.** Waste can be either *voluntary* or *permissive*. Voluntary waste (sometimes called *affirmative* waste) refers to acts of the holder of the possessory estate, such as erecting or demolishing a structure, or extracting non-replenishing natural resources. Permissive waste refers to *omissions* of the holder of the possessory estate, such as failing to pay property taxes, or failure to make needed repairs. Either can support a claim for waste by the owner of a future interest whose rights are permanently devalued as a result. Which form of waste was at issue in *Jackson*?

11.8. **Theories of Waste.** One commentator argues that *Jackson* was the starting point for a peculiarly American departure from the English doctrine of waste deplored by the dissenters. In this view, “courts created the American law of waste for several reasons: to promote efficient use of resources that the English rule would have inhibited; to advance an idea of American landholding as a republican enterprise, free of feudal hierarchy; and perhaps to advance a belief that a natural duty to cultivate wild land underlay the Anglo-American claim to North America.” Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653, 661 (2006). And indeed, the sensitivity of both opinions in *Jackson* to local conditions, the desirability of converting wild lands to agricultural use, and the sustainability of yeoman farming tend to support this pluralist view.

11.9. Law-and-economics theorists, in contrast, identify waste doctrine solely with the criterion of efficiency, and particularly the internalization of externalities and mitigation of holdout problems. As Judge Posner puts it: “The incentive of a life tenant is to maximize not the value of the property—that is, the present value of

the entire stream of future earnings obtainable from it—but only the present value of the earnings stream obtainable during his expected lifetime. So he will, for example, want to cut timber before it has attained its mature growth even though the present value of the timber would be greater if the cutting of some or all of it were postponed; for the added value from waiting would inure to the remainderman .... [Moreover,] since tenant and remainderman would have only each other to contract with, the situation would be one of bilateral monopoly and transaction costs might be high." To avoid these problems, "[t]he law of waste forbids the tenant to reduce the value of the property as a whole by considering only his own interest in it." Richard A. Posner, *Comment on Merrill on the Law of Waste*, 94 MARQ. L. REV. 1095-96 (2011).

### Note on Ameliorative Waste

What if, instead of doing something that *decreases* the value of the future interest, the holder of the possessory estate does something that *increases* the market value of the land, but in doing so changes the premises in ways the future interest holder doesn't like? Such alterations—known as *ameliorative waste*—have generated two types of approaches in the courts.

The first approach, adopted in *Melms v. Pabst Brewing Co.*, 79 N.W. 738 (Wisc. 1899), looks to the effect of the life tenant's actions on the market value of the parcel and whether those actions were necessitated by a change in conditions surrounding the parcel. In *Melms*, the Pabst Brewing Company had torn down an old mansion abutting a brewery it owned, mistakenly believing it owned the lot in fee simple when in fact it owned only the life estate of the widow Melms (the remainder being owned by her children). At the time of the demolition, the neighborhood around the house had become heavily industrialized, and had been re-graded such that the house stood 20-30 feet above street level and was worthless as a residential property. In these circumstances, the court held, whether the act of destroying the mansion and re-grading the lot on which it stood to street level constitutes waste is a question of fact for the jury. The court suggested that such actions will not constitute waste "when it clearly appears that the change will be, in effect, a meliorating change, which rather improves the inheritance than injures it." *Id.* at 739.

The second approach—more consistent with the common-law roots of waste doctrine—holds that *any* material change to real property caused by a lawful possessor without the consent of the holder of the future interest is waste, full stop. This approach informed the decision of the New York Supreme Court in *Brokaw v.*

*Fairchild*, 237 N.Y.S. 6 (Sup. Ct. N.Y. Cty. 1929). In that case, the court refused to allow the life tenant of a stately mansion on New York's Fifth Avenue at 79th Street to tear the mansion down over the objections of the holders of future interests in the lot, even though living in the mansion had become cost-prohibitive and the neighborhood had become a prime location for luxury apartment buildings, which could be built and operated on the site for a substantial profit. The theory underlying this result is that a life tenant has merely the rights of use, not full rights of ownership, and that the holder of the future interest is entitled to take possession of the parcel in substantially the same condition as it existed at the time the future interest was created: "The act of the tenant in changing the estate, and whether or not such act is lawful or unlawful, i.e., whether the estate is so changed as to be an injury to the inheritance, is the sole question involved." *Id.* at 15.

The opinion in *Brokaw* generated a backlash in New York's reform-minded legislature, which enacted a statute redefining waste law along the lines set forth in *Melms*; that statute remains in force today. See N.Y. REAL PROP. ACTS. & PROCS. L. § 803. But interestingly, the opinion in *Melms* itself seems to have arisen from a number of questionable factual and legal pronouncements from the Wisconsin courts. The full, fascinating story is recounted in Thomas W. Merrill, *Melms v. Pabst Brewing Co. and the Doctrine of Waste in American Property Law*, 94 MARQ. L. REV. 1055 (2011). As of 2009, the rule of *Melms* was followed in most U.S. jurisdictions, while a small number continued to follow the rule of *Brokaw*. *Id.* at 1083 (citing Gina Cora, *Want Not, Waste Not: Contracting Around the Law of Ameliorative Waste* (Apr. 1, 2009) (Yale Law School Student Prize Papers: Paper 47), [link](#)).

Which of these two rules do you think is most consistent with the pluralist justifications for waste doctrine described by Professor Purdy? Which do you think is most consistent with the law-and-economics approach? Do either of the rules require some other form of justification, and if so, what might that justification be?

## 11.3 Controlling Future Uses

As we saw in our discussion of estates and future interests, the common law gave property owners a fairly diverse and subtle array of tools to effectuate their intent regarding the use and disposition of their property. But this level of control raises serious potential for conflicts between the plans and wishes of the property owners of yesterday and the needs and desires of (actual and aspiring) property owners of today.

Consider that about 80 years before the Empire State Building was constructed, the land on which it now stands was a farm situated a mile beyond the northern edge of the urban quarters of New York City. See JAMES REMINGTON MCCARTHY & JOHN RUTHERFORD, PEACOCK ALLEY: THE ROMANCE OF THE WALDORF-ASTORIA 4-10 (1931). What if the first private owner of that farm—John Thompson, who purchased it in 1799 out of the common lands held by the city government for \$2,400 (*id.*)—had executed a conveyance of the land that included a future interest in “the eldest of my great-great-great-great grandchildren”? What if he had devised the land to his eldest child “on condition that the family farm may never be sold”? Or “on condition that the land may be used for farming purposes only”? Could the Empire State Building ever have been built? If not, is that a result we would be happy with?

The common law recognized that some property owners might try to dictate the disposition of property much farther into the future than could be justified by any legitimate interest or expertise they might have. As one commentator put it, writing in 1967: “[I]t would have been utterly impossible for any testator dying in 1866 to foresee the events that have taken place in the succeeding century, and . . . any prediction as to what may occur in the century following 1966 would be even more unlikely to conform to reality.” W. BARTON LEACH, PROPERTY LAW INDICTED! 71 (1967). As years pass, new generations undertake stewardship of resources, and the economic, social, and cultural demands on those resources change with the times. Allowing long-dead property owners to dictate the disposition of those resources to the fourth, fifth, or sixth generation after they’re gone significantly limits the ability of the possessors of today to flexibly direct resources to uses appropriate to the age.

The common law developed various doctrines designed to balance respect for property owners’ wishes to provide for their families as they see fit with vigilance against the dangers of dead-hand control. One powerful tool for striking this balance is the infamous **Rule Against Perpetuities**. We will not be studying the Rule at any length here, but its classic formulation—that an interest in property is void unless it necessarily will vest within 21 years of the end of a life in being at the time the interest is created—essentially operates to limit a property owner’s control to one generation beyond the end of his own life. For example, a grant to John Thompson’s great-great-great-great grandchild would be clearly invalid under the

Rule Against Perpetuities, but a grant by John Thompson to his living daughter's yet-unborn child would almost certainly be valid.<sup>1</sup>

Beyond limiting the *duration* of property owners' control, the common law developed additional rules regarding the *types* of restrictions grantors could place on otherwise valid interests in property that they conveyed. The following cases provide some examples. As you read them, consider how the principles they rely on relate to the aforementioned balance between respecting property owners' wishes and guarding against dead-hand control.

***Ford v. Allen***

526 S.W.2d 643 (Ct. Civ. App. Tex. 1975)

**O'QUINN, Justice.**

Chester Melvin Ford and Lola Mae Ford, the deceased persons whose wills are under review, were married in August of 1943, and Clyde M. Ford, appellant here and plaintiff below, was the only child born to their marriage. Mr. [Chester] Ford had been married twice prior to his marriage to Mrs. Ford, but had no children from those marriages. Mrs. Ford also had been married earlier, and from that marriage she had a son, Otis Martin Allen, who died in April of 1958, leaving three sons, resulting from two marriages. The three surviving sons were defendants below and are appellees in this appeal.

The undisputed evidence supports the finding of the trial court that Chester Melvin Ford and his wife, Lola Mae Ford, each executed a holographic will on the same day in April of 1960, and each of them devised "all my property to my beloved" spouse, followed by certain additional identical language which is under dispute. Mr. Ford died November 25, 1972, and less than a month later Mrs. Ford died, on December 18, 1972.

It also appears undisputed that, as the court found, Mr. Ford at the time of his death owned approximately 450 acres of land in Bell County . . . .

The language of the wills giving rise to this suit, as contained in the will of Mr. Ford, follows:

After the Payments of my Just Debts I devise all my property  
to my beloved wife Lola Mae Ford to do with as she See fit

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<sup>1</sup>We say "almost" only because if Thompson for some reason made the future interest in his unborn grandchild subject to the condition precedent of that grandchild attaining an age of more than 21 years, the interest would be void under the common-law Rule Against Perpetuities.

except that she is not to Sell, Morage (sic), or Lease any of our real Estate for more than Three (3) years without the written agreement of our son Clyde Melvin Ford.

Appellant contends that the language is ambiguous and requires construction, and that under a proper construction the language "created a life estate in real property in Lola Mae Ford with remainder to Clyde M. Ford in fee simple, or alternatively created a testamentary trust expressly or by implication for the use and benefit of Clyde M. Ford."

... The trial court concluded (1) that the language in the wills, providing that the devisee was not to sell, mortgage, or lease any of the realty for three years without written agreement of Clyde M. Ford, was "void as being a restraint on alienation and repugnant to the devise in fee;" and (2) the language of the wills . . . devised fee simple title to all property, since the wills contained no "language clearly showing a lesser estate than the fee was intended to be devised." We approve these conclusions as correct applications of the law to the language of the wills.

Appellant contends that by extrinsic evidence it may be demonstrated that the true intent of Mr. and Mrs. Ford was to devise their real property to their only son, Clyde M. Ford, and that because of the ambiguity of the language in the wills, such evidence should have been considered . . .

In brief, the evidence was that the real estate was the separate property of Mr. Ford, and that the three grandsons of Mrs. Ford were not kin to Mr. Ford; that Clyde M. Ford had helped to work the lands contained in the 450 acres, whereas the defendants had never worked any part of the land; that the grandsons were not close to their grandmother or to Mr. Ford, and none of them attended either the funeral of Mr. Ford or their grandmother; that Mrs. Ford set up a savings account for the grandsons and this alone was intended to take care of them; that Clyde M. Ford was close to his parents and was the natural object of the deceaseds' bounty, and the defendants were not; that during their life both Mr. and Mrs. Ford indicated orally that they wanted Clyde to have the land.

It is the established rule that an ambiguity arises only when the meaning which emanates from language used in the will admits of more than one interpretation. We find no ambiguity in the language of the Ford wills which in each writing clearly and plainly devises all property to the other spouse to do with as the other may see fit. The attempt, in language that follows, to place a restraint on alienation could not change or nullify the de-

vise. It is not a function of the courts, nor is it a role the courts may assume, to revise or to make over the writing in a will to achieve results different from results which flow from the plain language used by the maker of the will. The courts may not speculate, from extrinsic evidence or otherwise, that some other result may have been intended.

... Appellant also urges that the trial court erred in refusing to make a determination of heirship, and under these points insists that if Mrs. Ford died intestate, appellant is entitled to one-half of her estate and defendants are entitled only to the remaining one-half. The trial court correctly declined to decide the matter of heirship since administration of the estates is still pending in Bell County, where the County Court has acquired jurisdiction to determine heirs of the deceased.

All of appellant's point of error have been carefully examined and considered, and all points are overruled.

The trial court in its judgment denied the request of Clyde M. Ford that attorney's fees, court costs, and other expenses incurred by this suit to construe the wills be paid out of the two estates as costs and expenses of administration, and ordered all such costs and expenses to be paid by Ford individually.

The judgment of the trial court is in all things affirmed. It is ordered that costs of this appeal be taxed against appellant, Clyde M. Ford, individually.

#### **Notes and Questions**

11.10. Do you think Clyde is right that his parents wanted him to have the farm after both of them died? Or at least that they would rather Clyde have it than Lola Mae's estranged grandchildren from another marriage? If so, why do you think both Chester and Lola Mae executed wills without any explicit devise to Clyde? If not, why do you think the Fords' wills included a restriction on alienating the farm without Clyde's consent? (Incidentally, what is a "holographic" will?)

11.11. Why is the court unwilling to consider Clyde's evidence that his parents wanted him to have the farm? What's wrong with looking outside the four corners of the will itself to understand what the testator *really* wanted? Would we take a similar view of extrinsic evidence if the document being interpreted were, say, a contract for the sale of goods?

11.12. Justice O'Quinn says that the language of the Fords' wills "clearly and plainly devises all property to the other spouse to do with as the other may see fit."

But this is at best disingenuous and at worst deliberately false: the wills also, *in the very next clause*, “clearly and plainly” purport to limit what the other spouse can do with the property in the absence of Clyde’s consent. Why does the court enforce the former clause and render the latter clause void?

The reasoning of the trial court in this case may help explain things. Note that the trial court is said to have given two somewhat different reasons for invalidating Clyde’s power to block any effort by his surviving parent to alienate the farm (and with it any future interest he might have claimed by implication from this right). We are told that an attempt to convey such a power to Clyde must be void, both “as a restraint on alienation,” and as “repugnant to the . . . fee.” These reasons invoke two long-standing common-law principles: a policy against restraints on alienation, and the doctrine of *numeris clausus*.

Courts have generally strongly disfavored overt restraints on a grantee’s right to alienate their interest. Such restraints can make it quite difficult to move resources from lower-valued to higher-valued uses. A current owner of a resource might well be willing to sell it to a willing buyer who wants it more and can make more valuable use of it, but if we enforce a restraint on alienation imposed on the current owner by a past grantor, such a beneficial transaction cannot happen. The result would be serious misallocation of resources, and the rule that restraints on alienation are void demonstrates the common law’s willingness to defeat even the clearly expressed intent of a grantor where necessary to avoid such misallocation.

*Numeris clausus* (literally, “the number is closed”) is a legal principle derived from civil law systems but invoked in Anglo-American property law to refuse recognition of any interest in land other than the traditional common-law estates. Under this principle property owners may not create any new “bundle of rights” other than those that are already represented by the common-law estates themselves. So, because a possessory estate subject to a veto on the right of alienation by someone other than the possessory estate’s owner is not a “bundle of rights” that we can identify among our common-law estates, it must be outside the power of the Fords to create it. Courts have similarly rejected efforts by testators to, for example, give their surviving spouses unfettered control over devised property while also giving any property left over at the surviving spouse’s death to another beneficiary. Such hybrid bequests are, like the devise in *Ford*, typically treated as a fee simple (rendering the putative future interest void). See, e.g., *Sumner v. Borders*, 98 S.W.2d 918 (Ky. 1936).

Is the rule of *numeris clausus* motivated by the same rationales that give rise to the rule against restraints on alienation? Imagine if, rather than selecting from the

fixed menu of common-law estates, property owners were free to build their own tailored bundles of property interests for grantees, with their own ad hoc collections of limitations and restrictions on the rights of those grantees, and that these idiosyncratic collections of rights and limitations became commonplace across society. Suppose you now want to buy a parcel of land in that society. Can you be sure what you're buying? How? How well would we expect a real estate market built on a potentially infinite variety of interests in real property to function? See generally Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

11.13. Are there other principles underlying the rule against restraints on alienation or the *numerus clausus* principle other than ensuring a well-working market for property rights? Consider that the law of *intellectual property* has long included a so-called "first sale" doctrine, which provides that the first authorized purchaser of a good embodying an intellectual property right (for example, a book embodying a copyrighted work, or a machine embodying a patented invention) has the power to alienate *that particular article* free of any claim by the intellectual property right owner. See, e.g., 17 U.S.C. § 109(a) (copyright); *Adams v. Burke*, 84 U.S. 453, 456 (1873) ("[W]hen the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use."). At least where the owners of the relevant intellectual property rights can be clearly identified, can this rule be justified by the same principle as the rule against restraints on alienation of *land*? If not, what is the rationale for the first-sale doctrine?

11.14. Consider the following excerpts from the September 6, 2012 Amazon Kindle Store Terms of Use Agreement,<sup>2</sup> which governs the downloading of electronic copies of copyrighted literary works from Amazon for viewing on electronic devices.

"Kindle Content" means digitized electronic content obtained through the Kindle Store, such as books, newspapers, magazines, journals, blogs, RSS feeds, games, and other static and interactive electronic content.

....

**Use of Kindle Content.** Upon your download of Kindle Content and payment of any applicable fees (including applicable taxes), the Content Provider grants you a non-exclusive

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<sup>2</sup>*Kindle Store Terms of Use*, AMAZON (Sept. 6, 2012), [link](#).

right to view, use, and display such Kindle Content an unlimited number of times, solely on the Kindle or a Reading Application or as otherwise permitted as part of the Service, solely on the number of Kindles or Supported Devices specified in the Kindle Store, and solely for your personal, non-commercial use. Kindle Content is licensed, not sold, to you by the Content Provider . . . .

**Limitations.** Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense, or otherwise assign any rights to the Kindle Content or any portion of it to any third party, and you may not remove or modify any proprietary notices or labels on the Kindle Content. In addition, you may not bypass, modify, defeat, or circumvent security features that protect the Kindle Content.

. . . .

**Termination.** Your rights under this Agreement will automatically terminate if you fail to comply with any term of this Agreement. In case of such termination, you must cease all use of the Kindle Store and the Kindle Content, and Amazon may immediately revoke your access to the Kindle Store and the Kindle Content without refund of any fees. Amazon's failure to insist upon or enforce your strict compliance with this Agreement will not constitute a waiver of any of its rights.

Is this agreement consistent with the rules you've just learned? If not, is it enforceable? See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010).

11.15. Might a grantor impose restrictions on a grantee *other than* explicit limitations on the power to alienate that would raise the same concerns as those that motivate the rule against restraints on alienation? Consider the following cases:

***Wills v. Pierce***  
208 Ga. 417 (1951)

. . . Mrs. Walter Tilley Pierce and others filed in Terrell Superior Court, against Mrs. J. C. Wills and others, a petition, which alleged substantially the following: On December 1, 1923, J. W. Tilley by warranty deed conveyed described realty known as the Aven Home to J. C. Wills. The deed contained the clause: "The above property is conveyed to J. C. Wills [the grantee] to be used as a home by himself, his family and his heirs, upon

condition that the same be used by him or them as a home and a residence, and further that upon the failure of the said condition and the abandonment of said property as a residence by [the grantee], . . . his family or heirs, the same shall revert to [the grantor's] . . . estate and go as directed by [the grantor's] . . . will." The grantor died testate in 1924, and under the terms of his will the petitioners are the owners of the reversionary interest in the realty. The grantee died intestate in 1945, leaving as his sole surviving heirs his widow, Mrs. J. C. Wills, and two named children, who are the defendants. The condition under which the realty was conveyed has been violated, in that the defendants have abandoned the property as a home and residence, and are now residing elsewhere. . . . The petitioners prayed . . . that the interest of the defendants in the realty be declared forfeited, and the fee-simple title thereof be decreed to be in the petitioners; and that the petitioners have general equitable relief.

The defendants demurred to the petition on the ground that it failed to set forth any cause of action against them. The trial court overruled the demurrer, and the defendants excepted . . . .

**ATKINSON, Presiding Justice (after stating the foregoing facts).**

The granting clause in the deed under consideration was: "In consideration of the sum of one dollar to me paid, I . . . do hereby sell and convey to [the grantee and] . . . his heirs, a tract or parcel of land and appurtenances in fee simple." Then followed a description of the land, after which the grantor inserted the provision that the property was to be used as a home by the grantee, his family, and his heirs, and that upon the abandonment of the property as a residence by the grantee, his family, or his heirs, the same should revert to the grantor's estate and go as provided in his will.

Standing alone, the first clause in the deed would have conveyed an unconditional fee-simple estate, and the sole question for determination is whether or not the condition subsequent under which the forfeiture is claimed is valid and enforceable.

A provision in a deed or will that a fee-simple estate may not be sold is void as being repugnant to the estate granted.

While no express language is used in the present deed inhibiting alienation of the property, nevertheless—the condition being that the property was to be used as a home by the grantee, his family, and his heirs—the requirement to use as a home and the right to sell are mutually exclusive,

and whether or not the case falls within the rule against perpetuities, the conclusion is inescapable that since the grantee and his heirs must use the premises as a home they cannot sell it.

. . . A different question would have been presented if the condition subsequent had been that the premises should be used “as a home” or “for residential purposes” generally. See, in this connection, *City of Barnesville v. Stafford*, 161 Ga. 588(1), 131 S.E. 487, 43 A.L.R. 1045; *Taylor v. Bird*, 150 Ga. 626, 104 S.E. 502; *Rustin v. Butler*, 195 Ga. 389, 24 S.E.2d 318; *Williams v. Ramey*, 201 Ga. 737(1), 41 S.E.2d 159; *Tabor v. Gilmer County*, 205 Ga. 439(1), 53 S.E.2d 915; and similar cases, where conditions subsequent requiring use of property generally for park, school, religious, and courthouse purposes were held valid and enforceable.

Accordingly, the present petition, seeking to enforce a forfeiture for breach of a void condition subsequent, failed to set forth a cause of action, and the trial court erred in overruling the defendants’ general demurrer.

Judgment reversed.

All the Justices concur.

### **Notes and Questions**

11.16. A “fee simple subject to a condition subsequent” is another type of estate, in which the grantee’s property rights may terminate if a condition that the grantor specified becomes true. Do grantors appear to have the power to set such conditions subsequent after *Wills*? If so, what are its limits?

11.17. Why does the court consider the enforcement of the condition that the property at issue “be used as a home by [the grantee], his family and his heirs” to present a “different question” than the enforcement of a condition “that the premises should be used ‘as a home’ or ‘for residential purposes’ generally”? What makes these questions different?

11.18. Is there any relationship between the holding of *Wills* and our previously discussed rule against restraints on alienation or the principle of *numeris clausus*? If so, what’s the connection?

***Smedley v. City of Waldron***  
739 F.2d 399 (8th Cir. 1984)

**Per Curiam.**

In 1940, the City of Waldron, lacking funds to acquire a reservoir site, asked Hannah Smedley to donate land for that purpose. The governing agreement provided in part that:

5. The City of Waldron shall never sell, transfer, convey, lease, rent or otherwise dispose of the lands herein above described to other persons, firms, groups and/or corporations, except successors and/or assigns of itself, and if it attempts to do so, the lands immediately revert to Hannah Smedley and her heirs[.]

In 1977, Harry Smedley (Hannah Smedley's sole heir and devisee) sued unsuccessfully for reconveyance, arguing that the city had abandoned the land. In dismissing the complaint, the district court found that the city had not abandoned the reservoir; rather, it continuously maintained and used it as a reserve water supply.

In 1981, the city leased the oil and gas rights of the deeded land to Texas Oil and Gas Corporation. As a result, Harry Smedley brought this case, alleging that the city's lease of the mineral rights subjacent to the land violated paragraph 5 of the 1940 agreement. For relief, he demanded immediate reconveyance of the land and payment of all monies the city received under the lease. Both parties moved for summary judgment. The district court found that the agreement was an impermissible restraint on alienation and granted the city's motion for summary judgment. We reverse and remand for further proceedings.

Some Arkansas courts have disapproved restraints on alienation. See, e.g., *First National Bank of Fort Smith v. Graham*, 195 Ark. 586, 593, 113 S.W.2d 497 (1938); *Letzkus v. Nothwang*, 170 Ark. 403, 408, 279 S.W. 1006 (1926). . . . [But w]hen the grant is to a governmental unit for a public purpose, Arkansas courts have been reluctant to void the grant as impermissibly restraining alienation if doing so would flout the grantor's intent. One line of Arkansas cases, for example, approved disabling language in grants to localities where the land was to be used for school purposes. *McCrary School Dist. of Woodruff v. Brogden*, 231 Ark. 664, 333 S.W.2d 246, 249–50 (1960); *Vandale Special School Dist. No. 6 v. Feltner*, 215 Ark. 252,

220 S.W.2d 131, 133 (1949); *Taylor v. School Dist. No. 45 of Searcy County*, 214 Ark. 434, 216 S.W.2d 789 (1949); *Coffelt v. Decatur School Dist. No. 17*, 212 Ark. 743, 208 S.W.2d 1, 2 (1948); *Milner v. New Edinburg School Dist.*, 211 Ark. 337, 200 S.W.2d 319, 322 (1947); *Williams v. Kirby School Dist.*, 207 Ark. 458, 181 S.W.2d 488, 490 (1944); *Steel v. Rural Special School Dist. No. 15*, 180 Ark. 36, 20 S.W.2d 316, 317 (1929). Because summary judgment in favor of the city ignores the public purpose of the grant and defeats the donor's intent, we reverse the district court's judgment.

Having decided that the restraint on alienation here is not impermissible, we remand the case to the district court to resolve the important remaining factual questions. The district court shall determine whether the mineral lease is a violation of the parties' agreement. Because Arkansas courts hold that if the restraint is valid the intent of the donor controls, *Gibson v. Pickett*, 256 Ark. 1035, 512 S.W.2d 532, 535 (1974), the district court shall determine whether the donor intended that the city would lose the land only if the land was not used for a reservoir. Finally, the district court should determine the best means of fulfilling the donor's intent: will her intentions be satisfied merely by awarding her heirs the revenues from the lease, or will the extreme remedy of forfeiture of the reservoir to the heirs be necessary?

### Notes and Questions

11.19. **Wait . . . what?** How can Hannah Smedley's clearly expressed intent to absolutely forbid the City of Waldron from alienating the reservoir get around the common-law rule against restraints on alienation? And why can't Chester Ford's far more modest but no less clearly expressed intent to restrain Lola Mae's right to alienate do the same thing?

11.20. **Restraints on Alienation vs. Restrictions on Use.** In *Wills* the court seemed to be concerned that the condition subsequent restricting the grantees's use of the land conveyed was a sort of restraint on alienation in disguise. Could a naked restraint on alienation—such as the one in *Smedley*—really be a restriction on use in disguise? If so, would it be any less offensive to the principles underlying the rule against restraints on alienation?

11.21. Does *Smedley* reach the opposite result from *Ford* and *Wills* because the grantor's motivation is different in *Smedley* than in the other cases? (Is it?) Because

the grantee is a public entity rather than a private individual? Because the restraint on the grantee is less onerous? (Is it?)



# Chapter 12

## Security Interests

Money and property always seem to go together. A common way of joining the two is the **security interest**, in which one person's property right is used as security to guarantee a debt.

Consider the following: Alice needs to borrow money to buy a printing press (to run her newspaper business), and Bob has cash to lend. In exchange for the loan, Alice promises to pay Bob in monthly installments, with interest. But Bob is worried—what if Alice skips town and stops making the payments? So Bob wants to use the printing press as collateral for the loan. If Alice fails to make a payment, that is, if she **defaults**, Bob gets to keep the printing press, which Bob can hopefully sell for enough money to recover the value of the loan.

Alice and Bob could make these arrangements purely by contract, of course. But what if Alice first sells the printing press to Charlie, and then skips town and stops making the payments? Bob cannot sue Charlie for breach of a contract to which Charlie was not a party. Bob's only option is to sue Alice for breach of contract and hope that Alice can pay (if Bob can even find her).

So what Bob really wants is a property right in the printing press. Not a current right to use it (that's what Alice needs), but a right to take it in the event of a default. Like a reversion or remainder to a life estate that converts into a possessory estate upon the life tenant's death, Bob's desired property interest should convert into a possessory right to the printing press upon the event of a default.

In other words, *a security interest is simply a type of future interest*, and all the mechanics of the system of estates will help to explain the mechanics of security interests. There will be complications, of course, which this chapter will explore. But the basic framework will be the same: there will be current possessory estates

and future interests, and certain events will change those interests by operation of law.

Security interests can arise in a variety of ways, either voluntarily (where a property owner uses the property as collateral for a loan) or involuntarily (for example, to collect on tax debts or tort judgments). A voluntary security interest on real property is typically called a **mortgage**, and (somewhat confusingly) the phrase **secured transaction** in the United States generally refers to voluntary security interests in personal property under Article 9 of the Uniform Commercial Code. The term **lien** is typically used for involuntary security interests, though it is sometimes used interchangeably with “security interest.”<sup>1</sup>

Our focus in this chapter will be less on the formation of these security interests, and more on how they work: what happens when a default occurs, if the underlying property is sold, and so on. Pay close attention to what interests everyone holds, who has possession when, what events affect the parties’ property interests, and what legal procedures must be followed.

## 12.1 Liens

### *Williams v. Ford Motor Credit Co.*

674 F.2d. 717 (8th Cir. 1982)

**BENSON, Chief Judge.**

In this diversity action brought by Cathy A. Williams to recover damages for conversion arising out of an alleged wrongful repossession of an automobile, Williams appeals from a judgment notwithstanding the verdict entered on motion of defendant Ford Motor Credit Company (FMCC). In the same case, FMCC appeals a directed verdict in favor of third party defendant S & S Recovery, Inc. (S & S) on FMCC’s third party claim for indemnification. We affirm the judgment n.o.v. FMCC’s appeal is thereby rendered moot.

In July, 1975, David Williams, husband of plaintiff Cathy Williams, purchased a Ford Mustang from an Oklahoma Ford dealer. Although David Williams executed the sales contract, security agreement, and loan papers, title to the car was in the name of both David and Cathy Williams. The car was financed through the Ford dealer, who in turn assigned the paper

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<sup>1</sup>Unfortunately, this terminology is not standardized as a general matter, and different pockets of law may use these terms differently.

to FMCC. Cathy and David Williams were divorced in 1977. The divorce court granted Cathy title to the automobile and required David to continue to make payments to FMCC for eighteen months. David defaulted on the payments and signed a voluntary repossession authorization for FMCC. Cathy Williams was informed of the delinquency and responded that she was trying to get her former husband David to make the payments. There is no evidence of any agreement between her and FMCC. Pursuant to an agreement with FMCC, S & S was directed to repossess the automobile.

On December 1, 1977, at approximately 4:30 a.m., Cathy Williams was awakened by a noise outside her house trailer in Van Buren, Arkansas.<sup>1</sup> She saw that a wrecker truck with two men in it had hooked up to the Ford Mustang and started to tow it away. She went outside and hollered at them. The truck stopped. She then told them that the car was hers and asked them what they were doing. One of the men, later identified as Don Sappington, president of S & S Recovery, Inc., informed her that he was repossessing the vehicle on behalf of FMCC. Williams explained that she had been attempting to bring the past due payments up to date and informed Sappington that the car contained personal items which did not even belong to her. Sappington got out of the truck, retrieved the items from the car, and handed them to her. Without further complaint from Williams, Sappington returned to the truck and drove off, car in tow. At trial, Williams testified that Sappington was polite throughout their encounter and did not make any threats toward her or do anything which caused her to fear any physical harm. The automobile had been parked in an unenclosed driveway which plaintiff shared with a neighbor. The neighbor was awakened by the wrecker backing into the driveway, but did not come out. After the wrecker drove off, Williams returned to her house trailer and called the police, reporting her car as stolen. Later, Williams commenced this action.

The case was tried to a jury which awarded her \$5,000.00 in damages. FMCC moved for judgment notwithstanding the verdict, but the district court, on Williams' motion, ordered a nonsuit without prejudice to refile in state court. On FMCC's appeal, this court reversed and remanded with directions to the district court to rule on the motion for judgment notwithstanding the verdict. The district court entered judgment notwithstanding the verdict for FMCC, and this appeal followed.

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<sup>1</sup>Cathy Williams testified that the noise sounded like there was a car stuck in her yard.

Article 9 of the Uniform Commercial Code (UCC), which Arkansas has adopted and codified as Ark.Stat.Ann. § 85-9-503 (Supp.1981), provides in pertinent part:

Unless otherwise agreed, a secured party has on default the right to take possession of the collateral. In taking possession, a secured party may proceed without judicial process if this can be done without breach of the peace . . .<sup>4</sup>

In *Ford Motor Credit Co. v. Herring*, 589 S.W.2d 584, 586 (Ark. 1979), which involved an alleged conversion arising out of a repossession, the Supreme Court of Arkansas cited Section 85-9-503 and referred to its previous holdings as follows:

In pre-code cases, we have sustained a finding of conversion only where force, or threats of force, or risk of invoking violence, accompanied the repossession.

The thrust of Williams' argument on appeal is that the repossession was accomplished by the risk of invoking violence. The district judge who presided at the trial commented on her theory in his memorandum opinion:

Mrs. Williams herself admitted that the men who repossessed her automobile were very polite and complied with her requests. The evidence does not reveal that they performed any act which was oppressive, threatening or tended to cause physical violence. Unlike the situation presented in *Manhattan Credit Co. v. Brewer, supra*, it was not shown that Mrs. Williams would have been forced to resort to physical violence to stop the men from leaving with her automobile.

In the pre-Code case *Manhattan Credit Co. v. Brewer*, S.W.2d 765 (Ark. 1961), the court held that a breach of peace occurred when the debtor and her husband confronted the creditor's agent during the act of repossession

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<sup>4</sup>It is generally considered that the objectives of this section are (1) to benefit creditors in permitting them to realize collateral without having to resort to judicial process; (2) to benefit debtors in general by making credit available at lower costs; and (3) to support a public policy discouraging extrajudicial acts by citizens when those acts are fraught with the likelihood of resulting violence.

and clearly objected to the repossession. In *Manhattan*, the court examined holdings of earlier cases in which repossession were deemed to have been accomplished without any breach of the peace. In particular, the Supreme Court of Arkansas discussed the case of *Rutledge v. Universal C.I.T. Credit Corp*, 237 S.W.2d 469 (Ark. 1951). In *Rutledge*, the court found no breach of the peace when the repossession acquired keys to the automobile, confronted the debtor and his wife, informed them he was going to take the car, and immediately proceeded to do so. As the *Rutledge* court explained and the *Manhattan* court reiterated, a breach of the peace did not occur when the “Appellant [debtor-possessor] did not give his permission but he did not object.” *Manhattan, supra*, 341 S.W.2d at 767-68; *Rutledge, supra*, 237 S.W.2d at 470.

We have read the transcript of the trial. There is no material dispute in the evidence, and the district court has correctly summarized it. Cathy Williams did not raise an objection to the taking, and the repossession was accomplished without any incident which might tend to provoke violence.

Appellees deserve something less than commendation for the taking during the night time sleeping hours, but it is clear that viewing the facts in the light most favorable to Williams, the taking was a legal repossession under the laws of the State of Arkansas. The evidence does not support the verdict of the jury. FMCC is entitled to judgment notwithstanding the verdict.

**HEANEY, Circuit Judge, dissenting.**

The only issue is whether the repossession of appellant’s automobile constituted a breach of the peace by creating a “risk of invoking violence.” *See Ford Motor Credit Co. v. Herring*, 589 S.W.2d 584, 586 (Ark. 1979). The trial jury found that it did and awarded \$5,000 for conversion. Because that determination was in my view a reasonable one, I dissent from the Court’s decision to overturn it.

Cathy Williams was a single parent living with her two small children in a trailer home in Van Buren, Arkansas. On December 1, 1977, at approximately 4:30 a.m., she was awakened by noises in her driveway. She went into the night to investigate and discovered a wrecker and its crew in the process of towing away her car. According to the trial court, “she ran outside to stop them . . . but she made no *strenuous* protests to their actions.” (Emphasis added.) In fact, the wrecker crew stepped between her and the car when she sought to retrieve personal items from inside it, although the

men retrieved some of the items for her. The commotion created by the incident awakened neighbors in the vicinity.

Facing the wrecker crew in the dead of night, Cathy Williams did everything she could to stop them, short of introducing physical force to meet the presence of the crew. The confrontation did not result in violence only because Ms. Williams did not take such steps and was otherwise powerless to stop the crew.

The controlling law is the UCC, which authorizes self-help repossession only when such is done “without breach of the peace . . .” Ark.Stat.Ann. § 85-9-503 (Supp.1981). The majority recognizes that one important policy consideration underlying this restriction is to discourage “extrajudicial acts by citizens when those acts are fraught with the likelihood of resulting violence.” *Supra*, at 719. Despite this, the majority holds that no reasonable jury could find that the confrontation in Cathy Williams’ driveway at 4:30 a.m. created a risk of violence. I cannot agree. At a minimum, the largely undisputed facts created a jury question. The jury found a breach of the peace and this Court has no sound, much less compelling, reason to overturn that determination.

Indeed, I would think that sound application of the self-help limitation might require a directed verdict in favor of Ms. Williams, but certainly not against her. If a “night raid” is conducted without detection and confrontation, then, of course, there could be no breach of the peace. But where the invasion is detected and a confrontation ensues, the repossession should be under a duty to retreat and turn to judicial process. The alternative which the majority embraces is to allow a repossession to proceed following confrontation unless and until violence results in fact. Such a rule invites tragic consequences which the law should seek to prevent, not to encourage. I would reverse the trial court and reinstate the jury’s verdict.

### **Notes and Questions**

12.1. True or false: Cathy Williams would have been better off if she had thrown a punch or two. What do you make of the UCC’s purported policy of discouraging private extrajudicial violence? Where does *Williams* leave other single mothers facing towing crews at 4:30 AM?

12.2. Is the breach-of-the-peace test really about deterring violence, or is it a proxy for the other kinds of individual and social harms repossession can cause? If so, how good a proxy is it? Are there better ways to avoid those harms?

12.3. Notice that FMCC's lien is a property interest. One key indicium of this fact—or perhaps a component of it—is that it is freely assignable. FMCC was not the original lender. Who was? How did FMCC end up owning the lien?

12.4. On the other side of the loan, Cathy Williams was not the original borrower; David Williams was. Why is his failure to pay her problem? Indeed, he was under a court order to continue making payments. Why doesn't that protect her from repossession? This aspect of liens—that they run with the property – is considered crucial to secured lending. Why? Would FMCC be willing to extend credit in the first place if its resulting security interest did not bind David's successors in title?

12.5. In *Williams* the lienholder is not in physical possession of the collateral. Why not? Would car loans work if the lender retained possession? This creates two distinctive problems. First, how and when the lender can retake possession? (Answer: with a tow truck in the middle of the night.) But what if Cathy Williams drives the car out of state and hides it? For that matter, what if she destroys it rather than let FMCC repossess it? So FMCC's property interest in the car provides some protection for its contract rights, but hardly perfect protection. Could FMCC insist that Cathy Williams install a GPS device on the car that continually broadcasts its location? Cf. *Am. Car Rental, Inc. v. Comm'r of Consumer Prot.*, 869 A.2d 1198 (Conn. 2005) (unfair consumer practice for car rental agency to charge customer \$150 per instance of driving over 79 miles per hour for more than two minutes, as revealed by GPS tracker in car). Are there privacy concerns with this type of close monitoring? Safety concerns? Are these more or less severe than if the lender sent employees to personally follow Cathy Williams around and keep tabs on the car? What about a kill-switch that automatically shuts down the car's engine if it is driven more than fifty miles from her house? If FMCC can shut down the car remotely, could someone else? See Andy Greenberg, *Hackers Remotely Kill a Jeep on the Highway—With Me In It*, WIRED (July 21, 2015), [link](#).

12.6. The second distinctive problem when the lienholder is out of possession is notice to third parties. What happens if Cathy Williams sells the car without informing the buyer of the lien? Yes, this is yet another good-faith-purchaser problem; they are everywhere in property law. Consider the following case:

***M&I Western State Bank v. Wilson***

493 N.W.2d 387 (Wisc. Ct. App. 1992)

**ANDERSON, Judge.**

Darin Treleven appeals from a judgment of the trial court which awarded possession of a truck owned by Marilyn A. Wilson to the M & I Western State Bank (bank). Because the earlier release of the truck was a conditional release and the bank had notice of Treleven's lien through his possession of the truck, we reverse.

The bank holds a security interest in a 1978 Peterbilt truck owned by Wilson. Treleven repaired the truck seven times, each time releasing the vehicle to Wilson so she could earn the money to pay Treleven for the repairs. The repairs were invoiced between November 20, 1990 and April 23, 1991.

After Wilson defaulted on her payments to the bank, the bank commenced a replevin action. The parties made a repayment agreement; however, Wilson again defaulted and the bank obtained a judgment of replevin on April 9, 1990. The sheriff attempted to enforce the judgment but was unable to locate the truck. On May 12, 1991, employees of the bank saw the vehicle and followed it to Treleven's place of business, D.T. Truck Repair, Inc. The sheriff again tried to serve the writ of execution, but Treleven refused to release the vehicle, asserting that he held a mechanic's lien for services rendered.

After the attempted levy, the bank filed a second replevin action to determine who was entitled to possession of the truck and named Treleven as a third-party defendant. At the date of the hearing, Treleven still was owed \$3497.26 for the repairs plus \$1273.10 for interest and storage as of the date of the hearing, January 30, 1992. The bank's balance as of January 2, 1992 was \$3032.16. The bank's estimate of the value of the truck is approximately \$3000. If this estimate is correct, only the lien with first priority would be paid from the proceeds of the sale of the truck.

The trial court held that Treleven's release of the vehicle to Wilson constituted a waiver of Treleven's lien as to the bank and that the bank's lien had priority. The trial court ordered the bank to take possession and conduct a sale of the truck. On appeal, Treleven argues that the conditional release of the truck to the owner does not amount to a waiver of the lien and, alternatively, that he should be able to recover from the bank on the theory of unjust enrichment. Because we agree that the conditional re-

lease and regained possession do not waive Treleven's mechanic's lien or affect its priority over the prior secured interest, we do not have to address Treleven's unjust enrichment claim.

It is not disputed that before Treleven released possession of the truck, he had a mechanic's lien on Wilson's truck. Section 779.41(1), Stats., governs mechanic's liens and states in part:

Every mechanic and every keeper of a garage or shop, and every employer of a mechanic who transports, makes, alters, repairs or does any work on personal property at the request of the owner or legal possessor of the personal property, has a *lien on the personal property* for the just and reasonable charges therefor, including any parts, accessories, materials or supplies furnished in connection therewith and *may retain possession of the personal property until the charges are paid*. [Emphasis added.]

It also is not disputed that before Treleven released the truck to Wilson, Treleven's mechanic's lien had priority over the bank's security interest. Section 409.310, Stats., states:

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, *a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest* unless the lien is statutory and the statute expressly provides otherwise. [Emphasis added.]

Section 409.310 gave Treleven's mechanic's lien priority over the security interest because Treleven was in possession of the truck, Treleven's lien was created by sec. 779.41(1), Stats., and sec. 779.41(1) does not expressly address the priority given to the lien created.

The issue in this case is whether the mechanic, by allowing the owner to use her vehicle on a temporary basis before paying the repair bill, lost the lien or its priority on that vehicle. The interpretation of statutes is a question of law which we review de novo. We first must examine the language of sec. 779.41(1), Stats., to see if the relinquishment and resumption of possession have any affect on the existence of Treleven's mechanic's

lien. Section 779.41(1) provides that a mechanic “may retain possession of the personal property until the charges are paid.” This provision allows the mechanic to keep a customer’s property until the mechanic has been paid, without a court order. However, once the mechanic has relinquished possession of the vehicle, this statute does not provide the mechanic with a remedy even if the bill has not been paid. The statute also does not tell us whether the mechanic must retain possession of the vehicle to retain the lien—it states only that the mechanic “may retain possession.”

But the mechanic’s lien statute may not be interpreted in a vacuum. “[M]echanic’s lien laws provide *new and additional remedies* to those of the common law and are to be liberally construed to accomplish their equitable purpose of aiding materialmen and laborers to obtain compensation for material used and services bestowed upon property of another and thereby enhancing its value.” *Wiedenbeck-Dobelin Co. v. Mahoney*, 152 N.W. 479, 481 (Wisc. 1915) (emphasis added). Accordingly, in addition to the statutory language of sec. 779.41(1), Stats., we may look to the common law of mechanic’s liens and those Wisconsin decisions incorporating common law principles into the statutory mechanic’s lien law to determine whether Treleven’s lien survives.

Treleven argues that according to *Sensenbrenner v. Mathews*, 3 N.W. 599, 600 (Wis. 1879), the delivery of the vehicle to the owner must be both voluntary and unconditional in order to constitute a waiver of the lien. Treleven maintains that because he returned the vehicle to the owner so she could pay for the repairs and the allowed use was only on a temporary basis, the delivery of the vehicle was conditional and his lien survives. The bank also relies on *Sensenbrenner* for its argument that Treleven waived his lien by releasing the vehicle to Wilson. Alternatively, the bank asserts that even if the lien was not destroyed between Treleven and Wilson when the vehicle was conditionally released to Wilson, the lien was destroyed as to third persons.

Because *Sensenbrenner* is distinguishable on its facts from the present case, neither party’s reliance on that case is warranted. The court in *Sensenbrenner* found that the delivery of a buggy by the mechanic to the owner was unconditional and held that this unconditional delivery operated as a waiver of the lien. In contrast, Treleven’s release of the vehicle was conditional—*Sensenbrenner* says nothing of the effect of a conditional release to the owner. *Sensenbrenner* also does not explicitly hold that the only

way to waive a lien is through the voluntary and unconditional release of the property; *Sensenbrenner* merely states that this is one way to waive a lien. For these reasons, *Sensenbrenner* is not controlling precedent based on the facts of this case.

No Wisconsin court has decided whether the lien is lost once the mechanic conditionally releases the vehicle to the owner. The general and modern rule can be found in Restatement of Security § 80 (1941). This rule states that when the bailor (owner) is under an obligation to return the vehicle to the lienor (mechanic), the lien is revived upon the recovery of the vehicle, subject only to the interests of bona fide purchasers for value and attaching or levying creditors who do not have notice of the lienor's interest.

The bank would like a rule that upon a conditional release, the lien is lost as to all third parties. The Restatement reflects a more balanced view, recognizing that not all interests of third parties are affected by the conditional release. While the mechanic retains possession, third parties at least would have constructive notice of the mechanic's lien because they would be expected to examine the property in the mechanic's possession and be expected to know of the mechanic's lien statute. After a conditional release, those parties purchasing the vehicle, extending new credit, or levying on the vehicle would be vulnerable because even after examinations of the motor vehicle filings and the vehicle, there would be no way for them to know of the mechanic's prior interest. A creditor whose interest arose before the mechanic's lien would not have this concern. At the time the creditor extends credit, it is presumed to know the mechanic's lien statutes which could subordinate its interest to that of a mechanic making a later repair. This is a known risk to the creditor. A creditor also has the opportunity to protect itself by writing into the security agreement that all subsequent repairs must be approved by the creditor.

Once the mechanic's lien arises, in most circumstances, the later conditional release does no further damage to the prior creditor and actually can be advantageous to the creditor. For example, in a case such as this where the vehicle is necessary to the owner's business, the conditional release allows the owner to generate cash to pay off the mechanic's lien and make payments on the creditor's prior loan. If the mechanic were forced to keep possession of the vehicle, the owner would be unable to raise the cash to pay off either the mechanic or the creditor.

The circumstance where a prior creditor could be damaged by the conditional release also is covered by the Restatement. If a prior creditor does not have notice of the mechanic's lien and goes through the expense of levying upon the vehicle while it is in the owner's possession, then the levying creditor is accorded the same protection as the bona fide purchaser for value or the new attaching creditor. This rule gives the prior creditor a "window of opportunity" to levy, but the mechanic can protect the lien by notifying prior creditors of the conditional release arrangement.

For the reasons stated above, we reject the bank's argument that a conditional release of the vehicle destroys the lien as to all third parties. Instead, we adopt the Restatement's rule that upon a conditional release, the lien is enforceable against all parties except a bona fide purchaser for value or a subsequent attaching or levying creditor who has no notice of the mechanic's interest. Upon the resumption of possession, the lien is revived and retains its priority as before the release, except it is subordinate to the bona fide purchaser or attaching or levying creditor. Applying this rule to the facts of the case, it is apparent that the mechanic's lien is superior to the bank's security interest. The fact that the truck was found at the mechanic's place of business well after the repairs were made supports Treleven's claim that the release of the vehicle was conditional. Furthermore, the bank is not afforded the protection given to the levying creditor because the sheriff levied upon the vehicle while it was in Treleven's possession, and thus had notice of Treleven's interest.

Because Treleven's lien was not waived by the conditional release under sec. 779.41(1), Stats., we next must examine whether the conditional release destroyed the lien's priority under sec. 409.310, Stats. Neither party addressed this issue, but commentary and cases interpreting Uniform Commercial Code § 9-310, the model upon which sec. 409.310 is based, make clear that the possession requirement of this statute is separate from any possession requirement of the underlying mechanic's lien.

U.C.C. § 9-310 gives priority only to the mechanic in possession of the vehicle. It is uniformly held that if the mechanic voluntarily gives up possession of the vehicle, § 9-310 cannot be relied upon by the mechanic to give his lien priority over the prior secured interest. *See United States v. Crittenden*, 563 F.2d 678, 691 (5th Cir. 1977), *vacated and remanded*, 440 U.S. 715 (1979); *In re Glenn*, 20 B.R. 98, 99 (Bankr. E.D. Tenn. 1982); *Forrest Cate Ford, Inc. v. Fryar*, 465 S.W.2d 882, 884 (Tenn. Ct. App. 1970).

The question then becomes whether the resumption of possession will allow sec. 409.310, Stats., to be applied to give the mechanic's lien priority. The statute's language does not tell us whether continuous possession is required. When a statute is ambiguous we must look to other sources to determine legislative intent. Among the few courts that have decided this issue, the jurisdictions do not agree as to the effect of resuming possession under § 9-310. The three cases discussing this issue the most thoroughly are *Glenn, Crittenden* and *Thorp Commercial Corp. v. Mississippi Road Supply Co.*, 348 So. 2d 1016 (Miss. 1977).

The opinion of the Mississippi Supreme Court in *Thorp* held that the mechanic retained priority under the Mississippi equivalent to § 9-310 when he resumed possession of equipment. The court reasoned that the status or rights of the parties did not change between the date the mechanic lost possession of the equipment and the date it was restored to the possession of the mechanic. Furthermore, the court recognized that the secured party was not and could not be prejudiced by the restoration. Finally, the court concluded that because the Mississippi equivalent of § 9-310 did not clearly express an intention to reverse long-established principles of law, § 9-310 had to be read together with the older mechanic's lien statute and prior case law which established that mechanic's liens take priority over prior security interests. These justifications supported the court's opinion that priority status of the mechanic's lien was retained under § 9-310 when the mechanic regained possession.

*Glenn* and the dissenting opinion in *Thorp* stated that the priority of the mechanic's lien is lost under statutes based on § 9-310 when there is a lapse in the mechanic's possession. *Glenn* reasoned that a rule which allowed the reinstatement of priority "would create an ever-present dangerous uncertainty for parties, including prior secured parties, who deal with the debtor with respect to goods in his possession" because the prior secured party would have no notice of the mechanic's lien. *Glenn*, 20 B.R. at 99. *Glenn* also based its conclusion on the same concerns of the dissent in *Thorp*—a rule reinstating priority under the statute would permit the priority of the creditors to be determined by the debtor.

If he chooses to return property once relinquished by a repairman, the repairman prevails, but if he chooses not to relinquish possession of the property the secured creditor prevails . . . . [A rule reinstating priority under the statute] invites competition

for possession between a secured party and a repairman who has previously relinquished possession of the property.

*Id.* at 100–01.

The Fifth Circuit Court of Appeals held that a mechanic retained his priority over a prior security interest only to the extent that the mechanic continuously possessed the collateral. *Crittenden*, 563 F.2d at 691. The court analogized § 9-310 to 26 U.S.C. § 6323(b)(5), a provision of the Federal Tax Lien Act, which gives priority to the mechanic's lien only if the mechanic "is, and has been, continuously in possession of such property from the time such lien arose." 26 U.S.C. § 6323(b)(5). The court justified the continuous possession requirement by reasoning that while considerations of equity and fairness created the mechanic's lien exception to the normal priority rules, at some point when the mechanic gives up possession and the repairs were made in the more distant past the mechanic's interest becomes indistinguishable from the ordinary creditor.

In light of the longstanding Wisconsin policy of protecting material-men and laborers, we find the Mississippi court's opinion in *Thorp* to be the most persuasive. The bank has not presented any facts which would show how its rights were affected or its interest was prejudiced by the release of the property to Wilson and Treleven's subsequent repossession. If anything, the facts show that the bank was better off through the conditional release because it afforded Wilson the resources to pay off both debts.

Like Mississippi's law in *Thorp*, Wisconsin case law decided prior to the enactment of sec. 409.310, Stats., gave priority to a mechanic's lien over a prior security interest. See *Jesse A. Smith Auto Co. v. Kaestner*, 159 N.W. 738 (Wisc. 1916). Wisconsin's enactment of sec. 409.310 did not expressly state that its effect was to displace prior law in this area. Commentary to the Uniform Commercial Code reveals the drafter's view that § 9-310 was to reverse prior case law which subordinated the mechanic's lien to prior security interests, but it does not state how the rule was to affect prior decisions holding the mechanic's lien superior. See U.C.C. § 9-310 comment 2. Because Wisconsin's prior case law and sec. 409.310 can be read in a consistent manner, we decline to interpret the statute otherwise.

Finally, but not least importantly, the plain language of sec. 409.310, Stats., gives priority to the mechanic "in possession." It does not require "continuous possession" or "retained possession." We must construe laws

relating to mechanic's liens in a way to accomplish their equitable purpose of aiding mechanics in obtaining compensation.

The Fifth Circuit's opinion in *Crittenden* which read the continuous possession requirement into § 9-310 is not persuasive. In *Crittenden*, the Fifth Circuit was interested in formulating a federal standard to determine priorities under the Uniform Commercial Code. Thus, it looked to the Federal Tax Lien Act for guidance in its interpretation of the "possession" requirement of § 9-310. *Crittenden*, 563 F.2d at 691. On appeal the Supreme Court reversed, stating that the court should not be looking to federal standards to determine priorities, but should apply Georgia's statutes. *United States v. Kimbell Foods*, 440 U.S. 715, 740 (1979). On remand, the Fifth Circuit held that Georgia's priority statute was basically the same as model § 9-310 and, without discussion, applied the same interpretation of the statute to the facts in the case. *United States v. Crittenden*, 600 F.2d 478, 479–80 (5th Cir. 1979). Unlike the Fifth Circuit's first *Crittenden* opinion, we are not concerned with formulating a national standard and do not need to look at other federal laws interpreting "possession;" under Wisconsin law, we must interpret sec. 409.310, Stats., in a way that aids the mechanic in obtaining compensation. It is not in a mechanic's best interest to interpret "possession" in sec. 409.310 as "continuous possession," and we decline to do so. Therefore, because Treleven was in possession of the vehicle at the time the bank's lien was enforced, Treleven's mechanic's lien had priority over the bank's interest under sec. 409.310.

### **Notes and Questions**

12.7. *In re Housecraft Industries*, 155 B.R. 79, 86–87 (Bankr. D. Vt. 1993) gives some background on the evolution of security interests in personal property:

Until the early nineteenth century, the only way to create a valid interest in personal property was by physical pledge—the transfer of possession of the property (collateral) by a debtor (the pledgor) to the creditor or secured party (the pledgee). Possession provided public notice of a secured party's interest in collateral and prevented debtors from selling their pledged property to innocent purchasers or from obtaining credit based on encumbered assets. To further protect third parties against undisclosed interests in property, the common law presumed

that nonpossessory interests were fraudulent and therefore unenforceable against third parties. *Twyne's Case*, 76 Eng. Rep. 809 (Star Chamber 1601).

The increasing demands of the credit economy eventually created a need for collateral that remained in a debtor's possession. Limited only by their creativity, debtors, creditors, and their counsel formulated methods of perfection that provided both possession to debtors and security to creditors. The resulting rules varied from jurisdiction to jurisdiction, producing what one commentator has called a "labyrinthine melange" of personal property securities laws. Throughout this development toward modern commercial law, the common law pledge existed side by side with other forms of perfecting security interests in personal property.

The Uniform Commercial Code . . . streamlined commercial law and preserved the pledge to complement a public filing system. Article 9 of the UCC, . . . governs security interests in most forms of personal property and fixtures. Article 9 recognizes three general ways to perfect a security interest: filing (public registration); possession of the collateral, either directly, constructively or through an agent; and third party notice, including notice given by the secured party to another holding the collateral.

12.8. Treleven, the mechanic, wins in *Wilson*. But why? Critique the following summaries of the holding:

- "Mechanics in possession have priority over other creditors."
- "Treleven's lien arose before the bank's."
- "Treleven put the bank on notice of his lien."

Each of these statements is misleading standing alone, but the holding draws on them all. What is the rule of the case?

12.9. Suppose Groucho takes his car to Harpo's Transmissions for repairs and parks it on Harpo's lot. That's a bailment; Harpo must turn over the car when Groucho demands it back. But now suppose that Harpo does \$400 worth of repairs on the car at Groucho's request and Groucho fails to pay. Harpo now has a mechanic's lien on the car. Can Groucho get his car back? What remedies could Harpo obtain if he sued Groucho for breach of contract? Does having the car on his lot give him

any additional options? What if Groucho sells the car to Chico without telling Chico about Harpo's lien? What if Harpo lets Groucho drive the car off the lot to confirm that the transmission has been fixed and Groucho floors it as soon as he reaches the highway and never comes back? If Harpo finds the car in Groucho's driveway, can he tow it back to his lot?

12.10. What are Groucho and Harpo's respective rights and obligations if Zeppo steals the car while it's parked on Harpo's lot? If the police subsequently find the car abandoned on the side of the road, who is entitled to it? Conversely, if Zeppo totals the car by driving it into a tree and both Groucho and Harpo sue him for conversion, what result?

12.11. *Wilson* gives a glimpse at the perennial problem of *priority*, which arises whenever a debtor has multiple creditors and is unable to pay them all. The ultimate system for sorting out priority is federal bankruptcy law, but as *Wilson* illustrates, state commercial law (especially Article 9 of the UCC) plays a significant role too. Even a quick skim through Article 9 shows how extensively its rules are adapted to the particular characteristics of the class of property at issue (or perhaps, to the demands of special-interest lobbying and the successive encrustations of history). See, e.g., UCC § 9-102, which distinguishes accounts; farm products; oil, gas, and minerals both in and out of the ground; tort claims; commodity futures; consumer goods; health-care debts; manufactured homes; software; and much, much, more.

12.12. Many states attempt to solve the core problem in *Wilson* by requiring that car liens be recorded with the state Department of Motor Vehicles and indicated on car owners' certificates of title. The Maryland system, for example, provides that a security interest in a vehicle is "perfected" by "Delivery to the [Motor Vehicle] Administration of every existing certificate of title of the vehicle and an application for certificate of title [including the necessary information about the security interest]" and that a security interest that has not been so perfected "is not valid against any creditor of the owner or any subsequent transferee or secured party." Md. CODE TRANSP. § 13.202. The theory is that the buyer or lender can protect itself by demanding to see the title certificate—indeed, a buyer will need to turn in the old title certificate to register the car and a lender will need to turn it in to record its own security interest. Is this system fair to senior lenders? Fair to buyers and junior lenders? How might the system go wrong? How might a fraudster make it go wrong? All things considered, is this a better system than the Wisconsin one discussed in *Wilson*?

## 12.2 Real Estate Mortgages

A **mortgage** is an interest in land. It is not a possessory interest: the owner of a mortgage has no right to use the property, the way the owner of the fee or an easement owner would. Instead, mortgages exist to secure loans. A secured loan is backed, or secured, by a specific asset such as a house or a car, which the lender can seize in case of default. An unsecured loan is not secured by any specific asset—for example, credit card debt and student loans are unsecured. The borrower owes the money, and the lender can go after the borrower’s unsecured assets in case of default, but if those assets are too small, the unsecured lender is out of luck. Secured loans are generally considered less risky than unsecured loans, for obvious reasons, and should bear lower interest rates (absent some foolery on the part of the lender or government intervention into the market, both of which do happen).

Most mortgages are residential mortgages. Usually, homebuyers in the United States can’t afford to pay the entire purchase price of a house at the time they buy it. Instead, they take out a loan—a mortgage—to pay the bulk of the purchase price. They will sign a promissory note (the note) that creates personal liability for the borrowers if they fail to pay, and also sets out the terms of the mortgage such as the repayment period and the interest rate. They will also sign a mortgage, a written instrument that grants the lender an interest in their newly purchased land. Usually, this transaction occurs at the time the buyers buy the land, though mortgages can also be refinanced or taken out on already-owned property.

The homebuyers are the **mortgagors**. The lender is the **mortgagee**. Over time, the buyers pay off the loan. As they pay off the loan, they build “equity” in their homes. Equity is the difference between what a home is worth and what the homeowners owe on their mortgage.<sup>2</sup> As a result of deliberate policy choices, the model residential mortgage in the United States is for no more than 80% of the value of the house at time of purchase; has a fixed interest rate; and amortizes over a period of years, usually twenty or thirty. Amortization means that the payments are the same throughout the period of the mortgage: at the beginning, most of the payments go to interest on the loan, while over time more and more of the payments go to reduce the loan principal.

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<sup>2</sup>This terminology has a historical basis in the “equity of redemption,” which was a means by which early chancellors protected early mortgagors from abuses by lenders. Over time, the equitable procedures created by courts gave way to legislation establishing rules for how foreclosures could occur.

The mortgagors can transfer the land at will. However, any transfer will not free the land from the mortgage (nor will a transfer free them from their contractual promise to pay the debt); the mortgage **runs with the land**. Thus, a sensible transferee will not be willing to pay full value for the land—the fair market value of the land is reduced by the amount of the mortgage. A transferee can either take “subject to the mortgage,” which means that the original mortgagors still owe the debt and the transferee is at risk if they don’t pay, or “assuming the mortgage,” which means that the new owner agrees to pay the mortgage directly. When the purchaser assumes the mortgage, the seller still has a duty to pay the mortgage if the buyer doesn’t, but the seller can pursue the buyer for reimbursement if that happens. However, this all risks some big messes; to avoid problems associated with transfers, many mortgages have “due on sale” clauses, which means that the full amount of the mortgage comes due (“accelerates”) when the mortgagor sells the property. One important feature of a due on sale clause is that it enables lenders to reprice loans: if the interest rate has risen since the initial mortgage loan, the buyer can’t just assume the existing loan and receive a lower interest rate than would otherwise be available to him.

Suppose Joan Watson wants to sell her house to Sherlock Holmes. She still owes \$400,000 on her house; Holmes will be buying it for \$500,000. But she doesn’t have \$400,000 in the bank to pay off her mortgage, which has a due on sale clause. How can she accomplish the sale? The answer is that a series of transactions take place together. The day of the sale, Holmes will give Watson a check for \$500,000 (most of which will likely come from Holmes’ own new mortgage on the property). Watson will then pay her lender \$400,000 and keep \$100,000. As you can see, there will be some time at which both Holmes and Watson are relying on the value of the underlying property—Holmes to get his mortgage and Watson to pay hers off. For this reason, real estate transactions regularly involve the use of multiple third parties, including escrow agents, to facilitate and guarantee the sale.

If the mortgagors **default** on the mortgage by failing to pay the appropriate amounts at the appropriate times, the mortgagee can **foreclose**. Foreclosure can be time-consuming and expensive, so in some circumstances the mortgagee may accept a “deed in lieu of foreclosure,” by which the mortgagor surrenders the property to the mortgagee and the mortgagee accepts the deed. However, deeds in lieu of foreclosure are relatively rare; most of the time, if a default is not cured and the loan is not modified, the result will be a foreclosure.

Either by a private sale (**nonjudicial foreclosure**) or under judicial supervision (**judicial foreclosure**), the mortgagee can have the property sold and apply the pro-

ceeds of the sale to the amount due on the note. The foreclosure is so called because it forecloses the mortgagee's ability to get the property back by paying off the mortgage debt; after the foreclosure, it is too late to become current.<sup>3</sup>

In a number of states, it is possible to avoid judicial foreclosure—which takes more time and money than nonjudicial foreclosure—through the use of a “deed of trust,” which is recognized in most jurisdictions. Under a deed of trust, the borrower conveys title to the property to a person to hold in trust to secure the debt. If the borrower defaults, the trustee has the power of sale without needing to go to court. However, almost all states that allow this procedure do impose some procedural safeguards, such as notice and public sale. Other than the ability to avoid judicial foreclosure, you can expect a deed of trust to be treated like a mortgage.

In addition, there are two different types of secured loans: recourse and nonrecourse loans. For a **nonrecourse loan**, the only way the lender can get its money back in case of default is by seizing the asset, and if there's not enough money to satisfy the debt from the asset, too bad for the lender. The lender has no “recourse” against any of the borrower's other assets. A **recourse loan** is different: in case of default, the lender can seize and sell the asset, and if there's not enough money to satisfy the debt, the lender is now an unsecured creditor for the remaining balance (the deficiency) and can go after any of the borrower's other assets, such as her bank account. Foreclosure wipes out the lender's interest in the land, which means that the land can then be resold free of the lender's interest. However, with a recourse loan, foreclosure will not wipe out the borrower's debt, if it is greater than the foreclosure sale amount.

Obviously, lenders ordinarily prefer recourse loans, but will grant nonrecourse loans in various circumstances.<sup>4</sup> Many businesses can get nonrecourse loans based on their assets. Some states bar deficiency judgments for residential mortgages, which makes them nonrecourse loans. Other states bar deficiency judgments unless there is a judicial foreclosure, with its greater expense and greater procedural

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<sup>3</sup>At common law, the equity of redemption allowed the mortgagor to redeem the property from the mortgagee. This equity of redemption was extinguished by foreclosure sale. In about half of the states, there is also a statutory right to redeem the property from the *purchaser* at a foreclosure sale for a certain period of time. This right is rarely used, because most people would already have paid, if they could, before the sale.

<sup>4</sup>In fact, the basic idea of a corporation is a way of limiting a lender's recourse: before the corporate form, if a business owner went bust, creditors could go after the owner's personal assets until they were gone. The corporation allows shareholders/owners to limit their liability to the extent of the corporation's assets. If a person owned shares of Lehman Brothers, its creditors could make her shares worthless, but they couldn't make her pay Lehman Brothers' debts.

protections for the borrower. Still others limit the amount of any deficiency judgment to the difference between the principal balance and the property's fair market value at the time of foreclosure—this limit recognizes that foreclosed properties often sell for below market value for a variety of reasons, including buyers' uncertainty about the true condition of the property and the limited number of potential buyers who bid at foreclosure sales. (Historically, the mortgagee is often the only bidder at a foreclosure sale. Why would this be true?)

Even states that allow deficiency judgments generally recognize an exception: if the sale price shocks the conscience, then a deficiency judgment may not be allowed. More generally, even in the absence of a potential deficiency judgment, the foreclosing entity has a limited duty of good faith to the mortgagor in seeking an acceptable price at the sale. However, mere inadequacy of price will not invalidate a sale in the absence of fraud, unfairness, or procedural problems that deterred bidding. As a result, very low sale prices are sometimes accepted by courts. *Compare Moeller v. Lien*, 30 Cal. Rptr. 2d 777 (Ct. App. 1994) (sale at 25% of market value was acceptable where sale was to bona fide purchaser and there was no irregularity in the sale procedure), *with Murphy v. Fin. Dev. Corp.*, 495 A.2d 1245 (N.H. 1985) (finding that mortgagee violated duty to mortgagor when (1) sale was rescheduled and poorly advertised, (2) sale price was so low that it wiped out substantial equity for homeowners, and (3) mortgagee quickly resold property at substantially higher price).

One final introductory point: it is possible to take out a second and even a third mortgage. The first mortgage has **priority** over the second mortgage: it will be paid first at foreclosure. Only if there is money remaining after the first mortgage is paid off will the holder of the second mortgage be paid. As a result of the greater risk involved in second mortgages, they generally bear higher interest rates than first mortgages.

### Notes and Questions

12.13. As an initial matter, pay attention to the property interests involved. First, there is the promissory note itself, which gives the loan originator (the bank) has the right to receive monthly payments. But the note is typically alienable—the originator can sell it to another bank, or a loan servicer, or a financial institution. In that sense, the note itself is a kind of property.

12.14. Second, there are the property interests relating to the real property. The mortgagor has a sort of possessory estate, insofar as the mortgagor gets to live on the mortgaged land. The mortgagee has a kind of future interest.

What events cause a change to the property interests of the mortgagor and mortgagee by operation of law? (There are several.) What happens after each, and what are the resulting property interests? If you can answer these questions, then you have grasped the basic operation of mortgages.

12.15. The original *Open Source Property* module on mortgages provides a more detailed explanation of the 2007–2010 mortgage and foreclosure crisis in the United States. But this overview of how mortgages work is enough to provide the seeds for understanding what happened. Consider the following.

12.16. Foreclosure sales are supposed to recover the fair market value of the mortgaged land, which ought to be enough to repay the mortgagor's debt and also return additional equity that the mortgagor has built up through payments. These sales are usually conducted by an auction. Do you believe that these auctions actually recover the fair market value? Who shows up to these auctions?

12.17. When a bank offers a mortgage to a homebuyer, presumably the bank hopes that the homebuyer will pay off the mortgage and not default. Foreclosure is a costly, messy process. That's why credit ratings and background checks are so important for getting mortgages. What might lead a bank to be willing to offer a mortgage to a homebuyer who is at higher risk of default—a “subprime mortgage”? Perhaps if housing prices are rising faster than expected, as they were between 2001 and 2006?

12.18. A real estate mortgage is a useful security interest against a mortgage debt because the real estate is presumably more valuable than the debt. (That's also why a down payment around 20% is required.) What happens if housing prices fall so much that the real estate is worth less than the debt? This is called an **underwater mortgage**. What are the incentives of the mortgagor and the mortgagee?

12.19. If mortgages are property that can be bought and sold, they can be turned into investment vehicles. This process (described in detail in Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637 (2013)) is called **securitization**. In the same way that stocks for multiple companies can be bundled together to make a mutual fund, where one can buy shares and receive a cut of all the companies' dividends, multiple mortgages can be bundled together in a “mortgage-backed security,” where shareholders in the security are entitled to a cut of the profits (i.e., the interest payments) from

the foreclosures. Typically, the mortgages themselves are held by a legal entity such as a trust, which pays out the interest payments as the trust proceeds.

Who might buy these mortgage-backed securities? Investment bankers? Pension and retirement funds? You? And what happens to these investments when the mortgages go sour, for any of the reasons given above?

12.20. As we have seen, the current possessory estate holder can owe duties to future interest holders, under the doctrine of waste. What about the other way around—can a future interest holder owe a duty to the possessory estate holder? Consider the problem of mortgage servicing, described below.

## 12.3 Foreclosure Abuses

One ongoing problem is that the complicated structure of post-securitization mortgage lending left responsibility for problems diffuse, and even put incentives in precisely the wrong places. Because the trusts that own the mortgages and package them into mortgage-backed securities are passive legal vehicles with no employees or activities of their own, they contracted with mortgage servicers, often divisions of the same banks that initially sponsored the mortgage originators. The basic job is straightforward: servicers collect payments from homeowners and pass them along to the trust that represents the investors. Servicers are also responsible for handling foreclosures. In exchange, servicers typically get a small percentage of the value of the outstanding loans each year in fees. For a \$200,000 loan to a borrower with good credit, a servicer might collect about \$50 per month, with income decreasing as the balance of the loan drops. Servicers also make money from the “float”—interest earned during the short time the servicer holds the loan payment.

It is standard for servicers to be contractually required to keep paying the trust every month, even when there’s a default, until there’s a foreclosure. This would seem a strong incentive to do everything possible to help homeowners avoid a default, which is usually what investors want. The holder of a mortgage loses an average \$60,000 on a foreclosure, according to figures announced by the federal government.

But the systems weren’t set up that way. Among other things, servicers hired very few people with the ability to work with borrowers to find an affordable repayment; they were largely set up to take in money and pass it on. When the crisis hit, they were overwhelmed with troubled loans. Further, at the beginning of the foreclosure crisis, servicers often took the position that they were contractually prohibited from negotiating with borrowers by their agreements with the trusts, which

allegedly did not allow them to reduce mortgagors' nominal obligations without the consent of the trust. (Recall that the trusts are not functioning companies with humans making day-to-day decisions, so the servicers' position meant that *no one* could agree to a renegotiation.)

Separately, servicers had incentives that conflicted with borrowers' and investors' interests. Servicers can charge fees for late payments, title searches, property upkeep, inspections, appraisals and legal fees that can total hundreds of dollars each month and can all be charged against a homeowner's account. Servicers have first dibs on recouping those fees when a foreclosed home is sold, meaning they usually collect unless the home is essentially worthless. Moreover, when homeowners tried to catch up or make partial payments as they sought a renegotiated loan, servicers applied their payments first to the servicers' own fees rather than to the underlying loan. These fees can be lucrative. In 2010, major servicer Ocwen reported \$32.8 million in revenue from late fees alone, representing 9 percent of its total revenue. Professor Levitin, who has done extensive work on the legal and business structures resulting from securitization, concluded that a loan kept in default for a year or two could prove more profitable to a servicer than a typical healthy, performing loan.

The following case involves a trustee rather than a typical servicer, but otherwise it provides a sense of the problems that can arise when participants in the mortgage transaction are indifferent to the welfare of mortgagors.

### ***Klem v. Washington Mutual Bank***

176 Wash. 2d 771, 295 P.3d 1179 (Wash. 2013)

#### **CHAMBERS, J.**

Dorothy Halstien, an aging woman suffering from dementia, owned a home worth somewhere between \$235,000 and \$320,000. At about the time she developed dementia, she owed approximately \$75,000 to Washington Mutual Bank (WaMu), secured by a deed of trust\* on her home. Because of the cost of her care, her guardian did not have the funds to pay her mortgage, and Quality Loan Services (Quality), acting as the trustee of the deed of trust, foreclosed on her home. On the first day it could, Quality sold her home for \$83,087.67, one dollar more than she owed, including fees and costs. A notary, employed by Quality, had falsely notarized the

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\* "Deed of trust" is defined in section I of the Analysis section below; it is a kind of mortgage.  
—Eds.

notice of sale by predating the notary acknowledgment. This falsification permitted the sale to take place earlier than it could have had the notice of sale been dated when it was actually signed.

Before the foreclosure sale, Halstien's court appointed guardian secured a signed purchase and sale agreement from a buyer willing to pay \$235,000 for the house. Unfortunately, there was not enough time before the scheduled foreclosure sale to close the sale with that buyer. In Washington, the trustee has the discretion to postpone foreclosure sales. This trustee declined to consider exercising that discretion, and instead deferred the decision to the lender, WaMu. Despite numerous requests by the guardian, WaMu did not postpone the sale. A jury found that the trustee was negligent; that the trustee's acts or practices violated the Consumer Protection Act (CPA), chapter 19.86 RCW; and that the trustee breached its contractual obligations. The Court of Appeals reversed all but the negligence claim. We reverse the Court of Appeals in part and restore the award based upon the CPA. We award the guardian reasonable attorney fees and remand to the trial court to order appropriate injunctive relief.

### Facts

The issues presented require a detailed discussion of the facts. In 1996, Halstien bought a house on Whidbey Island for \$147,500. In 2004, she borrowed \$73,000 from WaMu, secured by a deed of trust on her home. That loan was the only debt secured by the property, which otherwise Halstien owned free and clear. Unfortunately, by 2006, when Halstien was 74 years old, she developed dementia. At the time, Halstien's daughter and her daughter's boyfriend were living at the home with her.

Washington State's Adult Protective Services became concerned that Halstien was a vulnerable adult being neglected at home. After an investigation, protective services petitioned the court for the appointment of a professional guardian to protect Halstien. The court granted the petition and Dianne Klem, executive director of Puget Sound Guardians, was appointed Halstien's guardian in January 2007. Klem soon placed Halstien in the dementia unit of a skilled nursing facility in Snohomish County.

Halstien's care cost between \$3,000 and \$6,000 a month. At the time, Halstien received about \$1,444 a month in income from Social Security and a Teamsters' pension. The State of Washington paid the balance of her care and is a creditor of her estate.

Halstien's only significant asset was her Whidbey Island home, which at the time was assessed by the county at \$257,804. WaMu also had an appraisal indicating the home was worth \$320,000, nearly four times the value of the outstanding debt. Klem testified that if she had been able to sell the home, she could have improved Halstien's quality of life considerably by providing additional services the State did not pay for.

Selling the home was neither quick nor easy. Even after Halstien was placed in a skilled care facility, her daughter still lived in the home (without paying rent) and both the daughter and her brother strongly opposed any sale. The record suggests Halstien's children expected to inherit the home and, Klem testified, getting the daughter and her family to leave "was quite a battle." Ultimately, Puget Sound Guardians prevailed, but before it could sell the home, it had to obtain court permission (complicated, apparently, by the considerable notice that had to be given to various state agencies and to family members, and because some of those entitled to notice were difficult to find), remove abandoned animals and vehicles, and clean up the property.

During this process Halstien became delinquent on her mortgage. Quality, identifying itself as "the agent for Washington Mutual," posted a notice of default on Halstien's home on or around October 25, 2007. The notice demanded \$1,372.20 to bring the note current. The record establishes that the guardianship did not have available funds to satisfy the demand.

A notice of trustee sale was executed shortly afterward by Seth Ott for Quality. The notice was dated and, according to the notary jurat of "R. Tassle," notarized on November 26, 2007. However, the notice of sale was not actually signed that day. The sale was set for February 29, 2008.

This notice of sale was one of apparently many foreclosure documents that were falsely notarized by Quality and its employees around that time. There was considerable evidence that falsifying notarizations was a common practice, and one that Quality employees had been trained to do. While Quality employees steadfastly refused to speculate under oath how or why this practice existed, the evidence suggests that documents were falsely dated and notarized to expedite foreclosures and thereby keep their clients, the lenders, beneficiaries, and other participants in the secondary market for mortgage debt happy with their work. Ott acknowledged on the stand that if the notice of sale had been correctly dated, the sale would not have taken place until at least one week later.

On January 10, 2008, Puget Sound Guardians asset manager David Greenfield called Ott in his capacity as trustee. Greenfield explained that Halstien was in a guardianship and that the guardianship intended to sell the property. Greenfield initially understood, incorrectly, that the trustee would postpone the sale if Puget Sound Guardians presented WaMu with a signed purchase and sale agreement by February 19, 2008. Puget Sound Guardians sought, and on January 31, 2008, received, court permission to hire a real estate agent to help sell the house.

Unknown to Greenfield, Quality, as trustee, had an agreement with WaMu that it would not delay a trustee's sale except upon WaMu's express direction. This agreement was articulated in a confidential "attorney expectation document" that was given to the jury. This confidential document outlines how foreclosures were to be done and billed. It specifically states, "Your office is not authorized to postpone a sale without authorization from Fidelity or Washington Mutual." This agreement is, at least, in tension with Quality's fiduciary duty to both sides and its duty to act impartially. *Cox v. Helenius*, 103 Wash.2d 383, 389, 693 P.2d 683 (1985) (citing *GEORGE E. OSBORNE, GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW* § 7.21 (1979) ("[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.")).<sup>1</sup>

Regardless of what Washington law expected or required of trustees, David Owen, Quality's chief operations officer in San Diego, testified that Quality did what WaMu told it to do during foreclosures. Owen testified that there were two situations where Quality would postpone a sale without bank permission: if there was a bankruptcy or if the debt had been paid. Owen could not remember any time Quality had postponed a sale without the bank's permission.

By February 19, 2008, Puget Sound Guardians had a signed purchase and sale agreement, with the closing date set for on or about March 28, 2008. This was almost a month after the scheduled foreclosure sale, but well within the 120 day window a trustee has to hold the trustee's sale under RCW 61.24.040(6). Quality referred the guardians to the bank "to find out the process for making this happen." Klem testified Quality "told us on two

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<sup>1</sup>Since then, the legislature has amended the deed of trust act to provide that the trustee owes a duty of good faith to both sides. LAWS OF 2008, ch. 153, § 1; RCW 61.24.010(4) (effective June 12, 2008).

occasions that they unequivocally could not assist us in that area, that only the bank could make the decision.”

Puget Sound Guardians contacted WaMu, which instructed them to send copies of the guardianship documents and a completed purchase and sale agreement. Over the next few days, WaMu instructed the guardians to send the same documents to WaMu offices in Seattle, Washington, southern California, and Miami, Florida. Klem testified that Puget Sound Guardians called WaMu on “[m]any occasions,” and that if the bank ever made a decision, it did not share what it was. The guardian also faxed a copy of the purchase and sale agreement to various WaMu offices on February 19, 21, 26, 27, and 28. In all, the guardian contacted Quality or WaMu over 20 times in the effort to get the sale postponed. Simply put, Quality deferred to WaMu and WaMu was unresponsive.

Accordingly, the trustee’s sale was not delayed and took place on February 29, 2008. Quality, as trustee, sold the Halstien home to Randy and Gail Preston for \$83,087.67, one dollar more than the amounts outstanding on the loan, plus fees and costs.<sup>4</sup> The Prestons resold the house for \$235,000 shortly afterward.

Klem later testified it was “shocking when we found out that [the home] had actually been sold for \$83,000 . . . . Because we trusted that they would sell it for the value of the home.” In previous cases where a ward’s home had gone into foreclosure, Klem testified, either the trustee had postponed the sale to allow Puget Sound Guardians to sell the property or had sold the property for a reasonable price. Klem testified that if they had just one more week, it was “very possible” that they could have closed the sale earlier.

In April 2008, represented by the Northwest Justice Project, Puget Sound Guardians sued Quality for damages on a variety of theories, including negligence, breach of contract, and violation of the CPA. Later, with permission of the court, Quality’s California sister corporation was added as a defendant. Halstien died that December.

Quality defended itself vigorously on a variety of theories. Initially successfully, Quality argued that any cause of action based on the trustee’s duties was barred by the fact Klem had not sought an injunction to enjoin the sale. The record suggests that it would have been impossible for the guardianship to get a presale injunction due to the time frame, the need

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<sup>4</sup>As of trial, Quality had not delivered that one dollar to the Halstien estate.

for court approval, and the lack of assets in the guardianship estate. While Judge Monica Benton dismissed some claims based on the failure of the estate to seek an injunction, she specifically found that the negligence, breach of contract, and CPA claims could go forward.

The case proceeded to a jury trial. The heart of the plaintiff's case was the theory that Quality's acts and practices of deferring to the lender and falsifying dates on notarized documents were unfair and deceptive and that the trustee was negligent in failing to delay the sale. David Leen, an expert on Washington's deed of trust act, chapter 61.24 RCW, testified that it was common for trustees to postpone the sale to allow the debtors to pay off the default. He testified that under the facts of this case, the trustee "would absolutely have to continue the sale."

By contrast, Ott, representing Quality as trustee in this case, testified that he did not take into account whether the house was worth more than the debt when conducting foreclosures. When asked why, Ott responded, "My job was to process the foreclosure . . . according to the state statutes." When pressed, Ott explained that he counted the days, prepared the forms, saw they were filed, and nothing more. He acknowledged that, prior to 2009, he would sometimes incorrectly date documents. He testified that he had been trained to do that. He also testified that Quality, as trustee, would not delay trustee sales without the lender's permission. And he testified that he had never actually read Washington's deed of trust statutes.<sup>5</sup>

The jury found for the plaintiff on three claims: negligence, CPA, and breach of contract. . . . The jury determined that the damages on all three claims were the same: \$151,912.33 (the difference between the foreclosure sale price and \$235,000) . . . .

Quality brought a blunderbuss of challenges to the trial court's decisions. . . . The Court of Appeals concluded . . . that the evidence was insufficient to uphold the breach of contract and CPA claims. . . .

## Analysis

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<sup>5</sup>This inspired a juror's question, "If you never read the statute, how did you know you were following it, following Washington law?" Ott responded that he relied on his training. . . .

## I. CPA Claims

To prevail on a CPA action, the plaintiff must prove an “(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986). The plaintiff argues that both Quality’s historical practice of predating notarized foreclosure documents and Quality’s practice of deferring to the lender on whether to postpone most sales, satisfies the first element of the CPA. Deciding whether the first element is satisfied requires us to examine the role of the trustee in nonjudicial foreclosure actions. A deed of trust is a form of a mortgage, an age-old mechanism for securing a loan. 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Transactions* § 17.1, at 253, § 20.1, at 403 (2d ed. 2004). In Washington, it is a statutorily blessed “three-party transaction in which land is conveyed by a borrower, the ‘grantor,’ to a ‘trustee,’ who holds title in trust for a lender, the ‘beneficiary,’ as security for credit or a loan the lender has given the borrower.” If the deed of trust contains the power of sale, the trustee may usually foreclose the deed of trust and sell the property without judicial supervision. *Id.* at 260–61; RCW 61.24.020; RCW 61.12.090; RCW 7.28.230(1) . . . .

### A. Unfair or Deceptive Acts or Practices

The legislature has specifically stated that certain violations of the deed of trust act are unfair or deceptive acts or practices for purposes of the CPA. [The Supreme Court found that this list was not exclusive; other violations could be unfair or deceptive as determined by a common-law, evolutionary process: “‘It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again’” (citation omitted).] . . . .

### B. Failure To Exercise Independent Discretion To Postpone Sale

Until the 1965 deed of trust act, there was no provision in Washington law for a nonjudicial foreclosure. In 1965, the legislature authorized nonjudicial foreclosure for the first time, subject to strict statutory requirements. Because of the very nature of nonjudicial foreclosures, Washington courts have not shied away from protecting the rights of the parties. . . .

The power to sell another person's property, often the family home itself, is a tremendous power to vest in anyone's hands. Our legislature has allowed that power to be placed in the hands of a private trustee, rather than a state officer, but common law and equity requires that trustee to be evenhanded to both sides and to strictly follow the law. This court has frequently emphasized that the deed of trust act "must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales." We have invalidated trustee sales that do not comply with the act.

As a pragmatic matter, it is the lenders, servicers, and their affiliates who appoint trustees. Trustees have considerable financial incentive to keep those appointing them happy and very little financial incentive to show the homeowners the same solicitude. However, despite these pragmatic considerations and incentives

under our statutory system, a trustee is not merely an agent for the lender or the lender's successors. Trustees have obligations to all of the parties to the deed, including the homeowner. RCW 61.24.010(4) ("The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor."); *Cox v. Helenius*, 103 Wash.2d 383, 389, 693 P.2d 683 (1985) ( "[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them." ) (citing GEORGE E. OSBORNE, GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.21 (1979)).

In a judicial foreclosure action, an impartial judge of the superior court acts as the trustee and the debtor has a one year redemption period. In a nonjudicial foreclosure, the trustee undertakes the role of the judge as an impartial third party who owes a duty to both parties to ensure that the rights of both the beneficiary and the debtor are protected. *Cox*, 103 Wash.2d at 389, 693 P.2d 683. While the legislature has established a mechanism for non-judicial sales, neither due process nor equity will countenance a system that permits the theft of a person's property by a lender or its beneficiary under the guise of a statutory nonjudicial foreclosure.<sup>10</sup> An independent

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<sup>10</sup>Washington courts have a long tradition of guarding property from being wrongfully appropriated through judicial process. When "a jury . . . returned a verdict which

trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the debtor is a minimum to satisfy the statute, the constitution, and equity, at the risk of having the sale voided, title quieted in the original homeowner, and subjecting itself and the beneficiary to a CPA claim.<sup>11</sup>

The trustee argues that we “should not hold that it is unfair and deceptive either to honor a beneficiary’s instructions not to postpone a sale without seeking its authorization, or to advise a grantor to contact her lender.” We note that Quality contends that it did not have a practice of deferring to the lender but merely followed its “legally-mandated respect for its Beneficiary’s instructions” and asserts that “[s]imply put, no competent Trustee would fail to respect its Beneficiary’s instructions not to postpone a sale without first seeking the Beneficiary’s permission.” We disagree. The record supports the conclusion that Quality abdicated its duty to act impartially toward both sides.

Again, the trustee in a nonjudicial foreclosure action has been vested with incredible power. Concomitant with that power is an obligation to both sides to do more than merely follow an unread statute and the beneficiary’s directions. If the trustee acts only at the direction of the beneficiary, then the trustee is a mere agent of the beneficiary and a deed of trust no longer embodies a three party transaction. If the trustee were truly a mere agent of the beneficiary there would be, in effect, only two parties with the beneficiary having tremendous power and no incentive to protect the statutory and constitutional property rights of the borrower.

We hold that the practice of a trustee in a nonjudicial foreclosure deferring to the lender on whether to postpone a foreclosure sale and thereby failing to exercise its independent discretion as an impartial third party with duties to both parties is an unfair or deceptive act or practice and satisfies the first element of the CPA. Quality failed to act in good faith to exercise its fiduciary duty to both sides and merely honored an agency relationship with one.

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displeased [Territorial Judge J.E. Wyche] in a suit over 160 acres of land” he threatened to set aside their verdict and remarked, “‘While I am judge it takes thirteen men to steal a ranch.’”

<sup>11</sup>We have not had occasion to fully analyze whether the nonjudicial foreclosure act . . . violates article I, section 3 of our state constitution’s command that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” . . .

### C. Predating Notarizations

Klem submitted evidence that Quality had a practice of having a notary predate notices of sale. This is often a part of the practice known as “robo-signing.” Specifically, in this case, it appears that at least from 2004–2007, Quality notaries regularly falsified the date on which documents were signed.

Quality suggests these falsely notarized documents are immaterial because the owner received the minimum notice required by law. This no-harm, no-foul argument again reveals a misunderstanding of Washington law and the purpose and importance of the notary’s acknowledgment under the law. A signed notarization is the ultimate assurance upon which the whole world is entitled to rely that the proper person signed a document on the stated day and place. Local, interstate, and international transactions involving individuals, banks, and corporations proceed smoothly because all may rely upon the sanctity of the notary’s seal. This court does not take lightly the importance of a notary’s obligation to verify the signor’s identity and the date of signing by having the signature performed in the notary’s presence. *Werner v. Werner*, 84 Wash.2d 360, 526 P.2d 370 (1974). As amicus Washington State Bar Association notes, “The proper functioning of the legal system depends on the honesty of notaries who are entrusted to verify the signing of legally significant documents.” While the legislature has not yet declared that it is a *per se* unfair or deceptive act for the purposes of the CPA, it is a crime in both Washington and California for a notary to falsely notarize a document. . . . A notary jurat is a public trust and allowing them to be deployed to validate false information strikes at the bedrock of our system. . . .

. . . We hold that the act of false dating by a notary employee of the trustee in a nonjudicial foreclosure is an unfair or deceptive act or practice and satisfies the first three elements under the Washington CPA.

The trustee argues as a matter of law that the falsely notarized documents did not cause harm. The trustee is wrong; a false notarization is a crime and undermines the integrity of our institutions upon which all must rely upon the faithful fulfillment of the notary’s oath. There remains, however, the factual issue of whether the false notarization was a cause of plaintiff’s damages. That is, of course, a question for the jury. We note that the plaintiff submitted evidence that the purpose of predated notarizations was to expedite the date of sale to please the beneficiary. Given the evi-

dence that if the documents had been properly dated, the earliest the sale could have taken place was one week later. [sic] The plaintiff also submitted evidence that with one more week, it was “very possible” Puget Sound Guardians could have closed the sale. This additional time would also have provided the guardian more time to persuade WaMu to postpone the sale. But given the trustee’s failure to fulfill its fiduciary duty to postpone the sale, there is sufficient evidence to support the jury’s CPA violation verdict, and we need not reach whether this deceptive act was a cause of plaintiff’s damages . . . .

### **Notes and Questions**

12.21. What, if anything, is the relevance of the sale price of the home to the court’s decision? Why would the bank bid a dollar more than what was owed on the loan?

12.22. *Klem* involves a variant on what is known as “robo-signing”—the creation of documents with important legal effects on foreclosure, without sufficient personal knowledge or even understanding by the person signing the document.

Jay Patterson, a forensic accountant who has examined hundreds of mortgage loans in bankruptcy or foreclosure, concluded that “95 percent of these loans contain some kind of mistake,” from an unnecessary \$15 late fee to thousands of dollars in fees and charges stemming from a single mistake that snowballed into a wrongful foreclosure. Most of these cases resulted in defaults, but when they were litigated, the facts could be telling. For example, one bankruptcy case, *In re Stewart*, involved a home in Jefferson Parish, New Orleans. Wells Fargo was the servicer. The debtor fell behind in her payments, and on September 12, 2005, Wells Fargo agents generated two opinions on the value of the home. Opinions require at least minimal inspection of the property. Stewart was charged \$125 for each opinion. However, on September 12, 2005, Jefferson Parish was under an evacuation order due to the devastation then being wrought by Hurricane Katrina. These were only two of the numerous fees the bankruptcy judge found had been wrongly charged to Stewart.

What ought to be done to rein in servicer misbehavior of this sort?

# **Part VI**

# **Leases**



# Chapter 13

## Leases: Types and Lifecycle

In its simplest form, the lease is a transfer in which the owner of real property conveys exclusive possession to a tenant (generally in exchange for rent). Most law students know through personal experience that the process of renting generally entails signing a lease contract. Like other contracts, a lease's terms can be negotiated and they explicitly govern many of the rights and responsibilities of the parties involved. So why then are leases discussed in the property course rather than contracts?

The short response is that a lease is a property-contract hybrid. While it is surely a contract, it's a contract for a very particular kind of property interest. The fuller answer, like so much in property, lies in the history of feudal land law. Under the traditional common law, a leasehold was understood primarily as a property interest, similar in nature to the estates covered in our chapter on Estates and Future Interests. A lord (often a baron) conveyed a possessory right to a tenant (usually a peasant) and retained for himself a future interest (typically a reversion). Importantly, once the landlord transferred the right to possession, he had few other obligations to the tenant.

This basic model survived until the 1960s, when many jurisdictions began to introduce general contract law principles (e.g. the implied duty of good faith and fair dealing) into the law of landlord-tenant. Importing contract theories into the lease has had two practical effects. First, parties to a lease now have the option to terminate in the case of *any* material breach; in the past tenants could only terminate if the landlord interfered with their possession. Second, modern tenants have far more protections from indifferent and unscrupulous landlords than their counterparts 50 years ago. Courts and legislatures have proven particularly eager to help

residential tenants—whom they view as vulnerable—from predations of the free market.

The law of leases is a massive topic in property law—the original Leases module of *Open Source Property* spans over a hundred pages. In this chapter, we’ll cover the creation and termination of leases, and the next chapter will cover the duties of landlords to tenants. If it should interest you, here is a list of topics *not* in this book but covered in the original module:

- The difference between a lease and an invitee
- Delivery of possession: what happens if the new tenant shows up but the old one refuses to leave?
- Anti-discrimination rules in selecting tenants
- Landlord exit: what happens if the landlord sells the property while it’s being leased?
- Contractual limits on assigning and subletting leases
- Security deposits
- Tort liability of landlords
- Gentrification and rent control

If any of these interest you, pick up a copy of the full Leases module. It is a great read and well worth your time.

## 13.1 Types of Leasehold

As we have seen throughout this course, property interests come in a limited number of forms, many of which we have inherited directly from feudal England. This theme holds in landlord-tenant. The common law developed three types of leaseholds that our modern property system still recognizes: the term of years, the periodic tenancy, and the tenancy at will.

**The Term of Years.** The *term of years* is a leasehold measured by any fixed period of time. The most familiar term of years lease is the residential one-year lease. The actual term, however, may vary greatly. In 2001, the U.S. government signed a 99-year lease for an embassy in Singapore. Leases of hundreds or even thousands of years are not unheard of, either. See *Monbar v. Monaghan*, 18 Del. Ch. 395 (1932) (two thousand year lease). At the other end of the spectrum, vacation properties like beach condos and lake houses commonly rent for one-week periods.

Whatever the duration, a term of years automatically ends when the stated term expires. For example, imagine L leases Blackacre to T “from September 1, 2015 to August 31, 2016.” Neither party is required to give the other notice of termination. The tenant must simply surrender possession to the landlord by midnight on August 31. The death of either contracting party does not affect a term of years lease, unless the landlord and tenant have agreed otherwise. If the tenant dies, the law requires her estate to carry out the lease.

**The Periodic Tenancy.** The *periodic tenancy* is a lease for some fixed duration that automatically renews for succeeding periods until either the landlord or tenant gives notice of termination. This automatic renewal is the chief practical difference between the periodic tenancy and the term of years. The most common type of periodic tenancy is the month-to-month lease. As the name suggests, a month-to-month lease lasts for a month and then continues for subsequent months, until either the landlord or tenant ends the lease. Periodic tenancies have no certain end date; some residential tenants with month-to-month leases stay in their apartments for decades.

Termination requires one party to give advance notice to the other. These notice requirements are now heavily regulated by statute in most jurisdictions. Under the common law (which is still the basis for many state regulations), for year-to-year periodic leases (or any periodic lease with a longer initial duration), parties must give notice at least six months before the period ends. For leases less than a year, the minimum notice equals the length of the lease period. Additionally, unless the parties make an agreement to the contrary, the lease must terminate on the final day of a period. Assume, for example, that T signs a month-to-month lease that begins May 1. On August 20, T gives notice of termination to her landlord. When will the lease end? T must give the landlord a minimum of one month notice. That pushes T's obligations under the lease to September 19. A periodic tenancy, however, must end on the last day of a period. Thus, T's lease will terminate on September 30 at midnight.

The death of either the landlord or tenant does not end a periodic tenancy. If, for example, the tenant dies before the lease terminates, the law vests the tenant's estate with the responsibility to fulfill the remaining obligations under the lease.

**The Tenancy at Will.** The *tenancy at will* has no fixed duration and endures so long as both of the parties desire. For example, if the landlord and tenant sign a document that reads, "Tenant will pay the Landlord \$500 on the first of the month and the lease will endure as long as both of us wish" they have created a tenancy at will. Under the common law, either party could end such a lease at any moment. Today, most states have enacted statutes that establish minimum notice periods—30 days is common. Tenancies at will also terminate if the landlord sells the property, the tenant abandons the unit, or either party dies.<sup>1</sup>

Tenancies at will can arise as a result of the clear intention of the parties—the ease of termination is a valued feature in some negotiations. But note, the tenancy at will is also the catchall lease category. If a leasehold doesn't qualify as either a term of years or periodic tenancy, the law crams it into the tenancy at will box—even if that clearly violates the goals of the parties. This occasionally creates real hardship for individuals with sloppily drafted leases.

**The Tenancy at Sufferance.** Imagine that you own a small apartment building in a college town. At the end of the school year, one of your tenants refuses to move out. The law refers to such tenants as *holdovers*. As a landlord, what are your options in this situation? How does the legal system treat individuals who stay past the end of their leases? Can you kick them out? Are they obligated to pay you rent?

When a tenant stays in possession after the lease has expired, the law allows the landlord to make a one-time election. The landlord has the option to treat the holdover as a trespasser, bring an eviction proceeding, and sue for damages. Alternatively, the landlord may renew the holdover's lease for another term. This second option is typically referred to as a *tenancy at sufferance*. Some hornbooks list the tenancy at sufferance as a fourth type of common law leasehold. The tenancy at sufferance, however, is not based on any affirmative agreement between parties and is probably better understood as a remedy for wrongful occupancy. Also note that disputes sometimes pop-up over what election the landlord has made. For example, what if the landlord does nothing for two months but then initiates eviction?

In most jurisdictions, when a landlord chooses to hold the tenant to a new lease, it creates a periodic tenancy. States differ, however, on how to compute the length

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<sup>1</sup>In jurisdictions that require 30-day notice periods before the termination of a tenancy at will, this is one of the key remaining differences between the month-to-month periodic lease and the tenancy at will.

of the period and, thus, the amount of the damages. Some simply copy over the length of the original lease (with a maximum of one year). Others divine the repeating period by looking at how the rent was paid. Imagine, for example, your tenant had originally signed a lease reading, "This lease will run from January 1, 2014 to December 31, 2014. Rent is due on the first of each month." The tenancy created by the holdover would either be a year-to-year lease or a month-to-month lease depending on the jurisdiction.

Still other states take other approaches. Some, for example, specify that a holdover must pay double (or triple) rent for the holdover period.

***Effel v. Rosberg***  
360 S.W.3d 626 (Tex. App. 2012)

**MORRIS, Justice.**

This is an appeal from the trial court's judgment awarding Robert G. Rosberg possession of property in a forcible detainer action. Appellant Lena Effel brings seventeen issues generally contending the trial court . . . erred in concluding Rosberg was entitled to possession of the property. After examining the record on appeal and reviewing the applicable law, we conclude appellant's arguments are without merit. We affirm the trial court's judgment.

**I.**

[On March 1, 2006, Robert G. Rosberg filed suit against Lena Effel's nephews, Henry Effel and Jack Effel. The parties settled the dispute out of court and signed a compromise settlement agreement. As part of the settlement, Rosberg received a piece of land owned by Henry and Jack Effel. The property contained the home where Lena Effel lived. The settlement agreement between the Effels and Rosberg stated that Lena Effel] "shall continue to occupy the property for the remainder of her natural life, or until such time as she voluntarily chooses to vacate the premises." The settlement agreement further stated that a lease agreement incorporating the terms of the settlement agreement would be prepared before the closing date of the purchase. . . .

The property in question was deeded to Rosberg with no reservation of a life estate. A lease for appellant was prepared by the Effels' attorney. The term of the lease was "for a term equal to the remainder of the Lessee's

life, or until such time that she voluntarily vacates the premises.” The lease also contained various covenants relating to payment of rent and charges for utilities as well as the use and maintenance of the grounds. The lease provided that if there was any default in the payment of rent or in the performance of any of the covenants, the lease could be terminated at the option of the lessor. The lease was signed by Rosberg as lessor and by Henry Effel on behalf of appellant under a power of attorney as lessee.

Three years later, on February 24, 2010, Rosberg, through his attorney, sent a letter to appellant both by regular mail and certified mail stating that he was terminating her lease effective immediately. The reason for the termination, according to the letter, was Rosberg’s discovery that appellant had installed a wrought iron fence in the front yard of the property in violation of two covenants of the lease. The letter stated that appellant was required to leave and surrender the premises within ten days and, if she did not vacate the premises, Rosberg would commence eviction proceedings. Appellant did not vacate the property.

On April 29, 2010, Rosberg filed this forcible detainer action in the justice court. The justice court awarded possession of the property to Rosberg, and appellant appealed the decision to the county court at law. The county court held a trial de novo without a jury and, again, awarded the property to Rosberg. The court concluded the lease created a tenancy at will terminable at any time by either party. The court further concluded that Rosberg was authorized to terminate the lease, whether because it was terminable at will or because appellant violated the terms of the lease, and the lease was properly terminated on February 24, 2010. Appellant now appeals the county court’s judgment.

## II.

. . . In appellant’s remaining issues, she challenges the findings of fact and conclusions of law made by the county court. In her tenth issue, appellant challenges the county court’s first conclusion of law in which it stated “[t]he lease, which purported to be for the rest of Lena Effel’s life, created only a tenancy at will terminable at any time by either party.” Appellant argues that the lease must be read together with the settlement agreement and the court must give effect to the intent of the parties. Appellant was not a party to the settlement agreement, however. Appellant was a party only to the lease. It is the lease, and not the settlement agreement, that

forms the basis of this forcible detainer action. Accordingly, we look solely to the lease to determine appellant's rights in this matter.

The lease states that appellant was a lessee of the property "for a term equal to the remainder of Lessee's life, or until such time as she voluntarily vacates the premises." It is the long-standing rule in Texas that a lease must be for a certain period of time or it will be considered a tenancy at will. *See Holcombe v. Lorino*, 124 Tex. 446, 79 S.W.2d 307, 310 (1935). Courts that have applied this rule to leases that state they are for the term of the lessee's life have concluded that the uncertainty of the date of the lessee's death rendered the lease terminable at will by either party.

Appellant argues the current trend in court decisions is away from finding a lease such as hers to be terminable at will. Appellant relies on the 1982 decision of *Philpot v. Fields*, 633 S.W.2d 546 (Tex. App. 1982). In *Philpot*, the court stated that the trend in law was away from requiring a lease to be of a definite and certain duration. In reviewing the law since *Philpot*, however, we discern no such trend. *See Kajo Church Square, Inc. v. Walker*, 2003 WL 1848555, at \*5 (Tex. App. 2003). The rule continues to be that a lease for an indefinite and uncertain length of time is an estate at will. *See Providence Land Servs., L.L.C. v. Jones*, 353 S.W.3d 538, 542 (Tex. App. 2011). In this case, not only was the term of the lease stated to be for the uncertain length of appellant's life, but her tenancy was also "until such time that she voluntarily vacates the premises." If a lease can be terminated at the will of the lessee, it may also be terminated at the will of the lessor. Because the lease at issue was terminable at will by either party, the trial court's first conclusion of law was correct. We resolve appellant's tenth issue against her.

In her fourth issue, appellant contends the trial court erred in concluding that Rosberg sent her a proper notice to vacate the premises under section 24.005 of the Texas Property Code. Section 24.005 states that a landlord must give a tenant at will at least three days' written notice to vacate before filing a forcible detainer suit unless the parties contracted for a longer or shorter notice period in a written lease or agreement. TEX. PROP. CODE ANN. § 24.005(b) (West Supp. 2011). The section also states that the notice must be delivered either in person or by mail at the premises in question. Id. § 24.005(f). If the notice is delivered by mail, it may be by regular mail, registered mail, or certified mail, return receipt requested, to the premises in question.

The undisputed evidence in this case shows that Rosberg, through his attorney, sent appellant a written notice to vacate the premises by both regular mail and certified mail on February 24, 2010. The notice stated that appellant had ten days to surrender the premises. Nothing in the lease provided for a longer notice period. Henry Effel testified at trial that appellant received the notice and read it. Rosberg did not bring this forcible detainer action until April 29, 2010. The evidence conclusively shows, therefore, that Rosberg's notice to vacate the property complied with section 24.005. . . .

Because Rosberg had the right to terminate appellant's tenancy at any time and properly notified her of the termination under section 24.005 of the Texas Property Code, the trial court did not err in awarding the property at issue to Rosberg. Consequently, it is unnecessary for us to address the remainder of appellant's issues.

We affirm the trial court's judgment.

### Notes and Questions

13.1. **The parties' intent?** When Henry and Jack Effel drafted the settlement agreement transferring their property to Robert Rosberg, what were they trying to accomplish? Did the court carry out the intentions of the parties? Why?

13.2. **Other approaches.** In *Garner v. Gerrish*, 473 N.E.2d 223 (N.Y. 1984), the New York Court of Appeals faced a case with very similar facts. The tenant, Lou Gerrish, had a lease stating, "Lou Gerrish [sic] has the privilege of termination [sic] this agreement at a date of his own choice." The New York court found that the document created a new kind of leasehold—a lease for life. The *Garner* opinion attacked the argument in favor of the tenancy at will as being grounded in the "antiquated notion[s]" of medieval property law. Is there any good reason for the law to only recognize three leasehold tenancies? What if, instead, the lease gave only the *landlord* the power to terminate, and required the tenant to stay and pay as long as the landlord desired?

13.3. **Working within the system.** Could the lease have been drafted in a way that would have let Lena Effel stay on the property for the duration of her life or until she chose to move, as long as she kept paying the rent?

13.4. **Institutional competence.** Are courts or legislatures better positioned to create new property forms?

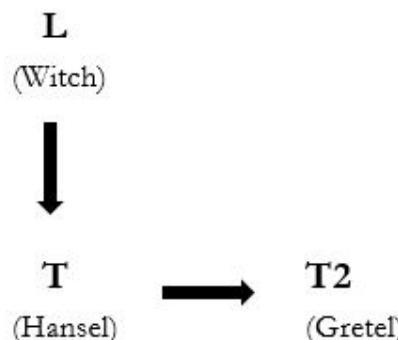
13.5. **The background story.** Lena Effel lived in the house owned by her nephews for over 20 years. Before that, her twin brother (Henry and Jack's father)

had lived in the home for many years. At the time the compromise settlement agreement was signed, Lena was 93 years old. At the time Rosberg sought to evict her, Lena was 97. Should any of those facts have influenced the judges in the case?

## 13.2 Assigning and Subletting

Tenants have exit options, too. The default rule is that a tenant's interest in a term of years lease or periodic tenancy is also freely transferable. (Note, however, that a tenant cannot transfer a tenancy at will to another party.) The law recognizes two types of transfer: the *assignment* and the *sublease*. The vast majority of jurisdictions use an objective test to distinguish the two. In an assignment, the original tenant transfers all of the remaining interest under the lease to a new tenant. In a sublease, on the other hand, the original tenant transfers less than all of her remaining rights in the unexpired period—the original tenant either gets the unit back at the end of the sublease or reserves a right to cut the sublease short.

An example should illuminate the concepts. Imagine that the Witch leases her Gingerbread Cottage to Hansel for a period of one year—January 1 to December 31—in exchange for \$100 a month. Four months into the lease, Hansel then transfers all of his remaining interest in the property to Gretel so that she now has exclusive possessory rights until the end of the term. This transfer is an assignment because Hansel has no further rights in the property. If Hansel had retained for himself the final two months of the lease or if he'd rented the cottage to Gretel for only the summer months, we would then categorize the agreement as a sublease.



A minority of jurisdictions takes a less formalistic approach to the assignment/sublease division. In these states, the subjective intent of the parties, rather than the structure of the transaction, controls. Arkansas, for example, allows parties to designate their leases as subleases or assignment (and receive all the attendant rights and obligations under the chosen category) regardless of whether the new tenant takes the unit for the entire remaining term.

The distinction between subleases and assignments has a few significant legal consequences. Primarily, it affects who can benefit from the promises in the original lease and who is on the hook for the obligations. Think again about the Hansel and Gretel example described above. If Gretel, who took over the lease, stops making rent payments, whom can the landlord sue? The original tenant, Hansel? Gretel? Both? What if the original one-year lease contained a provision allowing the tenant to renew for a second year with the same terms? Can Gretel take advantage of that clause?

To enforce any promise, the law requires a certain type of legal relationship between the parties, known as *privity*. Donald Trump, for example, cannot successfully sue you if one of his Trump Tower tenants suddenly fails to pay rent—there's simply no connection between Trump and you. Trump could only sue you if a privity relationship exists: either *privity of contract* or *privity of estate*. Privity of contract is easy enough to understand. Parties are in privity of contract if they have entered into a valid contract with each other. In our example, the Witch and Hansel are in privity of contract because they signed the original lease agreement. The Witch gave Hansel the right to exclusive possession for one year and Hansel promised to pay rent every month. As a result of this legal relationship, the Witch has the option to sue Hansel if she doesn't receive rent. That remains true even if Hansel transfers his lease to someone else. That bears repeating: the original tenant's promise to pay the landlord stands until the original lease expires (or until the landlord releases the tenant from this obligation).

When Hansel and the Witch first sign the lease, they also stand in privity of estate with each other. This concept is yet another holdover from feudal times. Privity of estate makes concrete the medieval belief that an individual takes on a series of rights and obligations when they occupy land owned by another.<sup>2</sup> For our purposes, privity of estate arises when two parties have successive ownership claims in the same property. Hansel and the Witch have privity of estate because once Hansel's

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<sup>2</sup>The medieval mind thought of rent as something that came from the land itself: the tenant paid the land-lord out of the fruits of the land, sometimes metaphorically but sometimes literally, with crops harvested from the land being leased.

possessory interest concludes, his property rights flow immediately back to the Witch. Despite its archaic origin, the idea remains important in modern property law because individuals in privity of estate can sue each other directly for (some) violations of a rental agreement.<sup>3</sup>

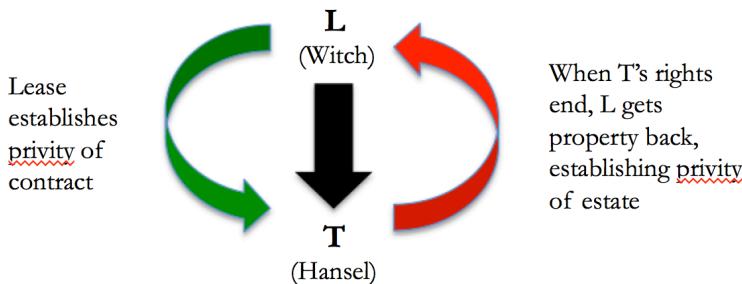
Consider, again, what happens when Hansel transfers his rights in the gingerbread cottage to Gretel. Can the Witch successfully haul Gretel into court if she stops making payments? It should be obvious that Gretel has not made any direct agreement with the Witch (or made any promise to benefit her) so they are not in privity of contract. But what about privity of estate? This is where the distinction between assignments and subleases matters. If Hansel assigns his interest to Gretel, then Gretel and the Witch would be in privity of estate (and the Witch could sue Gretel for the missing rent). We know they have privity of estate because when Gretel's rights end under the assignment, the Witch would immediately be entitled to exclusive possession of the cottage—they have successive interests in the same piece of real estate. Conversely, if Hansel subleases his apartment to Gretel for the summer, a privity relationship would not arise between Gretel and the Witch. Instead, Gretel would have privity of estate with Hansel because at the conclusion of Gretel's interest, Hansel would have the right to exclusive possession. Thus, under the sublease, the Witch could not sue Gretel for rent.

Figuring out which parties stand in privity of estate can initially cause a lot of confusion. However, asking two quick questions can help define these relationships. The first step is to ask, “Have any tenants made an assignment of their rights?” If a tenant has assigned their rights they have no chance of possessing the property again and, thus, cannot stand in privity of estate with anyone (although they may still be in privity of contract with various parties). For all the remaining tenants ask, “Who receives the property when this tenant’s possessory rights finally end?” Remember, parties with successive interests have privity of estate.

Although it may be redundant, a few diagrams may help clarify these relationships. Assume that L leases an apartment to T. Whenever a landlord initially leases to a tenant the two parties are in both privity of contract and privity of estate:

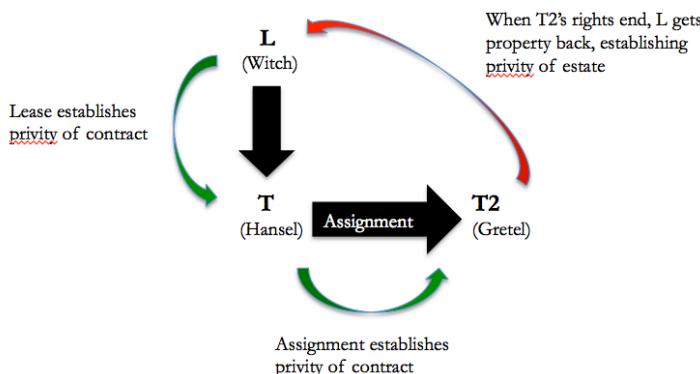
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<sup>3</sup>We'll learn more about which promises “run with the land” in a later chapter about covenants. For now, it's enough to know that transferees can only enforce promises that concern the property or land.



L and T are in privity of contract because they agreed on a lease contract. To figure out the privity of estate relationships, we first ask if anyone has assigned their interest. The answer here is “no.” For all remaining tenants, we inquire “who gets control over the property when this tenant’s possessory rights end?” In this hypothetical, who gets the leased premise when T’s term concludes? The answer, of course, is the landlord. T and L are in privity of estate because the landlord gets the property back from the tenant at the end of the lease.

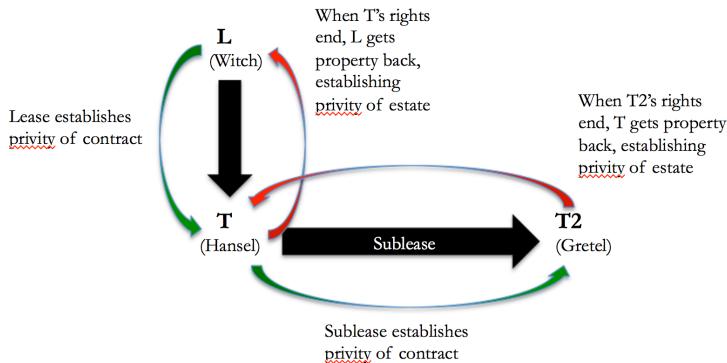
The relationships change if T assigns his rights to a new party, T2. The diagram of an assignment is below:



The contractual relationships are easy enough to map. As discussed earlier, when T assigns his interest, he remains in privity of contract with L—they signed a rental agreement that has not expired. T and T2 are also in privity of contract as a result of the assignment contract. But what about privity of estate? L and T are no longer in privity of estate because T has relinquished all of his property interests. Remember that parties who assign their rights stand in privity of estate with no one. For all other tenants we ask, “Who receives the property when this tenant’s possessory

rights finally end?" When T2's possessory rights conclude, who takes control of the property? The answer is the landlord. L and T2 now have a privity of estate relationship.

How do things change with a sublease?



As before, T remains in privity of contract with L for the duration of the original lease. In this example, there are no assignments, so we begin by asking which parties have successive property interests. When the possessory rights of T2 end, T will then have control over the property. Thus T2 and T have a privity of estate relationship. Then, when T's rights over the property conclude, the possessory rights will flow back to the landlord, meaning that T and L also have privity of estate.

Before moving on, one final wrinkle merits attention. As discussed earlier, when the original tenant subleases or assigns his leasehold, the default rule is that the landlord and the new tenant are not in privity of contract. It is possible, however, to create a privity of contract relationship between the L and T2. Most often this is accomplished by including a clause in the takeover agreement between the original tenant and the new tenant that reads, "New Tenant assumes the obligation to perform all of the original tenant's duties under the original lease." If the new tenant takes on this responsibility, the landlord becomes a third-party beneficiary to the agreement and comes into privity of contract with the new tenant.

Under the traditional common law, leaseholds were freely transferable property interests. Modern courts continue to recognize the alienability of tenancies as a default position, but allow parties to contract around the basic rule. As a result, most leases (including yours, probably) now contain some restriction on a tenant's ability to assign or sublease her property interests. For example, one oft-used lease agreement, which can be downloaded for free from the Internet, includes the following provision: "The tenant will not assign this Lease, or sublet or grant any con-

cession or license to use the Property or any part of the Property. Any assignment or subletting will be void and will, at the Landlord's option, terminate the Lease." In most states, courts uphold such bars on transfer as reasonable restraints on alienation. More controversial are clauses that allow sublease or assignment but only "with the consent of the landlord."

### **Problems**

13.6. Landlord leases property to T1 from January 1, 2015 to December 31, 2015. On March 1, T1 sold T2 her remaining interest in the property. On October 1, T2 rented the property to T3 for two months. Describe the privity relationships between all of the parties. If T3 stops sending rent payments to Landlord, whom can the Landlord sue to recover the money?

13.7. Alger, a landlord, rents a commercial building to Brown for 5 years. Six months into the lease, Brown subleases his interest to Clancy for 3 years. Clancy then turns around and assigns his interest to Dahl. Describe the privity relationships between all of the parties. If Dahl stops sending rent checks to Alger, whom can Alger sue to recover the money.

13.8. Picasso, a landlord, rents an apartment to Renoir for one year. The lease contains a provision allowing the tenant to renew the leasehold for a second year on the same terms. Renoir assigns his interest in the lease to Seurat. Seurat then assigns his interest to Turner. What are the privity relationships between the parties? Can Turner exercise the renewal clause in the original lease? See *Castle v. Double Time, Inc.*, 737 P.2d 900 (Okla. 1987) (discussing renewal clauses).

13.9. Landlord leases a unit to T1 for ten years beginning in 2010. In 2012, T1 transfers all of his right to T2 "for a period of five" years. In 2013, T2 subleases to T3 for one year. What are the privity relationships and whom can the landlord sue if T3 stops paying rent?

13.10. L leases a commercial property to T1 for ten years beginning in 2010. In 2012, T1 assigns all of her interest to T2. A year later, T2 assigns all of her interest to T3. In 2014, T3 subleases to T4 for a term of four years. In the sublease contract, T4 agrees to assume "all of the covenants and promises" in the original lease between L and T1. In 2015, T4's business fails and she ceases making paying rent. What are the privity relationships? Whom can L sue to recover the unpaid rent money?

### 13.3 Abandonment

A tenant who needs to exit a lease early and cannot find another party to sublet must seek out other alternatives. For example, a tenant can always ask her landlord to terminate the lease before the term ends. The tenant generally agrees to turn over the property and pay a small fee and, in return, the landlord releases the tenant from all further obligations. This is called a *surrender*.

Alternatively, a tenant may simply pack her things, abandon the premise, and stop making rent payments. This often happens if a tenant cannot work out a surrender agreement or finds herself in desperate financial circumstances. What are the rights and obligations of the parties in this scenario? What happens if a tenant breaks a lease and leaves?

#### ***Sommer v. Kridel***

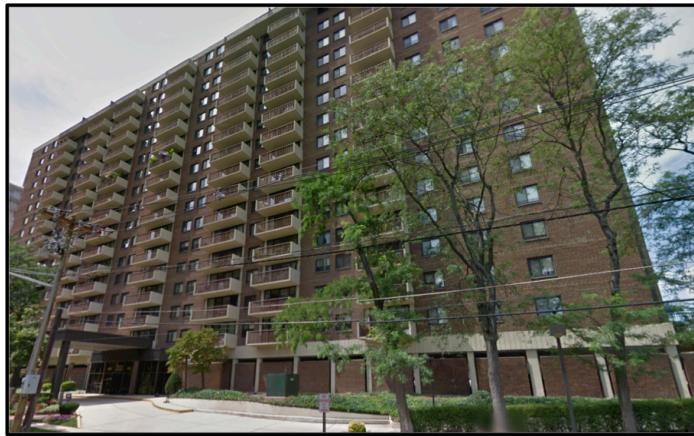
378 A.2d 767 (N.J. 1977)

**PASHMAN, J.**

We granted certification in these cases to consider whether a landlord seeking damages from a defaulting tenant is under a duty to mitigate damages by making reasonable efforts to re-let an apartment wrongfully vacated by the tenant. Separate parts of the Appellate Division held that, in accordance with their respective leases, the landlords in both cases could recover rents due under the leases regardless of whether they had attempted to re-let the vacated apartments. Although they were of different minds as to the fairness of this result, both parts agreed that it was dictated by *Joyce v. Bauman*, 174 A. 693 (1934) . . . . We now reverse and hold that a landlord does have an obligation to make a reasonable effort to mitigate damages in such a situation. We therefore overrule *Joyce v. Bauman* to the extent that it is inconsistent with our decision today.

#### I

This case was tried on stipulated facts. On March 10, 1972 the defendant, James Kridel, entered into a lease with the plaintiff, Abraham Sommer, owner of the “Pierre Apartments” in Hackensack, to rent apartment 6-L in that building. The term of the lease was from May 1, 1972 until April 30, 1974, with a rent concession for the first six weeks, so that the first month’s rent was not due until June 15, 1972.



**Figure 13.1:** The Pierre Apartments today

One week after signing the agreement, Kridel paid Sommer \$690. Half of that sum was used to satisfy the first month's rent. The remainder was paid under the lease provision requiring a security deposit of \$345. Although defendant had expected to begin occupancy around May 1, his plans were changed. He wrote to Sommer on May 19, 1972, explaining:

I was to be married on June 3, 1972. Unhappily the engagement was broken and the wedding plans cancelled. Both parents were to assume responsibility for the rent after our marriage. I was discharged from the U.S. Army in October 1971 and am now a student. I have no funds of my own, and am supported by my stepfather.

In view of the above, I cannot take possession of the apartment and am surrendering all rights to it. Never having received a key, I cannot return same to you.

I beg your understanding and compassion in releasing me from the lease, and will of course, in consideration thereof, forfeit the 2 month's rent already paid.

Please notify me at your earliest convenience.

Plaintiff did not answer the letter.

Subsequently, a third party went to the apartment house and inquired about renting apartment 6-L. Although the parties agreed that she was

ready, willing and able to rent the apartment, the person in charge told her that the apartment was not being shown since it was already rented to Kridel. In fact, the landlord did not re-enter the apartment or exhibit it to anyone until August 1, 1973. At that time it was rented to a new tenant for a term beginning on September 1, 1973. The new rental was for \$345 per month with a six week concession similar to that granted Kridel.

Prior to re-letting the new premises, plaintiff sued Kridel in August 1972, demanding \$7,590, the total amount due for the full two-year term of the lease. Following a mistrial, plaintiff filed an amended complaint asking for \$5,865, the amount due between May 1, 1972 and September 1, 1973. The amended complaint included no reduction in the claim to reflect the six week concession provided for in the lease or the \$690 payment made to plaintiff after signing the agreement. Defendant filed an amended answer to the complaint, alleging that plaintiff breached the contract, failed to mitigate damages and accepted defendant's surrender of the premises. He also counterclaimed to demand repayment of the \$345 paid as a security deposit.

The trial judge ruled in favor of defendant. Despite his conclusion that the lease had been drawn to reflect "the 'settled law' of this state," he found that "justice and fair dealing" imposed upon the landlord the duty to attempt to re-let the premises and thereby mitigate damages. He also held that plaintiff's failure to make any response to defendant's unequivocal offer of surrender was tantamount to an acceptance, thereby terminating the tenancy and any obligation to pay rent. As a result, he dismissed both the complaint and the counterclaim. The Appellate Division reversed in a per curiam opinion, 153 N.J.Super. 1 (1976), and we granted certification. . . .

## II

As the lower courts in both appeals found, the weight of authority in this State supports the rule that a landlord is under no duty to mitigate damages caused by a defaulting tenant. *See Joyce v. Bauman, supra* . . . . This rule has been followed in a majority of states . . . and has been tentatively adopted in the American Law Institute's Restatement of Property. . . .

Nevertheless, while there is still a split of authority over this question, the trend among recent cases appears to be in favor of a mitigation requirement. . . .

The majority rule is based on principles of property law which equate a lease with a transfer of a property interest in the owner's estate. Under this rationale the lease conveys to a tenant an interest in the property which forecloses any control by the landlord; thus, it would be anomalous to require the landlord to concern himself with the tenant's abandonment of his own property. *Wright v. Baumann*, 398 P.2d 119, 120-21 (Or. 1965).

For instance, in *Muller v. Beck*, *supra*, where essentially the same issue was posed, the court clearly treated the lease as governed by property, as opposed to contract, precepts. The court there observed that the "tenant had an estate for years, but it was an estate qualified by this right of the landlord to prevent its transfer," 110 A. at 832, and that "the tenant has an estate with which the landlord may not interfere." *Id.* at 832. Similarly, in *Heckel v. Griese*, *supra*, the court noted the absolute nature of the tenant's interest in the property while the lease was in effect, stating that "when the tenant vacated, . . . no one, in the circumstances, had any right to interfere with the defendant's possession of the premises." 171 A. 148, 149. Other cases simply cite the rule announced in *Muller v. Beck*, *supra*, without discussing the underlying rationale. See *Joyce v. Bauman*, *supra*, 174 A. 693 . . . .

Yet the distinction between a lease for ordinary residential purposes and an ordinary contract can no longer be considered viable. As Professor Powell observed, evolving "social factors have exerted increasing influence on the law of estates for years." 2 *Powell on Real Property* (1977 ed.), § 221(1) at 180-81. The result has been that:

[t]he complexities of city life, and the proliferated problems of modern society in general, have created new problems for lessors and lessees and these have been commonly handled by specific clauses in leases. This growth in the number and detail of specific lease covenants has reintroduced into the law of estates for years a predominantly contractual ingredient.

(*Id.* at 181). . . .

This Court has taken the lead in requiring that landlords provide housing services to tenants in accordance with implied duties which are hardly consistent with the property notions expressed in *Muller v. Beck*, *supra*, and *Heckel v. Griese*, *supra*. See *Braitman v. Overlook Terrace Corp.*, 346 A.2d 76 (1975) (liability for failure to repair defective apartment door lock); *Berzito*

v. *Gambino*, 308 A.2d 17 (1973) (construing implied warranty of habitability and covenant to pay rent as mutually dependent); *Marini v. Ireland*, 265 A.2d 526 (1970) (implied covenant to repair); *Reste Realty Corp. v. Cooper*, 251 A.2d 268 (1969) (implied warranty of fitness of premises for leased purpose). In fact, in *Reste Realty Corp. v. Cooper, supra*, we specifically noted that the rule which we announced there did not comport with the historical notion of a lease as an estate for years. 251 A.2d 268. And in *Marini v. Ireland, supra*, we found that the “guidelines employed to construe contracts have been modernly applied to the construction of leases.” 265 A.2d at 532.

Application of the contract rule requiring mitigation of damages to a residential lease may be justified as a matter of basic fairness. Professor McCormick first commented upon the inequity under the majority rule when he predicted in 1925 that eventually:

the logic, inescapable according to the standards of a ‘jurisprudence of conceptions’ which permits the landlord to stand idly by the vacant, abandoned premises and treat them as the property of the tenant and recover full rent, [will] yield to the more realistic notions of social advantage which in other fields of the law have forbidden a recovery for damages which the plaintiff by reasonable efforts could have avoided. (McCormick, *The Rights of the Landlord Upon Abandonment of the Premises by the Tenant*, 23 Mich. L. Rev. 211, 221-22 (1925)).

Various courts have adopted this position.

The pre-existing rule cannot be predicated upon the possibility that a landlord may lose the opportunity to rent another empty apartment because he must first rent the apartment vacated by the defaulting tenant. Even where the breach occurs in a multi-dwelling building, each apartment may have unique qualities which make it attractive to certain individuals. Significantly, in *Sommer v. Kridel*, there was a specific request to rent the apartment vacated by the defendant; there is no reason to believe that absent this vacancy the landlord could have succeeded in renting a different apartment to this individual.

We therefore hold that antiquated real property concepts which served as the basis for the pre-existing rule, shall no longer be controlling where there is a claim for damages under a residential lease. Such claims must

be governed by more modern notions of fairness and equity. A landlord has a duty to mitigate damages where he seeks to recover rents due from a defaulting tenant.

If the landlord has other vacant apartments besides the one which the tenant has abandoned, the landlord's duty to mitigate consists of making reasonable efforts to re-let the apartment. In such cases he must treat the apartment in question as if it was one of his vacant stock.

As part of his cause of action, the landlord shall be required to carry the burden of proving that he used reasonable diligence in attempting to re-let the premises. We note that there has been a divergence of opinion concerning the allocation of the burden of proof on this issue. *See Annot., supra*, § 12 at 577. While generally in contract actions the breaching party has the burden of proving that damages are capable of mitigation . . . here the landlord will be in a better position to demonstrate whether he exercised reasonable diligence in attempting to re-let the premises. . . .

### III

The *Sommer v. Kridel* case presents a classic example of the unfairness which occurs when a landlord has no responsibility to minimize damages. Sommer waited 15 months and allowed \$4658.50 in damages to accrue before attempting to re-let the apartment. Despite the availability of a tenant who was ready, willing and able to rent the apartment, the landlord needlessly increased the damages by turning her away. While a tenant will not necessarily be excused from his obligations under a lease simply by finding another person who is willing to rent the vacated premises, see, e.g., *Reget v. Dempsey-Tegler & Co.*, 216 N.E.2d 500 (Ill. App. 1966) (new tenant insisted on leasing the premises under different terms); *Edmands v. Rust & Richardson Drug Co.*, 77 N.E. 713 (Mass. 1906) (landlord need not accept insolvent tenant), here there has been no showing that the new tenant would not have been suitable. We therefore find that plaintiff could have avoided the damages which eventually accrued, and that the defendant was relieved of his duty to continue paying rent. Ordinarily we would require the tenant to bear the cost of any reasonable expenses incurred by a landlord in attempting to re-let the premises . . . but no such expenses were incurred in this case. . . .

In assessing whether the landlord has satisfactorily carried his burden, the trial court shall consider, among other factors, whether the landlord,

either personally or through an agency, offered or showed the apartment to any prospective tenants, or advertised it in local newspapers. Additionally, the tenant may attempt to rebut such evidence by showing that he proffered suitable tenants who were rejected. However, there is no standard formula for measuring whether the landlord has utilized satisfactory efforts in attempting to mitigate damages, and each case must be judged upon its own facts.

Compare . . . *Carpenter v. Wisniewski*, 215 N.E.2d 882 (Ind. App. 1966) (duty satisfied where landlord advertised the premises through a newspaper, placed a sign in the window, and employed a realtor); *Re Garment Center Capitol, Inc.*, 93 F.2d 667, 115 A.L.R. 202 (2 Cir. 1938) (landlord's duty not breached where higher rental was asked since it was known that this was merely a basis for negotiations); *Foggia v. Dix*, 509 P.2d 412, 414 (Or. 1973) (in mitigating damages, landlord need not accept less than fair market value or "substantially alter his obligations as established in the pre-existing lease"); *with Anderson v. Andy Darling Pontiac, Inc.*, 43 N.W.2d 362 (Wis. 1950) (reasonable diligence not established where newspaper advertisement placed in one issue of local paper by a broker); . . . *Consolidated Sun Ray, Inc. v. Oppenstein*, 335 F.2d 801, 811 (8 Cir. 1964) (dictum) (demand for rent which is "far greater than the provisions of the lease called for" negates landlord's assertion that he acted in good faith in seeking a new tenant).

## IV

The judgment in *Sommer v. Kridel* is reversed.

### Notes and Questions

**13.11. The basic law.** Today almost all states impose a duty to mitigate on residential landlords. The rule also applies to commercial tenancies in many states. The Restatement (Second) of Property § 12.1(3), however, continues to cling to the common law notion that a landlord can wait until the end of the term and then sue the tenant for all of the unpaid rent. The authors of the Restatement believe the traditional rule discourages abandonment, limits vandalism, and better protects the expectations of landlords.

**13.12. Tenants still on the hook.** Importantly, the duty to mitigate does not relieve an abandoning tenant of all liability. Even if a new tenant rents the unit, the landlord can still recover damages for all of the costs of finding the replacement

tenant and for any time that the unit remained empty. The landlord can also recoup any unpaid rent that accrued before the abandonment. Finally, if the rental market in the area has softened and landlord is forced to rent the unit at lower price, the tenant is responsible for the difference between the new rent and the original rent.

**13.13. Property v. Contract.** The lingering controversy over the duty to mitigate stems largely from the property/contract tension inherent in the nature of the lease. If a leasehold is primarily a property interest, then the landlord has few responsibilities to the tenant after ceding possession and control—the tenant is free to use the property or let it lay fallow. If, on the other hand, the lease is viewed through the lens of contract law, the parties clearly have a responsibility to mitigate damages. *But see Edward Chase & E. Hunter Taylor, Jr., Landlord and Tenant: A Study in Property and Contract*, 30 VILL. L. REV. 571 (1985) (arguing the distinction is overstated).

**13.14. What's a good faith effort?** Ken rents an apartment to Sarah for one year. Three months into the lease, Sarah gets a new job in a different state and turns the apartment back over to Ken. Ken puts an 8x11 “for rent” sign in the window of the unit. Has he made a good faith effort to mitigate damages? Does it matter how he advertises the other units? What if Tim offers to rent Sarah’s unit but Tim has bad credit: does Ken have to accept Tim?

**13.15. The Legend of Jim Kridel.** The woman Jim Kridel intended to marry came from a family with significant assets. When the engagement fell through, Kridel—who had no income of his own—could not afford the rent at the Pierre Apartments. The opinion mentions that Kridel notified Sommer of his predicament in writing, but does not reflect that Kridel and Sommer also had a heated discussion on the phone. During the telephone conversation, Kridel offered Sommer \$750 of the pre-paid rent as compensation for breaking the lease (adjusted for inflation, that’s roughly equivalent to \$3000 today). Sommer, however, knew that Kridel’s stepfather was a prominent (and presumably well-off) physician and demanded an additional \$750. Kridel refused, and told Sommer, “If you don’t like it, you can sue me, baby!” Sommer did just that.

When the litigation began, Kridel was a first year law student at Rutgers. He initially represented himself but gradually picked up pro bono help from lawyers he met at summer jobs and partners in the firm where he worked after graduating. Kridel estimates that Sommer—a very wealthy landlord—spent over \$500,000 on legal fees. Kridel also recalls that the law of New Jersey was firmly against his position that the lease should be governed by contract principles. On appeal, he relied primarily on a case from the state of Oregon, which opposing counsel disparaged

as a place full of bumpkin fishermen and loggers. When Kridel won, he wrapped the opinion around an Oregon salmon and sent to Sommer's lawyers.

Asked why he pursued the case with such vigor, he replied, "Sommer was wrong. The rule was unfair. And I was probably the only tenant in New Jersey who could afford to pour that much time and attention into a case like that."

In the intervening years, Kridel has had a long and successful legal career in New Jersey and New York. He continues to find himself mixed up with controversy. In 2010, Kridel represented *Real Housewives of New Jersey* star Teresa Giudice in her bankruptcy proceeding. The bankruptcy went sour: Giudice and her husband were convicted of fraud and sentenced to federal prison in 2014. Giudice sued Kridel for malpractice, charging that his "abysmal failure as an attorney . . . literally led his client into the cross-hairs of federal prosecutors, and a prison cell." First Amended Complaint at ¶ 4, *Giudice v. Kridel*, No. MRS-L-1861-15 (N.J. Sup. Ct. Mar. 17, 2017). The case apparently settled in 2018.

## 13.4 Eviction

If a tenant fails to pay rent or otherwise commits a material breach of the lease, the landlord can elect to terminate the leasehold and evict the tenant from the property. It is undoubtedly true that the eviction process and the subsequent scramble for a new place to live can be a traumatic, humiliating, and disruptive occurrence. Eviction displaces children from their schools, rends the social networks of the poor, and forces many families into shelters or onto the streets. Matthew Desmond, a sociologist at Harvard, has found that forced relocations are also shockingly common. In Milwaukee, the location of Desmond's research, 17 percent of the moves undertaken by renters over a two-year period were forced relocations. See Matthew Desmond et al., *Forced Relocation and Residential Instability Among Urban Renters*, 89 Soc. Sci. Rev. 227 (2015). In response to the social cost of eviction, some American cities and many countries around the world make it difficult for landlords to remove tenants. Should more U.S. jurisdictions follow suit? Consider the following story:

A patient political scientist . . . might be able to place American cities on a left-to-right spectrum according to how long tenants whose eviction has become a cause manage to stay where they are. It may be, for instance that some city like Houston is on the far right of the spectrum. . . . Houston's most pow-

erful citizens are known for a devotion to private property so intense that they see routine planning and zoning as acts of naked confiscation. . . . San Francisco might qualify for the left end of the spectrum. [I]ts best-known evictees [are] the tenants of the run-down three-story building called the International Hotel . . . . In the fall of 1968, about a hundred and fifty people who were living in the hotel . . . were told to be out of the building by January 1, 1969. The building was finally cleared—in what amounted to a military operation requiring several hundred policemen—on August 4, 1977.

Calvin Trillin, *Some Thoughts on the International Hotel Controversy*, *New Yorker*, Dec. 19, 1977, at 116.

### **Notes and Questions**

13.16. Would you rather be a tenant in a place like Houston—where evictions happen quickly—or in San Francisco—where they do not?

13.17. Imagine you’re a landlord in a jurisdiction where it takes a long time to remove a tenant for non-payment of rent. How would that change your business strategy? Would you ever take a chance on a tenant with bad credit or a history of being evicted?

We turn now to the procedure of eviction. When a landlord believes that a tenant has committed a material breach of the lease, how exactly does she go about removing a lessee from the property?

### ***Berg v. Wiley***

264 N.W.2d 145 (Minn. 1978)

#### **ROGOSHESKE, Justice.**

Defendant landlord, Wiley Enterprises, Inc., and defendant Rodney A. Wiley (hereafter collectively referred to as Wiley) appeal from a judgment upon a jury verdict awarding plaintiff tenant, A Family Affair Restaurant, Inc., damages for wrongful eviction from its leased premises. The issues for review are whether the evidence was sufficient to support the jury’s finding that the tenant did not abandon or surrender the premises and whether the trial court erred in finding Wiley’s reentry forcible and wrongful as a matter of law. We hold that the jury’s verdict is supported by sufficient

evidence and that the trial court's determination of unlawful entry was correct as a matter of law, and affirm the judgment.

On November 11, 1970, Wiley, as lessor . . . executed a written lease agreement letting land and a building in Osseo, Minnesota, for use as a restaurant. The lease provided a 5-year term beginning December 1, 1970, and specified that the tenant agreed to bear all costs of repairs and remodeling, to "make no changes in the building structure" without prior written authorization from Wiley, and to "operate the restaurant in a lawful and prudent manner." Wiley also reserved the right "at (his) option (to) retake possession" of the premises "(s)hould the Lessee fail to meet the conditions of this Lease." In early 1971, plaintiff Kathleen Berg took assignment of the lease from the prior lessee, and on May 1, 1971, she opened "A Family Affair Restaurant" on the premises. In January 1973, Berg incorporated the restaurant and assigned her interest in the lease to "A Family Affair Restaurant, Inc." As sole shareholder of the corporation, she alone continued to act for the tenant.

The present dispute has arisen out of Wiley's objection to Berg's continued remodeling of the restaurant without procuring written permission and her consequent operation of the restaurant in a state of disrepair with alleged health code violations. Strained relations between the parties came to a head in June and July 1973. In a letter dated June 29, 1973, Wiley's attorney charged Berg with having breached lease items 5 and 6 by making changes in the building structure without written authorization and by operating an unclean kitchen in violation of health regulations. The letter demanded that a list of eight remodeling items be completed within 2 weeks from the date of the letter, by Friday, July 13, 1973, or Wiley would retake possession of the premises under lease item 7. Also, a June 13 inspection of the restaurant by the Minnesota Department of Health had produced an order that certain listed changes be completed within specified time limits in order to comply with the health code. The major items on the inspector's list, similar to those listed by Wiley's attorney, were to be completed by July 15, 1973.

During the 2-week deadline set by both Wiley and the health department, Berg continued to operate the restaurant without closing to complete the required items of remodeling. The evidence is in dispute as to whether she intended to permanently close the restaurant and vacate the premises at the end of the 2 weeks or simply close for about 1 month in order to re-

model to comply with the health code. At the close of business on Friday, July 13, 1973, the last day of the 2-week period, Berg dismissed her employees, closed the restaurant, and placed a sign in the window saying "Closed for Remodeling." Earlier that day, Berg testified, Wiley came to the premises in her absence and attempted to change the locks. When she returned and asserted her right to continue in possession, he complied with her request to leave the locks unchanged. Berg also testified that at about 9:30 p.m. that evening, while she and four of her friends were in the restaurant, she observed Wiley hanging from the awning peering into the window. Shortly thereafter, she heard Wiley pounding on the back door demanding admittance. Berg called the county sheriff to come and preserve order. Wiley testified that he observed Berg and a group of her friends in the restaurant removing paneling from a wall. Allegedly fearing destruction of his property, Wiley called the city police, who, with the sheriff, mediated an agreement between the parties to preserve the status quo until each could consult with legal counsel on Monday, July 16, 1973.

Wiley testified that his then attorney advised him to take possession of the premises and lock the tenant out. Accompanied by a police officer and a locksmith, Wiley entered the premises in Berg's absence and without her knowledge on Monday, July 16, 1973, and changed the locks. Later in the day, Berg found herself locked out. The lease term was not due to expire until December 1, 1975. The premises were re-let to another tenant on or about August 1, 1973. Berg brought this damage action against Wiley . . . [for] intentional infliction of emotional distress . . . and other tort damages based upon claims in wrongful eviction. . . . Wiley answered with an affirmative defense of abandonment and surrender and counterclaimed for damage to the premises. . . . With respect to the wrongful eviction claim, the trial court found as a matter of law that Wiley did in fact lock the tenant out, and that the lockout was wrongful.

The jury, by answers to the questions submitted, found no liability on Berg's claim for intentional infliction of emotional distress and no liability on Wiley's counterclaim for damages to the premises, but awarded Berg \$31,000 for lost profits and \$3,540 for loss of chattels resulting from the wrongful lockout. The jury also specifically found that Berg neither abandoned nor surrendered the premises. . . .

On this appeal, Wiley seeks an outright reversal of the damages award for wrongful eviction, claiming insufficient evidence to support the jury's

finding of no abandonment or surrender and claiming error in the trial court's finding of wrongful eviction as a matter of law.

The first issue before us concerns the sufficiency of evidence to support the jury's finding that Berg had not abandoned or surrendered the leasehold before being locked out by Wiley. Viewing the evidence to support the jury's special verdict in the light most favorable to Berg, as we must, we hold it amply supports the jury's finding of no abandonment or surrender of the premises. While the evidence bearing upon Berg's intent was strongly contradictory, the jury could reasonably have concluded, based on Berg's testimony and supporting circumstantial evidence, that she intended to retain possession, closing temporarily to remodel. Thus, the lockout cannot be excused on ground that Berg abandoned or surrendered the leasehold.

The second and more difficult issue is whether Wiley's self-help repossession of the premises by locking out Berg was correctly held wrongful as a matter of law.

Minnesota has historically followed the common-law rule that a landlord may rightfully use self-help to retake leased premises from a tenant in possession without incurring liability for wrongful eviction provided two conditions are met: (1) The landlord is legally entitled to possession, such as where a tenant holds over after the lease term or where a tenant breaches a lease containing a reentry clause; and (2) the landlord's means of reentry are peaceable. *Mercil v. Broulette*, 69 N.W. 218 (1896). Under the common-law rule, a tenant who is evicted by his landlord may recover damages for wrongful eviction where the landlord either had no right to possession or where the means used to remove the tenant were forcible, or both. See, e.g., *Poppen v. Wadleigh*, 51 N.W.2d 75 (1952) . . . .

Wiley contends that Berg had breached the provisions of the lease, thereby entitling Wiley, under the terms of the lease, to retake possession, and that his repossession by changing the locks in Berg's absence was accomplished in a peaceful manner. In a memorandum accompanying the post-trial order, the trial court stated two grounds for finding the lockout wrongful as a matter of law: (1) It was not accomplished in a peaceable manner and therefore could not be justified under the common-law rule, and (2) any self-help reentry against a tenant in possession is wrongful under the growing modern doctrine that a landlord must always resort to the judicial process to enforce his statutory remedy against a tenant

wrongfully in possession. Whether Berg had in fact breached the lease and whether Wiley was hence entitled to possession was not judicially determined. . . .

In applying the common-law rule, we have not before had occasion to decide what means of self-help used to dispossess a tenant in his absence will constitute a nonpeaceable entry, giving a right to damages without regard to who holds the legal right to possession. Wiley argues that only actual or threatened violence used against a tenant should give rise to damages where the landlord had the right to possession. We cannot agree.

It has long been the policy of our law to discourage landlords from taking the law into their own hands, and our decisions and statutory law have looked with disfavor upon any use of self-help to dispossess a tenant in circumstances which are likely to result in breaches of the peace. We gave early recognition to this policy in *Lobdell v. Keene*, 88 N.W. 426, 430 (1901), where we said:

The object and purpose of the legislature in the enactment of the forcible entry and unlawful detainer statute was to prevent those claiming a right of entry or possession of lands from redressing their own wrongs by entering into possession in a violent and forcible manner. All such acts tend to a breach of the peace, and encourage high-handed oppression. The law does not permit the owner of land, be his title ever so good, to be the judge of his own rights with respect to a possession adversely held, but puts him to his remedy under the statutes.

To facilitate a resort to judicial process, the legislature has provided a summary procedure in Minn. St. 566.02 to 566.17 whereby a landlord may recover possession of leased premises upon proper notice and showing in court in as little as 3 to 10 days. As we recognized in *Mutual Trust Life Ins. Co. v. Berg*, 246 N.W. 9, 10 (1932), “(t)he forcible entry and unlawful detainer statutes were intended to prevent parties from taking the law into their own hands when going into possession of lands and tenements . . . .” To further discourage self-help, our legislature has provided treble damages for forcible evictions, §§ 557.08 and 557.09, and has provided additional criminal penalties for intentional and unlawful exclusion of a tenant. § 504.25. In *Sweeney v. Meyers*, *supra*, we allowed a business tenant not only damages for lost profits but also punitive damages against a landlord who, like Wiley, entered in the tenant’s absence and locked the tenant out.

In the present case, as in Sweeney, the tenant was in possession, claiming a right to continue in possession adverse to the landlord's claim of breach of the lease, and had neither abandoned nor surrendered the premises. Wiley, well aware that Berg was asserting her right to possession, retook possession in her absence by picking the locks and locking her out. The record shows a history of vigorous dispute and keen animosity between the parties. Upon this record, we can only conclude that the singular reason why actual violence did not erupt at the moment of Wiley's changing of the locks was Berg's absence and her subsequent self-restraint and resort to judicial process. Upon these facts, we cannot find Wiley's means of reentry peaceable under the common-law rule. Our long-standing policy to discourage self-help which tends to cause a breach of the peace compels us to disapprove the means used to dispossess Berg. To approve this lock-out, as urged by Wiley, merely because in Berg's absence no actual violence erupted while the locks were being changed, would be to encourage all future tenants, in order to protect their possession, to be vigilant and thereby set the stage for the very kind of public disturbance which it must be our policy to discourage. . . .

We recognize that the growing modern trend departs completely from the common-law rule to hold that self-help is never available to dispossess a tenant who is in possession and has not abandoned or voluntarily surrendered the premises. Annotation, 6 A.L.R.3d 177, 186; 76 Dickinson L. Rev. 215, 227. This growing rule is founded on the recognition that the potential for violent breach of peace inheres in any situation where a landlord attempts by his own means to remove a tenant who is claiming possession adversely to the landlord. Courts adopting the rule reason that there is no cause to sanction such potentially disruptive self-help where adequate and speedy means are provided for removing a tenant peacefully through judicial process. At least 16 states have adopted this modern rule, holding that judicial proceedings, including the summary procedures provided in those states' unlawful detainer statutes, are the exclusive remedy by which a landlord may remove a tenant claiming possession. . . .

While we would be compelled to disapprove the lockout of Berg in her absence under the common-law rule as stated, we approve the trial court's reasoning and adopt as preferable the modern view represented by the cited cases. To make clear our departure from the common-law rule for the benefit of future landlords and tenants, we hold that, subsequent to

our decision in this case, the only lawful means to dispossess a tenant who has not abandoned nor voluntarily surrendered but who claims possession adversely to a landlord's claim of breach of a written lease is by resort to judicial process. We find that Minn. St. 566.02 to 566.17 provide the landlord with an adequate remedy for regaining possession in every such case. Where speedier action than provided in §§ 566.02 to 566.17 seems necessary because of threatened destruction of the property or other exigent circumstances, a temporary restraining order under Rule 65, Rules of Civil Procedure, and law enforcement protection are available to the landlord. Considered together, these statutory and judicial remedies provide a complete answer to the landlord. In our modern society, with the availability of prompt and sufficient legal remedies as described, there is no place and no need for self-help against a tenant in claimed lawful possession of leased premises.

Applying our holding to the facts of this case, we conclude, as did the trial court, that because Wiley failed to resort to judicial remedies against Berg's holding possession adversely to Wiley's claim of breach of the lease, his lockout of Berg was wrongful as a matter of law. The rule we adopt in this decision is fairly applied against Wiley, for it is clear that, applying the older common-law rule to the facts and circumstances peculiar to this case, we would be compelled to find the lockout nonpeaceable for the reasons previously stated. The jury found that the lockout caused Berg damage and, as between Berg and Wiley, equity dictates that Wiley, who himself performed the act causing the damage, must bear the loss.

Affirmed.

### Notes and Questions

**13.18. Who did what wrong?** Kathleen Berg, the tenant, never missed a rent payment. Why, exactly, did Wiley think he was entitled to enter the property and exclude the tenant? Is Rodney Wiley at fault for this dispute? If you were his lawyer at the time, would you have given him different advice? If he was entitled to possession, how did he end up owing \$34,500 to Berg?

**13.19. Tending to Cause a Breach of the Peace.** In case you aren't convinced that repossession carries an inherent risk of a breach of the peace, consider the story of Erskine G. Bryce. In the summer of 2001, Mr. Bryce—a 66-year-old city marshal in Brooklyn, New York—arrived at the second-story apartment of 53-year-old

JoAnne Jones to remove her from possession pursuant to a duly issued court order for her eviction. At the time, Ms. Jones owed about \$14,000 in back rent. She violently attacked the marshal, knocking him over a stairwell railing down to the ground floor below. Mr. Bryce's head hit a refrigerator on the way down. Ms. Jones grabbed an aluminum rod, ran down the stairs, and began beating Mr. Bryce with the rod. She then doused his body with paint thinner and set him on fire with a cigarette lighter. Almost as quickly as it had arisen, Ms. Jones's rage subsided, and she attempted to put out the flames she had ignited by running back and forth to her apartment to fetch basins of water—but it was too late. The medical examiner concluded that Mr. Bryce died from a combination of blunt force injuries and the flames that quickly consumed his upper body—in other words, that he had been beaten to within an inch of his life and then burned alive. C.J. Chivers, *Tenant Held in Murder of Marshal*, N.Y. TIMES (Aug. 23, 2001).

Mr. Bryce had two decades of experience as a marshal and a reputation for dealing calmly and compassionately with those he evicted. He was a stranger to Ms. Jones until he arrived to evict her. But in the moment, the situation still exploded into horrific, deadly violence. How much more likely do we think such violence would be where a landlord—who has a personal stake in recovering possession, no particular professional experience in managing or defusing tense situations, no imprimatur of government authority, and a bitter history with the tenant—attempts to repossess?

13.20. **Do landlords love violence?** If the court here is correct that all self-help remedies contain the inherent potential for violence, why do landlords seem so eager to employ them? Why would a landlord ever resist going through the court process, which the Justice Rogoscheske describes as “adequate and speedy”?

13.21. **Can landlords stand their ground?** Many states have so-called “stand your ground” laws. Stand your ground laws authorize individuals to use deadly force in self-defense when faced with a reasonable threat. There is no duty to retreat first. Why are legislatures concerned about violence in the landlord/tenant context but not in the self-defense setting?

13.22. **Costs.** Who does the demise of self-help hurt?

13.23. **Basic eviction procedure.** Every state has now enacted statutes—often referred to as forcible entry and detainer laws—that help landlords to promptly regain possession when a tenant holds over or commits a material breach of the lease. In most jurisdictions, statutes mandate that landlords pursue relief through the court system and refrain from self-help remedies. While these eviction procedures vary between jurisdictions, there are some significant commonalities be-

tween most states' forced entry and detainer laws. In all jurisdictions, for example, a landlord who wishes to evict a tenant must first send the tenant proper written notice. The notice requirement generally obliges the landlord to accurately state the tenant's name and address, and reveal the nature of the alleged breach. Most states also require the landlord to give the tenant an opportunity (often 3 days, but sometimes as long as 14) to either cure the default or move out. These are often referred to as "Cure or Quit" notices. If the tenant corrects the problem, they must be allowed to stay. However, if the tenant stays in the unit and does not cure the default, the landlord can file a petition for eviction with the local housing court. Upon the landlord's request, the court will quickly set a trial date and a process server will deliver a summons and complaint to each tenant. Most tenants do not contest their evictions. If the tenant does not respond to the summons, the court will enter a judgment in favor of the landlord and the landlord will then hire a local sheriff to remove the tenant from the property. The entire process generally takes from 20 to 60 days.

13.24. **Defending against eviction.** Occasionally a tenant will mount a vigorous defense to an eviction notice. The most commonly raised defenses are (1) notice was faulty, (2) the tenant cured the default, (3) the landlord illegally retaliated against the tenant, and, (4) the tenant had a right to withhold rent because the unit failed to meet certain minimum standards required by law.

# Chapter 14

## Leases: Landlord Duties

In feudal England, policy makers and government officials expressed little concern over the housing conditions of renters. The law was well-settled: Once a landlord turned over the right of possession, the tenant became responsible for maintenance of the leased property. If a tenant decided to live in squalor rather than complete basic repairs, that was the tenant's problem, not the landlord's worry. Although it may seem counterintuitive to modern readers (who rely on landlords to fix nearly everything), putting the burden on the tenant to maintain the property actually produced efficient results in the medieval world: landlords often lived long distances from their lessees, communication was slow, houses were simply constructed, and most tenants had the knowledge and skills to complete basic repairs.

The basic principle that tenants are responsible for their own living conditions remained unchallenged until the 1960s, when both academics and politicians expressed growing concern about the rental housing stock in central cities. Many worried that exploitative landlords were flouting safety regulations and taking advantage of tenants who had few housing choices as a result of their poverty and the rampant discrimination in the housing market. The problems in the poorest neighborhoods also had spillover effects in surrounding communities—disease, vermin, and fires do not respect municipal borders. In response to these problems, the law began to vest tenants with a new series of rights against their landlords. This subsection traces the evolution of these rights and explores the rise of legal tools to ensure minimum housing standards for all renters.

## 14.1 The Covenant of Quiet Enjoyment

Traditional common law principles do not leave renters completely defenseless against unprincipled landlords. Every lease, whether residential or commercial, contains a *covenant of quiet enjoyment*. Often this promise is explicitly stated in the lease contract. Where it's not specifically mentioned, all courts will imply it into the agreement. The basic idea is that the landlord cannot interfere with the tenant's use of the property. Most courts state the legal test this way: A breach of the covenant of quiet enjoyment occurs when the landlord substantially interferes with the tenant's use or enjoyment of the premises.

Consider the following hypothetical:

Little Bo Peep Detective Services rents the second floor of a four-floor building. A year into the five-year lease, the landlord suddenly begins a construction project designed to update the suites on the first floor. These renovations create loud noise and regular interruptions of electric service. The construction work has also made the parking lot inaccessible. Employees and customers need to walk a quarter-mile to access the building from a nearby parking garage.

Do these problems amount to a violation of the covenant of quiet enjoyment? To determine whether the interference is "substantial" courts generally consider the purpose the premises are leased for, the foreseeability of the problem, the potential duration, and the degree of harm. In this example, if the construction project lasts for more than a few days, then Little Bo Peep can most likely bring a successful claim against its landlord under the covenant of quiet enjoyment. The problems here are not mere trifles—the noise, lack of electricity, and inadequate parking fundamentally affect the company's ability to use the property as they intended.

The difficult conceptual issue with the covenant of quiet enjoyment concerns the remedy. If the landlord breaks the covenant, what are the tenant's options? After a breach, the tenant can always choose to stay in the leased property, continue to pay rent, and sue the landlord for damages.

Additionally, certain violations of the covenant of quiet enjoyment allow the tenant to consider the lease terminated, leave, and stop paying rent. Recall from earlier in the chapter that the landlord's fundamental responsibility is to provide the tenant with possession (or, in some jurisdictions, the right to possession). From that principle, courts developed a rule that in cases where the landlord wrongfully evicts the tenant, all the tenant's obligations under the lease cease. Imagine:

Landlord and tenant both sign a lease that reads, “Landlord agrees to provide Tenant with possession of 123 Meadowlark Lane for a period of 12 months beginning April 1. Tenant agrees to pay \$100 per month.” After 4 months, however, the Landlord retakes possession of the property by forcing the tenant out and changing the locks.

Assuming the tenant hasn’t committed a material breach, the landlord’s actions constitute an obvious violation of the covenant of quiet enjoyment—the tenant can no longer use the property for any purpose. Thus, any eviction where the tenant is physically denied access to the unit ends the tenant’s obligation to pay rent and allows the tenant to sue for damages incurred from being removed from possession (A tenant could also sue to regain the unit). The law is very clear on this point. Relatedly, if the landlord denies the tenant access to some portion of the rented space (say, an allotted parking space) that, too, constitutes a breach of the covenant of quiet enjoyment. The tenant subject to such a partial eviction has the option to terminate the lease and sue for damages.

But what if the landlord doesn’t physically interfere with her tenant’s occupancy? What if the landlord creates an environment that’s so miserable that the tenant is forced to flee? Is this an “eviction” that would allow the tenant to consider the lease terminated or must the tenant stay and continue paying rent while he brings a damages lawsuit?

***Fidelity Mutual Life Insurance Co. v. Kaminsky***

768 S.W.2d 818 (Tex. App. 1989)

**MURPHY, Justice.**

The issue in this landlord-tenant case is whether sufficient evidence supports the jury’s findings that the landlord and appellant, Fidelity Mutual Life Insurance Company [“Fidelity”], constructively evicted the tenant, Robert P. Kaminsky, M.D., P.A. [“Dr. Kaminsky”] by breaching the express covenant of quiet enjoyment contained in the parties’ lease. We affirm.

Dr. Kaminsky is a gynecologist whose practice includes performing elective abortions. In May 1983, he executed a lease contract for the rental of approximately 2,861 square feet in the Red Oak Atrium Building for a two year term which began on June 1, 1983. The terms of the lease required Dr. Kaminsky to use the rented space solely as “an office for the practice of medicine.” Fidelity owns the building and hires local companies to manage it. At some time during the lease term, Shelter Commercial Properties

[“Shelter”] replaced the Horne Company as managing agents. Fidelity has not disputed either management company’s capacity to act as its agent.

The parties agree that: (1) they executed a valid lease agreement; (2) Paragraph 35 of the lease contains an express covenant of quiet enjoyment conditioned on Dr. Kaminsky’s paying rent when due, as he did through November 1984; Dr. Kaminsky abandoned the leased premises on or about December 3, 1984 and refused to pay additional rent; anti-abortion protestors began picketing at the building in June of 1984 and repeated and increased their demonstrations outside and inside the building until Dr. Kaminsky abandoned the premises.

When Fidelity sued for the balance due under the lease contract following Dr. Kaminsky’s abandonment of the premises, he claimed that Fidelity constructively evicted him by breaching Paragraph 35 of the lease. Fidelity apparently conceded during trial that sufficient proof of the constructive eviction of Dr. Kaminsky would relieve him of his contractual liability for any remaining rent payments. Accordingly, he assumed the burden of proof and the sole issue submitted to the jury was whether Fidelity breached Paragraph 35 of the lease, which reads as follows:

*Quiet Enjoyment.*

Lessee, on paying the said Rent, and any Additional Rental, shall and may peaceably and quietly have, hold and enjoy the Leased Premises for the said term.

A constructive eviction occurs when the tenant leaves the leased premises due to conduct by the landlord which materially interferes with the tenant’s beneficial use of the premises. *See Downtown Realty, Inc. v. 509 Tremont Bldg.*, 748 S.W.2d 309, 313 (Tex.App.—Houston [14th Dist.] 1988, n.w.h.). Texas law relieves the tenant of contractual liability for any remaining rentals due under the lease if he can establish a constructive eviction by the landlord. . . .

In order to prevail on his claim that Fidelity constructively evicted him and thereby relieved him of his rent obligation, Dr. Kaminsky had to show the following: 1) Fidelity intended that he no longer enjoy the premises, which intent the trier of fact could infer from the circumstances; 2) Fidelity, or those acting for Fidelity or with its permission, committed a material act or omission which substantially interfered with use and enjoyment of

the premises for their leased purpose, here an office for the practice of medicine; 3) Fidelity's act or omission permanently deprived Dr. Kaminsky of the use and enjoyment of the premises; and 4) Dr. Kaminsky abandoned the premises within a reasonable period of time after the act or omission. *E.g., Downtown Realty, Inc.*, 748 S.W.2d at 311 . . . .

[T]he jury found that Dr. Kaminsky had established each element of his constructive eviction defense. The trial court entered judgment that Fidelity take nothing on its suit for delinquent rent.

Fidelity raises four points of error. . . .

Fidelity's first point of error relies on *Angelo v. Deutser*, 30 S.W.2d 707 (Tex.Civ.App.—Beaumont 1930, no writ), *Thomas v. Brin*, 38 Tex.Civ.App. 180, 85 S.W. 842 (1905, no writ) and *Sedberry v. Verplanck*, 31 S.W. 242 (Tex.Civ.App.1895, no writ). These cases all state the general proposition that a tenant cannot complain that the landlord constructively evicted him and breached a covenant of quiet enjoyment, express or implied, when the eviction results from the actions of third parties acting without the landlord's authority or permission. Fidelity insists the evidence conclusively establishes: a) that it did nothing to encourage or sponsor the protestors and; b) that the protestors, rather than Fidelity or its agents, caused Dr. Kaminsky to abandon the premises. Fidelity concludes that reversible error resulted because the trial court refused to set aside the jury's answers to the special issues and enter judgment in Fidelity's favor and because the trial court denied its motion for a new trial. We disagree. . . .

The protests took place chiefly on Saturdays, the day Dr. Kaminsky generally scheduled abortions. During the protests, the singing and chanting demonstrators picketed in the building's parking lot and inner lobby and atrium area. They approached patients to speak to them, distributed literature, discouraged patients from entering the building and often accused Dr. Kaminsky of "killing babies." As the protests increased, the demonstrators often occupied the stairs leading to Dr. Kaminsky's office and prevented patients from entering the office by blocking the doorway. Occasionally they succeeded in gaining access to the office waiting room area.

Dr. Kaminsky complained to Fidelity through its managing agents and asked for help in keeping the protestors away, but became increasingly frustrated by a lack of response to his requests. The record shows that no security personnel were present on Saturdays to exclude protestors from the building, although the lease required Fidelity to provide security ser-

vice on Saturdays. The record also shows that Fidelity's attorneys prepared a written statement to be handed to the protestors soon after Fidelity hired Shelter as its managing agent. The statement tracked TEX. PENAL CODE ANN. § 30.05 (Vernon Supp. 1989) and generally served to inform trespassers that they risked criminal prosecution by failing to leave if asked to do so. Fidelity's attorneys instructed Shelter's representative to "have several of these letters printed up and be ready to distribute them and verbally demand that these people move on and off the property." The same representative conceded at trial that she did not distribute these notices. Yet when Dr. Kaminsky enlisted the aid of the Sheriff's office, officers refused to ask the protestors to leave without a directive from Fidelity or its agent. Indeed, an attorney had instructed the protestors to remain unless the landlord or its representative ordered them to leave. It appears that Fidelity's only response to the demonstrators was to state, through its agents, that it was aware of Dr. Kaminsky's problems.

Both action and lack of action can constitute "conduct" by the landlord which amounts to a constructive eviction. *E.g., Downtown Realty Inc.*, 748 S.W.2d at 311. In *Steinberg v. Medical Equip. Rental Serv., Inc.*, 505 S.W.2d 692 (Tex. Civ. App.—Dallas 1974, no writ) accordingly, the court upheld a jury's determination that the landlord's failure to act amounted to a constructive eviction and breach of the covenant of quiet enjoyment. 505 S.W.2d at 697. Like Dr. Kaminsky, the tenant in Steinberg abandoned the leased premises and refused to pay additional rent after repeatedly complaining to the landlord. The *Steinberg* tenant complained that Steinberg placed trash bins near the entrance to the business and allowed trucks to park and block customer's access to the tenant's medical equipment rental business. The tenant's repeated complaints to Steinberg yielded only a request "to be patient." *Id.* Fidelity responded to Dr. Kaminsky's complaints in a similar manner: although it acknowledged his problems with the protestors, Fidelity, like Steinberg, effectively did nothing to prevent the problems.

This case shows ample instances of Fidelity's failure to act in the fact of repeated requests for assistance despite its having expressly covenanted Dr. Kaminsky's quiet enjoyment of the premises. These instances provided a legally sufficient basis for the jury to conclude that Dr. Kaminsky abandoned the leased premises, not because of the trespassing protestors, but because of Fidelity's lack of response to his complaints about the protestors. Under the circumstances, while it is undisputed that Fidelity did

not “encourage” the demonstrators, its conduct essentially allowed them to continue to trespass. The general rule of the *Angelo*, *Thomas* and *Sedberry* cases, that a landlord is not responsible for the actions of third parties, applies only when the landlord does not permit the third party to act. See e.g., *Angelo*, 30 S.W.2d at 710 [“the act or omission complained of must be that of the landlord and not merely of a third person *acting without his authority or permission*” (emphasis added)]. We see no distinction between Fidelity’s lack of action here, which the record shows resulted in preventing patients’ access to Dr. Kaminsky’s medical office, and the *Steinberg* case where the landlord’s inaction resulted in trucks’ blocking customer access to the tenant’s business. We overrule the first point of error. . . .

In its [final] point of error, Fidelity maintains the evidence is factually insufficient to support the jury’s finding that its conduct permanently deprived Dr. Kaminsky of use and enjoyment of the premises. Fidelity essentially questions the permanency of Dr. Kaminsky’s being deprived of the use and enjoyment of the leased premises. To support its contentions, Fidelity points to testimony by Dr. Kaminsky in which he concedes that none of his patients were ever harmed and that protests and demonstrations continued despite his leaving the Red Oak Atrium building. Fidelity also disputes whether Dr. Kaminsky actually lost patients due to the protests.

The evidence shows that the protestors, whose entry into the building Fidelity failed to prohibit, often succeeded in blocking Dr. Kaminsky’s patients’ access to his medical office. Under the reasoning of the *Steinberg* case, omissions by a landlord which result in patients’ lack of access to the office of a practicing physician would suffice to establish a permanent deprivation of the use and enjoyment of the premises for their leased purpose, here “an office for the *practice* of medicine.” *Steinberg*, 505 S.W.2d at 697; accord, *Downtown Realty, Inc.*, 748 S.W.2d at 312 (noting jury’s finding that a constructive eviction resulted from the commercial landlord’s failure to repair a heating and air conditioning system in a rooming house).

Texas law has long recited the requirement, first stated in *Stillman*, 266 S.W.2d at 916, that the landlord commit a “material and permanent” act or omission in order for his tenant to claim a constructive eviction. However, as the *Steinberg* and *Downtown Realty, Inc.* cases illustrate, the extent to which a landlord’s acts or omissions permanently and materially deprive a tenant of the use and enjoyment of the premises often involves a question of degree. Having reviewed all the evidence before the jury in this case, we

cannot say that its finding that Fidelity's conduct permanently deprived Dr. Kaminsky of the use and enjoyment of his medical office space was so against the great weight and preponderance of the evidence as to be manifestly unjust. We overrule the fourth point of error.

We affirm the judgment of the trial court.

### Notes and Questions

**14.1. Evolution of the doctrine.** As discussed above, English judges widely recognized that tenants could terminate the lease (and sue for damages) if the landlord physically denied them possession of the rented property. Eventually the basic concept was expanded to situations where the landlord commits some act that, while it falls short of an actual eviction, so severely affects the value of the tenancy that the tenant is forced to flee. This is known as *constructive eviction*.

**14.2. Basic constrictive eviction law.** To make a claim of constructive eviction a tenant must show that some act or omission by the landlord substantially interferes with the tenant's use and enjoyment of the property. The tenant also needs to notify the landlord about the problem, give the landlord an opportunity to cure the defect, and then vacate the premises within a reasonable amount of time.

**14.3. Stay or go?** Why might a tenant contemplating bringing a constructive eviction claim worry about the requirement to vacate the premises? Is constructive eviction a more powerful remedy in a place like San Francisco, which has a very tight housing market, or Houston, which has more open units?

**14.4. Landlord's wrongful conduct.** To make use of the doctrine of quiet enjoyment, the tenant must show that the landlord committed some wrongful act. There's wide agreement that any affirmative step taken by the landlord that impedes the tenant's use of the property can meet the requirement of an "act." Examples would include burning toxic substances on the property, prolonged construction activities, or a substantial alteration of an essential feature of the leased premises. The trickier doctrinal question is whether a landlord's failure to act can ever qualify as the wrongful conduct. Traditionally, courts hesitated to impose liability on landlords for their omissions, but the law of most states now asserts that a "lack of action" can constitute the required act. For example, a landlord's failure to provide heat in the winter months is generally found to violate the covenant of quiet enjoyment. Some courts, nervous about unjustly expanding landlords' potential liability, deem omissions wrongful only when the landlord fails to fulfill some clear duty—either a duty bargained for in the lease or a statutory duty.

14.5. **Troublesome tenants.** Suppose your landlord rents the floor above your apartment to the members of a Led Zeppelin cover band. If the band practices every night between the hours of 3:00 am and 4:00 am, could you bring a successful constructive eviction claim against the landlord?

14.6. **Third parties.** What if the Led Zeppelin cover band played every night at a club across the street? If the noise from the bar kept you awake, could you sue your landlord for constructive eviction?

## 14.2 The Implied Warranty of Habitability

Although the covenant of quiet enjoyment offers tenants some protections, the doctrine—without more—can leave renters exposed to dreadful living conditions. What if cockroaches invade a tenant’s apartment? Or a sewer pipe in the basement begins to leak? What if a storm shatters the windows of the apartment? Or a wall of a building falls down? Unless the landlord somehow caused any of these disasters (or had a clearly articulated duty to fix them) a tenant cannot bring a successful case under the covenant of quiet enjoyment. In *Hughes v. Westchester Development Corp.*, 77 F.2d 550 (D.C. Cir. 1935), for example, vermin invaded the tenant’s apartment, making it “impossible to use the kitchen and toilet facilities.” Despite the infestation, the court found that the tenant remained responsible for the rent because the landlord was not to blame for the bugs’ sudden appearance. Leases, the court ruled, contained no implied promise that the premises were fit for the purpose it was leased. If tenants desired more and better protection, they had the burden to bargain for such provisions in the lease.

All of this changed in the late 1960s and early 70s. The most lasting accomplishment of the tenants’ rights movement was the widespread adoption of the *implied warranty of habitability*. In the United States, only Arkansas has failed to adopt the rule as of 2023. In a nutshell, the implied warranty of habitability imposes a duty on landlords to provide residential tenants with a clean, safe, and habitable living space.

***Hilder v. St. Peter***  
478 A.2d 202 (Vt. 1984)

**BILLINGS, Chief Justice.**

Defendants appeal from a judgment rendered by the Rutland Superior Court. The court ordered defendants to pay plaintiff damages in the amount

of \$4,945.00, which represented “reimbursement of all rent paid and additional compensatory damages” for the rental of a residential apartment over a fourteen month period in defendants’ Rutland apartment building. Defendants filed a motion for reconsideration on the issue of the amount of damages awarded to the plaintiff, and plaintiff filed a cross-motion for reconsideration of the court’s denial of an award of punitive damages. The court denied both motions. On appeal, defendants raise [two] issues for our consideration: first, whether the court correctly calculated the amount of damages awarded the plaintiff; secondly, whether the court’s award to plaintiff of the entire amount of rent paid to defendants was proper since the plaintiff remained in possession of the apartment for the entire fourteen month period. . . .

The facts are uncontested. In October, 1974, plaintiff began occupying an apartment at defendants’ 10–12 Church Street apartment building in Rutland with her three children and new-born grandson. Plaintiff orally agreed to pay defendant Stuart St. Peter \$140 a month and a damage deposit of \$50; plaintiff paid defendant the first month’s rent and the damage deposit prior to moving in. Plaintiff has paid all rent due under her tenancy. Because the previous tenants had left behind garbage and items of personal belongings, defendant offered to refund plaintiff’s damage deposit if she would clean the apartment herself prior to taking possession. Plaintiff did clean the apartment, but never received her deposit back because the defendant denied ever receiving it. Upon moving into the apartment, plaintiff discovered a broken kitchen window. Defendant promised to repair it, but after waiting a week and fearing that her two year old child might cut herself on the shards of glass, plaintiff repaired the window at her own expense. Although defendant promised to provide a front door key, he never did. For a period of time, whenever plaintiff left the apartment, a member of her family would remain behind for security reasons. Eventually, plaintiff purchased and installed a padlock, again at her own expense. After moving in, plaintiff discovered that the bathroom toilet was clogged with paper and feces and would flush only by dumping pails of water into it. Although plaintiff repeatedly complained about the toilet, and defendant promised to have it repaired, the toilet remained clogged and mechanically inoperable throughout the period of plaintiff’s tenancy. In addition, the bathroom light and wall outlet were inoperable. Again, the defendant agreed to repair the fixtures, but never did. In order to have light in the bathroom, plaintiff at-

tached a fixture to the wall and connected it to an extension cord that was plugged into an adjoining room. Plaintiff also discovered that water leaked from the water pipes of the upstairs apartment down the ceilings and walls of both her kitchen and back bedroom. Again, defendant promised to fix the leakage, but never did. As a result of this leakage, a large section of plaster fell from the back bedroom ceiling onto her bed and her grandson's crib. Other sections of plaster remained dangling from the ceiling. This condition was brought to the attention of the defendant, but he never corrected it. Fearing that the remaining plaster might fall when the room was occupied, plaintiff moved her and her grandson's bedroom furniture into the living room and ceased using the back bedroom. During the summer months an odor of raw sewage permeated plaintiff's apartment. The odor was so strong that the plaintiff was ashamed to have company in her apartment. Responding to plaintiff's complaints, Rutland City workers unearthed a broken sewage pipe in the basement of defendants' building. Raw sewage littered the floor of the basement, but defendant failed to clean it up. Plaintiff also discovered that the electric service for her furnace was attached to her breaker box, although defendant had agreed, at the commencement of plaintiff's tenancy, to furnish heat.

In its conclusions of law, the court held that the state of disrepair of plaintiff's apartment, which was known to the defendants, substantially reduced the value of the leasehold from the agreed rental value, thus constituting a breach of the implied warranty of habitability. The court based its award of damages on the breach of this warranty and on breach of an express contract. Defendant argues that the court misapplied the law of Vermont relating to habitability because the plaintiff never abandoned the demised premises and, therefore, it was error to award her the full amount of rent paid. Plaintiff counters that, while never expressly recognized by this Court, the trial court was correct in applying an implied warranty of habitability and that under this warranty, abandonment of the premises is not required. Plaintiff urges this Court to affirmatively adopt the implied warranty of habitability.

Historically, relations between landlords and tenants have been defined by the law of property. Under these traditional common law property concepts, a lease was viewed as a conveyance of real property. See Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 Cornell L.Q. 489, 489-

90 (1971) (hereinafter cited as *Expansion of Tenants' Rights*). The relationship between landlord and tenant was controlled by the doctrine of caveat lessee; that is, the tenant took possession of the demised premises irrespective of their state of disrepair. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 Wis. L. Rev. 19, 27–28. The landlord's only covenant was to deliver possession to the tenant. The tenant's obligation to pay rent existed independently of the landlord's duty to deliver possession, so that as long as possession remained in the tenant, the tenant remained liable for payment of rent. The landlord was under no duty to render the premises habitable unless there was an express covenant to repair in the written lease. *Expansion of Tenants' Rights, supra*, at 490. The land, not the dwelling, was regarded as the essence of the conveyance.

An exception to the rule of caveat lessee was the doctrine of constructive eviction. *Lemle v. Breeden*, 462 P.2d 470, 473 (Haw. 1969). Here, if the landlord wrongfully interfered with the tenant's enjoyment of the demised premises, or failed to render a duty to the tenant as expressly required under the terms of the lease, the tenant could abandon the premises and cease paying rent. *Legier v. Deveneau*, 126 A. 392, 393 (Vt. 1924).

Beginning in the 1960's, American courts began recognizing that this approach to landlord and tenant relations, which had originated during the Middle Ages, had become an anachronism in twentieth century, urban society. Today's tenant enters into lease agreements, not to obtain arable land, but to obtain safe, sanitary and comfortable housing.

[T]hey seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

*Javins v. First National Realty Corp.*, 428 F.2d 1071, 1074 (D.C.Cir.), cert. denied, 400 U.S. 925, 91 S.Ct. 186, 27 L.Ed.2d 185 (1970).

Not only has the subject matter of today's lease changed, but the characteristics of today's tenant have similarly evolved. The tenant of the Middle Ages was a farmer, capable of making whatever repairs were necessary to his primitive dwelling. *Green v. Superior Court*, 517 P.2d 1168, 1172 (Cal. 1974). Additionally, "the common law courts assumed that an equal

bargaining position existed between landlord and tenant. . . ." Note, *The Implied Warranty of Habitability: A Dream Deferred*, 48 UMKC L.REV. 237, 238 (1980) (hereinafter cited as *A Dream Deferred*).

In sharp contrast, today's residential tenant, most commonly a city dweller, is not experienced in performing maintenance work on urban, complex living units. *Green v. Superior Court, supra*, 517 P.2d at 1173. The landlord is more familiar with the dwelling unit and mechanical equipment attached to that unit, and is more financially able to "discover and cure" any faults and break-downs. *Id.* Confronted with a recognized shortage of safe, decent housing, see 24 V.S.A. § 4001(1), today's tenant is in an inferior bargaining position compared to that of the landlord. *Park West Management Corp. v. Mitchell*, 391 N.E.2d 1288, 1292 (N.Y. 1979). Tenants vying for this limited housing are "virtually powerless to compel the performance of essential services." *Id.*

In light of these changes in the relationship between tenants and landlords, it would be wrong for the law to continue to impose the doctrine of caveat lessee on residential leases.

The modern view favors a new approach which recognizes that a lease is essentially a contract between the landlord and the tenant wherein the landlord promises to deliver and maintain the demised premises in habitable condition and the tenant promises to pay rent for such habitable premises. These promises constitute interdependent and mutual considerations. Thus, the tenant's obligation to pay rent is predicated on the landlord's obligation to deliver and maintain the premises in habitable condition.

*Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 842 (Mass. 1973).

Recognition of residential leases as contracts embodying the mutual covenants of habitability and payment of rent does not represent an abrupt change in Vermont law. Our case law has previously recognized that contract remedies are available for breaches of lease agreements. *Clarendon Mobile Home Sales, Inc. v. Fitzgerald*, 381 A.2d 1063, 1065 (Vt. 1977). . . . More significantly, our legislature, in establishing local housing authorities, 24 V.S.A. § 4003, has officially recognized the need for assuring the existence of adequate housing.

[S]ubstandard and decadent areas exist in certain portions of the state of Vermont and . . . there is not . . . an adequate supply of decent, safe and sanitary housing for persons of low income and/or elderly persons of low income, available for rents which such persons can afford to pay . . . this situation tends to cause an increase and spread of communicable and chronic disease . . . [and] constitutes a menace to the health, safety, welfare and comfort of the inhabitants of the state and is detrimental to property values in the localities in which it exists . . .

24 V.S.A. § 4001(4). In addition, this Court has assumed the existence of an implied warranty of habitability in residential leases. *Birkenhead v. Coombs*, 465 A.2d 244, 246 (Vt. 1983).

Therefore, we now hold expressly that in the rental of any residential dwelling unit an implied warranty exists in the lease, whether oral or written, that the landlord will deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean and fit for human habitation. This warranty of habitability is implied in tenancies for a specific period or at will. *Boston Housing Authority v. Hemingway*, *supra*, 293 N.E.2d at 843. Additionally, the implied warranty of habitability covers all latent and patent defects in the essential facilities of the residential unit. *Id.* Essential facilities are “facilities vital to the use of the premises for residential purposes. . . .” *Kline v. Burns*, 276 A.2d 248, 252 (N.H. 1971). This means that a tenant who enters into a lease agreement with knowledge of any defect in the essential facilities cannot be said to have assumed the risk, thereby losing the protection of the warranty. Nor can this implied warranty of habitability be waived by any written provision in the lease or by oral agreement.

In determining whether there has been a breach of the implied warranty of habitability, the courts may first look to any relevant local or municipal housing code; they may also make reference to the minimum housing code standards enunciated in 24 V.S.A. § 5003(c)(1)–5003(c)(5). A substantial violation of an applicable housing code shall constitute *prima facie* evidence that there has been a breach of the warranty of habitability. “[O]ne or two minor violations standing alone which do not affect” the health or safety of the tenant, shall be considered *de minimis* and not a breach of the warranty. *Javins v. First National Realty Corp.*, *supra*, 428 F.2d at 1082 n. 63. . . . In addition, the landlord will not be liable for defects

caused by the tenant. *Javins v. First National Realty Corp.*, *supra*, 428 F.2d at 1082 n. 62.

However, these codes and standards merely provide a starting point in determining whether there has been a breach. Not all towns and municipalities have housing codes; where there are codes, the particular problem complained of may not be addressed. *Park West Management Corp. v. Mitchell*, *supra*, 391 N.E.2d at 1294. In determining whether there has been a breach of the implied warranty of habitability, courts should inquire whether the claimed defect has an impact on the safety or health of the tenant. *Id.*

In order to bring a cause of action for breach of the implied warranty of habitability, the tenant must first show that he or she notified the landlord "of the deficiency or defect not known to the landlord and [allowed] a reasonable time for its correction." *King v. Moorehead*, *supra*, 495 S.W.2d at 76.

Because we hold that the lease of a residential dwelling creates a contractual relationship between the landlord and tenant, the standard contract remedies of rescission, reformation and damages are available to the tenant when suing for breach of the implied warranty of habitability. *Lemle v. Breedon*, *supra*, 462 P.2d at 475. The measure of damages shall be the difference between the value of the dwelling as warranted and the value of the dwelling as it exists in its defective condition. *Birkenhead v. Coombs*, *supra*, 465 A.2d at 246. In determining the fair rental value of the dwelling as warranted, the court may look to the agreed upon rent as evidence on this issue. *Id.* "[I]n residential lease disputes involving a breach of the implied warranty of habitability, public policy militates against requiring expert testimony" concerning the value of the defect. *Id.* at 247. The tenant will be liable only for "the reasonable rental value [if any] of the property in its imperfect condition during his period of occupancy." *Berzito v. Gambino*, 308 A.2d 17, 22 (N.J. 1973).

We also find persuasive the reasoning of some commentators that damages should be allowed for a tenant's discomfort and annoyance arising from the landlord's breach of the implied warranty of habitability. See Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CAL. L. REV. 1444, 1470–73 (1974) (hereinafter cited as *A New Doctrine*); *A Dream Deferred*, *supra*, at 250–51. Damages for annoyance and discomfort are reasonable in light of the fact that:

the residential tenant who has suffered a breach of the warranty . . . cannot bathe as frequently as he would like or at all if there is inadequate hot water; he must worry about rodents harassing his children or spreading disease if the premises are infested; or he must avoid certain rooms or worry about catching a cold if there is inadequate weather protection or heat. Thus, discomfort and annoyance are the common injuries caused by each breach and hence the true nature of the general damages the tenant is claiming.

Moskovitz, *A New Doctrine*, *supra*, at 1470–71. Damages for discomfort and annoyance may be difficult to compute; however, “[t]he trier [of fact] is not to be deterred from this duty by the fact that the damages are not susceptible of reduction to an exact money standard.” *Vermont Electric Supply Co. v. Andrus*, 315 A.2d 456, 459 (Vt. 1974).

Another remedy available to the tenant when there has been a breach of the implied warranty of habitability is to withhold the payment of future rent. *King v. Moorehead*, *supra*, 495 S.W.2d at 77. The burden and expense of bringing suit will then be on the landlord who can better afford to bring the action. In an action for ejectment for nonpayment of rent, 12 V.S.A. § 4773, “[t]he trier of fact, upon evaluating the seriousness of the breach and the ramifications of the defect upon the health and safety of the tenant, will abate the rent at the landlord’s expense in accordance with its findings.” *A Dream Deferred*, *supra*, at 248. The tenant must show that: (1) the landlord had notice of the previously unknown defect and failed, within a reasonable time, to repair it; and (2) the defect, affecting habitability, existed during the time for which rent was withheld. See *A Dream Deferred*, *supra*, at 248–50. Whether a portion, all or none of the rent will be awarded to the landlord will depend on the findings relative to the extent and duration of the breach. *Javins v. First National Realty Corp.*, *supra*, 428 F.2d at 1082–83. Of course, once the landlord corrects the defect, the tenant’s obligation to pay rent becomes due again. *Id.* at 1083 n. 64.

Additionally, we hold that when the landlord is notified of the defect but fails to repair it within a reasonable amount of time, and the tenant subsequently repairs the defect, the tenant may deduct the expense of the repair from future rent. 11 Williston on Contracts § 1404 (3d ed. W. Jaeger 1968); *Marini v. Ireland*, 265 A.2d 526, 535 (N.J. 1970).

In addition to general damages, we hold that punitive damages may be available to a tenant in the appropriate case. Although punitive damages are generally not recoverable in actions for breach of contract, there are cases in which the breach is of such a willful and wanton or fraudulent nature as to make appropriate the award of exemplary damages. *Clarendon Mobile Home Sales, Inc. v. Fitzgerald, supra*, 381 A.2d at 1065. A willful and wanton or fraudulent breach may be shown "by conduct manifesting personal ill will, or carried out under circumstances of insult or oppression, or even by conduct manifesting . . . a reckless or wanton disregard of [one's] rights . . ." *Sparrow v. Vermont Savings Bank*, 112 A. 205, 207 (Vt. 1921). When a landlord, after receiving notice of a defect, fails to repair the facility that is essential to the health and safety of his or her tenant, an award of punitive damages is proper. *111 East 88th Partners v. Simon*, 434 N.Y.S.2d 886, 889 (N.Y. Civ. Ct. 1980).

The purpose of punitive damages . . . is to punish conduct which is morally culpable. . . . Such an award serves to deter a wrongdoer . . . from repetitions of the same or similar actions. And it tends to encourage prosecution of a claim by a victim who might not otherwise incur the expense or inconvenience of private action. . . . The public benefit and a display of ethical indignation are among the ends of the policy to grant punitive damages.

*Davis v. Williams*, 402 N.Y.S.2d 92, 94 (N.Y.Civ.Ct.1977).

In the instant case, the trial court's award of damages, based in part on a breach of the implied warranty of habitability, was not a misapplication of the law relative to habitability. Because of our holding in this case, the doctrine of constructive eviction, wherein the tenant must abandon in order to escape liability for rent, is no longer viable. When, as in the instant case, the tenant seeks, not to escape rent liability, but to receive compensatory damages in the amount of rent already paid, abandonment is similarly unnecessary. *Northern Terminals, Inc. v. Smith Grocery & Variety, Inc., supra*, 418 A.2d at 26-27. Under our holding, when a landlord breaches the implied warranty of habitability, the tenant may withhold future rent, and may also seek damages in the amount of rent previously paid.

In its conclusions of law the trial court stated that the defendants' failure to make repairs was compensable by damages to the extent of reimbursement of all rent paid and additional compensatory damages. The

court awarded plaintiff a total of \$4,945.00; \$3,445.00 represents the entire amount of rent plaintiff paid, plus the \$50.00 deposit. . . .

Additionally, the court denied an award to plaintiff of punitive damages on the ground that the evidence failed to support a finding of willful and wanton or fraudulent conduct. *See Clarendon Mobile Home Sales, Inc. v. Fitzgerald, supra*, 381 A.2d at 1065. The facts in this case, which defendants do not contest, evince a pattern of intentional conduct on the part of defendants for which the term “slumlord” surely was coined. Defendants’ conduct was culpable and demeaning to plaintiff and clearly expressive of a wanton disregard of plaintiff’s rights. The trial court found that defendants were aware of defects in the essential facilities of plaintiff’s apartment, promised plaintiff that repairs would be made, but never fulfilled those promises. The court also found that plaintiff continued, throughout her tenancy, to pay her rent, often in the face of verbal threats made by defendant Stuart St. Peter. These findings point to the “bad spirit and wrong intention” of the defendants, *Glidden v. Skinner*, 458 A.2d 1142, 1144 (Vt. 1983), and would support a finding of willful and wanton or fraudulent conduct, contrary to the conclusions of law and judgment of the trial judge. However, the plaintiff did not appeal the court’s denial of punitive damages, and issues not appealed and briefed are waived. *R. Brown & Sons, Inc. v. International Harvester Corp.*, 453 A.2d 83, 84 (Vt. 1982).

### Notes and Questions

14.7. **Residential v. commercial.** Unlike the covenant of quiet enjoyment, the implied warranty of habitability only applies to residential leases. Commercial tenants still largely operate under common-law legal rules. Commonly, commercial landlords and tenants do not rely on the default rules, but rather assign the duty of upkeep and repair with an express provision in the lease.

14.8. **What is habitability?** Do all defects in an apartment amount to violations? What is the standard of habitability as laid out in *Hilder*?

14.9. **Paternalism?** Is the implied warranty of habitability too paternalistic? Some economists argue that the poorest Americans should have more freedom over how they spend their limited dollars. Isn’t it possible that some individuals might want to occupy a really cheap (if slightly dangerous) dwelling so that they have more money to spend on healthy foods, transportation, and clothes? Would

it matter if the evidence showed that such apartments were in fact cheaper than “habitable” apartments?

14.10. **Necessary?** Do you agree with the arguments made by the court in *Hilder* about the necessity of the implied warranty of habitability? Don’t landlords already have excellent incentives to maintain their buildings?

14.11. **Arkansas and beyond.** As mentioned above, Arkansas is the one state that has not adopted the implied warranty of habitability—either by statute or judicial fiat. Is Arkansas a Mad Max-style hellscape for renters? Are tenants there worse (or worse off) than the tenants in other states? Some people think so. Vice magazine recently dubbed Arkansas, “The Worst Place to Rent in America.” See *Arkansas: The Worst Place to Rent in America*, VICE NEWS (June 24, 2014), [link](#). But does the implied warranty of habitability provide much practical protection? Do poor tenants know about it? Do they have the resources to push back against aggressive landlords who threaten lawsuits and other forms of retaliation? Professor David Super has suggested that the decision of tenants’ rights movement to focus on habitability over affordability and overcrowding was a strategic mistake. See David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389-463 (2011). Is there a nirvana for renters anywhere?

14.12. **Procedure & remedies.** If a tenant believes his apartment does not meet the standard of habitability, he must first must notify the landlord of the defects and give the landlord a reasonable amount of time to cure the problems. If the landlord either cannot or will not make repairs, the implied warranty of habitability offers the renter a menu of options. Each option presents a different combination of costs and risks to the tenant. If the landlord breaches, the tenant may:

1. *Leave, terminate contract.* The tenant may consider the lease terminated and move out.
2. *Stay and sue for damages.* As with the covenant of quiet enjoyment, a tenant may stay in the unit and pay rent, while suing the landlord for damages. There is significant disagreement among jurisdictions about how to calculate damages. In *Hilder*, the court uses the difference between the rental price of the dwelling if it met the standard of habitability and the value of the dwelling as it exists; the rent charged is not evidence of actual value, but rather evidence of the appropriate price if it met the standard of habitability. [Note that given the court’s calculation, the value was apparently zero?] Other courts look at the difference between the amount of rent stated in the lease and the fair market value of the premises. What is the better approach? Should the rent charged be considered evidence of fair market value? If not, why not?

3. *Stay and charge the cost of repair.* A tenant has the option to fix the defect and then deduct the cost of repair from the rent.
4. *Stay and withhold rent.* In most jurisdictions, a tenant can withhold the entire rent for violations of the implied warranty of habitability (although, a cautious tenant should pay the rent into an escrow account). This is a very powerful remedy. First, it gives the landlord strong incentive to respond to valid complaints from tenants. Second, it puts the burden on the landlord (rather than the tenant) to initiate a lawsuit when contested issues arise. Finally, if the landlord does move to evict the tenant for non-payment, violations of the implied warranty of habitability can serve as a defense.
5. *Extreme violations.* Tenants have won punitive damages in cases where the landlord committed repeated or gruesome violations of the implied warranty.

14.13. What if the landlord is unable to remedy a violation within a reasonable time, due to external circumstances? For example, in Flint, Michigan, a municipal utility planning error left residents with hazardous tap water in 2014. Assuming that water filtration or other in-home solutions were not options, would a landlord be on the hook for the city's error?

The REVISED UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT, proposed in 2015 but not yet adopted in any state (as of 2024), recognized that this could be a problem. The model code adds Section 403, which "limits the landlord's liabilities in cases where it is impossible for the landlord to remedy a noncompliance." NAT'L CONF. OF COMM'RS ON UNIF. STATE LS., REVISED UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT 2 (2015), [link](#). Specifically, that section provides that in cases where remediation is impossible, the tenant may either terminate the lease or "recover actual damages limited to the diminution in the value of the dwelling unit." *Id.* § 403(c). The landlord may also terminate the lease upon 30 days' notice, and a landlord who does so may not rent the unit for 90 days thereafter. *Id.* § 403(d).

Given that the RURLTA has not been adopted, how should state courts treat these situations? Are there doctrines from contract law that might help?

### **Problem**

14.14. The Mad Hatter and the Alice each decide to rent an apartment in Wonderland. The Mad Hatter walks into a large apartment and sees a hole in the roof, but he decides to rent the unit anyway. The apartment that Alice decides to lease has no obvious problems. The next day, however, some mold spots appear by one of the vents. The mold grows rapidly and Alice starts to have regular headaches and

some trouble breathing. Additionally, an unknown troublemaker smashed Alice's air conditioning unit and it no longer works. Can either the Mad Hatter or Alice win a lawsuit against their landlord if their problems aren't fixed?

### 14.3 Retaliatory Eviction

#### *Imperial Colliery Co. v. Fout*

373 S.E.2d 489 (W. Va. 1988)

Danny H. Fout, the defendant below, appeals a summary judgment dismissing his claim of retaliatory eviction based on the provisions of W. Va. Code, 55-3A-3(g), which is our summary eviction statute. Imperial Colliery had instituted an eviction proceeding and Fout sought to defend against it, claiming that his eviction was in retaliation for his participation in a labor strike.

This case presents two issues: (1) whether a residential tenant who is sued for possession of rental property under W. Va. Code, 55-3A-1, *et seq.*, may assert retaliation by the landlord as a defense, and (2) whether the retaliation motive must relate to the tenant's exercise of a right incidental to the tenancy.

Fout is presently employed by Milburn Colliery Company as a coal miner. For six years, he has leased a small house trailer lot in Burnwell, West Virginia, from Imperial Colliery Company. It is alleged that Milburn and Imperial are interrelated companies. A written lease was signed by Fout and an agent of Imperial in June, 1983. This lease was for a primary period of one month, and was terminable by either party upon one month's notice. An annual rental of \$1.00 was payable in advance on January 1 of each year. No subsequent written leases were signed by the parties.

On February 14, 1986, Imperial advised Fout by certified letter that his lease would be terminated as of March 31, 1986. Fout's attorney corresponded with Imperial before the scheduled termination date. He advised that due to various family and monetary problems, Fout would be unable to timely vacate the property. Imperial voluntarily agreed to a two-month extension of the lease. A second letter from Fout's attorney, dated May 27, 1986, recited Fout's personal problems and requested that Imperial's attempts to oust Fout be held "in abeyance" until they were resolved. A

check for \$1.00 was enclosed to cover the proposed extension. Imperial did not reply.

On June 11, 1986, Imperial sued for possession of the property, pursuant to W. Va. Code, 55-3A-1, *et seq.*, in the Magistrate Court of Kanawha County. Fout answered and removed the suit to the circuit court on June 23, 1986. He asserted as a defense that Imperial's suit was brought in retaliation for his involvement in the United Mine Workers of America and, more particularly, in a selective strike against Milburn. Imperial's retaliatory motive was alleged to be in violation of the First Amendment rights of speech and assembly, and of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* Fout also counter-claimed, seeking an injunction against Imperial and damages for annoyance and inconvenience.

After minimal discovery, Imperial moved for summary judgment. The circuit court granted Imperial's motion in an amended judgment order dated October 8, 1986, relying principally upon *Criss v. Salvation Army Residences*, 173 W.Va. 634, 319 S.E.2d 403 (1984). The court concluded that the retaliation defense "must derive from, or in some respect be related to, exercise by the tenant of rights incident to his capacity as a 'tenant'." Since Fout's participation in the labor strike was admittedly unrelated to his tenancy, the defense was dismissed and possession of the property was awarded to Imperial. It is from this order that Fout appeals.

Our initial inquiry is whether retaliation by the landlord may be asserted by the tenant as a defense in a suit under W. Va. Code, 55-3A-3(g). We addressed this issue in *Criss v. Salvation Army Residences*, *supra*, and stated without any extended discussion that this section "specifically provides for the defense of retaliation." 173 W. Va. at 640, 319 S.E.2d at 409. We did not have occasion in *Criss* to trace the development of the retaliatory eviction defense.

It appears that the first case that recognized retaliatory eviction as a defense to a landlord's eviction proceeding was *Edwards v. Habib*, 397 F.2d 687 (D.C.Cir.1968), *cert. denied*, 393 U.S. 1016 (1969). There, a month-to-month tenant who resided in a District of Columbia apartment complex reported to a local health agency a number of sanitary code violations existing in her apartment. The agency investigated and ordered that remedial steps be taken by the landlord, who then advised Edwards that her lease was terminated. When the landlord sued for possession of the premises,

Edwards alleged the suit was brought in retaliation for her reporting of the violations. A verdict was directed for the landlord and Edwards appealed.

On appeal, the court reviewed at length the goals sought to be advanced by local sanitary and safety codes. It concluded that to allow retaliatory evictions by landlords would seriously jeopardize the efficacy of the codes. A prohibition against such retaliatory conduct was therefore to be implied, even though the regulations were silent on the matter.

Many states have protected tenant rights either on the *Edwards* theory or have implied such rights from the tenant's right of habitability. Others have utilized statutes analogous to section 5.101 of the Uniform Residential Landlord and Tenant Act, 7B U.L.A. 503 (1985), which is now adopted in fifteen jurisdictions. Similar landlord and tenant reform statutes in seventeen other states also provide protection for tenancy-related activities.

Under W. Va. Code, 37-6-30, a tenant is, with respect to residential property, entitled to certain rights to a fit and habitable dwelling. In *Teller v. McCoy*, 162 W. Va. 367, 253 S.E.2d 114 (1978), we spoke at some length of the common law right of habitability which a number of courts had developed to afford protection to the residential tenant. We concluded that these rights paralleled and were spelled out in more detail in W. Va. Code, 37-6-30. In *Teller*, we also fashioned remedies for the tenant where there had been a breach of the warranty of habitability. However, we had no occasion to discuss the retaliatory eviction issue in *Teller*.

The central theme underlying the retaliatory eviction defense is that a tenant should not be punished for claiming the benefits afforded by health and safety statutes passed for his protection. These statutory benefits become a part of his right of habitability. If the right to habitability is to have any meaning, it must enable the tenant to exercise that right by complaining about unfit conditions without fear of reprisal by his landlord. See Annot., 40 A.L.R.3d 753 (1971).

After the seminal decision in *Edwards*, other categories of tenant activity were deemed to be protected. Such activity was protected against retaliation where it bore a relationship to some legitimate aspect of the tenancy. For example, some cases provided protection for attempts by tenants to organize to protect their rights as tenants. Others recognized the right to press complaints directly against the landlord via oral communications, petitions, and "repair and deduct" remedies. . . .

A few courts recognize that even where a tenant's activity is only indirectly related to the tenancy relationship, it may be protected against retaliatory conduct if such conduct would undermine the tenancy relationship. Typical of these cases is *Winward Partners v. Delos Santos*, 59 Haw. 104, 577 P.2d 326 (1978). There a group of month-to-month tenants gave testimony before a state land use commission in opposition to a proposal to redesignate their farm property from "agricultural" to "urban" uses. The proposal was sponsored by the landlord, a land developer. As a result of coordinated activity by the tenants, the proposal was defeated. Within six months, the landlord ordered the tenants to vacate the property and brought suit for possession.

The Hawaii Supreme Court noted that statutory law provided for public hearings on proposals to redesignate property, and specifically invited the views of the affected tenants. The court determined that the legislative policy encouraging such input would be jeopardized "if . . . [landlords] were permitted to retaliate against . . . tenants for opposing land use changes in a public forum." 59 Haw. at 116, 577 P.2d at 333. It relied on *Pohlman v. Metropolitan Trailer Park, Inc.*, 126 N.J.Super. 114, 312 A.2d 888 (Ch.Div.1973), which involved a similar fact pattern where tenants' intervention in zoning matters to protect their tenancy was sufficiently germane to the landlord-tenant relationship to support the defense of retaliatory eviction. See also *S.P. Growers Ass'n v. Rodriguez*, 17 Cal.3d 719, 552 P.2d 721, 131 Cal. Rptr. 761 (1976) (retaliation for suit by tenant charging violation of Farm Labor Contractor Registration Act, 7 U.S.C. § 2041, et seq.).

The Legislature, in giving approval to the retaliation defense, must have intended to bring our State into line with the clear weight of case law and statutory authority outlined above. We accordingly hold that retaliation may be asserted as a defense to a summary eviction proceeding under W. Va. Code, 55-3A-1, et seq., if the landlord's conduct is in retaliation for the tenant's exercise of a right incidental to the tenancy.

Fout seeks to bring this case within the *Windward* line of authority. He argues principally that Imperial's conduct violated a public policy which promotes the rights of association and free speech by tenants. We do not agree, simply because the activity that Fout points to as triggering his eviction was unrelated to the habitability of his premises.

From the foregoing survey of law, we are led to the conclusion that the retaliatory eviction defense must relate to activities of the tenant incidental to the tenancy. First Amendment rights of speech and association unrelated to the tenant's property interest are not protected under a retaliatory eviction defense in that they do not arise from the tenancy relationship. Such rights may, of course, be vindicated on other independent grounds.

For the reasons discussed above, the judgment of the Circuit Court of Kanawha County is affirmed.

### Notes and Questions

14.15. **The basic law.** In states that recognize retaliatory eviction, a landlord may not punish tenants when they exercise legal rights incidental to their tenancy. Generally, this means that a landlord cannot raise the rent, reduce services, refuse to renew a lease, or bring an eviction action for the purpose of retaliating against a tenant who has complained about the condition of the unit, filed a lawsuit concerning the fitness of the unit, contacted a local agency, or exercised rights under the implied warranty of habitability.

14.16. **Legal change.** Under the traditional English common law, a landlord could raise the rent or refuse to renew a tenant's lease for any reason. How does the court in *Imperial Colliery* justify changing a long-settled rule?

14.17. **Rise of the doctrine.** The doctrine of retaliatory eviction came to prominence around the same time as the implied warranty of habitability. What's the link between these two rules?

14.18. **Retaliate for what?** West Virginia, like most states, protects tenants from retaliatory eviction. In the case above, Fout presented evidence that he lost his tenancy as a result of retaliation by his landlord. Why then did Fout lose? Do you agree with the limitations that West Virginia has put on the doctrine of retaliatory eviction? Why should tenants fear losing their homes if they exercise their First Amendment rights?

14.19. **Property serves human values?** Recall the *Marsh* case (company owned town cannot prevent distribution of pamphlets on sidewalk) and the *Shack* case (property owners cannot bar social service workers from meeting with migrant laborers) from earlier in the semester. In those opinions we saw that property rights are occasionally trumped other values. Why don't Fout's rights under the First Amendment and the National Labor Relations Act outweigh his landlord's desire to kick him out? Can you distinguish *Imperial Colliery* from *Marsh* and *Shack*?

14.20. **Is housing special?** Is housing a good like any other, or is it somehow different from most things we buy and sell on the market? In continental European countries there's a tentative national consensus that all housing—even privately owned apartments—has a uniquely public or social dimension. As a result, many European nations grant citizens strong protections against forced relocations. For example, “good faith” eviction schemes are pervasive. In a “good faith” jurisdiction, a landlord can only refuse to renew a tenancy for a good reason—generally some faulty behavior on the part of the tenant (damaging the premise, creating a nuisance, breaching a material term in the lease) or the landlord’s desire to remodel the unit. Should U.S. states adopt such a rule?

14.21. **Remedies.** What’s the appropriate remedy for a tenant who wins a retaliatory eviction case?

14.22. **Establishing motive.** Peter Pan calls his local Board of Health to complain about the conditions in The Neverland Apartments, where he rents a two-bedroom unit. The landlord, Hook, is furious at Pan. They get into a heated screaming match in front of the building. If Hook waits a year and then dramatically raises Pan’s rent, will Pan be able to win a retaliatory eviction case? What if Hook waits six months? Three months? Some states require the tenant to show that the landlord would not have taken action “but for” the tenant exercising a right. Because of the difficulties in establishing motive, other states employ a burden-shifting model in retaliatory eviction cases. In these jurisdictions, the law presumes that the landlord has acted with a retaliatory motive if the landlord raises the rent (or takes another retaliatory action) within a certain amount of time after the tenant has availed himself of a legal entitlement. The window of time varies from three months to a year, but many states use a six-month period. Importantly, the presumption against the landlord is rebuttable.

14.23. **How common is retaliation?** In his book, *Evicted: Poverty and Profit in the American City*, Matthew Desmond recounts an anecdote about a landlord who would immediately begin preparing eviction papers as soon as his tenants complained about their living conditions.

## 14.4 Wrapping Up

The following rental agreement is modeled on an actual lease that a friend of the casebook authors was asked to sign. Do you see any potential problems for a tenant? Would you sign this lease?

**Residential Rental Agreement and Contract**

THIS AGREEMENT (hereinafter known as the “Lease” or the “Agreement”) is made and entered into this 1st day of September 2015, between **Peter Rabbit** (hereinafter referred to as the “Tenant”) and **Mr. McGregor** (hereinafter referred to as the “Landlord”). In exchange for valuable consideration, the landlord and tenant agree to the following:

1. Property. The landlord owns certain real property and improvements at **123 Vegetable Garden Way, Potterville, Beatrixia** (hereinafter referred to as the “Property” or the “Premise”). The Landlord wishes to lease the Premise to the Tenant upon the terms and conditions stated in this Lease. The Tenant wishes to lease the Premise from the Landlord upon the terms and conditions stated in this Lease.
2. Term. This agreement shall commence on September 1, 2015 and shall terminate on August 31, 2018 at 11:59 PM. Upon any termination of the Agreement, the Tenant will pay off all outstanding bills, remove all personal property from the Premise, bring the leased premise back to the condition it was in upon move-in (excepting normal wear and tear), peacefully vacate the premise, return all keys to the Landlord, and give the Landlord a forwarding address.
3. Holdovers. If the Tenant holds over after the termination of the lease, a new tenancy from month-to-month shall be created. Under the new month-to-month lease the Tenant shall be responsible for double the agreed upon rent.
4. Rent. The Tenant shall pay the landlord \$1000 per month as rent for the entire term of the agreement. The rent shall be due on the 1st day of each calendar month. Weekends, holidays, and religious observances do not excuse the Tenant’s obligation to make timely payments.
5. Delivery of Possession. The Landlord shall not be held liable for any failure to deliver possession of the Premise by the starting date of the agreed upon term.
6. Late Fees. A late fee of 5% shall be due if the rent is received after the 5th day of the month. A late of 10% shall be due if the rent is received after the 10th day of the month. Acceptance of a late fee does not affect or waive any other right or remedy the Landlord may exercise for Tenant’s failure to timely pay rent.
7. Returned Checks. In the event that any payment by the Tenant is returned for insufficient funds or if the Tenant stops payment, the Tenant will pay \$100 to the Landlord for each such event, in addition to the Late Fees described above.
8. Security Deposit. The Tenant shall deposit with the Landlord \$1500 as a security deposit for this Agreement. All interest that accrues on such a security de-

posit shall belong to the Landlord alone. The Landlord may use the deposit money for any and all purposes allowed by law.

9. Utilities. It is the responsibility of the Tenant to obtain all utilities for the leased Property. Tenant's failure to make any payment for the utilities shall constitute a material breach of the agreement. The Landlord shall not be held liable for any failure to deliver any utility service or for any damage caused by a problem with any utility service, whatever the cause of such problem. The Tenants do hereby waive any claim for damages that result from any problem with utility service.

10. Keys. The Tenant shall not install any new locks anywhere on the property or make any copies of the keys. The Tenant also shall refrain from providing any keys to any person not listed on this Agreement. When the lease terminates, the Tenant shall return all keys to the Landlord.

11. Pets. No pets of any kind, type, or breed shall be allowed on the property without the Landlord's express written consent. This consent, if given, will require an additional pet deposit.

12. Use of the Premise. The premise shall be used and occupied solely by the Tenant. Tenant shall not allow any other person to use or occupy the premise without first obtaining Landlord's written consent. No part of the Premise shall be used at any time during the term for any business, trade, or other commercial purpose. Additionally, the tenant agrees to comply with all local, state, and federal laws, regulations, and ordinances. No part of the property may be used in any way that aids or advances a criminal enterprise.

13. Assignments and Subletting. The Tenant shall not license, assign, or sublet the Property and/or this agreement without the written consent of the Landlord. An assignment, subletting or license without the Landlord's written consent shall be considered absolutely null and void and, at the Landlord's option, terminate this Agreement.

14. Alterations. The Tenant shall make no alterations to the Premise without written consent of the Landlord. If the Tenant makes any unauthorized improvement, modification, or change to the Property, the landlord has the option to charge the Tenant the cost of restoring the Premise to its original condition. In the event that the Landlord approves an alteration made by the Tenant, such alterations shall become the property of the Landlord and remain on the Property.

15. Maintenance & Repair. Except for normal wear and tear, the Tenant shall maintain the Premise in the condition it was upon the starting date of the Agreement. Should any damages, malfunctions, breakages, or other problems occur during the course of the Lease, the Landlord shall have a reasonable amount of time

to complete such repairs. During that time, the Tenant's rent shall remain due in full and on time despite any hardships such repairs or delays may cause. Tenant also has a contractual duty to (1) notify Landlord of any problems with the leased premise, (2) Deposit all trash, rubbish, refuse, and garbage in the trash cans provided by the city, (3) keep all windows, doors, and locks in good order, (4) inspect the fire alarms each and every month.

16. Noise. The Tenant and the Tenant's guests shall at all times keep the level of sound down to a level that does not annoy or interfere with other residents or neighbors.

17. Sale of the Property. The Landlord shall have the right to sell or transfer his ownership of the Property and this Agreement at any time and without restriction. Upon sale or transfer of the Landlord's interest, this agreement may be terminated by either the Landlord or the party who purchases the Landlord's interest. The Tenant agrees to release, waive, and hold harmless the Landlord and the Landlord's successor from all liability if such a transfer occurs.

18. Access. The Landlord and his agents shall have the right to enter the Property without notice to inspect the property, make repairs, or show the property to prospective tenants or purchasers.

19. Condition of the Premise. The Landlord makes no guarantees or warranties about the condition of the leased premise. The Tenant assumes all risk of injury or harm stemming from any accidents or criminal acts occurring on or around the Premise. The Tenant agrees to hold the Landlord harmless for all liability stemming any injury or harm to the Tenant, Tenant's property, or Tenant's guests. The Tenant further agrees to indemnify, defend, and hold harmless the Landlord from any and all claims over the condition of the premise. Should the Tenant damage the Premise, he shall indemnify the Landlord for all costs of repair or replacement within 30 days.

20. Natural Disaster. In the event of a natural disaster, fire, or other catastrophic event, the Landlord may choose not to repair the Premise, in which case the Lease shall terminate. The Landlord may also elect to fix the Premise, in which case the Tenant must continue to pay the full monthly rent so long as the repairs are completed within a reasonable time. In either case, any and all damages and injuries connected to acts of the Tenant, his guests, or property shall be the sole financial responsibility of the Tenant.

21. Eminent Domain. If a government or private entity takes the Premise or any part of the Premise by eminent domain, this Lease shall terminate. The new termination shall be the date of the final taking order. Any award or court judgment

in favor of the Landlord in an eminent domain case or any settlement award stemming from an eminent domain proceeding shall belong to the Landlord in full. The Tenant shall have no claim over such awards.

22. Attorney's Fees. Tenant agrees to pay all reasonable attorney's fees, court costs, and other expenses if it becomes necessary for the Landlord to enforce any of the conditions of covenants of this Lease, including but not limited to eviction proceedings, collection of rents, and damage to the Premise caused by the Tenant. The Tenant also agrees to indemnify the Landlord for all attorney's fees, court costs, and other expenses that the Landlord may incur while successfully defending a lawsuit brought by the Tenant.

22. Abandonment. If at any time during the term of this Lease the Tenant abandons the Premise, the Landlord may obtain possession of the Premise in any manner provided for by law. Any personal property left behind shall be considered abandoned. The Landlord may dispose of such personal property in any manner he deems fit and is released of all liability for doing so.

23. Severability. If any portion of this Lease shall be found unenforceable, invalid, or void under any law or public policy, that portion of the Lease shall be severed from the remainder of the Agreement. All remaining portions of the Agreement will remain in effect and enforceable.

24. Governing Law. This lease shall be governed and interpreted under the laws of the Commonwealth of Beatrixia.

25. Non-Waiver. No delay or non-enforcement of any term of this Agreement by the Landlord shall not be deemed a waiver. All terms and conditions of this Agreement shall remain fully enforceable should the Landlord seek to enforce any condition or covenant at a later date, even if the Landlord has intentionally or unintentionally neglected to do so in a previous instance.

26. Notices. Any notice required or permitted under this Agreement must be written on 8½ x 11 paper and sent by United Parcel Service (UPS). Notice shall be sent to the address of the Property for the Tenant or to **345 Bunny Pie Lane, Potterville, Beatrixia** for the Landlord.

27. Spelling and Grammar. Any mistakes in spelling, grammar, punctuation, or gender usage shall not be fatal to the Agreement. Rather, they shall be interpreted to carry out the intent of the parties.

28. Default. Tenant shall be in default of this Agreement if he fails to comply with any covenant, condition or term and/or fails to pay rent when due and/or causes damage to the Premise during the term which cumulatively equals or exceeds \$100. Should the Tenant ever default, the Landlord may **with or without no-**

**tice** either (1) terminate the Lease or (2) terminate the Tenant's right to possession of the Premise while leaving this Agreement operative. If the Landlord elects option (2), the Landlord will have the immediate right to possess the Premises and the Tenant shall lose all possessory rights and have the obligation to immediately vacate the Premise. However, the Tenant shall still have the duty to pay all rents, fees and expenses mandated under this Agreement and/or by the judicial system until either the agreed upon term concludes or the property is re-rented at a monthly rate not less than the amount owned under this Agreement with any negative balance owed by the Tenant.

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Tenant Signature

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Date

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Landlord Signature

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Date



# Open Source Property

## Volume II

Stephen Clowney, James Grimmelmann, Michael Grynberg,  
Jeremy Sheff, and Rebecca Tushnet

This build edited by Charles Duan

December 24, 2024



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## **Part VII**

# **Simultaneous Owners**



# Chapter 15

## Concurrent Ownership

More than one person can “own” a thing at any given time. Their rights will be exclusive as against the world, but not exclusive as against each other. When conflicts between them develop, or when the outside world seeks to regulate their behavior, we need to understand the nature and limits of their rights.

In the late 1980s, a sample of real estate records showed that about two-thirds of residential properties were held in some form of co-ownership. Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenancy Possession Value Liability and a Call for Default Rule Reform*, 1994 Wis. L. REV. 331. Given that many justifications for the institution of private property rely on the idea that competing interests in property lead to inefficiency, waste, and conflict, it is perhaps surprising that so much private property is, in practice, owned by more than one person. If communal ownership is so inefficient, why do we recognize so many kinds of co-ownership?

This chapter will consider two contemporary forms of concurrent ownership: tenancy in common, and joint tenancy with rights of survivorship. Additional forms of concurrent ownership will be covered in the next chapter.

### 15.1 Tenancy in Common

**Tenancy in common** is the modern default form of co-ownership, unless a contrary intent is expressed; usually that intent must be in writing. All tenants in common are entitled to possession and use of the property. Only **partition**, discussed below, results in separate and divided interests.

Tenants in common need not own equal shares. If there is no document or legal rule of inheritance specifying their shares, courts will often look to the contribution of the cotenants to the purchase in order to determine appropriate shares.

### 15.1.1 Rights and Duties of Tenants in Common

Concurrent owners can generally contract among themselves to allocate the various benefits and burdens of ownership as they see fit. But in the absence of such agreement, there are several default rules regarding the rights and obligations that arise between cotenants of property.

This system of default rules begins with the premise that each cotenant is entitled to all the rights of ownership in the entire co-owned parcel. Thus, for example, cotenants do not necessarily have the right to compromise other cotenants' right to exclude. If one cotenant objects to a police search and the other would allow it, the objecting cotenant prevails. A warrantless search is not allowed unless an exception to the warrant requirement applies. *Georgia v. Randolph*, 547 U.S. 103 (2006).

The implications of multiple equal and undivided interests in a co-owned parcel become far more complicated with respect to other rights of ownership—particularly the rights of possession and use. If all co-owners are equally entitled to possession and use of the whole parcel, what happens when more than one cotenant decides to assert those rights at the same time? Is it physically possible to put co-equal rights of all concurrent owners into practice? And if not, what if any obligation does a cotenant in possession owe to cotenants out of possession? Consider the following case:

#### ***Martin v. Martin***

878 S.W. 2d 30 (Ky. Ct. App. 1994)

. . . Garis and Peggy own an undivided one-eighth interest in a tract of land in Pike County. This interest was conveyed to Garis by his father, Charles Martin, in 1971. Appellees, Charles and Mary Martin, own a life estate in the undivided seven-eighths of the property for their joint lives, with remainder to appellants.

In 1982, Charles Martin improved a portion of the property and developed a four lot mobile home park which he and Mary rented. In July of 1990, Garis and Peggy moved their mobile home onto one of the lots. It is undisputed that Garis and Peggy expended no funds for the improvement

or maintenance of the mobile home park, nor did they pay rent for the lot that they occupied.

In 1990, Garis and Peggy filed an action which sought an accounting of their claimed one-eighth portion of the net rent received by Charles and Mary from the lots. The accounting was granted, however, the judgment of the trial court required appellants to pay "reasonable rent" for their occupied lot. It is that portion of the judgment from which this appeal arises.

The sole issue presented is whether one cotenant is required to pay rent to another cotenant. Appellants argue that absent an agreement between cotenants, one cotenant occupying premises is not liable to pay rent to a co-owner. Appellees respond that a cotenant is obligated to pay rent when that cotenant occupies the jointly owned property to the exclusion of his co-owner.

Appellants and appellees own the subject property as tenants in common. The primary characteristic of a tenancy in common is unity of possession by two or more owners. Each cotenant, regardless of the size of his fractional share of the property, has a right to possess the whole.

The prevailing view is that an occupying cotenant must account for outside rental income received for use of the land, offset by credits for maintenance and other appropriate expenses. The trial judge correctly ordered an accounting and recovery of rent in the case *sub judice*.

However, the majority rule on the issue of whether one cotenant owes rent to another is that a cotenant is not liable to pay rent, or to account to other cotenants respecting the reasonable value of the occupancy, absent an ouster or agreement to pay.

The trial court relied erroneously on *Smither v. Betts*, Ky., 264 S.W.2d 255 (1954), for its conclusion that appellants were "obligated to pay seven-eighths of the reasonable rental for the use of the lot they occupy." In *Smither*, one cotenant had exclusive possession of jointly owned property by virtue of a lease with a court-appointed receiver and there was an agreement to pay rent. That clearly is not the case before us. There was no lease or any other agreement between the parties.

The appellees reason that the award of rent was proper upon the premise that Garis and [Peggy] ousted their cotenants. While the proposition that a cotenant who has been ousted or excluded from property held jointly is entitled to rent is a valid one, we are convinced that such ouster must amount to exclusive possession of the entire jointly held property. We

find support for this holding in *Taylor*, supra, in which the Court stated at 807-08:

But, however this may be, running throughout all the books will be found two essential elements which must exist before the tenant sought to be charged is liable. These are: (a) That the tenant sought to be charged and who is claimed to be guilty of an ouster must assert exclusive claim to the property in himself, thereby necessarily including a denial of any interest or any right or title in the supposed ousted tenant; (b) he must give notice to this effect to the ousted tenant, or his acts must be so open and notorious, positive and assertive, as to place it beyond doubt that he is claiming the entire interest in the property.

We conclude that appellants' occupancy of one of the four lots did not amount to an ouster. To hold otherwise is to repudiate the basic characteristic of a tenancy in common that each cotenant shares a single right to possession of the entire property and each has a separate claim to a fractional share.

Accordingly, the judgment of the Pike Circuit Court is reversed as to the award of rent to the appellees.

### Notes and Questions

**15.1. Recurring conflicts between cotenants.** Rules for cotenant liability are incoherent and unsatisfactory despite centuries of litigated cases. Evelyn Lewis speculates that “cotenant conflicts receive little attention from property law reformers” because they involve “‘one-shotters’—parties who rarely litigate, who are predominantly members of the obedient middle-class and who suffer quietly the rules of law they were too unsophisticated to know or consider in advance of the conflict.” Evelyn Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability*, 1994 WIS. L. REV. 331.

Management conflicts can arise easily because, unlike in a trust or a corporation (both forms of joint ownership) there is no one with the legal right to manage the property on behalf of the other owners, and a cotenant who takes on the burden of management is not entitled to be paid for her services to the others. See *Combs v. Ritter*, 223 P.2d 505 (Cal. Ct. App. 1950). Although each cotenant has the

right to possess and benefit from the property, and the duty to pay her share of necessary expenses such as taxes, there is no mechanism for group decision-making. If co-owners can't agree, they may simply have to split—by divorce followed by a transfer to one party or sale in the case of tenancy by the entirety and community property; by severance and partition for joint tenants; and by partition for tenants in common. Short of partition, which involves selling or physically dividing the property, the only assistance the courts offer cotenants is a claim for accounting for rents or profits received by another cotenant, or a claim for contribution for payments of another cotenant's share of taxes, mortgage payments, and necessary maintenance expenses.

15.2. **Ouster.** Denial of a right to possession constitutes **ouster**, and the damages are the non-possessing cotenant's share of the rental value of the property. *Harlan v. Harlan*, 168 P.2d 985 (Cal. Ct. App. 1946) (damages for ouster are rental value).

Evelyn Lewis concludes that, as with adverse possession, the standard for what constitutes an ouster is so manipulable that courts can reach almost any result on any given set of facts. See, e.g., *Cox v. Cox*, 71 P.3d 1028 (Idaho 2003) (tenant in common was ousted and was entitled to ½ of the fair rental value of the house occupied by her brother when he told her he was selling the house and that she "had better find a place to live"); *Mauch v. Mauch*, 418 P.2d 941 (Okla. 1966) (cotenants in possession of family farm ousted widowed sister-in-law by telling her they "didn't want to have her on the place" and that she "was not to come back"); but see *Fitzgerald v. Fitzgerald*, 558 So.2d 122 (Fla. Dist. Ct. App. 1990) (ex-wife didn't oust ex-husband by telling him to leave the family home and that otherwise "she'd call the law").

What if one cotenant denies that the other has any title to the property? *Estate of Duran*, 66 P.3d 326 (N.M. 2003) (cotenant lived on the property kept silent or gave evasive answers to questions about his use of the property; this was not ouster where he "never expressly told [the other cotenants] that he claimed to own their portions of the property"). Purporting to convey full title to the property is an ouster, since it sets up a claim for adverse possession by the grantee. *Whittington v. Cameron*, 52 N.E.2d 134 (Ill. 1943).

What if one cotenant seeks to use a portion of the land, and the other prevents her from doing so, perhaps by building a structure on it?

15.3. **Constructive Ouster.** Can a "constructive ouster" occur without one of the cotenants explicitly barring another from possession? Though this question can arise in a variety of contexts (what if the property is physically too small for all the cotenants to live in?), a common one is separation or divorce of a couple. Should the

person moving out be considered “constructively ousted” and entitled to rent from the significant other retaining possession? *Compare Stylianopoulos v. Stylianopoulos*, 455 N.E.2d 477 (Mass. Ct. App. 1983) (yes), with *Reitmeier v. Kalinoski*, 631 F. Supp. 565 (D.N.J. 1986) (no). See also *Cohen v. Cohen*, 746 N.Y.S.2d 22 (App. Div. 2002) (no right to rent for period during which a court protective order barred cotenant from the property due to his assaultive conduct).

**15.4. Contribution: sharing the costs.** “[T]he protection of the interest of each cotenant from extinction by a tax or foreclosure sale imposes on each the duty to contribute to the extent of his proportionate share the money required to make such payments.” 2 AMERICAN LAW OF PROPERTY § 6.17. Because failure to pay carrying costs increases the risk that the asset will be lost to all cotenants, every concurrent owner has an obligation to pay her share. See also *Beshear v. Ahrens*, 709 S.W.2d 60 (Ark. 1986) (allowing contribution for mortgage payments and property taxes as “expenditures necessarily made for the protection of the common property”).

The majority rule is that cotenants out of possession need not share in the costs of repairs in the absence of an agreement to do so. The idea is that questions “of how much should be expended on repairs, their character and extent, and whether as a matter of business judgment such expenditures are justified,” are too uncertain for judicial resolution. 2 AMERICAN LAW OF PROPERTY § 6.18. But then, in a partition action, cotenants who pay for repairs will get credit for them—does that make sense? Further, some courts will allow contribution for “necessary” repairs. *Palanza v. Lufkin*, 804 A.2d 1141 (Me. 2002) (finding contribution towards necessary repairs justified, even though some of the repairs had cosmetic effects). Some jurisdictions require a cotenant to provide her fellow cotenants with notice and opportunity to object to the repairs in order to be entitled to contribution. *Anderson v. Joseph*, 26 A.3d 1050 (Md. Ct. Spec. App. 2011) (denying contribution for repairs that resulted from “massive flooding” for failure to provide notice).

**15.5. Accounting: the right to share in profits.** Cotenants who allow others to use the land, whether to exploit resources or to rent, must give other cotenants their shares of any consideration received from the third-party users.

Recall that in at least some contexts one cotenant cannot unilaterally exercise the right to exclude of the other cotenants. But that isn’t always true with respect to productive uses of land by third parties with permission of one cotenant. To be sure, in some states, a lease from only one co-owner is void and the lessee can be ejected. But in other states, one cotenant can lease his interest, subject only to a duty to account to the non-leasing cotenants for net profits. *Swartzbaugh v. Sampson*, 54 P.2d 73 (Cal. Ct. App. 1936). Where there is such a duty, to whom does the lessee

owe rent? The answer is that she only owes rent to the leasing cotenant, unless she ousts the other cotenants. Those other cotenants must look to a contribution action against the leasing cotenant.

The usual rule is that cotenants must account for the raw value of resources they extract themselves, but particularly bad misbehavior by a cotenant may lead to an award of the processed value. *Kirby Lumber Co. v. Temple Lumber Co.*, 83 S.W.2d 638 (Tex. 1935) (raw value of timber where timber was taken in good faith); cf. *White v. Smyth*, 214 S.W.2d 967 (Tex. 1948) (cotenant who mined asphalt without consent from other cotenants had to account for net profits, although he took no more than his one-ninth interest—resource could not be partitioned in kind because the quality and quantity of asphalt varied sharply across the parcel in ways that could not be easily determined; cotenant couldn't take the most easily mined resources for himself and make his own partition).

Absent an ouster, an accounting usually just requires the cotenant to share the actual value received, not the fair market value. Suppose a lease claims to be nonexclusive and to only lease one cotenant's share, and is for half of the fair market rental value of the property. What should happen when the other cotenant seeks an accounting? See Annot., 51 A.L.R.2d 388 (1957). Suppose the lease is made by one cotenant to spite or harm another? Cf. *George v. George*, 591 S.W.2d 655 (Ark. Ct. App. 1979) (where 99-year lease carried nominal rent and the court found an intent to defraud the cotenant, the lease was set aside).

**15.6. Tenants in possession; tenants out of possession.** *Martin* applies the majority rule that—absent ouster—a cotenant in possession need not pay anything to cotenants out of possession if she lives on and farms the land, absent an ouster. *DesRoches v. McCrary*, 24 N.W.2d 511 (Mich. 1946) (no duty of cotenant in possession to pay rent to other cotenants). Reciprocally, there is generally no ouster if one cotenant requests her share of the fair rental value of the land from the occupying cotenant, and the occupying cotenant denies the request. *Von Drake v. Rogers*, 996 So. 2d 608 (La. Ct. App. 2008) (“A co-owner in exclusive possession may be liable for rent, but only beginning on the date another co-owner has demanded occupancy and been refused.”) (emphasis added). But a few cases hold that denying a request for rent constitutes an ouster. *Eldridge v. Wolfe*, 221 N.Y.S. 508 (1927).

Why might courts have developed a practice of requiring cotenants to account for profits from mining and cutting lumber, but not for profits from their own farming or residential uses of co-owned property? Logically, the cotenant in possession should have to pay—she is receiving a benefit from using the land, the fair market rental value of the property, and the other cotenants are not. As *Martin* itself proves,

if she did rent the land to a third party, she would be required to share that benefit with the other co-owners. This rule creates an incentive for the cotenant to stay in possession rather than renting the land out, even if renting to a third party would be more efficient overall.

**15.7. The relationship between contribution and accounting.** If one cotenant occupies the property, with no ouster, and seeks contribution from the non-occupant for his share of the taxes and insurance, can the non-occupant offset the amounts due by the value of living on the property to the occupant? Many courts say yes. See, e.g., *Barrow v. Barrow*, 527 So. 2d 1373 (Fla. 1988) (occupant can only recover contribution if non-occupant's proportionate share of expenses is greater than the value of occupying the property); *Esteves v. Esteves*, 775 A.2d 163 (N.J. Super. Ct. App. Div. 2001) (parents who occupied house for 18 years were entitled to be reimbursed by their son for half of the expenses of mortgage and maintenance, but the son was allowed to set off the amount equal to the reasonable value of the parents' sole occupancy). This view is not strictly consistent with the majority rule that non-ousting tenants are not liable to non-possessing cotenants for rent, because it means that the occupant is essentially paying the non-occupant for being able to live on the land. Is this rule, which will often keep much actual cash from changing hands nonetheless fair?

The minority view is that no defensive offset is available against a cotenant in possession, absent ouster. *Yakavonis v. Tilton*, 968 P.2d 908 (Wash. Ct. App. 1998); *Baird v. Moore*, 141 A.2d 324 (N.J. App. Div. 1958) (cotenant out of possession may not offset value of occupation if cotenant's possession is not adverse). Which rule makes more logical sense? More practical sense?

Basically, courts often have enough flexibility to rule in the direction the equities point—finding that contribution is or isn't available. The need to balance the harms from imposition of unexpected costs on cotenants out of possession with the harms to the property's value from negligent co-owners also gives courts flexibility. Ultimately, because partition is always available to cotenants who truly can't agree, it makes sense for courts to point them towards partition if they're fighting over maintenance and repairs.

In *Martin*, when calculating Garis and Peggy's 1/8 share of the “net rent,” what expenses should be deducted? Can they be required to pay a share of the costs of developing the mobile home park, such as putting in sewage lines and electrical connections? Note that a cotenant is generally not entitled to contribution from other cotenants for the costs of improving the property (see note 15.9 below). But, on partition, the improver is entitled to the part of the property that's been improved, or

in case of sale to the lesser of (1) the increase in value due to the improvement or (2) the cost of the improvement. Should that rule be applied in an accounting as well?

Lewis suggests that courts use ouster to engage in the “equitable second-guessing that so often blurs crystalline rules.” *Compare Spiller v. Mackereth*, 334 So. 2d 859 (Ala. 1976) (lock change wasn’t ouster), *with Morga v. Friedlander*, 680 P.2d 1267 (Ariz. Ct. App. 1984) (lock change was ouster). In effect, courts use ouster, plus the majority rule allowing offset of the value of an occupying cotenant’s possession in an action for contribution, to nullify the formal rule that any cotenant can occupy the land rent-free, regardless of the size of his or her share, and still seek contribution for necessary expenses.

**15.8. Quasi-fiduciary duties of good faith.** Cotenants are **fiduciaries** for each other, at least if they receive their interests in the same will or grant, or through the same inheritance. *Poka v. Holi*, 357 P.2d 100 (Haw. 1960) (cotenants have fiduciary obligation to give other cotenants adequate notice of adverse claims to the property); *but see Wilson v. S.L. Rey, Inc.*, 21 Cal. Rptr. 2d 552 (Ct. App. 1993) (cotenants who acquire interests at different times by different instruments have no fiduciary relationship).

If one cotenant buys the property at a tax sale or a foreclosure sale, the title is shared with the other cotenants: for these purposes, the cotenant is a fiduciary for the other cotenants. *Johnson v. Johnson*, 465 S.W.2d 309 (Ark. 1971); *but cf. Stevenson v. Boyd*, 96 P. 284 (Cal. 1908) (finding assertion of cotenant’s claim barred by laches after four-year delay). However, the purchasing cotenant can seek contribution from the others, so that they bear their fair share of the cost of removing the lien or mortgage. Why would the courts create such a fiduciary duty? What is the abusive practice that they fear?

**15.9. Improvements.** Any cotenant has the right to make improvements to the property, but other cotenants are not required to contribute. See *Knight v. Mitchell*, 240 N.E.2d 16 (Ill. Ct. App. 1968) (cotenant couldn’t seek contribution for developing and running oil wells, though he could set off necessary operating expenses in other cotenant’s action for accounting of his profits); Johnie L. Price, *The Right of a Cotenant to Reimbursement for Improvements to the Common Property*, 18 BAYLOR L. REV. 111 (1966).

In most states, the interests of the improver will be protected if that won’t harm the interests of the other cotenants. This usually allows the improver to recoup the added value, if any, resulting from his improvements on partition, or in accounting for rents and profits. *Graham v. Inlow*, 790 S.W.2d 428 (Ark. 1990). But if improvements fail to pay off, the improver is not compensated—he bears all the risk. A few

cases limit recovery to the smaller of the amount of value added by an improvement or its costs. The risk is borne by the improver, but the rewards are shared. Which rule makes more sense?

15.10. **Waste.** If one cotenant damages the property or harms its value, other cotenants may have claims for **waste**. While the ordinary remedy for waste is treble damages, courts will normally just hold the tenant in possession accountable for net profits from exploiting the property, as explained above in the discussion of removing timber and similar resources. *CASNER, AMERICAN LAW OF PROPERTY*, § 6.15. What effects does that rule have on the use of land?

Waste claims are correspondingly difficult to win. *Davis v. Byrd*, 185 S.W.2d 866 (Mo. 1945) (mining by one cotenant isn't waste as long as the other cotenants aren't excluded and the miner doesn't willfully or negligently injure the land); *Hihn v. Peck*, 18 Cal. 640 (1861) (cotenant may remove valuable timber "to an extent corresponding to [his] share of the estate" without committing waste); *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566 (9th Cir. 1924) (cotenant can produce oil without other cotenants' consent, but cannot exclude other cotenants from exercising the same right). Consider whether time matters: should the standard for what constitutes waste vary depending on whether the other interest-holders have present interests (and could act now to reap their own benefits, albeit at greater cost than waiting) or future interests (and thus can only wait for their ownership interests to attach)?

15.11. **Adverse possession by cotenants against other cotenants.** A cotenant can adversely possess the share of another cotenant. But it is typically much more difficult to show the elements of adverse possession (which ones?), because the ordinary expectation is that each cotenant may possess the entire property. Compare *Hare v. Chisman*, 101 N.E.2d 268 (Ind. 1951) (husband's sole possession of house after wife died was not adverse to his cotenants, her heirs, since it "was not an unnatural act of them to permit their father to occupy this property, collect the income, pay the expense, and enjoy the surplus"), with *Johnson v. James*, 377 S.W.2d 44 (Ark. 1964) (presumption against adversity is even stronger when cotenants are related, though presumption was overcome through sole possession for 36 years, where cotenants knew of a will purportedly granting occupant sole possession and said nothing).

15.12. **Intangible assets.** *Erickson v. Trinity Theatre*, presented later in this book, discusses joint ownership of copyrights. ("Joint" here does not refer to joint tenancy; it is an unfortunately imprecise colloquialism in copyright law.) When you read that case, compare the rules of copyright ownership among multiple authors with the rules of tenancy in common here.

**15.13. Concluding thoughts: crystals and mud.** Transaction costs—the costs of managing the property and getting cotenants to agree—can be very high among cotenants, as compared to the costs of having a manager with authority to make decisions for the group. (For example, consider the issue of approving a particular tenant who wishes to rent the property and have exclusive possession.) The actively engaged cotenant who rents to a third party gets only some of the gain, but takes most of the risk. After all, if the renter turns into a nightmare who trashes the place, the cotenant who rented the property will be liable for any harm; but the other cotenants might sue to share in any gains that materialize. Professor Carol Rose argues that courts sometimes impose equitable duties—muddy rules—on parties in order to replicate the results that would have occurred had they trusted each other and behaved fairly and decently towards one another. Thus, our rules about co-ownership are not just rules about economic efficiency, but about how people should behave. See generally Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988). Does this help you make any sense of the co-ownership rules?

## 15.1.2 Partition

### *Delfino v. Vealencis* 436 A.2d 27 (Conn. 1980)

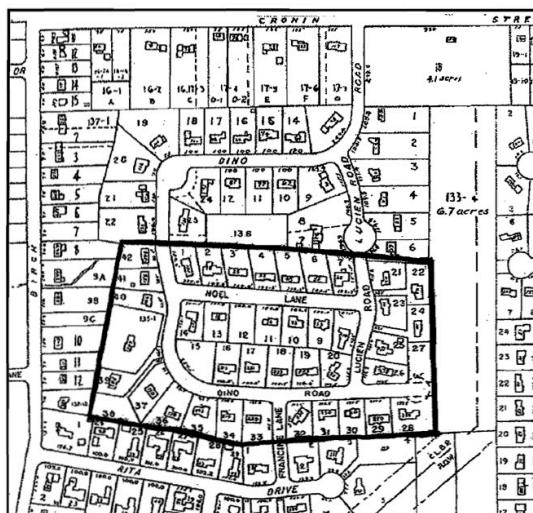
**ARTHUR H. HEALEY, Associate Justice.**

The central issue in this appeal is whether the Superior Court properly ordered the sale, pursuant to General Statutes § 52-500,<sup>1</sup> of property owned by the plaintiffs and the defendant as tenants in common.

The plaintiffs, Angelo and William Delfino, and the defendant, Helen C. Vealencis, own, as tenants in common, real property located in Bristol, Connecticut. The property consists of an approximately 20.5 acre parcel of land and the dwelling of the defendant thereon. The plaintiffs own an un-

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<sup>1</sup>General Statutes § 52-500 states: “Sale of Real or Personal Property Owned by Two or More. Any court of equitable jurisdiction may, upon the complaint of any person interested, order the sale of any estate, real or personal, owned by two or more persons, when, in the opinion of the court, a sale will better promote the interests of the owners. . . . A conveyance made in pursuance of a decree ordering a sale of such land shall vest the title in the purchaser thereof, and shall bind the person entitled to the life estate and his legal heirs and any other person having a remainder interest in the lands; but the court passing such decree shall make such order in relation to the investment of the avails of such sale as it deems necessary for the security of all persons having any interest in such land.”



**Figure 5-1**  
Subdivision plot plan for the 20.5-acre parcel

**Figure 15.1:** Subdivision plot plan for the 20.5 acre parcel

divided 99/144 interest in the property, and the defendant owns a 45/144 interest. The defendant occupies the dwelling and a portion of the land, from which she operates a rubbish and garbage removal business.<sup>3</sup> Apparently, none of the parties is in actual possession of the remainder of the property. The plaintiffs, one of whom is a residential developer, propose to develop the property, upon partition, into forty-five residential building lots.

In 1978, the plaintiffs brought an action in the trial court seeking a partition of the property by sale with a division of the proceeds according to the parties' respective interests. The defendant moved for a judgment of in-kind partition and the appointment of a committee to conduct said partition. The trial court, after a hearing, concluded that a partition in kind could not be had without "material injury" to the respective rights of the parties, and therefore ordered that the property be sold at auction by a

<sup>3</sup>The defendant's business functions on the property consist of the overnight parking, repair and storage of trucks, including refuse trucks, the repair, storage and cleaning of dumpsters, the storage of tools, and general office work. No refuse is actually deposited on the property.

committee and that the proceeds be paid into the court for distribution to the parties.

On appeal, the defendant claims essentially that the trial court's conclusion that the parties' interests would best be served by a partition by sale is not supported by the findings of subordinate facts, and that the court improperly considered certain factors in arriving at that conclusion. In addition, the defendant directs a claim of error to the court's failure to include in its findings of fact a paragraph of her draft findings.

General Statutes § 52-495 authorizes courts of equitable jurisdiction to order, upon the complaint of any interested person, the physical partition of any real estate held by tenants in common, and to appoint a committee for that purpose.<sup>7</sup> When, however, in the opinion of the court a sale of the jointly owned property "will better promote the interests of the owners," the court may order such a sale under § 52-500.

It has long been the policy of this court, as well as other courts, to favor a partition in kind over a partition by sale. . . . Due to the possible impracticality of actual division, this state, like others, expanded the right to partition to allow a partition by sale under certain circumstances. The early decisions of this court that considered the partition-by-sale statute emphasized that "(t)he statute giving the power of sale introduces . . . no new principles; it provides only for an emergency, when a division cannot be well made, in any other way. The court later expressed its reason for preferring partition in kind when it stated: "(A) sale of one's property without his consent is an extreme exercise of power warranted only in clear cases." *Ford v. Kirk*, 41 Conn. 9, 12 (1874). Although under General Statutes § 52-500 a court is no longer required to order a partition in kind even in cases of extreme difficulty or hardship; it is clear that a partition by sale should be ordered only when two conditions are satisfied: (1) the physical attributes of the land are such that a partition in kind is impracticable or inequitable; and (2) the interests of the owners would better be promoted by a partition by sale. Since our law has for many years presumed that a partition in kind would be in the best interests of the owners, the burden is on the party requesting a partition by sale to demonstrate that such a sale would better promote the owners' interests.

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<sup>7</sup>If the physical partition results in unequal shares, a money award can be made from one tenant to another to equalize the shares.

The defendant claims in effect that the trial court's conclusion that the rights of the parties would best be promoted by a judicial sale is not supported by the findings of subordinate facts. We agree.

Under the test set out above, the court must first consider the practicability of physically partitioning the property in question. The trial court concluded that due to the situation and location of the parcel of land, the size and area of the property, the physical structure and appurtenances on the property, and other factors, a physical partition of the property would not be feasible. An examination of the subordinate findings of facts and the exhibits, however, demonstrates that the court erred in this respect.

It is undisputed that the property in question consists of one 20.5 acre parcel, basically rectangular in shape, and one dwelling, located at the extreme western end of the property. Two roads, Dino Road and Lucien Court, abut the property and another, Birch Street, provides access through use of a right-of-way. Unlike cases where there are numerous fractional owners of the property to be partitioned, and the practicability of a physical division is therefore drastically reduced; in this case there are only two competing ownership interests: the plaintiffs' undivided 99/144 interest and the defendant's 45/144 interest. These facts, taken together, do not support the trial court's conclusion that a physical partition of the property would not be "feasible" in this case. Instead, the above facts demonstrate that the opposite is true: a partition in kind clearly would be practicable under the circumstances of this case.

Although a partition in kind is physically practicable, it remains to be considered whether a partition in kind would also promote the best interests of the parties. In order to resolve this issue, the consequences of a partition in kind must be compared with those of a partition by sale.

The trial court concluded that a partition in kind could not be had without great prejudice to the parties since the continuation of the defendant's business would hinder or preclude the development of the plaintiffs' parcel for residential purposes, which the trial court concluded was the highest and best use of the property. The court's concern over the possible adverse economic effect upon the plaintiffs' interest in the event of a partition in kind was based essentially on four findings: (1) approval by the city planning commission for subdivision of the parcel would be difficult to obtain if the defendant continued her garbage hauling business; (2) lots in a residential subdivision might not sell, or might sell at a lower price, if the

defendant's business continued; (3) if the defendant were granted the one-acre parcel, on which her residence is situated and on which her business now operates, three of the lots proposed in the plaintiffs' plan to subdivide the property would have to be consolidated and would be lost; and (4) the proposed extension of one of the neighboring roads would have to be rerouted through one of the proposed building lots if a partition in kind were ordered. The trial court also found that the defendant's use of the portion of the property that she occupies is in violation of existing zoning regulations. The court presumably inferred from this finding that it is not likely that the defendant will be able to continue her rubbish hauling operations from this property in the future. The court also premised its forecast that the planning commission would reject the plaintiffs' subdivision plan for the remainder of the property on the finding that the defendant's use was invalid. These factors basically led the trial court to conclude that the interests of the parties would best be protected if the land were sold as a unified unit for residential subdivision development and the proceeds of such a sale were distributed to the parties.

. . . The defendant claims that the trial court erred in finding that the defendant's use of a portion of the property is in violation of the existing zoning regulations, and in refusing to find that such use is a valid non-conforming use. . . . [T]he court's finding in this regard must be stricken as unsupported by sufficient competent evidence. We are left, then, with an unassailed finding that the defendant's family has operated a "garbage business" on the premises since the 1920s and that the city of Bristol has granted the defendant the appropriate permits and licenses each year to operate her business. There is no indication that this practice will not continue in the future.

Our resolution of this issue makes it clear that any inference that the defendant would probably be unable to continue her rubbish hauling activity on the property in the future is unfounded. We also conclude that the court erred in concluding that the city's planning commission would probably not approve a subdivision plan relating to the remainder of the property. Any such forecast must be carefully scrutinized as it is difficult to project what a public body will decide in any given matter. . . . The court's finding indicates that only garbage trucks and dumpsters are stored on the property; that no garbage is brought there; and that the defendant's business operations involve "mostly containerized . . . dumpsters, a contemporary

development in technology which has substantially reduced the odors previously associated with the rubbish and garbage hauling industry.” These facts do not support the court’s speculation that the city’s planning commission would not approve a subdivision permit for the undeveloped portion of the parties’ property.

The court’s remaining observations relating to the effect of the defendant’s business on the probable fair market value of the proposed residential lots, the possible loss of building lots to accommodate the defendant’s business<sup>13</sup> and the rerouting of a proposed subdivision road, which may have some validity, are not dispositive of the issue. It is the interests of all of the tenants in common that the court must consider; and not merely the economic gain of one tenant, or a group of tenants. The trial court failed to give due consideration to the fact that one of the tenants in common has been in actual and exclusive possession of a portion of the property for a substantial period of time; that the tenant has made her home on the property; and that she derives her livelihood from the operation of a business on this portion of the property, as her family before her has for many years. A partition by sale would force the defendant to surrender her home and, perhaps, would jeopardize her livelihood. It is under just such circumstances, which include the demonstrated practicability of a physical division of the property, that the wisdom of the law’s preference for partition in kind is evident.

... Since the property in this case may practicably be physically divided, and since the interests of all owners will better be promoted if a partition in kind is ordered, we conclude that the trial court erred in ordering a partition by sale, and that, under the facts as found, the defendant is entitled to a partition of the property in kind.

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<sup>13</sup>It should be noted in this regard that a partition in kind would result in a physical division of the land according to the parties’ respective interests. The defendant would, therefore, not obtain any property in excess of her beneficial share of the parties’ concurrent estates.

### Notes and Questions

15.14. **Oweltiy.**<sup>1</sup> Courts have the equitable power to order **oweltiy** payments when it is impractical to partition in kind according to exact shares, but when monetary payments can adjust for the variance in the value of the parcels from the interests held by the respective cotenants. See *Dewrell v. Lawrence*, 58 P.3d 223, 227 (Okla. Civ. App. 2002); CODE OF ALA. § 35-6-24 (2010); CAL. CIV. PROC. CODE § 873.250 (West 2009).

15.15. **Denouement.** Thomas Merrill and Henry Smith did some digging for their property casebook, *Property: Principles and Policies*. Apparently, Vealencis was a difficult client and antagonized the trial judge, which meant that her victory on the law did not translate to victory in the real world. In *Delfino*, Vealencis was awarded three lots, including her homestead, a total of about one acre worth \$72,000. (See lot 135-1 on far left of image.) She was also required to pay \$26,000 in oweltiy to the Delfinos to compensate them for the harm her garbage operation imposed on the proposed subdivision.

While Vealencis had a 5/16 interest in the land, her net benefit was only \$46,000, or less than one-fourth of what she was due. Three years later, the Delfinos sold their roughly 19 acres to a developer for \$725,000. The developer separated Vealencis' lot from the rest of the subdivision by a two-foot-wide strip of land (see lots 39 and 40). This deprived her of access to Dino Road and its sewer and water connections, as well as preventing her trucks from entering the subdivision (even though she'd already paid for diminishing the value of the homes in the subdivision). Vealencis' only access to the land was a 16.5 foot easement over lot 9C. She was required to use an artesian well and a septic tank. See Manel Baucells & Steven A. Lippman, *Justice Delayed Is Justice Denied: A Cooperative Game Theoretic Analysis to Hold-up in Coownership*, 22 CARDOZO L. REV. 1191 (2001). Vealencis died in 1990, still running the garbage business.

Why was she required to pay oweltiy up-front rather than waiting to see if the harm materialized and allowing the Delfinos to recover in an action for nuisance later? Is there anything the court could have done in its division to avoid the unfairness to Vealencis? And what does this result suggest about the appropriate choice of remedies— injunction or damages—in nuisance cases?

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<sup>1</sup>This charming term is followed in *Black's Legal Dictionary* by another winner: To quote Blackstone, “Owling, so called from its being usually carried on in the night, . . . is the offense of transporting sheep or wool out of this kingdom.”

**15.16. Implementing partition in kind.** In a partition in kind, how should the court determine who gets what land? See *Anderson v. Anderson*, 560 N.W.2d 729 (Minn. Ct. App. 1997) (cotenants awarded parcel on which they had a residence); *Barth v. Barth*, 901 P.2d 232 (Okla. Ct. App. 1995) (considering cotenant's ownership of adjacent land). In Louisiana, partition in kind is not allowed unless parcels of equal value can be created, and parcels must be drawn by lot. See *McNeal v. McNeal*, 732 So. 2d 663 (La. Ct. App. 1999). Is this a good idea? What about “I cut, you choose” as a way of implementing partition in kind? There’s a large literature in game theory, mathematics, and computer science on these problems, dealing with more than two parties, heterogenous resources, etc. Very little of this seems to have made its way into law. *But see Note, Cutting the Baby in Half*, 77 BROOK. L. REV. 263 (2011) (surveying some of the literature).

Some state laws also provide for allotment, in which the court allocates part of the property to a cotenant—which can include an oweltiy payment if the allocated portion is more than the cotenant’s share—and then sells the remainder. *E.g.*, 25 DEL. CODE § 730; S.C. CODE ANN. § 15-61-50; VA. CODE ANN. § 8.01-83. Sometimes a cotenant must show an equitable claim to allotment in order to get it. HAW. REV. STAT. §§ 668-7(5)-(6).

**15.17. Partition by sale as the default?** Consider the court’s claims about the preference for partition in kind. Partition in kind will essentially always diminish the market value of the land compared to partition by sale. Do other, intangible interests nonetheless adequately justify a preference for partition in kind?

*Ark Land Co. v. Harper*, 599 S.E.2d 754 (W. Va. 2004), suggests that a rule favoring maximization of market value “would permit commercial entities to always ‘evict’ pre-existing co-owners, because a commercial entity’s interest in property will invariably increase its value.”

**15.18. Heirs’ property.** When a property owner dies without a will, the state intestacy laws often divide ownership across multiple relatives, giving each a share as a tenant in common. Over multiple generations of intestacy, ownership can become highly fractionated. This is unfortunately common for families lacking access to legal resources, or those struck by disaster (say, in New Orleans after Hurricane Katrina).

If this “heirs’ property” becomes valuable for development, third parties would often acquire the interest of a distant relative who has a fractional share and petition for partition. Given the often hundreds of people who own interests in a piece of heirs’ property, courts generally hold that partition in kind is impossible. The resulting sale can dispossess people who have lived on or used the land for decades;

family members who would like to keep the land are rarely able to outbid developers, who nonetheless usually pay substantially below-market prices because of the forced nature of the sale.

The Uniform Partition of Heirs' Property Act, enacted in six states as of 2015, provides co-owners with a right of first refusal to buy the petitioning co-owner's share, and, if they do not exercise that right, attempts to create a more competitive bidding process. The expectation is that even co-owners who can't raise enough money to buy the entire parcel at fair market value, as at a traditional partition sale, are more likely to be able to buy another cotenant's fractional share. Under the Act, courts can also consider the historical and cultural value of the land to the people living on it, not just the economic value of the land, in deciding whether to reject partition by sale. See, e.g., *Chuck v. Gomes*, 532 P.2d 657 (Haw. 1975) (Richardson, C.J., dissenting):

[T]here are interests other than financial expediency which I recognize as essential to our Hawaiian way of life. Foremost is the individual's right to retain ancestral land in order to perpetuate the concept of the family homestead. Such right is derived from our proud cultural heritage. . . . [W]e must not lose sight of the cultural traditions which attach fundamental importance to keeping ancestral land in a particular family line.

**15.19. Contracting around partition rights.** Should cotenants be able to waive their right to partition? See *Gore v. Beren*, 867 P.2d 330 (Kan. 1994) (cotenants agreed to a right of first refusal if any cotenant wished to sell; this agreement impliedly waived the right to partition and didn't violate the Rule Against Perpetuities because it was personal to the parties and would necessarily end during the lifetime of one of the parties); see also *Michalski v. Michalski*, 142 A.2d 645 (N.J. Super. 1958) (otherwise valid restriction on right to partition may be unenforceable when circumstances have changed so much that enforcement would be unduly harsh); *Reilly v. Sageser*, 467 P.2d 358 (Wash. Ct. App. 1970) (option to purchase from cotenant at cost of cotenant's investment in land and improvements was valid unless both parties agreed or one party substantially breached other elements of agreement); cf. *Low v. Spellman*, 629 A.2d 57 (Me. 1993) (invalidating right of first refusal given to grantors, heirs, and assigns as in violation of the Rule Against Perpetuities; fixed price of \$6500 also created unreasonable restraint on alienation).

**15.20. Partitioning a future interest.** Can owners who own only a future interest seek partition of that interest? At common law, the answer was no because they lacked a present possessory interest, and some states still adhere to this rule. See,

e.g., *Triebel v. Citizens State Bank*, 598 N.W.2d 96 (N.D. 1999). Many states, however, allow co-owners of vested future interests to seek partition of that interest. See, e.g., ARK. CODE § 18-60-401.

15.21. **Partitioning personal property.** Are there circumstances in which a physical partition of personal property would make sense? How would you divide up a photo album with hundreds of photographs? Cf. *In re Estate of McDowell*, 345 N.Y.S.2d 828 (Sur. Ct. 1973) (custody of rocking chair desired by both heirs should be divided in six-month increments, remainder to the survivor); Ronen Perry & Tal Zarsky, *Taking Turns*, 43 FLA. ST. U. L. REV. (2015). This solution raises a more general question: why don't we see more co-ownership of real property on the time-share model?

## 15.2 Joint Tenancy

**Joint tenancy** (in some jurisdictions called a “joint tenancy with right of survivorship” and abbreviated “JTWROS”) is a form of ownership that can be unilaterally severed and turned into a tenancy in common. Its distinctive feature is the right of survivorship: If a joint tenancy is not severed before a joint tenant’s death, that joint tenant’s interest disappears and the remaining tenant continues to own an undivided interest, allowing the survivor to avoid probate. Thus, joint tenancy is most widely used today as a substitute for a will.<sup>2</sup>

In modern times, tenancy in common is preferred to other kinds of co-ownership. A conveyance “to Alice and Beth” therefore creates a tenancy in common by default, though it’s relatively standard to include “as tenants in common” to avoid all uncertainty. The creation and continuation of a joint tenancy is beset with traps, even though it may well be most co-owners’ preferred form of ownership for residential property. Some states have statutes that appear to abolish the joint tenancy, but they will often find joint tenancies with a right of survivorship if the intent to create them is clear enough. See, e.g., *McLeroy v. McLeroy*, 40 S.W.2d 1027 (Tenn. 1931).

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<sup>2</sup>Note that the federal government does not follow the fiction that nothing passes at death to the surviving joint tenant; the decedent’s interest will be taxed as if it were transferred to the survivor, though if the joint tenants are married no tax will be due.

### 15.2.1 Creating a Joint Tenancy

The traditional test for the creation and continuation of a joint tenancy depended upon the presence of the four “unities”: (1) time—the joint tenants’ interests were all acquired at the same time; (2) title—the interests were all acquired by the same document or by joint adverse possession; (3) interest—the tenants’ shares must all be equal and undivided; and (4) possession—all joint tenants must have equal rights to possess the whole (in the absence of an agreement to the contrary<sup>3</sup>):

Unless the unities existed at the tenancy’s inception, or if they were broken at any subsequent point, the joint tenancy was automatically severed, and the owners became tenants in common. This requirement meant, for example, that the owner of property could not create a joint tenancy in himself and others without first making use of a straw man. Because all joint tenants had to receive their interest in the property at the same time and by the same title, the owner had first to convey to a third party, who would in turn convey the property back to the grantor and the other tenants. They would then take in joint tenancy. Without this purely formal step, however, they would be only tenants in common.

R. H. Helmholz, *Realism and Formalism in the Severance of Joint Tenancies*, 77 NEB. L. REV. 1 (1998). Today (as was already largely true in the 1950s), the necessity for using a straw man to create a joint tenancy has been largely eliminated from American law, sometimes by judicial decision but more often by statutory enactment. We will examine this issue further below, when we discuss severance of a joint tenancy.

A conveyance “to Alice and Beth as joint tenants, and not as tenants in common,” will create a joint tenancy in most states. “Joint” alone, however, may not be enough insofar as it might indicate a colloquial sense of ownership together, rather than the particular legal device. *Compare Downing v. Downing*, 606 A.2d 208 (Md. 1992) (“to A and B as joint tenants” creates joint tenancy), with *Taylor v. Taylor*, 17 N.W.2d 745 (Mich. 1945) (“jointly,” absent further circumstantial evidence, does not suffice to create joint tenancy). Some states require a specific invocation of a right of

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<sup>3</sup>At common law, joint tenants could not hold unequal shares, and attempting to create such a tenancy would create a tenancy in common. However, modern courts are increasingly willing to accept a clearly shown intent to hold unequal shares. See *Moat v. Ducharme*, 555 N.E.2d 897 (Mass. App. 1990) (unequal contributions); *Jezo v. Jezo*, 127 N.W.2d 246 (Wis. 1964) (evidence of contrary intent can override presumption of equal shares).

survivorship. See, e.g., *Hoover v. Smith*, 444 S.E.2d 546 (Va. 1994). But in other states, language like “as joint tenants with the right of survivorship” might create life estates in the supposedly joint tenants, with the remainder to the survivor after one dies. See *Hunter v. Hunter*, 320 S.W.2d 529 (Mo. 1959); *Snover v. Snover*, 502 N.W.2d 370 (Mich. Ct. App. 1993). Be sure you understand what the problem is: under what circumstances will it make a difference whether A and B have a joint tenancy, with right of survivorship, or instead have a tenancy in common in life estate, with the remainder to the survivor? Courts sometimes refer to the latter as an “indestructible” remainder, which is confusing language – the remainder can’t be destroyed by the *other* cotenant, whereas a right of survivorship in a joint tenancy can be unilaterally destroyed.

It is vitally important to consult your state’s statutes and precedent before drafting a conveyance to more than one owner. *James v. Taylor*, 969 S.W.2d 672 (Ark. App. Ct. 1998), for example, considered a deed from a mother conveying property to three children “jointly and severally, and unto their heirs, assigns and successors forever.” There was substantial evidence of intent to create a joint tenancy with right of survivorship: one of the children testified that her mother told her lawyer that she wanted the deed drafted so that, if one of her children died, the property would belong to the other two children, and so on. Nevertheless, the court of appeals noted that the conveyance contained no express language indicating a right of survivorship, so the state’s default statutory policy, favoring tenancy in common absent express language to the contrary, overrode the mother’s intent.

Assuming a court looked for extrinsic evidence of the drafter’s intent in a case involving ambiguous language, what would constitute persuasive evidence of an intent to create a joint tenancy?

### 15.2.2 Severance of a Joint Tenancy

**Severance** is any act that destroys one or more of the four unities required to maintain a joint tenancy. The legal consequence of severance is that the joint tenancy is converted to a tenancy in common. (For those rare joint tenancies involving three or more joint tenants, one joint tenant may sever the joint tenancy as to his interest, but the others remain joint tenants with each other.) The traditional rule for severance required either that all the tenants expressly agree to hold as tenants in common, or that one of the tenants convey to a third person in order to destroy the unities (particularly the unities of time and title), to turn a joint tenancy into a tenancy in common. In modern times, a conveyance from oneself as joint tenant to

oneself as tenant in common is likely to succeed just as well as a conveyance by one tenant to a straw owner plus a reconveyance from the straw. See *Hendrickson v. Minneapolis Fed. Sav. & Loan Ass'n*, 161 N.W.2d 688 (Minn. 1968); *Riddle v. Harmon*, 162 Cal. Rptr. 530 (Cal. Ct. App. 1980); see also *Countrywide Funding Corp. v. Palmer*, 589 So. 2d 994 (Fla. Dist. Ct. App. 1991) (one joint tenant forged the other's signature in purported conveyance to himself; court held that his act severed the tenancy). But see *Krause v. Crossley*, 277 N.W.2d 242 (Neb. 1979) (rejecting this modern trend and requiring conveyance to a third party for an effective severance); L.B. 694, § 11, 1980 NEB. LAWS 577 (codified as NEB. REV. STAT. § 76-118(4) (Reissue 1996)) (reversing result in *Krause* and allowing self-conveyance to sever).

The largest problem in severance is one of surprise, which can occur whether or not a third party straw is required to participate in the severance. As Helmholz explains:

Since one joint tenant has always been able to sever the tenancy without the concurrence or even the knowledge of the other, the possibility of a severance that is unfair to the other has long existed. It can take several forms, as where the joint tenant who has contributed nothing to the purchase of the assets then severs unilaterally, thereby upsetting the normal expectations of the other joint tenant. Its most extreme form is the secret severance. If the tenant who severs secretly is the first to die, the heirs or successors produce the severing document and take half of the property. It accrues to them under the tenancy in common that was the result of the severance. If the severing tenant survives, however, the severing document is suppressed and the survivor takes the whole. The heirs or successors of the first to die get nothing. It is what the economists call "strategic behavior"

Helmholz, *supra*, at 25-26.

Why not impose a notice requirement for a deliberate severance? What about imposing a requirement that a severing instrument be timely recorded in the public land records? See CAL. CIV. CODE § 683.2 (West 1998) (if a joint tenancy is recorded, severance is only effective against the non-severing tenant if the severance is recorded either before the severing tenant's death or, in limited circumstances, recorded within seven days after death; the severing tenant's right of survivorship is cut off even without recording); MINN. STAT. ANN. § 500.19-5 (West 1997) (requiring

recording to make unilateral severance valid); N.Y. REAL PROP. LAW § 240-c(2) (similar). Does a recording requirement solve the problem of surprise?

Joint tenants may also take acts that are more ambiguous with respect to their rights. Courts then have to decide what kinds of acts are sufficient to work a severance.

***Harms v. Sprague***

473 N.E.2d 930 (1984)

**Thomas J. MORAN, Justice.**

Plaintiff, William H. Harms, filed a complaint to quiet title and for declaratory judgment in the circuit court of Greene County. Plaintiff had taken title to certain real estate with his brother John R. Harms, as a joint tenant, with full right of survivorship. The plaintiff named, as a defendant, Charles D. Sprague, the executor of the estate of John Harms and the devisee of all the real and personal property of John Harms. Also named as defendants were Carl T. and Mary E. Simmons, alleged mortgagees of the property in question. Defendant Sprague filed a counterclaim against plaintiff, challenging plaintiff's claim of ownership of the entire tract of property and asking the court to recognize his (Sprague's) interest as a tenant in common, subject to a mortgage lien. At issue was the effect the granting of a mortgage by John Harms had on the joint tenancy. Also at issue was whether the mortgage survived the death of John Harms as a lien against the property.

The trial court held that the mortgage given by John Harms to defendants Carl and Mary Simmons severed the joint tenancy. Further, the court found that the mortgage survived the death of John Harms as a lien against the undivided one-half interest in the property which passed to Sprague by and through the will of the deceased. The appellate court reversed, finding that the mortgage given by one joint tenant of his interest in the property does not sever the joint tenancy. Accordingly, the appellate court held that plaintiff, as the surviving joint tenant, owned the property in its entirety, unencumbered by the mortgage lien. . . .

Two issues are raised on appeal: (1) Is a joint tenancy severed when less than all of the joint tenants mortgage their interest in the property? and (2) Does such a mortgage survive the death of the mortgagor as a lien on the property?

A review of the stipulation of facts reveals the following. Plaintiff, William Harms, and his brother John Harms, took title to real estate located in Roodhouse, on June 26, 1973, as joint tenants. The warranty deed memorializing this transaction was recorded on June 29, 1973, in the office of the Greene County recorder of deeds.

Carl and Mary Simmons owned a lot and home in Roodhouse. Charles Sprague entered into an agreement with the Simmons whereby Sprague was to purchase their property for \$25,000. Sprague tendered \$18,000 in cash and signed a promissory note for the balance of \$7,000. Because Sprague had no security for the \$7,000, he asked his friend, John Harms, to co-sign the note and give a mortgage on his interest in the joint tenancy property. Harms agreed, and on June 12, 1981, John Harms and Charles Sprague, jointly and severally, executed a promissory note for \$7,000 payable to Carl and Mary Simmons. The note states that the principal sum of \$7,000 was to be paid from the proceeds of the sale of John Harms' interest in the joint tenancy property, but in any event no later than six months from the date the note was signed. The note reflects that five monthly interest payments had been made, with the last payment recorded November 6, 1981. In addition, John Harms executed a mortgage, in favor of the Simmonses, on his undivided one-half interest in the joint tenancy property, to secure payment of the note. William Harms was unaware of the mortgage given by his brother.

John Harms moved from his joint tenancy property to the Simmons property which had been purchased by Charles Sprague. On December 10, 1981, John Harms died. By the terms of John Harms' will, Charles Sprague was the devisee of his entire estate. The mortgage given by John Harms to the Simmonses was recorded on December 29, 1981.

Prior to the appellate court decision in the instant case no court of this State had directly addressed the principal question we are confronted with herein—the effect of a mortgage, executed by less than all of the joint tenants, on the joint tenancy. Nevertheless, there are numerous cases which have considered the severance issue in relation to other circumstances surrounding a joint tenancy. All have necessarily focused on the four unities which are fundamental to both the creation and the perpetuation of the joint tenancy. These are the unities of interest, title, time, and possession. The voluntary or involuntary destruction of any of the unities by one of the joint tenants will sever the joint tenancy.

In a series of cases, this court has considered the effect that judgment liens upon the interest of one joint tenant have on the stability of the joint tenancy. In *Peoples Trust & Savings Bank v. Haas* (1927), 328 Ill. 468, 160 N.E. 85, the court found that a judgment lien secured against one joint tenant did not serve to extinguish the joint tenancy. As such, the surviving joint tenant “succeeded to the title in fee to the whole of the land by operation of law.”

. . . Clearly, this court adheres to the rule that a lien on a joint tenant’s interest in property will not effectuate a severance of the joint tenancy, absent the conveyance by a deed following the expiration of a redemption period. It follows, therefore, that if Illinois perceives a mortgage as merely a lien on the mortgagor’s interest in property rather than a conveyance of title from mortgagor to mortgagee, the execution of a mortgage by a joint tenant, on his interest in the property, would not destroy the unity of title and sever the joint tenancy.

Early cases in Illinois, however, followed the title theory of mortgages. In 1900, this court recognized the common law precept that a mortgage was a conveyance of a legal estate vesting title to the property in the mortgagee. Consistent with this title theory of mortgages, therefore, there are many cases which state, in dicta, that a joint tenancy is severed by one of the joint tenants mortgaging his interest to a stranger. Yet even the early case of *Lightcap v. Bradley*, cited above, recognized that the title held by the mortgagee was for the limited purpose of protecting his interests. The court went on to say that “the mortgagor is the owner for every other purpose and against every other person. The title of the mortgagee is anomalous, and exists only between him and the mortgagor \* \* \*.” *Lightcap v. Bradley* (1900), 186 Ill. 510, 522-23, 58 N.E. 221.

Because our cases had early recognized the unique and narrow character of the title that passed to a mortgagee under the common law title theory, it was not a drastic departure when this court expressly characterized the execution of a mortgage as a mere lien . . .

[A] joint tenancy is not severed when one joint tenant executes a mortgage on his interest in the property, since the unity of title has been preserved. As the appellate court in the instant case correctly observed: “If giving a mortgage creates only a lien, then a mortgage should have the same effect on a joint tenancy as a lien created in other ways.” Other ju-

risdictions following the lien theory of mortgages have reached the same result.

. . . An inherent feature of the estate of joint tenancy is the right of survivorship, which is the right of the last survivor to take the whole of the estate. Because we find that a mortgage given by one joint tenant of his interest in the property does not sever the joint tenancy, we hold that the plaintiff's right of survivorship became operative upon the death of his brother. As such plaintiff is now the sole owner of the estate, in its entirety.

Further, we find that the mortgage executed by John Harms does not survive as a lien on plaintiff's property. A surviving joint tenant succeeds to the share of the deceased joint tenant by virtue of the conveyance which created the joint tenancy, not as the successor of the deceased. The property right of the mortgaging joint tenant is extinguished at the moment of his death. While John Harms was alive, the mortgage existed as a lien on his interest in the joint tenancy. Upon his death, his interest ceased to exist and along with it the lien of the mortgage. Under the circumstances of this case, we would note that the mortgage given by John Harms to the Simmonses was only valid as between the original parties during the lifetime of John Harms since it was unrecorded. In addition, recording the mortgage subsequent to the death of John Harms was a nullity. As we stated above, John Harms' property rights in the joint tenancy were extinguished when he died. Thus, he no longer had a property interest upon which the mortgage lien could attach . . . .

### **Notes and Questions**

15.22. The result in *Harms*, in which the mortgage disappears if the joint tenant who granted it predeceases the other joint tenant, is the most common result in "lien theory" states, which represent the vast majority of states today. However, for the reasons discussed in *Harms*, the results in "title theory" states are mixed. Compare *Downing v. Downing*, 606 A.2d 208 (Md. 1992) (no automatic severance although Maryland is a "title" state), with *Schaefer v. Peoples Heritage Savings Bank*, 669 A.2d 185 (Me. 1996) (mortgage severs joint tenancy), and *General Credit Co. v. Cleck*, 609 A.2d 553 (Pa. Sup. Ct. 1992) (same); Taylor Mattis, *Severance of Joint Tenancies by Mortgages: A Contextual Approach*, 1977 S. ILL. U. L.J. 27.

Suppose we adopted an intent-based standard to determine whether the joint tenancy was severed. How would we have determined John Harms' intent after his death?

15.23. Is the result in *Harms* fair? Suppose John had instead survived William. Would the mortgage burden half the interest in the property, or the whole interest? See *People v. Nogarr*, 330 P.2d 858 (Cal. Ct. App. 1958) (if the mortgaging joint tenant survives the nonmortgaging joint tenant, the lien attaches to the entire interest). Wouldn't the mortgagees get a windfall if the value of their secured interest suddenly jumped in value? On the other hand, isn't that just the flip side of the loss they suffer if William survives John? Should we create a hybrid that would protect the lender, and burden William's interest after John's death, even without severing?

Suppose the mortgage had worked a severance. If John had paid the mortgage off before dying, should the severance be undone and the joint tenancy restored? What would the parties likely have expected?

15.24. Given the result in *Harms*, how will lenders behave when one co-owner seeks to take out a loan? Sophisticated lenders make mistakes, see *Texas American Bank v. Morgan*, 733 P.2d 864 (N.M. 1987), but mostly the lenders at risk are ordinary people, often relatives or friends of the borrower.

What about a creditor who has a judgment against one joint tenant—what should she do to make sure she can get access to the property to satisfy the judgment? In practice, the creditor must act during the debtor's life to attach a lien to the property and foreclose on that lien. See, e.g., *Rembe v. Stewart*, 387 N.W.2d 313 (Iowa 1986); *Jamestown Terminal Elev., Inc. v. Knopp*, 246 N.W.2d 612 (N.D. 1976) (judgment lien on joint tenancy property did not survive when debtor cotenant died before execution sale); *Jackson v. Lacy*, 97 N.E.2d 839 (Ill. 1951) (severance doesn't occur at foreclosure, but only on expiration of the redemption period after foreclosure sale); see also *Harris v. Crowder*, 322 S.E.2d 854 (W. Va. 1984) (a creditor may do what the debtor could do, so a creditor of one joint tenant could convert a joint tenancy into a tenancy in common, as long as the other cotenant's interest wouldn't be otherwise prejudiced; an example of prejudice would be the loss of a favorable interest rate on a mortgage due to the timing of the creditor's act).

15.25. According to Charles Sprague's lawyer, Charles and John were romantically involved. If the events underlying the case occurred today, they could have married before John's death. Would that have changed anything?

In *Riccelli v. Forcinito*, 595 A.2d 1322 (Pa. Super. Ct. 1991), discussed above, Sam Riccelli and Carmen Pirozek had a joint tenancy. Four years later, Sam Riccelli married Rita Riccelli. Carmen Pirozek lived in the Riccelli-Pirozek property until her

death in 1984. Her son lived in the house until Sam Riccelli died in 1987; Rita Riccelli then sued to kick him out, claiming to be the sole owner because Sam had inherited the whole property by right of survivorship. Did the marriage sever the joint tenancy? It might seem that the marriage, which gave Rita at least a potential interest in the property, severed the unities of time, title, interest, and possession. However, the court held that marriage of one joint tenant did not sever the joint tenancy. What's the best argument against severance? Is it the same as the argument in *Harms* against allowing a mortgage given by only one joint tenant to sever the joint tenancy?

Compare the case of *Goldman v. Gelman*, 77 N.E.2d 200 (N.Y. 2000). Before a divorce decree became final, the wife gave her divorce attorney a mortgage on the marital home, which was owned by the entirety, in order to secure her debt to her attorney. The husband was awarded exclusive title to the whole marital home. New York's highest court held that the divorce did not destroy the mortgage, because the wife's interest was valid until the final divorce decree, which turned the tenancy by the entirety into a tenancy in common. The mortgage still burdened the wife's interest, and survived when the wife's interest was transferred to the husband. Who ultimately has to pay the wife's divorce lawyer?

**15.26. Other acts that might work a severance.** Technical breaches of the four unities are unlikely to work a severance. For example, when one joint tenant is adjudged an incompetent and the legal title to the incompetent's property is assigned to a guardian, courts hold that no severance occurred. See, e.g., *Moses v. Butner* (*In re Estate and Guardianship of Wood*), 14 Cal. Rptr. 147 (Cal. Ct. App. 1961). Cases are divided on whether the grant of a lease by one joint tenant works a severance. Compare *Tenhet v. Boswell*, 554 P.2d 330 (Cal. 1976) (lease by one joint tenant does not sever joint tenancy, though lease is terminated by death of leasing joint tenant), with *Estate of Gulleedge*, 673 A.2d 1278 (D.C. 1996) (lease to third person severs joint tenancy); see also *In re Estate of Johnson*, 739 N.W.2d 493 (Iowa 2007) (adopting intent-based approach to severance). Some cases even suggest that a lease only works a temporary severance, and the joint tenancy is automatically reformed when the lease ends. Isn't that a ridiculous rule? Are the four unities doing any real work here?

The traditional rule was that, when property is held jointly by spouses, divorce did not sever the joint tenancy. Unlike entireties property, jointly held property need not be held by spouses, so the four unities remain intact even after divorce. Does this make sense? Some states now presume severance upon divorce. See e.g., OHIO REV. CODE ANN. § 5302.20(c)(5) (Anderson 1996). Others require courts to deal

with the status of property as part of the divorce decree. See, e.g., *Johnson v. Johnson*, 169 N.W.2d 595 (Minn. 1969). The majority rule is that divorce works a severance, though the cases are divided; Helmholtz argues that the results turn not on the four unities but on the courts' best understanding of the parties' intent. In a divorce case, both parties are alive, so it may seem possible to determine that intent. As Helmholtz points out, matters get dicey when a divorce or a sale is pending and one of the spouses dies:

Most of these disputes arose where the parties were not thinking at all about what would happen if one of them died. Why would they? They assumed that the divorce would be completed or that the contract for sale would be fulfilled. In most situations that is exactly what did happen. But not all. Where the unexpected does happen and one party dies, litigation all too easily ensues. In it, the courts have been left with the task of discovering the intent of the parties from what are very often the slenderest of indications.

Helmholz, *supra*, at 25. Given that "intent" may be an unworkable standard, is a formalist approach looking only to the four unities preferable in that it at least provides courts with an answer?

Finally, where joint tenants have sought partition but the partition hasn't yet occurred, the almost universal rule is that there is no severance until a court has granted the partition, or at least until only the barest formalities remain to finalize it. See, e.g., *Heintz v. Hudkins*, 824 S.W.2d 139 (Mo. Ct. App. 1992). Helmholtz again:

Although it may be said in favor of this rule that the parties might always have changed their mind before the final decree, that seems a poor justification in the face of their clearly expressed intent to sever and the untimely death of one of them. The true reason for the rule must be a formal one: the rule is necessary in order to safeguard the integrity of the underlying action for partition. Partition cannot be effective before it is obtained. One cannot secure the results of a judicial action simply by asking for it.

Helmholz, *supra*, at 30.

**15.27. What shares exist after severance?** The general assumption is that joint tenants have equal shares after severance—after all, the unity of interest requires that all joint tenants have equal shares *before* severance. However, if the

equities strongly favored unequal shares, courts might well bend the rules. Compare *Cunningham v. Hastings*, 556 N.E.2d 12 (Ind. Ct. App. 1990) (though one co-tenant paid the purchase price, the creation of a joint tenancy entitles each party to an equal share of the proceeds on partition; equitable adjustments to cotenants' equal shares are allowed for tenancies in common, not joint tenancies), *with Moat v. Ducharme*, 555 N.E.2d 897 (Mass. App. Ct. 1990) (presumption of equal shares is rebuttable because partition must be equitable), and *Jezo v. Jezo*, 127 N.W.2d 246 (Wis. 1964) (presumption of equal shares is rebuttable).

15.28. **Joint tenants who kill.** The general rule is that a person who intentionally causes another's death loses any inheritance rights he otherwise would have had from his victim's estate. In *Estate of Castiglioni*, 47 Cal. Rptr. 2d 288 (Ct. App. 1995), the surviving spouse petitioned for half of the property she held in joint tenancy with her deceased husband, of whose murder she was subsequently convicted. California Probate Code Section 251 provides in part: "A joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as the decedent's property and the killer has no rights by survivorship." Thus, there was no question that she could not inherit the entire property through a right of survivorship; her husband's share went to her husband's heir, a daughter.

However, years before the murder, the husband put his separate property in joint tenancy with the wife. The question was therefore whether the husband's share was an undivided half of the former joint tenancy property, or whether equitable tracing rules should apply to increase that share. The court of appeals held the latter, and that it was error to give the killer half of the joint tenancy property. The court noted that, had the tenancy been severed by divorce rather than by murder, the widow/murderer wouldn't have received any of the property at issue, because under California's community property regime the husband would have been reimbursed by tracing his contributions to their joint property. CAL. FAMILY CODE § 2640(b). Thus, equitable principles dictated that she should not be allowed to benefit from her crime, and her share would be reduced by the amount necessary to reflect his contribution.

What should have happened if the couple had lived in a state without community property rules, the source of the court's equitable tracing principle? Suppose section 251 instead read: "If a joint tenant feloniously and intentionally kills another joint tenant, the share of the decedent passes as though the killer had predeceased the decedent." What would the result be in *Estate of Castiglioni* in that situation?

15.29. **Simultaneous death.** What happens when two joint tenants die in the same accident, or the order of their death can't be determined? The Uniform Simultaneous Death Act initially provided that, without sufficient evidence of the order of death, half of the property should be distributed as if the first joint tenant had died first, and the other half as if the other joint tenant had died first. This rule led to some unpleasant litigation and "gruesome" attempts by heirs to prove that a specific joint tenant died first. The 1993 revision of the USDA states that, unless a governing instrument such as a will specifies otherwise, the half-and-half approach will be used in the absence of "clear and convincing" evidence that one joint tenant survived the other by 120 hours.

15.30. **Joint accounts with rights of survivorship.** "Joint accounts" are bank accounts generally held by couples, children and parents, or business partners. Each account holder has the ability to draw on the account. Many joint accounts come with a right of survivorship: If a joint account owner dies, the survivor(s) get all the money—creating another way around the delays involved in probating a will.

In many states, joint account-holders do not have the same undivided interest and rights to the use and enjoyment of the deposits that joint owners of real property do. That is, the donee/nondepositor isn't entitled to the funds unless she survives the donor/depositor. See *UNIFORM PROBATE CODE* § 6-211 (2008). On the donor/depositor's death, the majority rule is that the surviving joint tenant takes the balance in a joint account unless there is clear and convincing evidence that the depositor's intent was to create a "convenience account," that is, an account that was supposed to be used by the nondepositor—usually a younger relative—to take care of the depositor's business affairs. Some jurisdictions conclusively presume that the surviving joint tenant should receive the balance. See *Wright v. Bloom*, 635 N.E.2d 31 (Ohio 1994).

What should happen if Orlando deposits \$10,000 in a joint bank account with Abbie, and Abbie then withdraws \$5000 from the account while Orlando is alive, without his permission or later agreement? Orlando can force Abbie to return the money. Why not presume that Orlando intended a present gift to Abbie? By the same logic, her creditors can't reach all the money to satisfy their claims against her unless and until she survives the donor/depositor. N. William Hines, *Personal Property Joint Tenancies: More Law, Fact and Fancy*, 54 MINN. L. REV. 509 (1970).

However, the presumption against a present gift can be overcome by clear and convincing evidence. In a minority of jurisdictions, joint account owners have equal shares in the account during their lifetimes, as in a joint tenancy in land.

Joint accounts with a right of survivorship can be used as a will substitute, but there are potential tax consequences, not to mention risks of dispute during the time the person who put the money in the account is alive, or disputes after death when alternate heirs argue that the account was never intended to benefit the survivor. If the depositor's intent is to give whatever money is in the account to the non-depositing joint account holder when the depositor dies but not before, many states allow accounts to be designated "payable on death," preventing the non-depositing account holder from withdrawing the money while the depositor is alive. In the alternative, a revocable inter vivos trust will also provide the desired results. As for an elderly parent who wants her child to use money for her care, a better solution would be a power of attorney, making her child into her agent with the power to act on her behalf. This power of attorney would end with the parent's death.

15.31. **Why not allow severance by will?** If a joint tenant can sever without constraint during her lifetime, why not by will? Courts will not recognize such a transfer. See, e.g., *Gladson v. Gladson*, 800 S.W.2d 709 (Ark. 1990). There is an easy formalist explanation: by definition, the joint tenant's interest ends at her death and ownership automatically passes to the survivor, so there is nothing for her to pass by will. But isn't this just playing with definitions? A number of cases have allowed severance by will when the joint owners make joint wills, indicating a clear intent to sever at death, on the theory that it's the agreement to make the joint will that severs the joint tenancy.

The best explanation for the "no severance by will" rule is that it is about the operation of the system of wills, and preserves the use of joint tenancy as a device to avoid probate, even if it frustrates the intent of the testator. In addition, a joint tenant who severs by will is playing a no-lose game at the other tenant's expense. If she dies first, her designated heir takes her share. If she survives the other tenant, she takes all. If she has to sever during her lifetime, the severance occurs, whether that ends up benefiting her or not. This rule may not matter much given the cavalier way states allow secret severances, but still, severance by will is so contrary to the sharing spirit of joint tenancies that the rule requiring joint wills makes sense.



# Chapter 16

## Institutional Ownership

This book began with a premise that property is a relationship between people and (tangible or intangible) things. Most often, the relationship is direct—a person is the owner of a thing, enjoying property rights against the world. But that is not the only arrangement. People can also have indirect relationships with property, through a legally created entity. The people own and control an entity, and the entity owns and controls some property. But there is not necessarily transitivity: The people do not necessarily own or control the property.

In this chapter, we will explore three of these institutional arrangements of property ownership:

- First is the **trust**, an arrangement in which one person (or property-holding entity) holds property for the benefit of another.
- Second, there are a variety of business associations that have the power to hold property as an independent legal entity, such as partnerships, limited liability companies, and professional associations. A full treatment of these is a matter for a business associations course; here our focus will be on one type of association, the **corporation**.
- Third, marriage is an institution that can hold property. As we will see, property ownership within a marriage can have its own special rules, and in some respects can resemble corporate ownership.

As you read, pay close attention to the structure of relationships. Be diligent about tracking legal entities and their relationships with people and property, and be careful not to mix them up. You will be rewarded with a new set of powerful tools for arranging ownership and affairs.

## 16.1 Trusts

### Note on Trusts

The origin of the trust lies in medieval tax estate planning and tax evasion. (Arguably, nothing has changed in the last six hundred years.) Imagine Osbert, a minor lord in the 15th century, who holds Blackacre as a tenant of Leonard, a slightly less minor lord. Osbert is getting on in years and has started to worry about the future of his family. His elder son, Aylwin, is not showing promising signs of maturity, and Osbert has come to think that Aylwin may be better suited to religious orders than the duties of managing a great estate. But Osbert's younger son Bartholomew appears to be a fine young gentleman: athletic, patient, and wise in the ways of men. Osbert would like to provide for Aylwin, but would prefer to have Blackacre go to Bartholomew. Osbert's problem is that the available conveyancing devices don't work for him. If he does nothing, then Blackacre goes to Alywin at Osbert's death under the rule of primogeniture in effect in England at the time, according to which the eldest son receives any land his father owned at his death (was "seised of," in contemporary terminology). A will leaving Blackacre to Bartholomew doesn't work because land could not be devised by will until the Statute of Wills in 1540. And Osbert doesn't want to convey Blackacre (or a future interest in Blackacre) to Bartholomew now, because Bartholomew might die before him, or Aylwin might get his act together, or something else could come along to force a change in plan.

The solution hit on by contemporary lawyers was the "use." Osbert conveys Blackacre to his friend Theobald "to the use of Osbert and his heirs." Then he writes a letter to Theobald, instructing Theobald to convey Blackacre to Bartholomew at Osbert's death. This works. When Osbert dies, Theobald owns Blackacre, so primogeniture never kicks in. Then Theobald conveys to Bartholomew while they are both alive, so again the conveyance is perfectly good. What's more, Osbert can change his instructions to Theobald at any time by writing a new letter. And as an added bonus, because the land never passes by intestacy, the "feudal incidents"—effectively taxes payable to Leonard when a new tenant inherits—never become due. Uses became highly popular for solving numerous similar problems created by the inflexibility of the medieval system of interests in land.

But there was a fly in the ointment. As far as the law courts could see—or rather, as far as they were willing to look—the "to the use of" language was a superfluous, meaningless, and ineffective addition to an otherwise valid conveyance. On their view of the situation, Theobald owns Blackacre in fee simple once Osbert conveys to

him. Osbert's subsequent letter is a worthless piece of paper; much as if you wrote to Bill Gates telling him to convey to you some lakefront property in Washington. So if Theobald turned out to be untrustworthy and held on to Blackacre for himself or conveyed it to Aylwin contrary to Osbert's instructions, Osbert's plan would come to ruin. In such cases, Osbert and Bartholomew could obtain relief from the Chancellor, who would hold that Theobald was under a duty in equity and good conscience to follow Osbert's instructions.

The use thus created what we would today call an "equitable interest" in land. Theobald remained the *legal* owner of Blackacre while he held it to the use of Osbert and his heirs, but Osbert was the *equitable* owner, since he could enforce his claims and instructions in a court of equity. Over time a variety of similar situations, in which Chancery would enforce interests in land legally owned by another, gave rise to a reasonably coherent body of equitable jurisdiction, equitable doctrine, and equitable interests in property.

The use is long gone, along with the medieval doctrines that necessitated it, but the modern **trust** shares its essential characteristics. A trust requires three people and one thing. The people are the **settlor**, who creates the trust; the **trustee**, who holds legal title to the trust property and is responsible for following the settlor's instructions, and the **beneficiary**, who is entitled to receive distributions from the trust in accordance with the settlor's instructions but does not directly control it. The thing is the trust *property* (or sometimes *res*, Latin for "thing," or *corpus*, Latin for "body"), whose ownership is split between the trustee (with legal title) and the beneficiary (with equitable title).

### ***Rothko v. Reis (In re Estate of Rothko)***

372 N.E.2d 291 (N.Y. 1977)

**COOKE, Judge.**

Mark Rothko, an abstract expressionist painter whose works through the years gained for him an international reputation of greatness, died testate on February 25, 1970. The principal asset of his estate consisted of 798 paintings of tremendous value, and the dispute underlying this appeal involves the conduct of his three executors in their disposition of these works of art. In sum, that conduct as portrayed in the record and sketched in the opinions was manifestly wrong and indeed shocking.

Rothko's will was admitted to probate on April 27, 1970 and letters testamentary were issued to Bernard J. Reis, Theodoros Stamos and Morton

Levine. Hastily and within a period of only about three weeks and by virtue of two contracts each dated May 21, 1970, the executors dealt with all 798 paintings.

By a contract of sale, the estate executors agreed to sell to Marlborough A.G., a Liechtenstein corporation (hereinafter MAG), 100 Rothko paintings as listed for \$1,800,000, \$200,000 to be paid on execution of the agreement and the balance of \$1,600,000 in 12 equal interest-free installments over a 12-year period. Under the second agreement, the executors consigned to Marlborough Gallery, Inc., a domestic corporation (hereinafter MNY), "approximately 700 paintings listed on a Schedule to be prepared," the consignee to be responsible for costs covering items such as insurance, storage restoration and promotion. By its provisos, MNY could sell up to 35 paintings a year from each of two groups, pre-1947 and post-1947, for 12 years at the best price obtainable but not less than the appraised estate value, and it would receive a 50% commission on each painting sold, except for a commission of 40% on those sold to or through other dealers.

Petitioner Kate Rothko, decedent's daughter and a person entitled to share in his estate by virtue of an election under [New York Estates, Powers and Trusts Law (EPTL)] 5-3.3, instituted this proceeding to remove the executors, to enjoin MNY and MAG from disposing of the paintings, to rescind the aforesaid agreements between the executors and said corporations, for a return of the paintings still in possession of those corporations, and for damages. She was joined by the guardian of her brother Christopher Rothko, likewise interested in the estate, who answered by adopting the allegations of his sister's petition and by demanding the same relief. The Attorney-General of the State, as the representative of the ultimate beneficiaries of the Mark Rothko Foundation, Inc., a charitable corporation and the residuary legatee under decedent's will, joined in requesting relief substantially similar to that prayed for by petitioner. . . .

Following a nonjury trial covering 89 days and in a thorough opinion, the Surrogate found:<sup>\*</sup>

- that Reis was a director, secretary and treasurer of MNY, the consignee art gallery, in addition to being a coexecutor of the estate;
- that the testator had a 1969 inter vivos contract with MNY to sell Rothko's work at a commission of only 10% and whether that agree-

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<sup>\*</sup>The list formatting has been added to improve readability. —Eds.

ment survived testator's death was a problem that a fiduciary in a dual position could not have impartially faced;

- that Reis was in a position of serious conflict of interest with respect to the contracts of May 21, 1970 and that his dual role and planned purpose benefited the Marlborough interests to the detriment of the estate;
- that it was to the advantage of coexecutor Stamos as a "not-too-successful artist, financially," to curry favor with Marlborough and that the contract made by him with MNY within months after signing the estate contracts placed him in a position where his personal interests conflicted with those of the estate, especially leading to lax contract enforcement efforts by Stamos;
- that Stamos acted negligently and improvidently in view of his own knowledge of the conflict of interest of Reis;
- that the third coexecutor, Levine, while not acting in self-interest or with bad faith, nonetheless failed to exercise ordinary prudence in the performance of his assumed fiduciary obligations since he was aware of Reis' divided loyalty, believed that Stamos was also seeking personal advantage, possessed personal opinions as to the value of the paintings and yet followed the leadership of his coexecutors without investigation of essential facts or consultation with competent and disinterested appraisers, and
- that the business transactions of the two Marlborough corporations were admittedly controlled and directed by Francis K. Lloyd.

It was concluded that the acts and failures of the three executors were clearly improper to such a substantial extent as to mandate their removal under SCPA 711 as estate fiduciaries. The Surrogate also found

- that MNY, MAG and Lloyd were guilty of contempt in shipping, disposing of and selling 57 paintings in violation of the temporary restraining order dated June 26, 1972 and of the injunction dated September 26, 1972;

- that the contracts for sale and consignment of paintings between the executors and MNY and MAG provided inadequate value to the estate, amounting to a lack of mutuality and fairness resulting from conflicts on the part of Reis and Stamos and improvidence on the part of all executors;
  - that said contracts were voidable and were set aside by reason of violation of the duty of loyalty and improvidence of the executors, knowingly participated in and induced by MNY and MAG;
  - that the fact that these agreements were voidable did not revive the 1969 *inter vivos* agreements since the parties by their conduct evinced an intent to abandon and abrogate these compacts.
- ....

In seeking a reversal, it is urged that an improper legal standard was applied in voiding the estate contracts of May, 1970 and that in case of a conflict of interest, absent self-dealing, a challenged transaction must be shown to be unfair. The subject of fairness of the contracts is intertwined with the issue of whether Reis and Stamos were guilty of conflicts of interest.<sup>2</sup> [Austin W. Scott Jr., *Scott on Trusts*] is quoted to the effect that "(a) trustee does not necessarily incur liability merely because he has an individual interest in the transaction . . . ."

These contentions should be rejected. . . . There is more than an adequate basis to conclude that the agreements between the Marlborough corporations and the estate were neither fair nor in the best interests of the estate. This is demonstrated, for example, by the comments of the Surrogate concerning the commissions on the consignment of the 698 paintings and those of the Appellate Division concerning the sale of the 100 paintings.

To be sure, the assertions that there were no conflicts of interest on the part of Reis or Stamos indulge in sheer fantasy. Besides being a director and officer of MNY, for which there was financial remuneration, however slight, Reis, as noted by the Surrogate, had different inducements

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<sup>2</sup>In New York, an executor, as such, takes a qualified legal title to all personality specifically bequeathed and an unqualified legal title to that not so bequeathed; he holds not in his own right but as a trustee for the benefit of creditors, those entitled to receive under the will and, if all is not bequeathed, those entitled to distribution under the EPTL.

to favor the Marlborough interests, including his own aggrandizement of status and financial advantage through sales of almost one million dollars for items from his own and his family's extensive private art collection by the Marlborough interests. Similarly, Stamos benefited as an artist under contract with Marlborough and, interestingly, Marlborough purchased a Stamos painting from a third party for \$4,000 during the week in May, 1970 when the estate contract negotiations were pending. The conflicts are manifest. Further, as noted in Bogert, *Trusts and Trustees* (2d ed.), "The duty of loyalty imposed on the fiduciary prevents him from accepting employment from a third party who is entering into a business transaction with the trust" (§ 543, subd. (S), p. 573). "While he (a trustee) is administering the trust he must refrain from placing himself in a position where his personal interest or that of a third person does or may conflict with the interest of the beneficiaries" (*Bogert, Trusts* (Hornbook Series 5th ed.), p. 343). Here, Reis was employed and Stamos benefited in a manner contemplated by Bogert. In short, one must strain the law rather than follow it to reach the result suggested on behalf of Reis and Stamos.

Levine contends that, having acted prudently and upon the advice of counsel, a complete defense was established. Suffice it to say, an executor who knows that his coexecutor is committing breaches of trust and not only fails to exert efforts directed towards prevention but accedes to them is legally accountable even though he was acting on the advice of counsel. When confronted with the question of whether to enter into the Marlborough contracts, Levine was acting in a business capacity, not a legal one, in which he was required as an executor primarily to employ such diligence and prudence to the care and management of the estate assets and affairs as would prudent persons of discretion and intelligence, accented by "(n)o<sup>t</sup> honesty alone, but the punctilio of an honor the most sensitive" (*Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)). Alleged good faith on the part of a fiduciary forgetful of his duty is not enough. He could not close his eyes, remain passive or move with unconcern in the face of the obvious loss to be visited upon the estate by participation in those business arrangements and then shelter himself behind the claimed counsel of an attorney.

Further, there is no merit to the argument that MNY and MAG lacked notice of the breach of trust. The record amply supports the determination that they are chargeable with notice of the executors' breach of duty.

### Notes and Questions

16.1. DAR WILLIAMS, MARK ROTHKO SONG (Razor & Tie 1993):

The blue it speaks so full  
It's like the beauty, one can barely stand  
Or too much things dropped in your hand  
And there's a green like the peace in your heart sometimes  
  
I met her at the funeral  
She said, "I don't know what he meant to me  
I just know he affected me  
An effect not unlike his art, I believe"

16.2. As *Rothko* illustrates, trusts can arise in a variety of settings. The executor of a will and the administrator of an estate in intestacy act as trustees for the parties who are to receive the decedent's property. The estate of a bankrupt firm or individual is also managed by a trustee, who acts to maximize its value for the creditors.

There are many kinds of trusts. Private trusts have identifiable individual beneficiaries. There are also charitable trusts, which can serve broader social purposes and large classes of unidentified beneficiaries, and business trusts, in which trustees manage financial assets for specific purposes. Many retirement funds, for example, are organized as trusts with the employees who are entitled to pensions as beneficiaries. Another common distinction is between revocable trusts, which the settlor can terminate, and irrevocable trusts, which she cannot. Trusts can also be **inter vivos**, i.e. established by the settlor during her lifetime, or testamentary, i.e. created in the settlor's will.

16.3. The basic duties of a trustee are **obedience** to the instructions given by the settlor, **loyalty** to the interests of the beneficiaries (rather than the trustee's own interests), and **prudence** in managing the trust assets appropriately. Various subsidiary duties, such as the duty to **account** for the trust assets and how they have been used, ensure that the basic duties are carried out faithfully. Which of these duties did the different trustees in *Rothko* violate? Observe the different standards of care required for the trustees: why is the standard of loyalty so much more stringent than the standard of prudence? Which of these duties should the settlor be able to waive when he or she sets up the trust? Which of them should the beneficiaries be able to waive? To make this more concrete, do you think that Mark Rothko wanted his executors to sell off his paintings quickly to Marlborough? If so, should he have

been allowed to specify so, and how? On the other side, could Kate Rothko and the other heirs have given permission for the sale, and if so, what form of notice and consent would the trustees have needed to get?

16.4. In an omitted part of the opinion, the *Rothko* court discussed the proper measure of damages. It upheld the Surrogate's decision to award appreciation damages, i.e. the value of the wrongfully sold paintings as of the time of the Surrogate's decree. This ended up being an especially large sum because the price of Rothko works rose rapidly after his death (and continued rising well after *Rothko*). Although sometimes justified in deterrence terms, it is a bit of an anomalous remedy in trust law and has been criticized by trusts scholars: holding trustees accountable for increases in value *after* they sell off trust assets is unusual. Two other damage measures are more common. One is the familiar make-whole remedy of tort law: if the trustees' breach of trust has reduced the value of the trust corpus, they are liable for the difference between the trust's actual value and what it would have been if not for the breach. This damage measure makes evident sense against the trustee who imprudently sells a trust asset too cheaply, or who holds on to an asset after a prudent trustee would have sold it, or who imprudently fails to diversify a trust corpus that is concentrated in a single risky asset. But breach of the duty of loyalty often calls for something more. Take the trustee who withdraws \$50,000 from a trust then goes on a gambling spree in Las Vegas and wins an additional \$100,000. Letting the trustee deposit the original \$50,000 back in the trust and walk away with the \$100,000 in gambling winnings would make the trust whole, but it would also leave trustees with a temptation to gamble—literally and figuratively—with trust assets for their own gain. In these circumstances, the usual remedy is *restitution*: the trustee must disgorge her ill-gotten gains back to the trust. Even if this gives the beneficiaries a windfall, the trustee would be unjustly enriched were she allowed to keep the gains. (Do you see how appreciation damages go even further than either of these measures?)

Observe that the restitutionary remedy involves a kind of *tracing*: the beneficiaries are regarded as having a right to the property in the trust corpus, and they can reclaim that property even as the trustee modifies it or changes its form. So if the trustee buys a Picasso with the trust corpus, and the Picasso increases in value, and the trustee then sells it, she will be required to pay back the full amount she received for the Picasso. Query: just the trustee? Why can't Kate Rothko et al. recover her father's paintings from the people Marlborough sold them to? What about the paintings sold to Marlborough but not yet resold by it?

16.5. A trust beneficiary has equitable title to trust assets. Equitable title is not legal title, as illustrated by spendthrift trusts. Suppose that the fabulously wealthy parents of Rick von Slonecker, currently 28 and never employed, decide that they want their son to enjoy a luxurious lifestyle, so they create in their wills a trust to pay Rick \$1 million a year for life, with the remainder to go either to his children, or if there are none, to various charitable causes. (Side note: observe the great flexibility provided by the trust form; equitable interests are almost always better alternatives to legal ones in any complicated property settlement, given the notorious inflexibility and troublesome traps of the system of estates in land.) They fear, not without reason, that Rick will run up gambling debts and want to pay off large legal settlements quietly. So they put a clause in the trust instrument making abundantly clear that the monthly payments are to go directly to Rick and no one else, and that Rick shall have no power to encumber the trust corpus. Now, in many states, when the casino comes calling and waving its bill, it must pursue Rick directly, even though he is penniless except for a few days immediately after each check arrives from the trust. It would be more convenient for the casino either to collect its debts from the trust corpus, or to obtain an order directing the trustee to pay it instead, but the casino has no more rights to the trust than Rick does, and *Rick holds only an equitable interest in the trust.*

Is it fair and just for Rick's parents to help Rick escape his debts in this way? One might think that there would be an obvious motivation for states to protect legitimate creditors against the various asset-shielding uses and abuses of trusts, but the trend has been in the other direction. Competition for trust business has induced numerous jurisdictions to adopt highly settlor-friendly trust law, such as validating spendthrift trusts like Rick's or weakening the Rule Against Perpetuities to attract long-lived dynastic trusts with beneficiaries spread out over many generations in a family. There are even asset-protection trusts, in which the settlor is also the principal beneficiary; the goal is that she can draw on the trust but her creditors cannot. These legal concessions to settlors can benefit state economies because trustees are entitled to compensation for managing trust assets, and many financial and legal service providers offer professional trust management services. But these benefits come at the expense of frustrated creditors and current generations bound by the dead-hand control of long-gone settlors. Is this a worthwhile trade for state legislatures to make?

16.6. There is at least one way in which courts do not pursue the legal fiction that the trustee has legal title to trust assets through to its logical conclusion. Suppose the trustee (rather than the beneficiary) has a gambling problem and racks up



**Figure 16.1:** Ad for Bessemer Trust, June 2014, New York Times Magazine: “At Bessemer Trust, we believe maintaining wealth from generation to generation is the true art of wealth management . . . History is littered with family names once associated with great wealth that are now mere footnotes. Everything we do is designed to keep you from becoming one of them.”

\$500,000 in personal gambling debts. Can the casino collect out of the trust corpus? Strict logic would say yes; they are the trustee’s property. But Section 507 of the Uniform Trust Code flatly says no: “Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.” See also 11 U.S.C. § 541(d) (exempting from a debtor’s estate in bankruptcy “[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest.”) Note that this rule cannot be justified using the usual principle that one is not bound by prior equitable interests of which one has no notice, since it affects even creditors who have no notice of the trust. Only if the trustee affirmatively commits breach of trust by withdrawing trust assets can she possibly be subjected to third-party claims. (Incidentally, what about the settlor’s creditors? Should they be able to reach trust assets?)

16.7. In *Eyerman v. Mercantile Trust Co.*, a court invalidated Louise Johnston’s attempt to instruct her executor to tear down her house. Could she have created The Louise Woodruff Johnston Testamentary Trust To Destroy My House and left her house to it in her will instead? Probably not. Section 404 of the Uniform Trust Code requires that a trust “must be for the benefit of its beneficiaries” and the comments condemn “frivolous or capricious” trust terms as violative of public policy. In *M’Caig v. University of Glasgow*, [1907] Sess. Cass 231, a Scottish court invalidated a

testamentary trust whose assets were to be used “for the purpose of erecting monuments and statutes [of] myself, brothers, and sisters.”

## 16.2 Corporations

### The Corporation\*

In HOLGER SPAMANN & JENS FRANKENREITER, CORPORATIONS (3d ed. 2023), *link*

Formally speaking, a corporation is nothing but an *abstraction* to which we assign rights and duties. It exists independently of humans in the sense that it has indefinite life, and its assets and obligations are legally separate from those of any humans involved in its founding or administration. . . .

Of course, being an abstraction rather than a real person, the corporation cannot exercise its rights, discharge its duties, or consume its profits by itself. Human beings must act on its behalf and ultimately consume its profits, if any. . . . The basic *default governance* is simple: (common) shareholders elect the board of directors, which formally manages the corporation, mostly by appointing the chief executive officer and other top management, who in turn act on behalf of the corporation in day-to-day matters. As to consuming the profits, the board may decide to distribute available funds to shareholders—or not. . . .

To make this more concrete, think of your local pizza store. Perhaps it is called “Olivia’s Pizza,” and Olivia indeed runs the place. You might think that Olivia is the “owner” of the store. In all likelihood, however, the formal “owner” of the pizza place—or rather the contracting party on the relevant contracts—is actually a corporation. The corporation might be called “Olivia’s Pizza Place Inc.” or “XYZ Corp.” for that matter. XYZ Corp. might be (a) the lessee under any lease contract for the store building or other leased items, (b) the employer of any employees, (c) the owner of any real estate or chattel such as the pizza oven or the store sign, and (d) the contracting party with the payment system operator (so your payment for the pizza might show up under “XYZ Corp.” on your credit card statement). . . .

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One benefit of incorporating can be convenience in contracting in certain transactions. If Olivia ever wanted to sell the pizza place after incorporating, she would just sell the corporation—a single asset (or to be more precise, all her shares in the corporation, still just one collection of a uniform asset). By contrast, as a single owner, she would have to transfer all the assets individually.

Another convenience is that incorporating changes the default rule from unlimited liability to **limited liability**. The default rule for corporations is that shareholders, directors, and corporate officers are not liable for corporate debts (but they do stand to lose any assets they invested in the corporation as shareholders: hence the expression “limited liability” rather than “no liability”). By contrast, the default rule for single owners is the same as that for any other individual debt: full liability except for protection under the bankruptcy code. . . .

Another benefit is **entity shielding**. Entity shielding refers to a liability barrier in the opposite direction: Olivia’s personal creditors cannot demand payment or seize any assets from XYZ Corp. The personal creditors can only seize Olivia’s shares in XYZ Corp. Entity shielding is extremely useful because it allows those interacting with XYZ Corp. to focus their attention on the pizza store’s assets and financial prospects, and not worry about Olivia’s other businesses. Imagine for example that Olivia also runs a construction business in a different city. Without entity shielding, creditors from the construction business might seize assets of the pizza store, and vice versa. As a consequence, the two businesses’ financial health could not be assessed independently of each other. By contrast, with entity shielding, a bank making a loan to develop the pizza store need only assess the financial prospects of the pizza store, i.e., XYZ Corp. And if the construction business does fail, XYZ Corp. can nevertheless continue business as usual.

### *Walkovszky v. Carlton*

18 N.Y.2d 414 (1966)

#### **FULD, Justice:**

This case involves what appears to be a rather common practice in the taxicab industry of vesting the ownership of a taxi fleet in many corporations, each owning only one or two cabs.

The complaint alleges that the plaintiff was severely injured four years ago in New York City when he was run down by a taxicab owned by the defendant Seon Cab Corporation and negligently operated at the time by the defendant Marchese. The individual defendant, Carlton, is claimed to be a stockholder of 10 corporations, including Seon, each of which has but two cabs registered in its name, and it is implied that only the minimum automobile liability insurance required by law (in the amount of \$10,000) is carried on any one cab. Although seemingly independent of one another, these corporations are alleged to be "operated . . . as a single entity, unit and enterprise" with regard to financing, supplies, repairs, employees and garaging, and all are named as defendants. The plaintiff asserts that he is also entitled to hold their stockholders personally liable for the damages sought because the multiple corporate structure constitutes an unlawful attempt "to defraud members of the general public" who might be injured by the cabs. . . .

The law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability but, manifestly, the privilege is not without its limits. Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, "pierce the corporate veil", whenever necessary "to prevent fraud or to achieve equity". In determining whether liability should be extended to reach assets beyond those belonging to the corporation, we are guided, as Judge Cardozo noted, by "general rules of agency". In other words, whenever anyone uses control of the corporation to further his own rather than the corporation's business, he will be liable for the corporation's acts "upon the principle of *respondeat superior* applicable even where the agent is a natural person". Such liability, moreover, extends not only to the corporation's commercial dealings but to its negligent acts as well.

In the *Mangan* case, the plaintiff was injured as a result of the negligent operation of a cab owned and operated by one of four corporations affiliated with the defendant Terminal. Although the defendant was not a stockholder of any of the operating companies, both the defendant and the operating companies were owned, for the most part, by the same parties. The defendant's name (Terminal) was conspicuously displayed on the sides of all of the taxis used in the enterprise and, in point of fact, the defendant actually serviced, inspected, repaired and dispatched them. These facts were deemed to provide sufficient cause for piercing the corporate

veil of the operating company—the nominal owner of the cab which injured the plaintiff—and holding the defendant liable. The operating companies were simply instrumentalities for carrying on the business of the defendant without imposing upon it financial and other liabilities incident to the actual ownership and operation of the cabs. . . .

The individual defendant is charged with having “organized, managed, dominated and controlled” a fragmented corporate entity but there are no allegations that he was conducting business in his individual capacity. Had the taxicab fleet been owned by a single corporation, it would be readily apparent that the plaintiff would face formidable barriers in attempting to establish personal liability on the part of the corporation’s stockholders. The fact that the fleet ownership has been deliberately split up among many corporations does not ease the plaintiff’s burden in that respect. The corporate form may not be disregarded merely because the assets of the corporation, together with the mandatory insurance coverage of the vehicle which struck the plaintiff, are insufficient to assure him the recovery sought. If Carlton were to be held individually liable on those facts alone, the decision would apply equally to the thousands of cabs which are owned by their individual drivers who conduct their businesses through corporations organized pursuant to section 401 of the Business Corporation Law and carry the minimum insurance required by subdivision 1 (par. [a]) of section 370 of the Vehicle and Traffic Law. These taxi owner-operators are entitled to form such corporations, and we agree with the court at Special Term that, if the insurance coverage required by statute “is inadequate for the protection of the public, the remedy lies not with the courts but with the Legislature.” It may very well be sound policy to require that certain corporations must take out liability insurance which will afford adequate compensation to their potential tort victims. However, the responsibility for imposing conditions on the privilege of incorporation has been committed by the Constitution to the Legislature and it may not be fairly implied, from any statute, that the Legislature intended, without the slightest discussion or debate, to require of taxi corporations that they carry automobile liability insurance over and above that mandated by the Vehicle and Traffic Law.

This is not to say that it is impossible for the plaintiff to state a valid cause of action against the defendant Carlton. However, the simple fact is that the plaintiff has just not done so here. While the complaint alleges that

the separate corporations were undercapitalized and that their assets have been intermingled, it is barren of any “sufficiently particular[ized] statements” that the defendant Carlton and his associates are actually doing business in their individual capacities, shuttling their personal funds in and out of the corporations “without regard to formality and to suit their immediate convenience.” Such a “perversion of the privilege to do business in a corporate form” would justify imposing personal liability on the individual stockholders. Nothing of the sort has in fact been charged, and it cannot reasonably or logically be inferred from the happenstance that the business of Seon Cab Corporation may actually be carried on by a larger corporate entity composed of many corporations which, under general principles of agency, would be liable to each other’s creditors in contract and in tort.

In point of fact, the principle relied upon in the complaint to sustain the imposition of personal liability is not agency but fraud. Such a cause of action cannot withstand analysis. If it is not fraudulent for the owner-operator of a single cab corporation to take out only the minimum required liability insurance, the enterprise does not become either illicit or fraudulent merely because it consists of many such corporations. The plaintiff’s injuries are the same regardless of whether the cab which strikes him is owned by a single corporation or part of a fleet with ownership fragmented among many corporations. Whatever rights he may be able to assert against parties other than the registered owner of the vehicle come into being not because he has been defrauded but because, under the principle of *respondeat superior*, he is entitled to hold the whole enterprise responsible for the acts of its agents.

In sum, then, the complaint falls short of adequately stating a cause of action against the defendant Carlton in his individual capacity. . . .

### Notes and Questions

16.8. Corporate structure sharply distinguishes between two kinds of property. **Corporate assets**, like the cabs in *Walkovszky*, belong to the corporation. **Corporate shares** belong to the corporation’s shareholders; they give the holders rights to share in the corporation’s profits and to control the corporation’s activities. So the shareholders own the corporation, which owns its assets—but the shareholders do not directly own or control the assets. Instead, in a business corporation (there are also nonprofit corporations, municipal corporations, and more), the sharehold-

ers elect a **board of directors**, which is responsible for operating the company. The board typically hires corporate officers and delegates day-to-day operations to them, but in theory it can take the reins when needed—and must do so for major corporate activities like mergers. If shareholders do not like how the board of directors are running the corporation, their two options are to sell their shares (if they can) or to elect new directors (if they can). Understanding this structure is crucial for understanding corporate law and the treatment of corporate property.

16.9. What purpose can possibly be served by allowing Carlton to escape liability for the injuries tortiously caused by the taxicab companies he owns and controls? Isn't limited liability an open invitation to pillage and lay waste? Should there perhaps be a distinction between (typically voluntary) contract creditors and (typically involuntary) tort creditors? Or between **closely held** corporations with one or a few shareholders and **public** corporations whose shares are traded on major stock markets and held by thousands or millions of shareholders?

16.10. The reverse of limited liability is asset partitioning: just as Seon's creditors can't reach outside the corporation to Carlton's personal assets, Carlton's personal creditors can't reach inside the corporation to Seon's corporate assets. Is there anything his creditors can do to get at the wealth sitting inside Seon and its corporate siblings?

16.11. In the aftermath of *Walkovsky*, the New York legislature increased the required insurance coverage for taxicab operators, but it left alone the state's law of veil-piercing. Does this suggest that the case was rightly or wrongly decided?

16.12. How does *Walkovsky* encourage taxicab companies to structure their businesses? This is a recurring problem in corporate and commercial law (which will become apparent in the mortgage crisis section): parties will arrange a corporate or transactional form to gain specific advantages while isolating themselves from the associated legal risks. In securitization, for example, a group of assets is pushed into a separate legal entity, isolating them from claims against their corporate parent, and vice-versa. If the new entity defaults on its obligations, the company that loaded it up with toxic junk will avoid liability—or such is the plan, anyway.

## 16.3 Family Ownership

The institution of marriage is another legal vehicle for property ownership. A married couple can hold property in two special forms that unmarried couples cannot: in **tenancy by the entirety**, and as **community property**. Each of these special forms offers distinct benefits, rules, and consequences.

As with other forms of concurrent ownership, you should be able to identify the formation requirements, the powers and duties of the co-tenants, and the rules for dissolution of these marital property structures. Indeed, typically marital property is included in the same chapter as tenancy in common and joint tenancy. But there are also similarities to corporate ownership and trusts—see if you can find them.

One additional thought to consider: these forms of property are limited to married people. Is it fair that the special features and benefits of tenancy by the entirety and community property are limited in this way? And can you creatively devise structures that enable unmarried people to own property with the same, or at least similar, features and benefits?

### 16.3.1 Tenancy by the Entirety

*United States v. Craft*  
535 U.S. 274 (2002)

**Justice O'CONNOR delivered the opinion of the Court.**

This case raises the question whether a tenant by the entirety possesses “property” or “rights to property” to which a federal tax lien may attach. Relying on the state law fiction that a tenant by the entirety has no separate interest in entireties property, the United States Court of Appeals for the Sixth Circuit held that such property is exempt from the tax lien. We conclude that, despite the fiction, each tenant possesses individual rights in the estate sufficient to constitute “property” or “rights to property” for the purposes of the lien, and reverse the judgment of the Court of Appeals.

#### I

In 1988, the Internal Revenue Service (IRS) assessed \$482,446 in unpaid income tax liabilities against Don Craft, the husband of respondent Sandra L. Craft, for failure to file federal income tax returns for the years 1979 through 1986. When he failed to pay, a federal tax lien attached to “all property and rights to property, whether real or personal, belonging to” him. 26 U.S.C. § 6321.

At the time the lien attached, respondent and her husband owned a piece of real property in Grand Rapids, Michigan, as tenants by the entirety. After notice of the lien was filed, they jointly executed a quitclaim deed purporting to transfer the husband’s interest in the property to respondent for one dollar. When respondent attempted to sell the property a few years

later, a title search revealed the lien. The IRS agreed to release the lien and allow the sale with the stipulation that half of the net proceeds be held in escrow pending determination of the Government's interest in the property.

Respondent brought this action to quiet title to the escrowed proceeds. The Government claimed that its lien had attached to the husband's interest in the tenancy by the entirety. It further asserted that the transfer of the property to respondent was invalid as a fraud on creditors. The District Court granted the Government's motion for summary judgment, holding that the federal tax lien attached at the moment of the transfer to respondent, which terminated the tenancy by the entirety and entitled the Government to one-half of the value of the property.

Both parties appealed. The Sixth Circuit held that the tax lien did not attach to the property because under Michigan state law, the husband had no separate interest in property held as a tenant by the entirety. It remanded to the District Court to consider the Government's alternative claim that the conveyance should be set aside as fraudulent.

On remand, the District Court concluded that where, as here, state law makes property exempt from the claims of creditors, no fraudulent conveyance can occur. It found, however, that respondent's husband's use of nonexempt funds to pay the mortgage on the entireties property, which placed them beyond the reach of creditors, constituted a fraudulent act under state law, and the court awarded the IRS a share of the proceeds of the sale of the property equal to that amount. . . .

We granted certiorari to consider the Government's claim that respondent's husband had a separate interest in the entireties property to which the federal tax lien attached.

## II

Whether the interests of respondent's husband in the property he held as a tenant by the entirety constitutes "property and rights to property" for the purposes of the federal tax lien statute, is ultimately a question of federal law. The answer to this federal question, however, largely depends upon state law. The federal tax lien statute itself "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." Accordingly, "[w]e look initially to state law to determine what rights the taxpayer has in the property the Government

seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation."

A common idiom describes property as a "bundle of sticks"—a collection of individual rights which, in certain combinations, constitute property. State law determines only which sticks are in a person's bundle. Whether those sticks qualify as "property" for purposes of the federal tax lien statute is a question of federal law.

In looking to state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them. Such state law labels are irrelevant to the federal question of which bundles of rights constitute property that may be attached by a federal tax lien. In *Drye v. United States*, 528 U.S. 49 (1999), we considered a situation where state law allowed an heir subject to a federal tax lien to disclaim his interest in the estate. The state law also provided that such a disclaimer would "creat[e] the legal fiction" that the heir had predeceased the decedent and would correspondingly be deemed to have had no property interest in the estate. We unanimously held that this state law fiction did not control the federal question and looked instead to the realities of the heir's interest. We concluded that, despite the State's characterization, the heir possessed a "right to property" in the estate—the right to accept the inheritance or pass it along to another—to which the federal lien could attach.

### III

We turn first to the question of what rights respondent's husband had in the entireties property by virtue of state law. In order to understand these rights, the tenancy by the entirety must first be placed in some context. . . .

A tenancy by the entirety is a unique sort of concurrent ownership that can only exist between married persons. Because of the common-law fiction that the husband and wife were one person at law (that person, practically speaking, was the husband), Blackstone did not characterize the tenancy by the entirety as a form of concurrent ownership at all. Instead, he thought that entireties property was a form of single ownership by the marital unity. Neither spouse was considered to own any individual interest in the estate; rather, it belonged to the couple. . . .

Michigan's version of the estate is typical of the modern tenancy by the entirety. Following Blackstone, Michigan characterizes its tenancy by the entirety as creating no individual rights whatsoever: "It is well settled under the law of this State that one tenant by the entirety has no interest separable from that of the other . . . Each is vested with an entire title." And yet, in Michigan, each tenant by the entirety possesses the right of survivorship. Each spouse—the wife as well as the husband—may also use the property, exclude third parties from it, and receive an equal share of the income produced by it. Neither spouse may unilaterally alienate or encumber the property, although this may be accomplished with mutual consent. Divorce ends the tenancy by the entirety, generally giving each spouse an equal interest in the property as a tenant in common, unless the divorce decree specifies otherwise.

In determining whether respondent's husband possessed "property" or "rights to property" within the meaning of 26 U.S.C. § 6321, we look to the individual rights created by these state law rules. According to Michigan law, respondent's husband had, among other rights, the following rights with respect to the entireties property: the right to use the property, the right to exclude third parties from it, the right to a share of income produced from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with the respondent's consent and to receive half the proceeds from such a sale, the right to place an encumbrance on the property with the respondent's consent, and the right to block respondent from selling or encumbering the property unilaterally.

#### IV

We turn now to the federal question of whether the rights Michigan law granted to respondent's husband as a tenant by the entirety qualify as "property" or "rights to property" under § 6321. The statutory language authorizing the tax lien "is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." We conclude that the husband's rights in the entireties property fall within this broad statutory language.

Michigan law grants a tenant by the entirety some of the most essential property rights: the right to use the property, to receive income produced

by it, and to exclude others from it. See *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (“[T]he right to exclude others” is “‘one of the most essential sticks in the bundle of rights that are commonly characterized as property’”). These rights alone may be sufficient to subject the husband’s interest in the entireties property to the federal tax lien. They gave him a substantial degree of control over the entireties property, and, as we noted in *Drye*, “in determining whether a federal taxpayer’s state-law rights constitute ‘property’ or ‘rights to property,’ [t]he important consideration is the breadth of the control the [taxpayer] could exercise over the property.”

The husband’s rights in the estate, however, went beyond use, exclusion, and income. He also possessed the right to alienate (or otherwise encumber) the property with the consent of respondent, his wife. It is true, as respondent notes, that he lacked the right to unilaterally alienate the property, a right that is often in the bundle of property rights. There is no reason to believe, however, that this one stick—the right of unilateral alienation—is essential to the category of “property.” . . .

Excluding property from a federal tax lien simply because the taxpayer does not have the power to unilaterally alienate it would, moreover, exempt a rather large amount of what is commonly thought of as property. . . . Community property States often provide that real community property cannot be alienated without the consent of both spouses. Accordingly, the fact that respondent’s husband could not unilaterally alienate the property does not preclude him from possessing “property and rights to property” for the purposes of § 6321.

Respondent’s husband also possessed the right of survivorship—the right to automatically inherit the whole of the estate should his wife predecease him. Respondent argues that this interest was merely an expectancy, which we suggested in *Drye* would not constitute “property” for the purposes of a federal tax lien. 528 U.S., at 60, n. 7 (“[We do not mean to suggest] that an expectancy that has pecuniary value . . . would fall within § 6321 prior to the time it ripens into a present estate”). *Drye* did not decide this question, however, nor do we need to do so here. As we have discussed above, a number of the sticks in respondent’s husband’s bundle were presently existing. It is therefore not necessary to decide whether the right to survivorship alone would qualify as “property” or “rights to property” under § 6321.

That the rights of respondent's husband in the entireties property constitute "property" or "rights to property" "belonging to" him is further underscored by the fact that, if the conclusion were otherwise, the entireties property would belong to no one for the purposes of § 6321. Respondent had no more interest in the property than her husband; if neither of them had a property interest in the entireties property, who did? This result not only seems absurd, but would also allow spouses to shield their property from federal taxation by classifying it as entireties property, facilitating abuse of the federal tax system.

Justice SCALIA's and Justice THOMAS' dissents claim that the conclusion that the husband possessed an interest in the entireties property to which the federal tax lien could attach is in conflict with the rules for tax liens relating to partnership property. This is not so. As the authorities cited by Justice THOMAS reflect, the federal tax lien does attach to an individual partner's interest in the partnership, that is, to the fair market value of his or her share in the partnership assets. As a holder of this lien, the Federal Government is entitled to "receive . . . the profits to which the assigning partner would otherwise be entitled," including predissolution distributions and the proceeds from dissolution. . . .

There is, however, a difference between the treatment of entireties property and partnership assets. The Federal Government may not compel the sale of partnership assets (although it may foreclose on the partner's interest). It is this difference that is reflected in Justice SCALIA's assertion that partnership property cannot be encumbered by an individual partner's debts. This disparity in treatment between the two forms of ownership, however, arises from our decision in *United States v. Rodgers*, *supra* (holding that the Government may foreclose on property even where the co-owners lack the right of unilateral alienation), and not our holding today. In this case, it is instead the dissenters' theory that departs from partnership law, as it would hold that the Federal Government's lien does not attach to the husband's interest in the entireties property at all, whereas the lien may attach to an individual's interest in partnership property . . . .

We therefore conclude that respondent's husband's interest in the entireties property constituted "property" or "rights to property" for the purposes of the federal tax lien statute. We recognize that Michigan makes a different choice with respect to state law creditors: "[L]and held by husband and wife as tenants by entirety is not subject to levy under execution

on judgment rendered against either husband or wife alone.” But that by no means dictates our choice. The interpretation of 26 U.S.C. § 6321 is a federal question, and in answering that question we are in no way bound by state courts’ answers to similar questions involving state law. As we elsewhere have held, “‘exempt status under state law does not bind the federal collector.’” . . .

**Justice SCALIA, with whom Justice THOMAS joins, dissenting.**

. . . I write separately to observe that the Court nullifies (insofar as federal taxes are concerned, at least) a form of property ownership that was of particular benefit to the stay-at-home spouse or mother. She is overwhelmingly likely to be the survivor that obtains title to the unencumbered property; and she (as opposed to her business-world husband) is overwhelmingly unlikely to be the source of the individual indebtedness against which a tenancy by the entirety protects. It is regrettable that the Court has eliminated a large part of this traditional protection retained by many States.

**Justice THOMAS, with whom Justice STEVENS and Justice SCALIA join, dissenting.**

. . . The Court does not contest that the tax liability the IRS seeks to satisfy is Mr. Craft’s alone, and does not claim that, under Michigan law, real property held as a tenancy by the entirety belongs to either spouse individually. Nor does the Court suggest that the federal tax lien attaches to particular “rights to property” held individually by Mr. Craft. Rather, borrowing the metaphor of “property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations constitute property,” the Court proposes that so long as sufficient “sticks” in the bundle of “rights to property” “belong to” a delinquent taxpayer, the lien can attach as if the property itself belonged to the taxpayer.

This amorphous construct ignores the primacy of state law in defining property interests . . . .

I

Title 26 U.S.C. § 6321 provides that a federal tax lien attaches to “all property and rights to property, whether real or personal, belonging to” a delinquent taxpayer. It is uncontested that a federal tax lien itself “creates no property rights but merely attaches consequences, federally defined, to rights created under state law.” Consequently, the Government’s lien under

§ 6321 “cannot extend beyond the property interests held by the delinquent taxpayer,” under state law . . . .

**A**

. . . As the Court recognizes, pursuant to Michigan law, as under English common law, property held as a tenancy by the entirety does not belong to either spouse, but to a single entity composed of the married persons. Neither spouse has “any separate interest in such an estate.” An entireties estate constitutes an indivisible “sole tenancy.” Because Michigan does not recognize a separate spousal interest in the Grand Rapids property, it did not “belong” to either respondent or her husband individually when the IRS asserted its lien for Mr. Craft’s individual tax liability. Thus, the property was not property to which the federal tax lien could attach for Mr. Craft’s tax liability.

*Drye* . . . was concerned not with whether state law recognized “property” as belonging to the taxpayer in the first place, but rather with whether state laws could disclaim or exempt such property from federal tax liability after the property interest was created. *Drye* held only that a state-law disclaimer could not retroactively undo a vested right in an estate that the taxpayer already held, and that a federal lien therefore attached to the taxpayer’s interest in the estate. 528 U.S., at 61 (recognizing that a disclaimer does not restore the status quo ante because the heir “determines who will receive the property—himself if he does not disclaim, a known other if he does”). . . .

**B**

. . . Rather than adopt the majority’s approach, I would ask specifically, as the statute does, whether Mr. Craft had any particular “rights to property” to which the federal tax lien could attach. He did not.<sup>5</sup> . . . With such rights subject to lien, the taxpayer’s interest has “ripen[ed] into a present

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<sup>5</sup>Even such rights as Mr. Craft arguably had in the Grand Rapids property bear no resemblance to those to which a federal tax lien has ever attached. See W. Elliott, *Federal Tax Collections, Liens, and Levies* ¶¶ 9.09[3][a]–[f] (2d ed. 1995 and 2000 Cum. Supp.) (listing examples of rights to property to which a federal tax lien attaches, such as the right to compel payment; the right to withdraw money from a bank account, or to receive money from accounts receivable; wages earned but not paid; installment payments under a contract of sale of real estate; annuity payments; a beneficiary’s rights to payment under a spendthrift trust; a liquor license; an easement; the taxpayer’s interest in a timeshare;

estate” of some form and is more than a mere expectancy, and thus the taxpayer has an apparent right “to channel that value to [another].”

In contrast, a tenant in a tenancy by the entirety not only lacks a present divisible vested interest in the property and control with respect to the sale, encumbrance, and transfer of the property, but also does not possess the ability to devise any portion of the property because it is subject to the other’s indestructible right of survivorship. This latter fact makes the property significantly different from community property, where each spouse has a present one-half vested interest in the whole, which may be devised by will or otherwise to a person other than the spouse. See 4 G. Thompson, *Real Property* § 37.14(a) (D. Thomas ed. 1994) (noting that a married person’s power to devise one-half of the community property is “consistent with the fundamental characteristic of community property”: “community ownership means that each spouse owns 50% of each community asset”).

It is clear that some of the individual rights of a tenant in entireties property are primarily personal, dependent upon the taxpayer’s status as a spouse, and similarly not susceptible to a tax lien. For example, the right to use the property in conjunction with one’s spouse and to exclude all others appears particularly ill suited to being transferred to another, and to lack “exchangeable value.”

Nor do other identified rights rise to the level of “rights to property” to which a § 6321 lien can attach, because they represent, at most, a contingent future interest, or an “expectancy” that has not “ripen[ed] into a present estate.” By way of example, the survivorship right wholly depends upon one spouse outliving the other, at which time the survivor gains “substantial rights, in respect of the property, theretofore never enjoyed by [the] survivor.” . . .

Similarly, while one spouse might escape the absolute limitations on individual action with respect to tenancy by the entirety property by obtaining the right to one-half of the property upon divorce, or by agreeing with the other spouse to sever the tenancy by the entirety, neither instance is an event of sufficient certainty to constitute a “right to property” for purposes of § 6321. Finally, while the federal tax lien could arguably have attached to a tenant’s right to any “rents, products, income, or profits” of real prop-

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options; the taxpayer’s interest in an employee benefit plan or individual retirement account).

erty held as tenants by the entirety, the Grand Rapids property created no rents, products, income, or profits for the tax lien to attach to . . . .

Ownership by “the marriage” is admittedly a fiction of sorts, but so is a partnership or corporation. There is no basis for ignoring this fiction so long as federal law does not define property, particularly since the tenancy by the entirety property remains subject to lien for the tax liability of both tenants . . . .

### **Notes and Questions**

16.13. *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977), reached a different result under state law. *Sawada* allowed a transfer of entireties property (the family home) by a husband and wife to their children, in order to avoid the risk that the home would be vulnerable to claims by Masako and Helen Sawada, who'd been injured when they were struck by a car operated by the husband, and who eventually became judgment creditors as a result of the lawsuits they filed against the husband, Kokichi Endo. Given that any lien against the house could only attach to the husband's interest and that the house couldn't be sold without the wife's consent, what exactly was the risk to the Endos' ownership of the house?

The Endos conveyed the house to their children, for no valuable consideration, after the accident and after the first complaint was filed. The parents continued to live in the house, though they had no legal interest in it. After trial, both Sawadas were awarded a total of roughly \$25,000. The wife, Ume Endo, died shortly thereafter, survived by Kokichi. The Sawadas, unable to recover against Kokichi Endo's personal property, sought to invalidate the transfer of the family home to the children as fraudulent.

The Hawaii Supreme Court found that a spouse's interest in property held by the entireties was not subject to levy and execution by that spouse's individual creditors, even though some states do allow seizure and sale by creditors, subject to the other spouse's contingent right of survivorship. The Hawaii Supreme Court reasoned that the Married Women's Property Acts equalized husband and wife, creating a unity of equals who both had the right to use and enjoy the whole estate. This insulated the wife's interest in the estate from the separate debts of her husband, and vice versa. “A joint tenancy may be destroyed by voluntary alienation, or by levy and execution, or by compulsory partition, but a tenancy by the entirety may not. The indivisibility of the estate, except by joint action of the spouses, is an indispensable feature of the tenancy by the entirety.” Creditors of one spouse could not even

attach that spouse's right of survivorship, because that would make a conveyance by both spouses too uncertain, harming the other spouse's interest.

The Hawaii Supreme Court continued, "there is obviously nothing to prevent [a] creditor from insisting upon the subjection of property held in tenancy by the entirety as a condition precedent to the extension of credit. Further, the creation of a tenancy by the entirety may not be used as a device to defraud existing creditors." That's all well and good for voluntary creditors, but what about involuntary creditors like the Sawadas? They weren't offered any options before they extended "credit" to Kokichi Endo in the form of the injuries he inflicted on them. Is this rule fair to them? (Is the proper comparison a world in which Kokichi Endo didn't own a house at all when he hit them, or a world in which he owned a house jointly or in common when he hit them? Does it matter that the law is less directly involved in whether Endo owned a house than in the rules of co-ownership?)

The Hawaii Supreme Court concluded that public policy supported its holding, because tenancy by the entirety protected an interest in family solidarity:

When a family can afford to own real property, it becomes their single most important asset. Encumbered as it usually is by a first mortgage, the fact remains that so long as it remains whole during the joint lives of the spouses, it is always available in its entirety for the benefit and use of the entire family. Loans for education and other emergency expenses, for example, may be obtained on the security of the marital estate. This would not be possible where a third party has become a tenant in common or a joint tenant with one of the spouses, or where the ownership of the contingent right of survivorship of one of the spouses in a third party has cast a cloud upon the title of the marital estate, making it virtually impossible to utilize the estate for these purposes.

561 P.2d at 1297. A dissent pointed out that, under the Married Women's Property Acts, what was required was equality as between spouses, not any particular rule about creditors. At common law, "the interest of the husband in an estate by the entireties could be taken by his separate creditors on execution against him, subject only to the wife's right of survivorship." Thus, the dissent reasoned, equal treatment merely required that both spouses be subjected to this rule.

One way of looking at the matter: entireties property is specifically designed, at least in its modern incarnation, to protect the interest of one spouse against the other's independent acts. If that's the case, then aren't the *Craft* dissents correct? If

a state may choose this objective in its property law, why shouldn't this choice be respected? Or are there special concerns relating to federal tax that justify overriding this choice? If so, should the government be able to force the sale of entireties property, or should it be forced to wait to see which spouse survives the other?

16.14. **Forfeiture.** What about criminal forfeiture of property involved in a crime, such as a house in which a drug transaction occurred? Some forfeiture statutes exempt property used without the consent or knowledge of its owner. Under those statutes, some courts allow the innocent spouse to retain use and possession of entirety property during her lifetime, as well as her right of survivorship. *Compare United States v. 1500 Lincoln Ave.*, 949 F.2d 73 (3d Cir. 1991) (guilty spouse's interest is forfeited, subject to innocent spouse's possession and survivorship rights), *with United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511 (11th Cir. 1990) (not allowing current forfeiture, but allowing government to file lis pendens preserving its right to guilty spouse's interest upon death of innocent spouse or severance of estate). What if a forfeiture statute doesn't protect innocent owners? In that case, the government can seize the entire property, including the innocent spouse's interest. *Bennis v. Michigan*, 516 U.S. 442 (1996) (rejecting takings and due process claims).

16.15. **Homestead acts as an alternative?** Many states have so-called "homestead" acts, protecting the family home (up to a certain value or size) from many creditors' claims, though not against foreclosure of a mortgage on that home. California provides for \$50,000 for a single person, \$75,000 for a "family unit," and \$150,000 for people 65 or older, disabled, or 55 or older with an annual income under \$15,000. CAL. CODE CIV. PROC. § 704.730 (2003). Washington provides for protections for \$40,000 real property or \$15,000 personal property. WASH. REV. CODE § 6.13.030 (1999). Should the tenancy by the entirety be abolished in favor of homestead exemptions? Compare the protections for mortgagors, discussed in the unit on Mortgages.

16.16. **Creating a tenancy by the entirety.** Traditionally, a tenancy by the entirety was created by granting property "to X and Y, husband and wife, as tenants by the entirety." Today, X and Y can be any spouses, and states that recognize tenancies by the entirety often presume that a transfer "to A and B, [spouses]," creates that estate. See, e.g., *Constitution Bank v. Olson*, 620 A.2d 1146 (Pa. Super. Ct. 1993). Other states always presume a tenancy in common even when the co-owners are married, so a clear expression of the requisite intent is required. See MISS. CODE ANN. § 89-11-7. As a rule, the magic words "tenants by the entirety" should be used.

If the cotenants are not married, the magic words will not work. In *Riccelli v. Forcinito*, 595 A.2d 1322 (Pa. Super. Ct. 1991), Sam Riccelli and Carmen Pirozek bought property in 1962 “as tenants by the entireties with the right of survivorship.” However, they weren’t married at the time of the purchase, and so they couldn’t have a tenancy by the entirety. What kind of tenancy did they have? The court reasoned: “The appropriate form of tenancy is to be determined by the intention of the parties, ‘the ultimate guide by which all deeds must be interpreted.’ . . . [J]oint tenancy with the right of survivorship best effectuates their intention to the extent legally permissible, that being the form of tenancy for unmarried persons most nearly resembling the tenancy by the entireties enjoyed by husband and wife, since in both instances the survivor takes the whole.” The modern presumption in favor of tenancy in common yielded to a clearly expressed contrary intent. See also *Funches v. Funches*, 413 S.E.2d 44 (Va. 1992) (“tenancy by the entirety” with express survivorship language that was given to unmarried parties created a joint tenancy because of the survivorship language). But see *Smith v. Stewart*, 596 S.W.2d 346 (Ark. Ct. App. 1980) (deed “to A and B, his wife,” when A and B were unmarried, failed to create a joint tenancy; the relevant state statute required an express declaration of joint tenancy with right of survivorship), aff’d, 601 S.W.2d 837 (Ark. 1980).

16.17. **Divorce.** Because marriage is a requirement for a tenancy by the entirety, divorce ends that form of ownership. What should replace it? The modern preference is for tenancy in common as a general rule, and many states follow that rule with tenancies by the entireties that end by divorce. See, e.g., MICH. COMP. LAWS ANN. § 552.102. A few states presume that a tenancy by the entirety is converted to a joint tenancy unless the parties otherwise agree. See, e.g., *Estate of Childress v. Long*, 588 So. 2d 192 (Miss. 1991).

16.18. **Common law marriage.** Common law marriage was widely recognized when access to formal marriage was sometimes difficult, particularly in rural areas. However, it is now recognized only in 11 states and the District of Columbia. Where it is recognized, the parties must manifest an intent to be married and hold themselves out as husband and wife. If they do so, they have exactly the same rights as any other married couple. Is this a kind of “adverse possession” of the benefits of marriage?

Many states abolished common law marriage on the theory that it was no longer required, given the ease of accessing a marriage license, and that it encouraged people to lie about whether they’d held themselves out as husband and wife. Moreover, a marriage license makes it easy to understand who is entitled to pen-

sions and other benefits, which became more important as those types of assets became more significant throughout the twentieth century.

### 16.3.2 Community Property

Nine states, representing roughly 30% of the population of the U.S., recognize community property for married people: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Under community property regimes, marital property belongs to each spouse equally. Each spouse has a right to pass on his or her share to anyone by will, making community property different from joint tenancy; however, it is also possible to hold community property with a right of survivorship, highly similar to joint tenancy. In the absence of a right of survivorship, a surviving spouse is typically entitled to some of the community property when the other spouse dies intestate; his or her share generally depends on whether there are surviving issue (children and other descendants), and how many there are.

The basic idea of community property is that a marriage is a cooperative endeavor, and each spouse contributes to gains, whether directly or indirectly. Except for Alaska, which requires an explicit agreement, ALASKA STAT. § 34.77.090 (2002), the default rule under a community property regime is that property earned by a spouse during marriage belongs to the marital community, and each spouse owns half of the community property as an equal undivided interest. This includes property purchased with income earned during the marriage. This contrasts to common law states, in which property belongs by default to the spouse who acquires it during the marriage.

Property owned before marriage, as well as property acquired by inheritance or gift during the marriage, remains separate property in most states. States are divided about whether and when income from separate property, such as interest, royalties, and rent, becomes part of the community property. Idaho, Louisiana, Texas and Wisconsin treat the income from all property as community property, while the other states allow such income to remain separate property. Classification may prove complicated: for example, is an award of damages from a bike accident involving one spouse community property? The answer may depend on whether the award represents economic harm such as lost earnings (community property) or pain and suffering (separate property). What if the award is for loss of a limb, which has both earnings-related and quality of life-related aspects? What if the

award is for loss of consortium—the caretaking and intimate relations shared between spouses?

In general, spouses are free to take property as separate property by agreement, and to convert property from one regime to the other by agreement. If community and separate property are commingled, tracing the shares may prove very difficult, and the party with the burden of showing that the property is separate may have a hard time prevailing. Carefully kept records may allow a tracing spouse to overcome the presumption that assets held during marriage are community property. Under the “family expense presumption,” family expenses are presumed to have come from community assets in a commingled account. If such expenses exceeded deposits of community funds, the balance will be separate property. See *v. See*, 415 P.2d 776 (Cal. 1966). As for outstanding debt paid off in part with community property, California apportions community and separate property according to the contributions made. Thus, a person who has a house subject to a mortgage before she marries, and then pays the remainder of the mortgage with money earned during marriage, will own the house partly as separate property and partly as community property. Other states use an “inception” theory and consider the house entirely separate property because the purchase was made before the marriage. And other states use a “vesting” theory and consider the house entirely community property because title didn’t vest until the mortgage was paid off.

In most cases, either spouse may manage community property. However, if title is in only one spouse’s name, that spouse may be the only one who can manage the property. In addition, a spouse who runs a business that is community property may have exclusive control. The controlling spouse has a kind of fiduciary duty: she must act in good faith towards her spouse, but she is not required to act with good judgment. Transferring or mortgaging community property, unlike day-to-day management, requires the consent of both spouses in a number of community property states, though not all. See J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 L. & CONTEMP. PROBS. 99 (1993). The fact that a deed says that property is separate property is not controlling, because the law prevents a spouse from converting community property to separate property unilaterally. In some states, such as Texas, the controlling spouse can make reasonable gifts of community property, while California and Washington allow any gift by the managing spouse to be set aside by the other spouse. In most states, a bona fide purchaser from any managing spouse is protected against invalidation of the sale.

In some states, creditors can reach whatever property a spouse is entitled to manage. If the spouses share the family car, for example, then a creditor of either

spouse could seize the car to satisfy one spouse's debt (after following the appropriate procedures). Others only allow creditors to reach community property if both spouses consented to the relevant debt, and others limit the amount of community property creditors of only one spouse can reach.

A spouse may dispose of half of the community property at his or her death. There is no right of survivorship, but the other half belongs to the survivor. The decedent can allocate the property however she wants in a will; if there is no will, then some community property states make the other spouse the heir, while others give the decedent's issue priority.

There is no such thing as a tenancy by the entireties in a community property state; there can be joint tenancy or tenancy in common, but property held in those forms is separate property. Like a tenancy by the entireties, community property can only exist between married people. Moreover, neither spouse alone can convey his or her undivided share to another person, except to the other spouse. Community property is not subject to partition. Without agreement, the spouse's only option to separate the couple's undivided interests is divorce, which will result in an equal or "equitable" division of community property, depending on the state. California, New Mexico, and Louisiana divide community property and debts equally,<sup>1</sup> while courts use the more flexible equitable division in the other community property states. In California, absent a written agreement to the contrary, a spouse who contributes separate property to acquiring community property must be reimbursed for the contribution at divorce, though the spouse can't get interest or an adjustment for a change in the value of the property, and the reimbursement can't exceed the net value of the property at the time the property was acquired. CAL. FAMILY CODE § 2640(b). Can you see why the legislature felt it necessary to impose the net value cap? What kind of unsavory activities might result if the rule were different?

If a married couple moves to a non-community property state, community property retains its character, which can lead to some complicated situations.

A family law course will cover the significant differences between community property and joint tenancy in more detail, including tax implications. The regimes reward careful planning, especially for people with substantial assets. See Andrea B. Carroll, *Incentivizing Divorce*, 30 CARDozo L. REV. 1925 (2009) (arguing that marital property rules, particularly in community property states, create perverse incentives toward divorce).

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<sup>1</sup>In the absence of agreement to the contrary or deliberate misappropriation of community property by one spouse.



# Chapter 17

## Easements

### 17.1 What Is an Easement?

**Easements** are interests in land. Unlike fee simple ownership, they are non-possessory. Rather, they allow the easement holder to use or control someone else's land. Suppose Anna owns Blackacre, and Brad owns Whiteacre, which borders Blackacre. Anna would like to cross Whiteacre to reach Blackacre. She could ask Brad for permission to cross, but even if he says yes, permission can be revoked. Brad might also convey Whiteacre to a less welcoming owner. Anna may therefore wish to acquire a property interest that gives her an *irrevocable* right to cross over Whiteacre. If Brad conveys her this interest (by sale or grant), Anna now owns an **easement of access**, which is a right to enter and cross through someone's land on the way to someplace else.

**Terminology.** Easements come in multiple flavors. The first distinction is between affirmative and negative easements. An **affirmative easement** lets the owner do something on (or affecting) the land of another, known as the **servient estate** (or **servient tenement**). The right is the **benefit** of the easement, and the obligation on the servient estate is its **burden**.

As noted above, a common affirmative easement is an **easement of access** (also known as an **easement of way**), which requires the owner of the servient estate to allow the easement holder to travel on the land to reach another location. In the example above, Anna has an affirmative easement to cross Whiteacre, the servient estate, to access Blackacre.<sup>1</sup> A **negative easement** prohibits the owner of the servient

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<sup>1</sup>If the easement holder is allowed to take something from the land (suppose Anna has the right to harvest wheat from Whiteacre while in transit to Blackacre), the right is called a *profit à prendre* or

estate from engaging in some action on the land. For example, if Anna has a solar panel on her property, she might acquire a solar easement from Brad that would prohibit the construction of any structures on Whiteacre that might block the sun from Anna's panel on Blackacre.

Another distinction is between the **easement appurtenant** and **easement in gross**. An easement appurtenant benefits another piece of land, the **dominant estate**. The owner of the dominant estate exercises the rights of the easement. If ownership of the dominant estate changes, the new owner exercises the powers of the easement; the prior owner retains no interest. So if Anna's easement to cross Whiteacre to reach Blackacre is an easement appurtenant, Blackacre is the dominant estate. If she conveys Blackacre to Charlie, Charlie becomes the owner of the easement.

In an easement in gross, the easement benefits a specific person, who exercises the rights of the easement rights regardless of land ownership. If Anna's easement to cross Whiteacre to reach Blackacre is an easement in gross, she keeps her easement even if she conveys Blackacre. In general, the presumption is in favor of an easement appurtenant over an easement in gross. Why do you think that is?

Easements are part of the larger law of **servitudes**, which include real covenants and equitable servitudes. A servitude is a legal device that creates a right or obligation that **runs with the land**. A right runs with the land when it is enjoyed not only by its initial owner but also by all successors to that owner's benefited property interest. A burden runs with the land when it binds not only its initial obligor but also all successors to that obligor's burdened property interest. A servitude can be, among other things, an easement, profit, or covenant. These interests overlap, and the **RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES)** (2000) seeks to unify them.<sup>2</sup> As a matter of history, however, easement law developed as a distinct set of doctrines, and this chapter gives them separate treatment.<sup>3</sup>

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**profit.** Profits were traditionally classified as distinct from easements, though their legal treatment is typically similar. See, e.g., *Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong*, 516 N.W.2d 410, 414 (Wis. 1994) ("[W]e can find no distinction between easements and profits relevant to recording the property interest[.]"). The **RESTATEMENT** characterizes the profit as a kind of easement. § 1.2.

<sup>2</sup>A covenant is a servitude if either its benefit or its burden runs with the land; otherwise it is merely a contract enforceable only as between the original contracting parties (or perhaps a gratuitous promise enforceable by nobody at all). When a covenant is a servitude, it may equivalently be described as either a "servitude" or "a covenant running with the land." We will discuss covenants in a later chapter.

<sup>3</sup>Moreover, the **THIRD RESTATEMENT** is somewhat notorious for the extent to which it seeks not only to "restate" the common law, but to push it in a particular direction. While the **THIRD RESTATE-**

## 17.2 Express Easements

Because easements are interests in land, express easements are subject to the Statute of Frauds. Failures to comply with the statute may still be enforced in cases of reasonable detrimental reliance. See, e.g., *RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES)* § 2.9.

**Third parties.** Easements are often created as part of the transfer of land (e.g., selling a property, but retaining the right to use its parking lot). Traditionally, grantors could reserve an easement in the conveyed land for themselves, but could not create an easement for the benefit of a third party. This rule led to extra transactions. Where the traditional rule applied, if A wanted to convey to B while creating an easement for C, A could convey to C who would then convey to B, while reserving an easement.

The modern trend discards this restriction. See, e.g., *Minton v. Long*, 19 S.W.3d 231, 238 (Tenn. Ct. App. 1999); *Willard v. First Church of Christ, Scientist*, 7 Cal. 3d 473, 476-77 (1972) (describing the traditional reservation rule as “clearly an inappropriate feudal shackle today”). The modern *RESTATEMENT* likewise dispenses with the traditional approach, allowing the direct creation of easements on behalf of third parties. *RESTATEMENT* § 2.6. Some jurisdictions nonetheless retain the bar, citing reliance interests and the prospect that such easements create instability in title records. *Estate of Thomson v. Wade*, 509 N.E.2d 309, 310 (N.Y. 1987).

There is an argument that the extra transactions required by the traditional rule promote better title indexing. The *RESTATEMENT* observes:

To avoid the prohibition, two conveyances must be used: the first conveys the easement to the intended beneficiary; the second conveys the servient estate to the intended transferee. The only virtue of the rule is that it tends to ensure that a recorded easement will be properly indexed in the land-records system, but there are so many exceptions to the rule, where it is still in force, that it does not fill that function very well.

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MENT does tend to provide the modern approach to most servitudes issues, it has a tendency to advocate against traditional, formalist rules that are often still good law in many American jurisdictions. We will not thoroughly explore these distinctions here; you should however be aware of the importance of thoroughly investigating the applicable law in your jurisdiction if you ever encounter servitudes in practice.

RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.6 cmt. a (2000). Are you persuaded that the benefits of a separate transaction for recording purposes outweigh the costs?

## 17.3 Implied Easements

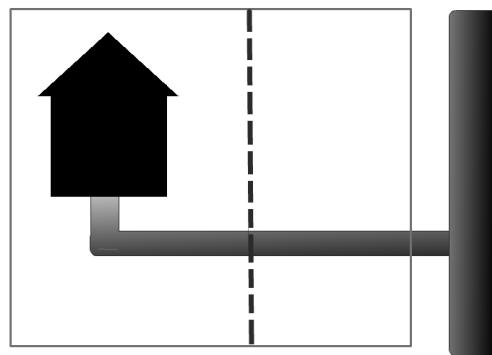
Easements may come into being without explicit agreements. They may arise from equitable enforcement of implied agreements or references to maps or boundary references in conveyances. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.13. In this section, we focus on two forms of implied easements: An **easement implied by existing use** and an **easement by necessity**. Both such easements commonly arise as a byproduct of land transactions.

### 17.3.1 Easement Implied by Existing Use

An easement implied by existing use may arise when a parcel of land is divided and amenities once enjoyed by the whole parcel are now split up, such that in order to enjoy the amenity (a utility line, or a driveway, for example), one of the divided lots requires access to the other. Imagine, for example, a home connected to a city sewer line via a privately owned drainpipe, on a parcel that is later divided by carving out a portion of the lot between the original house and the sewer line connection, as shown in Figure 17.1.

In such a situation, courts will frequently find an easement implied by prior existing use, allowing the owner of the house to continue using the drainpipe even though it is now under someone else's land. See, e.g., *Van Sandt v. Royster*, 83 P.2d 698 (Kan. 1938). There are, however, some limits to the circumstances that will justify the implication of such an easement:

[T]he easement implied from a preexisting use, [is] also characterized as a quasi-easement. Such an easement arises where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part. The servitude must be in use at the time of severance and necessary for the reasonable enjoyment of the severed part. A grant of a right to continue such use arises by implication of law. An implied easement from a preexisting use is established by proof of three elements: (1) common ownership



**Figure 17.1:** A divided parcel of land with a sewer line running through both lots.

of the claimed dominant and servient parcels and a subsequent conveyance or transfer separating that ownership; (2) before severance, the common owner used part of the united parcel for the benefit of another part, and this use was apparent and obvious, continuous, and permanent; and (3) the claimed easement is necessary and beneficial to the enjoyment of the parcel conveyed or retained by the grantor or transerrer.

*Dudley v. Neteler*, 924 N.E.2d 1023, 1027-28 (Ill. App. 2009) (internal citations and quotations omitted). The following notes consider each of these elements.

### Notes and Questions

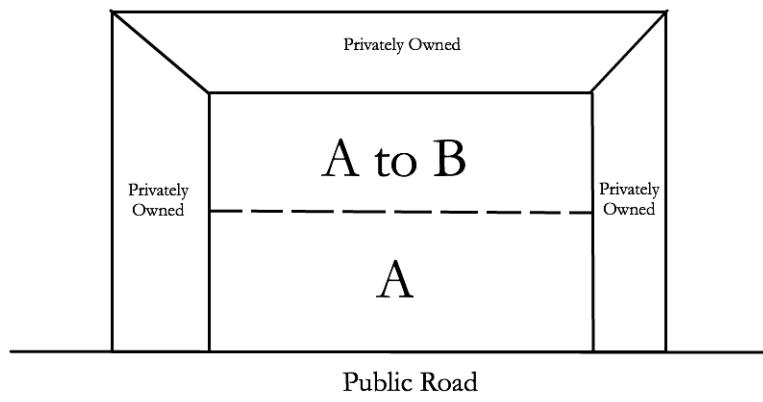
**17.1. Common Ownership.** Are easements implied by prior existing use fair to owners of subdivided land? Why shouldn't we require purchasers of subdivided lots to "get it in writing"—that is, to bargain for easements to obvious and necessary amenities when accepting a parcel carved out from a larger plot of land? For that matter, why don't we require the original owner to bargain for the right to continue to use land that they are purporting to sell? Who do we think is in a better position to identify the need for such an easement, the prior owner of the undivided parcel, or the purchaser of the carved-out portion of that parcel? Should the answer matter in determining whether to imply an easement or not?

The common law did draw distinctions between implied *reservation* of an easement (to the owner of the original undivided lot) and implied *grant* of an easement (to the first purchaser of the separated parcel). The latter required a lesser showing of necessity than the former, which would only be recognized upon a showing of *strict* necessity. The theory was that the deed that first severed the parcels from one another should be construed against its grantor, who was in a better position to know of the need for an easement to property she already owned, and to write such an easement into the deed she was delivering. Indeed, a minority of jurisdictions still follow this rule.

The modern RESTATEMENT, in contrast, makes no distinction as to whether the easement is sought by the grantor or the grantees, providing simply that the use will continue if the parties had reasonable grounds to so expect. Factors tending to show that expectation are that: “(1) the prior use was not merely temporary or casual, and (2) continuance of the prior use was reasonably necessary to enjoyment of the parcel, estate, or interest previously benefited by the use, and (3) existence of the prior use was apparent or known to the parties, or (4) the prior use was for underground utilities serving either parcel.” RESTatement (THIRD) OF PROPERTY (SERVITUDES) § 2.12 (2000). The commentary allows for the possibility that the balance of hardships and grantor knowledge might justify a court’s refusing to imply a servitude in favor of the grantor when it would have for the grantees. *Id.* cmt. a. But the general approach is to accept and accommodate the fact that grantors do not always protect themselves as well as they perhaps should. *Id.* (“Although grantors might be expected to know that they should expressly reserve any use rights they intend to retain after severance, experience has shown that too often they do not.”).

**17.2. Reasonable necessity.** Reasonable necessity is something less than absolute necessity. See, e.g., *Rinderer v. Keeven*, 412 N.E.2d 1015, 1026 (Ill. App. 1980) (“It is well established that one who claims an easement by implication need not show absolute necessity in order to prevail; it is sufficient that such an easement be reasonable, highly convenient and beneficial to the dominant estate.” (internal quotation and citation omitted)). Does this leave courts with too much discretion to impose easements? A minority of jurisdictions make a formal distinction between implied easements in favor of grantees and grantors, requiring strict necessity in the case of the latter. RESTatement § 2.12. *But see Tortoise Island Communities, Inc. v. Moorings Ass’n, Inc.*, 489 So. 2d 22, 22 (Fla. 1986) (concluding that an absolute necessity is required in all cases).

**17.3. What is apparent?** Should home purchasers be expected to investigate the state of utility lines upon making a purchase? The RESTatement (THIRD) OF



**Figure 17.2:** A “landlocked” parcel of land.

PROPERTY (SERVITUDES) reports that most cases to consider the question imply the easement when underground utilities are at issue. § 2.12 (Reporter’s Note) (such easements “will be implied without regard to their visibility or the parties’ knowledge of their existence if the utilities serve either parcel”). Are such uses plausibly apparent? Or is this simply a case of the law implying terms that the parties likely would have bargained for had they thought to consider the matter?

### 17.3.2 Easements by Necessity

An **easement by necessity** (or sometimes **way by necessity**) arises when land becomes landlocked or incapable of reasonable use absent an easement. For example, if A owns a rectangular parcel bordered on the north, east, and west by privately owned land and on the south by a public street, and conveys to B a strip of her land on the northern boundary, B will acquire an easement by necessity across the southern portion of the parcel retained by A, as shown in Figure 17.2.

***Thomas v. Primus***  
84 A.3d 916 (Conn. App. 2014)

#### MIHALAKOS, J.

The plaintiffs, William Thomas, Craig B. Thomas and Andrea Thomas Jabs, appeal from the trial court’s declaratory judgment granting an ease-

ment by necessity and implication in favor of the defendant, Bruno Primus. On appeal, the plaintiffs claim that the court erred in finding an easement by necessity.<sup>1</sup> The plaintiffs also claim that the defendant's claim for an easement should have been barred by the defense of laches. We affirm the judgment of the trial court.

The following facts, as found by the court, are relevant to this appeal. The plaintiffs own property located at 460 Camp Street in Plainville. The defendant owns one and one-quarter acres of undeveloped land abutting the eastern boundary of the plaintiffs' property. The dispute at issue here concerns the northernmost portion of the plaintiffs' property, a twenty-five feet wide by three hundred feet long strip of land known as the "passway," which stretches from the public road on the western boundary of the plaintiffs' property to the defendant's property to the east.

Both the plaintiffs' and the defendant's properties originally were part of a single lot owned by Martha Thomas, the grandmother of the plaintiffs. In 1959, Martha Thomas conveyed the one and one-quarter acres of landlocked property, currently owned by the defendant, to Arthur Primus, the defendant's brother. At the conveyance, which the defendant attended, Martha Thomas and Arthur Primus agreed that access to the landlocked property would be through the passway, which until that time had been used by Martha Thomas to access the eastern portions of her property. In 1969, the defendant took possession of the land. In 2002, the plaintiffs took possession of the western portion of Martha Thomas' property, including the passway.

In 2008, the plaintiffs decided to sell their property. When the defendant learned of their intention, he sent a letter to the plaintiffs asserting his right to use the passway to access his land. In 2009, the plaintiffs signed a contract to sell their property, but the prospective purchasers cancelled the contract when they learned of the defendant's claimed right to use the passway. The plaintiffs then brought the action to quiet title that is the subject of this appeal, seeking, among other things, a declaratory judgment that the defendant had no legal interest in the property. The defendant brought a counterclaim asking the court to establish his right to use the

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<sup>1</sup>The plaintiffs also claim that the court erred in finding an easement by implication. Because we conclude that the court properly found an easement by necessity, we need not consider this claim.

passway uninterrupted by the plaintiffs. . . . In response to the defendant's counterclaim, the plaintiffs asserted the special defense of laches.

A trial was held on June 5 and 6, 2012. On August 31, 2012, the court issued its decision, finding in favor of the defendant on the plaintiffs' complaint and on his counterclaim, and concluding that the defendant had an easement by necessity and an easement by implication over the passway. Specifically, the court found an easement by necessity was created when Martha Thomas conveyed a landlocked parcel to Arthur Primus, as it was absolutely necessary in order to access the property. . . .

## I

On appeal, the plaintiffs claim that the court erred in finding an easement by necessity because (1) the defendant's predecessor in title had the right to buy reasonable alternative access to the street, (2) the defendant failed to present full title searches of all adjoining properties, and (3) Martha Thomas and Arthur Primus did not intend for an easement to exist. . . .

Originating in the common law, easements by necessity are premised on the conception that "the law will not presume, that it was the intention of the parties, that one should convey land to the other, in such manner that the grantee could derive no benefit from the conveyance . . ." *Collins v. Prentice*, 15 Conn. 39, 44 (1842). An easement by necessity is "imposed where a conveyance by the grantor leaves the grantee with a parcel inaccessible save over the lands of the grantor . . ." *Hollywyle Assn., Inc. v. Hollister*, 164 Conn. 389, 398, 324 A.2d 247 (1973). The party seeking an easement by necessity has the burden of showing that the easement is reasonably necessary for the use and enjoyment of the party's property.

## A

First, the plaintiffs claim that an easement by necessity does not exist because the defendant's predecessor in title had the right to buy reasonable alternative access to the street. We disagree.

In considering whether an easement by necessity exists, "the law may be satisfied with less than the absolute need of the party claiming the right of way. The necessity need only be a reasonable one." *Hollywyle Assn., Inc. v. Hollister*, supra, 164 Conn. at 399, 324 A.2d 247.

In this case, the plaintiffs presented evidence at trial that, at the time he purchased the property from Martha Thomas in 1959, Arthur Primus maintained bonds for deed that allowed him to purchase access to Camp Street through a different piece of property for \$900. Although he did not exercise this right, the plaintiffs contend that the fact that Arthur Primus held this option establishes that the defendant's use of the passway is not reasonably necessary.

The plaintiffs correctly note that the ability of a party to create alternative access through his or her own property at a reasonable cost can preclude the finding of reasonable necessity required to establish an easement by necessity. Nonetheless, we are aware of nothing in our case law that suggests that a party is required to purchase *additional* property in order to create alternative access, even at a reasonable price.<sup>2</sup>

Furthermore, easements by necessity need not be created at the time of conveyance. See *D'Addario v. Truskoski*, 57 Conn.App. 236, 247, 749 A.2d 38 (2000) (recognizing easement by necessity created by state taking and natural disaster). Even if we were to assume, arguendo, that Arthur Primus' bonds for deed made use of the passway unnecessary at the time he owned the property, those bonds for deed expired in 1962, several years before the defendant owned the property, and provide no reasonable alternative access today. Thus, we see no reason to disturb the court's finding that use of the passway is currently necessary for the use and enjoyment of the defendant's property. . . .

## C

Finally, the plaintiffs argue that an easement by necessity does not exist because Martha Thomas and Arthur Primus did not intend for the easement to exist. We disagree.

The seminal case in this state on easements by necessity recognized that "the law will not presume, that it was the intention of the parties, that

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<sup>2</sup>The plaintiffs' sole authority in support of their position; *Griffeth v. Eid*, 573 N.W.2d 829 (N.D.1998); is distinguishable from the case before us. In that case, the North Dakota Supreme Court upheld a trial court's ruling that a party seeking an easement by necessity had not met his burden of establishing reasonable necessity because potential alternate access existed, including the possibility of purchasing an easement over another abutting property, and the party had not provided evidence that he had pursued these options and found them unavailing. In this case, there is no evidence in the record that the defendant had the opportunity to purchase alternate access.

one should convey land to the other, in such manner that the grantee could derive no benefit from the conveyance . . . . The law, under such circumstances, will give effect to the grant according to the presumed intent of the parties.” *Collins v. Prentice*, supra, 15 Conn. at 44, 15 Conn. 39. This rationale does not, as the plaintiffs suggest, establish intent as an element of an easement by necessity. Instead, “[t]he presumption as to the intent of the parties is a fiction of law . . . and merely disguises the public policy that no land should be left inaccessible or incapable of being put to profitable use.” (Citation omitted.) *Hollywyle Assn., Inc. v. Hollister*, supra, 164 Conn. at 400, 324 A.2d 247. Thus, absent an explicit agreement by the grantor and grantee that an easement does *not* exist, a court need not consider intent in establishing an easement by necessity. See *O'Brien v. Coburn*, 46 Conn.App. 620, 633, 700 A.2d 81 (holding that “the intention of the parties [was] irrelevant” in case establishing easement by necessity), cert. denied, 243 Conn. 938, 702 A.2d 644 (1997).

In this case, the court found that the defendant’s property was landlocked and that access over the pass-way was reasonably necessary for the use and enjoyment of the defendant’s property. Therefore, the court found an easement by necessity to exist over the pass-way. This conclusion was supported by the record and there is no legal deficiency in the court’s analysis. . . .

### Notes and Questions

17.4. As *Thomas* indicates, there are two traditional rationales for easements by necessity. The first considers it an implied term of a conveyance, assuming that the parties would not intend for land to be conveyed without a means for access. The second simply treats the issue as one of public policy favoring land use. See *RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES)* § 2.15 cmt. a (2000).

17.5. *Thomas*’s implication to the contrary aside, the traditional view is that the necessity giving rise to an easement by necessity must exist at the time the property is severed. *RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES)* § 2.15 (2000) (“Servitudes by necessity arise only on severance of rights held in a unity of ownership.”); *Roy v. Euro-Holland Vastgoed, B.V.*, 404 So. 2d 410, 412 (Fla. Dist. Ct. App. 1981) (“[I]n order for the owner of a dominant tenement to be entitled to a way of necessity over the servient tenement both properties must at one time have been owned by the same party . . . . In addition, the common source of title must have created the

situation causing the dominant tenement to become landlocked. A further requirement is that at the time the common source of title created the problem the servient tenement must have had access to a public road.”).

17.6. Easements by necessity are typically about access, but other kinds of uses may be necessary to the reasonable enjoyment of property. For example, suppose O conveys mineral rights to Blackacre to A. A would have both an easement of access to Blackacre and the right to engage in the mining necessary to reach the minerals. Likewise, an express easement of way may require rights to maintain and improve the easement. Access for utilities may also give rise to an easement by necessity, creating litigation over which utilities are “necessary”:

When questioned by defendants as to why he could not use a cellular phone on his property, plaintiff testified he ran a home business and a cellular phone was not adequate to handle his business needs; for example, a computer cannot access the Internet over a cellular phone. Plaintiff also testified solar power and gas generators were unable to produce enough electricity to make his home habitable.

*Smith v. Heissinger*, 745 N.E.2d 666, 672 (Ill. App. 2001) (affirming finding of necessity of easement for underground utilities).

Courts often describe the degree of necessity required to find an easement by necessity as being “strict.” See, e.g., *Ashby v. Maechling*, 229 P.3d 1210, 1214 (Mont. 2010) (“Two essential elements of an easement by necessity are unity of ownership and strict necessity.”). It is certainly higher than that needed for an easement implied by existing use. That said, considerable precedent indicates that the necessity need not be absolute. See, e.g., *Cale v. Wanamaker*, 121 N.J. Super. 142, 148, 296 A.2d 329, 333 (Ch. Div. 1972) (“Although some courts have held that access to a piece of property by navigable waters negates the ‘necessity’ required for a way of necessity, the trend since the 1920’s has been toward a more liberal attitude in allowing easements despite access by water, reflecting a recognition that most people today think in terms of ‘driving’ rather than ‘rowing’ to work or home.”).

17.7. Several states provide owners of landlocked property a statutory right to obtain access through neighboring land by means of a **private condemnation** action. Some courts have held that the availability of private condemnation actions negate the necessity prong of a common law easement by necessity claim. See, e.g., *Ferguson Ranch, Inc. v. Murray*, 811 P.2d 287, 290 (Wyo. 1991) (“[A] civil action for a common law way of necessity is not available because of the existence of W.S. 24-9-101.”). Private condemnation actions may also extend to contexts beyond those

covered by the common law easement by necessity. See, e.g., Cal. Civ. Code § 1001 (utilities).

## 17.4 Prescriptive Easements

Easements may also arise from prescription. An easement by prescription is acquired in a manner similar to adverse possession, as it is a non-permissive use that ultimately ripens into a property interest. Recall the five elements of adverse possession: Entry and possession that is (1) actual, (2) exclusive, (3) hostile or under claim of right, (4) open and notorious, and (5) continuous for the statutory limitations period. Which (if any) of these elements might have to be modified where the right being acquired is not a right of possession, but a right of use?

### *Felgenhauer v. Soni*

17 Cal.Rptr.3d 135 (Cal. App. 2004).

#### GILBERT, P.J.

Here we hold that to establish a claim of right to a prescriptive easement, the claimant need not believe he or she is legally entitled to use of the easement. Jerry and Kim Felgenhauer brought this action to quiet title to prescriptive easements over neighboring property owned by Ken and Jennifer Soni. A jury made special findings that established a prescriptive easement for deliveries. We affirm.

#### Facts

In November of 1971, the Felgenhausers purchased a parcel of property consisting of the front portion of two contiguous lots on Spring Street in Paso Robles. The parcel is improved with a restaurant that faces Spring Street. The back portion of the lots is a parking lot that was owned by a bank. The parking lot is between a public alley and the back of the Felgenhausers' restaurant.

From the time the Felgenhausers opened their restaurant in 1974, deliveries were made through the alley by crossing over the parking lot to the restaurant's back door. The Felgenhausers never asked permission of the bank to have deliveries made over its parking lot. The Felgenhausers operated the restaurant until the spring of 1978. Thereafter, until 1982, the Felgenhausers leased their property to various businesses.

The Felgenhauers reopened their restaurant in June of 1982. Deliveries resumed over the bank's parking lot to the restaurant's back door. In November of 1984, the Felgenhauers sold their restaurant business, but not the real property, to James and Ann Enloe. The Enloes leased the property from the Felgenhauers. Deliveries continued over the bank's parking lot.

James Enloe testified he did not believe he had the right to use the bank's property and never claimed the right. Enloe said that during his tenancy, he saw the bank manager in the parking lot. The manager told him the bank planned to construct a fence to define the boundary between the bank's property and the Felgenhauers' property. Enloe asked the manager to put in a gate so that he could continue to receive deliveries and have access to a trash dumpster. The manager agreed. Enloe "guess[ed]" the fence and gate were constructed about three years into his term. He said, "[Three years] could be right, but it's a guess." In argument to the jury, the Sonis' counsel said the fence and gate were constructed in January of 1988.

The Enloes sold the restaurant to Brett Butterfield in 1993. Butterfield sold it to William DaCossee in March of 1998. DaCossee was still operating the restaurant at the time of trial. During all this time, deliveries continued across the bank's parking lot.

The Sonis purchased the bank property, including the parking lot in dispute in 1998. In 1999, the Sonis told the Felgenhauers' tenant, DaCossee, that they were planning to cut off access to the restaurant from their parking lot.

The jury found the prescriptive period was from June of 1982 to January of 1988.

## Discussion

### I

The Sonis contend there is no substantial evidence to support a prescriptive easement for deliveries across their property. They claim the uncontested evidence is that the use of their property was not under "a claim of right." . . .

At common law, a prescriptive easement was based on the fiction that a person who openly and continuously used the land of another without the owner's consent, had a lost grant. California courts have rejected the fiction of the lost grant. Instead, the courts have adopted language from adverse

possession in stating the elements of a prescriptive easement. The two are like twins, but not identical. Those elements are open and notorious use that is hostile and adverse, continuous and uninterrupted for the five-year statutory period under a claim of right. Unfortunately, the language used to state the elements of a prescriptive easement or adverse possession invites misinterpretation. This is a case in point.

The Sonis argue the uncontested evidence is that the use of their property was not under a claim of right. They rely on the testimony of James Enloe that he never claimed he had a right to use the bank property for any purpose.

Claim of right does not require a belief or claim that the use is legally justified. It simply means that the property was used without permission of the owner of the land. As the American Law of Property states in the context of adverse possession: "In most of the cases asserting [the requirement of a claim of right], it means no more than that possession must be hostile, which in turn means only that the owner has not expressly consented to it by lease or license or has not been led into acquiescing in it by the denial of adverse claim on the part of the possessor." (3 Casner, *American Law of Property* (1952) Title by Adverse Possession, § 5.4, p. 776.) . . . Enloe testified that he had no discussion with the bank about deliveries being made over its property. The jury could reasonably conclude the Enloes used the bank's property without its permission. Thus they used it under a claim of right.

The Sonis attempt to make much of the fence the bank constructed between the properties and Enloe's request to put in a gate. But Enloe was uncertain when the fence and gate were constructed. The Sonis' attorney argued it was constructed in January of 1988. The jury could reasonably conclude that by then the prescriptive easement had been established.

The Sonis argue the gate shows the use of their property was not hostile. They cite *Myran v. Smith* (1931) 117 Cal.App. 355, 362, 4 P.2d 219, for the proposition that to effect a prescriptive easement the adverse user ". . . must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest."

But *Myran* made the statement in the context of what is necessary to create a prescriptive easement. Here, as we have said, the jury could reasonably conclude the prescriptive easement was established prior to the

erection of the fence and gate. The Sonis cite no authority for the proposition that even after the easement is created, the user must keep the flag of hostility flying. To the contrary, once the easement is created, the use continues as a matter of legal right, and it is irrelevant whether the owner of the servient estate purports to grant permission for its continuance. . . .

### Notes and Questions

17.8. **Fiction of the lost grant.** *Felgenhauer* refers to the fiction of the lost grant. The principle traces back to English law. 4-34 POWELL ON REAL PROPERTY § 34.10 (“In early England the enjoyment had to have been ‘from time immemorial,’ and this date came to be fixed by statute as the year 1189. Towards the close of the medieval period, this theory was rephrased and an easement of this type was said to arise from a grant, presumably made in favor of the claimant before the time of legal memory, but since lost.”). The usual American approach is to ignore the fiction and simply apply rules of prescription that largely track those of adverse possession. See *id.*

17.9. How do the elements of a prescriptive easement differ from the elements of adverse possession? Why do you think they differ in this way? How do the resulting interests differ?

17.10. **Easements acquired by the public.** What happens if city pedestrians routinely cut across a private parking lot? May an easement by prescription be claimed by the public at large? Does it matter that the right asserted is not in the hands of any one person? Here, too, the fiction of the lost grant may play a role in the willingness of courts to entertain the possibility.

There is a split of authority as to whether a public highway may be created by prescription. A number of older cases hold that the public cannot acquire a road by prescription because the doctrine of prescription is based on the theory of a lost grant, and such a grant cannot be made to a large and indefinite body such as the public. See II American Law of Property § 9.50 (J. Casner ed.1952). The lost grant theory, however, has been discarded. W. Burby, Real Property § 31, at 77 (1965). In its place, courts have resorted to the justifications that underlie statutes of limitations: “[The] functional utility in helping to cause prompt termination of controversies before the possible loss of evidence and in stabilizing long continued property uses.” 3 R. Powell, *supra* note



**Figure 17.3:** Image by Bryan Costales, used under a Creative Commons Attribution 4.0 International license.

5, ¶ 413, at 34–103–04; W. Burby, *supra*, § 31, at 77; Restatement of Property ch. 38, Introductory Note, at 2923 (1944). These reasons apply equally to the acquisition of prescriptive easements by public use. The majority view now is that a public easement may be acquired by prescription. 2 J. Grimes, *Thompson on Real Property* § 342, at 209 (1980).

*Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410, 416 (Alaska 1985).

What then should the owner of a publicly accessible location do? The owners of Rockefeller Center reportedly block off its streets one day per year in order to prevent the loss of any rights to exclude. David W. Dunlap, *Closing for a Spell, Just to Prove It's Ours*, N.Y. TIMES (Oct. 28, 2011), [link](#) (“But there is another significant hybrid: purely private space to which the public is customarily welcome, at the owners' implicit discretion. These spaces include Lever House, Rockefeller Plaza and College Walk at Columbia University, which close for part of one day every year.”). Another option is to post a sign granting permission to enter (thus negating any element of adversity). Some states approve this approach by statute. CAL. CIV. CODE § 1008 (“No use by any person or persons, no matter how long continued, of any land, shall ever ripen into an easement by prescription, if the owner of such property posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading substantially as follows: ‘Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code.’ ”).

## 17.5 Irrevocable Licenses

An easement is distinct from a **license**. A license is permission from the owner to enter the land. Because it is permissive, it is revocable. Many difficulties with distinguishing easements from licenses arise when parties fail to clearly bargain over the right to use land. See, e.g., *Willow Tex, Inc. v. Dimacopoulos*, 503 N.E.2d 99, 100 (N.Y. 1986) (“The writing must establish unequivocally the grantor’s intent to give *for all time to come* a use of the servient estate to the dominant estate. The policy of the law favoring unrestricted use of realty requires that where there is any ambiguity as to the permanence of the restriction to be imposed on the servient estate, the right of use should be deemed a license, revocable at will by the grantor, rather than an easement.”).

Under the right circumstances, a license may become irrevocable.

### ***Richardson v. Franc***

182 Cal.Rptr.3d 853 (Cal. App. 2015)

#### **RUVOLLO, P.J.**

In order to access their home in Novato, California, James Scott Richardson and Lisa Donetti (respondents) had to traverse land belonging to their neighbors, Greg and Terrie Franc (appellants) on a 150-foot long road which was authorized by an easement for “access and public utility purposes.” Over a 20-year period, both respondents and their predecessors-in-interest maintained landscaping, irrigation, and lighting appurtenant to both sides of the road within the easement area without any objection. Six years after purchasing the property burdened by the easement, appellants demanded that respondents remove the landscaping, irrigation, and lighting on the ground that respondents’ rights in the easement area were expressly limited to access and utility purposes, and the landscaping and other improvements exceeded the purpose for which the easement was granted. Respondents brought this lawsuit seeking, among other things, to establish their right to an irrevocable license which would grant them an uninterrupted right to continue to maintain the landscaping and other improvements. . . .

. . . In 1989, Karen and Tom Poksay began building their home on undeveloped property at 2513 Laguna Vista Drive in Novato, California. The project included constructing and landscaping a 150-foot long driveway

within the 30-foot wide easement running down to the site of their new home, which was hidden from the street. The driveway was constructed pursuant to an easement over 2515 Laguna Vista Drive, which was then owned by [appellants' predecessors in interest]. The easement was for access and utility purposes only.

Landscaping along the driveway was important to the Poksays. . . . They hired a landscaper, who dug holes for plants and trees. Ms. Poksay then added plants and trees along both sides of the driveway in the easement area—hawthorn trees, Australian tea trees, daylilies, Mexican sage, breath of heaven, flowering pear trees, and evergreen shrubs.

The landscaper installed a drip irrigation system. . . . Water fixtures were also installed along the driveway for fire safety. The Poksays also added electrical lighting along the driveway, later replacing the electrical lighting with solar lighting.

During the decade that the Poksays resided at the property Ms. Poksay regularly tended to the landscaped area, including trimming and weeding, ensuring the irrigation system was working properly, and replacing plants and trees as necessary. In addition to Ms. Poskay's own labor, the Poksays paid their landscaper to perform general maintenance . . . .

Respondents purchased the property in late 2000. . . . Over the years, respondents added new plants and trees, including oleanders, an evergreen tree, another tea tree, Mexican sage, lavender, rosemary, and a potato bush. Respondent Donetti testified that landscapers came weekly or every other week, and the landscapers spent 40 to 50 percent of their time in the easement area. . . . During her testimony, respondent Donetti explained, “we've paid a lot of money to nurture it and grow it. It's beautiful. It has privacy. It's absolutely tied to our house value. It's our curb appeal.”

Appellants purchased 2515 Laguna Vista Drive in 2004. [Appellant Greg Franc admitted he knew about the landscaping in the easement area, as well as the hiring of landscapers.] He even admitted that the trees were “beautiful and provide a lot of color and [were] just all-around attractive.” From 2004 to August 2010, appellants and respondents lived in relative harmony . . . . It was not until late 2010—approximately six years after appellants bought the property and two decades after the landscaping and other improvements began—that appellants first raised a concern about the landscaping and other improvements. Prior to that date, no one had ever objected.

In late September or early October 2010, without any notice, appellant Greg Franc cut the irrigation and electrical lines on both sides of the driveway. He cut not only the lines irrigating the landscaping on the easement, but also those irrigating respondents' own property. The water valve pumps leading to the irrigation lines were disassembled as well. As part of these proceedings, the trial court granted respondents' motion for preliminary injunction and the irrigation system was restored. . . . Following a bench trial and an on-site visit to the property, the court . . . granted respondents' request for an irrevocable license. . . .

. . . [A]s appellants acknowledge, the grant of an irrevocable license is "based in equity." After the trial court has exercised its equitable powers, the appellate court reviews the judgment under the abuse of discretion standard. . . .

Before we address the specific issues appellants raise on appeal, it is helpful to review the law governing the grant of an irrevocable license. "A license gives authority to a licensee to perform an act or acts on the property of another pursuant to the express or implied permission of the owner." (6 Miller & Starr, Cal. Real Estate (3d ed. 2000) Easements, § 15:2, p. 15-10.) "A licensor generally can revoke a license at any time without excuse or without consideration to the licensee. In addition, a conveyance of the property burdened with a license revokes the license . . ." (*Id.* at pp 15-10-15-11, fns. omitted.)

However, a license may become irrevocable when a landowner knowingly permits another to repeatedly perform acts on his or her land, and the licensee, in reasonable reliance on the continuation of the license, has expended time and a substantial amount of money on improvements with the licensor's knowledge. Under such circumstances, it would be inequitable to terminate the license. In that case, the licensor is said to be estopped from revoking the license, and the license becomes the equivalent of an easement, commensurate in its extent and duration with the right to be enjoyed. A trial court's factual finding that a license is irrevocable is reviewed for substantial evidence.

In the paradigmatic case, a landowner allows his neighbor the right to use some portion of his property—often a right of way or water from a creek—knowing that the neighbor needs the right to develop his property. The neighbor then builds a house, digs an irrigation ditch, paves the right of way, plants an orchard, or farms the land in reliance on the landowner's

acquiescence. Later, after failing to make a timely objection, the landowner or his successor suddenly raises legal objections and seeks to revoke the neighbor's permissive usage. . . .

In the instant case . . . the statement of decision states: "Because [respondents] adduced sufficient evidence at trial concerning their substantial expenditures in the easement area for landscaping, maintenance, care, and physical labor, and because sufficient evidence was presented at trial to support that [respondents'] predecessor-in-interest, Ms. Poksay, also expended substantial sums in the easement area for landscaping, maintenance, care, and physical labor, and because, as the evidence and testimony at trial showed, that no objection was made to any of this by either [appellants] or [appellants'] predecessor-in-interest, Mr. Schaefer, over the course of more than 20 years, [respondents] have sufficiently met the requirements for an irrevocable parol license for both [respondents], and [respondents'] successors-in-interest. Both law and equity dictate this result."

. . . [Appellants] contend the trial court erred in finding the evidence supported the creation of an irrevocable license because respondents' reliance on continued permission to landscape and make other improvements in the easement area was not reasonable as a matter of law. Appellants point out the evidence at trial revealed that throughout the history of the ownership of the property, there was never an actual request for permission to make and maintain these improvements and express consent was never given. In essence, appellants contend that tacit permission by silence is insufficient to create an irrevocable license and that respondents were required to show an express grant of permission induced them into undertaking the improvements within the easement area.

Permission sufficient to establish a license can be express or implied. . . . A license may also arise by implication from the acts of the parties, from their relations, or from custom. When a landowner knowingly permits another to perform acts on his land, a license may be implied from his failure to object. . . .

. . . Here, the undisputed evidence revealed appellants failed to object to the landscaping and other improvements for 6 years before appellants first made their demand that the landscaping and other improvements be removed. Thus, with full knowledge that the road providing ingress and egress to respondents' property was landscaped, irrigated, and lit, and with full knowledge that respondents were maintaining these improvements on

an ongoing basis, appellants said nothing to respondents. When coupled with the previous 14 years appellants' predecessors-in-interest acquiesced in these improvements, this constituted a total of 20 years of uninterrupted permissive use of the easement area for the landscaping and other improvements. Therefore, we find the court had ample evidence to conclude that adequate and sufficient permission was granted to respondents by appellants to maintain the extensive landscaping improvements on either side of the roadway.

Appellants next stress that for the license to be irrevocable, there must be substantial expenditures in reliance on the license. In this regard, the trial court made the necessary findings that respondents "have expended substantial monetary sums to improve, maintain, landscape, and care for the easement area, including the retention of professional landscapers on a regular basis . . . ."

Appellants next challenge "the unlimited physical scope and duration of the license" granted by the trial court. They claim "the trial court, in derogation of equity and the law, decided that [r]espondents . . . should have sole and absolute discretion to decide what will happen on property that is owned by [appellants]." In making this argument, appellants ignore the fact that the trial court was vested with broad discretion in framing an equitable result under the facts of this case. . . . As it was empowered to do, the trial court exercised its broad equitable discretion and fashioned relief to fit the specific facts of this case. The court found "by a preponderance of the evidence that [respondents] hold an irrevocable parol license for themselves and their successors-in-interest to maintain and improve landscaping, irrigation, and lighting within the 30' wide and 150' long easement."

Appellants assert "it is wholly erroneous and grossly unfair to make the license *irrevocable in perpetuity*." (Original italics.) Appellants argue that a proper ruling in this case would be to grant respondents an irrevocable license but "with the license to landscape and garden limited in duration until [respondents] transfer title to anyone else or no longer reside on the property . . . ."

The principles relating to the duration of an irrevocable license were stated by our Supreme Court over a century ago, and these principles are still valid today. An otherwise revocable license becomes irrevocable when the licensee, acting in reasonable reliance either on the licensor's representations or on the terms of the license, makes substantial expenditures

of money or labor in the execution of the license; and the license will continue “for so long a time as the nature of it calls for.” As explained in a leading treatise, “A license remains irrevocable for a period sufficient to enable the licensee to capitalize on his or her investment. He can continue to use it only as long as justice and equity require its use.” (6 Miller & Starr, *supra*, § 15:2, p. 15–15.)

The evidence adduced at trial indicates respondents and their predecessors in interest expended significant money and labor when they planted and nurtured the landscaping abutting the roadway, installed sophisticated irrigation equipment throughout the easement area, and constructed lighting along the roadway. Under such circumstances the trial court did not abuse its discretion in concluding it would be inequitable to require respondents to remove these improvements when the property is transferred, given the substantial investment in time and money and the permanent nature of these improvements. . . .

Lastly, we reject appellants’ hyperbolic claim that in fashioning the scope and duration of the irrevocable license granted in this case, “the trial court, without exercising caution, took property that rightfully belonged to [appellants] and ceded it to [r]espondents—and their successors—forever.”

This argument ignores that a license does not create or convey any interest in the real property; it merely makes lawful an act that otherwise would constitute a trespass. . . . Far from granting respondents “an exclusive easement amounting to fee title” as appellants’ claim, the court’s decision simply maintains the status quo that has existed for over 20 years and was obvious to appellants when they purchased the property a decade ago.

### **Notes and Questions**

17.11. The RESTATEMENT characterizes irrevocable license situations as a servitude created by estoppel. RESTATEMENT § 2.10. Is there any difference, then, between an irrevocable license and an easement by prescription? Is there any reason to treat them differently?

17.12. Is landscaping important enough to justify the intrusion into property ownership interests? What do you think would have happened had the appellants won?

17.13. How well does *Richardson* track your intuitions about everyday behavior? Would you ask permission before engaging in the landscaping at issue here?

Would you advise a client to? Suppose you asked your neighbor for an easement of way to enable you to build on an adjoining property? You're friends, and he says yes. But you know a thing or two about the law, so you know that if your relations turn sour you would have to rely on an irrevocable license claim. Would you push for a formal grant in writing? Is that a neighborly thing to do? For one view, see *Shepard v. Purvine*, 248 P.2d 352, 361-62 (Or. 1952) ("Under the circumstances, for plaintiffs to have insisted upon a deed would have been embarrassing; in effect, it would have been expressing a doubt as to their friend's integrity."). Does it make a difference that you know to ask? What about those without legal training? Should the law accommodate private ordering or funnel property holders into formal arrangements? Do the interests of third parties, including possible future purchasers of each of the affected properties, matter to your analysis?

**17.14. Assigning licenses.** *Richardson* affirms a trial court's determination of an "irrevocable parol license for both respondents, and respondents' successors-in-interest." Is the benefit of a license assignable to others along with the underlying land, like an easement appurtenant? The authorities pretty uniformly say no: "an irrevocable license is a nontransferable personal interest." JON W. BRUCE ET AL., THE LAW OF EASEMENTS AND LICENSES IN LAND § 11:9 (2024) (citing *Blackburn v. Lefebvre*, 976 So. 2d 482, 493-94 (Ala. Civ. App. 2007); *Shearer v. Hodnette*, 674 So. 2d 548, 551 (Ala. Civ. App. 1995)); RESTATEMENT (FIRST) OF PROPERTY § 517, cmt. a (2024) ("Privileges of use constituting licenses often arise out of relations that are highly personal. Where they do so arise they are commonly intended to constitute privileges personal to the licensee alone."). Even the very section of the treatise that *Richardson* itself cites states, "The privilege conferred by a license is personal to the licensee and cannot be inherited, conveyed, or assigned" under California law. HARRY D. MILLER ET AL., MILLER & STARR CALIFORNIA REAL ESTATE § 15:2 (4th ed. 2023).

Is *Richardson* inconsistent with its own authorities? It is possible that the court thought this license unusual and thus assignable, but the opinion offers no reasoning along these lines. A better explanation is that the Francs' attorney simply didn't make the point. In relevant part, the Francs' appellate brief levies three arguments against the scope of the irrevocable license: (1) that the license should have a time limit, (2) that the license "took fee title" away from the Francs, and (3) that it was unclear how much new planting was allowed under the license. Opening Brief of Appellants Greg and Terrie Franc at 37-40, *Richardson v. Franc*, 182 Cal. Rptr. 3d 853 (Cal. App. July 25, 2013) (No. A137815). The brief did not specifically argue that licenses were personal and not transferable, and so the appellate court may not have had occasion to question that aspect of the judgment.

## 17.6 Transferring Easements

**Easements appurtenant.** Transferring easements appurtenant is simple; when the dominant estate is conveyed, the rights of the easement come along. This is a natural consequence of the principle that servitudes (such as easements) run with the land. A more complicated problem concerns the division of the dominant estate into smaller parcels. The default approach is to allow each parcel to enjoy the benefit of the easement. *RESTATEMENT (FIRST) OF PROPERTY* § 488 (1944) (“Except as limited by the terms of its transfer, or by the manner or terms of the creation of the easement appurtenant, those who succeed to the possession of each of the parts into which a dominant tenement may be subdivided thereby succeed to the privileges of use of the servient tenement authorized by the easement.”). Here, however, foreseeability and the extent of the added burden matters. See generally R. W. Gascoyne, *Right of owners of parcels into which dominant tenement is or will be divided to use right of way*, 10 A.L.R.3d 960 (Originally published in 1966) (collecting cases).

**Easements in gross.** The modern view is that easements in gross are transferable, assuming no contrary intent in their creation (e.g., that the benefit was intended to be personal to the recipient). *RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES)* § 4.6 cmt. (2000) (“Although historically courts have often stated that benefits in gross are not transferable, American courts have long carved out an exception for profits and easements in gross that serve commercial purposes. Under the rule stated in this section, the exception has now become the rule.”); *RESTATEMENT (FIRST) OF PROPERTY* § 489 (1944) (commercial easements in gross, as distinct from easements for personal satisfaction, are transferable); § 491 (noncommercial easements in gross “determined by the manner or the terms of their creation”).

Another issue concerns the divisibility of an easement in gross. Here, too, the danger is that divisibility may lead to excessive burdens on the servient estate. Section 493 of the *FIRST RESTATEMENT OF PROPERTY* provides that whether divisibility is permitted depends on the circumstances surrounding the easement’s creation. The facts giving rise to a prescriptive easement, for example, may give a landowner fair notice that a single trespasser may acquire an easement, but not that the easement may then be shared by many others once the prescription period passes. In contrast, an exclusive easement might lead to a presumption of divisibility, for “the fact that [the owner of the servient tenement] is excluded from making the use authorized by the easement, plus the fact that apportionability increases the value of the easement to its owner, tends to the inference in the usual case that the easement was intended in its creation to be apportionable.” *Id.* cmt. c. Where the grant is

non-exclusive a clearer indication of intended divisibility may be required. *Id.* cmt. d. Section 5.9 of the modern RESTATEMENT goes further by making divisibility the default assumption unless contrary to the parties intent or where divisibility would place unreasonable burdens on the servient estate.

## 17.7 Terminating Easements

Easements can be terminated in a variety of ways.

**Unity of ownership.** When the dominant and servient estates of an easement appurtenant unite under one owner, the easement ends. Likewise an easement in gross ends if the owner acquires an interest in the servient tenement that would have provided independent authority to exercise the rights of the easement.

**Release by the easement holder.** The FIRST RESTATEMENT would require a written instrument under seal for an *inter vivos* release, while the modern RESTATEMENT simply requires compliance with the Statute of Frauds.

**Abandonment.** Abandonment resembles a release. The FIRST RESTATEMENT treats them separately, however, and distinguishes the two by describing abandonment as intent by the easement holder to give up the easement, while a release is an act done on behalf of the owner of the burdened property. Abandonment may be inferred by actions. RESTATEMENT (FIRST) OF PROPERTY § 504 (1944).

**Estoppel.** Estoppel may terminate an easement when 1) the owner of the servient tenement acts in a manner that is inconsistent with the easement's continuation; 2) the acts are in foreseeable reasonable reliance on conduct by the easement holder; and 3) allowing the easement to continue would work an unreasonable harm to the owner of the servient property. *Id.* § 505.

**Prescription.** Just as an easement may be gained by prescription, so too may it be lost by open and notorious adverse acts by the owner of the servient tenement that interrupt the exercise of the easement for the prescription period.

**Condemnation.** The exercise of the eminent domain power to take the servient estate creates the possibility of compensation for the easement owner.

**A tax deed.** Section 509 of the FIRST RESTATEMENT provides that a tax deed will extinguish an easement in gross, but not an easement appurtenant.

**Expiration.** If the interest was for a particular time.

**Recording Acts.** Being property interests, easements are subject to the recording acts, and unrecorded interests may be defeated by transferees without notice. The modern restatement provides for exceptions for certain easements not subject to the Statute of Frauds and generally for servitudes that "would be dis-

covered by reasonable inspection or inquiry.” RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 7.14 (2000).

## 17.8 Negative Easements/Conservation Easements

In the United States, most of the work that could have been done by negative easements is largely performed by real covenants or equitable servitudes, which we take up in a future reading. See RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.2 (“A ‘negative’ easement, the obligation not to use land in one’s possession in specified ways, has become indistinguishable from a restrictive covenant, and is treated as such in this Restatement.”). Nineteenth century English law gave negative easements a narrow domain. They were available only to prevent the servient estate from restricting light, air, support, or the flow of water of an artificial stream to the dominant estate. *Id.* § 1.2 cmt. h. Such easements were likewise not widely embraced in the United States, where equitably enforced negative covenants held in gross were disfavored.

For the most part, negative easements only arise by agreement or grant. U.S. courts therefore consistently reject the English “doctrine of ancient lights,” which recognizes a right to light from a neighbor’s land after the passage of time under certain circumstances. 4-34 POWELL ON REAL PROPERTY § 34.11.

The limitations of negative easements complicated efforts to create conservation and preservation easements. Such easements tend to be held in gross (e.g., by a conservation organization), and the common law prohibited equitable enforcement of negative covenants held in gross. The law likewise was skeptical about expanding the categories for which negative easements were available. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.6 cmt. a (2000). The problem was addressed by the Uniform Conservation Easement Act, which has now been adopted by every state. 4-34A POWELL ON REAL PROPERTY § 34A.01.

## 17.9 Public Use Rights

Public prescriptive easements are not the only way to grant members of the public access rights to land. The **public trust** doctrine addresses the public’s right to access certain natural resources.

***Lawrence v. Clark County***

254 P.3d 606, 608-09 (Nev. 2011)

The public trust doctrine is an ancient principle thought to be traceable to Roman law and the works of Emperor Justinian. See *State v. Sorensen*, 436 N.W.2d 358, 361 (Iowa 1989). Justinian derived the doctrine from the principle that the public possesses inviolable rights to certain natural resources, noting that “[b]y the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea.” The Institutes of Justinian, Lib. II, Tit. I, § 1 (Thomas Collett Sandars trans. 5th London ed. 1876). He also stated that “rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men.” *Id.* § 2.

The doctrine was thereafter adopted by the common law courts of England, which espoused the similar principle that “title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the King” and that such title “is held subject to the public right.” *Shively v. Bowlby*, 152 U.S. 1, 13, 14 S.Ct. 548, 38 L.Ed. 331 (1894). . . .

Courts in this country have readily embraced the public trust doctrine. In 1821, in the first notable American case to express public trust principles, the Supreme Court of New Jersey observed that citizens have a common right to sovereign-controlled waterways:

The sovereign power itself . . . cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.

*Arnold v. Mundy*, 6 N.J.L. 1, 78 (N.J.1821).

Thereafter, the United States Supreme Court similarly recognized that “when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use.” *Martin et al. v. Waddell*, 41 U.S. 367, 410, 16 Pet. 367, 10 L.Ed. 997 (1842).

Fifty years later, in what has become the seminal public trust doctrine case, the Supreme Court decided *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). In *Illinois Central* the Court noted that because the State of Illinois was admitted to the United States on “equal footing” with the original

13 colonies, it, like the colonies, was granted title to the navigable waters and the lands underneath them. For Illinois, that meant that upon its admission, it held title to its portion of the waters of and lands beneath Lake Michigan. However, the waters and lands underneath Lake Michigan were not freely alienable by the State of Illinois—its title to those areas was “different in character from that which the State holds in lands intended for sale.” More specifically, it possessed only “title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.” As a result, the Court concluded that the Illinois Legislature’s attempted relinquishment of such trust property to the Illinois Central Railroad

is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public . . . . The State can no more abdicate its trust over property in which the whole people are interested than it can abdicate its police powers in the administration of government and the preservation of the peace.

While the Court noted that such lands need not, under all circumstances, be perpetually held in trust, it recognized that in effecting transfers, the public interest is always paramount, providing that “[t]he control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.” *Id.*

#### **Note**

As public uses of waters expanded, so too did the public trust doctrine. In New Jersey, the courts extended the public trust doctrine to protect recreational uses. It then extended the public’s right to access the “wet sands,” which is land extending from the ocean to the average high tide water mark, to include access via certain “dry sands.”

***Matthews v. Bay Head Imp. Ass'n***  
471 A.2d 355 (N.J. 1984)

. . . In order to exercise these rights guaranteed by the public trust doctrine, the public must have access to municipally-owned dry sand areas as well as the foreshore. The extension of the public trust doctrine to include municipally-owned dry sand areas was necessitated by our conclusion that enjoyment of rights in the foreshore is inseparable from use of dry sand beaches. . . . We [previously] held that where a municipal beach is dedicated to public use, the public trust doctrine "dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible." 61 N.J. at 309, 294 A.2d 47. . . .

We now address the extent of the public's interest in privately-owned dry sand beaches. This interest may take one of two forms. First, the public may have a right to cross privately owned dry sand beaches in order to gain access to the foreshore. Second, this interest may be of the sort enjoyed by the public in municipal beaches . . . namely, the right to sunbathe and generally enjoy recreational activities.

Beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and improvement of transportation facilities. . . .

Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine. This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea. . . .

The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge. The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations

eliminate the right to the recreational use of the ocean. This was a principal reason why in [earlier cases] we held that municipally-owned dry sand beaches "must be open to all on equal terms . . ." We see no reason why rights under the public trust doctrine to use of the upland dry sand area should be limited to municipally-owned property. It is true that the private owner's interest in the upland dry sand area is not identical to that of a municipality. Nonetheless, where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.

We perceive no need to attempt to apply notions of prescription, *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73 (Fla.1974), dedication, *Gion v. City of Santa Cruz*, 2 Cal.3d 29, 465 P.2d 50, 84 Cal.Rptr. 162 (1970), or custom, *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969), as an alternative to application of the public trust doctrine. Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be "fixed or static," but one to "be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Avon*, 61 N.J. at 309, 294 A.2d 47.

Precisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand.

Today, recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. While the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.

### Notes and Questions

17.15. Do the rights covered by the public trust doctrine preexist the state, or are they pure creatures of law? When may courts change public trust rules? When they do so, are the rules changing or is the court explaining that the rule “always” thus, but is only now being announced? Does anything turn on this distinction? As we will see, how we define such changes has implications on whether a property owner may claim that the state is committing a constitutional violation by “taking” land without just compensation.

17.16. When a court alters preexisting conceptions of the right to exclude should anything be due to the property owner? Does your conception of what the public trust doctrine is help determine your answer to this question?

17.17. **Other theories of expanding public access rights.** Courts have used other doctrines to expand public access to private lands, including theories of prescriptive easements, “implied dedication,” and customary uses. See generally 4-34 POWELL ON REAL PROPERTY § 34.11. As an example of implied dedication, the California Supreme Court declared:

Although “No Trespassing” signs may be sufficient when only an occasional hiker traverses an isolated property, the same action cannot reasonably be expected to halt a continuous influx of beach users to an attractive seashore property. If the fee owner proves that he has made more than minimal and ineffectual efforts to exclude the public, then the trier of fact must decide whether the owner’s activities have been adequate. If the owner has not attempted to halt public use in any significant way, however, it will be held as a matter of law that he intended to dedicate the property or an easement therein to the public, and evidence that the public used the property for the prescriptive period is sufficient to establish dedication.

*Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 41, 465 P.2d 50, 58 (1970). On custom, see, e.g., *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974) (“The general public may continue to use the dry sand area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use this particular area of the beach as they have without dispute and without interruption for many years.”).

17.18. **Politics!** Do not overlook the role of the political process in questions of beach access. Following the *Gion* ruling noted above, the California legislature

added Cal. Civ. Code § 1009, which opines that “[o]wners of private real property are confronted with the threat of loss of rights in their property if they allow or continue to allow members of the public to use, enjoy or pass over their property for recreational purposes” and that the “stability and marketability of record titles is clouded by such public use, thereby compelling the owner to exclude the public from his property.” It therefore provides that “no use of such property by the public after the effective date of this section shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently, in the absence of an express written irrevocable offer of dedication of such property to such use.” Does the availability of a legislative remedy if landowners organize and convince the legislature to act suffice to address the concerns about cases like *Matthews*?

17.19. **Conflicting uses.** Once the public has the right of access to private land, what other limits on private ownership follow? See, e.g., *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974) (private landowner's construction of tower on beach did not interfere with customary public rights).

17.20. **Public Policy.** Are expansions of public access rights by the courts beneficial? What kinds of incentives do they create? Consider the following criticism:

Commentators were severe in their criticism of *Gion-Dietz*, noting not only departure from precedent, the failure to consider total loss to the owner, and the prohibition of taking property without compensation, but also that the case created an obvious inequity and would prove counterproductive to the public policy espoused. [Citations of critical commentary omitted.]

The inequity addressed by commentators appears when weighing penalties against rewards to landowners having no immediate use for their property so that permitting public use poses no interference or impairment. Those landowners who were neighborly and hospitable in permitting public use were penalized by *Gion-Dietz* by loss of their land, while those excluding the public by fencing or other means were rewarded by retention of their exclusive use. While virtue is usually its own reward, the law does not usually penalize the virtuous. The decision was asserted to be counterproductive because landowners to avoid prescriptive dedication would now exclude the public from using open and unimproved property for recreation purposes. Thus the very policy sought to be furthered would be

defeated. (*County of Orange v. Chandler-Sherman Corp.* (1976) 54 Cal.App.3d 561, 564, 126 Cal.Rptr. 765, 767, points out that one of the reactions to *Gion-Dietz* was “soaring sales of chain link fences.”)

*Cnty. of Los Angeles v. Berk*, 26 Cal. 3d 201, 228-31, 605 P.2d 381, 398-401 (1980) (Clark, J., dissenting). But expanding access offers benefits of its own:

The law of beach access in Hawaii has an enormous, incalculable impact on social life. Though the law limits the property rights of beachfront owners as they are defined elsewhere, it increases the wealth of every single person in the state by giving them a right to go to the beach anywhere in the state. Everyone, no matter how poor, has a backyard on the beach. Individuals and families go the shore in the morning to swim or surf before work. Families gather to watch the sun go down in the evening. Even if they only have a small apartment inland, they have a right to sit outside on the beach wherever they please. It affects the range of options people have, their daily routine, and the sense of satisfaction of almost everyone.

Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1329 (2014).

17.21. Many European nations recognize (either by tradition or statute) a “right to roam” on private lands (excluding homestead or cultivated areas). Heidi Gorovitz Robertson, *Public Access to Private Land for Walking: Environmental and Individual Responsibility As Rationale for Limiting the Right to Exclude*, 23 GEO. INT'L ENVTL. L. REV. 211 (2011). The right to roam often encompasses the picking of berries, mushrooms, and the like. Open access used to be the norm for unenclosed land in the United States until the late 1800s; open range laws allowed cattle grazing on unimproved lands. Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 674 (2011); *Nashville & C.R. Co. v. Peacock*, 25 Ala. 229, 232 (1854) (“Our present Code contains similar provisions, which show conclusively that the unenclosed lands of this State are to be treated as common pasture for the cattle and stock of every citizen.”). Pressure to close the range and forbid the crossing of uncultivated or unenclosed land came from three sources: farmers, who were relying less on free range livestock; railroads, who wished to avoid liability for cattle collisions; and southern planters, who viewed closed range laws as a mechanism for limiting the independence of newly emancipated African-American farmers. Saw-

ers, *supra*, at 681-84; R. Ben Brown, *Free Men and Free Pigs: Closing the Southern Range and the American Property Tradition*, 108 RADICAL HISTORY REVIEW 117, 119 (Fall 2010) (“When the most important political and economic project of the post-Reconstruction era became recapturing the labor of African Americans to produce staple crops, restricting African American access to open range resources became a priority.”).



# **Part VIII**

# **Conflicts**



# Chapter 18

## Allocation

So far we have looked at the rights that property owners have against the world, and considered the wide spectrum of ways in which ownership can be shared or divided. The next few chapters turn to a new category of problems: conflicts between property owners, and how the law resolves those conflicts.

Four such conflicts are explored. This chapter deals with conflicts of initial acquisition—when two people claim to have gained ownership over the same resource. Next, we consider conflicts between different classes of property—when real property rights clash with personal property, or intellectual property clashes with tangible property. We then turn to the problem of nuisance—when one property owner's use interferes with another's. The common question to ask across these chapters: How do courts decide which property right must yield to the other, and why? Finally, we'll round out the discussion of property-versus-property conflicts with a mechanism for property owners to negotiate out private resolutions, called covenants.

### 18.1 Animals

#### *Pierson v. Post*

3 Cai. R. 175 (N.Y. Sup. Ct. 1805)

THIS was an action of trespass on the case commenced in a justice's court, by the present defendant against the now plaintiff.

The declaration stated that *Post*, being in possession of certain dogs and hounds under his command, did, "upon a certain wild and uninhabited,



**Figure 18.1:** Source: R.S. SURTEES, HAWBUCK GRANGE 197 (1885), British Library, [link](#).

unpossessed and waste land, called the beach, find and start one of those noxious beasts called a fox," and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, *Pierson*, well knowing the fox was so hunted and pursued, did, in the sight of *Post*, to prevent his catching the same, kill and carry it off. A verdict having been rendered for the plaintiff below, the defendant there sued out a *certiorari*, and now assigned for error, that the declaration and the matters therein contained were not sufficient in law to maintain an action . . . .

#### **TOMPKINS, J. delivered the opinion of the court.**

This cause comes before us on a return to a *certiorari* directed to one of the justices of *Queens* county.

The question submitted by the counsel in this cause for our determination is, whether *Lodowick Post*, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to, or property in, the fox, as will sustain an action against *Pierson* for killing and taking him away?

The cause was argued with much ability by the counsel on both sides, and presents for our decision a novel and nice question. It is admitted that a fox is an animal *feræ naturæ*, and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple

question of what acts amount to occupancy, applied to acquiring right to wild animals?

If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. *Justinian's Institutes*, lib. 2. tit. 1. s. 13. and *Fleta*, lib. 3. c. 2. p. 175. adopt the principle, that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognised by *Bracton*, lib. 2. c. 1. p. 8.

*Puffendorf*, lib. 4. c. 6. s. 2. and 10. defines occupancy of beasts *feræ naturæ*, to be the actual corporal possession of them, and *Bynkershoek* is cited as coinciding in this definition. It is indeed with hesitation that *Puffendorf* affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues. The foregoing authorities are decisive to show that mere pursuit gave *Post* no legal right to the fox, but that he became the property of *Pierson*, who intercepted and killed him.

It therefore only remains to inquire whether there are any contrary principles, or authorities, to be found in other books, which ought to induce a different decision. Most of the cases which have occurred in *England*, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which beasts *feræ naturæ* have been apprehended; the former claiming them by title of occupancy, and the latter *ratione soli*. Little satisfactory aid can, therefore, be derived from the *English* reporters.

*Barbeyrac*, in his notes on *Puffendorf*, does not accede to the definition of occupancy by the latter, but, on the contrary, affirms, that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, *describe* the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent, and as far as *Barbeyrac* appears to me to go, his objections to *Puffendorf's* definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the

mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labour, have used such means of apprehending them. *Barbeyrac* seems to have adopted, and had in view in his notes, the more accurate opinion of *Grotius*, with respect to occupancy. That celebrated author, lib. 2. c. 8. s. 3. p. 309. speaking of occupancy, proceeds thus: “*Requiritur autem corporalis quædam possessio ad dominium adipiscendum; atque ideo, vulnerasse non sufficit.*”\* But in the following section he explains and qualifies this definition of occupancy: “*Sed possessio illa potest non solis manibus, sed instrumentis, ut decipulis, retibus, laqueis dum duo adsint: primum ut ipsa instrumenta sint in nostra potestate, deinde ut fera, ita inclusa sit, ut exire inde nequeat.*”† This qualification embraces the full extent of *Barbeyrac*’s objection to *Puffendorf*’s definition, and allows as great a latitude to acquiring property by occupancy, as can reasonably be inferred from the words or ideas expressed by *Barbeyrac* in his notes. The case now under consideration is one of mere pursuit, and presents no circumstances or acts which can bring it within the definition of occupancy by *Puffendorf*, or *Grotius*, or the ideas of *Barbeyrac* upon that subject.

The case cited from 11 *Mod.* 74–130.‡ I think clearly distinguishable from the present; inasmuch as there the action was for maliciously hindering and disturbing the plaintiff in the exercise and enjoyment of a private franchise; and in the report of the same case, 3 *Salk.* 9. *Holt*, Ch. J. states, that the ducks were in the plaintiff’s decoy pond, and so in his possession,

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\* Translation: “Some bodily possession is required for acquiring ownership; for that reason, wounding is not enough.” —Eds.

† Translation: “But that possession can be not only by hand, but by instruments, such as traps, nets, and snares, where two things are present: first that this instrument itself be in our control, and then that the wild thing, being enclosed, cannot exit therefrom.” —Eds.

‡ This citation, and the following citation to *Salk.*, both refer to the case of *Keeble v. Hickeringill*, 103 Eng. Rep. 1127, 11 East 574 (Q.B. 1707). —Eds.

from which it is obvious the court laid much stress in their opinion upon the plaintiff's possession of the ducks, *ratione soli*.<sup>§</sup>

We are the more readily inclined to confine possession or occupancy of beasts *feræ naturæ*, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.

However uncourteous or unkind the conduct of *Pierson* towards *Post*, in this instance, may have been, yet his act was productive of no injury or damage for which a legal remedy can be applied. We are of opinion the judgment below was erroneous, and ought to be reversed.

**LIVINGSTON, J.**

My opinion differs from that of the court.

Of six exceptions, taken to the proceedings below, all are abandoned except the third, which reduces the controversy to a single question.

Whether a person who, with his own hounds, starts and hunts a fox on waste and uninhabited ground, and is on the point of seizing his prey, acquires such an interest in the animal, as to have a right of action against another, who in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away?

This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over *Justinian*, *Fleta*, *Bracton*, *Puffendorf*, *Locke*, *Barbeyrac*, or *Blackstone*, all of whom have been cited; they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor *reynard*<sup>¶</sup> would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of *Diana*. But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal, the correc-

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<sup>§</sup> Translation: "by reason of the soil." —Eds.

<sup>¶</sup> Reynard was a clever (and often duplicitous) fox character who featured in several well-known medieval European folk tales and literary works. The character's popularity gave rise to the modern French word for "fox": *renard*. —Eds.

tion of any mistake which we may be so unfortunate as to make. By the pleadings it is admitted that a fox is a “wild and noxious beast.” Both parties have regarded him, as the law of nations does a pirate, “*hostem humani generis*,”<sup>||</sup> and although “*de mortuis nil nisi bonum*,”<sup>\*\*</sup> be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barn yards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, “*sub jove frigido*,”<sup>††</sup> or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit? Whatever *Justinian* may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business, in the language of the declaration in this cause, “with hounds and dogs to find, start, pursue, hunt, and chase,” these animals, and that, too, without any other motive than the preservation of *Roman* poultry; if this diversion had been then in fashion, the lawyers who composed his institutes, would have taken care not to pass it by, without suitable encouragement. If any thing, therefore, in the digests or pandects shall appear to militate against the defendant in error, who, on this occasion, was the foxhunter, we have only to say *tempora mutantur*,<sup>‡‡</sup> and if men themselves change with the times, why should not laws also undergo an alteration?

It may be expected, however, by the learned counsel, that more particular notice be taken of their authorities. I have examined them all, and feel great difficulty in determining, whether to acquire dominion over a thing,

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<sup>||</sup> Translation: “enemy of the human race.” —Eds.

<sup>\*\*</sup> Translation: “Of the dead say nothing but good.” —Eds.

<sup>††</sup> Translation: “Under frigid Jove” (*i.e.*, under a cold sky). —Eds.

<sup>‡‡</sup> Translation: “times change.” Part of a well-known Latin aphorism, *tempora mutantur, nos et mutamur in illis*: “times change, and we change with them.” —Eds.

before in common, it be sufficient that we barely see it, or know where it is, or wish for it, or make a declaration of our will respecting it; or whether, in the case of wild beasts, setting a trap, or lying in wait, or starting, or pursuing, be enough; or if an actual wounding, or killing, or bodily tact and occupation be necessary. Writers on general law, who have favoured us with their speculations on these points, differ on them all; but, great as is the diversity of sentiment among them, some conclusion must be adopted on the question immediately before us. After mature deliberation, I embrace that of *Barbeyrac*, as the most rational, and least liable to objection. If at liberty, we might imitate the courtesy of a certain emperor, who, to avoid giving offence to the advocates of any of these different doctrines, adopted a middle course, and by ingenious distinctions, rendered it difficult to say (as often happens after a fierce and angry contest) to whom the palm of victory belonged. He ordained, that if a beast be followed with *large dogs and hounds*, he shall belong to the hunter, not to the chance occupant; and in like manner, if he be killed or wounded with a lance or sword; but if chased with *beagles only*, then he passed to the captor, not to the first pursuer. If slain with a dart, a sling, or a bow, he fell to the hunter, if still in chase, and not to him who might afterwards find and seize him.

Now, as we are without any municipal regulations of our own, and the pursuit here, for aught that appears on the case, being with dogs and hounds of *imperial stature*, we are at liberty to adopt one of the provisions just cited, which comports also with the learned conclusion of *Barbeyrac*, that property in animals *feræ naturæ* may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a *reasonable* prospect (which certainly existed here) of taking, what he has *thus* discovered an intention of converting to his own use.

When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a beast so pernicious and incorrigible, we cannot greatly err, in saying, that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporal possession, or bodily *seisin*, confers such a right to the object of it, as to make any one a wrongdoer, who shall interfere and shoulder the spoil. The *justice's* judgment ought, therefore, in my opinion, to be affirmed.

Judgment of reversal.

### Notes and Questions

**18.1. What the Fox?** *Pierson* is perhaps the most celebrated case in American property law, and scholars have delighted in debating its history and theory. Among other things, research has shown that the case's presentation of the facts is incomplete and likely misleading.

Lodowick Post and Jesse Pierson were young men of well-to-do families. The Piersons were local farmers and longtime residents of the Southampton area where the case took place, and the Posts were more recent newcomers who had made their fortune in business (Lodowick's father Nathan Post may have been a whaling ship captain). Andrea McDowell, *Legal Fictions in Pierson v. Post*, 105 MICH. L. REV. 735, 744–45 (2007). Fox hunting was typically seen by upper-class New Yorkers as a leisure sport, the agricultural New Englanders would have treated foxes as dangerous vermin who stole farmers' chickens. See Bethany Berger, *It's Not About the Fox: The Untold Story of Pierson v. Post*, 55 DUKE L.J. 1089, 1131–33 (2006); Angela Fernandez, *The Lost Record of Pierson v. Post, the Famous Fox Case*, 27 LAW & HIST. REV. 149, 166 (2009); McDowell, *supra*, at 764. Southampton, at the eastern end of Long Island and closer to Connecticut than New York City, was “thus on a boundary, of sorts,” between these cultural and professional difference.

The case report describes the land on which the fox was found as “wild and uninhabited, unpossessed and waste.” But it may have been a community-owned pasture in which the Piersons had an ownership share. See Berger, *supra*, at 1120–21. In any event, the fox was found not far from Pierson’s house, suggesting that Pierson may have killed the fox to protect his chickens. See Fernandez, *supra*, at 167–68. Pierson was not himself hunting, but saw the fox run down a well and clubbed it to death. See *id.* at 166. Post arrived and demanded the body of the fox, to which Pierson apparently responded, “it may be you was going to kill him, but you did not kill him. I was going to kill him and did kill him.” *Id.* (quoting H.P. Hedges, *Pierson vs. Post*, SAG-HARBOR EXPRESS, Oct. 24, 1895, at 1).

Despite serious flaws in litigation procedure, the New York Supreme Court plainly saw the case as an opportunity to develop the law, and waited for over two years to issue an opinion. See *id.* at 172–75. As one scholar notes, the opinions’ citation to Roman and civil law rather than Blackstone and common law suggests the court’s desire to reject English law after the American Revolution. See Berger, *supra*, at 1135–36. Furthermore, the judges’ backgrounds may have played a role in their conceptions of property: The Livingston family was one of the largest landowners

in New York state, renting their property to thousands of tenant farmers; Tompkins' parents were tenant farmers who rented land. See *id.* at 1138–39.

What of this informs your understanding of the outcome of the case? The New England–New York cultural divide? The different interests of farmers and leisure hunters with respect to foxes? The title ownership of the land? English versus American norms? Something else? And is this case really about the initial allocation of property, as most textbooks suggest? See *id.* at 1142; Joseph William Singer, *Starting Property*, 46 St. Louis U. L.J. 565, 569–70 (2002) (“*Pierson* is not about the means of initial acquisition but rather concerns social relationships.”).

18.2. **Justifying Allocations.** Does awarding ownership of a previously un-owned chattel to the first possessor of that chattel strike you as a good rule? Consider some arguments that might be raised for or against it:

- Administrability: Is the rule easy to apply? Does it give clear and ready answers? Does it make judges' and litigants' jobs easier or harder? Does it minimize the cost and time involved in resolving disputes? Can it be applied without resort to ambiguous or hard-to-obtain evidence?
- Fairness: Does the rule comport with well-considered notions of fairness? Does it treat similarly situated people similarly? Does it favor some claimants over others based on criteria that seem irrelevant, arbitrary, or beyond the claimants' control?
- Morality: Does the rule reward moral behavior and punish—or at least refrain from rewarding—immoral behavior? (This assumes of course that we have a standard for moral and immoral behavior.)
- Reliance: Does the rule respect the reasonable expectations of those with an interest in contested resources? Does it result in a forfeiture of their investment of time, money, or effort premised on such expectations? Does it comport with tradition?
- Pragmatism: Does the rule roughly comport with the moral intuitions of those who are subject to it? Do we expect the rule to be obeyed?
- Ecology: Is the rule consistent with responsible stewardship of resources? Does it ensure that an exhaustible resource will remain available for the benefit of future generations?
- Incentives: Does the rule encourage or discourage the conversion of idle resources to productive use? Does it encourage excessive, duplicative, or wasteful efforts to exploit resources? Does it encourage or discourage disputes or

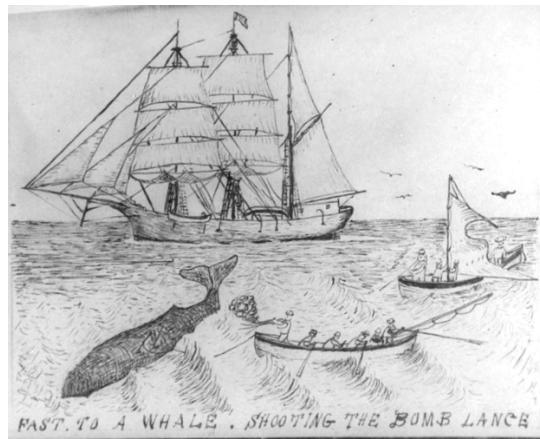
violence among rival claimants? Does it encourage would-be claimants to expend resources on protecting themselves *against other* would-be claimants, instead of on more productive pursuits? When weighing these incentives in the aggregate, is the rule *efficient*? That is, does it extract the greatest possible value from available resources at the lowest possible cost?

Which of these arguments strikes you as more or less important to the justification of a legal rule—particularly a rule of property law? Which of them were invoked by Justices Tompkins and Livingston in *Pierson*?

Even if we agree as to which of these arguments matter in disposing of a particular dispute, are we sure to agree whether a particular type of argument favors a particular party? For example, is Justice Livingston correct in claiming that the decision in Pierson's favor will provide insufficient incentive for hunters to capture foxes? Is Justice Tompkins correct in claiming that a decision in Post's favor would lead to increased disputes over the trophies of the chase? Does either opinion clearly establish which outcome would be the most fair? How could we know the answer to these questions?

18.3. **Alternatives to First Possession.** Is the rule of first possession the best available rule for allocating unowned resources? Consider some possible alternative allocation principles:

- Perhaps initial allocation should go to the first *claimant*—the first to explicitly assert a right of ownership (or manifest the intent to assert such a right, as by pursuit).
- Perhaps initial allocation should go to the *last possessor*—the person who gains and maintains possession against the efforts of all competitors.
- Perhaps possession is irrelevant: perhaps initial allocation should go to all interested claimants in equal shares.
- Perhaps the resource should be owned as a *commons*: it belongs to everybody jointly; everybody has an equal right to it and nobody has a superior right to anyone else.
- Perhaps the government ought to own everything and simply provide rights of possession and use by means of bureaucratic and political mechanisms. (Then again, perhaps this is exactly what the common law of *real* property does, under the traditional English doctrine that “all the land in the kingdom is supposed to be holden, mediately or immediately, of the king” who confers title (and titles, like Duke or Count) on supporters. 2 BLACKSTONE, *COMMEN-TARIES* \*59.)



**Figure 18.2:** Source: “Fast to a whale, shooting the bomb lance.” New Bedford Free Public Library. *Digital Commonwealth, link.*

- Perhaps ownership should be determined by lot, at random.

How would each of these rules compare to the rule of first possession in terms of each of the justifications we have just reviewed for and against that rule? What do you think would be the *practical* result of choosing one of these alternative allocation regimes—i.e., how would people likely shape their behavior in response to these allocation rules?

18.4. Recall the first type of justification we discussed in Note 1 above: administrability. Do you think it will always be obvious that one claimant of a chattel has achieved possession and another has not? Consider the following case.

### ***Ghen v. Rich***

8 F. 159 (D. Mass. 1881)

#### **NELSON, D.J.**

This is an action to recover the value of a fin-back whale. Ghen, the plaintiff,\* lives in Provincetown and Rich, the defendant, in Wellfleet.

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\*In the original case, the action is called a “libel,” the plaintiff Ghen the “libellant,” and the defendant Rich the “respondent.” For simplicity, these terms have been modernized and the parties’ names used, without indication. —Eds.

In the early spring months the easterly part of Massachusetts Bay is frequented by the species of whale known as the fin-back whale. Fishermen from Provincetown pursue them in open boats from the shore, and shoot them with bomb-lances fired from guns made expressly for the purpose. When killed they sink at once to the bottom, but in the course of from one to three days they rise and float on the surface. . . . The person who happens to find them on the beach usually sends word to Provincetown, and the owner comes to the spot and removes the blubber. . . . [The whale] swims with great swiftness, and for that reason cannot be taken by the harpoon and line. Each boat's crew engaged in the business has its peculiar mark or device on its lances, and in this way it is known by whom a whale is killed.

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, and this right has never been disputed until this case. Ghen has been engaged in this business for ten years past. On the morning of April 9, 1880 . . . he shot and instantly killed with a bomb-lance the whale in question. . . . [Ellis found it.] Instead of sending word to Provincetown, as is customary, Ellis advertised the whale for sale at auction, and sold it to Rich . . . . Neither 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.

Ghen claims title to the whale under this usage. Rich insists that this usage is invalid.

[The court reviewed several cases on conflicts over whale ownership, in which the party who first harpooned the whale was awarded ownership.]

I see no reason why the usage proved in this case is not as reasonable as that sustained in the cases cited. Its application must necessarily be extremely limited, and can affect but a few persons. It has been recognized and acquiesced in for many years. It requires in the first taker the only act of appropriation that is possible in the nature of the case. Unless it is sustained, this branch of industry must necessarily cease, for no person would engage in it if the fruits of his labor could be appropriated by any chance finder. . . . That the rule works well in practice is shown by the extent of the industry which has grown up under it, and the general acquiescence of a whole community interested to dispute it. It is by no means clear that without regard to usage the common law would not reach the same result.

That seems to be the effect of the decisions in [some of the cases reviewed]. If the fisherman does all that is possible to do to make the animal his own, that would seem to be sufficient. Such a rule might well be applied in the interest of trade, there being no usage or custom to the contrary. Holmes, Com. Law, 217. But be that as it may, I hold the usage to be valid, and that the property in the whale was in Ghen. . . .

### Notes and Questions

**18.5. Primary and Secondary Rules.** Is the rule of *Ghen v. Rich* different from the rule of *Pierson v. Post*? If so, how? Are the justifications for the rule, or for the outcome, the same in each case? If not, how do they differ?

To answer this question, it may be helpful to distinguish between what leading legal philosopher H.L.A. Hart called *primary rules* and *secondary rules*. In Hart's account, *primary rules* are those that prescribe standards of conduct, and set forth consequences for failure to act accordingly. Statutes defining and setting forth punishments for crimes provide a straightforward example. *Secondary rules* are basically everything else, but in particular they include rules that give actors within the legal system the power to create, alter, or abolish their own primary rules. For example, contract law is largely a body of secondary rules: parties to a contract acting within those rules have the power to create legal rights and obligations that will bind them; the contract itself embodies the applicable primary rules. (For more on this distinction—and more of Hart's monumental contributions to jurisprudence—see H.L.A. HART, THE CONCEPT OF LAW.)

Based on this admittedly limited introduction to the concept, was the determinative legal rule in *Ghen v. Rich* a primary or a secondary rule? What about in *Pierson v. Post*?

**18.6. Whose Custom?** In *Aberdeen Arctic Co. v. Sutter*, 4 McQ. H.L. 355 (1862), the House of Lords heard the appeal of a case involving a hired Eskimo harpooner aboard an English whaling vessel in Cumberland Inlet, a traditional native fishing ground in what is now Canada. The harpooner, one Bullygar, struck a whale with a harpoon and line, at the end of which was attached an inflated sealskin, or "drog," which the native fishermen had a custom of using to tire the harpooned animal and to make it easier to track while it swims below the surface. The whale dove immediately, so deep that Bullygar was forced to release his line, and it did not surface again until it had traveled several miles. Before Bullygar and his ship could retrieve it, another ship—the *Alibi*—came upon the wounded whale, killed it, and took it. Bully-

gar's captain (Sutter) sued the owners of the *Alibi* for "compensation and damages" in the amount of £1,200.

The Law Lords found for the owners of the *Alibi*, recognizing a custom of English whalers in the shallower waters around Greenland. This custom was known as "fast and loose" (which does not—or did not—mean what you think it means). According to the "fast and loose" rule, the first ship to harpoon a whale has a right to the animal so long as the ship holds "fast" to its line, even if other ships participate in the ultimate killing and capture of the whale. But if the whale should break free—even if mortally wounded—or if the line should be intentionally cut or released—even for reasons of safety or necessity—the whale becomes "loose" and will become the property of the first ship to actually secure it. (See HERMAN MELVILLE, MOBY-DICK 372-75 (1922) [1892] ("Fast-Fish and Loose-Fish").)

Sutter argued that Cumberland Inlet had long been governed by the custom of the Eskimo—which conferred ownership on the first person whose harpoon struck and remained in the animal with the drog attached—and that the English "fast and loose" rule should not apply. Lord Chancellor Westbury rejected the argument. He opined that Sutter had the burden of proving that English whaling ships entering this new fishing ground had agreed *not* to bring the "fast and loose" custom with them. Indeed, he openly doubted whether the drog fishing methods of the Eskimo—which they used primarily in seal hunting—were even capable of capturing a whale. Moreover, he suggested that even if the case were to be decided by the law of "occupancy" rather than the custom of English whalers, the result would be the same.

Is the rule of *Ghen v. Rich* the same as the rule of *Aberdeen Arctic Co. v. Sutter*? If different, which rule is better and why?

18.7. Imagine you are counsel to either Pierson or Rich, and your adversary makes you an offer of settlement: to sell the contested chattel and split the proceeds evenly. What would you advise your client to do? Consider the following case.



**Figure 18.3:** Source: *Up For Grabs* (Crooked Hook Productions 2004)

## 18.2   Baseballs

### *Popov v. Hayashi*

2002 WL 31833731 (Cal. Sup. Ct. San Francisco Cty. Dec. 18, 2002)

**McCarthy, J.**

#### Facts

In 1927, Babe Ruth hit sixty home runs. That record stood for thirty four years until Roger Maris broke it in 1961 with sixty one home runs. Mark McGwire hit seventy in 1998. On October 7, 2001, at PacBell Park in San Francisco, Barry Bonds hit number seventy three. That accomplishment set a record which, in all probability, will remain unbroken for years into the future.

The event was widely anticipated and received a great deal of attention.

The ball that found itself at the receiving end of Mr. Bond's bat garnered some of that attention. Baseball fans in general, and especially people at the game, understood the importance of the ball. It was worth a great deal of money<sup>1</sup> and whoever caught it would bask, for a brief period of time, in the reflected fame of Mr. Bonds.

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<sup>1</sup>It has been suggested that the ball might sell for something in excess of \$1,000,000.

With that in mind, many people who attended the game came prepared for the possibility that a record setting ball would be hit in their direction. Among this group were plaintiff Alex Popov and defendant Patrick Hayashi. They were unacquainted at the time. Both men brought baseball gloves, which they anticipated using if the ball came within their reach.

... When the seventy-third home run ball went into the arcade, it landed in the upper portion of the webbing of a softball glove worn by Alex Popov. While the glove stopped the trajectory of the ball, it is not at all clear that the ball was secure. Popov had to reach for the ball and in doing so, may have lost his balance.

Even as the ball was going into his glove, a crowd of people began to engulf Mr. Popov. He was tackled and thrown to the ground while still in the process of attempting to complete the catch. Some people intentionally descended on him for the purpose of taking the ball away, while others were involuntarily forced to the ground by the momentum of the crowd.

Eventually, Mr. Popov was buried face down on the ground under several layers of people. At one point he had trouble breathing. Mr. Popov was grabbed, hit and kicked. People reached underneath him in the area of his glove. [The evidence is insufficient] to establish which individual members of the crowd were responsible for the assaults on Mr. Popov.

Mr. Popov intended at all times to establish and maintain possession of the ball. At some point the ball left his glove and ended up on the ground. It is impossible to establish the exact point in time that this occurred or what caused it to occur.

Mr. Hayashi was standing near Mr. Popov when the ball came into the stands. He, like Mr. Popov, was involuntarily forced to the ground. He committed no wrongful act. While on the ground he saw the loose ball. He picked it up, rose to his feet and put it in his pocket.

... It is important to point out what the evidence did not and could not show. Neither the camera [of a local news team fortuitously recording the incident] nor the percipient witnesses were able to establish whether Mr. Popov retained control of the ball as he descended into the crowd. Mr. Popov's testimony on this question is inconsistent on several important points, ambiguous on others and, on the whole, unconvincing. We do not know when or how Mr. Popov lost the ball.

Perhaps the most critical factual finding of all is one that cannot be made. We will never know if Mr. Popov would have been able to retain

control of the ball had the crowd not interfered with his efforts to do so. Resolution of that question is the work of a psychic, not a judge.

### Legal Analysis

Plaintiff has pled causes of actions for conversion, trespass to chattel, injunctive relief and constructive trust.

Conversion is the wrongful exercise of dominion over the personal property of another. . . . If a person entitled to possession of personal property demands its return, the unjustified refusal to give the property back is conversion.

. . . Conversion does not exist, however, unless the baseball rightfully belongs to Mr. Popov. One who has neither title nor possession, nor any right to possession, cannot sue for conversion. The deciding question in this case then, is whether Mr. Popov achieved possession or the right to possession as he attempted to catch and hold on to the ball.

The parties have agreed to a starting point for the legal analysis. Prior to the time the ball was hit, it was possessed and owned by Major League Baseball. At the time it was hit it became intentionally abandoned property. The first person who came in possession of the ball became its new owner.

. . . Although the term possession appears repeatedly throughout the law, its definition varies depending on the context in which it is used. Various courts have condemned the term as vague and meaningless.

This level of criticism is probably unwarranted.

While there is a degree of ambiguity built into the term possession, that ambiguity exists for a purpose. Courts are often called upon to resolve conflicting claims of possession in the context of commercial disputes. A stable economic environment requires rules of conduct which are understandable and consistent with the fundamental customs and practices of the industry they regulate. Without that, rules will be difficult to enforce and economic instability will result. Because each industry has different customs and practices, a single definition of possession cannot be applied to different industries without creating havoc.

This does not mean that there are no central principles governing the law of possession. It is possible to identify certain fundamental concepts that are common to every definition of possession.

. . . We start with the observation that possession is a process which culminates in an event. The event is the moment in time that possession

is achieved. The process includes the acts and thoughts of the would be possessor which lead up to the moment of possession.

The focus of the analysis in this case is not on the thoughts or intent of the actor. Mr. Popov has clearly evidenced an intent to possess the baseball and has communicated that intent to the world.<sup>23</sup> The question is whether he did enough to reduce the ball to his exclusive dominion and control. Were his acts sufficient to create a legally cognizable interest in the ball?

Mr. Hayashi argues that possession does not occur until the fan has complete control of the ball. Professor Brian Gray, suggests the following definition[:] “A person who catches a baseball that enters the stands is its owner. A ball is caught if the person has achieved complete control of the ball at the point in time that the momentum of the ball and the momentum of the fan while attempting to catch the ball ceases. A baseball, which is dislodged by incidental contact with an inanimate object or another person, before momentum has ceased, is not possessed. Incidental contact with another person is contact that is not intended by the other person. The first person to pick up a loose ball and secure it becomes its possessor.”<sup>24</sup>

Mr. Popov argues that this definition requires that a person seeking to establish possession must show unequivocal dominion and control, a standard rejected by several leading cases.<sup>25</sup> Instead, he offers the perspectives of Professor Bernhardt and Professor Paul Finkelman who suggest that possession occurs when an individual intends to take control of a ball and manifests that intent by stopping the forward momentum of the ball whether or not complete control is achieved.

Professors Finkelman and Bernhardt have correctly pointed out that some cases recognize possession even before absolute dominion and control is achieved. Those cases require the actor to be actively and ably engaged in efforts to establish complete control.<sup>27</sup> Moreover, such efforts

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<sup>23</sup>Literally.

<sup>24</sup>This definition is hereinafter referred to as Gray’s Rule.

<sup>25</sup>*Pierson v. Post*, 3 Caines R. (N.Y.1805).

<sup>27</sup>The degree of control necessary to establish possession varies from circumstance to circumstance. “The law . . . does not always require that one who discovers lost or abandoned property must actually have it in hand before he is vested with a legally protected interest. The law protects not only the title acquired by one who finds lost or abandoned property but also the right of the person who discovers such property, and is actively and ably engaged in reducing it to possession, to complete this process without interference from another. The courts have recognized that in order to acquire a legally cognizable

must be significant and they must be reasonably calculated to result in unequivocal dominion and control at some point in the near future.

This rule is applied in cases involving the hunting or fishing of wild animals<sup>29</sup> or the salvage of sunken vessels. The hunting and fishing cases recognize that a mortally wounded animal may run for a distance before falling. The hunter acquires possession upon the act of wounding the animal not the eventual capture. Similarly, whalers acquire possession by landing a harpoon, not by subduing the animal.

In the salvage cases, an individual may take possession of a wreck by exerting as much control "as its nature and situation permit". Inadequate efforts, however, will not support a claim of possession. Thus, a "sailor cannot assert a claim merely by boarding a vessel and publishing a notice, unless such acts are coupled with a then present intention of conducting salvage operations, and he immediately thereafter proceeds with activity in the form of constructive steps to aid the distressed party."

These rules are contextual in nature. They are crafted in response to the unique nature of the conduct they seek to regulate. Moreover, they are influenced by the custom and practice of each industry. The reason that absolute dominion and control is not required to establish possession in the cases cited by Mr. Popov is that such a rule would be unworkable and unreasonable. The "nature and situation" of the property at issue does not immediately lend itself to unequivocal dominion and control. It is impossible to wrap one's arms around a whale, a fleeing fox or a sunken ship.

The opposite is true of a baseball hit into the stands of a stadium. Not only is it physically possible for a person to acquire unequivocal dominion and control of an abandoned baseball, but fans generally expect a claimant to have accomplished as much. The custom and practice of the stands creates a reasonable expectation that a person will achieve full control of a ball before claiming possession. There is no reason for the legal rule to be inconsistent with that expectation. Therefore Gray's Rule is adopted as the definition of possession in this case.

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interest in lost or abandoned property a finder need not always have manual possession of the thing. Rather, a finder may be protected by taking such constructive possession of the property as its nature and situation permit." *Treasure Salvors Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel* 640 F.2d 560, 571 (1981).

<sup>29</sup> . . . *Ghen v. Rich* 8 F. 159 (D.Mass.1881); *Pierson v. Post* 3 Caines R. (N.Y.1805) . . . .

The central [tenet] of Gray's Rule is that the actor must retain control of the ball after incidental contact with people and things. Mr. Popov has not established by a preponderance of the evidence that he would have retained control of the ball after all momentum ceased and after any incidental contact with people or objects. Consequently, he did not achieve full possession.

That finding, however, does not resolve the case. The reason we do not know whether Mr. Popov would have retained control of the ball is not because of incidental contact. It is because he was attacked. His efforts to establish possession were interrupted by the collective assault of a band of wrongdoers.<sup>34</sup>

A decision which ignored that fact would endorse the actions of the crowd by not repudiating them. Judicial rulings, particularly in cases that receive media attention, affect the way people conduct themselves. This case demands vindication of an important principle. We are a nation governed by law, not by brute force.

As a matter of fundamental fairness, Mr. Popov should have had the opportunity to try to complete his catch unimpeded by unlawful activity. To hold otherwise would be to allow the result in this case to be dictated by violence. That will not happen.

. . . The legal question presented at this point is whether an action for conversion can proceed where the plaintiff has failed to establish possession or title. It can[.] An action for conversion may be brought where the plaintiff has title, possession or the right to possession.

. . . Consistent with this principle, the court adopts the following rule. Where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others, the actor has a legally cognizable pre-possessory interest in the property. That pre-possessory interest constitutes a qualified right to possession which can support a cause of action for conversion.

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<sup>34</sup>Professor Gray has suggested that the way to deal with this problem is to demand that Mr. Popov sue the people who assaulted him. This suggestion is unworkable for a number of reasons. First, it was an attack by a large group of people. It is impossible to separate out the people who were acting unlawfully from the people who were involuntarily pulled into the mix. Second, in order to prove damages related to the loss of the ball, Mr. Popov would have to prove that but for the actions of the crowd he would have achieved possession of the ball. As noted earlier, this is impossible.

... Recognition of a legally protected pre-possessory interest, vests Mr. Popov with a qualified right to possession and enables him to advance a legitimate claim to the baseball based on a conversion theory. Moreover it addresses the harm done by the unlawful actions of the crowd.

It does not, however, address the interests of Mr. Hayashi. The court is required to balance the interests of all parties.

Mr. Hayashi was not a wrongdoer. He was a victim of the same bandits that attacked Mr. Popov. . . . Mr. Hayashi appears on the surface to have done everything necessary to claim full possession of the ball, [but] the ball itself is encumbered by the qualified pre-possessory interest of Mr. Popov. At the time Mr. Hayashi came into possession of the ball, it had, in effect, a cloud on its title.

An award of the ball to Mr. Popov would be unfair to Mr. Hayashi. It would be premised on the assumption that Mr. Popov would have caught the ball. That assumption is not supported by the facts. An award of the ball to Mr. Hayashi would unfairly penalize Mr. Popov. It would be based on the assumption that Mr. Popov would have dropped the ball. That conclusion is also unsupported by the facts.

Both men have a superior claim to the ball as against all the world. Each man has a claim of equal dignity as to the other. We are, therefore, left with something of a dilemma.

Thankfully, there is a middle ground.

. . . The concept of equitable division has its roots in ancient Roman law. As Helmholtz points out, it is useful in that it "provides an equitable way to resolve competing claims which are equally strong." Moreover, "[i]t comports with what one instinctively feels to be fair".

. . . The principle at work here is that where more than one party has a valid claim to a single piece of property, the court will recognize an undivided interest in the property in proportion to the strength of the claim.

. . . Mr. Hayashi's claim is compromised by Mr. Popov's pre-possessory interest. Mr. Popov cannot demonstrate full control. . . . Their legal claims are of equal quality and they are equally entitled to the ball.

. . . The court therefore declares that both plaintiff and defendant have an equal and undivided interest in the ball. Plaintiff's cause of action for conversion is sustained only as to his equal and undivided interest. In order to effectuate this ruling, the ball must be sold and the proceeds divided equally between the parties . . . .



**Figure 18.4:** Source: Raphael, Judgment of Solomon. Vatican Museums.

### Notes and Questions

**18.8. Splitting the Baby.** The cynical lawyer would call Judge McCarthy's ruling in *Popov v. Hayashi* a classic example of "splitting the baby." The implication is that ordering the division of the disputed chattel is wishy-washy, or a cop-out. This assumes that there is a "right" answer that will make one party perfectly happy and utterly disappoint the other, but for whatever reason the judge has decided to ignore that answer and instead issue a ruling that tries to give something to everybody and therefore satisfies nobody.<sup>1</sup>

Is that a fair critique? Come to think of it, why don't we resolve *all* disputes over initial ownership of chattels this way? Should Pierson and Post have split the value of the fox pelt? Should Ghen and Rich (or perhaps Ellis) have shared the value of the whale oil? (Wouldn't they have done so under the custom supposedly enforced by the court in that case?) Are there good reasons *not* to compel competing claimants of a resource to *share*? What would your kindergarten teacher say?

Your casebook authors would never dare contradict your kindergarten teacher, but we might venture a few questions: How would you expect competing claimants to a single, indivisible resource to behave under a rule that requires them to share

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<sup>1</sup>In the Old Testament parable from which the idiom is derived, King Solomon supposedly used this device to suss out the true facts of the case he was called on to decide—that is, to identify the true mother of a disputed child. (He did not, in the event, actually split the baby.) (1 KINGS 3:16-28.) Why might a judge in a modern court of law issue a ruling that makes nobody happy? Why do you think Judge McCarthy did so in *Popov*?

that resource? How do adults who share a household usually share the resources of that household? Does it matter if the people sharing like or respect each other? How would you expect courts to resolve their disputes under a rule requiring sharing? What do you expect the reactions to such resolutions would be? What would be the effect on the value and productive use of such resources?

Finally, which of the justifications for allocation rules discussed in Note 18.2 on page 505 are implicated by these questions?

18.9. **Precedent.** In common-law systems, courts rely on *precedent*—earlier decided cases presenting similar facts and legal issues—to guide their decisions. Precedent may be either *binding authority*—if it issues from a court with direct appellate jurisdiction over the court deciding an identical issue—or *persuasive authority*—if it issues from a different court in an opinion the deciding court finds well-reasoned and analogous.

In *Popov* Judge McCarthy cited and relied on our two earlier chattels cases, *Pier-son v. Post* and *Ghen v. Rich*, to justify his ruling. Do you agree with Judge McCarthy’s interpretation of these precedents? Do you think he applied them correctly to the facts of the case before him? Do you think he should have relied on these two decisions as persuasive authority in the *Popov* case?

18.10. **Escape and Return.** The common law developed particular rules to deal with a captured wild animal that later escaped. In general, once such an animal is free of the control of its captor, that captor loses their property right in the animal—it becomes once again *ferae naturae*, and a new captor can become its owner by killing or capturing it, free of any claim by the original captor. If, however, the animal in question has *animus revertendi*—a natural tendency to return to its place of captivity (like, say, homing pigeons, hived bees, or trained hawks)—its temporary departure from the possession of the original owner does not diminish that owner’s property right. See 2 WILLIAM BLACKSTONE, COMMENTARIES \*392-93.

Might the rule of escape have any application to *Popov v. Hayashi*? Or are there other factors at work in the case that make the rule unhelpful?

18.11. **Postscript.** Recall Question 18.7 on page 510, above. Patrick Hayashi claims that before this case went to trial, he made a settlement offer to Alex Popov whereby the two men would essentially do what the court ended up ordering them to do—selling the ball and dividing the proceeds. Popov, confident in his right to sole ownership, allegedly countered with a lowball offer of \$5,000 in exchange for return of the ball.<sup>2</sup> This turned out to be . . . ill advised.

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<sup>2</sup>Jay Posner, *Possessing 73rd HR ball first made his life a hassle, then movie*, SAN DIEGO UNION-TRIBUNE (June 14, 2005), [link](#)

Despite speculation that Barry Bonds's record-setting home-run ball might sell for a million dollars or more, the controversy over its ownership appears to have negatively affected its market value. At auction, the ball sold for \$450,000.<sup>3</sup> Split according to the court's order, that came out to \$225,000 for each party—not a bad haul. But don't forget: this case was bitterly litigated for over a year—including a trial that proceeded over several weeks—and that ain't cheap.

Patrick Hayashi's attorneys ultimately agreed to waive most of their fee following the resolution of the case, leaving him enough from the proceeds of the sale to cover the cost of his graduate education. He left San Francisco and began a happy new life and career in San Diego.<sup>4</sup>

Alex Popov was not so lucky. The day after the ball went under the auction hammer, Popov's attorney, Martin Triano, obtained a temporary restraining order freezing Popov's share of the proceeds.<sup>5</sup> Mr. Triano claimed that Popov still owed him attorney's fees in the amount of \$473,500.<sup>6</sup> Alex Popov eventually filed for bankruptcy,<sup>7</sup> but not before suing his attorney for malpractice and fraud.<sup>8</sup> The litigation between Messrs. Popov and Triano was last before a judge in September 2011, nearly 10 years after Popov had his fateful brush with a piece of sports (and legal) history. At that appearance, Mr. Popov was ordered to pay Mr. Triano an additional \$22,241 in legal fees arising from their decade of litigation against one another<sup>9</sup>—though one suspects Mr. Triano may have some difficulty collecting the award. (There is a lesson here for lawyers, not just litigants.)

To learn more about the saga of *Popov v. Hayashi*, and to see video of the infamous home run itself, we highly recommend the 2004 feature-length documentary *Up for Grabs*.

**18.12. Review and Application.** On September 21, 2008, José Molina hit what would be the last home run at the old Yankee Stadium (which was demolished following the end of the season to make way for a new, glitzier facility). The ball

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<sup>3</sup>Ira Berkow, *73rd Home Run Ball Sells for \$450,000*, N.Y. TIMES (June 26, 2003), [link](#).

<sup>4</sup>Gwen Knapp, *Finally, in Bonds ball case, someone shows some class*, S.F. CHRON. (Dec. 30, 2003) at A1, [link](#).

<sup>5</sup>In re Martin Triano, Case No. CPF 03 503194, Temporary Restraining Order, June 26, 2003 (Cal. Super. Ct. San. Francisco Cty.).

<sup>6</sup>*Id.*, Petition filed by Martin F. Triano (June 20, 2003); see also David Kravets, Attorney sues fan over Bonds ball case, USA Today (July 8, 2003), [link](#).

<sup>7</sup>Bankruptcy Petition #: 05-32929 (N.D. Cal. Sept. 6, 2005).

<sup>8</sup>Popov v. Triano, Case No. CGC 04 427956, Complaint, Jan. 12, 2004 (Cal. Super. Ct. San. Francisco Cty.).

<sup>9</sup>In re Martin Triano, Case No. CPF 03 503194, Minute Entry, Sept. 16, 2011 (Cal. Super. Ct. San. Francisco Cty.) (granting in part Triano's motion for attorney's fees, in the amount of \$22,241).

sailed into the left-field stands, and was stopped by a net hung over the seating area specifically for the purpose of protecting fans from incoming fly balls. Several fans attempted to reach through the net to grab the ball, and one—Steve Harshman—managed to get his hand around it. But the net was still between him and the ball. Harshman told reporters he had intended to rip the ball through the net, but was interrupted by staff at the stadium, who instructed him to release it while giving assurances that they would return it to him. Harshman followed the staff's instructions, and the ball rolled down the net and into an adjacent seating area, where Bronx schoolteacher Paul Russo caught it. Yankee Stadium staff immediately confronted Russo and instructed him to turn over the ball. Russo complied, he claimed, because he thought the staff was offering to secure the ball on his behalf. Instead, to Mr. Russo's surprise and chagrin, they delivered the ball to Mr. Harshman.<sup>10</sup>

Imagine Mr. Russo sues Mr. Harshman for return of the last home-run ball hit at the House that Ruth Built. What result? Would it matter if Yankee Stadium had a long-established policy of having its staff deliver game-play balls to fans who grasp them through protective netting on condition that the fan release the ball when instructed? Would it matter *why* the organization implemented such a policy?

**18.13. First Possession? Really?** We have now examined three different cases that purport to resolve a property dispute between an earlier pursuer and a later captor by reference to the rule of first possession. But each of them appears to come out a different way. *Pierson* awards the chattel (or its value) to the captor; *Ghen* to the pursuer; *Popov* to both in equal shares. Are these three cases really applying the same rule? If so, what nuances should we add to the maxims “first in time is first in right” or “title goes to the first possessor” in order to explain the outcomes of these three cases and help us to resolve factually similar cases we may encounter in the future? And if not, what are the *multiple* rules or considerations that govern the initial allocation of rights in chattels? Either way, how should we justify our rule(s)?

## 18.3 Plays

Just as with land, there can be multiple owners of intellectual property rights. The copyright laws contemplate a *joint work* that is “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101. “The authors of a joint work

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<sup>10</sup>James Barron, *At the Stadium, Possession Is Some Tenth of the Law*, N.Y. TIMES (Sept. 24, 2008) at B3, [link](#).

are coowners of copyright in the work,” § 201(a), and they each have “an undivided, independent right to use the work, subject only to a duty of accounting for profits to other co-owners.” *U.S. ex rel. Berge v. Bd. of Trs. of Univ. of Ala.*, 104 F.3d 1453, 1461 (4th Cir. 1997) (quoting H.R. REP. No. 94-1476, at 121 (1976)). Similarly, a patented invention may be “made by two or more persons jointly,” 35 U.S.C. § 116(a), and “each of the joint owners of a patent” may exploit the invention “without the consent of and without accounting to the others,” in the absence of an agreement otherwise, § 262.<sup>11</sup>

So who counts as a joint author or inventor? Given the power of any joint intellectual property owner to use and license the work, this question can have tremendous ramifications. The answers are not always expected and often debatable. As you read these materials, think about the last big group project you did—who did what work and who received what credit—and see if the legal rules line up with your intuitions.

### ***Erickson v. Trinity Theatre, Inc.***

13 F.3d 1061 (7th Cir. 1994)

#### **RIPPLE, Circuit Judge.**

The plaintiff Karen Erickson . . . was one of the founders of a theatre company in Evanston, Illinois, that ultimately became known as Trinity Theatre [the defendant]. Between 1981 and January 1991, Ms. Erickson served Trinity in various capacities: as playwright, artistic director, actress, play director, business manager, and member of the board of directors. This suit revolves around Ms. Erickson’s role as playwright.

[Erickson wrote three plays, in collaboration with the Trinity actors. Here is the court’s description of one such collaboration over a play *Much Ado About Shakespeare*:]

*Much Ado* is a compilation of scenes and sonnets from William Shakespeare and other writers of his time. Ms. Erickson revised this work from an earlier script entitled *Sounds and Sweet Aires*. Michael Osborne, a Trinity actor, testified that Ms. Erickson compiled *Much Ado* in 1988 and that many decisions about what was to be included were made during rehearsals. Osborne identified two portions of the copyrighted script that resulted from his suggestions: a passage to *Macbeth* and the introduction to the play. The

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<sup>11</sup>Notice the use of “joint owners” here. This does *not* refer to joint tenancy in the formal sense; the terminology is unfortunately domain-specific.

editing of the text, Osborne continued, was accomplished largely by consensus; however, when a consensus could not be had, Ms. Erickson made the final decisions. Osborne further testified that he understood at the time that the play was being created for Trinity and not for Ms. Erickson. Ms. Erickson does not dispute the process described by Osborne, but characterizes it differently. She perceived the process only as actors making suggestions for her script.

[After Erickson left the company, Trinity continued performing her plays. Erickson sued for copyright infringement. Trinity's defense was that, by virtue of its actors' collaboration with Erickson in writing the plays, they were joint authors and so Trinity was a joint owner of the copyrights.]

We now turn to the issue of whether any of the material in question is a "joint work." In a joint work, the joint authors hold undivided interests in a work, despite any differences in each author's contribution. Each author as co-owner has the right to use or to license the use of the work, subject to an accounting to the other co-owners for any profits. Thus, even a person whose contribution is relatively minor, if accorded joint authorship status, enjoys a significant benefit. . . .

[The court first held that, in order for a copyrighted work to be a joint work, each author must "intend that their respective contributions be merged into a unitary whole."]

Even if two or more persons collaborate with the intent to create a unitary work, the product will be considered a "joint work" only if the collaborators can be considered "authors." Courts have applied two tests to evaluate the contributions of authors claiming joint authorship status: Professor Nimmer's de minimis test and Professor Goldstein's copyrightable subject matter ("copyrightability") test. The de minimis and copyrightability tests differ in one fundamental respect. The de minimis test requires that only the combined product of joint efforts must be copyrightable. By contrast, Professor Goldstein's copyrightability test requires that each author's contribution be copyrightable. We evaluate each of these tests in turn. . . .

[Nimmer's] position has not found support in the courts. The lack of support in all likelihood stems from one of several weaknesses in Professor Nimmer's approach. First, Professor Nimmer's test is not consistent with one of the Act's premises: ideas and concepts standing alone should not receive protection. Because the creative process necessarily involves the

development of existing concepts into new forms, any restriction on the free exchange of ideas stifles creativity to some extent. Restrictions on an author's use of existing ideas in a work, such as the threat that accepting suggestions from another party might jeopardize the author's sole entitlement to a copyright, would hinder creativity. Second, contribution of an idea is an exceedingly ambiguous concept. Professor Nimmer provides little guidance to courts or parties regarding when a contribution rises to the level of joint authorship except to state that the contribution must be "more than a word or a line." . . .

[Goldstein's test] has been adopted, in some form, by a majority of courts that have considered the issue. According to Professor Goldstein, "[a] collaborative contribution will not produce a joint work, and a contributor will not obtain a co-ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright." . . . We agree that the language of the [Copyright] Act supports the adoption of a copyrightability requirement. Section 101 of the Act defines a "joint work" as a "work prepared by two or more *authors*" (emphasis added). To qualify as an author, one must supply more than mere direction or ideas. An author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection. . . .

The copyrightable subject matter test does not suffer from the same infirmities as Professor Nimmer's de minimis test. The copyrightability test advances creativity in science and art by allowing for the unhindered exchange of ideas, and protects authorship rights in a consistent and predictable manner. It excludes contributions such as ideas which are not protected under the Copyright Act. This test also enables parties to predict whether their contributions to a work will entitle them to copyright protection as a joint author. Compared to the uncertain exercise of divining whether a contribution is more than de minimis, reliance on the copyrightability of an author's proposed contribution yields relatively certain answers. The copyrightability standard allows contributors to avoid post-contribution disputes concerning authorship, and to protect themselves by contract if it appears that they would not enjoy the benefits accorded to authors of joint works under the Act.

[Applying the test laid out above, the court found that there might be a dispute over intent to create a joint work. It did not need to resolve that dispute, because:]

In order for the plays to be joint works under the Act, Trinity also must show that actors' contributions to Ms. Erickson's work could have been independently copyrighted. Trinity cannot establish this requirement for any of the above works. The actors, on the whole, could not identify specific contributions that they had made to Ms. Erickson's works. Even when Michael Osborne was able to do so, the contributions that he identified were not independently copyrightable. Ideas, refinements, and suggestions, standing alone, are not the subjects of copyrights. Consequently, Trinity cannot establish the two necessary elements of the copyrightability test and its claims must fail.

### **Notes and Questions**

18.14. Patent law similarly limits joint inventorship. A joint inventor is one who "contributes to the conception of the claimed invention"—roughly speaking, someone who helps to form the structural or functional idea of the invention. *E.g., Eli Lilly & Co. v. Aradigm Corp.*, 376 F.3d 1352, 1359 (Fed. Cir. 2004). One who merely explains the state of the art is not a joint inventor; nor is a person who only contributes to "reduction to practice," roughly taking the idea of the invention (from one who conceived it) and making an operational product out of it.

In *Burroughs Wellcome Co. v. Barr Laboratories, Inc.*, scientists at pharmaceutical company Burroughs Wellcome identified a handful of chemicals they thought might be useful for treating the HIV virus, and asked scientists at the National Institutes of Health to test them. When the NIH scientists found one of the candidate chemicals (AZT) to be effective, the company applied for a patent on it. 40 F.3d 1223, 1226 (Fed. Cir. 1994). Held: the NIH scientists were not joint inventors, because they merely tested a chemical that Burroughs Wellcome had conceived—even though the company scientists had no idea which chemical would work and NIH's scientists did the experimental work.

Do the results in these cases seem fair to you? Would Erickson have written her plays without the Trinity actors' help, or would Burroughs Wellcome have discovered AZT as an HIV treatment without NIH? Who deserves rights in the resulting commercial value?

18.15. In many communities, there are strong norms of who is considered an “author.” These norms often do not align with intellectual property law definitions. In scientific research, for example, principal investigators of laboratories are often named as “authors” on research papers even if they do not write a single sentence; the scientists who do data analysis often are named as well even though, as we saw in *Feist*, factual data is not copyrightable matter.

Should community norms and collaborators’ intentions matter more than formal rules laid out by courts unfamiliar with those norms and intentions? On this question, compare with judicial treatment of parties’ intentions for concurrent ownership in land.

18.16. What about non-human creators? Can they hold title to intellectual property? This question has become especially prominent recently in view of creative and inventive works generated by artificial intelligence. In the famous “monkey selfie” case, the Ninth Circuit relied on a textual interpretation of the Copyright Act to conclude that only humans can maintain rights under copyright law. See *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018). Nevertheless, there has been increasing pressure to clarify rights of ownership in intellectual property from AI-generated works.

What do you think should happen? What would need to change in the law, in order to grant ownership of intellectual property (or property generally) to non-human creators? Alternatively, who should own the rights to an AI-generated invention or creative work? The person who typed the prompt? The computer scientists? The creators of the training data? No one?

## 18.4 Conquest

A classic property law case, not included in this book, is *Johnson v. McIntosh*, in which the two parties held competing titles to the same land, one obtained from the U.S. government and the other from the American Indian nations. 21 U.S. (8 Wheat.) 240 (1823).<sup>12</sup> Chief Justice John Marshall, writing for the Supreme Court, held in favor of the government-obtained title on the grounds that, by conquest of the American Indians, the United States held superior title to the land.

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<sup>12</sup>You will often see the case styled as “*Johnson v. M’Intosh*.” This is incorrect: The apostrophe should face the other direction (*M’Intosh*), such that it looks like a small superscript letter c. See Michael G. Collins, *M’Culloch and the Turned Comma*, 12 GREEN BAG 2D 265 (2009).

A system of land ownership founded on violent conquest seems arbitrary and unjustifiable today. Indeed, Chief Justice Marshall seems almost embarrassed to confirm the “extravagant . . . pretension” that European discovery and conquest is not only a legitimate source of land titles in the United States, but the *only* legitimate source of such titles.

Is the United States’ dispossession of Native Americans really a “historical” injustice? Professor Joseph Singer has long faulted the American legal system for its continued mistreatment of Native Americans:

[T]itle to land in the United States rests on the forced taking of land from first possessors—the very opposite of respect for first possession. Conquest is a mode of original acquisition that we cannot sweep under the rug by pretending that it accords with any recognizable principle of justice. And conquest, unfortunately, is where American history starts—as does the title to almost every parcel of land in the United States. This is a highly inconvenient (not to say stunningly demoralizing) fact, not least of all to the Indian nations that continue to inhabit the North American continent . . . .

Many of us protect ourselves from having to think too deeply about conquest by distancing ourselves from it. . . . If we can relegate conquest to the distant past, we can concentrate instead on the fact that the United States was founded on respect for property rights. We do not acquire property by conquest today.

This comforting story is misleading at best and false at worst. We cannot comfort ourselves with the idea that conquest became a thing of the past with the American Revolution, independence from Great Britain, and the adoption of the U.S. Constitution.

Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763, 766-67 (2011) (reproduced with permission of the author). As Professor Singer explains, *id.* at 767–68, most of the federal government’s dispossession of Native American land occurred during the 19th century. During the early 20th century—while the Supreme Court was gaining a reputation for striking down state economic legislation in the name of protect-

ing freedom of contract and private property (the so-called “*Lochner era*”<sup>13</sup>)—the United States forcibly took two-thirds of the remaining lands of the Indian nations. The Supreme Court held in 1955 that Alaska natives possessed merely a license to live on the land—revocable permission from whites to occupy Alaskan territory. As recently as 2009, the Supreme Court held that the Navajo Nation had no right to sue the federal government for damages where the Secretary of the Interior was alleged to have colluded with a mining company to undercompensate the tribe for mining rights on lands held under “joint title” between the Navajo and the United States (by law, the Secretary must approve any leases of tribal land for mining purposes). *United States v. Navajo Nation*, 556 U.S. 287 (2009). As Professor Singer reminds us, the conquest is not over.

What about patenting of indigenous technologies? See Winona LaDuke, *Rice-keepers: A Struggle to Protect Biodiversity and a Native American Way of Life*, ORION MAG., July–Aug. 2007, [link](#).

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<sup>13</sup>*Lochner v. New York*, 198 U.S. 45 (1905).

# Chapter 19

## Conflicts Across Property Types

### 19.1 Land Versus Chattels: *Ratione Soli*

*Ratione soli* is the principle that the right to take possession of wild animals belongs to the owner of the land where the animal may be found; thus title to any animals captured or killed on owned land automatically vests in the landowner. The English rule is in stark opposition to the civil (i.e., Roman) law rule, reflected in the Institutes of Justinian,<sup>1</sup> which is that the captor of a wild animal acquires property rights in the animal wherever captured, though he may be liable in trespass to the owner of the real property on which the animal was pursued or taken. This distinction affects not only the right to possession of the animal itself, but also the measure of damages, because the damages from the trespass may be less than the value of the animal.

A strong principle of *ratione soli* was consolidated in mid-19th century England as part of the class wars between the landed gentry—who passionately defended game hunting as an exclusive sport for the aristocracy—and the upwardly-mobile merchant classes and more desperate farmers and poachers—who saw game as a token of luxury and a means of sustenance, respectively. See generally Chester

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<sup>1</sup>J. INST. 2.1.12. The *Institutes* are a portion of the massive codification of Roman law under Byzantine (Roman) Emperor Justinian I: the *Corpus Iuris Civilis*. The *Corpus*, in turn, is an important predecessor of most modern civil law systems, which prevail in Continental European nations and many of their former colonies. Unlike common-law systems, which prevail in England and most of its former colonies (including the United States, with the exception of Louisiana), legal authority in civil law systems derives not from caselaw, but from comprehensive statutory codes. A primary distinction between common law and civil law systems is the sharply diminished role of precedent in civil law adjudication. (Recall note 18.9 on page 519, *supra*.)

Kirby, *The English Game Law System*, 38 AM. HIST. REV. 240 (1933). The aristocrats won a decisive victory in a suit by a game merchant against certain servants of the Marquis of Exeter, who had forcibly seized several dozen rabbits purchased by the merchant for resale, on grounds that they had been poached from the Marquis's lands. *Blades v. Higgs*, (1865) 11 Eng. Rep. 1474, 11 H.L.Cas. 621. The Law Lords ruled that wild animals are the property of the owner of the land on which they are taken, and that the Marquis's servants were therefore within their rights in repossessing the rabbits.

*Ratione soli* was initially rejected by the newly independent American states, in favor of a rule of “free taking.” This made some sense in the America of John Locke’s imagination: a vast, naturally bountiful, largely undeveloped, and sparsely populated continent. Moreover, “[i]n the New World, game was no sporting matter, but rather a source of food and clothing.” Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703 (1976). Thus, for the first century of the new Republic’s life, landowners for the most part enjoyed no special privileges to wild animals on their otherwise idle land; hunters were presumed to be free to enter or cross unenclosed and undeveloped land in pursuit of game, even where that land was privately owned. Landowners could defeat this presumption by posting notices of their intent to exclude hunters at the boundaries of their property, but in practice posting was uncommon and generally ineffective for large holdings in the wilds of the frontier. *Id.* at 712-14.

Over time, even the vast American continent saw its natural resources threatened with depletion by overexploitation, and its lands subject to increased development that conflicted with the free taking regime. Nevertheless, while a small number of American cases adopted *ratione soli* (see, e.g., *Rexroth v. Coon*, 23 A. 37 (R.I. 1885) (bees); *Schulte v. Warren*, 75 N.E. 783 (Ill. 1905) (fish)), the rule never took hold here as it did in England. Today, wild animals are subject to a variety of state and federal regulations that fairly comprehensively govern whether, when, and under what circumstances they may be hunted or captured, on the theory that wildlife is a common resource to be managed by the government for the benefit of the people. See generally Michael C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVIRON. L. 673 (2005). But a majority of states still allow licensed hunters to take or pursue game on unenclosed private land unless the landowner has posted against hunting or trespassing. Mark R. Sigman, Note, *Hunting and Posting on Private Land in America*, 54 DUKE L. J. 549, 558-68 (2004).

One possible virtue of the doctrine of *ratione soli* is the same as the virtue of the punitive damages award in *Jacque v. Steenberg Homes*: it may marginally discourage trespasses on land by those who would trespass for the purpose of capturing wild animals. But at what cost? And do we really need *ratione soli* when, as *Jacque* makes clear, punitive damages are already available against trespassers? Or when there are other legal remedies available against those who interfere with landowners' efforts to exploit wild animals on their land? Is there any other principled justification for either *ratione soli* or free taking, or are the rules merely sops to particular political interests? In light of all this history, what do you think *ought* to be the legal rights of landowners with respect to wild animals that happen to be on their land? Why? Is there any reason landowners should have a superior claim to anyone else?

## 19.2 Land Versus Chattels: Fugitive Resources

We have studied a fair number of cases about property rights in wild animals. By now you may be asking yourself: who cares? This is, after all, an area of legal doctrine that you will almost certainly never encounter in your future career as a lawyer. Are we wasting your time?

Obviously we don't think so. Lawyers typically reason about novel cases by analogy to past cases in the same general doctrinal field. We have seen this type of reasoning by analogy already, in *Popov v. Hayashi*: a baseball is not a wild animal, but Judge McCarthy thought cases about wild animals provided instruction for the dispute before him. (Query: Why might he have thought so?) With respect to the intersection of land and chattels, we can similarly see the doctrines of *ratione soli* and free taking as reflecting principles applicable to *fugitive resources*: chattels that can move of their own accord from place to place, sometimes taking them onto owned land. There are plenty of valuable resources that share this quality, and many of them are the subject of heated legal disputes even today. We will focus here on two: water and oil.

Water is essential to life, but it can also be put to a variety of other practical uses: irrigating farmland, extracting minerals from mines and oil or gas from wells, powering dams and mills, cooling industrial equipment, and as an input to manufacturing, for example. Fresh water from rainfall and snowmelt may flow over the surface of land, either free-flowing (particularly during heavy rains or spring thaws) or in defined channels as streams and lakes. Rain and snowmelt can also seep down

and be absorbed by the earth as subsurface groundwater or deep aquifers. In either case, water has a fundamental physical connection to land, but it also moves freely over, under, and across land. (Sound familiar?)

Both surface and subsurface waters are renewable; they are replenished by precipitation. But they're still scarce. This scarcity comes in two basic forms, which map to the economic categories of **stocks** and **flows**. Depletion of a groundwater source at a rate exceeding its natural replenishment will eventually exhaust the **stock**—or finite total *amount*—of water at that source. A stream **flows** at a particular (though perhaps variable) *rate*, but that rate is primarily determined by ecological rather than human processes, so adding more users or more intense uses may not threaten *future flows* but does reduce the share of the flow available to each at any given time. Given these forms of scarcity, competition over water resources is inevitable, and property law may be called on to regulate that competition.

Complicating the matter, the rate of renewal of water stocks and the magnitude of water flows vary from time to time and place to place: Hawaii gets a lot more rain than Nevada, and California got a lot more rain in 1983 than it did in 2013. Reflecting this natural diversity, the American states have devised two broad categories of common-law responses to the challenge of managing conflicts over access to water, epitomized by the two cases below. The first response, **riparian rights**, dominates in the wetter, eastern states, and was firmly established by our first case, *Tyler v. Wilkinson*. The second response, **prior appropriation**, prevails in the more arid western states, and is sometimes referred to as the “Colorado Rule” given its historic association with our second case, *Coffin v. Left Hand Ditch Co.* Both cases deal with rights to flows, in particular the flow of a river. As you read these cases, try to understand how the two systems differ, and what might explain or justify the difference.

### ***Tyler v. Wilkinson***

24 F.Cas. 472, 4 Mason 397 (D. R.I. 1827)

#### **STORY, Circuit Justice.**

[The Pawtucket River forms part of the boundary between Rhode Island and Massachusetts. Plaintiffs owned several mills on the Massachusetts side of the river. For over a century, mills on both sides of the river had been powered by the flow of the Pawtucket as directed by a dam (the “lower dam”). Defendants owned several mills upstream of the plaintiffs on the Rhode Island side of the river and on a man-made canal called

Sergeant's Trench, which bypassed the lower dam on the western bank. Defendants erected a new dam (the "upper dam") to direct the flow of water toward their mills, interfering with the ability of plaintiffs to rely on the flow of the Pawtucket to the lower dam to power the plaintiffs' mills. Plaintiffs sued for a declaration that by "ancient usage" they had a superior claim to the waters of the Pawtucket over the defendants, whom the plaintiffs alleged were entitled only to "wastewater," or so much of the flow as was not needed by the plaintiffs. Supreme Court Justice Joseph Story, riding circuit, heard the dispute and rendered the following opinion.]

Before proceeding to an examination of these points, it may be proper to ascertain the nature and extent of the right, which riparian proprietors generally possess, to the waters of rivers flowing through their lands . . . .

Prima facie every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, *usque ad filum aquae*. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial, whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that, which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood, as holding the doctrine, that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. . . . The maxim is applied, "*Sic utere tuo, ut non alienum laedas.*"

But of a thing, common by nature, there may be an appropriation by general consent or grant. Mere priority of appropriation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the use already acquired. But our law annexes to the riparian proprietors the right to the use in common, as an incident to the land; and whoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law. Now, this may be, either by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment, without interruption, which affords a just presumption of right. By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right . . . .

With these principles in view, the general rights of the plaintiffs cannot admit of much controversy. They are riparian proprietors, and, as such, are entitled to the natural flow of the river without diminution to their injury. As owners of the lower dam, and the mills connected therewith, they have no rights beyond those of any other persons, who might have appropriated that portion of the stream to the use of their mills. That is, their rights are to be measured by the extent of their actual appropriation and use of the water for a period, which the law deems a conclusive presumption in favor of rights of this nature. In their character as mill-owners, they have no title to the flow of the stream beyond the water actually and legally appropriated to the mills; but in their character as riparian proprietors, they have annexed to their lands the general flow of the river, so far as it has not been already acquired by some prior and legally operative appropriation. No doubt, then, can exist as to the right of the plaintiffs to the surplus of the natural flow of the stream not yet appropriated. Their rights, as riparian proprietors, are general; and it is incumbent on the parties, who seek to narrow these rights, to establish by competent proofs their own title to divert and use the stream.

And this leads me to the consideration of the nature and extent of the rights of the trench owners. There is no doubt, that in point of law or fact, there may be a right to water of a very limited nature, and subservient to the more general right of the riparian proprietors. . . . But the presumption

of an absolute and controlling power over the whole flow, a continuing power of exclusive appropriation from time to time, in the riparian proprietor, as his wants or will may influence his choice, would require the most irresistible facts to support it. Men who build mills, and invest valuable capital in them, cannot be presumed, without the most conclusive evidence, to give their deliberate assent to the acceptance of such ruinous conditions. The general presumption appears to me to be that which is laid down by Mr. Justice Abbott in *Saunders v. Newman*, 1 Barn. & Ald. 258: "When a mill has been erected upon a stream for a long period of time, it gives to the owner a right, that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that would stop all improvements in machinery. If, indeed, the alterations made from time to time prejudice the right of the lower mill (i.e. by requiring more water), the case would be different."

In this view of the matter, the proprietors of Sergeant's trench are entitled to the use of so much of the water of the river as has been accustomed to flow through that trench to and from their mills (whether actually used or necessary for the same mills or not), during the twenty years last before the institution of this suit, subject only to such qualifications and limitations, as have been acknowledged or rightfully exercised by the plaintiffs as riparian proprietors, or as owners of the lower mill-dam, during that period. But here their right stops; they have no right farther to appropriate any surplus water not already used by the riparian proprietors, upon the notion, that such water is open to the first occupiers. That surplus is the inheritance of the riparian proprietors, and not open to occupancy.

... My opinion accordingly is, that the trench owners have an absolute right to the quantity of water which has usually flowed therein, without any adverse right on the plaintiffs to interrupt that flow in dry seasons, when there is a deficiency of water. But the trench owners have no right to increase that flow; and whatever may be the mills or uses, to which they may apply it, they are limited to the accustomed quantity, and may not exceed it . . . [I]f there be a deficiency, it must be borne by all parties, as a common loss, wherever it may fall, according to existing rights . . . and that the plaintiffs to this extent are entitled to have their general right established, and an injunction granted.

It is impracticable for the court to do more, in this posture of the case, than to refer it to a master to ascertain, as near as may be, and in conformity with the suggestions in the opinion of the court, the quantity to which the trench owners are entitled, and to report a suitable mode and arrangement permanently to regulate and adjust the flow of the water, so as to preserve the rights of all parties.

... The decree of the court is to be drawn up accordingly; and all further directions are reserved to the further hearing upon the master's report, &c. Decree accordingly.

***Coffin v. Left Hand Ditch Co.***  
6 Colo. 443 (1882)

**HELM, J.**

Appellee, who was plaintiff below, claimed to be the owner of certain water by virtue of an appropriation thereof from the south fork of the St. Vrain creek. It appears that such water, after its diversion, is carried by means of a ditch to the James creek, and thence along the bed of the same to Left Hand creek, where it is again diverted by lateral ditches and used to irrigate lands adjacent to the last named stream. Appellants are the owners of lands lying on the margin and in the neighborhood of the St. Vrain below the mouth of said south fork thereof, and naturally irrigated therefrom.

In 1879 there was not a sufficient quantity of water in the St. Vrain to supply the ditch of appellee and also irrigate the said lands of appellant. A portion of appellee's dam was torn out, and its diversion of water thereby seriously interfered with by appellants. The action is brought for damages arising from the trespass, and for injunctive relief to prevent repetitions thereof in the future. . . . [T]rial was had before a jury . . . , and verdict and judgment given for appellee. Such recovery was confined, however, to damages for injury to the dam alone, and did not extend to those, if any there were, resulting from the loss of water.

. . . It is contended by counsel for appellants that the common law principles of riparian proprietorship prevailed in Colorado until 1876, and that the doctrine of priority of right to water by priority of appropriation thereof was first recognized and adopted in the constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state. The climate is dry, and the soil,

when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufructuary estate, or right of property. It has always been the policy of the national, as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built, and permanent improvements made; the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right by priority of appropriation, and a great part of the value of all this property is at once destroyed.

... We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation.

... It is urged, however, that even if the doctrine of priority or superiority of right by priority of appropriation be conceded, appellee in this case is not benefited thereby. Appellants claim that they have a better right to the water because their lands lie along the margin and in the neighborhood of the St. Vrain. They assert that, as against them, appellee's diversion of said water to irrigate lands adjacent to Left Hand creek, though prior in time, is unlawful.

In the absence of legislation to the contrary, we think that the right to water acquired by priority of appropriation thereof is not in any way dependent upon the locus of its application to the beneficial use designed. And the disastrous consequences of our adoption of the rule contended for, forbid our giving such a construction to the statutes as will concede the same, if they will properly bear a more reasonable and equitable one.

The doctrine of priority of right by priority of appropriation for agriculture is evoked, as we have seen, by the imperative necessity for artificial irrigation of the soil. And it would be an ungenerous and inequitable rule that would deprive one of its benefit simply because he has, by large expenditure of time and money, carried the water from one stream over an intervening watershed and cultivated land in the valley of another. It might be utterly impossible, owing to the topography of the country, to get water upon his farm from the adjacent stream; or if possible, it might be impracticable on account of the distance from the point where the diversion must take place and the attendant expense; or the quantity of water in such stream might be entirely insufficient to supply his wants. It sometimes happens that the most fertile soil is found along the margin or in the neighborhood of the small rivulet, and sandy and barren land beside the larger stream. To apply the rule contended for would prevent the useful and profitable cultivation of the productive soil, and sanction the waste of water upon the more sterile lands. It would have enabled a party to locate upon a stream in 1875, and destroy the value of thousands of acres, and the improvements thereon, in adjoining valleys, possessed and cultivated for the preceding decade. Under the principle contended for, a party owning land ten miles from the stream, but in the valley thereof, might deprive a prior appropriator of the water diverted therefrom whose lands are within a thousand yards, but just beyond an intervening divide.

. . . The judgment of the court below will be affirmed.

### Notes and Questions

**19.1. Different Strokes for Different Folks.** Why is the rule for control and use of surface waters different in the Eastern United States than it is in the West? Why is it different for water in New England than it is for wild animals in (old) England? Is the “priority of appropriation” rule in Colorado the same as the “free taking” rule for game in the early American frontier? If not, how and why does it differ?

One of the important skills of lawyers (and legal scholars) is to identify *distinctions* among seemingly analogous fact patterns that could account for courts’ selection of the rules they apply to those facts. So: can we identify some distinctions in the facts of these two cases that might account for the difference between, say, the eastern (riparian) rule and the western (priority of appropriation) rule for water? (Did Justice Helm identify any such distinctions in *Coffin*?)

We might examine at least three different grounds for distinguishing these types of cases from one another. First, the characteristics of the *resource itself* may be different. That may be a relevant basis for distinguishing wild animals from water; as we will see it may also be a basis for distinguishing both of those resources from oil and gas. Second, the characteristics of the *society* in which the resource is being exploited may be different. As we have already noted, the interior of the American continent in the 18th century was a very different place than the English countryside—in terms of its population density and in terms of the level of development and exploitation of existing natural resources. And as the *Coffin* court noted, the quality and distribution of arable soil in the mountain west makes irrigation an “imperative necessity” to agriculture in a way “unknown to” the riparian east. Third, the particular uses of the resource may differ from one social context to another. For example, in New England, where surface water is plentiful, streams were mainly used *non-consumptively* to power industrial plants in the 19th century; in Colorado, where water is scarce, streams were used primarily for consumptive purposes—mining, farming, and drinking. See Carol M. Rose, *Energy And Efficiency in the Re-alignment of Common-Law Water Rights*, 19 J. LEG. STUD. 261, 290-93 (1990). Any of these types of distinctions could justify a change in legal rules from one case to another. Which—if any—do you think best explain the difference between *Tyler* and *Coffin*?

**19.2. Stock Resources.** *Tyler* and *Coffin* deal with allocation of the right to a share of the flow of a natural watercourse. But much water use depends not on surface waters, but on groundwater, extracted by means of wells and pumps. Such groundwater can behave more like a stock resource than a flow resource; excessive extraction by any one claimant *today* threatens the availability of the resource for *all* claimants *in the future*. Indeed, extraction of groundwater—and even collection of precipitation—can alter the flows of surface channels, threatening the rights of remote riparians or prior appropriators. For this reason, some states—particularly in the more arid Western United States—have enacted comprehensive statutory codes and administrative regulations allocating water rights. California’s system is among the most complex, layering early common-law riparian rights with later common-law prior appropriation rights and a subsequent statutory code administered by a powerful administrative agency with significant discretion to alter and limit water uses to respond to changing conditions. The state’s regulatory reach is profound; in May of 2015 the Water Board responded to serious drought conditions by adopting emergency regulations requiring residents to refrain from most outdoor uses of water and requiring businesses to reduce their potable water usage by 25%, all on pain

of a fine of \$500 per day. STATE WATER RESOURCES CONTROL Bd. RES. No. 2015-0032: TO ADOPT AN EMERGENCY REGULATION FOR STATEWIDE WATER CONSERVATION (May 5, 2015), [link](#).

19.3. **Non-Renewable Fugitive Resources.** For our next category of fugitive resource—oil and gas—stock depletion is the standard state of affairs, exacerbated by the fact that oil stocks do not replenish themselves the way water stocks do. As you read, consider how this characteristic of fossil fuels affect the justifications for allocating them to one claimant or another.

## ***Briggs v. Southwestern Energy Production Company***

224 A.3d 334 (Pa. 2020)

### **Chief Justice SAYLOR.**

In this appeal by allowance, we consider whether the rule of capture immunizes an energy developer from liability in trespass, where the developer uses hydraulic fracturing on the property it owns or leases, and such activities allow it to obtain oil or gas that migrates from beneath the surface of another person's land.

### **I. Background**

#### **A. The Rule of Capture**

Oil and gas are minerals, and while in place they are considered part of the land. They differ from coal and other substances with a fixed situs in that they are fugacious in nature—meaning they tend to seep or flow across property lines beneath the surface of the earth. Such underground movement is known as “drainage.” Drainage stems from a physical property of fluids in that they naturally move across a pressure gradient from high to low pressure. Indeed, the extraction of oil or gas by drilling is based, at least in part, on creating a low-pressure pathway from the mineral’s subterranean location to the earth’s surface.

Oil and gas have thus been described as having a “fugitive and wandering existence,” *Brown v. Vandergrift*, 80 Pa. 142, 147 (Pa. 1875), and have been compared to wild animals which move about from one property to another. See *Westmoreland & Cambria Nat. Gas Co. v. DeWitt*, 130 Pa. 235, 249, 18 A. 724, 725 (1889) (“In common with animals, and unlike other minerals, [oil, gas, and water] have the power and the tendency to escape without

the volition of the owner.”). Accordingly, such minerals are subject to the rule of capture, which is

[a] fundamental principle of oil-and-gas law holding that there is no liability for drainage of oil and gas from under the lands of another so long as there has been no trespass . . . .

BLACK’S LAW DICTIONARY 1358 (8th ed. 2004)); *accord Brown v. Spilman*, 155 U.S. 665, 669-70, 15 S. Ct. 245, 247, 39 L.Ed. 304 (1895).<sup>1</sup> A corollary to this rule is that an aggrieved property owner’s remedy for the loss, through drainage, of subsurface oil or gas has traditionally been to offset the effects of the developer’s well by drilling his or her own well, often termed an “offset well.” *See Barnard v. Monongahela Gas Co.*, 216 Pa. 362, 365, 65 A. 801, 803 (1907) (“What then can the neighbor do? Nothing; only go and do likewise.”).

The reference to “the lands of another” in the above quote does not suggest a developer may invade the subsurface area of a neighboring property by drilling at an angle rather than vertically (referred to as slant drilling or slant wells), or by drilling horizontally beneath the surface. This is because the title holder of a parcel of land generally owns everything directly beneath the surface. Rather, and as suggested by the “no trespass” predicate, it refers to the potential for oil and gas to migrate from the plaintiff’s property to the developer’s land when extracted from a common pool or reservoir spanning both parcels.

### B. Hydraulic fracturing

One of the central questions in this matter involves how these principles apply where hydraulic fracturing is used to extract oil or gas from subsurface geological formations. According to the federal government, hydraulic fracturing is used in “unconventional” gas production. “Unconventional” reservoirs can cost-effectively produce gas only by using a special stimulation technique, like hydraulic fracturing . . . . This is often because the gas is highly dispersed in the rock, rather than occurring in a concentrated underground location. United States Environmental Protection Agency (the “EPA”), *The Process of Unconventional Natural Gas Produc-*

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<sup>1</sup>The term “capture” is also drawn from an analogy to wild animals. At common law, a person could acquire title to such an animal by reducing it to possession.

*tion, link* (viewed Oct. 22, 2019). In terms of how the technique works, the EPA continues:

Fractures are created by pumping large quantities of fluids at high pressure down a wellbore and into the target rock formation. Hydraulic fracturing fluid commonly consists of water, proppant and chemical additives that open and enlarge fractures within the rock formation. These fractures can extend several hundred feet away from the wellbore. The proppants—sand, ceramic pellets or other small incompressible particles—hold open the newly created fractures.

*Id.*

After injection, fluid is withdrawn from the well while leaving the proppants in place to hold the fissures open. This enhances the drainage of oil or gas into the wellbore where it can be captured.

### C. Factual and Procedural History of This Case

#### (i) Introduction

The parties presently favor essentially the same rule of law: they both, in substance, argue that the traditional rule of capture should apply, subject to the common-law standard for trespass of real property based on physical intrusion onto another's land. Each party, moreover, depicts the other as erroneously suggesting that an exception to this framework should pertain where hydraulic fracturing is used to obtain oil or natural gas. In particular, the plaintiffs suggest that Southwestern wishes to convert the rule of capture into a precept whereby energy developers may physically invade the property of others to capture natural gas so long as they are using hydraulic fracturing. For its part, Southwestern portrays the plaintiffs and the Superior Court decision from which it appeals as positing that the rule of capture simply does not apply when hydraulic fracturing is used for energy development on one's own land.

#### (ii) Undisputed Facts

Adam, Paula, Joshua, and Sarah Briggs ("Plaintiffs") own a parcel of real estate consisting of approximately eleven acres in Harford Township, Susquehanna County. During all relevant times, Plaintiffs have not leased their property to any entity for natural gas production. Plaintiffs' prop-

erty is adjacent to a tract of land leased by Appellant Southwestern Energy Production Company for natural gas extraction (the “Production Parcel”). Southwestern maintains wellbores on the Production Parcel and has used hydraulic fracturing to boost natural gas extraction from the Marcellus Shale formation through those wellbores.

### **(iii) Proceedings Before the Court of Common Pleas**

In November 2015, Plaintiffs commenced an action against Southwestern in which they stated two causes of action, trespass and conversion. In Count I (the trespass claim), Plaintiffs averred that Southwestern’s actions constituted a trespass which deprived Plaintiffs of the value of the “natural gas extracted from under their land[.]” In Count II (the conversion claim), Plaintiffs alleged that, through its drilling activities, Southwestern had deprived Plaintiffs of their possession and use of the natural gas and converted it to Southwestern’s use. Notably, Plaintiffs did not expressly allege that Southwestern’s activities had caused a physical intrusion into Plaintiffs’ property.

Southwestern filed a responsive pleading denying it had extracted gas from Plaintiffs’ land and denying it had trespassed upon Plaintiffs’ property or converted their natural gas. Southwestern specifically denied it had drilled underneath Plaintiffs’ property and stated, further, that it had “only drilled for oil, gas or minerals from under properties for which [Southwestern] has leases.”

After the parties engaged in discovery, Southwestern filed a motion for summary judgment and a supporting brief in which it argued that it did not physically invade Plaintiffs’ property and, to the extent that it had recovered any gas through drainage from that property to the Production Parcel, again, it was entitled to judgment as a matter of law under the rule of capture. Plaintiffs . . . filed their own motion for partial summary judgment as to liability, asserting that courts should not apply the rule of capture in circumstances where gas has been captured through the use of hydraulic fracturing.

By order and opinion, the common pleas court granted Southwestern’s motion for summary judgment, and denied Plaintiffs’ motion for partial summary judgment . . . Plaintiffs filed a notice of appeal, . . . in which they raised a single issue: whether the trial court erred in determining that the rule of capture precluded liability under theories of trespass and conver-

sion, where Southwestern had used hydraulic fracturing to obtain natural gas which originated under Plaintiffs' land.

#### **(iv) Proceedings Before the Superior Court**

A two-judge panel of the Superior Court reversed in a published decision. . . . The court noted, however, that the record did not indicate whether Southwestern's operations had resulted in a subsurface intrusion into Plaintiffs' property, going so far as to express that "[t]here does not appear to be *any evidence, or even an estimate*, as to how far the subsurface fractures extend from each of the wellbore [sic] on Southwestern's lease." . . . Accordingly, the panel reversed the trial court's order and remanded for additional factual development.

. . . [T]he Superior Court panel's analysis can reasonably be viewed as embodying two distinct, but interrelated, holdings: first, that whenever "artificial means," such as hydraulic fracturing, are used to stimulate the flow of underground resources, the rule of capture does not apply because drainage does not occur through the operation of "natural agencies," and second, that in this particular case summary judgment was premature in light of certain unspecified allegations relating to cross-boundary intrusions into Plaintiffs' land.

## **II. Preliminary Discussion**

### **A. Trespass**

In Pennsylvania, a trespass occurs when a person who is not privileged to do so intrudes upon land in possession of another, whether willfully or by mistake. This conception of trespass is not disputed by the parties. Nevertheless, meaningful appellate review at this stage is not straightforward for multiple reasons.

### **B. Pleading Deficiencies, Decisional Irregularities, and Issue Limitation**

. . . Plaintiffs did not assert . . . in their pleadings . . . that Southwestern had effectuated a physical intrusion onto (or into) their property. The Superior Court panel recognized this aspect of Plaintiffs' litigation position, but raised and resolved, *sua sponte*, an issue based on the opposite premise, that Plaintiffs *had* alleged a physical intrusion. Then, stating that there was no record evidence that such an intrusion had taken place, and without ref-

erencing any specific aspect of the pleadings, the panel indicated that the Complaint's allegations were alone sufficient to raise a genuine issue of fact so as to preclude summary judgment.

This is in some tension with the governing summary-judgment standard which generally centers on whether the adverse party has produced enough evidence to raise a question of material fact as to each element of the claim.

... [M]oreover, Southwestern articulated the issue for this Court's consideration in terms of whether the rule of capture should be applied in the same manner it has always been applied: to allow for the capture of oil and gas which merely drains from an adjacent property after the completion of a well using hydraulic fracturing *solely within the developer's property*. This is an issue, again, on which the parties do not presently diverge: they both answer in the affirmative. Their disagreement is limited to whether any physical intrusion has taken place—a question that is not fairly subsumed within the issue framed for our review.

### III. Analysis

The issue as stated by Southwestern should nonetheless be resolved for purposes of this dispute—and to provide guidance to the bench and bar—because at least part of the Superior Court's opinion can reasonably be construed as setting forth a *per se* rule foreclosing application of the rule of capture in hydraulic fracturing scenarios, and that rule rests on faulty assumptions. In particular, and most saliently, the panel appears to have indicated that one litmus for whether the rule of capture applies is whether the defendant's gas extraction methodology relies only on the natural drainage of oil or gas within a conventional pool or reservoir, or whether instead those methods utilize some means of artificial stimulation to induce drainage.

The Superior Court's position in this respect logically rests on one of two grounds: (a) the act of artificially stimulating the cross-boundary flow through the use of hydraulic fracturing solely on the developer's property in and of itself renders the rule of capture inapplicable; or (b) as Plaintiffs argue, any time natural gas migrates across property lines resulting, directly or indirectly, from hydraulic fracturing, a physical intrusion into the plaintiff's property must necessarily have taken place.

As to the first proposition, all drilling for subsurface fugacious minerals involves the artificial stimulation of the flow of that substance. The mere act of drilling interferes with nature and stimulates the flow of the minerals toward artificially-created low pressure areas, most notably, the wellbore. This Court has held that the rule of capture applies although the driller uses further artificial means, such as a pump, to enhance production from a source common to it and the plaintiff—so long as no physical invasion of the plaintiff’s land occurs. *See Jones*, 194 Pa. at 384, 44 A. at 1075 (indicating that, absent physical intrusion, a developer may use “all the skill and invention of which a man is capable” to appropriate resources from under his own property). There is no reason why this precept should apply any differently to hydraulic fracturing conducted solely within the driller’s property.

. . . Accordingly, we reject as a matter of law the concept that the rule of capture is inapplicable to drilling and hydraulic fracturing that occurs entirely within the developer’s property solely because drainage of natural resources takes place as the direct or indirect result of hydraulic fracturing, or that such drainage stems from less “natural” means than conventional drainage.

The second predicate—that drainage from under a plaintiff’s parcel can only occur if the driller first physically invades that property—does not lend itself to a purely legal resolution. . . . By design, hydraulic fracturing creates fissures in rock strata which store hydrocarbons within their porous structure. On the state of the present record, this alone does not establish that a physical intrusion into a neighboring property is necessary for such action to result in drainage from that property. We cannot rule out, for example, that a fissure created through the injection of hydraulic fluid entirely within the developer’s property may create a sufficient pressure gradient to induce the drainage of hydrocarbons from the relevant stratum of rock underneath an adjacent parcel even absent physical intrusion. Nor can we discount the possibility that a fissure created within the developer’s property may communicate with other, pre-existing fissures that reach across property lines. Whether these, or any other non-invasive means of drainage occasioned by hydraulic fracturing, are physically possible in a given case is a factual question to be established through expert evidence.

The Superior Court panel appears to have assumed, if implicitly, that such occurrences were impossible—but, again, there is no basis in the record for such an assumption. In all events, a plaintiff asserting a cause of action “must be able to prove all the elements of his case by proper evidentiary standards.” *Papieves v. Lawrence*, 437 Pa. 373, 379, 263 A.2d 118, 121 (1970). Thus, to the extent this lawsuit goes forward on Plaintiffs’ new, physical-intrusion theory, Plaintiffs will bear the burden of demonstrating that such an intrusion took place.

We have not overlooked Southwestern’s argument that trespass should not be viewed as occurring miles beneath the surface of the earth. As Southwestern observes, in some jurisdictions traditional concepts of physical trespass have been relaxed where activities take place miles below the surface and the plaintiff is not deprived of the use and enjoyment of the land. Southwestern posits that this is analogous to the principle that trespass does not arise high above the surface. See *Causby*, 328 U.S. at 260-61, 66 S. Ct. at 1065. It emphasizes that other socially useful endeavors—such as carbon sequestration projects, energy storage wells, and waste disposal sites—could be jeopardized if the rule against trespass were to be enforced in an unduly stringent manner where deep subsurface activities are concerned.

Without speaking to the merit of such a claim, we note that this Court is limited to the issue as it was framed in the petition for allowance of appeal, and Southwestern has not articulated any reason an exception should be made in the present dispute. Thus, to the extent Southwestern argues it should be permitted to escape liability even if it is ultimately found to have effectuated a physical intrusion into Plaintiff’s subsurface property, its claim in this regard has not been preserved for review by this Court.

This brings us to the question of whether the lawsuit can, indeed, progress on a theory of trespass by physical intrusion, and by extension, to the question of the appropriate mandate from this Court. Ordinarily, and for the reasons explained, we would deem any such contention to be absent from the litigation, as it does not appear to have been mentioned in Plaintiffs’ pleadings or argued as a basis to deny Southwestern’s motion for summary judgment. The Superior Court, however, evidently believed there was some legitimate basis to dispose of the appeal on the presupposition that Southwestern was alleged to have physically invaded Plaintiffs’ subsurface property with hydraulic fracturing liquid and proppants; and,

as noted, Southwestern has not challenged the intermediate court's action in this respect.

That being the case, . . . we find that the appropriate action at this juncture is to vacate the Superior Court's order and remand for reconsideration in light of the guidance provided in this opinion, and the certified record on appeal . . . .

**Justice DOUGHERTY[, concurring in part and dissenting in part:]**

I join the majority's holding that the rule of capture remains effective in Pennsylvania to protect a developer from trespass liability where there has been no physical invasion of another's property. In so holding, the majority correctly recognizes that if there **is** such a physical invasion the rule of capture will **not** insulate a developer engaged in hydraulic fracturing from trespass liability. As I agree with both propositions, I also agree the matter should be remanded for further proceedings involving a specific inquiry into a physical invasion. I respectfully dissent, however, from the notion that this question must be determined by the Superior Court on the present record . . . . Given the state of the record, which was apparently not complete at the time the trial court erroneously entered summary judgment, I would remand the matter to that court for further proceedings, including the completion of discovery on the factual question of physical invasion, and trial thereon as necessary.

### **Notes and Questions**

**19.4. Questions of Fact; Questions of Law.** Do Chief Justice Saylor and Justice Dougherty disagree on the content of the legal rules in Pennsylvania regarding the ownership of oil and gas? Do they disagree on the law of trespass as it applies to mineral extraction? If the answer to both these questions is no, what is their disagreement about?

In considering these questions, ask yourself what *actually happened* to the Briggses and their land in this case. Are you confident you can answer that question? If not, it may be difficult to say whether they should prevail on their trespass or conversion claims. This is not because the legal rule is unclear; rather it is because it may be unclear whether the rule is satisfied *given the facts in the record*. This distinction between *legal* issues and *factual* issues is central to the practice of law, and you will surely learn more about it in your civil procedure class. How does the court's resolution of the *legal* issues in the case affect the *factual questions* that

the parties must answer in litigation? How should they go about answering those questions? What is likely to happen to the Briggses' claim on remand, and what would have happened if Justice Dougherty's opinion had instead carried a majority of the court? (Hint: The answer to this last question has less to do with the law of property and more to do with the law of civil procedure.)

**19.5. I Drink Your Milkshake.**<sup>2</sup> *Briggs* reaffirms a principle of long standing in oil and gas law. Imagine Alice and Bob are neighboring landowners in an oil-rich region. Alice drills an oil well at an angle, such that the wellhead is on Alice's land, but the bottom of the wellbore, from which the pipe draws oil, is under Bob's land. Bob sues Alice to enjoin the continued operation of the well and to recover the value of the oil already extracted. Under the rule of capture and the definition of trespass as discussed in *Briggs*, what result and why? See 1 SUMMERS OIL AND GAS § 2:3 (3d ed.) ("[I]f a well deviates from the vertical and produces oil or gas from under the surface of another landowner, that is a trespass for which the adjacent owner is entitled to damages, an accounting and injunction."). Why might it be acceptable to use a well on your land to draw the oil from under your neighbor's land, but not to drill the bottom of your well under the surface owned by your neighbor to extract the very same oil? Does the distinction have any practical effect? Does the advent of fracking technology change your answer?

**19.6. Incentives Again.** Given that any landowner can lawfully extract all the oil and gas under not only her land, but potentially under the land of any neighboring landowners who occupy the surface over the same geologic formation, what incentive does each landowner over a large formation have with respect to that underlying oil and gas? In early-20th-century California, we found out.

Figure 19.1 is an image of Signal Hill, California, one of the richest oil fields ever discovered, around the peak of its productivity in 1923. Why do you think there are so many oil derricks in such close proximity to each other? Do you think this quantity and density of wells are necessary to extract the oil underground? If not, isn't this duplication of investment and effort wasteful? Couldn't the oil be just as easily extracted with one (or at least far fewer) wells? If so, why did the people of Signal Hill build so many? Could property law be playing a role?

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<sup>2</sup>THERE WILL BE BLOOD (Paramount Vantage/Miramax Films 2007).



**Figure 19.1:** Signal Hill, California, c. 1923. Source: U.S. Library of Congress PPOC, [link](#).

**19.7. The Tragedy of the Commons.** The race to drill in Signal Hill evokes one of the key set-pieces invoked by economists to justify private property rights: the *tragedy of the commons*, famously described in an essay of the same name:

Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. . . . As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, “What is the utility to me of adding one more animal to my herd?” . . . [T]he herdsman receives all the proceeds from the sale of the additional animal . . . Since, however, the effects of overgrazing are shared by all the herdsmen, . . . any particular decision-making herdsman [bears] only a fraction of [the negative effects of his additional animal]. . . . [T]he rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited.

Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

The negative effects of each additional animal, which are suffered by all the common owners collectively, are what economists refer to as an **externality**. Some of the things we do with the resources we control can make *others* better or worse off. If I divert a stream to my mine, your crops may wither; if I plant a rosebush in my garden, you may enjoy the smell of my flowers on your way to work each day. The

key point to keep in mind about these externalities caused by my conduct is that *I care about them less than you do*. I am better off if the stream I diverted makes my mine more productive; the fact that the diversion causes your crops to die doesn't affect me directly, or perhaps at all.

Externalities can lead to the kind of misallocation of investment and effort we see in Signal Hill or the overcrowded pasture: in deciding whether to engage in an activity, I am unlikely to take sufficient account of the effects of my activity on others. This, in turn, can lead to bad *aggregate* outcomes: I may impose large costs on all my neighbors by engaging in an activity that is of only moderate benefit to me, or I may refrain from an activity that would confer large benefits on many people at only moderate cost to myself. The trouble is that I have no *incentive* to weigh the cost of your dying crops, your starving animals, or your dried-up well.

The economist's solution to this problem is to *internalize the externalities* that result from resource use. That is, to find some way to make the effects of a person's actions hit that person in the pocketbook, for good or for ill. One way to internalize the externalities that generate the tragedy of the commons is to convert the commons to private ownership. Knowing that pasturing too many animals today would leave nothing for his animals to eat tomorrow, a rational *owner* of the pasture would calibrate the number of animals he keeps to maximize their number today while ensuring a stable supply of fodder into the future. Indeed, Professor Harold Demsetz famously argued that property rights arise precisely when the benefits of exploiting a scarce resource have increased in value (due to increasing demand or decreasing supply) to the point where the right to control that value would be a sufficient incentive to undertake the costs of responsibly managing the resource (i.e., where an owner would be willing to internalize the externalities of using the resource). See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

So goes the theory, at any rate. But this theory leaves open a host of practical questions, primarily about *allocation* of these theoretically attractive private property rights. Does it make the most sense to have one owner of the whole pasture? Should the pasture be divided into parcels, and if so, how many and how should they be assigned? What if dividing the pasture into smaller parcels leaves each owner with insufficient space to pasture animals? If there is just one owner, how are we supposed to choose the lucky winner? And once the winner is chosen, what is everyone else supposed to do? Finally, who has the authority to decide all these questions?

We can apply these questions to our oil and gas example. If you were trying to avoid overexploitation of the oil field at Signal Hill in 1923, would you assign pri-

vate property rights over the entire oil field? How? To whom? Is there an alternative to private property rights that can avoid inefficient overexploitation? Might the experience of other societies whose territory includes valuable fossil fuel reserves be instructive? See Helge Ryggvik, *A Short History of the Norwegian Oil Industry: From Protected National Champions to Internationally Competitive Multinationals*, 89 Bus. Hist. Rev. 3 (2015).

**19.8. Hardin's Problematic Legacy.** Garrett Hardin's metaphor of the overburdened pasture was one piece of a broader worldview expressed in his writings that strikes many today as deeply problematic. Like many mid-20th-century residents of rich countries, Hardin was concerned about a supposed "population bomb": a postwar trend of higher population growth in poorer countries relative to richer countries. Some predicted that this population growth would generate levels of consumption that would overburden the earth's resources (particularly its capacity to produce food), leading to exhaustion of those resources and widespread pollution, famine, and poverty.

Hardin's reaction to those predictions was to see developing nations as adversaries in a global competition for resources, and to urge national and even ethnic solidarity within rich countries to resist the developing world's demands for access to those resources. Though few read the full essay today, *The Tragedy of the Commons* is ultimately an argument in favor of compulsory restraints on procreation. Its final sections equate "breeding" with bank robbery, and conclude: "The only way we can preserve and nurture other and more precious freedoms is by relinquishing the freedom to breed, and that very soon." Hardin, *supra*, at 1248. Hardin thought rich countries should refuse to grant foreign aid, limit immigration from poor countries, impose compulsory measures to reduce fertility rates, and harden their hearts against any moral pangs arising from the resulting suffering of the world's poor—policies that went hand-in-hand with his view of resource competition as the struggle of rich societies against poor societies for survival. In his own words:

Metaphorically each rich nation can be seen as a lifeboat full of comparatively rich people. In the ocean outside each lifeboat swim the poor of the world, who would like to get in, or at least to share some of the wealth. What should the lifeboat passengers do? . . . Suppose we decide to preserve our small safety factor and admit no more to the lifeboat. Our survival is then possible although we shall have to be constantly on guard against boarding parties.

Garrett Hardin, *Lifeboat Ethics*, PSYCHOLOGY TODAY (Sept. 1974), [link](#).

Today, many critics note that Hardin's arguments smack of eugenics and imperialism. In his non-academic writings, Hardin was outspoken in his opposition to ethnic diversity and his support of restricting non-European immigration to the United States, and the Southern Poverty Law Center identifies him as a white nationalist extremist. Southern Poverty Law Center, *Extremist Files: Garrett Hardin*, [link](#). One critic rejects Hardin's argument about the tragedy of the commons as a product of his chauvinist politics: “[R]acist, eugenicist, nativist and Islamophobe . . . [h]is writings and political activism helped inspire the anti-immigrant hatred spilling across America today . . . Hardin wasn’t making an informed scientific case. Instead, he was using concerns about environmental scarcity to justify racial discrimination.” Matto Mildenberger, *The Tragedy of The Tragedy of the Commons*, SCIENTIFIC AMERICAN: VOICES (April 23, 2019), [link](#).

Does the fact that Hardin held deplorable social and political views detract from the force of his arguments about resource management? Your answer may depend on whether you believe the two are related—whether his solutions to the problem of stewarding the Earth’s scarce resources were really just a means to the particular (and contestable) ends contemplated by his political views. There is a plausible argument that they were: that his theoretical model of overconsumption in a commons is an abstraction of his concern that growing resource consumption by developing Latin American, Asian, and African societies posed a threat to the ability of rich European and North American societies to maintain the far higher per capita levels of consumption they enjoy. In this view, Hardin’s proposed solution—giving some privileged consumers the power to exclude others—seems conveniently designed to justify rich countries’ privileged consumption levels. The very term “population bomb,” popularized in a bestselling book published in the same year as *The Tragedy of the Commons* (PAUL R. EHRLICH, THE POPULATION BOMB (1968)), reflects a view of the developing world as a deadly threat, and implies that the solution lies, not in reduced consumption by rich countries, or in reallocation of resources more generally, but in limiting the number of competitors for scarce resources.

This view has had serious world-historical consequences. Over the second half of the 20th century, population control was enthusiastically promoted by Western countries, by philanthropic organizations such as the Rockefeller Foundation and the Ford Foundation, and by the United Nations. The governments of developing countries such as India and China—often with the support and financial encouragement of Western-led institutions such as the World Bank—implemented decades-long programs of incentivized or compulsory sterilization and abortion—with mixed

results, and at great cost. See generally MATTHEW CONNELLY, *FATAL MISCONCEPTION: THE STRUGGLE TO CONTROL WORLD POPULATION* (2008).

But as it turned out, Hardin and the other doomsayers were wrong in their predictions of global famine and resource collapse. Technological advances in food production and pollution control, as well as social and political changes such as conservation programs, democratization, and reductions in armed conflict, ultimately put the lie to many of their direst predictions. Food insecurity and extreme poverty have steadily *declined* worldwide since the 1960s. Population growth rates have also steadily declined worldwide, notably in inverse correlation with increases in income and in women's educational attainment. But even today, similar fears and analogous political concerns pervade debates over problems of great importance—particularly climate change—in which resource allocation and stewardship play a crucial role.

19.9. **The Comedy of the Commons.** Whether or not one finds Hardin's arguments morally repugnant, his analyses have also been criticized as bad social science. It turns out that the free-for-all common pasture of Hardin's essay lacks a historical antecedent: medieval English commons were actually a form of community resource management based on ancient rules and customs that served to preserve the commons for future generations. See Susan Jane Buck Cox, *No Tragedy on the Commons*, 7 ENVTL. ETHICS 49 (1985). And such community management arrangements are not unusual.

Some of the most groundbreaking work in economics in the past half-century—such as the Nobel Prize-winning work of Dr. Elinor Ostrom—has demonstrated how community resource management actually works surprisingly well in contexts as diverse as Swiss mountain farms, Filipino irrigation canals, and Turkish fisheries. See generally ELINOR OSTROM, *GOVERNING THE COMMONS* (1990). Indeed, some resources—infrastructure such as roads and waterways, recreational facilities such as parks and beaches, and social spaces such as public squares—may have characteristics of a “comic” commons in that the more people use them, the more valuable they become (at least within a finite community). See generally, e.g., Carol Rose, *The Comedy of the Commons: Commerce, Custom, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986). We discussed these ideas with respect to the public trust doctrine in our unit on Easements.

Given the practical problems of allocation raised by efforts to privatize resources, and the availability of alternative management schemes for at least some such resources, we might well question whether the absence of property rights over scarce resources necessarily results in tragedy. In any case, we ought to be skepti-

cal of the argument that the tragedy of the commons must affect all resources, in all societies, at all times.

19.10. Are the doctrines we have studied regarding allocation of fugitive resources property-based or commons-based? Take, for example, the riparian doctrine of reasonable use: can riparian owners take as much of the waters flowing past their land as they want, whenever they wish? Is there any middle ground between the “sole and despotic dominion” of Blackstone’s private property and the tragic spiraling waste of Hardin’s unregulated pasture? If so, how does the law decide who gets what?

What about the prior appropriation rule governing water rights in western states? Is it an instance of law stepping in to prevent a tragedy of the commons? That is certainly one conventional interpretation of the rule. But Professor David Schorr recently argued that early settlers in Colorado had informally worked out relatively egalitarian water allocation arrangements, which the *Coffin* court was merely protecting against destabilizing intrusions by new arrivals and powerful corporate interests. See generally DAVID SCHORR, THE COLORADO DOCTRINE (2012). Which makes more sense to you: that the *Coffin* court was setting economic policy to avoid overuse of scarce water, or that it was protecting the past investments and future expectations of the state’s most established citizens? If you were a newly arrived farmer in Colorado when *Coffin* was announced, how would you react to the opinion?

## 19.3 Intellectual Versus Tangible Property

### *Impression Products, Inc. v. Lexmark International, Inc.*

137 S.Ct. 1523 (2017)

**Chief Justice ROBERTS delivered the opinion of the Court.**

A United States patent entitles the patent holder (the “patentee”), for a period of 20 years, to “exclude others from making, using, offering for sale, or selling [its] invention throughout the United States or importing the invention into the United States.” Whoever engages in one of these acts “without authority” from the patentee may face liability for patent infringement.

When a patentee sells one of its products, however, the patentee can no longer control that item through the patent laws—its patent rights are said to “exhaust.” The purchaser and all subsequent owners are free to use

or resell the product just like any other item of personal property, without fear of an infringement lawsuit.

[The question in this case is] whether a patentee that sells an item under an express restriction on the purchaser's right to reuse or resell the product may enforce that restriction through an infringement lawsuit.\*

## I

The underlying dispute in this case is about laser printers—or, more specifically, the cartridges that contain the powdery substance, known as toner, that laser printers use to make an image appear on paper. Respondent Lexmark International, Inc. designs, manufactures, and sells toner cartridges to consumers in the United States and around the globe. It owns a number of patents that cover components of those cartridges and the manner in which they are used.

When toner cartridges run out of toner they can be refilled and used again. This creates an opportunity for other companies—known as remanufacturers—to acquire empty Lexmark cartridges from purchasers in the United States and abroad, refill them with toner, and then resell them at a lower price than the new ones Lexmark puts on the shelves.

Not blind to this business problem, Lexmark structures its sales in a way that encourages customers to return spent cartridges. It gives purchasers two options: One is to buy a toner cartridge at full price, with no strings attached. The other is to buy a cartridge at roughly 20-percent off through Lexmark's "Return Program." A customer who buys through the Return Program still owns the cartridge but, in exchange for the lower price, signs a contract agreeing to use it only once and to refrain from transferring the empty cartridge to anyone but Lexmark. To enforce this single-use/no-resale restriction, Lexmark installs a microchip on each Return Program cartridge that prevents reuse once the toner in the cartridge runs out.

Lexmark's strategy just spurred remanufacturers to get more creative. Many kept acquiring empty Return Program cartridges and developed methods to counteract the effect of the microchips. With that technological obstacle out of the way, there was little to prevent the remanufacturers from using the Return Program cartridges in their resale business. After all, Lexmark's contractual single-use/no-resale agreements were with the

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\*The case considered a second question regarding sales outside the United States, not reproduced here. —Eds.

initial customers, not with downstream purchasers like the remanufacturers.

Lexmark, however, was not so ready to concede that its plan had been foiled. In 2010, it sued a number of remanufacturers, including petitioner Impression Products, Inc., for patent infringement with respect to two groups of cartridges. One group consists of Return Program cartridges that Lexmark sold within the United States. Lexmark argued that, because it expressly prohibited reuse and resale of these cartridges, the remanufacturers infringed the Lexmark patents when they refurbished and resold them. The other group consists of all toner cartridges that Lexmark sold abroad and that remanufacturers imported into the country. Lexmark claimed that it never gave anyone authority to import these cartridges, so the remanufacturers ran afoul of its patent rights by doing just that.

Eventually, the lawsuit was whittled down to one defendant, Impression Products, and one defense: that Lexmark's sales, both in the United States and abroad, exhausted its patent rights in the cartridges, so Impression Products was free to refurbish and resell them, and to import them if acquired abroad. [The district court held that Lexmark's patent rights were exhausted; the Federal Circuit reversed.]

We granted certiorari to consider the Federal Circuit's decisions . . . and now reverse.

## II

### A

We conclude that Lexmark exhausted its patent rights in [the Return Program] cartridges the moment it sold them. The single-use/no-resale restrictions in Lexmark's contracts with customers may have been clear and enforceable under contract law, but they do not entitle Lexmark to retain patent rights in an item that it has elected to sell.

The Patent Act grants patentees the "right to exclude others from making, using, offering for sale, or selling [their] invention[s]." For over 160 years, the doctrine of patent exhaustion has imposed a limit on that right to exclude. See *Bloomer v. McQuewan*, 14 How. 539, 14 L.Ed. 532 (1853). The limit functions automatically: When a patentee chooses to sell an item, that product "is no longer within the limits of the monopoly" and instead becomes the "private, individual property" of the purchaser, with the rights

and benefits that come along with ownership. A patentee is free to set the price and negotiate contracts with purchasers, but may not, “*by virtue of his patent*, control the use or disposition” of the product after ownership passes to the purchaser. The sale “terminates all patent rights to that item.”

This well-established exhaustion rule marks the point where patent rights yield to the common law principle against restraints on alienation. The Patent Act “promote[s] the progress of science and the useful arts by granting to [inventors] a limited monopoly” that allows them to “secure the financial rewards” for their inventions. But once a patentee sells an item, it has “enjoyed all the rights secured” by that limited monopoly. Because “the purpose of the patent law is fulfilled . . . when the patentee has received his reward for the use of his invention,” that law furnishes “no basis for restraining the use and enjoyment of the thing sold.”

We have explained in the context of copyright law that exhaustion has “an impeccable historic pedigree,” tracing its lineage back to the “common law’s refusal to permit restraints on the alienation of chattels.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013). As Lord Coke put it in the 17th century, if an owner restricts the resale or use of an item after selling it, that restriction “is void, because . . . it is against Trade and Traffique, and bargaining and contracting betweene man and man.” 1 E. Coke, *Institutes of the Laws of England* § 360, p. 223 (1628); see J. Gray, *Restraints on the Alienation of Property* § 27, p. 18 (2d ed. 1895) (“A condition or conditional limitation on alienation attached to a transfer of the entire interest in personality is as void as if attached to a fee simple in land”).

This venerable principle is not, as the Federal Circuit dismissively viewed it, merely “one common-law jurisdiction’s general judicial policy at one time toward anti-alienation restrictions.” Congress enacted and has repeatedly revised the Patent Act against the backdrop of the hostility toward restraints on alienation. That enmity is reflected in the exhaustion doctrine. The patent laws do not include the right to “restrain[] . . . further alienation” after an initial sale; such conditions have been “hateful to the law from Lord Coke’s day to ours” and are “obnoxious to the public interest.” *Straus v. Victor Talking Machine Co.*, 243 U.S. 490, 501 (1917). “The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration.”

But an illustration never hurts. Take a shop that restores and sells used cars. The business works because the shop can rest assured that, so long as

those bringing in the cars own them, the shop is free to repair and resell those vehicles. That smooth flow of commerce would sputter if companies that make the thousands of parts that go into a vehicle could keep their patent rights after the first sale. Those companies might, for instance, restrict resale rights and sue the shop owner for patent infringement. And even if they refrained from imposing such restrictions, the very threat of patent liability would force the shop to invest in efforts to protect itself from hidden lawsuits. Either way, extending the patent rights beyond the first sale would clog the channels of commerce, with little benefit from the extra control that the patentees retain. And advances in technology, along with increasingly complex supply chains, magnify the problem.

This Court accordingly has long held that, even when a patentee sells an item under an express restriction, the patentee does not retain patent rights in that product. . . . Our recent decision in *Quanta Computer, Inc. v. LG Electronics, Inc.* settled the matter. In that case, a technology company—with authorization from the patentee—sold microprocessors under contracts requiring purchasers to use those processors with other parts that the company manufactured. One buyer disregarded the restriction, and the patentee sued for infringement. Without so much as mentioning the lawfulness of the contract, we held that the patentee could not bring an infringement suit because the “authorized sale . . . took its products outside the scope of the patent monopoly.” 553 U.S., at 638.

Turning to the case at hand, we conclude that this well-settled line of precedent allows for only one answer: Lexmark cannot bring a patent infringement suit against Impression Products to enforce the single-use/no-resale provision accompanying its Return Program cartridges. Once sold, the Return Program cartridges passed outside of the patent monopoly, and whatever rights Lexmark retained are a matter of the contracts with its purchasers, not the patent law.

## B

The Federal Circuit reached a different result largely because it got off on the wrong foot. The “exhaustion doctrine,” the court believed, “must be understood as an interpretation of” the infringement statute, which prohibits anyone from using or selling a patented article “without authority” from the patentee. Exhaustion reflects a default rule that a patentee’s decision to sell an item “presumptively grant[s] ‘authority’ to the purchaser

to use it and resell it.” But, the Federal Circuit explained, the patentee does not have to hand over the full “bundle of rights” every time. If the patentee expressly withholds a stick from the bundle—perhaps by restricting the purchaser’s resale rights—the buyer never acquires that withheld authority, and the patentee may continue to enforce its right to exclude that practice under the patent laws.

The misstep in this logic is that the exhaustion doctrine is not a presumption about the authority that comes along with a sale; it is instead a limit on “the scope of the *patentee’s rights*.” The right to use, sell, or import an item exists independently of the Patent Act. What a patent adds—and grants exclusively to the patentee—is a limited right to prevent others from engaging in those practices. Exhaustion extinguishes that exclusionary power. As a result, the sale transfers the right to use, sell, or import because those are the rights that come along with ownership, and the buyer is free and clear of an infringement lawsuit because there is no exclusionary right left to enforce.

In sum, patent exhaustion is uniform and automatic. Once a patentee decides to sell—whether on its own or through a licensee—that sale exhausts its patent rights, regardless of any post-sale restrictions the patentee purports to impose, either directly or through a license.

### **Notes and Questions**

19.11. Initially, consider Lexmark’s business model that gave rise to this case. Lexmark discounts its printers heavily, sometimes selling them at or below cost. It then marks up the prices of consumable supplies like toner and ink, recovering any losses on the printer and making the company’s profits. This is known as the “razor and blades business model” (sell the razor handles cheaply, and then mark up the blades), and companies use it for a wide variety of products. (Single-serve coffee pods are another classic example.)

This business model is why Lexmark pursued the toner refills so vigorously. Competitors can supply the consumable parts at much cheaper prices, because the original manufacturer is overpricing those parts as part of the business model. But if consumers buy from those competitors, then the original manufacturer never recovers the initial loss. So the razor and blades model depends on some mechanism of exclusion—some property right, perhaps—that keeps competitors out.

Why use this business model? Couldn't Lexmark just charge more for the printers?

19.12. What else might post-sale restrictions be used for, besides preventing resale or repair? In *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, the patent holder held patents on movie projectors, and imposed a condition on theaters that they only use licensed projectors on the patent holder's terms. See 243 U.S. 502, 506–07 (1917). The patent holder, a licensing firm created and run by Thomas Edison, wielded extraordinary power over the motion picture industry during the early 1900s, unilaterally deciding what films would be made, which actors would be promoted, and which theaters would be allowed to operate. See Ralph Cassady, Jr., *Monopoly in Motion Picture Production and Distribution: 1908–1915*, 32 S. CAL. L. REV. 325 (1959).

Should a patent's right to exclude entail this level of industry control?

19.13. *Impression* does not just pit two types of property against each other—it pits two specific rights of property against each other. The toner cartridge owner enjoys a right to alienate to a refiller or anyone else. Lexmark, on the other hand, enjoys a right to subdivide its patent interest, in the same way that a landlord can lease one room of a house and retain the rest of it.

The Court holds that the right to alienate a chattel overrides the right to subdivide a patent. Do you agree? Can you think of a basis for prioritizing one right over the other? One point to consider: The right to subdivide is not absolute, as the *numerus clausus* principle and menu of estates in land demonstrate. But neither is the right to alienate—regulations such as drug approval can prohibit sales of products.

19.14. Patents are far from the only vehicle for imposing post-sale restraints on consumer goods. Copyright holders have sought to use their copyrights to prevent resale of books or to enforce minimum retail prices. The Supreme Court held such copyright-based restraints unenforceable, in a case about resale of used textbooks. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013). Other statutes, including the Digital Millennium Copyright Act and the Computer Fraud and Abuse Act, have been used to restrict consumers from reselling their purchased goods or using those goods in ways contrary to the manufacturers' wishes. See generally AARON PERZANOWSKI & JASON SCHULTZ, *THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY* (2016); Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008).

19.15. If you were representing Lexmark, how would you advise the company to proceed after this decision? Can you come up with another legal arrangement

that prevents refilling? Look back through the property materials you've learned so far.

# Chapter 20

## Nuisance

There is perhaps no more impenetrable jungle in the entire law than that regarding the word “nuisance.”

W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 86 (5th ed. 1984).

People want to use land for different things. We've already seen how the resulting conflicts provide a rationale for property rights. In the so-called tragedy of the commons, for example, each cattle owner has an incentive to use the pasture for grazing before someone else beats him or her to it. The race to consume leaves the pasture depleted and everyone worse off. Property rights are one, but by no means the only, mechanism for addressing the problem, as an individual owner may have the necessary incentive to ensure that the plot is not overconsumed. Likewise property rights enable owners to manage their holdings free from external interference. The farmer may plant her corn even though her neighbor wishes a hotel were there. And property rights facilitate the reconciliation of incompatible interests without outside intervention. Determining whether Blackacre is better off as a hotel or a farm might be a hard call for an outside regulator. But with enough money, the would-be hotelier may simply buy out the farmer (or vice versa).

This hardly exhausts the universe of potential dispute. As we have already seen, disputes may emerge within property boundaries. One joint tenant may want to use a pond for irrigation; the other, fishing. Property law provides another set of management mechanisms for this kind of disagreement—e.g. partition actions—that we studied in our unit on concurrent interests. Likewise the law of leaseholds has its own set of doctrines for managing the inevitable battles of the landlord/tenant relationship.

Here we are interested in conflicts that arise between neighboring property owners. The collision is not within an ownership interest (as with cotenants) but between such interests. My lifelong dream of operating the world's smokiest factory may be incompatible with my neighbor's desire for odorless living. We each own our respective land. What then?

One solution is to engage in private governance. We might strike a deal, and the law of servitudes lets us bind our successors in ownership to the arrangement. Alternatively, the state might resolve our dispute via regulation—the government may declare my facility illegal via zoning law or air quality regulation, effectively picking a winner between competing interests.

The law of nuisance takes a different tack. It also involves picking a winner, but turns the choice over to a court. The court's role, however, is not explicitly regulatory. Rather, it is there to determine whether the complained-of act is contrary to someone else's property rights. Stated another way, if my factory is a nuisance, your property rights *already* preclude its operation. The nuisance action merely clarifies that I violated your property rights (and that my property rights did not extend to the action in question). In essence, the court is determining whether a boundary has been crossed. But from another perspective, nuisance looks a lot like regulation. A judicial regulator (rather than a politically accountable agency) takes a look at the facts and decides whose interests ought to prevail. We might look at nuisance questions from either view, which complicates the doctrine.

## 20.1 The Problem of Nuisance Definition

"A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." RESTATEMENT (SECOND) OF TORTS § 821D (1979). What does that mean? Nuisance law is a history of courts trying to come to grips with a fairly vague exhortation. Judges sometimes invoke the maxim *sic utere tuo ut alienum non laedas*. "[O]ne must so use his own rights as not to infringe upon the rights of another. The principle of *sic utere* precludes use of land so as to injure the property of another." *Cline v. Dunlora S., LLC*, 726 S.E.2d 14, 17 (Va. 2012).

That's intuitive, but unhelpful. Back to the factory versus the home. If my ownership of land includes the right to emit smoke, I interfere with my neighbor's ability to enjoy her home. But if her property right includes the ability to shut me down, then her preferred property use interferes with *my* ability to use my property as I see fit. The harms are reciprocal. Appeals to *sic utere* beg the question. That said, there is something intuitively appealing about the maxim, and perhaps you have a

strong intuition (based on what?) that factories “cause” harm in a way that homes do not. How far do intuitions of harm go? What if, instead of using my property, I prefer to let it fall into disuse? Does this passive act cause harm?

### ***Puritan Holding Co. v. Holloschitz***

372 N.Y.S.2d 500 (Sup. Ct. 1975)

**WALTER M. SCHACKMAN, J.**

Plaintiff owns a small apartment building, recently renovated, on West 93rd Street in Manhattan, almost directly across the street from a building owned by the defendant. The latter building has been abandoned. Plaintiff claims the defendant has created a nuisance by not properly caring for her property and claims it has suffered damages as a result. Defendant did not appear in the action and an inquest was held before the court.

The uncontested proof at trial was that defendant’s building had deteriorated, become unsightly and been taken over by derelicts. The building’s condition has caused a deterioration in values on the block. A real estate expert testified that the depreciation in value of plaintiff’s property since the abandonment of defendant’s building was \$30,000 to \$35,000. He further stated it would be impossible for plaintiff to obtain a mortgage because of the condition of the defendant’s property. The question for the court is whether the failure of the defendant to supervise her abandoned property constitutes the maintenance of a private nuisance.

An excellent definition of nuisance appears in 4 ALR3d 908: “The nuisance doctrine operates as a restriction upon the right of an owner of property to make such use of it as he pleases. In legal phraseology the term ‘nuisance’ is applied to that class of wrongs which arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property, and which produces such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage. It is so comprehensive that it has been applied to almost all wrongs which have interfered with the rights of the citizen in his person, property, the enjoyment of his property, or his comfort. It has been said that the term ‘nuisance’ is incapable of an exact and exhaustive definition which will fit all cases, because the controlling facts are seldom alike, and each case stands on its own footing.”

The court has made a search of the reported cases in New York and has been unable to find any similar to the case at bar. However, it has been held that "every person who suffered actual damages, whether direct or consequential, from a nuisance, might maintain an action for his own particular injury." (*Lansing v Smith*, 4 Wend 9.) There are numerous cases where property owners, adjacent to or in the vicinity of a nuisance, were entitled to damages. Examples are: where a tire shop emitted offensive odors and fumes; the discharge of large quantities of dust; an open burning operation by a city in a landfill area and blasting operations.

In considering whether an activity is a nuisance, the court must be mindful of the location and surroundings as well as other circumstances. An activity which occurs in a particular location and surroundings may be reasonable, while the same activity in another location and in other surroundings may be a nuisance.

West 93rd Street is in the West Side Urban Renewal area which has recently seen a marked upward trend in real estate values. Annually there are thousands of buildings abandoned throughout New York City. Some buildings abandoned and left in disrepair in certain deteriorating neighborhoods of the city may not constitute a nuisance. However, here a building has been abandoned in a location where property owners are trying to maintain and upgrade the housing standards. Defendant has clearly violated section C26-80.0 of the Administrative Code of the City of New York which requires that vacant buildings must be either continuously guarded or sealed. The court is of the opinion that defendant's actions constitute a nuisance.

The court is not unmindful of the fact that given the number of abandonments, estimated by the Housing and Development Administration of the City of New York at approximately 12,000 units per year, and the further fact that the city does not have the funds to force the owners to maintain these properties, a decision in favor of plaintiff herein could result in a multiplicity of lawsuits. However, one bad building may eventually destroy an entire neighborhood. The courts have a duty to examine each situation independently.

Plaintiff has provided sufficient proof that defendant's building is, in its present condition, a nuisance. It is entitled to the difference between the market value of the building before and after the nuisance. Plaintiff's

expert has testified that the difference in value is \$30,000 to \$35,000. The court finds in favor of the plaintiff in the sum of \$30,000.

### Notes and Questions

20.1. **Whose House Was It Anyway?** The nuisance house in question, 265 West 93rd Street, was one of three row houses built in 1897–1898 by architect Alexander M. Welch and developers William W. and Thomas M. Hall. The townhouses were advertised as “the most attractive, medium sized, moderate priced Private Houses ever offered.” Tom Miller, *The Alexander and Augusta Boehm House—263 West 93rd Street, DAYTONIAN MANHATTAN* (Dec. 2023), [link](#); *265 West 93rd Street, LANDMARK W.* (last visited Mar. 22, 2024), [link](#). When Dorothy Holloschitz came into ownership of the house is uncertain, but according to the New York City property records, the house was sold at auction a year after the judgment, for \$39,000. It was later converted to a four-unit co-op. Unit 4 sold in 2016 for \$1.8 million.

For some reactions to the decision, see Max H. Seigel, *Owner of Rundown House Liable for Decay of Area*, N.Y. TIMES, Sept. 11, 1975, at 45, [link](#).

20.2. How much should it matter that the defendant independently violated a local regulation?

20.3. If *Holloschitz* does not go too far, how much freedom should courts have to judge land uses? Are there any metrics that would both provide judicial discretion as well as contain it? We will examine several approaches below, but the question underscores the problem of unclear boundaries in nuisance law. A lot of property doctrine exists to help us determine the scope of property rights *without* asking a judge. The metes and bounds in a deed tell us what is a trespass. The adverse possession limitations period lets expectations settle. Title recording gives notice of competing interests. And so on. When push comes to shove, litigation may be necessary to resolve disputed boundaries, but in most cases there are ways to determine them without the aid of a court. By contrast, the boundaries clarified by nuisance law are harder to ascertain *ex ante* in part because nuisance is more a flexible standard than a bright-line rule. What measures short of litigation are available to people like the plaintiff here? To be sure, the law cannot anticipate every possible conflict between property owners. There is therefore something to be said for *ex post* determinations of what is a reasonable use of land. Is this reason enough to use nuisance law to supplement regulatory and zoning schemes?

20.4. **Aesthetics.** Courts generally reject nuisance claims based on aesthetic harm, but that reluctance may be eroding. *Rattigan v. Wile*, 841 N.E.2d 680, 683

(Mass. 2006) (“We conclude in this appeal that activities on one’s property that create or maintain unreasonable aesthetic conditions for neighbors are actionable as a private nuisance.”); *id.* at 689-90 (arguing that the modern trend is to allow such claims). Courts also sometimes consider aesthetic harm as part of the larger nuisance analysis. *Sowers v. Forest Hills Subdivision*, 294 P.3d 427, 430 (Nev. 2013) (“[W]e hold that the aesthetics of a wind turbine alone are not grounds for finding a nuisance. However, we conclude that a nuisance in fact may be found when the aesthetics are combined with other factors, such as noise, shadow flicker, and diminution in property value.”).

20.5. What if a building became dilapidated because its owner could not afford upkeep? If so, does *Holloschitz* hint at nuisance’s potential to serve as a tool of exclusion of poor people? What other activities (or groups) might the law target? See generally Alfred L. Brophy, *Integrating Spaces: New Perspectives on Race in the Property Curriculum*, 55 J. LEGAL EDUC. 319, 331-33 (2005) (discussing attempts to use nuisance law as a tool of racial discrimination); John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 276-94 (2001) (discussing range of activities targeted by nuisance plaintiffs). For commentary on the disability rights implications of a recent nuisance suit between neighbors, see David Perry, *Flowers v Gopal-Rich folks try to declare autistic boy a “Public Nuisance”*, (September 23, 2015), [link](#). Could the mere presence of a sex offender in a residential community of families with young children be considered a nuisance? Some public nuisance ordinances deem repeated 911 calls a nuisance; what effect might such property law rules have on victims of domestic violence? See Emily Werth, *The Cost of Being “Crime Free”: Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances* (Aug. 2013), [link](#).

20.6. **Nuisance and Trespass.** Historically, trespass and nuisance were two distinct common-law classes of injury involving real property. 9 R. POWELL, REAL PROPERTY § 64.01[1], at 64-5 (1999); 4 RESTATEMENT (SECOND) OF TORTS § 821D cmt. a (1979). A defendant who invaded a plaintiff’s possession was a trespasser; a defendant who interfered with a plaintiff’s use and enjoyment of his property by acts done elsewhere than on the plaintiff’s land was subject to a claim of nuisance.

This ancient distinction between trespass and nuisance, on the basis of whether an invasion of a plaintiff’s land was direct or indirect, is not followed by more recent cases. Instead, recent case law treats trespass cases as involving acts that interfere with a plaintiff’s exclusive possession of real property and nuisance cases as involving acts interfering with a plaintiff’s use

and enjoyment of real property. In other words, the distinction no longer rests on the means by which the invasion is effected but, instead, on the nature of the right with which the tortfeasor interferes. When viewed in this way, claims of nuisance may include an instance of trespass in that a physical entry onto land possessed exclusively by another also may affect, in the abstract, the possessor's use and enjoyment of the land.

*Boyne v. Town of Glastonbury*, 955 A.2d 645, 652-53 (Conn. App. 2008) (successive citations to POWELL and the RESTATEMENT omitted); see also, e.g., *Cook v. DeSoto Fuels, Inc.*, 169 S.W.3d 94, 103 (Mo. Ct. App. 2005) (“[Plaintiffs’] allegations that [defendant] caused gasoline to enter their property can constitute a claim for both trespass and nuisance because that contamination involves a direct physical invasion that interferes with both the right to possession and the use and enjoyment of property.”); *Md. Heights Leasing, Inc. v. Mallinckrodt, Inc.*, 706 S.W.2d 218 (Mo. Ct. App. 1985) (complaint of low-level radiation emissions stated claim for nuisance and trespass).

## 20.2 Adjudicating Nuisance

Although some acts are treated as *per se* nuisances (typically illegal activities) courts must generally engage in contextual assessments of harm to determine whether a nuisance exists in fact (also referred to as a nuisance *per accidens*).

### *Sans v. Ramsey Golf & Country Club, Inc.* 149 A.2d 599 (N.J. 1959)

#### **FRANCIS, J.**

An injunction was issued by the Chancery Division of the Superior Court against defendant Ramsey Golf and Country Club, Inc., barring the further use of the men’s and women’s third tees of its golf course. The Appellate Division affirmed. . . .

The issue presented is a novel one. The facts which created it are not seriously in dispute. The physical setting which forms its background is the product of the ingenuity of a real estate developer.

[The defendant operated a residential and country club development with a nine-hole golf course.] The development tract contained three small

lakes, one of which, called Mirror Lake, became the water hazard hole about which this controversy centers. . . .

In 1949 the plaintiffs, husband and wife, purchased a lot in the development. Naturally, they were aware of the existence of the golf course, and they became members of the club. They commenced construction of a home on the lot in 1950, after which they acquired two adjoining parcels. One side of their property adjoins the fairway of the second hole. The rear line of the three lots is near Mirror Lake but does not run to the water. It is separated from the edge of the lake by a strip of land varying in width from 11 to 40 feet, which is owned by the golf club.

In 1948 the present third women's tee was built. Its location was designed to create a short par 4 water hole. . . . [T]he tee had been in continuous use since its installation, although the plaintiff Ralph Sans testified that he did not notice it until 1950 when his home was being built. Subsequently, apparently in 1949, a separate men's tee was built for this hole about 30 feet farther from the northerly edge of the lake. The purpose was to lengthen the water hazard for the men. Both tees are on golf club property. According to Sans, the men's tee is "roughly" 50 to 60 feet from the southerly corner of the rear of his house; the women's tee is closer.

In order to reach the third tees from the second green, the golfers walk along the 11 to 40-foot-wide path (owned by defendant and described above) separating plaintiffs' rear lawn from the lake.

Plaintiffs moved into their new home in June or July of 1951, and have lived there since that time. They have two children, who were 10 and 11 years of age when the case was heard. As the membership of the club grew, play on the golf course increased, and the players' use of the third tees and the path to reach them became annoying and burdensome to plaintiffs. They began to complain to defendant's officials, and thereafter and until this suit was brought, they sought to effect the relocation of the tees to the north of the northerly line of the lake. Such a change is feasible. In fact, when a stay of the restraint issued by the trial court was denied, a new temporary tee was built and has been in use pending the determination of this appeal. The objection of defendant to adopting it permanently is that an attractive short par 4 water hole is transformed into an ordinary par 3 one on a nine-hole course which already has three par 3 holes.

Plaintiffs' complaint charged defendant and its members with trespassing on their land by using the pathway along the lake in walking to the

ladies' and men's tees in question. This contention was abandoned when it appeared that plaintiffs did not own the strip and that, although National had not conveyed it to defendant in the original 1945 deed, a transfer had been made by deed in 1955. Other allegations, however, in company with the issues appearing in the pretrial order, were deemed by the trial court to present a claim that the location of the tees and the manner and incidents of their use by defendant and its members constituted a private nuisance as to plaintiffs. The trial was conducted on the latter basis.

Proof was adduced that in the golf season play begins on the third tees as early as 6 A.M. and continues throughout the day until twilight. On week-ends and holidays the activity is more intense. Sans spoke of an "endless stream of golfers" using the path just in back of his house. . . .

When Sans bought his first lot in 1949, the one on which his home was later constructed, he did not see the tee or tees in question. And there is no proof that anyone called them to his attention. It does appear that a certain brochure respecting the development had been given to him. A similar one was introduced in evidence. It contained what appeared to be an aerial color view of the tract, including the course. Although the tees were indicated, none was depicted on plaintiffs' side of the lake. When an inquiry was made on cross-examination as to whether he did not know that he was "buying a piece of property immediately adjacent to the golf course," he answered: "No, we did not buy a piece adjacent to the golf course. We had a choice of three lots on that end and we bought the lot away from the golf course." And as has been indicated, he testified further that he did not see a tee in the rear of his lots until some time in 1950 when his home was being erected.

According to plaintiffs, the constant movement of the players to and from the tee in close proximity to their rear lawn and house was accompanied by a flow of conversation which became annoying and burdensome to them. It awakened them and their children as early as 7 in the morning and it pervaded their home all day long until twilight. Moreover, they have a consciousness that everything they say in or around the house can be heard out on the path and so they are "under a constant strain and constant tension." They "never feel relaxed or free at home"; "(w)e never know when there is someone in our back yard." Occasionally, a low hook or slice or heeled shot of a golfer carries upon their lawn. Then, by means of a trespass, the ball is retrieved. Sometimes it is played from that position.

Apparently there are no out-of-bounds stakes in the area. The combination of difficulties makes it impossible to sit outside and "enjoy supper."

At times there are as many as 12 persons waiting to use the ladies' and men's tees. On a short course containing three par 3 holes, such backing up of playing groups, particularly at a 260-yard water hole, might well be expected. This gathering adds to the conversation, and the voices can be heard in the house. While silence is the conventional courtesy when a golfer is addressing his ball and swinging, the ban is relaxed between shots, and presumably the nature of the comments depends in some measure upon the success or failure of the player in negotiating the hazardous water.

But an even more serious objection involves plaintiffs' children. They have no freedom of play on their back lawn. Golfers tell them not to play there and constantly admonish them to be quiet. If they move their activities to the north side of the property, they are endangered by balls being driven on the second fairway. This exposure has constantly worried Mrs. Sans. The children have a dog. On one occasion they were cavorting in the rear of the house and the dog was barking. A golfer instructed them to keep it quiet, and when they were unable to do so he walked on plaintiffs' property and knocked the animal unconscious with a club—even though one of the children pleaded with him not to do it. Complaint about the incident to one of defendant's officials met with the response that "The dog had no right to be there." At times the players allow their own dogs to accompany them around the course, and they have attacked plaintiffs' dog when it was on the rear lawn.

The resident members of the club have the common right to use the lakes for fishing and boating. Plaintiffs have an aluminum boat in the lake immediately to the rear of their house. If the children take the boat out, the golfers at these tees order them off the water. They cannot fish with safety from the banks to the rear of the house for the same reason, and because of the danger of being struck by golf balls. Even in the winter, when children were ice skating there, golfers were hitting balls over their heads to the third fairway. . . .

Defendant recognized the danger, and at times during the winter the tee was closed off to avoid possible injury to the skaters. When this happened the hole was played from the other side of the lake—presumably in a manner similar to that followed since the injunction in this case.

On the basis of the evidence, which stands without substantial dispute, plaintiffs claim that the third tees in their present location constitute a private nuisance and that their use should be enjoined. Defendant denies that the facts in their total impact warrant that conclusion. Further, it claims that plaintiffs bought their lots, built their home and moved into the area with full knowledge of the existence and use of the golf course and therefore assumed any annoyances and inconveniences incident to the playing of the game.

The circumstances here are unique. A situation where a person buys or builds a home adjoining a wholly independent, unrelated and existing conventional type golf course is quite dissimilar. The basic theme of this development was residence. The recreational facilities, including the golf course were subordinate. Their purpose and existence were to make the area a desirable one in which to dwell. Note the ecstatic exclamations of the developer's brochures:

The perfect home location; . . . a millionaire's paradise for moderate income families; . . . Ramsey Country Club Estates is the culmination of a ten year search for the perfect home location . . . . Each approved purchaser will automatically receive a share representing proportionate ownership in the Country Club and all its properties. The Club will own the impressive \$100,000 ivy covered stone mansion for its club house. Here will be the center of social life for this unusual new community . . . . Owner-members of the Ramsey Country Club will own for their *exclusive use* the new 9-hole golf course . . . (the record contains no explanation of how the associate members-non-owners of property in the development-happened to be admitted to the club. Sans understood that membership was to be limited to property owners.), spacious sand bathing beaches, three picturesque lakes for canoeing, boating and fishing . . . complete facilities for the enjoyment of all winter sports . . . . Residents will enjoy swimming, canoeing, fishing, ice-skating in the comfort and safety of their own private community. . . . This magnificent club house and its grounds-all of these wonderful recreational facilities-will be shared, owned and enjoyed by a selected group of families who will live luxuriously in these unusual and incomparable

surroundings for less than the cost of a small city apartment.  
(Emphasis added, insertion ours.)

The plaintiffs may justly assert that these comments add equitable strength to their position in the present controversy. The brochure given to them before they became purchasers in 1949 portrayed the layout of the course; the greens were numbered and the tees were indicated. As has been pointed out, no tee appeared on their side of Mirror Lake. No suggestion is made that any representative of the developer or of defendant apprised them of any such tee. And it is not shown on the detailed map on file in the county clerk's office. In the factual context, the element of reliance by the Sans cannot be overlooked.

Thus the heart of the project was and is the home. The pastime facilities were intended to be no more than an aid to the enjoyment of the home, as the veins facilitate the functions of the heart. An avoidable and readily curable ailment in one vein should not be permitted to impair the central organ. Especially is this true when the remedy calls for a comparatively simple adjustment which will not materially impair the physical structure in its entirety.

The essence of a private nuisance is an unreasonable interference with the use and enjoyment of land. The elements are myriad. The law has never undertaken to define all of the possible sources of annoyance and discomfort which would justify such a finding. Pollock, *Torts* (1887), 260, 261. Litigation of this type usually deals with the conflicting interests of property owners and the question of the reasonableness of the defendant's mode of use of his land. The process of adjudication requires recognition of the reciprocal right of each owner to reasonable use, and a balancing of the conflicting interests. The utility of the defendant's conduct must be weighed against the quantum of harm to the plaintiff. The question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of the neighbor's land or operation of his business. Prosser, *Torts* (2d ed. 1955), 410. As the Court of Appeals of Ohio put it in *Antonik v. Chamberlain*, 81 Ohio App. 465, 78 N.E.2d 752, 759 (1947):

The law of nuisance plys between two antithetical extremes:  
The principle that every person is entitled to use his property  
for any purpose that he sees fit, and the opposing principle

that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor.

Defendant's members have the right to the ordinary and expected use of the golf course. Plaintiffs have the correlative right to the enjoyment of their property. The element of reciprocity must be emphasized because the parties' interests stem from a common source and are more mutually interdependent than in the usual case. The Appellate Division properly suggests the pertinent inquiry to be "whether defendant's activities materially and unreasonably interfere with plaintiffs' comforts or existence, 'not according to exceptionally refined, uncommon, or luxurious habits of living, but according to the simple tastes and unaffected notions generally prevailing among plain people.' "

In the unusual circumstances of this case, the activities of defendant are manifestly incompatible with the ordinary and expected comfortable life in plaintiffs' home and the normal use of their property. The evaluation of the conflicting equities must be made in the factual framework presented. And any relief granted must result from a reasonable accommodation of those equities to each other in the light of the evaluation. In our judgment, the facts considered in their totality demonstrate that plaintiffs' interests are paramount and demand reasonable protection. The trial court and the Appellate Division felt that a proper balance of equitable convenience could be achieved by requiring defendant to relocate the ladies' and men's third tees. Such relief, in our opinion, does not represent a burden disproportionate to the travail which would be suffered by plaintiffs and their family through the perpetuation of the present method of play on the course.

Judgment affirmed.

#### Notes and Questions

- 20.7. Why does *Sans* conclude that the "conflicting equities" favor the plaintiff?
- 20.8. **Threshold harms.** One way courts avoid getting too involved in nuisance cases is by requiring significant harm before engaging in the balancing of equities. RESTATEMENT (SECOND) OF TORTS § 821F (1979) ("There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a

normal person in the community or by property in normal condition and used for a normal purpose.”);

Before plaintiffs may recover the injury to them must be substantial. By substantial invasion is meant an invasion that involves more than slight inconvenience or petty annoyance. The law does not concern itself with trifles. Practically all human activities, unless carried on in a wilderness, interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. Each individual in a community must put up with a certain amount of annoyance, inconvenience or interference, and must take a certain amount of risk in order that all may get on together. But if one makes an unreasonable use of his property and thereby causes another substantial harm in the use and enjoyment of his, the former is liable for the injury inflicted.

*Watts v. Pama Mfg. Co.*, 256 N.C. 611, 619, 124 S.E.2d 809, 815 (1962) (citing 4 RESTATEMENT (FIRST) OF THE LAW OF TORTS § 822, cmts. g & j).

20.9. **Restatement standards.** The RESTATEMENT (SECOND) OF TORTS standard for a private nuisance is an activity that invades another’s interest in the use and enjoyment of land where the invasion is either “(a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.” RESTATEMENT (SECOND) OF TORTS § 822 (1979). We will focus on the first prong, intentional conduct that a court nonetheless finds unreasonable. Section 826 sets forth two tests. The invasion is unreasonable if “the gravity of the harm outweighs the utility of the actor’s conduct” or if “the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.”<sup>1</sup>

20.10. **“Coming to” a nuisance.** One way to adjudicate between competing interests is through first-in-time, first-in-right principles. Generally, whether the plaintiff came to the nuisance (i.e., acquired its property interest *after* the commencement of the allegedly unreasonable activity by the defendant) is treated as a factor

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<sup>1</sup>The RESTATEMENT likewise provides standards for assessing the gravity of the harm to the plaintiff, including factors like degree, duration, character, ability to avoid, and nature of the plaintiff’s activity (e.g., social value and local suitability). § 827. As the list indicates, they leave room for subjective interpretation. Likewise, the assessment of the defendant’s conduct includes considerations of social value, suitability to the location, and ability to avoid or prevent. § 828.

to be considered in balancing the equities, and not as a bar to a nuisance suit. Why do you think that is? Are there circumstances in which you think coming to a nuisance ought to bar a suit? Likewise, compliance with zoning ordinances is a non-dispositive factor in the defendant's favor.

20.11. **Idiosyncratic harms.** The harm giving rise to nuisance liability must be “of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose.” RESTATEMENT (SECOND) OF TORTS § 821F (1979). This creates difficulty for a range of asserted, but unproven, harms. See, e.g., *San Diego Gas & Electric Co. v. Superior Court*, 55 Cal. Rptr. 2d 724, 752 (1996) (rejecting nuisance claim based on fear of powerline electromagnetic fields). What about technological change? American law generally rejects the notion that one has a right to light from adjacent properties. But what if one has a solar panel? *Prah v. Maretti*, 321 N.W.2d 182, 191 (Wis. 1982) (allowing nuisance claim by owner of a solar heated home to proceed).

20.12. **Malice.** There is little utility to actions taken for the purposes of harming a neighbor, and the RESTATEMENT provides that such acts are nuisances when they cause harm to a property owner’s interests. RESTATEMENT (SECOND) OF TORTS § 829.<sup>2</sup> “Spite fences” are often explicitly the subject of statutes. See, e.g., N.H. REV. STAT. ANN. § 476:1 (“Any fence or other structure in the nature of a fence, unnecessarily exceeding 5 feet in height, erected or maintained for the purpose of annoying the owners or occupants of adjoining property shall be deemed a private nuisance.”).

20.13. **Private arrangements.** If a nuisance is a violation of a property right, it stands to reason that the right may have been transferred prior to the nuisance suit. Cf. *DeSarno v. Jam Golf Mgmt., LLC*, 670 S.E.2d 889, 890 (Ga. 2008) (distinguishing *Sans* and holding no trespass or nuisance claims were possible because “the easement in this case explicitly permitted the complained-of conduct and indeed exonerated the golf course owner from any liability for damages caused by the errant golf balls”).

## Note on the Clarity of Rights and Coase

The vagaries of nuisance standards reflect the difficulty of properly assigning the right (either to continue action or to enjoin the action). But perhaps all that really matters is the clarity of the property right. This was the suggestion of Nobel-Prize-winning economist Ronald Coase (1910-2013) in his famous article, *The Prob-*

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<sup>2</sup>The provision also treats acts contrary to “common standards of decency” as a nuisance, offering as an illustration a farmer who breeds animals in full view of a neighbor’s family. *Id.* cmt. d.

*lém of Social Cost*, 3 J.L. & ECON. 1 (1960). The article concerned the previously encountered problem of externalities—costs or benefits of an action that are borne by someone other than the actor. When a factory emits smoke, for example, the smoke causes harms to others that the factory owner does not experience. They are external to his decision to operate, and therefore more likely to be produced than we might want. Externalities need not be negative. The factory might stimulate economic development, e.g., by attracting restaurants to open nearby to cater to its workers.

It has been argued that property rights emerge when the benefits of internalizing externalities outweigh the costs of establishing a property system. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967). To return to the pasture held in common, suppose we make the land subject to private ownership. Giving property rights to a single party means that she will bear the cost of overgrazing (and thus take them into account before allowing that to happen, thereby internalizing the externality). She will likewise reap the benefits of improvements like an irrigation system, which without property rights would have been shared by too many to make the investment worthwhile.

But other externalities may remain. What happens when the smells of the pasture annoy the neighbors? Or if the land is used for fracking? Or a factory? How do we address the resulting harms to others? Regulation is a traditional answer to the problem of externality. The party causing the harm can either be made to pay or, if the harm is serious enough, cease the offending activity.

Enter Coase. He argued that the traditional approach, of trying to stop the harm, is question-begging in light of the reciprocity of harms:

The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.

Coase, *supra*, at 2. In other words, the issue is not stopping harm, but rather ascertaining whether the complained-of act does more harm than good. The market can help here, so long as property rights are clear and transaction costs are ignored. “It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a

rearrangement of rights will always take place if it would lead to an increase in the value of production.” *Id.* at 15.

So imagine a world in which there is only a smoke-producing factory (and its owner) and a house (and its owner, who has sued the factory for causing a nuisance). Suppose further that the homeowner values life without smoke at \$50, and the factory owner values operating at \$100. The nuisance suit then clarifies who has the relevant property right. If the homeowner wins, he now has the right to enjoin the factory owner. In a world without transactions costs, what happens next? We would expect the factory owner to pay the homeowner to release the injunction (as she values operation more than he values life without smoke). What if the activity is deemed to *not* be a nuisance? Then there is no deal to be had. The factory owner’s property rights encompass the right to emit smoke, and she values it more than the homeowner.

One interesting consequence of our hypothetical scenario is that the initial allocation of property rights *does not matter* with regards to whether the factory operates. Absent transaction costs, operations continue no matter which property owner “wins” the right to harm the other.<sup>3</sup> Coase argued that

It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximises the value of production) is independent of the legal position if the pricing system is assumed to work without cost.

*Id.* at 8. This insight is referred to as the *Coase Theorem*.<sup>4</sup> The theorem has a variety of expressions. It is the idea that absent transactions costs, parties will bargain to efficient outcomes concerning externalities regardless of the initial allocation of property rights. The implication for nuisance law is the suggestion that if transaction costs are low, it might matter more that property rights be clear than that they be properly assigned in the first instance.

*The Problem of Social Cost* is one of the more cited and debated articles in legal history. One problem with characterizing the debate is that it involves not only Coase’s work, but the various interpretations that may or may not be a fair repre-

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<sup>3</sup>To make sure you understand this point, repeat the exercise with reversed dollar values. You will see that the factory will *shut down* regardless of whether it is a nuisance.

<sup>4</sup>The term “Coase Theorem” to describe Coase’s insight is generally ascribed to George Stigler.

sentation of his ideas. See, e.g., Robert C. Ellickson, *The Case for Coase and Against "Coaseanism"*, 99 YALE L.J. 611 (1989) ("Coase's name is consistently attached to propositions that he has explicitly repudiated."). For present purposes, it is worth noting four reasons to be cautious in drawing normative lessons from Coase. First, as Coase himself emphasized, transactions costs are always present in the real world and often quite high. So if a factory is emitting smoke that falls on a neighborhood (rather than a single homeowner), bargaining costs may be large. The neighbors will face the difficulty of coordination (and the attendant problems of free riders and holdouts). Moreover, the health consequences of the factory may not be well known (i.e., there is a cost to simply having the information necessary for the neighborhood to know how highly it values freedom from smoke). Second, even if property rights allocations matter less than we think with respect to the production of externalities, they remain important from the perspective of distributive justice. When a judge decides whether A must pay B, or vice versa, one becomes wealthier at the expense of the other. The Coase Theorem tells us nothing about who merits the windfall. Likewise, wealth matters with respect to how the gain or loss is experienced insofar as money has a diminishing marginal utility. So, someone with only \$1000 to his name is likely to value an additional \$1000 more than would a millionaire. Third, unequal baseline distributions of wealth mean that many hypothesized transactions based on competing subjective valuations of entitlements may be impossible: what might it mean for a person with net financial worth of \$10,000 to value their respiratory health at \$100,000? Could such a person effectively bargain over another's right to pollute the air they breathe? Fourth, the proposition that initial allocations do not matter has been empirically challenged. It has been observed that people value what they possess more than what they do not. I may, for example, be willing to pay \$50 to shut a factory down. But if my starting point is one in which the factory is not yet operating and I have a veto, I might demand \$100 to release it. The "endowment effect" might mean that initial allocations therefore matter. For a colorful example of this effect in play over the right to recline an airline seat, see Christopher Buccafusco & Christopher Jon Sprigman, *Who Deserves Those 4 Inches of Airplane Seat Space?* SLATE (Sept. 23, 2014), [link](#).

All that said, Coase's article suggests that we keep in mind the value of clear property rights and the prospect that market mechanisms may sometimes be preferable to judicial allocations. Likewise Coase reminds us anew that law is not all. And, indeed, neither is the market. As we discussed in earlier chapters, social norms may play a powerful role in resolving usage disputes. These norms may be powerful enough to resolve disputes notwithstanding changes in the underlying le-

gal regime. For a classic account of this dynamic, concerning payments by farmers for damage done by wandering cattle, see ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1994).

## 20.3 Remedies

Nuisance plaintiffs usually seek injunctions. The ongoing harm of the nuisance suggests equitable relief, as damages for past harms would not address those that would follow if the nuisance continues. 9 POWELL ON REAL PROPERTY § 64.07. But because equity involves balancing, courts sometimes decline injunctions or offer more tailored remedies.

### Note on “Property Rules” and “Liability Rules”

When should a court award damages and when is an injunction appropriate? One of the most famous takes on the problem is found in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). The authors outline a framework for the protection of entitlements, distinguishing “property” and “liability” rules.

An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller. It is the form of entitlement which gives rise to the least amount of state intervention: once the original entitlement is decided upon, the state does not try to decide its value. It lets each of the parties say how much the entitlement is worth to him, and gives the seller a veto if the buyer does not offer enough. Property rules involve a collective decision as to who is to be given an initial entitlement but not as to the value of the entitlement.

Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule. This value may be what it is thought the original holder of the entitlement would have sold it for. But the holder’s complaint that he would have

demanded more will not avail him once the objectively determined value is set. Obviously, liability rules involve an additional stage of state intervention: not only are entitlements protected, but their transfer or destruction is allowed on the basis of a value determined by some organ of the state rather than by the parties themselves.

*Id.* at 1091.<sup>5</sup> We might think of an injunction against trespass as an illustration of a property rule. The trespasser must keep out unless the property owner agrees to let her enter. Contract damages are an example of a liability rule. If one is willing to pay damages, one is free to breach. As the examples suggest, property rules are associated with, well, property rights, while liability rules are associated with contract remedies. But there are exceptions in both subjects. For example, some states allow for private condemnation of rights of way to provide access to landlocked privately owned land. The owner of the property has no ability to say no to another's entry into his land, but is limited to a compensation remedy. Conversely, under certain circumstances a contract may be enforced by specific performance.

Calabresi and Melamed spend some time on the question of how entitlements are assigned in the first instance (i.e., is the factory a nuisance or does its owner have the right to pollute), but for present purposes we will focus on the question of deciding how to protect an entitlement once assigned. In a vacuum, property rules let parties decide for themselves how to value entitlements, but in the real world, transaction costs get in the way. Holdouts and freeriders may interfere with the coordination of multiple purchasers or sellers of entitlement (e.g., when multiple neighbors live near an offending factory). When negotiation costs exceed the entitlement's value, it will remain with the party to whom it was assigned, regardless of overall efficiency. In such cases, a liability rule might be preferable.

As applied to nuisance, the authors observe:

Traditionally . . . the nuisance-pollution problem is viewed in terms of three rules. First, Taney may not pollute unless his neighbor (his only neighbor let us assume), Marshall, allows it (Marshall may enjoin Taney's nuisance). Second, Taney may pollute but must compensate Marshall for damages caused (nuisance is found but the remedy is limited to damages). Third, Taney may pollute at will and can only be stopped by Marshall if Marshall pays him off (Taney's pollution is not held

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<sup>5</sup>And some entitlements, as the authors discuss, are inalienable.

to be a nuisance to Marshall). In our terminology rules one and two (nuisance with injunction, and with damages only) are entitlements to Marshall. The first is an entitlement to be free from pollution and is protected by a property rule; the second is also an entitlement to be free from pollution but is protected only by a liability rule. Rule three (no nuisance) is instead an entitlement to Taney protected by a property rule, for only by buying Taney out at Taney’s price can Marshall end the pollution.

The very statement of these rules in the context of our framework suggests that something is missing. Missing is a fourth rule representing an entitlement in Taney to pollute, but an entitlement which is protected only by a liability rule. The fourth rule . . . can be stated as follows: Marshall may stop Taney from polluting, but if he does he must compensate Taney.

*Id.* at 1115-16 (footnotes omitted). In a low-transaction cost world, Calabresi and Melamed would use property rules, and assign the entitlement based on whether or not the polluter is the low-cost risk avoider. In such cases improper allocations have distributive consequences, but transactions would at least ensure economic efficiency. (Do you see why?)

The moment we assume, however, that transactions are not cheap, the situation changes dramatically. Assume we enjoin Taney and there are 10,000 injured Marshalls. Now even if the right to pollute is worth more to Taney than the right to be free from pollution is to the sum of the Marshalls, the injunction will probably stand. The cost of buying out all the Marshalls, given holdout problems, is likely to be too great, and an equivalent of eminent domain in Taney would be needed to alter the initial injunction. Conversely, if we denied a nuisance remedy, the 10,000 Marshalls could only with enormous difficulty, given freeloader problems, get together to buy out even one Taney and prevent the pollution. This would be so even if the pollution harm was greater than the value to Taney of the right to pollute.

*Id.* at 1119. In such situations, the “rule four” possibility would increase the range of options in a nuisance case. If circumstances made a liability remedy appropriate, a court would be free to assign the entitlement to either party as efficiency or distributional concerns warranted. *Id.* at 1120.

Like a particle predicted by atomic theory, the rule four injunction option was described, but awaited observation in nature. It would not take long.

***Spur Industries, Inc. v. Del E. Webb Development Co.***  
494 P.2d 700 (Ariz. 1972)

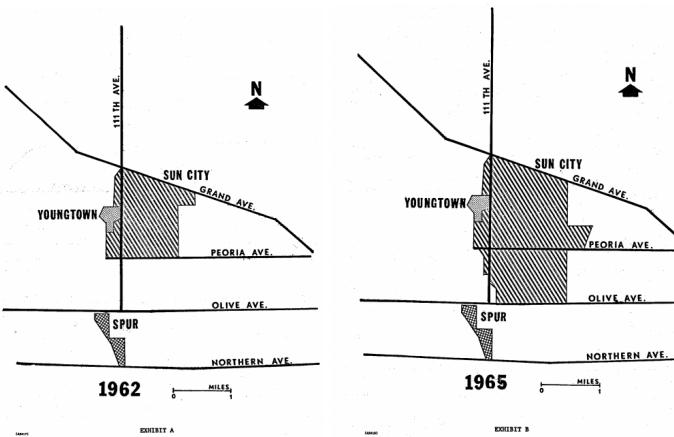
**CAMERON, Vice Chief Justice.**

From a judgment permanently enjoining the defendant, Spur Industries, Inc., from operating a cattle feedlot near the plaintiff Del E. Webb Development Company’s Sun City, Spur appeals. Webb cross-appeals. Although numerous issues are raised, we feel that it is necessary to answer only two questions. They are:

1. Where the operation of a business, such as a cattle feedlot is lawful in the first instance, but becomes a nuisance by reason of a nearby residential area, may the feedlot operation be enjoined in an action brought by the developer of the residential area?
2. Assuming that the nuisance may be enjoined, may the developer of a completely new town or urban area in a previously agricultural area be required to indemnify the operator of the feedlot who must move or cease operation because of the presence of the residential area created by the developer?

The facts necessary for a determination of this matter on appeal are as follows. The area in question is located in Maricopa County, Arizona, some 14 to 15 miles west of the urban area of Phoenix, on the Phoenix-Wickenburg Highway, also known as Grand Avenue. About two miles south of Grand Avenue is Olive Avenue which runs east and west. 111th Avenue runs north and south as does the Agua Fria River immediately to the west. See Exhibits A and B [in Figure 20.1].

Farming started in this area about 1911. In 1929, with the completion of the Carl Pleasant Dam, gravity flow water became available to the property located to the west of the Agua Fria River, though land to the east



**Figure 20.1:** Exhibits A and B to *Spur Industries*.

remained dependent upon well water for irrigation. By 1950, the only urban areas in the vicinity were the agriculturally related communities of Peoria, El Mirage, and Surprise located along Grand Avenue. Along 111th Avenue, approximately one mile south of Grand Avenue and 1 1/2 miles north of Olive Avenue, the community of Youngtown was commenced in 1954. Youngtown is a retirement community appealing primarily to senior citizens.

In 1956, Spur's predecessors in interest, H. Marion Welborn and the Northside Hay Mill and Trading Company, developed feed-lots, about 1/2 mile south of Olive Avenue, in an area between the confluence of the usually dry Agua Fria and New Rivers. The area is well suited for cattle feeding and in 1959, there were 25 cattle feeding pens or dairy operations within a 7 mile radius of the location developed by Spur's predecessors. In April and May of 1959, the Northside Hay Mill was feeding between 6,000 and 7,000 head of cattle and Welborn approximately 1,500 head on a combined area of 35 acres.

In May of 1959, Del Webb began to plan the development of an urban area to be known as Sun City. For this purpose, the Marinette and the Santa Fe Ranches, some 20,000 acres of farmland, were purchased for \$15,000,000 or \$750.00 per acre. This price was considerably less than the price of land located near the urban area of Phoenix, and along with the

success of Youngtown was a factor influencing the decision to purchase the property in question.

By September 1959, Del Webb had started construction of a golf course south of Grand Avenue and Spur's predecessors had started to level ground for more feedlot area. In 1960, Spur purchased the property in question and began a rebuilding and expansion program extending both to the north and south of the original facilities. By 1962, Spur's expansion program was completed and had expanded from approximately 35 acres to 114 acres. See Exhibit A above.

Accompanied by an extensive advertising campaign, homes were first offered by Del Webb in January 1960 and the first unit to be completed was south of Grand Avenue and approximately 2 1/2 miles north of Spur. By 2 May 1960, there were 450 to 500 houses completed or under construction. At this time, Del Webb did not consider odors from the Spur feed pens a problem and Del Webb continued to develop in a southerly direction, until sales resistance became so great that the parcels were difficult if not impossible to sell. . . .

By December 1967, Del Webb's property had extended south to Olive Avenue and Spur was within 500 feet of Olive Avenue to the north. See Exhibit B above. Del Webb filed its original complaint alleging that in excess of 1,300 lots in the southwest portion were unfit for development for sale as residential lots because of the operation of the Spur feedlot.

Del Webb's suit complained that the Spur feeding operation was a public nuisance because of the flies and the odor which were drifting or being blown by the prevailing south to north wind over the southern portion of Sun City. At the time of the suit, Spur was feeding between 20,000 and 30,000 head of cattle, and the facts amply support the finding of the trial court that the feed pens had become a nuisance to the people who resided in the southern part of Del Webb's development. The testimony indicated that cattle in a commercial feedlot will produce 35 to 40 pounds of wet manure per day, per head, or over a million pounds of wet manure per day for 30,000 head of cattle, and that despite the admittedly good feedlot management and good housekeeping practices by Spur, the resulting odor and flies produced an annoying if not unhealthy situation as far as the senior citizens of southern Sun City were concerned. There is no doubt that some of the citizens of Sun City were unable to enjoy the outdoor living which Del Webb had advertised and that Del Webb was faced with sales resistance

from prospective purchasers as well as strong and persistent complaints from the people who had purchased homes in that area. . . .

It is noted . . . however, that neither the citizens of Sun City nor Youngtown are represented in this lawsuit and the suit is solely between Del E. Webb Development Company and Spur Industries, Inc.

### **May Spur Be Enjoined?**

The difference between a private nuisance and a public nuisance is generally one of degree. A private nuisance is one affecting a single individual or a definite small number of persons in the enjoyment of private rights not common to the public, while a public nuisance is one affecting the rights enjoyed by citizens as a part of the public. To constitute a public nuisance, the nuisance must affect a considerable number of people or an entire community or neighborhood.

Where the injury is slight, the remedy for minor inconveniences lies in an action for damages rather than in one for an injunction. Moreover, some courts have held, in the "balancing of conveniences" cases, that damages may be the sole remedy. *See Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870, 40 A.L.R.3d 590 (1970), and annotation comments, 40 A.L.R.3d 601.

Thus, it would appear from the admittedly incomplete record as developed in the trial court, that, at most, residents of Youngtown would be entitled to damages rather than injunctive relief.

We have no difficulty, however, in agreeing with the conclusion of the trial court that Spur's operation was an enjoinable public nuisance as far as the people in the southern portion of Del Webb's Sun City were concerned.

§ 36-601, subsec. A reads as follows:

#### **§ 36-601. Public nuisances dangerous to public health**

A. The following conditions are specifically declared public nuisances dangerous to the public health:

1. Any condition or place in populous areas which constitutes a breeding place for flies, rodents, mosquitoes and other insects which are capable of carrying and transmitting disease-causing organisms to any person or persons.

By this statute, before an otherwise lawful (and necessary) business may be declared a public nuisance, there must be a "populous" area in which people are injured:

... (I)t hardly admits a doubt that, in determining the question as to whether a lawful occupation is so conducted as to constitute a nuisance as a matter of fact, the locality and surroundings are of the first importance. (citations omitted) A business which is not per se a public nuisance may become such by being carried on at a place where the health, comfort, or convenience of a populous neighborhood is affected. . . . What might amount to a serious nuisance in one locality by reason of the density of the population, or character of the neighborhood affected, may in another place and under different surroundings be deemed proper and unobjectionable. . . .

*MacDonald v. Perry*, 32 Ariz. 39, 49-50, 255 P. 494, 497 (1927).

It is clear that as to the citizens of Sun City, the operation of Spur's feedlot was both a public and a private nuisance. They could have successfully maintained an action to abate the nuisance. Del Webb, having shown a special injury in the loss of sales, had a standing to bring suit to enjoin the nuisance. The judgment of the trial court permanently enjoining the operation of the feedlot is affirmed.

### Must Del Webb Indemnify Spur?

A suit to enjoin a nuisance sounds in equity and the courts have long recognized a special responsibility to the public when acting as a court of equity:

§ 104. Where public interest is involved.

Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. Accordingly, the granting or withholding of relief may properly be dependent upon considerations of public interest. . . .

27 Am.Jur.2d, Equity, page 626.

In addition to protecting the public interest, however, courts of equity are concerned with protecting the operator of a lawfully, albeit noxious, business from the result of a knowing and willful encroachment by others near his business.

In the so-called "coming to the nuisance" cases, the courts have held that the residential landowner may not have relief if he knowingly came into a neighborhood reserved for industrial or agricultural endeavors and has been damaged thereby:

Plaintiffs chose to live in an area uncontrolled by zoning laws or restrictive covenants and remote from urban development. In such an area plaintiffs cannot complain that legitimate agricultural pursuits are being carried on in the vicinity, nor can plaintiffs, having chosen to build in an agricultural area, complain that the agricultural pursuits carried on in the area depreciate the value of their homes. The area being *primarily agricultural*, and opinion reflecting the value of such property must take this factor into account. The standards affecting the value of residence property in an urban setting, subject to zoning controls and controlled planning techniques, cannot be the standards by which agricultural properties are judged.

People employed in a city who build their homes in suburban areas of the county beyond the limits of a city and zoning regulations do so for a reason. Some do so to avoid the high taxation rate imposed by cities, or to avoid special assessments for street, sewer and water projects. They usually build on improved or hard surface highways, which have been built either at state or county expense and thereby avoid special assessments for these improvements. It may be that they desire to get away from the congestion of traffic, smoke, noise, foul air and the many other annoyances of city life. But with all these advantages in going beyond the area which is zoned and restricted to protect them in their homes, they must be prepared to take the disadvantages.

*Dill v. Excel Packing Company*, 183 Kan. 513, 525, 526, 331 P.2d 539, 548, 549 (1958). See also *East St. Johns Shingle Co. v. City of Portland*, 195 Or. 505, 246 P.2d 554, 560-562 (1952).

And:

. . . a party cannot justly call upon the law to make that place suitable for his residence which was not so when he selected it. . . .

*Gilbert v. Showerman*, 23 Mich. 448, 455, 2 Brown 158 (1871).

Were Webb the only party injured, we would feel justified in holding that the doctrine of "coming to the nuisance" would have been a bar to the relief asked by Webb, and, on the other hand, had Spur located the feedlot near the outskirts of a city and had the city grown toward the feedlot, Spur would have to suffer the cost of abating the nuisance as to those people locating within the growth pattern of the expanding city. . . .

There was no indication in the instant case at the time Spur and its predecessors located in western Maricopa County that a new city would spring up, full-blown, alongside the feeding operation and that the developer of that city would ask the court to order Spur to move because of the new city. Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public.

Del Webb, on the other hand, is entitled to the relief prayed for (a permanent injunction), not because Webb is blameless, but because of the damage to the people who have been encouraged to purchase homes in Sun City. It does not equitable or legally follow, however, that Webb, being entitled to the injunction, is then free of any liability to Spur if Webb has in fact been the cause of the damage Spur has sustained. It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result.

Having brought people to the nuisance to the foreseeable detriment of Spur, Webb must indemnify Spur for a reasonable amount of the cost of moving or shutting down. It should be noted that this relief to Spur is limited to a case wherein a developer has, with foreseeability, brought into a previously agricultural or industrial area the population which makes necessary the granting of an injunction against a lawful business and for which the business has no adequate relief.

It is therefore the decision of this court that the matter be remanded to the trial court for a hearing upon the damages sustained by the defendant Spur as a reasonable and direct result of the granting of the permanent

injunction. Since the result of the appeal may appear novel and both sides have obtained a measure of relief, it is ordered that each side will bear its own costs. . . .

### **Notes and Questions**

20.14. What if there had been no “guilty” developer like Del Webb? Why doesn’t the logic of the coming to a nuisance cases (quoted by the opinion) apply to those who chose to purchase from Del Webb?

20.15. **Public vs. Private Nuisances.** Public nuisances involve unreasonable interferences with rights held by the general public. Under the RESTATEMENT, they arise when the complained-of actions threaten public health, violate statutory law (including administrative regulations), or otherwise have a significant effect on a public right. RESTATEMENT (SECOND) OF TORTS § 821B (1979). Unlike private nuisances, they do not require an interference with the use of land. *Id.* cmt. h. As *Spur* indicates, one may sue on a public nuisance if one alleges a “special injury” specific to the plaintiff and not shared by the public at large.

20.16. In addition to using “coming to” nuisance arguments, feedlot operators may be specifically protected from nuisance suits. Some states explicitly insulate agricultural operations from nuisance liability with “right to farm” legislation. Kan. St. Ann. 2-3201 provides:

It is the declared policy of this state to conserve and protect and encourage the development and improvement of farmland for the production of food and other agricultural products. The legislature finds that agricultural activities conducted on farmland in areas in which nonagricultural uses have moved into agricultural areas are often subjected to nuisance lawsuits, and that such suits encourage and even force the premature removal of the lands from agricultural uses. It is therefore the purpose of this act to provide agricultural activities conducted on farmland protection from nuisance lawsuits.



# **Part IX**

## **Covenants**



# Chapter 21

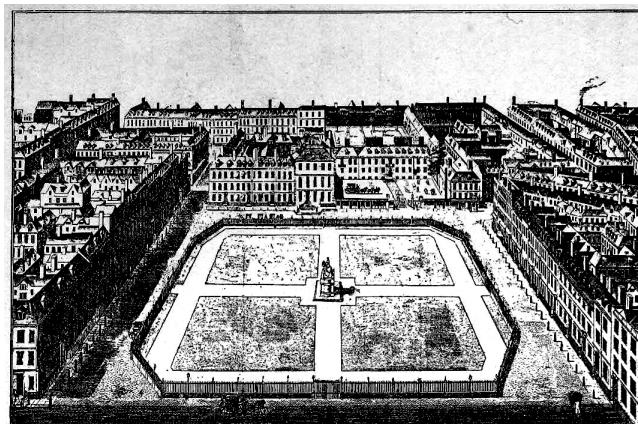
## Restrictive Covenants

### 21.1 Introduction

The historical antipathy of English law toward *negative easements*—the right of a landowner to *prevent* particular uses of *someone else's* land—made private ordering over conflicting land uses somewhat difficult. The basic problem is relatively easy to understand. Suppose Abigail pays her neighbor Beatrice \$1000 in exchange for a promise that Beatrice will use her land only for residential purposes, because Abigail does not want to live next door to a busy commercial or industrial facility. Suppose that Beatrice then begins to construct a factory on her land. Abigail could sue for breach of contract and obtain appropriate remedies—perhaps including injunctive relief barring Beatrice from building the factory.

But now suppose that instead of building a factory herself, Beatrice sells her land to Clara, who intends to build a factory on the land. Clara didn't promise Abigail anything, and Abigail gave Clara no consideration—they are not in privity of contract. We might therefore conclude that Abigail is out of luck: she cannot enforce a contract against someone who didn't agree to be bound by it. But if that is our conclusion, there is now a huge obstacle to Abigail and Beatrice ever reaching their agreement in the first place: how could Abigail ever trust that her consideration is worth paying if Beatrice can deprive Abigail of the benefit of the bargain by selling her (Beatrice's) land? More generally, if a promise to *refrain* from certain uses will not “run with the land,” can private parties ever effectively resolve their disputes over competing land uses by agreement?

Notwithstanding this concern, English courts were historically quite resistant to enforcing such restrictions against successors to the promisor's property interest.



**Figure 21.1:** Leicester Square in the 18th Century. Source: JOHN HOLLINGSHEAD, THE STORY OF LEICESTER SQUARE 19 (1892), British Library Online, [link](#).

As you've already learned, only a very small number of negative easements were recognized. Furthermore, actions at law—seeking the remedy of money damages—for breach of a covenant restricting the use of land were available only in quite limited circumstances, in cases involving landlord-tenant relationships. Early American courts were more willing to enforce such covenants outside of the landlord-tenant context, but still required quite strict chains of privity of estate—voluntary transfers of title by written instruments—before they would enforce such covenants by an action for money damages. Of course, where the dispute is over competing uses of neighboring land, perhaps money damages are not the appropriate—or even the desired—remedy. And herein was the key to substantial liberalization of the enforcement of restrictive covenants. Eventually, landowners with an interest in enforcing such covenants found a workaround.

***Tulk v. Moxhay***  
[1845] 47 Eng. Rep. 1345

This was a motion by way of appeal from the Master of the Rolls to dissolve an injunction.

In the month of July 1808, the Plaintiff was seised in fee-simple not only of the piece of ground which formed the open space or garden in Leicester Square, but also of several houses situated in that square.

By an indenture of release, dated the 15th of July 1808, and made between the Plaintiff, of the one part, and Charles Elms, of the other part, after reciting that the Plaintiff was seised of that piece of land in fee-simple, and had contracted to sell it to Elms, but not reciting that that contract was made subject to any condition, in consideration of £210, the Plaintiff conveyed to Elms, in fee-simple, "all that piece or parcel of land, commonly called Leicester Square Garden or pleasure-ground, with the equestrian statue then standing in the centre thereof, and the iron railings and stone-work round the garden, and all easements or ways, &c., to hold the same to Elms, his heirs and assigns for ever." And in that indenture there was contained a covenant by Elms, in the words following:— "And the said Charles Elms, for himself, his heirs, executors, administrators, and assigns, doth covenant, promise, and agree to and with the said Charles Augustus Tulk, his heirs, executors, and administrators, in manner following—that is to say, that he, the said Charles Elms, his heirs and assigns, shall and will, from time to time, and at all times for ever hereafter, at his and their own proper costs and charges, keep and maintain the said piece or parcel of ground and square garden, and the iron railing round the same, in its present form, and in sufficient and proper repair as a square garden and pleasure-ground, in an open state, uncovered with any buildings, in a neat and ornamental order; and shall not nor will take down, nor permit or suffer to be taken down or defaced, at any time or times hereafter, the equestrian statue now standing or being in the centre of the said square garden, but shall and will continue and keep the same in its present situation, as it now is; and also, that it shall be lawful to and for the inhabitants of Leicester Square aforesaid, tenants of the said Charles Augustus Tulk, and of John Augustus Tulk, Esq., his father, their heirs and assigns, as well as the said Charles Augustus Tulk and John Augustus Tulk, their heirs and assigns, on payment of a reasonable rent for the same, to have keys (at their own expense), and the privilege of admission therewith annually, at any time or times, into the said square garden and pleasure-ground."

The bill then stated, that . . . the Defendant had become the owner of that piece of ground by Virtue of a title derived from Elms [through several successive conveyances]; and that he had formed a plan, or scheme for erecting certain lines of shops and buildings thereon; but that the Plaintiff objected to such scheme, as being contrary to the aforesaid covenant, and injurious to the Plaintiff's houses in the square; that the Defendant had,

nevertheless, proceeded to cut down several of the trees and shrubs, and had pulled down part of the iron railing, and had erected a hoarding or boards across the said piece of ground.

The bill charged, that, at the time when the Defendant purchased the piece of ground, and also when he took possession thereof, and also when he committed the acts complained of, he had notice of the covenant.

The bill prayed, that the Defendant, and his agents and workmen, might be restrained from . . . doing or committing, or permitting or suffering to be done or committed, any waste, spoil, destruction, or nuisance to be in or upon the said piece of garden ground.

An *ex parte* injunction was obtained from the Master of the Rolls, and the Defendant . . . by his answer, stated, that the inhabitants of Leicester Square and of the Plaintiff's houses had entirely ceased to use this piece of ground as a garden and pleasure-ground, or to pay any sum for the privilege of admission; and that, for many years before the Defendant purchased it, it had been in a ruinous condition, and not in an ornamental state, but altogether out of repair; that Tulk never took any steps to enforce the covenant, or to have the site of the ground improved; that the square was no longer a quiet place of residence, but that a thoroughfare had lately been made through it from Long Acre to Piccadilly; that he proposed to open two footpaths diagonally across the square, putting up gates and fences; that he had not yet fixed on any plan for building on it; or as to the ultimate use he should make of it; but he reserved by his answer the right to make all such use of the land as he might thereafter think fit, and lawfully could do; and he also submitted to the Court, that the covenant did not run with the land, and did not bind him as assignee.

The Defendant applied to the Master of the Rolls to dissolve the injunction, which his Lordship refused to do . . . . The effect of the injunction, as varied, was to restrain the Defendant, his workmen, &c., from converting or using the piece of ground and square garden in the bill mentioned, and the iron railing round the same, to or for any other purpose than as a square garden and pleasure-ground, in an open state, uncovered with buildings, until the hearing of this cause, or the further order of this Court.

The motion to dissolve the injunction was now renewed before the Lord Chancellor . . . .

**The Lord Chancellor [Cottenham].**

. . . It is not disputed that a party selling land may, by some means or other, provide that the party to whom he sells it shall conform to certain rules, which the parties may think proper to lay down as between themselves. They may so contract as to bind the party purchasing to deal with the land according to the stipulation between him and the vendor . . . . Here, then, upon the face of the instrument, and in a manner free from doubt . . . the owner of the houses sells and disposes of land adjoining to those houses with an express covenant on the part of the purchaser, his heirs and assigns, that there shall be no buildings erected upon that land. It is now contended, not that Elms, the vendee, could violate that contract—not that he could build immediately after he had covenanted not to build, or that this Court could have had any difficulty, if he had made that attempt, to prevent him from building—but that he might sell that piece of land as if it were not incumbered with that covenant; and that the person to whom he sold it might at once, without the risk of the interference of this Court, violate the covenant of the party from whom he purchased it.

Now, I do not apprehend that the jurisdiction of this Court is fettered by the question, whether the covenant runs with the land or not. The question is, whether a party taking property with a stipulation to use it in a particular manner—that stipulation being imposed on him by the vendor in such a manner as to be binding by the law and principles of this Court—will be permitted by this Court to use it in a way diametrically opposite to that which the party has stipulated for. . . . Of course, the party purchasing the property, which is under such restriction, gives less for it than he would have given if he had bought it unincumbered. Can there, then, be anything much more inequitable or contrary to good conscience, than that a party, who takes property at a less price because it is subject to a restriction, should receive the full value from a third party, and that such third party should then hold it unfettered by the restriction under which it was granted? That would be most inequitable, most unjust, and most unconscientious; and, as far as I am informed, this Court never would sanction any such course of proceeding; but, on the contrary, it has always acted upon this principle, that you, who have the property, are bound by the principles and law of this Court to submit to the contract you have entered into; and you will not be permitted to hand over that property, and give to your

assignee or your vendee a higher title, with regard to interest as between yourself and your vendor, than you yourself possess.

That is quite unconnected with the doctrine of a covenant running with the land. . . . There is no question about the legal liability, which is best proved by this: that if there be a merely legal agreement, and no covenant—no question about the covenant running with the land—the party who takes the land takes it subject to the equity which the owner of the property has created: and if he takes it, subject to that equity, created by those through whom he has derived a title to it, is it not the rule of this Court, that the party, who has taken the property with knowledge of the equity, is liable to the equity? Is not this an equity attached to the property, by the party who is competent to bind the property? If a party enters into an agreement for a lease, and then sells the property which was to be demised, the purchaser of that property, with knowledge of the agreement, cannot set up his title against the party claiming the benefit of that contract; because, if there had been an equity attaching to the property in the owner, the owner is not permitted to give a better title to the purchaser with notice than he himself possesses. The other party is entitled to the benefit of the contract, and to have it exercised and carried into effect against the person who is in possession, unless that person can shew he purchased it without notice. Here there is a clear, distinct, and admitted equity in the vendor, as against Mr. Elms; and as to the party now sought to be affected by it, it is not in dispute that he took the land with notice of the covenant: indeed, it appears on the face of the instrument which is the foundation of his title. It seems to me to be the simplest case that a Court of Equity ever acted upon, that a purchaser cannot have a better title than the party under whom he claims.

Without adverting to any question about a covenant running with land or not, I consider that this piece of land is purchased subject to an equity created by a party competent to create it; that the present Defendant took it with distinct knowledge of such equity existing; and that such equity ought to be enforced against him, as it would have been against the party who originally took the land from Mr. Tulk.

. . . I think, therefore, that the Master of the Rolls is quite right . . . and that this motion must be refused, with costs.

### Notes and Questions

21.1. Is the result in *Tulk* attributable to a difference in the willingness of courts of equity (as compared to courts of law) to find a covenant will “run with the land”? To the principle of *nemo dat*? To the rules regarding good-faith purchasers? To something else?

21.2. Is the result in *Tulk* consistent with the principle of *numerus clausus*? With the common-law policy against restraints on alienation?

21.3. *Tulk v. Moxhay* represented a new opening for private ordering regarding competing land uses, which hinged on the distinction between law and equity. In the end, the equitable exception swallowed the legal rule against restrictive covenants running with land. As one court explained:

In the past, some courts . . . have distinguished between a “real covenant” that runs with the land and an “equitable covenant” (sometimes called an “equitable servitude” or “equitable restriction”) that runs with the land. Today however, the *Restatement [(Third), Property (Servitudes)]* sensibly explains:

[T]he differences between covenants that historically could be enforced at law and those enforceable in equity . . . have all but disappeared in modern law. Continuing use of the dual terminology of real covenant and equitable servitude is confusing because it suggests the continued existence of two separate servitude categories with important differences. In fact, however, in modern law there are no significant differences. Valid covenants, like other contracts and property interests, can be enforced and protected by both legal and equitable remedies as appropriate, without regard to the form of the transaction that created the servitude.

*Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wash. App. 246, 253-54, 84 P.3d 295, 298-99 (2004) (footnotes omitted).

21.4. It is worth noting again that the THIRD RESTatement, quoted in *Lake Limerick Country Club*, is somewhat unique in not simply restating the law but also pushing it in a particular direction. Many jurisdictions have yet to adopt its more modern approach on merging the various servitudes, or on other important issues. As always in property law, it is important to consult the relevant authorities in your jurisdiction in order to determine whether courts there still follow more traditional

rules regarding the creation, enforcement, modification, and termination of restrictive covenants.

21.5. **Coase Revisited.** Which way do the equities really cut in *Tulk*? Lord Chancellor Cottenham concluded that it was unfair for Moxhay to deprive Tulk of the benefit of his bargain with Elms. Couldn't we just as easily say it is unfair for Tulk to interfere with Moxhay's use of the land he purchased? Indeed, given that English law courts of the time typically refused to hold that restrictive covenants would run with the land, doesn't Moxhay have the stronger equitable case? Wasn't it unreasonable for Tulk to expect he could obtain an enforceable covenant from *Elms alone* on behalf of Elms's "heirs, executors, administrators, and assigns"?

21.6. Put another way, isn't the problem here *reciprocal* in that the parties simply have incompatible land use preferences? Thus, when Lord Cottenham rhetorically asks, "Is not this an equity attached to the property, by the party who is competent to bind the property?" is he merely assuming the initial allocation of the relevant entitlement to the party that was there first? If so, is the application of a restrictive covenant to successors a circumstance in which the parties could effectively bargain to reach the efficient result?

21.7. Recall the dispute between Abigail, Beatrice, and Clara on page 595. Does the principle of "first in time is first in right" provide any reason to privilege Abigail's preferred use of Clara's land over Clara's preferred use? Does the fact that Abigail and Beatrice reached their agreement *before* Clara became involved suggest that, as a matter of general property law principles, later comers will have to either abide by that agreement or obtain *both parties'* consent to abrogate it? Is such a rule necessary to protect Abigail's legitimate expectations with respect to the use and enjoyment of her own property?

21.8. More generally, are the arguments supporting the principle of priority in time persuasive when applied to land *use* conflicts (as opposed to disputes over *title* or *possession*)? Conversely, if we *do* allow agreements like the one Abigail and Beatrice to run with the land, are we giving past owners too much control over the ability of present and future owners to adapt their land uses to changing circumstances?

## 21.2 Creation of an Enforceable Restrictive Covenant

As courts became more amenable to the enforcement of restrictive covenants by and against successors to the property interests of the original covenanting parties, they developed a set of requirements for such covenants to run with the land. As one court described these requirements:

The prerequisites for a covenant to “run with the land” are these: (1) the covenants must have been enforceable between the original parties, such enforceability being a question of contract law except insofar as the covenant must satisfy the statute of frauds; (2) the covenant must “touch and concern” both the land to be benefitted and the land to be burdened; (3) the covenanting parties must have intended to bind their successors-in-interest; (4) there must be vertical privity of estate, i.e., privity between the original parties to the covenant and the present disputants; and (5) there must be horizontal privity of estate, or privity between the original parties.

*Leighton v. Leonard*, 589 P.2d 279, 281 (Ct. App. Wash. Div. 1 1978). A further requirement is that a restrictive covenant is enforceable only against parties who are on actual or constructive notice of it. See *id.* at 281-282; accord *Inwood N. Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987).

The THIRD RESTATEMENT, following general trends in the caselaw, significantly relaxes this approach. Section 2.1 of the RESTATEMENT provides in relevant part:

A servitude is created

(1) if the owner of the property to be burdened

(a) enters into a contract or makes a conveyance intended to create a servitude that complies with . . . [the] Statute of Frauds . . . or . . . [a recognized e]xception to the Statute of Frauds . . . ; or

(b) conveys a lot or unit in a general-plan development or common-interest community subject to a recorded declaration of servitudes for the development or community; or

(2) if the requirements for creation of a servitude by estoppel, implication, necessity, or prescription . . . are met . . . .

A few features of the RESTATEMENT approach are worth noting. The first is that the common law's requirement of "horizontal privity of estate"—that the covenant be created in an instrument that conveys some interest in real property between the original covenantor and the original covenantee<sup>1</sup>—is eliminated. Under the RESTATEMENT view, a contract containing the covenant is sufficient to bind successors, even if it passes no *other* property interest, so long as the parties intended the covenant to run with the land. (Under this view, a covenant intended to bind successors is *itself* a sufficient interest in land.) Second, there is a deep connection between covenants that run with the land and "common-interest communities"—a property law institution that we will investigate further in a later chapter. Third, the Restatement elsewhere treats the common law requirement of notice as essentially a matter for the recording system, making the unenforceability of covenants for want of notice subject to the same rules as any other property interest. See RESTATEMENT § 7.14.

Finally, the RESTATEMENT rejects, with heavy criticism, the common law requirement that a restrictive covenant "touch or concern" land. RESTATEMENT § 3.1 cmt. a. Nevertheless, many jurisdictions continue to apply touch-and-concern doctrine, sometimes explicitly declining to follow the Restatement approach. See *Note: Touch and Concern, the Restatement (Third) of Property: Servitudes, and a Proposal*, 122 HARV. L. REV. 938, 942-45 (2009)). It is worth comparing the two approaches.

***Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank***  
15 N.E.2d 793 (N.Y. 1938)

**LEHMAN, Judge.**

The plaintiff, as assignee of Neponsit Realty Company, has brought this action to foreclose a lien upon land which the defendant owns. The lien, it is alleged, arises from a covenant, condition or charge contained in a deed of conveyance of the land from Neponsit Realty Company to a predecessor in title of the defendant. The defendant purchased the land at a judicial sale. The referee's deed to the defendant and every deed in the defendant's

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<sup>1</sup>Thus, at common-law, if B promised to use her land only for residential purposes in a deed from A to B, A and B would be in horizontal privity of estate with one another. However, if A and B simply entered into a *contract* whereby A paid B a sum of money in exchange for B's promise to use her land only for residential purposes, they would not be in horizontal privity of estate—because no interest in real property passed under the contract.

chain of title since the conveyance of the land by Neponsit Realty Company purports to convey the property subject to the covenant, condition or charge contained in the original deed . . . .

Upon this appeal the defendant contends that the land which it owns is not subject to any lien or charge which the plaintiff may enforce. Its arguments are confined to serious questions of law. . . . On this appeal we may confine our consideration to the merits of these questions, and, in our statement of facts, we drew indiscriminately from the allegations of the complaint and the allegations of the answer.

It appears that in January, 1911, Neponsit Realty Company, as owner of a tract of land in Queens county, caused to be filed in the office of the clerk of the county a map of the land. The tract was developed for a strictly residential community, and Neponsit Realty Company conveyed lots in the tract to purchasers, describing such lots by reference to the filed map and to roads and streets shown thereon. In 1917, Neponsit Realty Company conveyed the land now owned by the defendant to Robert Oldner Deyer and his wife by deed which contained the covenant upon which the plaintiff's cause of action is based.

That covenant provides:

And the party of the second part for the party of the second part and the heirs, successors and assigns of the party of the second part further covenants that the property conveyed by this deed shall be subject to an annual charge in such an amount as will be fixed by the party of the first part, its successors and assigns, not, however exceeding in any year the sum of four (\$4.00) Dollars per lot 20x100 feet. The assigns of the party of the first part may include a Property Owners' Association which may hereafter be organized for the purposes referred to in this paragraph, and in case such association is organized the sums in this paragraph provided for shall be payable to such association. The party of the second part for the party of the second part and the heirs, successors and assigns of the party of the second part covenants that they will pay this charge to the party of the first part, its successors and assigns on the first day of May in each and every year, and further covenants that said charge shall on said date in each year become a lien on the land and shall continue to be such lien

until fully paid. Such charge shall be payable to the party of the first part or its successors or assigns, and shall be devoted to the maintenance of the roads, paths, parks, beach, sewers and such other public purposes as shall from time to time be determined by the party of the first part, its successors or assigns. And the party of the second part by the acceptance of this deed hereby expressly vests in the party of the first part, its successors and assigns, the right and power to bring all actions against the owner of the premises hereby conveyed or any part thereof for the collection of such charge and to enforce the aforesaid lien therefor.

These covenants shall run with the land and shall be construed as real covenants running with the land until January 31st, 1940, when they shall cease and determine.

Every subsequent deed of conveyance of the property in the defendant's chain of title, including the deed from the referee to the defendant, contained, as we have said, a provision that they were made subject to covenants and restrictions of former deeds of record.

There can be no doubt that Neponsit Realty Company intended that the covenant should run with the land and should be enforceable by a property owners association against every owner of property in the residential tract which the realty company was then developing. The language of the covenant admits of no other construction. Regardless of the intention of the parties, a covenant will run with the land and will be enforceable against a subsequent purchaser of the land at the suit of one who claims the benefit of the covenant, only if the covenant complies with certain legal requirements. These requirements rest upon ancient rules and precedents. The age-old essentials of a real covenant, aside from the form of the covenant, may be summarily formulated as follows: (1) It must appear that grantor and grantees intended that the covenant should run with the land; (2) it must appear that the covenant is one "touching" or "concerning" the land with which it runs; (3) it must appear that there is "privity of estate" between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant . . . .

The covenant in this case is intended to create a charge or obligation to pay a fixed sum of money to be "devoted to the maintenance of the roads,

paths, parks, beach, sewers and such other public purposes as shall from time to time be determined by the party of the first part [the grantor], its successors or assigns." It is an affirmative covenant to pay money for use in connection with, but not upon, the land which it is said is subject to the burden of the covenant. Does such a covenant "touch" or "concern" the land? . . . In truth such a description or test so formulated is too vague to be of much assistance and judges and academic scholars alike have struggled, not with entire success, to formulate a test at once more satisfactory and more accurate. "It has been found impossible to state any absolute tests to determine what covenants touch and concern land and what do not. The question is one for the court to determine in the exercise of its best judgment upon the facts of each case." Clark, op. cit. p. 76.

Even though that be true, a determination by a court in one case upon particular facts will often serve to point the way to correct decision in other cases upon analogous facts. Such guideposts may not be disregarded. It has been often said that a covenant to pay a sum of money is a personal affirmative covenant which usually does not concern or touch the land. Such statements are based upon English decisions which hold in effect that only covenants, which compel the covenanter to submit to some *restriction on the use* of his property, touch or concern the land, and that the burden of a covenant which requires the covenanter to do an affirmative act, even on his own land, for the benefit of the owner of a "dominant" estate, does not run with his land. . . . [Nevertheless s]ome promises to pay money have been enforced, as covenants running with the land, against subsequent holders of the land who took with notice of the covenant. . . . [T]hough it may be inexpedient and perhaps impossible to formulate a rigid test or definition which will be entirely satisfactory or which can be applied mechanically in all cases, we should at least be able to state the problem and find a reasonable method of approach to it. It has been suggested that a covenant which runs with the land must affect the legal relations—the advantages and the burdens—of the parties to the covenant, as owners of particular parcels of land and not merely as members of the community in general, such as taxpayers or owners of other land. That method of approach has the merit of realism. The test is based on the effect of the covenant rather than on technical distinctions. Does the covenant impose, on the one hand, a burden upon an interest in land, which on the other hand increases the value of a different interest in the same or related land?

Even though we accept that approach and test, it still remains true that whether a particular covenant is sufficiently connected with the use of land to run with the land, must be in many cases a question of degree. A promise to pay for something to be done in connection with the promisor's land does not differ essentially from a promise by the promisor to do the thing himself, and both promises constitute, in a substantial sense, a restriction upon the owner's right to use the land, and a burden upon the legal interest of the owner. On the other hand, a covenant to perform or pay for the performance of an affirmative act disconnected with the use of the land cannot ordinarily touch or concern the land in any substantial degree. Thus, unless we exalt technical form over substance, the distinction between covenants which run with land and covenants which are personal, must depend upon the effect of the covenant on the legal rights which otherwise would flow from ownership of land and which are connected with the land. The problem then is: Does the covenant in purpose and effect substantially alter these rights?

. . . Looking at the problem presented in this case . . . and stressing the intent and substantial effect of the covenant rather than its form, it seems clear that the covenant may properly be said to touch and concern the land of the defendant and its burden should run with the land. True, it calls for payment of a sum of money to be expended for "public purposes" upon land other than the land conveyed by Neponsit Realty Company to plaintiff's predecessor in title. By that conveyance the grantee, however, obtained not only title to particular lots, but an easement or right of common enjoyment with other property owners in roads, beaches, public parks or spaces and improvements in the same tract. For full enjoyment in common by the defendant and other property owners of these easements or rights, the roads and public places must be maintained. In order that the burden of maintaining public improvements should rest upon the land benefited by the improvements, the grantor exacted from the grantee of the land with its appurtenant easement or right of enjoyment a covenant that the burden of paying the cost should be inseparably attached to the land which enjoys the benefit. It is plain that any distinction or definition which would exclude such a covenant from the classification of covenants which "touch" or "concern" the land would be based on form and not on substance . . .

. . . Another difficulty remains. Though between the grantor and the grantee there was privity of estate, the covenant provides that its bene-

fit shall run to the assigns of the grantor who "may include a Property Owners' Association which may hereafter be organized for the purposes referred to in this paragraph." The plaintiff has been organized to receive the sums payable by the property owners and to expend them for the benefit of such owners. Various definitions have been formulated of "privity of estate" in connection with covenants that run with the land, but none of such definitions seems to cover the relationship between the plaintiff and the defendant in this case. The plaintiff has not succeeded to the ownership of any property of the grantor. It does not appear that it ever had title to the streets or public places upon which charges which are payable to it must be expended. It does not appear that it owns any other property in the residential tract to which any easement or right of enjoyment in such property is appurtenant. It is created solely to act as the assignee of the benefit of the covenant, and it has no interest of its own in the enforcement of the covenant.

The arguments that under such circumstances the plaintiff has no right of action to enforce a covenant running with the land are all based upon a distinction between the corporate property owners association and the property owners for whose benefit the association has been formed. If that distinction may be ignored, then the basis of the arguments is destroyed. How far privity of estate in technical form is necessary to enforce in equity a restrictive covenant upon the use of land, presents an interesting question. Enforcement of such covenants rests upon equitable principles, and at times, at least, the violation "of the restrictive covenant may be restrained at the suit of one who owns property or for whose benefit the restriction was established, irrespective of whether there were privity either of estate or of contract between the parties, or whether an action at law were maintainable." *Chesebro v. Moers*, 233 N.Y. 75, 80, 134 N.E. 842, 843, 21 A.L.R. 1270. . . . We do not attempt . . . to formulate a definite rule as to when, or even whether, covenants in a deed will be enforced, upon equitable principles, against subsequent purchasers with notice, at the suit of a party without privity of contract or estate. There is no need to resort to such a rule if the courts may look behind the corporate form of the plaintiff.

The corporate plaintiff has been formed as a convenient instrument by which the property owners may advance their common interests. We do not ignore the corporate form when we recognize that the Neponsit Property Owners' Association, Inc., is acting as the agent or representa-

tive of the Neponsit property owners. As we have said in another case: when Neponsit Property Owners' Association, Inc., "was formed, the property owners were expected to, and have looked to that organization as the medium through which enjoyment of their common right might be preserved equally for all." *Matter of City of New York, Public Beach, Borough of Queens*, 269 N.Y. 64, 75, 199 N.E. 5, 9. Under the conditions thus presented we said: "It may be difficult, or even impossible to classify into recognized categories the nature of the interest of the membership corporation and its members in the land. The corporate entity cannot be disregarded, nor can the separate interests of the members of the corporation" (page 73, 199 N.E. page 8). Only blind adherence to an ancient formula devised to meet entirely different conditions could constrain the court to hold that a corporation formed as a medium for the enjoyment of common rights of property owners owns no property which would benefit by enforcement of common rights and has no cause of action in equity to enforce the covenant upon which such common rights depend. Every reason which in other circumstances may justify the ancient formula may be urged in support of the conclusion that the formula should not be applied in this case. In substance if not in form the covenant is a restrictive covenant which touches and concerns the defendant's land, and in substance, if not in form, there is privity of estate between the plaintiff and the defendant . . . .

### Notes and Questions

21.9. Does the touch-and-concern requirement lessen the potential for conflict between the law of restrictive covenants and the common-law doctrines designed to preserve marketability of land, such as *numerus clausus* and the rule against restraints on alienation?

21.10. As with easements, restrictive covenants may be implied in particular circumstances, and they may arise by estoppel. The most common context for such a covenant by implication is a common-scheme development, where purchasers acquire an interest in a parcel that is part of a community that appears to have commonly planned features—such as residential uses of particular size and density. Such purchasers may be charged with notice of an implied reciprocal covenant restricting their parcels to uses consistent with the common scheme or plan. See *Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925); RESTATEMENT §§ 2.11 & illus. 7; § 2.14. Conversely, where the seller touts the benefits of such features to purchasers who

buy in reliance on the seller's representations, the seller and his successors may be estopped from using the seller's retained land in a manner inconsistent with those uses. Indeed, such an estoppel may even serve as an acceptable substitute for the writing required under the Statute of Frauds. RESTATEMENT §§ 2.9-2.10.

21.11. A historical note in the THIRD RESTATEMENT explains:

At the beginning of the 20th century, four doctrines peculiar to servitudes law constrained landowners in the creation of servitudes: the horizontal-privity doctrine, the prohibition on creating benefits in gross, the prohibition on imposing affirmative burdens on fee owners, and the touch-or-concern doctrine. At the end of the century, little remains of those doctrines, which have gradually been displaced by doctrines that more specifically target the harms that may be caused by servitudes.

RESTATEMENT § 3.1, cmt. a. The touch-and-concern doctrine comes in for particular criticism in the RESTATEMENT, which attacks the doctrine's "vagueness, its obscurity, its intent-defeating character, and its growing redundancy." *Id.* § 3.2 cmt. b. Accordingly, the RESTATEMENT adopts a very different approach to the question of enforceability of restrictive covenants:

## **Restatement (Third) of Property (Servitudes)**

### **§ 3.1 Validity of Servitudes: General Rule**

A servitude . . . is valid unless it is illegal or unconstitutional or violates public policy.

Servitudes that are invalid because they violate public policy include, but are not limited to:

- (1) a servitude that is arbitrary, spiteful, or capricious;
- (2) a servitude that unreasonably burdens a fundamental constitutional right;
- (3) a servitude that imposes an unreasonable restraint on alienation . . . ;
- (4) a servitude that imposes an unreasonable restraint on trade or competition . . . ; and
- (5) a servitude that is unconscionable . . .

### Notes and Questions

21.12. Is the rationale of the touch-and-concern requirement discussed in *Neponsit* reflected in Section 3.1 of the RESTATEMENT? If not, are there other features of Section 3.1 that serve the common-law rules designed to ensure marketability of real property?

21.13. The RESTATEMENT's invalidation of servitudes that impose "an unreasonable restraint on alienation" draws further distinctions between "direct" and "indirect" restraints. "Direct" restraints—including overt prohibitions on lease or transfer, rights to withhold consent, options to purchase, and rights of first refusal—are valid if "reasonable," with reasonableness being determined "by weighing the utility of the restraint against the injurious consequences of enforcing the restraint." RESTATEMENT § 3.4. An "indirect" restraint is any other restriction on use that might incidentally "limit[] the numbers of potential buyers or . . . reduc[e] the amount the owner might otherwise realize on a sale of the property," and such a covenant is valid unless it "lacks a rational justification." *Id.* § 3.5 & cmt. a.

21.14. In the late 2000s, as the financial crisis and the collapse of the housing market dealt crippling blows to the construction industry, one firm came up with what it thought was a clever solution that built on the same securitization model that powered the mortgage market in the run-up to the collapse. The firm, Freehold Capital Partners, advised real estate developers to insert a covenant in all the deeds to lots in their new housing subdivisions that would require the purchaser and their successors to pay a portion of the resale price *to the developer* on every subsequent transfer of the property. See Robbie Whelan, *Home-Resale Fees Under Attack*, WALL ST. J. (July 30, 2010), [link](#). The plan was to securitize these "private transfer fee" payments: sell off slices of the right to the income stream from the transfer fees, and use the sale price of the securities to finance the construction of the homes that would be encumbered by the private transfer fee covenants. The scheme as conceived would not necessarily require the developer to retain title to any real property in the developments bound by these covenants.

Realtors, title search agencies, legislators, and eventually the federal government mobilized against this business model. Many states passed statutes prohibiting or seriously restricting these private fee transfer covenants. See, e.g., TEX. PROP. CODE § 5.202 (effective June 17, 2011). As of March 16, 2012, the Federal agencies that repurchase or otherwise backstop many American residential mortgages will not deal in mortgages on properties encumbered by such covenants.

Was all this legislative and regulatory action necessary? Would Freehold Capital Partners' private transfer fee covenants be enforceable under the common law of restrictive covenants as set forth in *Neponsit*? Under the RESTATEMENT?

21.15. What other types of covenants might offend public policy? And how far will public policy intrude on private ordering of property rights? Keep this question in mind for when we read *Shelley v. Kraemer*.

## 21.3 Modification and Termination of Covenants

Restrictive covenants, like easements, can be modified or terminated in many ways. The Restatement mostly does not draw a distinction between these two types of servitudes with respect to modification or termination, meaning that the grounds for termination discussed in our unit on Easements—merger, agreement, abandonment, etc.—apply with equal force to restrictive covenants. Note, however, that where a covenant benefits and burdens multiple lots simultaneously (as in *Neponsit*), these grounds for termination will be inordinately more difficult to satisfy, simply because more parties must give their consent or acquiescence and thus any one of them could effectively veto the covenant's termination.

One basis for modification or termination that is perhaps more likely to arise with respect to restrictive covenants than it is for easements is that conditions of the land have changed to such an extent that continued enforcement is inappropriate. This is particularly so where the restrictive covenants are part of a common scheme or plan for a community—precisely the circumstance in which other means of termination are likely to be difficult. In such a community, what types of changes to “facts on the ground” should justify terminating the covenants shaping the community’s land uses?

***El Di, Inc. v. Town of Bethany Beach***  
477 A.2d 1066 (Del. 1984)

**HERRMANN, Chief Justice for the majority:**

This is an appeal from a permanent injunction granted by the Court of Chancery upon the petition of the plaintiffs, The Town of Bethany Beach, et al., prohibiting the defendant, El Di, Inc. (“El Di”) from selling alcoholic

beverages at Holiday House, a restaurant in Bethany Beach owned and operated by El Di.

## I.

The pertinent facts are as follows:

El Di purchased the Holiday House in 1969. In December 1981, El Di filed an application with the State Alcoholic Beverage Control Commission (the "Commission") for a license to sell alcoholic beverages at the Holiday House. On April 15, 1982, finding "public need and convenience," the Commission granted the Holiday House an on-premises license. The sale of alcoholic beverages at Holiday House began within 10 days of the Commission's approval. Plaintiffs subsequently filed suit to permanently enjoin the sale of alcoholic beverages under the license.

On appeal it is undisputed that the chain of title for the Holiday House lot included restrictive covenants prohibiting both the sale of alcoholic beverages on the property and nonresidential construction.<sup>1</sup> The same restriction was placed on property in Bethany Beach as early as 1900 and 1901 when the area was first under development.

As originally conceived, Bethany Beach was to be a quiet beach community. The site was selected at the end of the nineteenth-century by the Christian Missionary Society of Washington, D.C. In 1900, the Bethany Beach Improvement Company ("BBIC") was formed. The BBIC purchased lands, laid out a development and began selling lots. To insure the quiet character of the community, the BBIC placed restrictive covenants on many plots, prohibiting the sale of alcohol and restricting construction to residential cottages. Of the original 180 acre development, however, approximately 1/3 was unrestricted.

The Town of Bethany Beach was officially incorporated in 1909. The municipal limits consisted of 750 acres including the original BBIC land

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<sup>1</sup>The restrictive covenant stated:

"This covenant is made expressly subject to and upon the following conditions: viz; That no intoxicating liquors shall ever be sold on the said lot, that no other than dwelling or cottage shall be erected thereon and but one to each lot, which must be of full size according to the said plan . . . a breach of which said conditions, or any of them, shall cause said lot to revert to and become again the property of the grantor, his heirs and assigns; and upon such breach of said conditions or restrictions, the same may be restrained or enjoined in equity by the grantor, his heirs or assigns, or by any co-lot owner in said plan or other party injured by such breach."

(hereafter the original or “old-Town”), but expanded far beyond the 180 acre BBIC development. The expanded acreage of the newly incorporated Town, combined with the unrestricted plots in the original Town, left only 15 percent of the new Town subject to the restrictive covenants.

Despite the restriction prohibiting commercial building (“no other than a dwelling or cottage shall be erected . . . ”), commercial development began in the 1920’s on property subject to the covenants. This development included numerous inns, restaurants, drug stores, a bank, motels, a town hall, shops selling various items including food, clothing, gifts and novelties and other commercial businesses. Of the 34 commercial buildings presently within the Town limits, 29 are located in the old-Town originally developed by BBIC. Today, Bethany Beach has a permanent population of some 330 residents. In the summer months the population increases to approximately 10,000 people within the corporate limits and to some 48,000 people within a 4 mile radius. In 1952, the Town enacted a zoning ordinance which established a central commercial district designated C-1 located in the old-Town section. Holiday House is located in this district.

Since El Di purchased Holiday House in 1969, patrons have been permitted to carry their own alcoholic beverages with them into the restaurant to consume with their meals. This “brown-bagging” practice occurred at Holiday House prior to El Di’s ownership and at other restaurants in the Town. El Di applied for a license to sell liquor at Holiday House in response to the increased number of customers who were engaging in “brown-bagging” and in the belief that the license would permit restaurant management to control excessive use of alcohol and use by minors. Prior to the time El Di sought a license, alcoholic beverages had been and continue to be readily available for sale at nearby licensed establishments including: one restaurant  $\frac{1}{2}$  mile outside the Town limits, 3 restaurants within a 4 mile radius of the Town, and a package store some 200-300 yards from the Holiday House.

The Trial Court granted a stay pending the outcome of this appeal.

## II.

In granting plaintiffs’ motion for a permanent injunction, the Court of Chancery rejected defendant’s argument that changed conditions in Bethany Beach rendered the restrictive covenants unreasonable and therefore unenforceable. The Chancery Court found that although the evidence

showed a considerable growth since 1900 in both population and the number of buildings in Bethany Beach, "the basic nature of Bethany Beach as a quiet, family oriented resort has not changed." The Court also found that there had been development of commercial activity since 1900, but that this "activity is limited to a small area of Bethany Beach and consists mainly of activities for the convenience and patronage of the residents of Bethany Beach."

The Trial Court also rejected defendant's contention that plaintiffs' acquiescence and abandonment rendered the covenants unenforceable. In this connection, the Court concluded that the practice of "brown-bagging" was not a sale of alcoholic beverages and that, therefore, any failure to enforce the restriction as against the practice did not constitute abandonment or waiver of the restriction.

### III.

We find that the Trial Court erred in holding that the change of conditions was insufficient to negate the restrictive covenant.

A court will not enforce a restrictive covenant where a fundamental change has occurred in the intended character of the neighborhood that renders the benefits underlying imposition of the restrictions incapable of enjoyment. Review of all the facts and circumstances convinces us that the change, since 1901, in the character of that area of the old-Town section now zoned C-1 is so substantial as to justify modification of the deed restriction. We need not determine a change in character of the entire restricted area in order to assess the continued applicability of the covenant to a portion thereof.

It is uncontradicted that one of the purposes underlying the covenant prohibiting the sale of intoxicating liquors was to maintain a quiet, residential atmosphere in the restricted area. Each of the additional covenants reinforces this objective, including the covenant restricting construction to residential dwellings. The covenants read as a whole evince an intention on the part of the grantor to maintain the residential, seaside character of the community.

But time has not left Bethany Beach the same community its grantors envisioned in 1901. The Town has changed from a church-affiliated residential community to a summer resort visited annually by thousands of tourists. Nowhere is the resultant change in character more evident than

in the C-1 section of the old-Town. Plaintiffs argue that this is a relative change only and that there is sufficient evidence to support the Trial Court's findings that the residential character of the community has been maintained and that the covenants continue to benefit the other lot owners. We cannot agree.

In 1909, the 180 acre restricted old-Town section became part of a 750 acre incorporated municipality. Even prior to the Town's incorporation, the BBIC deeded out lots free of the restrictive covenants. After incorporation and partly due to the unrestricted lots deeded out by the BBIC, 85 percent of the land area within the Town was not subject to the restrictions. Significantly, nonresidential uses quickly appeared in the restricted area and today the old-Town section contains almost all of the commercial businesses within the entire Town.

The change in conditions is also reflected in the Town's decision in 1952 to zone restricted property, including the lot on which the Holiday House is located, specifically for commercial use. Although a change in zoning is not dispositive as against a private covenant, it is additional evidence of changed community conditions.

Time has relaxed not only the strictly residential character of the area, but the pattern of alcohol use and consumption as well. The practice of "brown-bagging" has continued unchallenged for at least twenty years at commercial establishments located on restricted property in the Town. On appeal, plaintiffs rely on the Trial Court finding that the "brown-bagging" practice is irrelevant as evidence of waiver inasmuch as the practice does not involve the sale of intoxicating liquors prohibited by the covenant. We find the "brown-bagging" practice evidence of a significant change in conditions in the community since its inception at the turn of the century. Such consumption of alcohol in public places is now generally tolerated by owners of similarly restricted lots. The license issued to the Holiday House establishment permits the El Di management to better control the availability and consumption of intoxicating liquors on its premises. In view of both the ready availability of alcoholic beverages in the area surrounding the Holiday House and the long-tolerated and increasing use of "brown-bagging" enforcement of the restrictive covenant at this time would only serve to subvert the public interest in the control of the availability and consumption of alcoholic liquors.

. . . In view of the change in conditions in the C-1 district of Bethany Beach, we find it unreasonable and inequitable now to enforce the restrictive covenant. To permit unlimited "brown-bagging" but to prohibit licensed sales of alcoholic liquor, under the circumstances of this case, is inconsistent with any reasonable application of the restriction and contrary to public policy.

We emphasize that our judgment is confined to the area of the old-Town section zoned C-1. The restrictions in the neighboring residential area are unaffected by the conclusion we reach herein.

Reversed.

**CHRISTIE, Justice, with whom MOORE, Justice, joins, dissenting:**

I respectfully disagree with the majority.

I think the evidence supports the conclusion of the Chancellor, as finder of fact, that the basic nature of the community of Bethany Beach has not changed in such a way as to invalidate those restrictions which have continued to protect this community through the years as it has grown. Although some of the restrictions have been ignored and a portion of the community is now used for limited commercial purposes, the evidence shows that Bethany Beach remains a quiet, family-oriented resort where no liquor is sold. I think the conditions of the community are still consistent with the enforcement of a restrictive covenant forbidding the sale of intoxicating beverages.

In my opinion, the toleration of the practice of "brown bagging" does not constitute the abandonment of a longstanding restriction against the sale of alcoholic beverages. The restriction against sales has, in fact, remained intact for more than eighty years and any violations thereof have been short-lived. The fact that alcoholic beverages may be purchased right outside the town is not inconsistent with my view that the quiet-town atmosphere in this small area has not broken down, and that it can and should be preserved. Those who choose to buy land subject to the restrictions should be required to continue to abide by the restrictions.

I think the only real beneficiaries of the failure of the courts to enforce the restrictions would be those who plan to benefit commercially.

I also question the propriety of the issuance of a liquor license for the sale of liquor on property which is subject to a specific restrictive covenant against such sales.

I think that restrictive covenants play a vital part in the preservation of neighborhood schemes all over the State, and that a much more complete breakdown of the neighborhood scheme should be required before a court declares that a restriction has become unenforceable.

I would affirm the Chancellor.

### **Notes and Questions**

21.16. Several types of events may constitute “changed conditions” sufficient to at least trigger an inquiry whether a covenant ought still to be enforceable. Typical examples include condemnation of the burdened parcel through the power of eminent domain (typically bringing with it dedication to some purpose outside the scope of the covenant); zoning or rezoning (which may make the land incapable of legal use within the scope of the covenant); and nearby redevelopment that otherwise frustrates the purpose of the covenant.

21.17. The rule of *El Di* would hold covenants unenforceable for changed conditions if those conditions “render[] the benefits underlying imposition of the restrictions incapable of enjoyment.” Do residents really derive *no* benefit from a limit on the available venues for the sale of alcoholic beverages in their family vacation town? Does anyone else derive a benefit from such limits? If so, are they the kind of benefits that are enforceable as a matter of the law of servitudes?

21.18. There are subtle differences in the framing of the test courts apply under the doctrine of changed conditions, particularly in the context of the covenants governing a common-interest community. As the THIRD RESTATEMENT puts it:

The test for finding changed conditions sufficient to warrant termination of reciprocal-subdivision servitudes is often said to be whether there has been such a radical change in conditions since creation of the servitudes that perpetuation of the servitude would be of no substantial benefit to the dominant estate. However, the test is not whether the servitude retains value, but whether it can continue to serve the purposes for which it was created.

RESTATEMENT § 7.10, cmt. c. Do you think the difference between these two tests is likely to make a difference in the resolution of disputes? Which (if either) did the court apply in *El Di*? If *El Di* had applied the other test, would the outcome have been any different?

21.19. Does the mere fact of the disagreement between the majority and the dissent in *El Di* have any implications for the soundness of the doctrine of changed conditions? If reasonable minds can differ as to whether a covenant can still serve its purpose or still provides some benefit to the dominant owner, might that in itself be a reason to continue enforcing the parties' private agreement? How does the answer to this question relate to the public policy limits on enforceability of restrictive covenants? On the danger of dead-hand control discussed in the notes following *Tulk v. Moxhay*?

# Chapter 22

## Common-Interest Communities

As you have already seen, one prevalent application of restrictive covenants is in real estate development schemes that purport to subject many disparately held parcels within a community to a common scheme or plan. Neponsit and Bethany Beach are both communities that were initially developed under such a common scheme. Like zoning ordinances, the restrictive covenants that burden privately owned land within such developments may serve to quite comprehensively regulate the uses of land by members of the community.

Indeed, one major American city—Houston—relies largely (though not exclusively) on restrictive covenants to do the work that most other municipalities achieve by zoning. When zoning swept the nation in the 1920s, Houston was a growing, libertarian city, and sometimes-overheated rhetoric led Houstonians to reject zoning as communistic government interference with liberty. Later attempts to introduce zoning also failed due to the persistence of anti-zoning movements. See Barry J. Kaplan, *Urban Development, Economic Growth, and Personal Liberty: The Rhetoric of the Houston Anti-Zoning Movements, 1947-1962*, 84 SW. HIST. Q. 133 (1980); see also JOEL KOTKIN, OPPORTUNITY URBANISM (Oct. 2014), [link](#) (positing Houston's freedom and prosperity as the result of lack of zoning). The absence of zoning doesn't mean that land use in Houston is unregulated—the city code imposes minimum lot size and parking restrictions that have made the city the most sprawling American metropolis, and the most heavily dependent on privately-owned automobiles for transportation. But more detailed restrictions are often the work of private covenants.

Private covenants are common in Houston, replicating many of the standard functions of zoning, particularly separation of uses. Houston encourages covenant creation by allowing their creation by a majority vote of subdivision residents. Houstonians separate homes from businesses through restrictive covenants that specify the appropriate use for each lot in a subdivision, and enable every lot owner individually to sue. This regime works most effectively in wealthy neighborhoods. Houston's city code, unlike that of most American cities, also allows the city attorney to sue to enforce restrictive covenants. The city may seek civil penalties of up to \$1000 per day for a violation, and the city prioritizes enforcement of use restrictions, rather than other covenants such as aesthetic rules. In essence, the city has recreated "single use zoning" as covenant enforcement.

Both within and outside of Houston, such uses of restrictive covenants may allow—like the covenants in *Neponsit*—for centralized *private* authority to administer and enforce the covenants through a corporation or association constituted from among the property owners in the community. This kind of collective governance of land uses via restrictive covenants is what the Third Restatement refers to as a **common-interest community**. There are three primary types of common-interest community in the United States: the **homeowners association** (or "**HOA**"), the **condominium** (or "**condo**"), and the **cooperative** (or "**co-op**"). State statutes provide for the creation of these legal entities. According to the Community Associations Institute—an international research, education, and advocacy nonprofit organization that promotes and supports common-interest communities—there were over 330,000 common-interest communities in the United States in 2014, encompassing 26.7 million housing units and 66.7 million residents. See CMTY. ASS'NS INST., NATIONAL AND STATE STATISTICAL REVIEW FOR 2014, at 1 (2014), *link*.

## 22.1 Types

### 22.1.1 Homeowners Associations

The homeowners association is the most common type of common-interest community in the United States—over half of all common interest communities in the United States are HOAs. See *id.* In an HOA, the creation of community-wide restrictive covenants typically happens at the planning stage: a real estate developer plans out a subdivision of a contiguous parcel of undeveloped or underdeveloped land, and files with the local clerk or register of deeds a **subdivision plat** mapping out a survey of the separate lots of the planned community and a **declaration of**

**covenants, conditions, and restrictions (“CC&Rs”)** to bind each of those lots as restrictive covenants. When the subdivided lots are initially sold, the developer writes the same covenants into the deed to every lot, either explicitly or incorporating the CC&Rs of the declaration by reference. The CC&Rs will typically delegate enforcement to a homeowners association—a legal entity that is incorporated or otherwise created for the purpose of managing the common-interest community (as with the property owners’ association in *Neponsit*). The association’s membership is comprised of all owners of real property in the subdivision. These members are entitled to elect a board of managers to act on behalf of the association, though votes are usually not equally distributed to all residents; typically votes are allocated according to some proxy for property value, such as lot size.

The association itself may hold title to real property in common areas of the subdivision—such as private roads, parks and other recreational facilities, and common utilities. It may also contract on behalf of the community for common services, such as professional security guards. But its main function is to administer, modify as necessary, and enforce the restrictive covenants that bind the real property in the subdivision. This includes the collection of HOA dues—such as the fees that were at issue in *Neponsit*—that go toward the maintenance of the subdivision and other expenses incurred by the association (for example, professional fees for attorneys, accountants, etc.). The association is typically also empowered to levy special assessments against property owners in the subdivision as it deems necessary. See RESTATEMENT, § 6.5. The authority of the association to act is governed both by the CC&Rs and by a set of bylaws—like the bylaws of any other corporation—that set forth in detail what actions the managers may take according to what procedures, what actions require a vote of all members of the association, and whether there is any supermajority requirement for certain actions. As we will see, the association may also enact regulations regarding use and maintenance of privately owned property in the subdivision that go beyond the CC&Rs.

## 22.1.2 Condominiums

A **condominium** is very similar to a homeowners association, except it typically covers either a single multi-unit structure or several structures comprising attached residences on a single contiguous lot. Like a homeowners association, a condominium is established by filing with the appropriate public official a **condominium declaration**, which like the homeowners association declaration will contain the CC&Rs that will govern the condominium, and will provide for a condo-

minimum association to administer the CC&Rs and otherwise act on behalf of the community. State statutes typically impose a bit more regulation on condominiums than on subdivision HOAs, sometimes setting forth substantive rules limiting the powers of condominium associations or subjecting them to certain procedural requirements. But condominium associations typically have the same types of powers as HOAs, including the power to assess dues and special assessments from individual owner/members.

One important distinction between condominiums and homeowners associations has to do with how title to property is held in each. In a condominium, each unit owner holds title to their individual unit in fee simple, but the individual unit owners collectively own all common areas of the condominium property (hallways, common outdoor spaces, lobbies, recreation areas, etc.) as tenants in common. State statutes prohibit condominium owners from seeking partition of these commonly owned spaces. As with voting rights in the condominium association, each owner's fractional share in this tenancy in common is typically determined by some proxy for the value of the owner's particular unit, such as square footage.

### 22.1.3 Cooperatives

By far the least common form of common-interest community is the **cooperative**. In a cooperative, title to all real property in the community (typically an apartment building) is held by a cooperative corporation, whose shareholders are the residents of individual units. As with the other common-interest communities, the number of shares each individual unit owner holds is typically proportional to some proxy for the value of their residence—such as square footage. Each resident's shares are “appurtenant” (i.e., connected) to a **proprietary lease** for a particular unit—a lease whose term is tied to the resident's ownership of their shares in the cooperative. Co-op owners therefore have a dual relationship with their common-interest community: they are formally tenants, but at the same time they are shareholders of the (corporate) landlord. The proprietary lease typically plays the role that CC&Rs serve in HOAs and condominiums: it contains the covenants restricting residents' use of their own unit and any common spaces, and in lieu of rent it obliges residents to pay maintenance fees—which typically represent a fractional share of both operating expenses and carrying costs of the entire property (such as mortgage payments and property taxes).

The board of directors of a cooperative corporation typically wields significant power over the property and its residents. In addition to administering and enforc-

ing the terms of the proprietary lease and managing the property on behalf of all the residents, co-op boards are typically empowered to create and enforce additional rules to govern the community via their own by-laws and, sometimes, separate and potentially quite intrusive “house rules.” Beyond this, the governing documents of most co-operatives reserve to the board a right to withhold consent to any transfer of shares in the corporation (and, thus, of the proprietary lease to any unit in the cooperative). Absent violation of the anti-discrimination laws, boards are generally free to arbitrarily withhold such consent. One justification for this power is that residents of a co-operative depend on one another for the financial stability of their homes: a shareholder who fails to pay maintenance on time could threaten not only themselves but the entire community with foreclosure of a mortgage or a tax lien, and the board therefore has an interest in screening new shareholders for financial wherewithal and reliability. But another theory justifying such power is that a cooperative is, as its name implies, a form of collective governance of an intimate residential community, which limits the appropriate degree of outside legal interference. As the New York Court of Appeals put it: “there is no reason why the owners of the co-operative apartment house could not decide for themselves with whom they wish to share their elevators, their common halls and facilities, their stockholders’ meetings, their management problems and responsibilities and their homes.” *Weisner v. 791 Park Ave. Corp.*, 160 N.E.2d 720, 724 (N.Y. 1959).

Cooperatives exist almost exclusively in New York City, where they account for the majority of owner-occupied apartments in Manhattan. Given the tremendous power co-operative boards can exercise over admission of new shareholders, it is perhaps unsurprising that co-ops constitute the form of ownership for many of the city’s most exclusive residential apartment buildings. Tom Wolfe famously profiled these co-ops in the heady days of the 1980s bull market:

These so-called Good Buildings are forty-two cooperative apartment houses built more than half a century ago. Thirty-seven of them are located in a small wedge of Manhattan’s Upper East Side known as the Triangle[,] . . . an area defined by Fifty-seventh Street from Sutton Place to Fifth Avenue on the south, Fifth [Avenue] to Ninety-eighth Street on the west, and a diagonal back down to Sutton on the east . . . . The term Good Building was originally uttered sotto voce. Before the First World War it was code for “restricted to Protestants of northern European stock” . . . . Today Good certainly doesn’t mean democratic, but it does pertain to attributes that are at least

more broadly available than Protestant grandparents: namely, decorous demeanor, dignified behavior, business and social connections, and sheer wealth. In short, bourgeois respectability. The co-op boards want quiet, conservatively dressed families, although not with too many children. Children tie up the elevators and make noise in the lobby . . . . The boards raise and lower their financial requirements, as well as their social requirements, with the temperature of the market . . . . The first requirement is that the buyer be able to pay for the apartment in cash . . . . The second, in many buildings, is that he not be dependent on his job or profession to pay for his monthly maintenance fees and keep up appearances . . . . The prospects and their families are also expected to drop by the building for "cocktails," which is an inspection of dress and deportment . . . . The stiffest known financial requirements are at a Good Building on Park Avenue in the seventies, where the board asks that a purchaser of an apartment demonstrate a net worth of at least \$30 million.\*

Tom Wolfe, *Proper Places*, ESQUIRE (June 1985), at 194, 196-200.

## 22.2 Rulemaking Authority

As noted above, the governing documents of a common-interest community can significantly regulate the lives of its residents, and the governing bodies of the community are usually empowered to impose additional regulations. How expansive is this rulemaking authority?

### ***Hidden Harbour Estates, Inc. v. Norman***

309 So. 2d 180 (Fla. Dist. Ct. App. 1975)

**DOWNEY, Judge.**

The question presented on this appeal is whether the board of directors of a condominium association may adopt a rule or regulation prohibiting the use of alcoholic beverages in certain areas of the common elements of the condominium.

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\*This would be over \$66 million in 2015 dollars. —Eds.

Appellant is the condominium association formed, pursuant to a Declaration of Condominium, to operate a 202 unit condominium known as Hidden Harbour. Article 3.3(f) of appellant's articles of incorporation provides, *inter alia*, that the association shall have the power "to make and amend reasonable rules and regulations respecting the use of the condominium property." A similar provision is contained in the Declaration of Condominium.

Among the common elements of the condominium is a club house used for social occasions. Pursuant to the association's rule making power the directors of the association adopted a rule prohibiting the use of alcoholic beverages in the club house and adjacent areas. Appellees, as the owners of one condominium unit, objected to the rule, which incidentally had been approved by the condominium owners voting by a margin of 2 to 1 (126 to 63). Being dissatisfied with the association's action, appellees brought this injunction suit to prohibit the enforcement of the rule. After a trial on the merits at which appellees showed there had been no untoward incidents occurring in the club house during social events when alcoholic beverages were consumed, the trial court granted a permanent injunction against enforcement of said rule. The trial court was of the view that rules and regulations adopted in pursuance of the management and operation of the condominium "must have some reasonable relationship to the protection of life, property or the general welfare of the residents of the condominium in order for it to be valid and enforceable." In its final judgment the trial court further held that any resident of the condominium might engage in any lawful action in the club house or on any common condominium property unless such action was engaged in or carried on in such a manner as to constitute a nuisance.

With all due respect to the veteran trial judge, we disagree. It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization. The Declaration of Condominium involved herein is replete with examples of the

curtailment of individual rights usually associated with the private ownership of property. It provides, for example, that no sale may be effectuated without approval; no minors may be permanent residents; no pets are allowed.

Certainly, the association is not at liberty to adopt arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life of the various unit owners. On the contrary, we believe the test is reasonableness. If a rule is reasonable the association can adopt it; if not, it cannot. It is not necessary that conduct be so offensive as to constitute a nuisance in order to justify regulation thereof. Of course, this means that each case must be considered upon the peculiar facts and circumstances thereto appertaining.

Finally, restrictions on the use of alcoholic beverages are widespread throughout both governmental and private sectors; there is nothing unreasonable or unusual about a group of people electing to prohibit their use in commonly owned areas.

Accordingly, the judgment appealed from is reversed and the cause is remanded with directions to enter judgment for the appellant.

### **Notes and Questions**

22.1. What is the difference between the standard applied by the trial judge and that applied by the Court of Appeal in *Norman*? Don't both merely require rules promulgated by an association to be "reasonable"?

22.2. The Hidden Harbour development was back before the Florida District Court of Appeal six years later over a different dispute involving a resident's private well. In *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d 637 (Fla. Dist. Ct. App. 1981), the court opined:

There are essentially two categories of cases in which a condominium association attempts to enforce rules of restrictive uses. The first category is that dealing with the validity of restrictions found in the declaration of condominium itself. The second category of cases involves the validity of rules promulgated by the association's board of directors or the refusal of the board of directors to allow a particular use when the board is invested with the power to grant or deny a particular use.

In the first category, the restrictions are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right. Thus, although case law has applied the word "reasonable" to determine whether such restrictions are valid, this is not the appropriate test . . . .

The rule to be applied in the second category of cases, however, is different. In those cases where a use restriction is not mandated by the declaration of condominium *per se*, but is instead created by the board of directors of the condominium association, the rule of reasonableness comes into vogue. The requirement of "reasonableness" in these instances is designed to somewhat fetter the discretion of the board of directors. By imposing such a standard, the board is required to enact rules and make decisions that are reasonably related to the promotion of the health, happiness and peace of mind of the unit owners. In cases like the present one where the decision to allow a particular use is within the discretion of the board, the board must allow the use unless the use is demonstrably antagonistic to the legitimate objectives of the condominium association, i.e., the health, happiness and peace of mind of the individual unit owners.

The Restatement draws the same distinction between the standard for validity of covenants set forth in the CC&Rs of a declaration and the standard for validity of rules enacted by the governing body of a common-interest community. Thus, restrictions in a condominium declaration are valid—even if unreasonable—unless they are illegal, unconstitutional, or against public policy, RESTATEMENT § 3.1, while house rules and their enforcement are subject to a reasonableness standard, RESTATEMENT § 6.7 & Reporter's Note.

Does this distinction make sense? The court in *Basso* notes that "house rules," unlike CC&Rs, may be adopted *after* a resident acquires their property and thus without the notice that recording of the declaration provides before a resident in-

vests in the community.<sup>1</sup> Does that distinction justify the diverging standards for validity? Is such a justification consistent with the reasoning of *Norman*?

22.3. Not all jurisdictions follow the distinction drawn by *Basso* and the RESTATEMENT. Consider the following case.

***Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.***

878 P.2d 1275 (Cal. 1994)

**KENNARD, Justice.**

A homeowner in a 530-unit condominium complex sued to prevent the homeowners association from enforcing a restriction against keeping cats, dogs, and other animals in the condominium development. The owner asserted that the restriction, which was contained in the project's declaration recorded by the condominium project's developer, was "unreasonable" as applied to her because she kept her three cats indoors and because her cats were "noiseless" and "created no nuisance." Agreeing with the premise underlying the owner's complaint, the Court of Appeal concluded that the homeowners association could enforce the restriction only upon proof that plaintiff's cats would be likely to interfere with the right of other homeowners "to the peaceful and quiet enjoyment of their property."

Those of us who have cats or dogs can attest to their wonderful companionship and affection. Not surprisingly, studies have confirmed this effect . . . But the issue before us is not whether in the abstract pets can have a beneficial effect on humans. Rather, the narrow issue here is whether a pet restriction that is contained in the recorded declaration of a condominium complex is enforceable against the challenge of a homeowner. As we shall explain, the Legislature, in Civil Code section 1354, has required that courts enforce the covenants, conditions and restrictions contained in the recorded declaration of a common interest development "unless unreasonable."

Because a stable and predictable living environment is crucial to the success of condominiums and other common interest residential developments, and because recorded use restrictions are a primary means of ensuring this stability and predictability, the Legislature in section 1354 has afforded such restrictions a presumption of validity and has required of

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<sup>1</sup>Typically, either under state law or by a declaration's own terms (or both), the CC&Rs in a declaration may only be amended by a supermajority vote of all members of the association.

challengers that they demonstrate the restriction's "unreasonableness" by the deferential standard applicable to equitable servitudes. Under this standard established by the Legislature, enforcement of a restriction does not depend upon the conduct of a particular condominium owner. Rather, the restriction must be uniformly enforced in the condominium development to which it was intended to apply unless the plaintiff owner can show that the burdens it imposes on affected properties so substantially outweigh the benefits of the restriction that it should not be enforced against any owner. Here, the Court of Appeal did not apply this standard in deciding that plaintiff had stated a claim for declaratory relief. Accordingly, we reverse the judgment of the Court of Appeal and remand for further proceedings consistent with the views expressed in this opinion.

## I

Lakeside Village is a large condominium development in Culver City, Los Angeles County. It consists of 530 units spread throughout 12 separate 3-story buildings. The residents share common lobbies and hallways, in addition to laundry and trash facilities.

The Lakeside Village project is subject to certain covenants, conditions and restrictions (hereafter CC & R's) that were included in the developer's declaration recorded with the Los Angeles County Recorder on April 17, 1978, at the inception of the development project. Ownership of a unit includes membership in the project's homeowners association, the Lakeside Village Condominium Association (hereafter Association), the body that enforces the project's CC & R's, including the pet restriction, which provides in relevant part: "No animals (which shall mean dogs and cats), live-stock, reptiles or poultry shall be kept in any unit."<sup>3</sup>

In January 1988, plaintiff Natre Nahrstedt purchased a Lakeside Village condominium and moved in with her three cats. When the Association learned of the cats' presence, it demanded their removal and assessed fines against Nahrstedt for each successive month that she remained in violation of the condominium project's pet restriction.

Nahrstedt then brought this lawsuit against the Association, its officers, and two of its employees, asking the trial court to invalidate the assessments, to enjoin future assessments, to award damages for violation of her privacy when the Association "peered" into her condominium unit,

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<sup>3</sup>The CC & R's permit residents to keep "domestic fish and birds."

to award damages for infliction of emotional distress, and to declare the pet restriction “unreasonable” as applied to indoor cats (such as hers) that are not allowed free run of the project’s common areas. Nahrstedt also alleged she did not know of the pet restriction when she bought her condominium. . . .

The Association demurred to the complaint. In its supporting points and authorities, the Association argued that the pet restriction furthers the collective “health, happiness and peace of mind” of persons living in close proximity within the Lakeside Village condominium development, and therefore is reasonable as a matter of law. The trial court sustained the demurrer as to each cause of action and dismissed Nahrstedt’s complaint. Nahrstedt appealed.

A divided Court of Appeal reversed the trial court’s judgment of dismissal . . . . On the Association’s petition, we granted review to decide when a condominium owner can prevent enforcement of a use restriction that the project’s developer has included in the recorded declaration of CC & R’s . . . .

## II

Today, condominiums, cooperatives, and planned-unit developments with homeowners associations have become a widely accepted form of real property ownership. These ownership arrangements are known as “common interest” developments. . . . Use restrictions are an inherent part of any common interest development and are crucial to the stable, planned environment of any shared ownership arrangement . . . . The restrictions on the use of property in any common interest development may limit activities conducted in the common areas as well as in the confines of the home itself. Commonly, use restrictions preclude alteration of building exteriors, limit the number of persons that can occupy each unit, and place limitations on—or prohibit altogether—the keeping of pets.

Restrictions on property use are not the only characteristic of common interest ownership. Ordinarily, such ownership also entails mandatory membership in an owners association, which, through an elected board of directors, is empowered to enforce any use restrictions contained in the project’s declaration or master deed and to enact new rules governing the use and occupancy of property within the project. Because of its considerable power in managing and regulating a common interest devel-

opment, the governing board of an owners association must guard against the potential for the abuse of that power. As Professor Natelson observes, owners associations “can be a powerful force for good or for ill” in their members’ lives. Therefore, anyone who buys a unit in a common interest development with knowledge of its owners association’s discretionary power accepts “the risk that the power may be used in a way that benefits the commonality but harms the individual.” Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development’s governing documents, and comply with public policy.

Thus, subordination of individual property rights to the collective judgment of the owners association together with restrictions on the use of real property comprise the chief attributes of owning property in a common interest development. . . .

Notwithstanding the limitations on personal autonomy that are inherent in the concept of shared ownership of residential property, common interest developments have increased in popularity in recent years, in part because they generally provide a more affordable alternative to ownership of a single-family home . . . .

. . . When restrictions limiting the use of property within a common interest development satisfy the requirements of covenants running with the land or of equitable servitudes, what standard or test governs their enforceability? In California, as we explained at the outset, our Legislature has made common interest development use restrictions contained in a project’s recorded declaration “enforceable . . . *unless unreasonable.*” (§ 1354, subd. (a), italics added.) . . . In other words, such restrictions should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit.

This interpretation of section 1354 is consistent with the views of legal commentators as well as judicial decisions in other jurisdictions that have applied a presumption of validity to the recorded land use restrictions of a common interest development. As these authorities point out, and as we discussed previously, recorded CC & R’s are the primary means of achieving the stability and predictability so essential to the success of a shared ownership housing development. . . . When courts accord a presumption

of validity to all such recorded use restrictions and measure them against deferential standards of equitable servitude law, it discourages lawsuits by owners of individual units seeking personal exemptions from the restrictions. This also promotes stability and predictability in two ways. It provides substantial assurance to prospective condominium purchasers that they may rely with confidence on the promises embodied in the project's recorded CC & R's. And it protects all owners in the planned development from unanticipated increases in association fees to fund the defense of legal challenges to recorded restrictions.

How courts enforce recorded use restrictions affects not only those who have made their homes in planned developments, but also the owners associations charged with the fiduciary obligation to enforce those restrictions. When courts treat recorded use restrictions as presumptively valid, and place on the challenger the burden of proving the restriction "unreasonable" under the deferential standards applicable to equitable servitudes, associations can proceed to enforce reasonable restrictive covenants without fear that their actions will embroil them in costly and prolonged legal proceedings. Of course, when an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly.

There is an additional beneficiary of legal rules that are protective of recorded use restrictions: the judicial system. Fewer lawsuits challenging such restrictions will be brought, and those that are filed may be disposed of more expeditiously, if the rules courts use in evaluating such restrictions are clear, simple, and not subject to exceptions based on the peculiar circumstances or hardships of individual residents in condominiums and other shared-ownership developments.

. . . Refusing to enforce the CC & R's contained in a recorded declaration, or enforcing them only after protracted litigation that would require justification of their application on a case-by-case basis, would impose great strain on the social fabric of the common interest development. It would frustrate owners who had purchased their units in reliance on the CC & R's. It would put the owners and the homeowners association in the difficult and divisive position of deciding whether particular CC & R's should be applied to a particular owner. Here, for example, deciding whether a particular animal is "confined to an owner's unit and cre-

ate[s] no noise, odor, or nuisance" is a fact-intensive determination that can only be made by examining in detail the behavior of the particular animal and the behavior of the particular owner. Homeowners associations are ill-equipped to make such investigations, and any decision they might make in a particular case could be divisive or subject to claims of partiality.

Enforcing the CC & R's contained in a recorded declaration only after protracted case-by-case litigation would impose substantial litigation costs on the owners through their homeowners association, which would have to defend not only against owners contesting the application of the CC & R's to them, but also against owners contesting any case-by-case exceptions the homeowners association might make. In short, it is difficult to imagine what could more disrupt the harmony of a common interest development . . . .

Under the holding we adopt today, the reasonableness or unreasonableness of a condominium use restriction that the Legislature has made subject to section 1354 is to be determined *not* by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole. As we have explained, when, as here, a restriction is contained in the declaration of the common interest development and is recorded with the county recorder, the restriction is presumed to be reasonable and will be enforced uniformly against all residents of the common interest development *unless* the restriction is arbitrary, imposes burdens on the use of lands it affects that substantially outweigh the restriction's benefits to the development's residents, or violates a fundamental public policy.

Accordingly, here Nahrstedt could prevent enforcement of the Lakeside Village pet restriction by proving that the restriction is arbitrary, that it is substantially more burdensome than beneficial to the affected properties, or that it violates a fundamental public policy. For the reasons set forth below, Nahrstedt's complaint fails to adequately allege any of these three grounds of unreasonableness.

We conclude, as a matter of law, that the recorded pet restriction of the Lakeside Village condominium development prohibiting cats or dogs but allowing some other pets is not arbitrary, but is rationally related to health, sanitation and noise concerns legitimately held by residents of a high-density condominium project such as Lakeside Village, which includes 530 units in 12 separate 3-story buildings.

Nahrstedt's complaint alleges no facts that could possibly support a finding that the burden of the restriction on the affected property is so disproportionate to its benefit that the restriction is unreasonable and should not be enforced. Also, the complaint's allegations center on Nahrstedt and her cats (that she keeps them inside her condominium unit and that they do not bother her neighbors), without any reference to the effect on the condominium development as a whole, thus rendering the allegations legally insufficient to overcome section 1354's presumption of the restriction's validity . . . .

LUCAS, C.J., and MOSK, BAXTER, GEORGE and WERDEGAR, JJ., concur.

**ARABIAN, Justice, dissenting.**

"There are two means of refuge from the misery of life: music and cats."<sup>1</sup>

I respectfully dissent. While technical merit may commend the majority's analysis, its application to the facts presented reflects a narrow, indeed chary, view of the law that eschews the human spirit in favor of arbitrary efficiency. In my view, the resolution of this case well illustrates the conventional wisdom, and fundamental truth, of the Spanish proverb, "It is better to be a mouse in a cat's mouth than a man in a lawyer's hands."

As explained below, I find the provision known as the "pet restriction" contained in the covenants, conditions, and restrictions (CC & R's) governing the Lakeside Village project patently arbitrary and unreasonable within the meaning of Civil Code section 1354. Beyond dispute, human beings have long enjoyed an abiding and cherished association with their household animals. Given the substantial benefits derived from pet ownership, the undue burden on the use of property imposed on condominium owners who can maintain pets within the confines of their units without creating a nuisance or disturbing the quiet enjoyment of others substantially outweighs whatever meager utility the restriction may serve in the abstract. It certainly does not promote "health, happiness [or] peace of mind" commensurate with its tariff on the quality of life for those who value the companionship of animals. Worse, it contributes to the fraying of our social fabric.

. . . Generically stated, plaintiff challenges this restriction to the extent it precludes not only her but anyone else living in Lakeside Village from enjoying the substantial pleasures of pet ownership while affording no dis-

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<sup>1</sup>Albert Schweitzer.

cernible benefit to other unit owners if the animals are maintained without any detriment to the latter's quiet enjoyment of their own space and the common areas. In essence, she avers that when pets are kept out of sight, do not make noise, do not generate odors, and do not otherwise create a nuisance, reasonable expectations as to the quality of life within the condominium project are not impaired. At the same time, taking into consideration the well-established and long-standing historical and cultural relationship between human beings and their pets and the value they impart[,] enforcement of the restriction significantly and unduly burdens the use of land for those deprived of their companionship. Considered from this perspective, I find plaintiff's complaint states a cause of action for declaratory relief.

. . . Our true task in this turmoil is to strike a balance between the governing rights accorded a condominium association and the individual freedom of its members . . . . Pet ownership substantially enhances the quality of life for those who desire it. When others are not only undisturbed by, but *completely unaware of*, the presence of pets being enjoyed by their neighbors, the balance of benefit and burden is rendered disproportionate and unreasonable, rebutting any presumption of validity . . . .

I would affirm the judgment of the Court of Appeal.

### **Notes and Questions**

22.4. A few years after *Nahrstedt* was decided, the California legislature later enacted a statute providing that common-interest community governing documents cannot prohibit the keeping of "at least one pet." CAL. CIV. CODE § 4715.

22.5. Did Natore Nahrstedt lose because the pet restriction is reasonable in general, because the restriction is reasonable as applied to indoor cats, or because the fines levied by the board were a reasonable means of enforcing the restriction?

22.6. Is the reasonableness standard applied in *Nahrstedt* the same standard applied by the court in *Norman* and *Basso*? If not, how do the standards differ? How does the reasonableness standard of *Nahrstedt* differ from the standard Florida applies to CC&Rs?

## 22.3 Enforcement of Rules and Covenants

What happens if a resident of a common interest community breaches a covenant? How can the governing body of the community—the HOA managers, the condo board, or the co-op board—enforce the rules laid down in the restrictive covenants against breaching community members? *Neponset* provides one answer: the breach of a covenant to pay money—such as dues and assessments—will serve as an equitable lien on the breaching resident’s property in the community. This lien could be foreclosed, or more commonly the threat of foreclosure and the encumbrance of the lien can be used to leverage payment if and when the resident ever tries to sell her home. The governing body could also sue to recover unpaid sums, but because this involves significant additional expense it is typically an unattractive option reserved as a last resort.

But what about covenants that restrict use of property in the community—or rules that govern the conduct of residents on the community’s property? The Restatement suggests that the governing bodies of common-interest communities enjoy wide latitude to enforce the restrictions in governing documents. Section 6.8 provides: “In addition to seeking court enforcement, the association may adopt reasonable rules and procedures to encourage compliance and deter violations, including the imposition of fines, penalties, late fees, and the withdrawal of privileges to use common recreational and social facilities.” Typically the governing documents will empower the association or board to levy fines against residents for their breach of such rules of conduct or use. Those fines, like unpaid dues or assessments, can also become an equitable lien on the resident’s property if state law and/or the declaration so provide.

How should we assess the “reasonableness” of any particular enforcement action? And how searching a review should courts take of such actions if and when they are challenged by aggrieved members of the common-interest community?

### ***40 West 67th Street v. Pullman***

790 N.E.2d 1174 (N.Y. 2003)

**ROSENBLATT, J.**

In *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317 [1990] we held that the business judgment rule is the proper standard of judicial review when evaluating decisions made by residential cooperative corporations. In the case before us, de-

fendant is a shareholder-tenant in the plaintiff cooperative building. The relationship between defendant and the cooperative, including the conditions under which a shareholder's tenancy may be terminated, is governed by the shareholder's lease agreement. The cooperative terminated defendant's tenancy in accordance with a provision in the lease that authorized it to do so based on a tenant's "objectionable" conduct . . . .

## I.

Plaintiff cooperative owns the building located at 40 West 67th Street in Manhattan, which contains 38 apartments. In 1998, defendant bought into the cooperative and acquired 80 shares of stock appurtenant to his proprietary lease for apartment 7B.

Soon after moving in, defendant engaged in a course of behavior that, in the view of the cooperative, began as demanding, grew increasingly disruptive and ultimately became intolerable. After several points of friction between defendant and the cooperative,<sup>1</sup> defendant started complaining about his elderly upstairs neighbors, a retired college professor and his wife who had occupied apartment 8B for over two decades. In a stream of vituperative letters to the cooperative—16 letters in the month of October 1999 alone—he accused the couple of playing their television set and stereo at high volumes late into the night, and claimed they were running a loud and illegal bookbinding business in their apartment. Defendant further charged that the couple stored toxic chemicals in their apartment for use in their "dangerous and illegal" business. Upon investigation, the cooperative's Board determined that the couple did not possess a television set or stereo and that there was no evidence of a bookbinding business or any other commercial enterprise in their apartment.

Hostilities escalated, resulting in a physical altercation between defendant and the retired professor.<sup>2</sup> Following the altercation, defendant distributed flyers to the cooperative residents in which he referred to the professor, by name, as a potential "psychopath in our midst" and accused him of cutting defendant's telephone lines. In another flyer, defendant de-

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<sup>1</sup>Initially, defendant sought changes in the building services, such as the installation of video surveillance, 24-hour door service and replacement of the lobby mailboxes. After investigation, the Board deemed these proposed changes inadvisable or infeasible.

<sup>2</sup>Defendant brought charges against the professor which resulted in the professor's arrest. Eventually, the charges were adjourned in contemplation of dismissal.

scribed the professor's wife and the wife of the Board president as having close "intimate personal relations." Defendant also claimed that the previous occupants of his apartment revealed that the upstairs couple have "historically made excessive noise." The former occupants, however, submitted an affidavit that denied making any complaints about noise from the upstairs apartment and proclaimed that defendant's assertions to the contrary were "completely false."

Furthermore, defendant made alterations to his apartment without Board approval, had construction work performed on the weekend in violation of house rules, and would not respond to Board requests to correct these conditions or to allow a mutual inspection of his apartment and the upstairs apartment belonging to the elderly couple. Finally, defendant commenced four lawsuits against the upstairs couple, the president of the cooperative and the cooperative management, and tried to commence three more.

In reaction to defendant's behavior, the cooperative called a special meeting pursuant to article III (First) (f) of the lease agreement, which provides for termination of the tenancy if the cooperative by a two-thirds vote determines that "because of objectionable conduct on the part of the Lessee . . . the tenancy of the Lessee is undesirable."<sup>3</sup> The cooperative informed the shareholders that the purpose of the meeting was to determine whether defendant "engaged in repeated actions inimical to cooperative living and objectionable to the Corporation and its stockholders that make his continued tenancy undesirable."

Timely notice of the meeting was sent to all shareholders in the cooperative, including defendant. At the ensuing meeting, held in June 2000, owners of more than 75% of the outstanding shares in the cooperative were present. Defendant chose not attend. By a vote of 2,048 shares to 0, the shareholders in attendance passed a resolution declaring defendant's conduct "objectionable" and directing the Board to terminate his proprietary lease and cancel his shares. The resolution contained the findings upon

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<sup>3</sup>The full provision authorizes termination "if at any time the Lessor shall determine, upon the affirmative vote of the holders of record of at least two-thirds of that part of its capital stock which is then owned by Lessees under proprietary leases then in force, at a meeting of such stockholders duly called to take action on the subject, that because of objectionable conduct on the part of the Lessee, or of a person dwelling in or visiting the apartment, the tenancy of the Lessee is undesirable."

which the shareholders concluded that defendant's behavior was inimical to cooperative living. Pursuant to the resolution, the Board sent defendant a notice of termination requiring him to vacate his apartment by August 31, 2000. Ignoring the notice, defendant remained in the apartment, prompting the cooperative to bring this suit for possession and ejectment, a declaratory judgment cancelling defendant's stock, and a money judgment for use and occupancy, along with attorneys' fees and costs . . . .

## II. The *Levandusky* Business Judgment Rule

The heart of this dispute is the parties' disagreement over the proper standard of review to be applied when a cooperative exercises its agreed-upon right to terminate a tenancy based on a shareholder-tenant's objectionable conduct. In the agreement establishing the rights and duties of the parties, the cooperative reserved to itself the authority to determine whether a member's conduct was objectionable and to terminate the tenancy on that basis. The cooperative argues that its decision to do so should be reviewed in accordance with *Levandusky*'s business judgment rule. Defendant contends that the business judgment rule has no application under these circumstances and that RPAPL 711 requires a court to make its own evaluation of the Board's conduct based on a judicial standard of reasonableness.

*Levandusky* established a standard of review analogous to the corporate business judgment rule for a shareholder-tenant challenge to a decision of a residential cooperative corporation. The business judgment rule is a common-law doctrine by which courts exercise restraint and defer to good faith decisions made by boards of directors in business settings. The rule has been long recognized in New York. In *Levandusky*, the cooperative board issued a stop work order for a shareholder-tenant's renovations that violated the proprietary lease. The shareholder-tenant brought a CPLR article 78 proceeding to set aside the stop work order. The Court upheld the Board's action, and concluded that the business judgment rule "best balances the individual and collective interests at stake" in the residential cooperative setting (*Levandusky*, 75 N.Y.2d at 537, 554 N.Y.S.2d 807, 553 N.E.2d 1317).

In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination "[s]o long as the board acts for the purposes of the cooperative, within the scope

of its authority and in good faith" (*id.* at 538, 554 N.Y.S.2d 807, 553 N.E.2d 1317). In adopting this rule, we recognized that a cooperative board's broad powers could lead to abuse through arbitrary or malicious decisionmaking, unlawful discrimination or the like. However, we also aimed to avoid impairing "the purposes for which the residential community and its governing structure were formed: protection of the interest of the entire community of residents in an environment managed by the board for the common benefit" (*id.* at 537, 554 N.Y.S.2d 807, 553 N.E.2d 1317). The Court concluded that the business judgment rule best balances these competing interests and also noted that the limited judicial review afforded by the rule protects the cooperative's decisions against "undue court involvement and judicial second-guessing" (*id.* at 540, 554 N.Y.S.2d 807, 553 N.E.2d 1317).

Although we applied the business judgment rule in *Levandusky*, we did not attempt to fix its boundaries, recognizing that this corporate concept may not necessarily comport with every situation encountered by a cooperative and its shareholder-tenants. Defendant argues that when it comes to terminations, the business judgment rule conflicts with RPAPL 711(1) and is therefore inoperative.<sup>5</sup> We see no such conflict. In the realm of cooperative governance and in the lease provision before us, the cooperative's determination as to the tenant's objectionable behavior stands as competent evidence necessary to sustain the cooperative's determination. If that were not so, the contract provision for termination of the lease-to which defendant agreed-would be meaningless.

We reject the cooperative's argument that RPAPL 711(1) is irrelevant to these proceedings, but conclude that the business judgment rule may be applied consistently with the statute. Procedurally, the business judgment standard will be applied across the cases, but the manner in which it presents itself varies with the form of the lawsuit. *Levandusky*, for example, was framed as a CPLR article 78 proceeding, but we applied the business judgment rule as a concurrent form of "rationality" and "reasonableness"

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<sup>5</sup>RPAPL 711(1), in pertinent part, states: "A proceeding seeking to recover possession of real property by reason of the termination of the term fixed in the lease pursuant to a provision contained therein giving the landlord the right to terminate the time fixed for occupancy under such agreement if he deem the tenant objectionable, shall not be maintainable unless the landlord shall by competent evidence establish to the satisfaction of the court that the tenant is objectionable."

to determine whether the decision was “arbitrary and capricious” pursuant to CPLR 7803(3).

Similarly, the procedural vehicle driving this case is RPAPL 711(1), which requires “competent evidence” to show that a tenant is objectionable. Thus, in this context, the competent evidence that is the basis for the shareholder vote will be reviewed under the business judgment rule, which means courts will normally defer to that vote and the shareholders’ stated findings as competent evidence that the tenant is indeed objectionable under the statute. As we stated in *Levandusky*, a single standard of review for cooperatives is preferable, and “we see no purpose in allowing the form of the action to dictate the substance of the standard by which the legitimacy of corporate action is to be measured” (*id.* at 541, 554 N.Y.S.2d 807, 553 N.E.2d 1317).

Despite this deferential standard, there are instances when courts should undertake review of board decisions. To trigger further judicial scrutiny, an aggrieved shareholder-tenant must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith.

### III.

#### A. The Cooperative’s Scope of Authority

Pursuant to its bylaws, the cooperative was authorized (through its Board) to adopt a form of proprietary lease to be used for all shareholder-tenants. Based on this authorization, defendant and other members of the cooperative voluntarily entered into lease agreements containing the termination provision before us. The cooperative does not contend that it has the power to terminate the lease absent the termination provision. Indeed, it recognizes, correctly, that if there were no such provision, termination could proceed only pursuant to RPAPL 711(1).

The cooperative unfailingly followed the procedures contained in the lease when acting to terminate defendant’s tenancy. In accordance with the bylaws, the Board called a special meeting, and notified all shareholder-tenants of its time, place and purpose. Defendant thus had notice and the opportunity to be heard. In accordance with the agreement, the cooperative acted on a supermajority vote after properly fashioning the issue and the question to be addressed by resolution. The resolution specified the ba-

sis for the action, setting forth a list of specific findings as to defendant's objectionable behavior. By not appearing or presenting evidence personally or by counsel, defendant failed to challenge the findings and has not otherwise satisfied us that the Board has in any way acted ultra vires. In all, defendant has failed to demonstrate that the cooperative acted outside the scope of its authority in terminating the tenancy.

### B. Furthering the Corporate Purpose

*Levandusky* also recognizes that the business judgment rule prohibits judicial inquiry into Board actions that, presupposing good faith, are taken in legitimate furtherance of corporate purposes. Specifically, there must be a legitimate relationship between the Board's action and the welfare of the cooperative. Here, by the unanimous vote of everyone present at the meeting, the cooperative resoundingly expressed its collective will, directing the Board to terminate defendant's tenancy after finding that his behavior was more than its shareholders could bear. The Board was under a fiduciary duty to further the collective interests of the cooperative. By terminating the tenancy, the Board's action thus bore an obvious and legitimate relation to the cooperative's avowed ends.

There is, however, an additional dimension to corporate purpose that *Levandusky* contemplates, notably, the legitimacy of purpose—a feature closely related to good faith. Put differently, all the shareholders of a cooperative may agree on an objective, and the Board may pursue that objective zealously, but that does not necessarily mean the objective is lawful or legitimate. Defendant, however, has not shown that the Board's purpose was anything other than furthering the over-all welfare of a cooperative that found it could no longer abide defendant's behavior.

### C. Good Faith, in the Exercise of Honest Judgment

Finally, defendant has not shown the slightest indication of any bad faith, arbitrariness, favoritism, discrimination or malice on the cooperative's part, and the record reveals none. Though defendant contends that he raised sufficient facts in this regard, we agree with the Appellate Division majority that defendant has provided no factual support for his conclusory assertions that he was evicted based upon illegal or impermissible considerations. Moreover, as the Appellate Division noted, the cooperative emphasized that upon the sale of the apartment it "will 'turn over [to the

defendant] all proceeds after deduction of unpaid use and occupancy, costs of sale and litigation expenses incurred in this dispute.’” Defendant does not contend otherwise.

*Levandusky* cautions that the broad powers of cooperative governance carry the potential for abuse when a board singles out a person for harmful treatment or engages in unlawful discrimination, vendetta, arbitrary decisionmaking or favoritism. We reaffirm that admonition and stress that those types of abuses are incompatible with good faith and the exercise of honest judgment. While deferential, the *Levandusky* standard should not serve as a rubber stamp for cooperative board actions, particularly those involving tenancy terminations. We note that since *Levandusky* was decided, the lower courts have in most instances deferred to the business judgment of cooperative boards but in a number of cases have withheld deference in the face of evidence that the board acted illegitimately.<sup>8</sup>

The very concept of cooperative living entails a voluntary, shared control over rules, maintenance and the composition of the community. Indeed, as we observed in *Levandusky*, a shareholder-tenant voluntarily agrees to submit to the authority of a cooperative board, and consequently the board “may significantly restrict the bundle of rights a property owner normally enjoys” (75 N.Y.2d at 536, 554 N.Y.S.2d 807, 553 N.E.2d 1317). When dealing, however, with termination, courts must exercise a heightened vigilance in examining whether the board’s action meets the *Levandusky* test . . . .

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<sup>8</sup>See e.g. *Abrons Found. v. 29 E. 64th St. Corp.*, 297 A.D.2d 258, 746 N.Y.S.2d 482 [1st Dept.2002] [tenant raised genuine issues of material fact as to whether board acted in bad faith in imposing sublet fee meant solely to impact one tenant]; *Greenberg v. Board of Mgrs. of Parkridge Condominiums*, 294 A.D.2d 467, 742 N.Y.S.2d 560 [2d Dept.2002] [affirming injunction against board because it acted outside scope of authority in prohibiting tenant from erecting a succah on balcony]; *Dinicu v. Groff Studios Corp.*, 257 A.D.2d 218, 690 N.Y.S.2d 220 [1st Dept.1999] [business judgment rule does not protect cooperative board from its own breach of contract]; *Matter of Vacca v Board of Mgrs. of Primrose Lane Condominium*, 251 A.D.2d 674, 676 N.Y.S.2d 188 [2d Dept. 1998] [board acted in bad faith in prohibiting tenant from displaying religious statue in yard]; *Johar v. 82-04 Lefferts Tenants Corp.*, 234 A.D.2d 516, 651 N.Y.S.2d 914 [2d Dept. 1996] [board vote amending bylaws to declare plaintiff tenant ineligible to sit on cooperative board not shielded by business judgment rule]. While we do not undertake to address the correctness of the rulings in all of these cases, we list them as illustrative.

### Notes and Questions

22.7. For further background on this dispute, including quotes from David Pullman himself, see Dan Barry, *Sleepless and Litigious in 7B: A Co-op War Ends in Court*, N.Y. TIMES (June 7, 2003), *link*.

22.8. What aspect of the Court of Appeals' analysis constitutes "heightened vigilance"?

22.9. The RESTATEMENT does not adopt the business judgment rule for review of board actions, instead applying a "reasonableness" standard. The Reporter's comments suggest that the reasonableness of an enforcement action will depend on any number of factors, including its proportionality to the resident's offensive conduct (e.g., no \$1,000 fines for a single instance of failing to sort an aluminum can for recycling), the logical relationship between the offensive conduct and the remedy (e.g., no revocation of parking privileges for breach of a pet restriction), and whether the resident was provided with sufficient notice and opportunity to respond to the managers' complaint before any enforcement action was taken. See RESTATEMENT § 6.8 & cmt. b. Elsewhere the RESTATEMENT states that board members and officers have duties of care, prudence, and fairness toward members of the community. *Id.* § 6.13 & cmt. b. Is the RESTATEMENT position consistent with *Pullman*? If not, how does it differ?

22.10. The Court of Appeals did not consider the question whether the provision in Pullman's proprietary lease allowing the cooperative to kick him out on grounds that he was "objectionable" should be enforceable as a general matter. If it had, what do you think would have been the result? Does it matter which standard—reasonableness or the more permissive standard applicable to CC&Rs—applies? Which do you think ought to apply to the covenants in the proprietary leases of a cooperative?

22.11. Say you live in a residential neighborhood unencumbered by any restrictive covenants. Could you and your neighbors come together and decide to sell an unfriendly neighbor's house over his objection? If not, what additional facts make it possible for the residents of 40 West 67th Street (a tudor-style luxury pre-war apartment building half a tree-lined block from Central Park) to vote Pullman out of the apartment he bought in their building?

22.12. Common-interest communities are sometimes likened to miniature private governments. (Recall Norman's description of condominium owners as "a little democratic sub society.") The analogy holds up somewhat: they hold elections, the elected leaders can pass rules that all are bound to follow; they can assess fines

for breaking the rules; they can levy the equivalent of taxes to fund common services. There are, of course, important differences—not least failure to adhere to the principle of one-person-one-vote. But *Pullman* suggests another distinction: could any government officer or entity in the United States do to one of its citizens what Pullman's neighbors did to him? If not, what are the limits on government authority that would prevent such action, and what are the justifications for those limits? Do these justifications carry less force in the context of the enforcement of servitudes by the managers of a common-interest-community?



# **Part X**

# **Property and Society**



# Chapter 23

## Zoning

Zoning is a perennial issue for local governments. For most homeowners, their home is their largest asset, and they are exquisitely sensitive to any threats to its value—but threats can mean either the behavior of their neighbors, or constraints on their own behavior, setting up a seemingly irresolvable tension. (Economist William Fischel calls them “homevoters” in recognition of the way that their property interests shape their political choices.) In addition, local governments and would-be developers of new properties have interests of their own. Developers too seek to maximize their own property values, including their ability to develop future projects, which may lead them to sacrifice the theoretical maximum value of any given parcel. Governments want to protect their authority and their revenues, goals which they try to accomplish in a variety of ways.

Zoning is a way of answering the question: What—and where—do we want the places where we live to be? Our goals in this chapter are to understand the justifications for and modern varieties of zoning. As you read and review, consider how zoning compares to other types of land use controls, including nuisance, private covenants, and the implied warranty of habitability.

### 23.1 Euclidean Zoning

**Euclidean zoning**, so called based on the following case, concerns zoning regulations limiting the uses to which land may be put. (Another type of zoning, aesthetic zoning, relates to the appearance of buildings and structures; it is discussed in the original *Open Source Property* module on zoning but not in this book.)

***Euclid v. Ambler Realty Co.***  
272 U.S. 365 (1926)

**MR. JUSTICE SUTHERLAND delivered the opinion of the Court.**

The Village of Euclid is an Ohio municipal corporation. It adjoins and practically is a suburb of the City of Cleveland. Its estimated population is between 5,000 and 10,000, and its area from twelve to fourteen square miles, the greater part of which is farmlands or unimproved acreage. . . .

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid Avenue to the south and the Nickel Plate railroad to the north. Adjoining this tract, both on the east and on the west, there have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the Village Council establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.

The entire area of the village is divided by the ordinance into six classes of use districts, denominated U-1 to U-6, inclusive; three classes of height districts, denominated H-1 to H-3, inclusive, and four classes of area districts, denominated A-1 to A-4, inclusive. [The opinion lists the permissible uses for each of the districts in detail. It is sufficient for our purposes that the use districts form a spectrum from low-density residential (U-1) to heavy industry (U-6). The height and area districts imposed requirements on the height of buildings and square footage of lots, respectively.]

Appellee's tract of land comes under U-2, U-3 and U-6. The first strip of 620 feet immediately north of Euclid Avenue falls in class U-2, the next 130 feet to the north, in U-3, and the remainder in U-6. The uses of the first 620 feet, therefore, do not include apartment houses, hotels, churches, schools, or other public and semi-public buildings, or other uses enumerated in respect of U-3 to U-6, inclusive. The uses of the next 130 feet include all of these, but exclude industries, theatres, banks, shops, and the various other uses set forth in respect of U-4 to U-6, inclusive.

Annexed to the ordinance, and made a part of it, is a zone map showing the location and limits of the various use, height and area districts, from which it appears that the three classes overlap one another; that is to say,

for example, both U-5 and U-6 use districts are in A-4 area districts, but the former is in H-2 and the latter in H-3 height districts . . . .

The ordinance is assailed on the grounds that it is in derogation of § 1 of the Fourteenth Amendment to the Federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the State of Ohio. The prayer of the bill is for an injunction restraining the enforcement of the ordinance and all attempts to impose or maintain as to appellee's property any of the restrictions, limitations or conditions . . . .

The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path of progressive industrial development; that, for such uses, it has a market value of about \$10,000 per acre, but if the use be limited to residential purposes, the market value is not in excess of \$2,500 per acre; that the first 200 feet of the parcel back from Euclid Avenue, if unrestricted in respect of use, has a value of \$150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of \$50 per front foot.

It is specifically averred that the ordinance attempts to restrict and control the lawful uses of appellee's land so as to confiscate and destroy a great part of its value . . . .

Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems are developing, which require additional restrictions in respect of the use and occupation of private lands in urban communities.\* Regulations that are now uniformly sustained probably would have been rejected as arbitrary and oppressive even a half century ago.. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope

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\* Many of the opinion's sentences are extraordinarily long, and have been edited down substantially here. Consult the original before quoting anything. —Eds.

of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. . . .

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful [clue]. And the law of nuisances likewise may be consulted not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus, the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.

There is no serious difference of opinion in respect of the validity of laws and regulations [on building height and construction] to minimize the danger of fire or collapse, the evils of over-crowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances.

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity. . . .

[The real estate owner argued that Cleveland's industrial development was spreading into suburbs like Euclid, which would increase property values. So Euclid's zoning ordinances prohibiting industrial uses meant that the owner would not enjoy those property value increases.] But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated. It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.

We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over . . . the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded.

. . . The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of

apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that, in such sections, very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail come to be concretely applied to particular premises, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought upon the broad ground that the mere existence and threatened enforcement of the ordinance constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence. In respect of such provisions, of which specific complaint is not made, it cannot be said that the landowner has suffered or is threatened with an injury which entitles him to challenge their constitutionality.

. . . Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance, in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of

authority, leaving other provisions to be dealt with as cases arise directly involving them.

### **Notes and Questions**

**23.1. The dominance of the single-family home.** Americans love their homes, and homeownership remains a cornerstone of the “American dream.” Alexis de Tocqueville noted this several hundred years ago, and also commented that Americans would build homes and sell them as soon as the roof was complete. A particular ideal of the home developed in the twentieth century: “A separate house surrounded by a yard is the ideal kind of home.” MARY LOCKWOOD MATTHEWS, ELEMENTARY HOME ECONOMICS (1931). As a Wilmington, Delaware real estate ad from 1905 instructed, “Get your children into the country. The cities murder children. The hot pavements, the dust, the noise are fatal in many cases, and harmful always. The history of successful men is nearly always the history of country boys.”

Results from the 2013 American Household Survey (AHS), [link](#), show that 64% of all occupied housing, and 62% of recently built units, are detached single-family homes. Even in central cities, 79% of owner-occupied units are detached single-family houses. The average owner-occupied dwelling takes up nearly a third of an acre, as does the average recently built dwelling; bus service usually requires at least seven dwellings per acre to be viable.<sup>1</sup>

Homeownership has definite benefits. Homeowners are more likely to support school funding; even childless homeowners want their chief asset to be valuable because of its proximity to good schools. Homeowners participate more in local politics and community life than renters do, and their children seem to benefit as well. On the other hand, homeownership can be an anchor—when the structure of employment changes radically, and the best jobs are available in other regions, homeownership, and the resulting loss on a major asset, can deter people from moving, depressing economic growth and individual income.

**23.2. Segregation of uses.** The key principle behind Euclidean zoning is segregation of uses, in order to protect the single-family home. One clear cost is sprawl. Living away from density has other consequences: Wages are about thirty-five percent higher in cities, and research shows that this is because urban residents tend to have greater wage growth than residents in rural areas, suggesting that growth in human capacity is enhanced by density and interacting with closely situated others. Density allows for greater specialization and more productive interactions with

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<sup>1</sup>Only 55% of housing units have sidewalks, and the percentage is lower for over-65 homeowners.

a greater variety of people. Another consequence of use segregation is that undesirable uses tend to get concentrated in ghettos or red-light districts, or left to inner cities.

However, even opponents of Euclidean zoning might consider some segregation of uses desirable. In 2013, a Texas fertilizer plant explosion leveled houses and destroyed the middle school across the street. A former city council member said that he couldn't recall the town discussing whether it was a good idea to build houses and the school so close to the plant, which has been there since 1962. "The land was available out there that way . . . There never was any thought about it. Maybe that was wrong." Theodoric Meyer, *Could regulators have prevented the Texas fertilizer plant explosion?*, SALON, Apr. 28, 2013, [link](#).

23.3. **Churches.** It might fairly be said that many homevoters' concern for their property values amounts to religious fervor. Numerous zoning disputes have involved the location of churches, to which neighbors often object on grounds of weekend congestion—or, in the case of minority religions, for other reasons. *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451 (Mo. 1959), involved a religious organization (a Jewish synagogue) that wished to construct a new building for religious purposes, including services and religious education. Two weeks after Temple Israel bought the land, residents petitioned to change the zoning. Before Temple Israel began construction, the City changed the zoning to exclude churches and schools. It also established a complex and burdensome procedure to seek an exception allowing church or school use, and made the exception discretionary rather than mandatory. The Missouri Supreme Court ruled that municipalities had no authority to regulate the placement of churches or schools. Under the state's Zoning Enabling Act, Section 89.020 allowed them to regulate "the location and use of buildings, structures and land for trade, industry, residence and other purposes." Given the constitutional interest in freedom of religion, and the history of locating churches in residential areas, the court interpreted "other purposes" to exclude control over the location and use of buildings for churches and schools, though municipalities could regulate the buildings for health and safety purposes.

The land use provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc, et seq., now protect individuals, houses of worship, and other religious institutions from discrimination in zoning and land-marking laws. The Department of Justice has explained:

Religious assemblies, especially, new, small, or unfamiliar ones, may be illegally discriminated against on the face of zoning codes and also in the highly individualized and discretionary

processes of land use regulation. Zoning codes and landmarking laws may illegally exclude religious assemblies in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the zoning codes or landmarking laws may permit religious assemblies only with individualized permission from the zoning board or landmarking commission, and zoning boards or landmarking commission may use that authority in illegally discriminatory ways.

To address these concerns, RLUIPA prohibits zoning and landmarking laws that substantially burden the religious exercise of churches or other religious assemblies or institutions absent the least restrictive means of furthering a compelling governmental interest. This prohibition applies in any situation where: (i) the state or local government entity imposing the substantial burden receives federal funding; (ii) the substantial burden affects, or removal of the substantial burden would affect, interstate commerce; or (iii) the substantial burden arises from the state or local government's formal or informal procedures for making individualized assessments of a property's uses.

U.S. Dep't of Justice, Religious Land Use and Institutionalized Persons Act, Aug. 6, 2015, [link](#).

**23.4. Longstanding critiques of suburbia.** Since their inception, suburbs have been criticized for isolating and insulating the families who lived there. Social critic Louis Mumford wrote: “[T]he suburb served as an asylum for the preservation of illusion. Here domesticity could flourish, forgetful of the exploitation on which so much of it was based. Here individuality could prosper, oblivious of the pervasive regimentation beyond. This was not merely a child-centered environment, it was based on a childish view of the world, in which reality was sacrificed to the pleasure principle.” *THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS* 464 (1961).

Zoning raises distributional as well as efficiency concerns. Proponents of use zoning defend its contribution to “home values,” while critics of growth restrictions talk about “housing prices”; the former takes the perspective of existing owners while the latter suggests more concern for people who are priced out of ownership. Indeed, use zoning does seem to raise the price of single-family homes, though it’s less clear that it raises overall property values. Studies find that, in most parts of the

country, home prices are roughly at or near the costs of construction. But, where zoning limits construction, prices can increase substantially. Thus, in heavily regulated urban areas like New York City and many parts of California, home prices shot up in the past few decades.

A recent study found that land use restrictions added \$200,000 to the price of houses in Seattle, Washington; Seattle was in the top 3%, nationally, in approval delays for new projects. The executive officer of the Master Builders Association of King & Snohomish Counties estimated that regulatory costs comprised up to 30 percent of the total cost of building a new house (land costs included), including transportation, school and park impact fees, stormwater management fees, critical-areas mitigation and monitoring, pavement requirements and rockery permits. Neighborhood-based design review committees, which use citizen volunteers, delay the process further, sometimes requiring three or four rounds of review. Elizabeth Rhodes, *UW study: Rules add \$200,000 to Seattle house price*, SEATTLE TIMES, Feb. 14, 2008, [link](#).

## 23.2 Nonconforming Uses

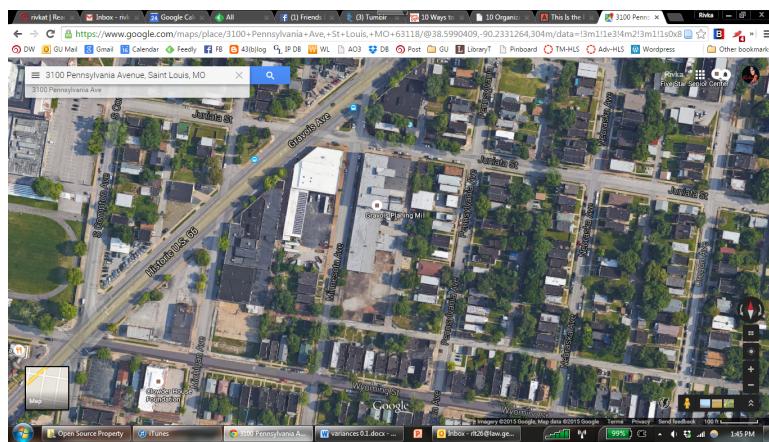
When zoning first began, there were a number of existing uses that would be prohibited by the new regimes. Zoning authorities expected these to die out naturally, but in fact, they often persisted for decades, in part because they often had local monopolies—a nonconforming use might be the only gas station in a residential neighborhood, for example. Many supporters of zoning wanted to do more to get rid of such uses.

Moreover, because zoning often changes—usually in the direction of becoming more restrictive—existing uses that were fine under the previous zoning regime can become newly unlawful. This is especially true when an unanticipated use begins and the rest of the neighbors want to change the zoning in response. But what about the interests of the property owner with the disfavored use, now known as a nonconforming use?

### ***Hoffmann v. Kinealy*** 389 S.W.2d 745 (Mo. 1965)

#### **A. P. STONE, Jr., Special Judge.**

This is an appeal by Carl O. Hoffmann, Jr., and Mrs. Geraldine St. Dennis (herein called relators), the owners of two adjoining lots (frequently



**Figure 23.1:** Google Earth image, 2015, with contested block in center

referred to as the lots) in the 3100 block of Pennsylvania in the City of St. Louis, from the judgment of the Circuit Court of the City of St. Louis affirming, upon review by certiorari, a decision of the board of adjustment sustaining a decision of the building commissioner which denied relators' application for a certificate of occupancy of the lots for a pre-existing lawful nonconforming use, to wit, for the open storage of lumber, building materials and construction equipment.

... Portions of the block, i.e., that portion in which the lots are located, [and certain other parcels], are in a "B" two-family dwelling district, while the remainder of the block, ... is in a "J" industrial district and is used for the operation of a planing mill and for open storage of lumber. A small building housing the general offices of Hoffmann Construction Company, relators' business in connection with which the lots have been used, is located in the "B" two-family dwelling district ... just across the alley from the lots.

The exhibits presented at the hearing before the board of adjustment, and brought to us with the transcript on appeal, indicate that there are fourteen buildings in the same portion of the block in which the lots are situate, including a tavern . . . , one three-family residence, eleven other residences, and at the rear of one residence a building identified on a plat as used for "tractor parts"; ten buildings in that portion of the block . . . , including a grocery store . . . , eight residences (all owned by relators), and at the rear of one residence the above-mentioned office building of Hoffmann

Construction Company; and that, on the other three corners . . . , there are two taverns and a cleaning and pressing shop.

Counsel for the city conceded at the hearing before the board of adjustment, and the subsequent finding of the board (not here disputed) was, that the lots were being used at the time of hearing for the open storage of lumber, building materials and construction equipment and that (in the language of the board's finding) "these premises have been used for this same purpose continuously since the year 1910." The front end of the lots is "landscaped" with a hedge and shrubbery, and the area used for open storage is enclosed with a high fence.

The first comprehensive zoning ordinance of the City of St. Louis became effective in 1926. On April 25, 1950, numerous sections of the zoning code were amended by Ordinance 45309. Section 5 A 1 of that ordinance provided that "No building or land shall be used for a use other than those permitted in the district in which such premises are located unless . . . such use existed prior to the effective date of this ordinance." Section 5 B of the same ordinance . . . provided that "The use of land within any dwelling district . . . for purposes of open storage . . . which do not conform to the provisions of this ordinance shall be discontinued within six (6) years from the effective date of this ordinance."

About six years and three months later, to wit, on July 24, 1956, Ordinance 48007 was enacted, amending that portion of Section 5 B of Ordinance 45309, with which we are here concerned, to read as follows: "The use of land within any dwelling district for the purpose of open storage is hereby prohibited." [The code was subsequently revised, but not in any way that changed this provision, and the relevant provision was renumbered as Section 903.030.]

. . . Relators' petition in the circuit court, upon which the writ of certiorari was issued, charged that Section 903.030 of the zoning code was unconstitutional, null and void and was of no effect as to relators' lots because, by prohibiting continuance of the pre-existing lawful nonconforming use of the lots, said section would impair, restrict and deprive relators of vested property rights and thereby would take and damage relators' private property for public use without just compensation in violation of Article 1, Section 26, Missouri Constitution of 1945.

. . . Respondants' position is that, under the statutory grant of police power in municipal zoning and planning, the city was empowered to en-

act . . . a so-called "amortization" or "toleration" provision which required discontinuance within six years thereafter of the nonconforming use of land within any dwelling district for purposes of open storage, and that, such six-year "amortization" or "toleration" period having run in April 1956, the subsequent absolute prohibition of said nonconforming use of land . . . was valid.

. . . Of course, it has long been settled that a comprehensive zoning ordinance operating prospectively, which has a substantial relationship to the public health, safety, morals or general welfare and is not unreasonable or discriminatory, is valid as a proper exercise of the police power. This is so even though, in restricting future uses, any such ordinance may impose hardship and inflict economic loss upon some property owners, for it is recognized that "[e]very valid exercise of the police power is apt to affect the property of some one adversely."

In earlier days of zoning legislation, it generally was recognized and conceded that termination of pre-existing lawful nonconforming uses would be unconstitutional . . . In *Women's Christian Ass'n. of Kansas City v. Brown*, 190 S.W.2d 900 (Mo. 1945), involving an attempted change of nonconforming use from a riding academy to a dance hall, this court said that: . . . "Within a period of another twenty years, a large number of such 'nonconforming' uses will have disappeared, either through the necessity of enlargement and expansion which invariably is forbidden or limited by ordinance, or by the owners realizing that it is unwise and uneconomic to be located in a district which probably is not suitable for the nonconforming purpose, or by obsolescence, destruction by fire or by the elements or similar inability to be used; so that many of these nonconforming uses will 'fade out,' with a resulting substantial and definite benefit to all communities."

. . . Certainly, the spirit of zoning ordinances always has been and still is to diminish and decrease nonconforming uses, and to that end municipalities have employed various approved regulatory methods such as prohibiting the resumption of a nonconforming use after its abandonment or discontinuance, prohibiting the rebuilding or alteration of nonconforming structures or structures occupied for nonconforming uses, and prohibiting or rigidly restricting a change from one nonconforming use to another. Even so, pre-existing lawful nonconforming uses have not faded out or eliminated themselves as quickly as had been anticipated, so zoning zealots

have been casting about for other methods or techniques to hasten the elimination of nonconforming uses. In so doing, only infrequent use has been made of the power of eminent domain, primarily because of the expense of compensating damaged property owners, but increasing emphasis has been placed upon the "amortization" or "tolerance" technique which conveniently bypasses the troublesome element of compensation.

Stated in its simplest terms, amortization contemplates the compulsory termination of a non-conformity at the expiration of a specified period of time, which period is equaled (sic) to the useful economic life of the non-conformity. The basic idea is to determine the remaining normal useful life of a pre-existing nonconforming use. The owner is then allowed to continue his use for this period and at the end must either conform or eliminate it. Courts approving the amortization technique as a valid exercise of the police power rationalize their holdings in this fashion: "The distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one of degree, and constitutionality depends on the relative importance to be given to the public gain and to the private loss. Zoning as it affects every piece of property is to some extent retroactive in that it applies to property already owned at the time of the effective date of the ordinance. The elimination of existing uses within a reasonable time does not amount to a taking of property nor does it necessarily restrict the use of property so that it cannot be used for any reasonable purpose. Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements. As a method of eliminating existing nonconforming uses it allows the owner of the non-conforming use, by affording an opportunity to make new plans, at least partially to offset any loss he might suffer . . . If the amortization period is reasonable the loss to the owner may be small when compared with the benefit to the public." *City of Los Angeles v. Gage*, 274 P.2d 34 (Cal. Ct. App. 1954).

Several cases in other jurisdictions have approved the termination of pre-existing nonconforming uses by the amortization technique. However, there are a number of decisions to the opposite effect, and it may be fairly said that there is "a decided lack of accord" in this area.

. . . But, although the holdings in other jurisdictions may, in some instances, be enlightening and persuasive, it is neither our duty nor our incli-

nation to rule a question of first impression in this state simply by counting foreign cases and then falling off the judicial fence on the side on which more cases can be found. Rather, our concern should be and is to determine the basic constitutional right of the matter, as we see it. Property is defined as including not only ownership and possession but also the right of use and enjoyment for lawful purposes. In fact, “[t]he substantial value of property lies in its use.” It follows that: “[t]he constitutional guaranty of protection for all private property extends equally to the enjoyment and the possession of lands. An arbitrary interference by the government, or by its authority, with the reasonable enjoyment of private lands is a taking of private property without due process of law, which is inhibited by the Constitution.”

. . . The amortization provision under review would terminate and take from instant relators the right to continue a lawful nonconforming use of their lots which has been exercised and enjoyed since 1910—a right of the character to which the courts traditionally have referred as a “vested right.” To our knowledge, no one has, as yet, been so brash as to contend that such a pre-existing lawful nonconforming use properly might be terminated immediately. In fact, the contrary is implicit in the amortization technique itself which would validate a taking presently unconstitutional by the simple expedient of postponing such taking for a “reasonable” time. All of this . . . prompts us to repeat the caveat of Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that “[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” . . .

. . . Accordingly, the judgment of the circuit court is set aside and the cause is remanded with directions to enter judgment ordering respondents, constituting the board of adjustment of the City of St. Louis, to issue, or cause to be issued, to relators a certificate of occupancy for continuance of the pre-existing lawful nonconforming use of relators’ lots for the open storage of lumber, building materials and construction equipment.

**HYDE, Judge (dissenting).**

. . . In the leading case of *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, the Court said that zoning and “all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.” The court pointed out the following reasons for this use

of the police power: “[T]he segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accident, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children.” . . .

In view of these applicable principles, it does not seem reasonable to say that the existence of a particular use of vacant land when a zoning ordinance is adopted gives the owner a vested right to continue it in perpetuity, especially the right to pile material on vacant ground. . . . High piles of stored material are not conducive to the maintenance or development of a good residential environment not only because they are unsightly but also because they could provide a lurking place for thieves and other criminals and also could attract children who might be injured playing there. While such open storage has not been classified as a nuisance, it thus has some of the undesirable characteristics of nuisance in a residential district. Therefore, I would hold the ordinance in this case, for termination of open storage in residential districts after six years, a reasonable exercise of the police power and valid.

### Notes and Questions

23.5. As the opinion notes, states are divided on whether amortization is an acceptable technique to deal with nonconforming uses. See cases collected at *Annotation, Validity of Provisions for Amortization of Nonconforming Uses*, 22 A.L.R. 3d (1968 & Supp. 1990).

Why not allow amortization? Consider the following hypothetical: Troy Barnes and Abed Nadir each buy a parcel of unzoned land for \$100,000, each expecting to use the land for a business. Barnes constructs a building for \$50,000, while Nadir holds off while he develops his filmmaking career. Barnes' business opens, making \$20,000 net each year. Five years after Barnes' business opens, the jurisdiction converts the zoning to residential only. Each parcel, used for residences, is worth only \$15,000. If Barnes is given an amortization period of five more years, what is the result for Barnes, assuming the building can't be converted to a residence? How much has Nadir lost? What justifies treating their situations differently?

23.6. Jurisdictions that reject amortization may face some pressure to limit what counts as a nonconforming use. See, e.g., *University City v. Diveley Auto Body Co., Inc.*, 417 S.W.2d 107 (Mo. 1967) (holding that a zoning ordinance requiring the owner of a signboard to comply with its provisions within three years was a regulation of existing property and not a taking); *St. Charles County v. St. Charles Sign & Elec., Inc.*, 237 S.W.3d 272 (Mo. Ct. App. 2007) (finding that an ordinance mandating that businesses storing inventory outdoors consisting of “reclaimed, junked, salvaged, scrapped or otherwise previously used inventory” must enclose such storage with fencing was a reasonable exercise of the police power but not a zoning ordinance, and therefore no prior nonconforming use exception was required).

23.7. **Terminating a nonconforming use.** Many situations can justify the end of a nonconforming use exception for a particular parcel. *City of Sugar Creek v. Reese*, 969 S.W.2d 888 (Mo. Ct. App. 1998):

In determining the legislative intent, courts consider that “the spirit of zoning ordinances always has been and still is to diminish and decrease nonconforming uses.” Thus, courts have allowed municipalities to regulate and limit nonconforming uses by various means such as prohibiting the resumption of a nonconforming use after its abandonment or discontinuance, prohibiting the rebuilding or alteration of nonconforming structures or structures occupied for nonconforming uses and prohibiting or rigidly restricting a change from one nonconforming use to another.

23.8. What about a change of ownership? Missouri holds that a transfer or change of ownership is not an abandonment of the right to a non-conforming use, because the use follows the land and not the person. *Walker v. City of Kansas City, Missouri*, 697 F.Supp. 1088 (W.D. Mo. 1988). Could you plausibly argue otherwise?

23.9. **Uses and rezoning close in time.** The not uncommon situation in which a zoning change is motivated by the appearance of a new, unpopular use is illustrated by *People Tags, Inc. v. Jackson County Legislature*, 636 F.Supp. 1345 (W.D. Mo. 1986), in which People Tags opened an adult bookstore, adult motion picture theater and adult mini motion picture theater within 1,500 feet of a church. Thereafter, the Jackson County legislature passed an ordinance precluding adult bookstore, adult motion picture theater, or adult mini motion picture theaters from being located within 1,500 feet of any church or school, with 120 days allowed for noncom-

pliant businesses to come into compliance.<sup>2</sup> Even in a jurisdiction allowing amortization, would 120 days be sufficient?

In *People Tags*, the court rejected the legislature's argument that the business was not open long enough to constitute a legitimate nonconforming use. The adult bookstore opened on September 5, 1984, and the legislature passed the first ordinance requiring it to shut down on September 10, 1984. There was no evidence that the bookstore wasn't open during regular business hours or didn't have a reasonable inventory in that time. Nor did the bookstore open in response to the anticipated passage of a new zoning ordinance. Thus, the bookstore was a protected nonconforming use.

23.10. The burden of proving a nonconforming use is on the party asserting the right. *In re Coleman Highlands*, 777 S.W.2d 621 (Mo. Ct. App. 1989). Are these rules consistent with the heavily pro-property rights rhetoric in the principal case?

23.11. **Vested rights.** As *People Tags* indicates, it can be vitally important to determine which came first, the use or the zoning that makes it a nonconforming use. Must the use be in full swing to trigger a property owner's right to continue the use? Even a state that allows amortization will confront this question, because it will determine whether an amortization period must be allowed.

In general, a use that is in progress may be a prior nonconforming use if sufficient commitments have been made, such as the construction of a building (with the then-proper permits). In Missouri, as in most states, filing a permit application under a prior zoning regime is insufficient, even if the owner bought the land in anticipation of the use and preparing the application required the investment of resources. See *State ex rel. Lee v. City of Grain Valley*, 293 S.W.3d 104 (Mo. Ct. App. 2009).

But see WASH. REV. CODE § 58.17.033 (rights under zoning ordinance vest as of the filing of a "valid and fully complete building permit application").

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<sup>2</sup>Ed. note: the law relating to First Amendment limits on state regulation of sexually-oriented businesses is extensive. When regulations are framed as zoning laws limiting the location of such businesses, they are often but not always upheld as reasonable time, place, and manner restrictions. See, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50. In the *People Tags* case, the court found this particular regulation unconstitutional because it operated to suppress an existing business, not just determine the location of future businesses. See also *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) (Massachusetts statute prohibiting sale of alcohol within 500 feet of a church "if the governing body of such church or school files written objection thereto" was an unconstitutional establishment of religion under the First Amendment).

What should be the result when a city issues a permit in error, and the developer relies on the permit to start building? *Compare Parkview Associates v. City of New York*, 519 N.E.2d 1372 (N.Y. 1988), with *State ex rel. Casey's General Stores, Inc. v. City of Louisiana*, 734 S.W.2d 890 (Mo. Ct. App. 1987) (applying equitable estoppel where city was consulted and gave assurances as to a building permit).

**23.12. Vested rights in easy-to-change uses?** In Missouri, the nonconforming use itself need not be one that requires substantial investment, if there is no doubt it precedes the enactment of the relevant regulation. In *Rose v. Board of Zoning Adjustment Platte County*, 68 S.W.3d 507 (Mo. Ct. App. 2001), Platte County found David Rose in violation of the county's Weed Ordinance for allowing uncultivated weeds to grow more than twelve inches high on his residential property. Rose bought his property in 1976, before the Weed Ordinance was enacted; he had a degree in wildlife management and ten years of work experience as a wetlands manager with the United States Fish and Wildlife Service. He decided to transform the cut-grass yard surrounding his home into a natural woodlands area: He planted additional trees, shrubs and flowering plants and allowed the natural vegetation in the yard to grow. He did not trim or mow the yard. Over the years, the vegetation "matured into a wooded state."

After failing to stop Rose under the county's nuisance ordinance, in 1999 the county enacted a new Weed Ordinance, requiring the removal of "weeds" from any parcel of land not zoned for agricultural use. The county found Rose to be in violation of the new ordinance; Rose argued that his prior nonconforming use was protected against suppression. The court of appeals found that there was a dispute over whether Rose had expanded his nonconforming use by allowing the vegetation to "become more dense and overgrown subsequent to the passage of the Weed Ordinance," and held that he was entitled to a hearing on the matter.

Should the court have even allowed Rose to claim a prior nonconforming use? In a state that allowed amortization, what sort of amortization period should Rose have been allowed?

## 23.3 Variances

*Euclid* treated zoning as a legislative judgment deserving substantial deference. Variances are more individualized decisions about specific parcels, and they raise key structural issues: How can an individualized determination avoid arbitrariness? How should courts review these individualized determinations—should they defer to zoning boards as much as they do with overall zoning schemes?

Missouri law empowers city boards of adjustment, “where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of [a zoning ordinance], to vary or modify the application of . . . such ordinance . . . so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done.” Mo. REV. STAT. § 89.090(3) (1998). This type of provision is common across the nation, though there is some state-to-state variation. The basic requirements for a variance in any state are (1) a showing of individualized hardship and (2) a lack of interference with the basic goals of the zoning scheme. Both must be shown; even substantial hardship is insufficient if granting a variance would do significant harm to the purposes of the zoning. In such a case, only a constitutional challenge or a federal law overriding local zoning could potentially allow the proposed use.

Zoning authorities’ basic hostility to variances is well expressed by the MISSOURI MUNICIPAL LEAGUE, PLANNING AND ZONING PROCEDURES FOR MISSOURI MUNICIPALITIES (Sept. 2004):

The most common situation in which variances are sought is where a developer divides his land into the greatest possible number of lots, barely meeting minimum standards, and then seeks permission to create substandard lots out of the remaining land. The subdivision regulations are intended to set forth minimum standards for development, not maximums, and the intent of the regulation is to use the remnants of land to increase lot sizes rather than create substandard lots. When variances are granted allowing substandard lots, it weakens the legal position of the city and its regulations and makes it difficult to defend its subdivision standards.

(While there is little systematic empirical evidence about actual board practice, the litigated variance cases tend not to have this “most common” fact pattern.)

**Procedure.** Most jurisdictions have a formal process setting out the deadlines and providing guidance to applicants on what they need to show to get a variance. See, e.g., ST. LOUIS BOARD OF ZONING ADJUSTMENT, CITIZEN’S GUIDE TO THE BOARD OF ZONING ADJUSTMENT VARIANCE PROCESS (n.d.). By contrast, the city of Ladue has no formal variance procedure at all. Instead, an applicant must seek a permit, and after the permit is denied, the City of Ladue Building Department sends the applicant a formal denial letter with Zoning Board of Adjustment instructions for an appeal.



**Figure 23.2:** Zoning Hearing, Valdosta County, Georgia, by John S. Quarterman, Aug. 26, 2013, CC-BY. For a detailed recap of a zoning hearing and many more pictures, see John S. Quarterman, *Dollar General (Teramore Development) @ GLPC 2013-08-26, ON LAKE FRONT (Sept. 5, 2013)*, [link](#).

***Matthew v. Smith***  
707 S.W.2d 411 (Mo. 1986)

**WELLIVER, Judge.**

This is an appeal from a circuit court judgment affirming the Board of Zoning Adjustment's decision to grant Jim and Susan Brandt a variance. The Brandts purchased a residential lot containing two separate houses upon a tract of land zoned for a single-family use. The court of appeals reversed the circuit court judgment, and the case was then certified to this Court by a dissenting judge. We reverse and remand.

The Brandts own a tract of land comprising one and one-half plotted lots. When they purchased the property in March of 1980, there already were two houses on the land, one toward the front of Erie Street and one in the rear. Each of the buildings is occupied by one residential family as tenants of the Brandts. The two houses apparently have been used as separate residences for the past thirty years, with only intermittent vacancies. The property is zoned for Single Family Residences. At the suggestion of a city official, the Brandts applied for a variance which would allow them to rent both houses with a single family in each house. After some delay,

including two hearings by the Board of Zoning Adjustment of Kansas City, the Board granted the application. Appellant, Jon Matthew, a neighboring landowner challenged the grant of the variance and sought a petition for certiorari from the Board's action. The circuit court affirmed the Board's order; on appeal, the court of appeals held that the Board was without authority to grant the requested variance. A dissenting judge certified the case to this Court . . . .

Under most zoning acts, these boards have the authority to grant variances from the strict letter of the zoning ordinance. The variance procedure "fulfil[s] a sort of 'escape hatch' or 'safety valve' function for individual landowners who would suffer special hardship from the literal application of the . . . zoning ordinance." It is often said that "[t]he variance provides an administrative alternative for individual relief that can avoid the damage that can occur to a zoning ordinance as a result of as applied taking litigation." The general rule is that the authority to grant a variance should be exercised sparingly and only under exceptional circumstances.

Both the majority of courts and the commentators recognize two types of variances: an area (nonuse) variance and a use variance.

The two types of variances with which cases are customarily concerned are "use" variances and "nonuse variances." The latter consist mostly of variances of bulk restrictions, of area, height, density, setback, side line restrictions, and restrictions covering miscellaneous subjects, including the right to enlarge nonconforming uses or to alter nonconforming structures.

As the name indicates, a use variance is one which permits a use other than one of those prescribed by the zoning ordinance in the particular district; it permits a use which the ordinance prohibits. A nonuse variance authorizes deviations from restrictions which relate to a permitted use, rather than limitations on the use itself, that is, restrictions on the bulk of buildings, or relating to their height, size, and extent of lot coverage, or minimum habitable area therein, or on the placement of buildings and structures on the lot with respect to required yards. Variances made necessary by the physical characteristics of the lot itself are nonuse variances of a kind commonly termed "area variances."

Many zoning acts or ordinances expressly distinguish between the two types of variances. When the distinction is not statutory, "the courts have always distinguished use from area variances." Some jurisdictions, whether

by express statutory directive or by court interpretation, do not permit the grant of a use variance.

[The Brandts] seek a variance to use the property in a manner not permitted under the permissible uses established by the ordinance. The ordinance clearly permits only the use of the property for a single family residence. The applicant is not seeking a variance from the area and yard restrictions which are no doubt violated because of the existence of the second residence. Such an area variance is not necessary because the applicant has a permissible nonconforming structure under the ordinance.

... [T]he express language of § 89.090, RSMo 1978, ... grants the Board the "power to vary or modify the application of any of the regulations or provisions of such ordinance relating to the *use*, construction or alteration of buildings or structures, or the use of land" (emphasis added). We, therefore, hold that under the proper circumstances an applicant may obtain a use variance.

Section 89.090, RSMo 1978 delegates to the Board of Adjustment the power to grant a variance when the applicant establishes "practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance . . . so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done." . . .

Almost all jurisdictions embellished the general concepts of "unnecessary hardship" or "practical difficulties" by further defining the conditions an applicant must satisfy before obtaining a variance . . . .

Unfortunately, any attempt to set forth a unified structure illustrating how all the courts have treated these conditions would, according to Professor Williams, prove unsuccessful. Williams observes that the law of variances is in "great confusion" and that aside from general themes any further attempt at unifying the law indicates "either (a) [one] has not read the case law, or (b) [one] has simply not understood it. Here far more than elsewhere in American planning law, muddle reigns supreme." Yet, four general themes can be distilled from variance law and indicate what an applicant for a variance must prove:

- (1) relief is necessary because of the unique character of the property rather than for personal considerations; and
- (2) applying the strict letter of the ordinance would result in unnecessary hardship; and the

- (3) imposition of such a hardship is not necessary for the preservation of the plan; and
- (4) granting the variance will result in substantial justice to all.

Although all the requirements must be satisfied, it is generally held that “[u]nnecessary hardship” is the principal basis on which a variance is granted.”

Before further examining the contours of unnecessary hardship, jurisdictions such as Missouri that follow the New York model rather than the Standard Act need to address the significance of the statutory dual standard of “unnecessary hardship” or “practical difficulties.” Generally, this dual standard has been treated in one of two ways. On the one hand, many courts view the two terms as interchangeable. On the other hand, a number of jurisdictions follow the approach of New York, the jurisdiction where the language originated, and hold that “practical difficulties” is a slightly lesser standard than “unnecessary hardship” and only applies to the granting of an area variance and not a use variance. The rationale for this approach is that an area variance is a relaxation of one or more incidental limitations to a permitted use and does not alter the character of the district as much as a use not permitted by the ordinance.

In light of our decision to permit the granting of a use variance, we are persuaded that the New York rule reflects the sound approach for treating the distinction between area and use variances. To obtain a use variance, an applicant must demonstrate, *inter alia*, unnecessary hardship; and, to obtain an area variance, an applicant must establish, *inter alia*, the existence of conditions slightly less rigorous than unnecessary hardship.

. . . It is generally said that *Otto v. Steinhilber*, 282 N.Y. 71, 24 N.E.2d 851, 853 (1939) contains the classic definition of unnecessary hardship:

Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.

Quite often the existence of unnecessary hardship depends upon whether the landowner can establish that without the variance the property cannot yield a reasonable return. "Reasonable return is not maximum return." Rather, the landowner must demonstrate that he or she will be deprived of all beneficial use of the property under any of the permitted uses:

A zoning regulation imposes unnecessary hardship if property to which it applies cannot yield a reasonable return from any permitted use. Lack of a reasonable return may be shown by proof that the owner has been deprived of all beneficial use of his land. All beneficial use is said to have been lost where the land is not suitable for any use permitted by the zoning ordinance.

Most courts agree that mere conclusory and lay opinion concerning the lack of any reasonable return is not sufficient; there must be actual proof, often in the form of dollars and cents evidence. In a well-reasoned opinion, Judge Meyer of the New York Court of Appeals stated:

Whether the existing zoning permits of a reasonable return requires proof from which can be determined the rate of return earned by like property in the community and proof in dollars and cents form of the owner's investment in the property as well as the return that the property will produce from the various uses permissible under the existing classification.

*N. Westchester Prof. Park v. Town of Bedford*, 458 N.E.2d 809 (N.Y. 1983). Such pronouncements and requirements of the vast majority of jurisdictions illustrate that, if the law of variances is to have any viability, only in the exceptional case will a use variance be justified.

. . . [T]he record is without sufficient evidence to establish unnecessary hardship. The only evidence in the record is the conclusory opinion of Brandt that they would be deprived of a reasonable return if not allowed to rent both houses. No evidence of land values was offered; and, no dollars and cents proof was presented to demonstrate that they would be deprived of all beneficial use of their property. Appellant, in fact, was not permitted to introduce such evidence. The Board, therefore, was without authority to grant a use variance upon this record.

The record, however, indicates that the Brandts may be entitled to a nonconforming use under the ordinance. . . .

**ROBERTSON, Judge, concurring in result.**

[Judge Robertson concurred on the ground that the Brandts sought an area variance, not a use variance, but, under the zoning ordinance, they still needed to demonstrate that the property couldn't earn a reasonable return without the variance.] [A separate concurrence is omitted.]

**Notes and Questions**

23.13. Was this a use variance or an area variance?

23.14. Note that the prior nonconforming use alternative is both more stringent and more relaxed: it requires the use to predate the zoning, but it also requires no showing of hardship once that priority is established.

23.15. Although the standard of review is supposed to be deferential, reversals of zoning board decisions are not uncommon. See, e.g., *Housing Authority v. Board of Adjustment*, 941 S.W.2d 725 (Mo. Ct. App. 1997) (board abused discretion in denying variances for lot size and setbacks where unusual size of parcel, which was laid out before zoning was enacted, meant that no conforming building could be erected, and where numerous other nearby properties had similar lot sizes and setbacks); *State ex rel. Klawuhn v. Board of Zoning Adjustment*, 952 S.W.2d 725 (Mo. Ct. App. 1997) (board wrongly granted three variances to allow owners to build a storage building on a vacant lot and store various vehicles and equipment in it; asserted hardship was personal to owners, "namely the large quantity of vehicles and equipment they wished to store inside the proposed storage building," even though housing the vehicles inside a structure might be more aesthetically appealing to neighbors than keeping them in open view; when asked whether he could get by with a smaller storage shed, owner responded, "Not and put what . . . I have to put in it").

23.16. **Mistakes.** Is a good-faith mistake a self-inflicted hardship? The answer is usually yes. See, e.g., *Wehrle v. Cassor*, 708 SW 2d 788 (Mo. Ct. App. 1986) (board erred in granting variance where violation, and hardship involved in curing violation, resulted from builders' measurement errors).

23.17. **Purchase with knowledge of the problem.** Suppose undeveloped land is purchased by someone who knows or should know that the land can't be developed in accordance with current restrictions without a variance. Does purchase with knowledge of a hardship count as a self-inflicted harm, disentitling the owner

to a variance? See, e.g., *Conley v. Town of Brookhaven Zoning Bd. of Appeals*, 40 N.Y.2d 309 (N.Y. 1976) (no). In what way could a prior owner or a purchaser create the hardship?

For use variances, by contrast to area variances, purchase with knowledge precludes a claim for a variance. Why distinguish area variances from use variances in this context?

**23.18. Can refusal to sell be a self-inflicted hardship?** In *Wolfner v. Board of Adjustment of City of Warson Woods*, 114 S.W.3d 298 (Mo. Ct. App. 2003), the owners bought one lot in 1939 and built a house on it, before zoning began in 1941, thus creating a prior nonconforming use. After 1941, they acquired an adjacent lot that was too small to be built on under the 1941 zoning. Until 1995, the owners used the adjacent lot as a side yard. The surviving owner then sold the main lot, but not the adjacent lot. The buyer of the main lot tried to buy the adjacent lot, but the owner rejected the offer, along with other offers from surrounding property owners. She requested a variance allowing a home to be built on the adjacent lot—it was only 7,500 square feet and 60 feet wide, less than the required 8,750 square feet and 70-foot width. The Board denied her request, and that of subsequent purchasers, the Wolfners, whose purchase was conditional on getting the variance. The Wolfners agreed to pay \$80,000 for the lot on the hope they could build on it; the Board found that this was not the kind of harm that merited a variance.

The court upheld the denial, noting that it was still possible that neighboring owners would be interested in buying the lot at its fair market value as a side yard. Is this fair? Note that if the original owners had *not* owned an adjacent lot, they would almost certainly have been entitled to the variance because their property was otherwise unbuildable. Compare, e.g., *Detwiler v. Zoning Hearing Board*, 596 A.2d 1156 (Pa. Comm. Ct. 1991) (holding owners of oddly shaped parcel entitled to variance even though they bought after the zoning began); *Commons v. Westwood Zoning Board of Adjustment.*, 410 A.2d 1138 (N.J. 1980) (similar result; although neighbors might be entitled to denial of variance if they were willing to buy the undersized parcel at fair market value, fair market value was to be calculated according to the value of the parcel with the variance, not the much lower value of the parcel without it).

**23.19. The law in action.** The legal standards governing variances are fairly easy to state, but doctrine doesn't necessarily control outcomes; facts on the ground are much more important. See Kathryn Moore, *The Lexington-Fayette Urban County Board of Adjustment: Fifty Years Later*, 100 Ky. L.J. 435 (2011-2012) (law professor who served on zoning board commented on "the Board's tendency to make

decisions that seem fair and practical rather than technically legally correct. Indeed, I am not sure that it is possible or even reasonable to expect a lay body to prefer technically legally correct decisions to practical and fair decisions, especially when the staff recommends the practical decision over the legally correct decision.”). The conventional wisdom is that courts reverse the grant of variances more often than their denial. Do you share the judicial intuition that an issued variance is more likely to be problematic than a denied one? The individual entity seeking a variance usually has a more focused interest in getting it than the rest of the neighbors have in blocking it. Some people who seek variances have even bribed zoning authorities.

**William A. Fischel, *The Evolution of Zoning Since the 1980s: The Persistence of Localism\****

In PROPERTY IN LAND AND OTHER RESOURCES 259 (Daniel H. Cole & Elinor Ostrom eds., 2012)

An observation about zoning boards that might be useful to scholars is that visiting the site in question is essential. Site visits can change the views of the case enormously. An applicant may show charming pictures of his antique-car hobby and seek a variance only to park some storage trailers. A visit might reveal that he actually harbors a private junkyard. Local knowledge is important because there is a literature on zoning boards, most often by attorneys, that finds fault with their decisions. One early and well-known critique is the article by Dukeminier and Stapleton (1962). A more recent study was conducted by an attorney who statistically examined variance decisions in five New Hampshire towns, one of which was Hanover, during the years 1987–1992, when I was on the zoning board. His chief finding was that variances are disproportionately granted if abutters do not object (Kent 1993; Ellickson and Been 2000). To which most board members would say, “Who knows better whether the variance will have an adverse effect?” The practice of granting variances if abutters do not object illustrates the recurrence of an early, grassroots approach to land use regulation, which required nonconforming uses to obtain permission of local property owners. It was struck down as unlawful delegation of the police power in several early cases, such as *Eubank v. City of Richmond*,

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\* Excerpts reprinted with permission. Prof. Fischel, an economist, studies zoning; he also sat on a zoning board for several years in order to better understand its workings. —Eds.

226 U.S. 137 (1912), but most local zoning boards informally operate as if it were still in effect.

Kent (1993) neglected to point out that four of the five towns in his sample have administrative officers who could discourage applicants with weak cases (Hanover's certainly did), but none of the other "misrule-by-variance" studies worry much about selection bias either. Kent also accurately reported that during the period he examined, the New Hampshire Supreme Court overturned the decisions of all ten towns whose opponents appealed their granting of variances. This seems to support his conclusion that local boards were prodigal in this regard. However, the decision in *Simplex v. Newington*, 145 N.H. 727 (2001), changed the court's previous zoning variance criteria, on which Kent had relied as the source of proper variances, to a less exacting standard that more closely reflected actual practice.

Legal error is not practical error, much less economic harm. Although the articles critical of boards mention the possibility that variances will degrade the neighborhood, even anecdotal evidence in support of that contention is scarce. Without visiting the site in question, it is often extremely difficult to tell whether the variance was warranted by legal, practical, or economic criteria. An underappreciated study by David Bryden (1977) established this more systematically. Bryden examined scores of Minnesota lakeshore building and septic variances (which he had no part in granting) and concluded that what looked like a travesty from the legal record in almost all cases made perfectly good sense to local board members who were acquainted with the details of the sites in question. For example, building setback variances, which by themselves seemed to have been issued with little regard to the state's standard criteria, were granted most often to allow septic systems to be even farther from the lake than the state required. The local officials knew the sites and made what Bryden inferred were appropriate trade-offs between the serious risk of septic-tank pollution of water bodies and the less consequential aesthetic concerns of building setbacks.

This is not to say that zoning boards are faultless. Some members can be inclined to promote a political agenda. Favoritism and score settling can influence some members' votes. But even the least sophisticated zoning boards have an asset that is almost never available to appellate judges or to statistical analysts: they know at least the neighborhood and usually

the specific site from personal experience. This makes a big difference that critics of boards need to take into account.

## 23.4 The Americans with Disabilities Act

Both the Americans with Disabilities Act (ADA) and the Fair Housing Act (FHA) have provisions that can affect local zoning and variance procedures.<sup>3</sup> People with disabilities, defined as a substantial impairment to a major life activity such as walking or seeing, as well as people who are perceived as having disabilities, are entitled to reasonable accommodations for their disabilities, which means that otherwise applicable laws and regulations may have to be waived.

### The ADA and City Governments: Common Problems

U.S. Department of Justice, Civil Rights Division, Disability Rights  
Section, [link](#) (last updated Feb. 24, 2020)

#### Common Problem:

City governments may fail to consider reasonable modifications in local laws, ordinances, and regulations that would avoid discrimination against individuals with disabilities.

#### Result:

Laws, ordinances, and regulations that appear to be neutral often adversely impact individuals with disabilities. For example, where a municipal zoning ordinance requires a set-back of 12 feet from the curb in the central business district, installing a ramp to ensure access for people who use wheelchairs may be impermissible without a variance from the city. People with disabilities are therefore unable to gain access to businesses in the city.

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<sup>3</sup>The ADA had even more profound effects on local building codes, which mandate particular building features. Along with fire and electrical codes, building codes—which specify matters such as the minimum width of doors and the maximum pitch of stairs—also profoundly shape the built environment, though we will not separately consider them here. Under the ADA, new construction of places of public accommodation must be accessible, which includes considerations such as entrance ramps and Braille labeling. See U.S. Architectural and Transportation Barriers Compliance Board (Access Board), Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities (2002), [link](#).



**Figure 23.3:** Figure from *The ADA and City Governments*.

City zoning policies were changed to permit [the business in Figure 23.3] to install a ramp at its entrance.

### **Requirement:**

City governments are required to make reasonable modifications to policies, practices, or procedures to prevent discrimination on the basis of disability. Reasonable modifications can include modifications to local laws, ordinances, and regulations that adversely impact people with disabilities. For example, it may be a reasonable modification to grant a variance for zoning requirements and setbacks.

### **Notes and Questions**

23.20. Suppose a business will be in violation of the ADA if it doesn't install a ramp, in violation of a setback requirement. Is it *entitled* to a variance under this guidance? What if the business should have known about the problem before constructing its building? (In that case, the zoning authority is also implicated—it shouldn't have approved any buildings that would violate the ADA. See U.S. Dep't of Justice, Civil Rts. Div., ADA Standards for Accessible Design (2010), [link](#).) What considerations might nonetheless justify denying the variance? What if the board argues that ramps are ugly and will decrease the value of the area? What if the board has safety concerns because the ramp will extend far enough to interfere

with bicyclists? The rule that ADA requires reasonable modifications to zoning laws may mean that the standard requirement of exceptional and undue hardship to the property owner isn't applicable. But another element of the test, detriment to the overall value of the area, is relevant in determining whether a modification is reasonable.

23.21. Variances usually preclude consideration of personal characteristics that aren't inherent in the land. Where the entity seeking a variance is a business, that question isn't particularly important—even if the business changes hands, the next owner will need a ramp to make the store accessible. But suppose zoning regulations require a particular elevation for residential beachfront property, in order to address concerns about danger from flooding. A property owner uses a wheelchair and wants a variance from the elevation requirement because otherwise he won't be able to get into his house. Does the ADA require the variance?

# Chapter 24

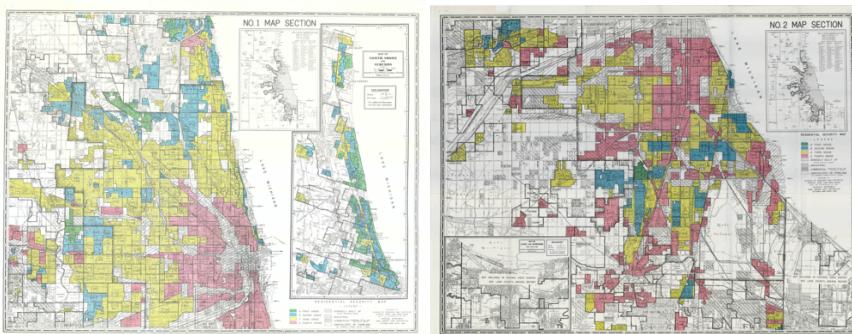
## Fundamental Rights

### 24.1 Redlining

#### 24.1.1 History

For much of the 20th century in the United States, many private lenders refused to extend mortgage credit—and federal agencies refused to extend or insure mortgage loans—on the basis of the racial composition of the neighborhood in which the mortgaged property was located. Community activists in the Austin neighborhood of Chicago coined the term “**redlining**” in the 1960s to describe this phenomenon, taking the name from the practice of lenders, insurers, and government agencies of drawing literal red lines on city maps around neighborhoods that were *collectively* deemed an unacceptable credit risk. This “location-based” discrimination is distinct from discrimination against particular *individuals* on the basis of race, though the two forms of discrimination often go hand in hand.

In the 1980s, historian Kenneth Jackson showed that the practice of redlining could be traced back at least as far as the Home Owners Loan Corporation (HOLC), a federal agency created in 1933 to help stem the tide of foreclosures generated by the Great Depression. Kenneth T. Jackson, *Race, Ethnicity, and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Administration*, 6 J. URB. HIST. 419 (1980). HOLC was largely responsible for introducing and popularizing the type of federally-backed, fully-amortized, long-term residential mortgage loan that is now the norm in the United States. But it also helped to systematize and institutionalize the appraisal theories and methods that gave rise to redlining, even



**Figure 24.1:** HOLC maps of Chicago.

creating what can now be recognized as the earliest extant redlined maps: HOLC’s “Residential Security Maps,” such as the maps of Chicago shown in Figure 24.1.

The University of Richmond Digital Scholarship Lab’s “Mapping Inequality” project has recently digitized HOLC’s maps and reports, converted them into standardized geographical data formats, and made the results available on their website. The project’s authors explain how HOLC’s appraisal methods worked in practice:

Neighborhoods receiving the highest grade of “A”—colored green on the maps—were deemed minimal risks for banks and other mortgage lenders when they were determining who should receive loans and which areas in the city were safe investments. Those receiving the lowest grade of “D,” colored red, were considered “hazardous.” Conservative, responsible lenders, in HOLC judgment, would “refuse to make loans in these areas [or] only on a conservative basis.” HOLC created area descriptions to help to organize the data they used to assign the grades. Among that information was the neighborhood’s quality of housing, the recent history of sale and rent values, and, crucially, the racial and ethnic identity and class of residents that served as the basis of the neighborhood’s grade. These maps and their accompanying documentation helped set the rules for nearly a century of real estate practice.

Robert K. Nelson, LaDale Winling, Richard Marciano & Nathan Connolly et al., *Mapping Inequality*, AM. PANORAMA (Robert K. Nelson & Edward L. Ayers eds., version 3.0 Dec. 11, 2023), [link](#).

Historians and sociologists have long argued over whether the HOLC maps were a *cause* of redlining, or were instead a *symptom* of the prevailing theories of real estate value that were widespread at the time that HOLC was created. The answer is probably a bit of both. Race-based real estate appraisal predated HOLC, as seen in one leading textbook teaching that “racial heritage and tendencies seem to be of paramount importance” to land values. FREDERICK M. BABCOCK, *THE VALUATION OF REAL ESTATE* 86, 91 (1932). And indeed, HOLC itself did not even engage in redlining, insofar as it actually did most of its lending in areas it designated “declining” or “hazardous.” However, as Jackson argued in his influential book, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 199 (1985), HOLC and its parent agency, the Federal Home Loan Bank Board (FHLBB), “applied these notions of ethnic and racial worth to real-estate appraising on an unprecedented scale,” hiring and training armies of appraisers and analysts to use these racial theories of neighborhood value in mapping out and categorizing nearly every residential parcel in over 200 American cities. Those professionals, the procedures they developed, and the maps they prepared, influenced private mortgage lenders as well as another New Deal agency of more lasting importance: the Federal Housing Administration (FHA), created in 1934.

FHA—which still exists today as a division of the department of Housing and Urban Development—plays an outsize role in the American residential mortgage market. FHA does not itself extend mortgage credit, but instead insures private mortgage loans that meet certain criteria. This mitigates the risk to lenders by allowing them to purchase insurance—backed by the full weight of the federal treasury—against losses arising from non-repayment of residential mortgage loans they originate. Such risk reduction, in turn, encourages more lending at lower prices, expanding access to mortgage credit. In order to qualify for FHA insurance, a mortgage loan must meet certain underwriting criteria designed by the agency to keep the risk of loss on any given insured loan within acceptable ranges. The strong demand for FHA insurance among mortgage lenders means that the agency’s underwriting criteria exert tremendous influence on the availability (and cost) of residential mortgage loans in the private market.

FHA’s underwriting criteria are collected in a series of manuals for appraisers, the earliest of which were prepared in large part by Frederick Babcock (who wrote the 1932 textbook quoted above, and was an early head of FHA’s under-

writing division). From its inception, FHA included neighborhood racial characteristics among its criteria for insurability. The agency's manual for 1936 allocated 20% of its location risk rating points to "Protection from Adverse Influences." Among those adverse influences were "infiltration of business and industrial uses, lower-class occupancy, and inharmonious racial groups." *FED. HOUS. ADMIN., UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT* pt. II, paras. 226–233 (1936), *link*.

With respect to the latter, the agency instructed its valuators to investigate "whether or not incompatible racial and social groups are present," on the theory that a "change in social or racial occupancy generally leads to instability and a reduction in values." *Id.* pt. II, para. 233. The head of FHA's Division of Economics and Statistics instructed staff members applying these criteria "to outline blocks with 'a considerable number' of populations commonly associated with low real estate values, such as 'Italians or Jews in the lower income group,' as well as those with 10 percent or more 'negroes or race other than white.'" Jennifer Light, *Discriminating Appraisals: Cartography, Computation, and Access to Federal Mortgage Insurance in the 1930s*, 52 TECH. & CULTURE 485, 499 (2011) (quoting Instructions for Dividing the City into Neighborhoods (Fed. Hous. Admin. n.d.)). Staff members were similarly encouraged to reflect local prejudices in downgrading neighborhoods populated by immigrants of other disfavored national origins and their descendants. See generally Jennifer S. Light, *Nationality and Neighborhood Risk at the Origins of FHA Underwriting*, 36 J. URB. HIST. 634 (2010).

These FHA evaluations looked not only to current conditions but also to likely future developments, on the theory that once a nonwhite resident entered a White neighborhood the White residents would relocate to more homogeneously White neighborhoods in an accelerating cascade—a phenomenon that came to be known as "White Flight."<sup>1</sup> Jackson notes that "In a March 1939 map of Brooklyn, for example, the presence of a single, non-white family on any block was sufficient to mark

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<sup>1</sup>In the mid-20th century, real estate speculators developed a practice of stoking fears of non-white neighbors and falling property values among residents of homogeneously White neighborhoods in order to profit from changing racial demographics. These speculators often spread rumors that Black families were moving in to a neighborhood, hoping to induce White homeowners to sell their homes at a discount out of fear that if they waited until the racial balance of their neighborhood had changed, they would have to accept an even lower price. The speculators often snapped up the homes of these panicky White homeowners for cash and then resold the homes to Black families at a substantial markup—often under onerous financing terms such as installment contracts that Black families were compelled to accept because of their inability to access mortgage credit through mainstream channels. This practice, known as "blockbusting," accelerated so-called "white flight" from

that entire block black.” JACKSON, CRABGRASS FRONTIER, *supra*, at 208–09. FHA’s theory of race and home values led it to recommend that deeds to parcels of residential real estate include covenants “[p]rohibit[ing] of the occupancy of properties except by the race for which they are intended.” FED. Hous. ADMIN., *supra*, pt. II, para. 284(3)(g).<sup>2</sup>

FHA removed neighborhood racial characteristics from its underwriting criteria in 1966, and the use of racial criteria by any public or private residential mortgage lending institution was rendered unlawful by the Fair Housing Act of 1968, but three decades of *de jure* redlining had already reshaped the face of American residential neighborhoods. One recent study found that the Black share of population in areas graded “D” on HOLC maps grew from 1930 to 1970, as it did in areas graded “C” bordering areas graded “B,” despite the fact that both “B” and “C” areas had virtually no Black residents prior to the advent of HOLC and FHA (the authors refer to this phenomenon as “yellow-lining” in reference to the yellow color-coding of “C”-graded areas on HOLC maps). Daniel Aaronson et al., *The Effects of the 1930s HOLC “Redlining” Maps* (Fed. Rsr. Bank of Chi. Working Paper Series, No. WP 2017-12, Feb. 2019), *link*. That same study showed that less favorable HOLC rankings were correlated with falling homeownership rates, falling home values, and rising vacancy rates during the same period, which the authors argue reflects housing disinvestment in redlined and even “yellow-lined” neighborhoods. *Id.*

## 24.1.2 Lasting Impact

During the redlining era, neighborhoods where substantial numbers of non-white people lived were often deemed categorically ineligible for FHA-insured loans. And because federal insurance allowed lenders to offer credit more cheaply, this meant that residents of predominantly White neighborhoods were able to borrow more easily and cheaply to buy or improve their homes, while residents of racially mixed or majority-minority neighborhoods either paid more for mortgage credit or were not able to access the mortgage market at all. In the latter case, those who wanted to buy homes in redlined neighborhoods had to purchase under (often usurious) installment contracts that carried high risks of default and forfeiture. This systematic deprivation of access to mortgage credit and housing wealth over

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urban neighborhoods to the suburbs from the late 1950s through the 1980s, and is unlawful under the Fair Housing Act. See 42 U.S.C. § 3204(e); 24 C.F.R. § 100.85.

<sup>2</sup>*Shelley v. Kraemer*, later in this chapter, held these racially restrictive covenants unconstitutional.

the course of decades has had long-term consequences, both for individuals and, importantly, for neighborhoods.

Half a century after the FHA disavowed redlining, American residential communities are still marked by substantial racial segregation. The *degree* of segregation across HOLC boundaries does seem to have diminished somewhat in some areas since the advent of the Fair Housing Act. See *id.* But that does not mean there has been broad racial residential integration. In many locations the neighborhood lines set down by HOLC in the late 1930s bear striking resemblances to boundaries of residential racial segregation in the 21st century. One recent study found that in the aggregate, over 85% of neighborhoods graded “A” in HOLC maps from the late 1930s were majority-White neighborhoods in 2016, while approximately 64% of neighborhoods graded “D” in those maps were majority-minority in 2016. See BRUCE MITCHELL & JUAN FRANCO, NAT’L CMTY. REINVESTMENT COAL., HOLC “REDLINING” MAPS: THE PERSISTENT STRUCTURE OF SEGREGATION AND ECONOMIC INEQUALITY (Mar. 20, 2018), [link](#). Interactive maps comparing HOLC zones to racial demographic data are presented in Ryan Best & Elena Mejía, *The Lasting Legacy of Redlining*, FIVE-THIRTYEIGHT (Feb. 9, 2022), [link](#).

If the era of *de jure* redlining ostensibly ended no later than the passage of the federal Fair Housing Act of 1968, why are residential communities largely segregated even now, half a century later? Scholars have tended to coalesce around three overlapping explanations. See generally Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 2 ANN. REV. SOC. 167 (2003).

**24.1. Racial Wealth Gaps and “Lock-In.”** One explanation may arise from the observation that decades of *de jure* discrimination and segregation rendered Black home buyers *as a group* less wealthy than White home buyers *as a group*, and resulted in systematic disparities in the value of housing stock in neighborhoods where mainly nonwhite people lived relative to housing stock in predominantly White neighborhoods. Since housing is a durable but depreciating asset, over time the unequal allocation of credit and capital investment generated a disparity of home values that correlated with neighborhood racial demographics: predominantly white neighborhoods came to be comprised of more valuable homes and wealthier homeowners than racially mixed or majority-minority neighborhoods. See generally DOUGLAS MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

Even when *de jure* discrimination ostensibly ended, these consequences of its history remained, and they would be difficult to change even if one were to as-

sume the absence of overt racial bias (by no means a safe assumption). Because (1) wealthier people can afford and tend to prefer more expensive homes, (2) wealth correlates with race, and (3) the value of homes correlates with the racial demographics of the neighborhood in which those homes are located, segregation may be, in a sense, “locked in”: Black homebuyers cannot afford to buy into high-value predominantly White neighborhoods, and White homebuyers can afford *not* to live in lower-value racially diverse or majority-minority neighborhoods, so segregation persists. See DARIA ROITHMAYR, *REPRODUCING RACISM* 93-120 (2014).

This explanation, while theoretically sound and grounded in historical experience, does not seem to be the whole story. While racial wealth and income gaps are real, and can be traced in part to policy decisions of the redlining era, empirical analysis suggests that these gaps are only a modest (though real) contributor to the persistence of residential racial segregation. In particular, wealth gaps alone do not explain observed levels of exclusion of Black homeowners from predominantly White neighborhoods. See generally Kyle Crowder et al., *Wealth, Race, and Inter-Neighborhood Migration*, 71 AM. SOC. REV. 72 (2006). Other, overlapping factors must also be playing a role.

**24.2. Segregation as an Emergent Phenomenon.** In the 1970s, the prominent game theorist Thomas C. Schelling (whose insights about cooperation and conflict had helped defuse the Cuban Missile Crisis and would later lead to his being awarded the Nobel Prize in economics) developed a still-influential mathematical model of segregation. See Thomas C. Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOC. 143 (1971). This model showed that large systematic discriminatory effects can emerge from even mild racial preferences, such as the desire not to be the minority in one’s neighborhood: “Except for a mixture at exactly 50:50, no mixture will then be self-sustaining because there is none without a minority, and if the minority evacuates, complete segregation occurs.” Simulations based on Schelling’s model demonstrate this emergent behavior, which you can try for yourself at: Vi Hart & Nicky Case, *Parable of the Polygons* (last updated Nov. 7, 2022), [link](#). (This simulation also suggests that cultivating widespread homeowner preferences *against* racial homogeneity may be one tool to promote desegregation).

**24.3. Private Discrimination.** Just as widespread invidious racial discrimination in the allocation of housing and mortgage credit existed long before HOLC was created, private discrimination did not magically disappear when the Fair Housing Act was enacted. When the activists of Austin coined the term “redlining,” they were referring to lines drawn on maps at their local, privately owned savings and loan of-

fices, not maps drawn by the federal government (though there was a historical and causal relationship between the two).

Sadly, even though the federal Fair Housing Act, analogous state and local laws, and associated regulations have long forbidden various discriminatory behaviors with respect to housing, such behaviors persist even today. For example, an ambitious three-year investigation conducted by the newspaper *Long Island Newsday* from 2016 to 2019 demonstrated that in the New York City suburbs of Long Island, real estate agents regularly discriminated against nonwhite house hunters compared to White house hunters. Notably, about a quarter of the agents investigated steered White house hunters toward more homogeneously White neighborhoods, while steering comparable nonwhite house hunters toward more mixed or majority-minority neighborhoods. See Ann Choi, Bill Dedman, Keith Herbert, & Olivia Winslow, *Long Island Divided*, NEWSDAY (Arthur Browne ed. Nov. 17, 2019), available at [link](#). Such steering is unlawful under the Fair Housing Act and related regulations. See, e.g., 24 C.F.R. § 100.70(c). Nevertheless, it clearly persists and—along with other forms of private discrimination—likely contributes to the continued *de facto* racial segregation of residential neighborhoods.

### 24.1.3 Overcoming the Legacy of Redlining

If we believe that racially segregated residential neighborhoods are a problem, what is the solution? Consider the following proposals. Do you think they are likely to be effective? Might they be counterproductive?

**24.4. Racial Wealth Gaps and Reparations.** If today's racial wealth and income gaps are indeed the product of *past* discrimination, can we count on these gaps to close over time as people in formerly redlined neighborhoods take advantage of economic opportunities now available to them? Is the problem simply that not enough time has passed since the redlining era? Is "lock-in" a phenomenon that might fade away if only we are patient enough?

If private housing discrimination were absent, and intergenerational social mobility (defined as upward changes in income and wealth from one generation to the next) were high, we might expect the passage of time to ameliorate racial wealth gaps and thereby reduce residential racial segregation. But as we have seen, private housing discrimination persists even half a century after being outlawed. And the latest research demonstrates that social mobility in the United States is not only low, it is *negatively correlated with segregation*—people who grow up in seg-

regated neighborhoods are less likely to see generational increases in income or wealth. See Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q.J. Econ. 1553, 1607-09 (2014) (“[B]oth blacks and whites living in areas with large African American populations have lower rates of upward income mobility . . . . [and m]ore racially segregated areas have less upward mobility.”) If this research is right, and lock-in will not simply fade away, what more should be done?

As we discussed in our unit on Allocation, historical injustices whose effects are felt in the present can be difficult to resolve through litigation. For this reason, many have proposed broader programs of redistribution to address such injustices, and the legacy of redlining is among the targets of such programs. An article by Ta-Nehisi Coates cites redlining as its primary example of systematic racial injustice in the United States that deprived Blacks of opportunities afforded to Whites to build intergenerational wealth, calling out for reparations as a remedy. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), available at [link](#).

**24.5. Tackling Demand-Side Discrimination.** If Schelling’s model of segregation is correct, real estate professionals like those investigated by *Newsday* might believe they have reasons to perpetuate continued residential segregation even if those professionals privately deplore (or believe they deplore) segregation and racial bias. For example, real estate agents might believe they are faithfully catering to the odious preferences of their house hunting clients when they preferentially direct White clients to homogeneously White neighborhoods, or direct non-white clients to racially mixed or majority-minority neighborhoods. That is, they may think that homebuyers generally prefer to live among people who look like them.

This belief may not be wrong! Consistent with the Schelling model, surveys find that White people tend to express preferences to live in an area where Whites are clearly in the majority, while nonwhites are more likely to express preferences to live in areas where races are evenly mixed. See, e.g., W. A. V. Clark, *Residential Preferences and Neighborhood Racial Segregation: A Test of the Schelling Segregation Model*, 28 DEMOGRAPHY 1 (1991). Some house hunters might even explicitly instruct their brokers about the racial demographics they are seeking in a new neighborhood. But if real estate agents tailor housing searches to such client preferences—even if the agents themselves abhor racial bias—they may be contributing to continued residential racial segregation. Should professional acquiescence to such discriminatory preferences on the part of house hunters be unlawful? See Lee Anne Fennell, *Searching for Fair Housing*, 97 B.U. L. REV. 349 (2017) (arguing it should be

unlawful); *cf. Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1530–31 (7th Cir. 1990) (real estate brokers who follow clients’ instructions to consider race in housing search do not violate the Fair Housing Act, because the Act protects buyers from discrimination, not neighborhoods from segregation).

**24.6. Segregation vs. Gentrification.** How might residential neighborhoods change if more homeowners began valuing racial diversity among their neighbors as a more important factor in deciding where to live? Given the persistent racial gaps in wealth and income, and the correlation of housing values with the race of neighborhood residents, how might such an increased preference for diversity manifest itself in homeowner behaviors? Who will be in the best position to choose to live in a more integrated neighborhood as demand for such neighborhoods increases?

Gentrification, generally defined, is the situation in which wealthier people move into a neighborhood and displace existing longtime residents. The same dynamics that arise when wealthy tenants suddenly begin leasing residences in a poorer neighborhood can arise when racially diverse or majority-minority neighborhoods get an influx of new investment in owner-occupied housing from White home buyers. So long as wealth and race are correlated, and housing values tend to drive local costs of living, integration-by-gentrification may perversely have the effect of *driving out* nonwhite residents of diverse neighborhoods who can no longer afford to live there, ultimately simply rearranging the boundary lines of racially segregated neighborhoods.

At least, integration-by-gentrification *could* have that effect. So far, empirical evidence is somewhat mixed. Perhaps because displacement is likely to lag gentrification, and because it is difficult to distinguish displacement (poorer, nonwhite residents being forced out by richer, White newcomers) from succession (poorer, nonwhite residents leaving at a normal rate and being replaced by richer, White newcomers), researchers disagree on whether displacement is happening at all in gentrifying neighborhoods, let alone the extent to which it is a problem. For a literature review, see Miriam Zuk et al., *Gentrification, Displacement, and the Role of Public Investment*, 33 J. PLANNING LIT. 31, 36–39 & tbl. 2 (2018).

Setting aside the potential problem of displacement, are segregation and gentrification our only options? Can you imagine a mechanism for residential racial integration that *doesn’t* involve gentrification? If the problem is that race, wealth, and neighborhood home values are correlated, is there any way to create opportunities for poorer homeowners to move into more expensive neighborhoods?

**24.7. Creditworthiness and Community Investment.** Like real estate agents who believe they are satisfying their clients’ preferences, finance professionals

looking out for their institutions' balance sheets might make decisions that have the effect of perpetuating residential racial segregation, even if the professionals themselves privately deplore (or believe they deplore) segregation and racial bias. Because, as discussed above, the value of residential real estate in racially diverse or majority-minority neighborhoods tends to be lower than the value of real estate in predominantly White neighborhoods, lending officers might well reason that loans secured by homes in racially diverse or majority-minority neighborhoods are likelier to result in losses for the lender than loans secured by real estate in predominantly White neighborhoods. A lending officer who sincerely believed this could in good faith tell himself that it would be irresponsible to extend credit secured by property in such neighborhoods. But writing off the credit needs of entire neighborhoods on the basis of such generalizations can be expected to leave many otherwise creditworthy borrowers without access to mortgage financing, based solely on the racial demographics of the neighborhood where they live—exactly the harm caused by *de jure* redlining.

To counteract this tendency, the Community Reinvestment Act of 1977 (“CRA”), 12 U.S.C. § 2901 *et seq.*, was enacted to require financial institutions to extend credit in all communities where they accept deposits—including low- and moderate-income neighborhoods—consistent with the “safe and sound” operation of the institution. 12 U.S.C. § 2903(a)(1). The CRA and its implementing regulations require federally regulated financial institutions to report their lending activities to the federal agency that regulates them. The agencies, in turn, must evaluate whether the reporting institutions are adequately meeting the credit needs of the communities they serve, and publish their evaluation accompanied by a rating of the institutions’ performance. In addition to subjecting financial institutions to public scrutiny, these evaluations are also used by federal regulators to determine whether the regulated institution should be granted permission to expand by acquisition, merger, or the opening of new branches and offices.

## 24.2 Racially Restrictive Covenants

### *Shelley v. Kraemer*

334 U.S. 1 (1948)

**Mr. Chief Justice VINSON delivered the opinion of the Court.**

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as

restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

. . . the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as (sic) not in subsequent conveyances and shall attach to the land, as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.

. . . On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question. The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

The Supreme Court of Missouri sitting en banc reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. At the time the court rendered its decision, petitioners were occupying the property in question.

... Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment. Specifically, petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States. We pass to a consideration of those issues.

## I.

Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider.

... It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; "simply that and nothing more."

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, § 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

This Court has given specific recognition to the same principle.

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary.

. . . But the present cases . . . do not involve action by state legislatures or city councils. Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this Court in the *Civil Rights Cases*, 1883, 109 U.S. 3, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may

be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters . . . .

### III.

. . . We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State . . . . The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power

in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color. . . .

The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind. Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.

For the reasons stated, the judgment of the Supreme Court of Missouri and the judgment of the Supreme Court of Michigan must be reversed.

Mr. Justice REED, Mr. Justice JACKSON, and Mr. Justice RUTLEDGE took no part in the consideration or decision of these cases.

### **Notes and Questions**

24.8. Racially restrictive covenants were widespread in the United States in the first half of the twentieth century. See generally Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541 (2001). Indeed,

just two decades prior to its decision in *Shelley*, in the case of *Corrigan v. Buckley*, 271 U.S. 323 (1926), the Supreme Court had affirmed the enforcement of such a covenant (against the original covenantor) in the District of Columbia (on grounds that the Equal Protection Clause of the 14th Amendment was inapplicable to the federal government—a proposition the Court retreated from in *Bolling v. Sharpe*, 347 U.S. 497 (1954)). And, as discussed in our unit on Redlining, in the years leading up to *Shelley* it was federal government policy to encourage mortgage lenders to insist on the inclusion of racially restrictive covenants in the deeds to homes that were to serve as collateral for federally-insured loans.

Note that three justices recused themselves from consideration of *Shelley*. Justice John Paul Stevens, in his memoir, surmises that they had to do so because they owned homes burdened (and, in the view of many white Americans of the day, benefited) by racially restrictive covenants. JUSTICE JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 69 (2011).

24.9. Does *Shelley* provide useful guidance on what types of privately agreed restrictions will be enforced and what types will go unenforced on constitutional or public policy grounds? Does the Restatement do any better?

24.10. Like racism, racially restrictive covenants have not gone away. Though unenforceable in court, they remain in the chain of title of much residential real estate today, and linger in historical title records. Several universities and public interest organizations have undertaken the work of identifying these lingering covenants in the hopes of removing them from title records. Examples include the University of Minnesota's Mapping Prejudice project ([link](#)), the University of Washington's Seattle Civil Rights & Labor History Project ([link](#)), and Prologue DC's Mapping Segregation project ([link](#)).

In the wake of white supremacist violence in Charlottesville, Virginia, in August of 2017, Charlottesville resident and legal commentator Dahlia Lithwick recounted:

Our lawyer once told us, when we purchased our home in Charlottesville, that the house to this day carries a racially restrictive covenant. No blacks, no Jews. That covenant is illegal and unenforceable. And so I have a house in Charlottesville that could once have been taken from me by the force of law.

Dahlia Lithwick, *They Will Not Replace Us*, SLATE (Aug. 13, 2017), [link](#). The white supremacists had descended on Charlottesville as a show of force centered on an equestrian statue of Confederate general Robert E. Lee, which the city had voted to remove. Jacey Fortin, *The Statue at the Center of Charlottesville's Storm*, N.Y. TIMES (Aug. 13, 2017), [link](#). In recent years, the law's treatment of racially restric-

tive covenants has come to take on some of the features of the culture war over the removal of Jim-Crow-era monuments to the Confederacy.

As we will see in the next section, removing a restrictive covenant from a chain of title can be quite difficult. In recent years, as attention has been drawn to the perpetuation of unenforceable racially restrictive covenants in title records, a number of states have enacted laws to make it easier—and in some cases mandatory—to file replacement deeds and other title documents with such covenants removed or stricken. See, e.g., CAL. GOV’T CODE § 12956.2; CAL. CIV. CODE § 4225; MD. CODE ANN., REAL PROP. §§ 3-112, 11B-113.3; MINN. STAT. § 507.18; NEV. REV. STAT. § 111.237(3); VA. CODE ANN. § 36-96.6. Note that under such statutes, the original instrument containing the covenant is not *removed* from the title records; the new document is simply *added* to the record with a reference to the location of the original, while the index is amended to point to the modified instrument rather than (or in addition to) the original instrument.

In the absence of such statutory intervention, however, it can be a challenge to remove racially restrictive language from title documents, even though—and perhaps even *because*—such language is unenforceable. In *Mason v. Adams Cty. Recorder*, 901 F.3d 753 (6th Cir. 2018), a suit seeking to compel county recorders in Ohio to “stop printing and publishing historical documents that contain racially restrictive covenants, to remove all such records from public view, and to permit the inspection and redaction of such documents” had been dismissed for lack of standing. In an opinion by Judge Boggs, the Court of Appeals affirmed the dismissal, explaining:

In ancient Rome, the practice of *damnatio memoriae*, or the condemnation of memory, could be imposed on felons whose very existence, including destruction of their human remains, would literally be erased from history for the crimes they had committed. Land title documents with racially restrictive covenants that we now find offensive, morally reprehensible, and repugnant cannot be subject to *damnatio memoriae*, as those documents are part of our living history and witness to the evolution of our cultural norms. Mason’s feeling of being unwelcomed may be real. A feeling cannot be unfelt. But Mason’s discomfort at the expression of historical language does not create particularized injury. The language in question is purely historical and is unenforceable and irrelevant in present-day land transactions.

901 F.3d at 757 (footnote omitted). In a concurrence, Judge Clay agreed that the plaintiff had not adequately pleaded a particularized injury, but held open the possibility that he *could* do so:

Justice may require us to repudiate or revise elements of our “living history” if those elements—whether they be public records, flags, or statutes—are shown to encourage or perpetuate discrimination or the badges and incidents of slavery; indeed, racial epithets that were once accepted as commonplace have not been preserved, and they have sometimes been stricken from our modern vernacular. We apply an even stricter standard where, as here, the government is the source of, or has ratified, language that has the purpose or effect of encouraging racial animus. We need not erase our history in order to disarm its harmful legacy, but victims of invidious discrimination who have suffered particularized injury as a result of the application of historical language should be able to seek redress, consistent with the context and the factual circumstances of their cases.

*Id.* at 758 (Clay, J. concurring). The debate between these two opinions—over the nature and gravity of the harms caused by the persistence of racist symbols, the appropriate response to those harms, and the nature of our obligations to preserve historical memory—is strikingly (and probably intentionally) similar to the debate over the removal of Confederate monuments. Is this debate helpful in determining what to do about title records? Are the issues presented by title records the same as those presented by statues of Confederate generals? If not, how do they differ?

24.11. Precisely because they remain in the chain of title for many parcels of real property, these types of discriminatory covenants still occasionally lead to disputes, particularly where residents continue to believe they are a good idea. For example, the Long Island, NY village of Yaphank, founded in the 1930s as “Camp Siegfried,” owes its origin to the expression of Nazi sympathies. This German-American community started as a summer camp for would-be Hitler Youth, and was financed by the German-American Bund party (a pro-Nazi organization). See Nicholas Casey, *Buyers’ Rule in L.I. Town Is Relic of Its Nazi Past*, N.Y. TIMES, Oct. 20, 2015, at A1, [link](#). The land comprising village’s residential subdivision of about 50 homes is actually owned by the “German American Settlement League, Inc.” whose bylaws restricted residency to League members, and restricted League membership “primarily” to people “of German extraction.” Yaphank residents owned, and



**Figure 24.2:** Robin Hutton, Shaved Head Family stickers 2, Sept. 25, 2012, BY-NC-ND.

could sell, the *structures* on their lots, but in order to take possession the buyer needed a lease to the underlying land, which the League controlled.

In 2015, the nonprofit advocacy organization Long Island Housing Services sued the German American Settlement League on behalf of two homeowners (both of German extraction) who were having difficulty selling their home subject to the restrictions. In 2016, the plaintiffs secured a settlement in which the League agreed to remove the racial restrictions from its bylaws and to comply with fair housing laws. LIHS's complaint is available here, [link](#), and the settlement is available here, [link](#).

### 24.3 Family Status Zoning

Any zoning scheme which creates a single-family zoning district, or even a standard for what single-family homes must look like, must contain a definition of family.

***City of Ladue v. Horn***  
720 S.W.2d 745 (Mo. Ct. App. 1986)

Defendants, Joan Horn and E. Terrence Jones, appeal from the judgment of the trial court in favor of plaintiff, City of Ladue (Ladue), which

enjoined defendants from occupying their home in violation of Ladue's zoning ordinance and which dismissed defendants' counterclaim. We affirm.

The case was submitted to the trial court on stipulated facts. Ladue's Zoning Ordinance No. 1175 was in effect at all times pertinent to the present action. Certain zones were designated as one-family residential. The zoning ordinance defined family as: "One or more persons related by blood, marriage or adoption, occupying a dwelling unit as an individual housekeeping organization." The only authorized accessory use in residential districts was for "[a]ccommodations for domestic persons employed and living on the premises and home occupations." The purpose of Ladue's zoning ordinance was broadly stated as to promote "the health, safety, morals and general welfare" of Ladue.

In July, 1981, defendants purchased a seven-bedroom, four-bathroom house which was located in a single-family residential zone in Ladue. Residing in defendants' home were Horn's two children (aged 16 and 19) and Jones's one child (age 18). The two older children attended out-of-state universities and lived in the house only on a part-time basis. Although defendants were not married, they shared a common bedroom, maintained a joint checking account for the household expenses, ate their meals together, entertained together, and disciplined each other's children. Ladue made demands upon defendants to vacate their home because their household did not comprise a family, as defined by Ladue's zoning ordinance, and therefore they could not live in an area zoned for single-family dwellings. When defendants refused to vacate, Ladue sought to enjoin defendants' continued violation of the zoning ordinance. Defendants counterclaimed, seeking a declaration that the zoning ordinance was constitutionally void. They also sought attorneys' fees and costs. The trial court entered a permanent injunction in favor of Ladue and dismissed defendants' counterclaim. Enforcement of the injunction was stayed pending this appeal.

. . . In Missouri, the scope of appellate review in zoning matters is limited; and the reviewing court may not substitute its judgment for that of the zoning authority. A zoning ordinance is presumed valid. The legislative body is vested with broad discretion and the appellate court cannot interfere unless it is shown that the legislative body has acted arbitrarily. "If the council's action is fairly debatable, the court cannot substitute its opinion."

. . . Capsulated, defendants' attack on Ladue's ordinance is three-pronged. First, the zoning limitations foreclose them from exercising their right to associate freely with whomever they wish. Second, their right to privacy is violated by the zoning restrictions. Third, the zoning classification distinguishes between related persons and unrelated persons. Defendants allege that the United States and Missouri Constitutions grant each of them the right to share his or her residence with whomever he or she chooses. They assert that Ladue has not demonstrated a compelling, much less rational, justification for the overly prescriptive blood or legal relationship requirement in its zoning ordinance.

Defendants posit that the term "family" is susceptible to several meanings. They contend that, since their household is the "functional and factual equivalent of a natural family," the ordinance may not preclude them from living in a single-family residential Ladue neighborhood. Defendants argue in their brief as follows:

The record amply demonstrates that the private, intimate interests of Horn and Jones are substantial. Horn, Jones, and their respective children have historically lived together as a single family unit. They use and occupy their home for the identical purposes and in the identical manners as families which are biologically or maritally related.

To bolster this contention, defendants elaborate on their shared duties, as set forth earlier in this opinion. Defendants acknowledge the importance of viewing themselves as a family unit, albeit a "conceptual family" as opposed to a "true non-family," in order to prevent the application of the ordinance.<sup>3</sup>

The fallacy in defendants' syllogism is that the stipulated facts do not compel the conclusion that defendants are living as a family. A man and woman living together, sharing pleasures and certain responsibilities, does not *per se* constitute a family in even the conceptual sense. To approximate

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<sup>3</sup>The distinction between "conceptual" or "non-traditional" families and true non-families may well be a distinction without a difference, the distinction resting in speculation and stereotypical presumptions. Further, recognition of the conceptual family suffers from the defect of commanding inquiry into who are the users rather than focusing on the use itself. See generally Note, *City of Santa Barbara v. Adamson: An Associational Right of Privacy and the End of Family Zones*, 69 Calif. L. Rev. 1052, 1068–70 (1981).

a family relationship, there must exist a commitment to a permanent relationship and a perceived reciprocal obligation to support and to care for each other. Only when these characteristics are present can the conceptual family, perhaps, equate with the traditional family. In a traditional family, certain of its inherent attributes arise from the legal relationship of the family members. In a non-traditional family, those same qualities arise in fact, either by explicit agreement or by tacit understanding among the parties.

While the stipulated facts could arguably support an inference by the trial court that defendants and their children comprised a non-traditional family, they do not compel that inference. . . . We assume, arguendo, that the sole basis for the judgment entered by the trial court was that defendants were not related by blood, marriage or adoption, as required by Ladue's ordinance.

We first consider whether the ordinance violates any federally protected rights of the defendants. Generally, federal court decisions hold that a zoning classification based upon a biological or a legal relationship among household members is justifiable under constitutional police powers to protect the public health, safety, morals or welfare of the community.

More specifically, the United States Supreme Court has developed a two-tiered approach by which to examine legislation challenged as violative of the equal protection clause. If the personal interest affected by the ordinance is fundamental, "strict scrutiny" is applied and the ordinance is sustained only upon a showing that the burden imposed is necessary to protect a compelling governmental interest. If the ordinance does not contain a suspect class or impinge upon a fundamental interest, the more relaxed "rational basis" test is applied and the classification imposed by the ordinance is upheld if any facts can reasonably justify it. Defendants urge this court to recognize that their interest in choosing their own living arrangement inexorably involves their fundamental rights of freedom of association and of privacy.

In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the United States Supreme Court also established the due process parameters of permissible legislation. The ordinance in question must have a "foundation in reason" and bear a "substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."

In the *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the court addressed a zoning regulation of the type at issue in this case. The court held that the Village of Belle Terre ordinance involved no fundamental right, but was typical of economic and social legislation which is upheld if it is reasonably related to a permissible governmental objective. The challenged zoning ordinance of the Village of Belle Terre defined family as:

One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit [or] a number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage . . . .

The court upheld the ordinance, reasoning that the ordinance constituted valid land use legislation reasonably designed to maintain traditional family values and patterns.

The importance of the family was reaffirmed in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), wherein the United States Supreme Court was confronted with a housing ordinance which defined a “family” as only certain closely related individuals. Consequently, a grandmother who lived with her son and two grandsons was convicted of violating the ordinance because her two grandsons were first cousins rather than brothers. The United States Supreme Court struck down the East Cleveland ordinance for violating the freedom of personal choice in matters of marriage and family life. The court distinguished *Belle Terre* by stating that the ordinance in that case allowed all individuals related by blood, marriage or adoption to live together; whereas East Cleveland, by restricting the number of related persons who could live together, sought “to regulate the occupancy of its housing by slicing deeply into the family itself.” The court pointed out that the institution of the family is protected by the Constitution precisely because it is so deeply rooted in the American tradition and that “[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family.”

Here, because we are dealing with economic and social legislation and not with a fundamental interest or a suspect classification, the test of constitutionality is whether the ordinance is reasonable and not arbitrary and bears a rational relationship to a permissible state objective. “[E]very line drawn by a legislature leaves some out that might well have been included.

That exercise of discretion, however, is a legislative, not a judicial, function."

Ladue has a legitimate concern with laying out guidelines for land use addressed to family needs. "It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." The question of whether Ladue could have chosen more precise means to effectuate its legislative goals is immaterial. Ladue's zoning ordinance is rationally related to its expressed purposes and violates no provisions of the Constitution of the United States. Further, defendants' assertion that they have a constitutional right to share their residence with whomever they please amounts to the same argument that was made and found unpersuasive by the court in *Belle Terre*.

We next consider whether the Ladue ordinance violates any rights of defendants protected by the Missouri Constitution. . . .

For purposes of its zoning code, Ladue has in precise language defined the term family. It chose the definition which comports with the historical and traditional notions of family; namely, those people related by blood, marriage or adoption. That definition of family has been upheld in numerous Missouri decisions. See, e.g., *London v. Handicapped Facilities Board of St. Charles County*, 637 S.W.2d 212 (Mo. App. 1982) (group home not a "family" as used in restrictive covenant); *Feely v. Birenbaum*, 554 S.W.2d 432 (Mo. App. 1977) (two unrelated males not a "family" as used in restrictive covenant); *Cash v. Catholic Diocese*, 414 S.W.2d 346 (Mo. App. 1967) (nuns not a "family" as used in a restrictive covenant).

Decisions from other state jurisdictions have addressed identical constitutional challenges to zoning ordinances similar to the ordinance in the instant case. The reviewing courts have upheld their respective ordinances on the ground that maintenance of a traditional family environment constitutes a reasonable basis for excluding uses that may impair the stability of that environment and erode the values associated with traditional family life.<sup>4</sup>

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<sup>4</sup>See, e.g., *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 357 N.Y.S.2d 449, 313 N.E.2d 756 (1974) (married couple, their two children and 10 foster children not a family under city's ordinance); *Rademan v. City and County of Denver*, 186 Colo. 250, 526 P.2d 1325 (1974) (two married couples living as a "communal family" not a family); *Town of Durham v. White Enterprises, Inc.*, 115 N.H. 645, 348 A.2d 706 (1975) (student renters not a family); *Prospect Gardens Convalescent Home, Inc. v. City of Norwalk*, 32 Conn. Sup. 214, 347 A.2d 637 (1975) (nursing home employees living together not a family). See generally Annot., 12 A.L.R.

The essence of zoning is selection; and, if it is not invidious or discriminatory against those not selected, it is proper. There is no doubt that there is a governmental interest in marriage and in preserving the integrity of the biological or legal family. There is no concomitant governmental interest in keeping together a group of unrelated persons, no matter how closely they simulate a family. Further, there is no state policy which commands that groups of people may live under the same roof in any section of a municipality they choose.

The stated purpose of Ladue's zoning ordinance is the promotion of the health, safety, morals and general welfare in the city. Whether Ladue could have adopted less restrictive means to achieve these same goals is not a controlling factor in considering the constitutionality of the zoning ordinance. Rather, our focus is on whether there exists some reasonable basis for the means actually employed. In making such a determination, if any state of facts either known or which could reasonably be assumed is presented in support of the ordinance, we must defer to the legislative judgment. We find that Ladue has not acted arbitrarily in enacting its zoning ordinance which defines family as those related by blood, marriage or adoption. Given the fact that Ladue has so defined family, we defer to its legislative judgment.

The judgment of the trial court is affirmed.

#### Notes and Questions

**24.12. Further background on the Supreme Court cases.** *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), was primarily concerned with the Village's attempts to exclude groups of unrelated college students from living together. The Supreme Court cited *Euclid* and similar cases in support of its holding that the legislature can

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4th 238 (1985). A number of jurisdictions have found restrictive zoning ordinances invalid. See, e.g., *City of Des Plaines v. Trottner*, 34 Ill.2d 432, 216 N.E.2d 116 (1970) (ordinance with restrictive definition of family violates authority delegated by state legislature in the enabling statute); *City of Santa Barbara v. Adamson*, 27 Cal.3d 123, 164 Cal. Rptr. 539, 610 P.2d 436 (1982) (zoning ordinance limiting the number of unrelated persons who could live together, but not related persons, did not further legislative goals); *Charter Township of Delta v. Dinolfo*, 419 Mich. 253, 351 N.W.2d 831 (1984) (restrictive definition of family not rationally related to achieving township's goals).

decide what kinds of uses are detrimental to the peaceful and attractive character of the area:

The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds . . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Are college students nuisance-like? The *Belle Terre* Court said the ordinance in that case showed no animosity towards unmarried couples, as proven by its inclusion of two unmarried people in its definition of “family.” But what about an unmarried couple with children, as in *Ladue*?

24.13. Justice Marshall’s vigorous dissent in *Belle Terre* would have distinguished between “uses of land . . . , for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings,” which zoning authorities could validly regulate, and “who those persons are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried,” which he would have found they could not. In Justice Marshall’s view, a neutral ordinance regulating density, noise, etc. could accomplish all the town’s goals. “The burden of such an ordinance would fall equally upon all segments of the community. It would surely be better tailored to the goals asserted by the village than the ordinance before us today, for it would more realistically restrict population density and growth and their attendant environmental costs.”

24.14. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), Justice Marshall joined the plurality opinion of the Court striking down East Cleveland’s more limited definition of “family,” over several dissents.<sup>3</sup> In that case, Inez Moore lived with her son, Dale Moore, Sr., and her two grandsons, Dale, Jr., and John Moore, Jr. The two boys were first cousins, rather than brothers; John came to live with his grandmother and the elder and younger Dale Moores after his mother’s death. This caused the household to violate East Cleveland’s family ordinance, resulting

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<sup>3</sup>The relevant ordinance defined “family” as “a number of individuals related to the nominal head of the household or to the spouse” thereof, and further enumerated specific relatives that could qualify as part of the statutorily defined family.

in criminal charges against Mrs. Moore. The Court distinguished *Belle Terre* by reasoning that East Cleveland “has chosen to regulate the occupancy of its housing by slicing deeply into the family itself.”

The doctrine of substantive due process, which protects fundamental rights against government intrusion, could not stop at the “first convenient, if arbitrary boundary—the boundary of the nuclear family.” Justices Brennan and Marshall, in concurrence, specifically pointed out that the “nuclear family” was really the pattern of “white suburbia,” which could not impose its preference on others, and noted traditions among immigrants and African-Americans of living together in multigenerational arrangements as a matter of survival. The concurrence touted multigenerational families as stronger and more beneficial for children than isolated nuclear families. Ultimately, the plurality wrote, “the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.”

Justice Stewart, joined by then-Justice Rehnquist, would have upheld the ordinance, rejecting the theory that “that the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated person.” The interests of a grandmother in living with her grandchildren were simply not sufficient, in the dissenters’ view, to justify invalidating a zoning ordinance. If the city was required to include grandchildren, why not longtime friends? A line had to be drawn somewhere, and this one was rational, especially since the grandmother could seek a variance if the application of the ordinance to her wouldn’t further its goals.

24.15. Given this further detail about *Belle Terre* and *Moore*, do you think *Ladue v. Horn* reached the right conclusion? Consider PAUL BOUDREAU, THE HOUSING BIAS: RETHINKING LAND USE LAWS FOR A DIVERSE NEW AMERICA (2011):

[Restrictive single family] regulations provide a fascinating perspective into the unique powers that America gives to laws governing “land use.” Government cannot, of course, tell you what kind of car to drive, what to cook for dinner, whether to watch reality TV, whether to fill the living room with ceramic gnomes or tchotchkes, or whether to pay for your kid’s college education. All these things are considered, and rightly so, within the realm of human privacy and basic human freedom. But under the label of land use law, governments are able to tell you who to consider your family and who can live in your house.... Why can government be so intrusive? Because the neighbors might

not like how you live and because they have pushed the local government, through civic local democracy, into passing a law regulating your household. It's an accepted exercise of the police power.

**24.16. More recent events.** Ladue's current (as of 2023) ordinance allows “[o]ne or more persons related by blood, marriage or legal adoption, or any number of persons so related plus one unrelated person, or two unrelated persons, occupying a dwelling unit as an individual housekeeping organization.” Is it constitutional to force an unmarried couple to leave if they each have a child from a prior relationship, or a married couple after they take foster children into their home? In 2006, a lesbian couple with a child was excluded from Ladue because of its family composition ordinance, and the same year an unmarried couple with two children was told they had to leave the home they'd bought in Black Jack, Missouri, another St. Louis suburb.<sup>4</sup>

The American Civil Liberties Union sued Black Jack. Discovery revealed that at least four other couples had been denied occupancy permits to live in Black Jack because they were unmarried and living with children, including a couple who were the parents of triplets. *Dispatch From Black Jack, MO, L.A. TIMES* A12 (May 21, 2006). Black Jack agreed to change its ordinance to settle the litigation.

Now that the lesbian couple in Black Jack can legally marry, can Black Jack go back to requiring couples to be married if they want to live in Black Jack with their children?

**24.17. States' varying treatment of family composition rules.** A number of other states, either on federal or state constitutional grounds, have instead drawn the line at “single housekeeping units” or “functional families.” See, e.g., *Delta Charter T'ship v. Dinolfo*, 351 N.W.2d 831 (Mich. 1984) (no rational basis to preclude four childhood friends from living together). The Court of Appeals of New York has been particularly protective of individual choice of living arrangements. See, e.g., *Group House of Port Washington v. Board of Zoning and Appeals*, 380 N.E.2d 207 (N.Y. 1978) (a house consisting of two surrogate parents and seven emotionally disturbed children was “the functional and factual equivalent of a natural family, and to exclude it from a residential area would be to serve no valid purpose”). Many New York municipalities now presume that a group of individuals smaller than four is a functional

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<sup>4</sup>See, e.g., Nancy Larson, *Gay Couples Keep Out!*, ADVOCATE 34 (Jul. 18, 2006) (discussing lesbian couple and daughter who were warned by real estate agents that Ladue would prevent them from living together); Eun Kyung Kim, *Law Means Unwed Couple, 3 Kids May Be... Booted From Black Jack*, St. Louis Post-DISPATCH A1 (Feb. 22, 2006).

family, and presume that a larger group is not but allow it to rebut that presumption. See, e.g., *Unification Theological Seminary v. City of Poughkeepsie*, 607 N.Y.S.2d 383 (N.Y. App. Div. 1994) (upholding this practice, where the ordinance provided that the zoning administrator should consider whether the group shares the entire house; lives and cooks together as a single housekeeping unit; shares expenses for food, rent, utilities or other household expenses; and is permanent and stable).

However, a number of states still follow *Belle Terre* when a jurisdiction's family composition ordinance is challenged. The litigated cases tend to be older, and even in the 1990s enforcement often drew incredulous media coverage, but there are a few recent cases upholding restrictive definitions of family. See, e.g., *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 145 So. 3d 320 (La. 2014) (upholding single-family ordinance that allowed (1) an unlimited number of related people or (2) no more than four unrelated people in a single housekeeping unit, if the owner occupied the premises). Some jurisdictions have even tightened their definitions. See, e.g., Stephanie McCrummen, *Manassas Changes Definition of Family*, WASH. POST A1 (Dec. 28, 2005) (newly enacted Manassas, VA zoning law prevented couple from living with woman's nephew; opponents attributed enactment to discrimination against immigrants); see generally Rigel C. Oliveri, *Single Family Zoning, Intimate Association, and the Right To Choose Household Companions*, FLA. L. REV. (2015); Adam Lubow, “... Not Related by Blood, Marriage, or Adoption”: *A History of the Definition of “Family” in Zoning Law*, 16 J. AFFORD. Hous. & COMM. DEV. LAW 144 (2007). In other instances, zoning authorities have focused on excluding groups of college students, not others. See, e.g., *Rosenberg v. City of Boston*, 2010 WL 2090956 (Mass. Land. Ct. 2010) (upholding the constitutionality of excluding only “five or more persons who are enrolled as full-time undergraduate students at a post-secondary educational institution” from living together in a dwelling unit).

24.18. The Supreme Court, in *Obergefell v. Hodges*, rejected arguments that bans on same-sex marriage protected children, because of the numerous children living with same-sex couples whose interests were harmed by discrimination against their parents. Does the same rationale apply here to invalidate family composition ordinances, at least as applied to households with children?

24.19. **The Fair Housing Act and the Americans with Disabilities Act.** The FHA and the ADA may also limit family composition rules, as applied to group homes for people with disabilities. Disability-related zoning litigation often involves residents of group homes, who routinely experience discrimination, either overt or simply through indifference, usually in the form of bans on group living arrangements. See, e.g., *Oxford House v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993)

(finding that town's family composition ordinance discriminated against individuals recovering from drug or alcohol addition because of their handicap). While pure density regulations capping the number of occupants per dwelling are exempt from the FHA, family definitions are not pure density regulations and thus reasonable accommodations to them may be required. *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995).

In order to deal with repeated FHA litigation around group homes, Missouri amended its zoning authorization statute, providing comprehensive definitions and limiting localities' power to exclude group homes:

For the purpose of any zoning law, ordinance or code, the classification single family dwelling or single family residence shall include any home in which eight or fewer unrelated mentally or physically handicapped persons reside, and may include two additional persons acting as house parents or guardians who need not be related to each other or to any of the mentally or physically handicapped persons residing in the home. In the case of any such residential home for mentally or physically handicapped persons, the local zoning authority may require that the exterior appearance of the home and property be in reasonable conformance with the general neighborhood standards. Further, the local zoning authority may establish reasonable standards regarding the density of such individual homes in an specific single family dwelling neighborhood.

Section 89.020.2. Does this adequately address problems of potential discrimination, including the obligation to provide reasonable accommodation?



# Chapter 25

## Takings

We now address a final method of resolving incompatible property uses. **Eminent domain**, also called **condemnation**, is the inherent power of the state to transfer title of private property into state hands. In the United States, when the government “takes” land in this manner, it must comply with the Takings Clause of the Fifth Amendment:

[N]or shall private property be taken for public use, without just compensation.

This brief constitutional provision encompasses three distinct issues that we will deal with in this chapter (though not in this order): (1) has there been a “taking” of private property? (2) Is the taking for “public use”; and (3) has “just compensation” been provided?

### 25.1 What Qualifies as a Taking

*Ruckelshaus v. Monsanto Co.*  
467 U.S. 986 (1984)

**Justice BLACKMUN delivered the opinion of the Court.**

In this case, we are asked to review a United States District Court’s determination that several provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) are unconstitutional. The provisions at issue authorize the Environmental Protection Agency (EPA) to use data submitted by an applicant for registration of a pesticide in evaluating the appli-

cation of a subsequent applicant, and to disclose publicly some of the submitted data.

## I

Over the past century, the use of pesticides to control weeds and minimize crop damage caused by insects, disease, and animals has become increasingly more important for American agriculture. While pesticide use has led to improvements in productivity, it has also led to increased risk of harm to humans and the environment. . . .

[The legislative history of FIFRA is complex but important. Here are the relevant parts.] As first enacted, FIFRA was primarily a licensing and labeling statute. [Applicants wishing to sell pesticides were required to provide the government with testing data about the product, which the Department of Agriculture (later the EPA) would use to verify the pesticide's labeling information.]

Congress undertook a comprehensive revision of FIFRA through the adoption of the Federal Environmental Pesticide Control Act of 1972. The amendments transformed FIFRA from a labeling law into a comprehensive regulatory statute. [Relevant to the case, the law permitted the EPA to use submitted testing data for two purposes: (1) during consideration of a second manufacturer's application for approval of a pesticide similar active ingredients, and (data-consideration); and (2) disclosure to the public as part of the application process (data-disclosure). However, the applicant could designate parts of the data as "trade secrets or commercial or financial information." Under the 1972 amendments, the EPA was not allowed to use correctly designated data for either of the two above purposes.]

Congress enacted other amendments to FIFRA in 1978. [Regarding the data-consideration provision], applicants are granted a 10-year period of exclusive use for data on new active ingredients contained in pesticides registered after September 30, 1978. All other data submitted after December 31, 1969, may be cited and considered in support of another application for 15 years after the original submission if the applicant offers to compensate the original submitter[, with the amount of compensation determined by binding arbitration.] Data that do not qualify for either the 10-year period of exclusive use or the 15-year period of compensation may be considered by EPA without limitation.

Also in 1978, Congress added a new subsection, that provides for disclosure of all health, safety, and environmental data to qualified requesters, notwithstanding the prohibition against disclosure of trade secrets[, with limited exceptions].

## II

Appellee Monsanto Company (Monsanto) is an inventor, developer, and producer of various kinds of chemical products, including pesticides. . . . The District Court found that Monsanto had incurred costs in excess of \$23.6 million in developing the health, safety, and environmental data submitted by it under FIFRA. . . . Monsanto also uses this information to develop additional end-use products and to expand the uses of its registered products. The information would also be valuable to Monsanto's competitors. For that reason, Monsanto has instituted stringent security measures to ensure the secrecy of the data.

. . . Monsanto alleged that [the data-consideration and data-disclosure] provisions effected a "taking" of property without just compensation, in violation of the Fifth Amendment. [The district court agreed.] We noted probable jurisdiction.

## III

In deciding this case, we are faced with [three] questions: (1) Does Monsanto have a property interest protected by the Fifth Amendment's Taking Clause in the health, safety, and environmental data it has submitted to EPA? (2) If so, does EPA's use of the data to evaluate the applications of others or EPA's disclosure of the data to qualified members of the public effect a taking of that property interest? (3) If there is a taking, is it a taking for a public use? . . .\*

This Court never has squarely addressed the applicability of the protections of the Taking Clause of the Fifth Amendment to commercial data of the kind involved in this case. In answering the question now, we are mindful of the basic axiom that "'[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' " Monsanto asserts that the health, safety, and

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\*The Court also considered the means of providing just compensation for any taking, and concluded that the Tucker Act gave Monsanto a sufficient means of obtaining compensation. —Eds.

environmental data it has submitted to EPA are property under Missouri law, which recognizes trade secrets, as defined in § 757, Comment *b*, of the Restatement of Torts, as property. The Restatement defines a trade secret as “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” And the parties have stipulated that much of the information, research, and test data that Monsanto has submitted under FIFRA to EPA “contains or relates to trade secrets as defined by the Restatement of Torts.”

Because of the intangible nature of a trade secret, the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others. Information that is public knowledge or that is generally known in an industry cannot be a trade secret. If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished.

Trade secrets have many of the characteristics of more tangible forms of property. A trade secret is assignable. A trade secret can form the res of a trust, and it passes to a trustee in bankruptcy.

Even the manner in which Congress referred to trade secrets in the legislative history of FIFRA supports the general perception of their property-like nature. In discussing the 1978 amendments to FIFRA, Congress recognized that data developers like Monsanto have a “proprietary interest” in their data. Further, Congress reasoned that submitters of data are “entitled” to “compensation” because they “have legal ownership of the data.” This general perception of trade secrets as property is consonant with a notion of “property” that extends beyond land and tangible goods and includes the products of an individual’s “labour and invention.” 2 W. Blackstone, *Commentaries* \*405; see generally J. Locke, *The Second Treatise of Civil Government*, ch. 5 (J. Gough ed. 1947).

Although this Court never has squarely addressed the question whether a person can have a property interest in a trade secret, which is admittedly intangible, the Court has found other kinds of intangible interests to be property for purposes of the Fifth Amendment’s Taking Clause. See, e.g., *Armstrong v. United States*, 364 U. S. 40, 44, 46 (1960) (materialman’s lien provided for under Maine law protected by Taking Clause); *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 596-602 (1935) (real estate

lien protected); *Lynch v. United States*, 292 U. S. 571, 579 (1934) (valid contracts are property within meaning of the Taking Clause). That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of this Court:

It is conceivable that [the term “property” in the Taking Clause] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.

*United States v. General Motors Corp.*, 323 U. S. 373, 377-378 (1945).

We therefore hold that to the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri law, that property right is protected by the Taking Clause of the Fifth Amendment.

#### IV

Having determined that Monsanto has a property interest in the data it has submitted to EPA, we confront the difficult question whether a “taking” will occur when EPA discloses those data or considers the data in evaluating another application for registration. . . .

The inquiry into whether a taking has occurred is essentially an ad hoc, factual inquiry. The Court, however, has identified several factors that should be taken into account when determining whether a governmental action has gone beyond “regulation” and effects a “taking.” Among those factors are: the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. It is to the last of these three factors that we now direct our attention, for we find that the force of this factor is so overwhelming, at least with respect to certain of the data submitted by Monsanto to EPA, that it disposes of the taking question regarding those data.

#### A

A “reasonable investment-backed expectation” must be more than a “unilateral expectation or an abstract need.” . . . With respect to any data

submitted to EPA on or after October 1, 1978, Monsanto knew that . . . once the 10-year period had expired, EPA could use the data [in considering another's application] without Monsanto's permission. . . . The statute also gave Monsanto notice that much of the health, safety, and efficacy data provided by it could be disclosed to the general public at any time. If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission.

Monsanto argues that the statute's requirement that a submitter give up its property interest in the data constitutes placing an unconstitutional condition on the right to a valuable Government benefit. But Monsanto has not challenged the ability of the Federal Government to regulate the marketing and use of pesticides. Nor could Monsanto successfully make such a challenge, for such restrictions are the burdens we all must bear in exchange for the advantage of living and doing business in a civilized community. . . . Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.

## B

[For data prior to the 1972 FIFRA amendments, the Court concluded that federal law offered no promise that the government would protect trade secrets.] Absent an express promise, Monsanto had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA. . . .

## C

The situation may be different, however, with respect to data submitted by Monsanto to EPA during the period from October 22, 1972, through September 30, 1978. Under the statutory scheme then in effect, a submitter was given an opportunity to protect its trade secrets from disclosure by designating them as trade secrets at the time of submission. . . . The statute gave Monsanto explicit assurance that EPA was prohibited from disclosing

publicly, or considering in connection with the application of another, any data submitted by an applicant if both the applicant and EPA determined the data to constitute trade secrets. . . . This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation. If EPA, consistent with the authority granted it by the 1978 FIFRA amendments, were now to disclose trade-secret data or consider those data in evaluating the application of a subsequent applicant in a manner not authorized by the version of FIFRA in effect between 1972 and 1978, EPA's actions would frustrate Monsanto's reasonable investment-backed expectation with respect to its control over the use and dissemination of the data it had submitted.

The right to exclude others is generally one of the most essential sticks in the bundle of rights that are commonly characterized as property. With respect to a trade secret, the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.<sup>16</sup> That the data retain usefulness for Monsanto even after they are disclosed—for example, as bases from which to develop new products or refine old products, as marketing and advertising tools, or as information necessary to obtain registration in foreign countries—is irrelevant to the determination of the economic impact of the EPA action on Monsanto's property right. The economic value of that property right lies in the competitive advantage over others that Monsanto enjoys by virtue of its exclusive access to the data, and disclosure or use by others of the data would destroy that competitive edge.

EPA encourages us to view the situation not as a taking of Monsanto's property interest in the trade secrets, but as a "pre-emption" of whatever

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<sup>16</sup>We emphasize that the value of a trade secret lies in the competitive advantage it gives its owner over competitors. Thus, it is the fact that operation of the data-consideration or data-disclosure provisions will allow a competitor to register more easily its product or to use the disclosed data to improve its own technology that may constitute a taking. If, however, a public disclosure of data reveals, for example, the harmful side effects of the submitter's product and causes the submitter to suffer a decline in the potential profits from sales of the product, that decline in profits stems from a decrease in the value of the pesticide to consumers, rather than from the destruction of an edge the submitter had over its competitors, and cannot constitute the taking of a trade secret.

property rights Monsanto may have had in those trade secrets.<sup>†</sup> . . . This argument proves too much. If Congress can “pre-empt” state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality. This Court has stated that a sovereign, “by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.”

. . . .

In summary, we hold that EPA’s consideration or disclosure of data submitted by Monsanto to the agency prior to October 22, 1972, or after September 30, 1978, does not effect a taking. We further hold that EPA consideration or disclosure of health, safety, and environmental data will constitute a taking if Monsanto submitted the data to EPA between October 22, 1972, and September 30, 1978 . . . .

## V

We must next consider whether any taking of private property that may occur by operation of the data-disclosure and data-consideration provisions of FIFRA is a taking for a “public use.” We have recently stated that the scope of the “public use” requirement of the Taking Clause is “coterminous with the scope of a sovereign’s police powers.” The role of the courts in second-guessing the legislature’s judgment of what constitutes a public use is extremely narrow.

. . . Here, the public purpose behind the data-consideration provisions is clear from the legislative history. Congress believed that the provisions would eliminate costly duplication of research and streamline the registration process, making new end-use products available to consumers more quickly. Allowing applicants for registration, upon payment of compensation, to use data already accumulated by others, rather than forcing them to go through the time-consuming process of repeating the research, would eliminate a significant barrier to entry into the pesticide market, thereby allowing greater competition among producers of end-use products. Such a procompetitive purpose is well within the police power of Congress.

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<sup>†</sup>If you are not familiar with it, preemption is the doctrine that where a state law conflicts with a federal law, the federal law overrides the state law. The EPA was in essence arguing that FIFRA eliminated state trade secret protection by virtue of preemption. —Eds.

. . . The court found that the data-disclosure provisions served no use [because the EPA-approved pesticide label] provided the public with all the assurance it needed that the product is safe and effective. It is enough for us to state that the optimum amount of disclosure to the public is for Congress, not the courts, to decide, and that the statute embodies Congress' judgment on that question. We further observe, however, that public disclosure can provide an effective check on the decisionmaking processes of EPA and allows members of the public to determine the likelihood of individualized risks peculiar to their use of the product.

We therefore hold that any taking of private property that may occur in connection with EPA's use or disclosure of data submitted to it by Monsanto between October 22, 1972, and September 30, 1978, is a taking for a public use.

[JUSTICE O'CONNOR dissented in part. In her view, the government had a confidentiality obligation in the pre-1972 data, so a disclosure of it would have been a taking.]

### Notes and Questions

25.1. What exactly is the “property” that the government has taken in *Monsanto*? One answer is the data that Monsanto spent \$23 million to develop. But then the government would “take” that data by requiring Monsanto to disclose it merely for purposes of pesticide approval—something the Court plainly does not hold. What rights or value has Monsanto lost? What does that tell you about what property is?

25.2. **Other IP rights.** Trade secrets exist under state law, to which courts may look in determining whether a property interest exists. What about federal IP rights? The issue is a debated.<sup>1</sup>

Should intellectual property receive takings protection? On the one hand, the underlying statutes give them the attributes of property. 35 U.S.C. § 261 (“Subject to the provisions of this title, patents shall have the attributes of personal property.”).

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<sup>1</sup>Compare, e.g., David H. Isaacs, *Not All Property Is Created Equal: Why Modern Courts Resist Applying the Takings Clause to Patents, and Why They Are Right to Do So*, 15 GEO. MASON L. REV. 1 (2007), with Adam Mossoff, *Patents As Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 689 (2007); see generally Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 FLA. L. REV. 529 (1998). (“[T]he law of takings with regard to intellectual property can only be characterized as a muddle within the muddle.”).

On the other, IP rights lack many of the traditional attributes of property. Not only are they intangible, but they constitute a government delegation to private parties of regulatory power over the actions of others. To the extent the government wishes to curtail these rights—or otherwise adjust the governing regime, introducing takings doctrine may upset its ability to adjust a regulatory regime to changing circumstances.

Moreover, the malleability of the concept of “property” complicates matters, for the question whether an intangible interest is property may arise in a context independent of any takings issues. Once the property switch is flipped, however, the complexities of takings analysis kick in. In *Kremen v. Cohen*, for example, the Ninth Circuit held that a domain name could be property for purposes of a conversion action. See 337 F.3d 1024 (9th Cir. 2003). That classification could ripple through other bodies of law. For example, the Anticybersquatting Consumer Protection Act (ACPA) allows trademark holders to claim domain names containing the marks from those who registered them with a “bad faith intent to profit.” 15 U.S.C. § 1125(d). But if a domain name is property—one that one acquires by registering it—how is ACPA’s operation not a taking without just compensation? Worse, how is it not taking from A and giving to B as prohibited by the “Public Use” Clause? To date, courts have not been receptive to this argument, *DaimlerChrysler v. The Net Inc.*, 388 F.3d 201 (6th Cir. 2004), but it suggests the difficulties with casually applying the label of property to interests that exist outside the common law property tradition.

25.3. If intellectual property is protected under the Takings Clause, what government acts constitute a taking? In particular, is infringement of a patent a taking? In *James v. Campbell*, the Supreme Court in dicta held that a patent “confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation.” 104 U.S. 356, 358 (1882). Recent cases have cited *James* approvingly for this point, leading some scholars to argue that the proposition is good law. See, e.g., *Horne v. Dep’t of Agric.*, 576 U.S. 350 (2015). However, *James* was followed just a few years later by *Schillinger v. United States*, which rejected the argument that government infringement of a patent is a taking, a view that courts continue to follow. See 155 U.S. 163, 168 (1894); *Golden v. US*, 955 F.3d 981, 988 (Fed. Cir. 2020). As one scholar has put it, patent infringement “is described in terms of eminent domain or takings when that characterization is irrelevant to the resolution of the case.” Jonathan Masur & Adam Mortara, *Patents, Property, and Prospectiveity*, 71 STAN. L. REV. 963, 991–92 (2019).

25.4. **Property under the Due Process Clause.** In *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, the Supreme Court reasoned that

patents “are surely included within the ‘property’ of which no person may be deprived by a State without due process of law.” 527 U.S. 627, 642 (1999). In fact, many things have been deemed property under the Due Process Clause: welfare benefits, professorial tenure, and public education. See *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Goss v. Lopez*, 419 U.S. 565, 574 (1975). Should these be property as well under the Takings Clause? For other purposes? Can something to be property for one constitutional provision but not another? Note that in these cases, all that the Due Process Clause required was notice and a hearing before deprivation of property; it does not require any monetary compensation.

25.5. **Preemption.** *Monsanto* rejects an argument that federal preemption of a state-law intellectual property right avoids the Takings Clause. There are actually quite a few examples of federal preemption of state IP rights. Federal patent law preempted a Florida statutory protection for boat hull designs, see *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), and the recently enacted Classics Protection and Access Act, 17 U.S.C. § 301(c), preempted state-level copyright protection in certain old sound recordings. Is just compensation owed? What value does preemption of state intellectual property rights serve?

25.6. **Regulatory exclusivities.** Under the 1978 FIFRA amendments described in *Monsanto*, if a pesticide manufacturer seeks approval for a new active ingredient, the EPA cannot use that data in considering other manufacturers’ products for 10 years. The first manufacturer enjoys a patent-like right over that active ingredient, insofar as competitors cannot win approval for that ingredient (at least without doing expensive and duplicative tests to reproduce the data). In the pharmaceutical industry, there are similarly “regulatory exclusivities” that limit the Food and Drug Administration’s ability to approve competitor drugs for several years after a first product is approved.

These regimes are much like intellectual property rights, and some commentators have described them as such. See, e.g., Robin Feldman, *Regulatory Property: The New IP*, 40 COLUM. J.L. & ARTS 53 (2016). To the extent that they are a kind of property, regulatory exclusivities are often criticized as poorly designed. If you were advising lawmakers on designing a regulatory exclusivity, what would you recommend they include? Consider revisiting James Grimmelmann’s list of themes of property law to answer this question.

## 25.2 “Public Use”

For a taking of property to be permissible under the Fifth Amendment, the property must be taken “for public use.” As *Monsanto* suggested, however, that limitation is construed deferentially. How far can the government go before running afoul of the public use requirement?

### *Kelo v. City of New London, Conn.* 545 U.S. 469 (2005)

**Justice STEVENS delivered the opinion of the Court.**

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was “projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.” In assembling the land needed for this project, the city’s development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city’s proposed disposition of this property qualifies as a “public use” within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.

### I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a “distressed municipality.” In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City’s unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. [The development plan had as its centerpiece a \$300 million research facility that the pharmaceutical company Pfizer Inc. would build. The development plan further proposed an “urban village” with a waterfront con-

ference hotel, restaurants, shopping, residences, offices, and services supporting the nearby marina and state park.]

The [plan's creators] intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to "build momentum for the revitalization of downtown New London," the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park.

The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.

## II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. [Other petitioners were similarly situated.] There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. [The trial court partially enjoined the condemnation. A split Supreme Court of Connecticut reversed, holding all the proposed takings valid.]

We granted certiorari . . . .

## III

Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State

may transfer property from one private party to another if future “use by the public” is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

As for the first proposition, the City would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party. Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a “carefully considered” development plan. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case. . . .

On the other hand, this is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this “Court long ago rejected any literal requirement that condemned property be put into use for the general public.” Indeed, while many state courts in the mid-19th century endorsed “use by the public” as the proper definition of public use, that narrow view steadily eroded over time. Not only was the “use by the public” test difficult to administer (e.g., what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. . . .

The disposition of this case therefore turns on the question whether the City’s development plan serves a “public purpose.” Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

In *Berman v. Parker*, 348 U.S. 26 (1954), this Court upheld a redevelopment plan targeting a blighted area of Washington, D. C., in which most of the housing for the area’s 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing. . . .

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Court considered a Hawaii statute whereby fee title was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership. We unanimously upheld the statute and rejected the Ninth Circuit's view that it was "a naked attempt on the part of the state of Hawaii to take the property of A and transfer it to B solely for B's private use and benefit." . . .

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. . . . For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

#### IV

Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' pro-

posal. Promoting economic development is a traditional and long-accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. In our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question . . . . It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose. . . .

It is further argued that without a bright-line rule nothing would stop a city from transferring citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use.

Alternatively, petitioners maintain that for takings of this kind we should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent. . . . The disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.

Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project. . . .

In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding-

ing the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court’s authority, however, extends only to determining whether the City’s proposed condemnations are for a “public use” within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek. . . .

**Justice KENNEDY, concurring.**

. . . This Court has declared that a taking should be upheld as consistent with the Public Use Clause, U.S. Const., Amdt. 5, as long as it is “rationally related to a conceivable public purpose.” *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984). This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses. The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits . . . . A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government’s actions were reasonable and intended to serve a public purpose.

[In this case, Justice Kennedy agreed “that benefiting Pfizer was not ‘the primary motivation or effect of this development plan’.”] . . . This

case, then, survives the meaningful rational-basis review that in my view is required under the Public Use Clause. . . .

**Justice O'CONNOR, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.**

. . . Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. . . . We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.

[T]he Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words “for public use” do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power. . . .

**Justice THOMAS, dissenting.**

The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called “urban renewal” programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to

put their lands to the highest and best social use, but are also the least politically powerful. . . .

. . . In the 1950's, no doubt emboldened in part by the expansive understanding of "public use" this Court adopted in *Berman*, cities "rushed to draw plans" for downtown development. B. Frieden & L. Sagalyn, *Downtown, Inc. How America Rebuilds Cities* 17 (1989). "Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them." Public works projects in the 1950's and 1960's destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. In 1981, urban planners in Detroit, Michigan, uprooted the largely "lower-income and elderly" Poletown neighborhood for the benefit of the General Motors Corporation. J. Wylie, *Poletown: Community Betrayed* 58 (1989). Urban renewal projects have long been associated with the displacement of blacks; "[i]n cities across the country, urban renewal came to be known as 'Negro removal.'" Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 47 (2003). Over 97 percent of the individuals forcibly removed from their homes by the "slum-clearance" project upheld by this Court in *Berman* were black. Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects. . . .

### **Notes and Questions**

25.7. If the state pays compensation and bears the political costs, what is wrong with taking from A and giving to B? Suppose the state wants land to be used for a particular purpose. Is it sensible to require the state to conduct operations or might turning them over to private actors enhance efficiency? Or is a "public use" requirement more about policing local political processes, deterring corruption or special interest capture? If so, is this an efficient mechanism?

25.8. *Kelo* provoked a strong public reaction and a flurry of state legislative activity designed to control abuses of eminent domain. By 2009, 43 states had enacted eminent domain restrictions. Does this mean that democracy works? Are there advantages to the Supreme Court's setting limits on eminent domain? Compare Alberto B. Lopez, *Revisiting Kelo and Eminent Domain's "Summer of Scrutiny"*, 59 ALA.

L. REV. 561, 565 (2008) (“[P]ost-*Kelo* legislation symbolizes the government’s effort to remedy the breach of the public’s trust caused by *Kelo* regardless of one’s substantive view of those legislative measures. Furthermore, the robust post-*Kelo* legislative response is a testament to the strength of one of the core principles of our government—federalism.”), with Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2105 (2009) (“Only seven states that had recently engaged in significant numbers of economic development and blight condemnations have enacted post-*Kelo* legislative reforms with any real teeth.”). Can one’s answer be independent of one’s prior views on the legitimate uses of eminent domain?

25.9. As Justice Thomas’s dissent notes, one criticism of the eminent domain power has been that it has been used in either a discriminatory or racially disproportionate manner. Which way does this consideration cut in *Kelo*? After all, the practice of labeling of minority communities as “blighted” is a matter of historical record. Might the Court’s approval of eminent domain’s use on *Kelo*’s facts improve the politics of eminent domain law by making clear that anyone could be on the receiving end of a condemnation? And to the extent the problem with eminent domain is discriminatory application, why isn’t the Constitution’s Equal Protection Clause a preferable safeguard? Or does the history cited by Justice Thomas answer that question?

25.10. Most of the affected homeowners in New London negotiated a purchase price with the New London Development Corporation (NLDC). For her part, *Kelo* reportedly turned down a purchase offer that would have netted her a \$22,000 profit on her home. The decision to litigate, while not letting her keep her property, did lead to a higher purchase price. The public outcry in the wake of the *Kelo* ruling led to favorable settlements for the holdout landowners. For example,

Kelo agreed in June 2006 to sell for \$442,000 (\$392,000 plus a pay-off of her \$50,000 mortgage); not too bad for a place she had purchased in August 1997 for \$53,500, and NLDC had appraised for condemnation at \$123,000 in November 2000. She only sold the lot. Avner Gregory, the same preservationist who had refurbished the house after moving it from its original location to the site where *Kelo* found it, relocated the house a second time to a vacant parcel with a pre-existing foundation, in a modest neighborhood several miles away, on the other side of the Amtrak rail line from Fort Trumbull. A plaque identifies the house as “The Kelo House.”

George Lefcoe, *Jeff Benedict's Little Pink House: The Back Story of the Kelo Case*, 42 CONN. L. REV. 925, 954-55 (2010) (footnotes omitted). In 2009 Pfizer announced it would leave New London to cut costs, taking its jobs to its facility in Groton, Connecticut. Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. TIMES, November 13, 2009, at A1, *link*.

## 25.3 Eminent Domain Operations

Local governments carry out condemnations in a variety of ways. There is no standard eminent domain regime. Some states require some sort of pre-condemnation activity (e.g., formal findings that a condemnation is necessary or efforts to negotiate with the landowner); others do not. Some jurisdictions require the condemning authority to initiate a judicial action; others allow an administrative procedure, giving the landowner the right to challenge the taking in court. Some states provide for expedited procedures, “quick take” provisions, either as an independent cause of action or by motion within an ongoing proceeding. 13 POWELL ON REAL PROPERTY § 79F.06.

In Illinois, for example, the condemning authority files an eminent domain action in the circuit court for the county of the property. The complaint details: “(i) the complainant’s authority in the premises, (ii) the purpose for which the property is sought to be taken or damaged, (iii) a description of the property, and (iv) the names of all persons interested in the property as owners or otherwise, as appearing of record, if known.” 735 ILL. COMP. STAT. ANN. § 30/10-5-10. Either the condemning authority or the property owner may request a jury trial. Expedited procedures (called a “quick take” procedure) are also available upon motion. *Id.* § 30/20-5-5.

## 25.4 Just Compensation

What is just compensation? The standard approach is fair market value. See, e.g., 735 ILL. COMP. STAT. ANN. § 30/10-5-60 (“[T]he fair cash market value of property in a proceeding in eminent domain shall be the amount of money that a purchaser, willing, but not obligated, to buy the property, would pay to an owner willing, but not obliged, to sell in a voluntary sale.”). This amount may include costs directly attributable to the condemnation. See *id.* § 735 ILL. COMP. STAT. ANN. § 30/10-5-62 (providing for compensation of reasonable relocation costs).

Evidentiary difficulties aside, the fair market value metric potentially understates the value of the home from the perspective of the property owner in at least three ways. First, fair market value ignores subjective values. A property owner often values it more than the market (as reflected by the fact that it has not yet been sold for the market price). If the property is a home, it may have high sentimental value (e.g., if it is where one raised children) or offer idiosyncratic amenities that cannot be easily duplicated but are not reflected in market price (e.g., proximity to friends, work, etc.). Second, eminent domain is a forced transaction. The landowner may experience the transaction as a violation of personal autonomy. Third, to the extent the project produces a surplus, the displaced landowner does not get a share. In other words, suppose five lots are each individually worth \$10,000, but they can be assembled into a park that confers \$100,000 of benefits on the surrounding area. The owners of the condemned lots do not share in the surplus, they still receive only \$10,000. See, e.g., 735 ILL. COMP. STAT. ANN. § 30/10-5-60 (“In the condemnation of property for a public improvement, there shall be excluded from the fair cash market value of the property any appreciation in value proximately caused by the improvement and any depreciation in value proximately caused by the improvement”).

What happens when only part of a parcel is taken? The general approach is to allow compensation for the effect of the severance on the land retained by the condemnee. Imagine O owns Blackacre and Whiteacre as one parcel with a combined value of \$100,000. If Blackacre is taken for a fair market value of \$50,000, and the severance leaves Whiteacre worth only \$40,000, O is entitled to compensation for the lost \$10,000. Note, however, that if O owned *only* Whiteacre, and its value was reduced by \$10,000 due to the next-door condemnation of Blackacre, O would receive nothing. 13 POWELL ON REAL PROPERTY § 79F.04.

What if a partial taking *enhances* the value of the remainder? See, e.g., 735 ILL. COMP. STAT. ANN. § 30/10-5-55 (“In assessing damages or compensation for any taking or property acquisition under this Act, due consideration shall be given to any special benefit that will result to the property owner from any public improvement to be erected on the property.”); *Illinois State Toll Highway Auth. v. Am. Nat. Bank & Trust Co. of Chicago*, 642 N.E.2d 1249, 1255 (Ill. 1994) (“[S]pecial benefits are any benefits to the property that enhance its market value and are not conjectural or speculative.”).

This mix of rules leads to results that may strike you as unfair. Imagine a government project to build a subway station, and three affected landowners, Alice, Bob, and Charles. Alice’s parcel is condemned in its entirety; half of Bob’s land is con-

demned; and Charles's land is untouched. Suppose further that the transit station leads to a doubling in the property values of the surrounding land. On these facts, Alice receives the pre-project value of her land. Bob receives nothing (assuming the appreciation of his retained half matches the pre-project value of the condemned portion); and Charles receives a windfall. Is there any way to avoid these difficulties?

Holders of future interests are also entitled to compensation. See generally 2 NICHOLS ON EMINENT DOMAIN § 5.02; see, e.g., CAL. CODE CIV. PROC. § 1265.420 ("Where property acquired for public use is subject to a life tenancy, upon petition of the life tenant or any other person having an interest in the property, the court may order any of the following: (a) An apportionment and distribution of the award based on the value of the interest of life tenant and remainderman; (b) The compensation to be used to purchase comparable property to be held subject to the life tenancy; (c) The compensation to be held in trust and invested and the income (and, to the extent the instrument that created the life tenancy permits, principal) to be distributed to the life tenant for the remainder of the tenancy; (d) Such other arrangement as will be equitable under the circumstances.").

## 25.5 Exactions

The state has broad powers to regulate land use. What if a state regulator agrees to limit regulation in return for a strip of land? The transaction is voluntary, but had the state just taken the land, it would have had to pay just compensation. Since the government isn't obligated to allow the project, doesn't the offer leave the landowner better off? Or is this a form of extortion?

These types of conditional grants of permits or other dispensations under land use regulations are called **exactions**. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court opened the door to closer scrutiny of these exchanges, declaring that permit conditions must serve the same purpose as the reason to withhold permission in the first place. Absent an "essential nexus" between the condition and the reason for the restriction, the demand is a taking. *Id.* at 837.

*Nollan* involved a permit request to tear down and rebuild a beachfront house. Because the project would reduce views of the ocean, the California Coastal Commission conditioned the permit on the Nollans' granting a public easement on their property to access the beach. The Court ruled this condition lacked the requisite nexus. To the extent that the project would impair sightlines to the beach, the state could condition permit approval on ameliorative steps, like size restrictions, limits on fencing, or provision of a platform to improve the public's view of the beach.

But the majority found it “quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new house.” *Id.* at 838.

The outcome of *Nollan* rested on the majority’s conclusion that there was *no* logical relationship between the condition demanded by the Coastal Commission and the harm it claimed to be regulating: a right to cross the Nollan’s land wouldn’t improve the public’s view of the beach from behind their house. What if there is *some* logical relationship, but it is (at least arguably) somewhat attenuated?

***Dolan v. City of Tigard***  
512 U.S. 374 (1994)

**Chief Justice REHNQUIST delivered the opinion of the Court.**

Petitioner challenges the decision of the Oregon Supreme Court which held that the city of Tigard could condition the approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements. We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.

I

The State of Oregon enacted a comprehensive land use management program in 1973. . . . Pursuant to the State’s requirements, the city of Tigard, a community of some 30,000 residents on the southwest edge of Portland, developed a comprehensive plan and codified it in its Community Development Code (CDC). The CDC requires property owners in the area zoned Central Business District to comply with a 15% open space and landscaping requirement, which limits total site coverage, including all structures and paved parking, to 85% of the parcel. . . .

The city also adopted a Master Drainage Plan (Drainage Plan). The Drainage Plan noted that flooding occurred in several areas along Fanno Creek, including areas near petitioner’s property. The Drainage Plan also established that the increase in impervious surfaces associated with continued urbanization would exacerbate these flooding problems. . . .

Petitioner Florence Dolan owns a plumbing and electric supply store located on Main Street in the Central Business District of the city. The store

covers approximately 9,700 square feet on the eastern side of a 1.67-acre parcel, which includes a gravel parking lot. Fanno Creek flows through the southwestern corner of the lot and along its western boundary. The year-round flow of the creek renders the area within the creek's 100-year floodplain virtually unusable for commercial development. The city's comprehensive plan includes the Fanno Creek floodplain as part of the city's greenway system.

Petitioner applied to the city for a permit to redevelop the site. Her proposed plans called for nearly doubling the size of the store to 17,600 square feet and paving a 39-space parking lot. The existing store, located on the opposite side of the parcel, would be razed in sections as construction progressed on the new building. In the second phase of the project, petitioner proposed to build an additional structure on the northeast side of the site for complementary businesses and to provide more parking. The proposed expansion and intensified use are consistent with the city's zoning scheme in the Central Business District.

The City Planning Commission (Commission) granted petitioner's permit application subject to conditions imposed by the city's CDC. The CDC establishes the following standard for site development review approval:

Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.

The city required that petitioner dedicate "to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] . . . and all property 15 feet above [the floodplain] boundary."<sup>\*</sup> In addition, the city demanded that the retail store be designed so as not to intrude into the greenway area. The city relies on the Commission's

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\*The original opinion included a much more extensive discussion of the Commission's dedication requirements, its findings on the connections between those requirements and the city's planning objectives, and the procedure of Dolan's appeals. This and the next paragraph are instead from Section III.B of the opinion. They are much more concise, and apparently the Court viewed these facts as sufficient to decide the case. —Eds.

rather tentative findings that increased storm water flow from petitioner's property "can only add to the public need to manage the [floodplain] for drainage purposes" to support its conclusion that the "requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site."

[The dedication of a 15-foot strip of property above the floodplain boundary, noted above, was for use as a bicycle and pedestrian pathway.] The city made the following specific findings relevant to the pedestrian/bicycle pathway:

In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

[The Oregon Court of Appeals and the Oregon Supreme Court both affirmed.]

## II

... Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. Such public access would deprive petitioner of the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

On the other side of the ledger, the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). . . .

The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they

involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan*, *supra*, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements. Petitioner does not quarrel with the city's authority to exact some forms of dedication as a condition for the grant of a building permit, but challenges the showing made by the city to justify these exactions. . . .

### III

In evaluating petitioner's claim, we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. *Nollan*, 483 U.S., at 837. If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development. We were not required to reach this question in *Nollan*, because we concluded that the connection did not meet even the loosest standard. Here, however, we must decide this question.

#### A

We addressed the essential nexus question in *Nollan*. . . . The California Coastal Commission demanded a lateral public easement across the Nollans' beachfront lot in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house. . . .

We agreed that the Coastal Commission's concern with protecting visual access to the ocean constituted a legitimate public interest. . . . We re-

solved, however, that the Coastal Commission's regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between visual access to the ocean and a permit condition requiring lateral public access along the Nollans' beachfront lot. . . . The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry . . . .

No such gimmicks are associated with the permit conditions imposed by the city in this case. Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain. Petitioner proposes to double the size of her retail store and to pave her now-gravel parking lot, thereby expanding the impervious surface on the property and increasing the amount of storm water runoff into Fanno Creek.

The same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers . . . .

## B

The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development . . . .

In some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. We think this standard is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose.

Other state courts require a very exacting correspondence, described as the "specifi[c] and uniquely attributable" test. Under this standard, if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes "a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations." We do not think the Federal Con-

stitution requires such exacting scrutiny, given the nature of the interests involved.

A number of state courts have taken an intermediate position, requiring the municipality to show a “reasonable relationship” between the required dedication and the impact of the proposed development. Typical is the Supreme Court of Nebraska’s opinion in *Simpson v. North Platte*, 206 Neb. 240, 245, 292 N.W.2d 297, 301 (1980), where that court stated:

The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.

....  
We think the “reasonable relationship” test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term “reasonable relationship” seems confusingly similar to the term “rational basis” which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as “rough proportionality” best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. ....

... We turn now to analysis of whether the findings relied upon by the city here, first with respect to the floodplain easement, and second with respect to the pedestrian/bicycle path, satisfied these requirements.

It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm water flow from petitioner’s property. Therefore, keeping the floodplain open and free from development would likely confine the pressures on Fanno Creek created by petitioner’s development. In fact, because petitioner’s property lies within the Central Business District, the CDC already required that petitioner leave 15% of it as open space and the undeveloped floodplain would have nearly satisfied

that requirement. But the city demanded more—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

The difference to petitioner, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Kaiser Aetna*, 444 U.S., at 176. It is difficult to see why recreational visitors trampling along petitioner’s floodplain easement are sufficiently related to the city’s legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request. . . .

If petitioner’s proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere. But that is not the case here. We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner’s proposed new building.

With respect to the pedestrian/bicycle pathway, we have no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District. The city estimates that the proposed development would generate roughly 435 additional trips per day. Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use. But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner’s development reasonably relate to the city’s requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway “could offset some of the traffic demand . . . and lessen the increase in traffic congestion.”

As Justice Peterson of the Supreme Court of Oregon explained in his dissenting opinion, however, “[t]he findings of fact that the bicycle pathway system ‘could offset some of the traffic demand’ is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of

the traffic demand.” 317 Ore., at 127, 854 P.2d, at 447 (emphasis in original). No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

## IV

Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization, particularly in metropolitan areas such as Portland. The city’s goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. “A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Pennsylvania Coal*, 260 U.S., at 416.

The judgment of the Supreme Court of Oregon is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

[The dissenting opinions of Justices Stevens (joined by Justices Blackmun and Ginsburg) and of Justice Souter are omitted.]

### Notes and Questions

25.11. Would this case have come out differently if the City of Tigard had made more specific factual findings? Or do you think that the greenway and bicycle path requirements could never avoid being an exaction? If you were a member of the City Planning Commission, what would you have done once this case arrived back on remand after the Supreme Court’s decision?

25.12. In *Monsanto*, the government conditioned marketing approval of pesticides on giving up intellectual property. Is that an exaction?

25.13. **Exactions of Money.** In *Koontz v. St. John’s River Water Management District*, 570 U.S. 595 (2013), the Supreme Court considered a local government’s demand that, to receive a permit for developing part of his land, the property owner pay for contractors to do work on unrelated public lands. The local government argued that this was not an exaction, because no interest in real property was being demanded. The Court disagreed, holding that “the government’s demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when [the government’s] demand is for money.”

While a general requirement to pay money is not a taking, see *E. Enters. v. Apfel*, 524 U.S. 498 (1998), the *Koontz* Court held that a taking could occur where there is a “direct link” between the monetary demand and a property interest. In the Court’s view, the land at issue in the permitting process created that direct link, rendering the Takings Clause applicable to the monetary exaction. The dissenters, by contrast, reasoned that the *Nollan/Dolan* framework applies only if the government’s underlying demand would constitute a taking, standing alone. Since a demand for monetary payment in isolation is not a taking, the dissenters reasoned, a payment demand as a condition of permitting cannot be either.

25.14. Building permits often require compliance with building codes that specify construction materials, arrangement of exits, fire safety, and numerous other matters. These requirements are conditions on obtaining the permit. Are these building code requirements exactions? Try to make an argument in both directions.

25.15. **Categorical Exclusions.** Just as some government acts are takings as a categorical matter; others are categorically excluded. *Koontz* mentions that taxes and user fees are never takings. Why not? One possibility is the idea that the private property protected by the Takings Clause only protects discrete resources, and does not apply to legally obligated acts like the payment of money. That was the logic of five Justices in *Eastern Enterprises*, which was discussed and distinguished in *Koontz*.

But can we do more than provide a definitional exclusion? Eduardo Peñalver observes:

As Richard Epstein—one of the few scholars to focus substantial effort on the issue—has noted, “[t]he taxing power is placed in one compartment; the takings power in another,” and scholarly discussion of the conflict between the two never really gets off the ground. In his book *Takings*, Epstein invited readers to view the conceptual similarity between takings and taxes as a reason to dramatically curtail the state’s power to tax. Specifically, Epstein argued that the Takings Clause required the government to adopt a system of proportional taxation, also known as a “flat tax.” This argument flew in the face of settled constitutional orthodoxy, which since the founding era has understood the state’s power to tax as being virtually plenary. . . .

This cool response to Epstein’s proposal is unsurprising. The constitutional doctrine defining the state’s power to tax is so en-

trenched that it is nearly axiomatic. In contrast, Takings Clause jurisprudence is characterized by nothing if not the confusion and intense disagreement it generates. . . .

Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2185-86 (2004) (footnotes omitted). Peñalver draws an opposite conclusion from Epstein's, noting that the seeming conflict between the two powers stems not from the reach of the taxing power, but from the fact that courts have applied the Takings Clause beyond its original understanding as a simple requirement of compensation when the power of eminent domain is exercised. If the clause were read more narrowly, the apparent tension would disappear. On this view, "Takings are the state's direct appropriation of parcels of property from individuals through the power of eminent domain, and taxes are generally applicable measures, enacted under the state's power to tax, requiring individuals to make payments to the state. Each corresponds to different and nonoverlapping governmental powers." *Id.* at 2188.

There are also government actions that do affect specific pieces of property that are nonetheless excluded from operation of the Takings Clause. We have already seen one example in the ruleOne example is the rule that regulation of a common law nuisance is never a taking. Other examples include government forfeitures, federal control of navigable waterways, and the state's right to destroy property to contain the spread of fire. See generally David A. Dana & Thomas W. Merrill, TAKINGS 110-120 (Foundation Press 2002); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008) ("Property seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause."). What explains these exceptions? Perhaps they, too, may be understood as simply categorically different government powers (i.e., if the Takings Clause is read as simply applying to eminent domain, the existence of regulatory takings notwithstanding). Dana and Merrill suggest that we might understand these exceptions similarly to the nuisance exclusion—the powers are within traditional conceptions of the state's police powers, and they have a long historical pedigree, long enough that property owners may be said to be on imputed notice that they may be exercised.



# Chapter 26

## Regulatory Takings

Traditional eminent domain actions involve the government intentionally selecting a property right to appropriate—a parcel of land, for example. But the Fifth Amendment also limits the ability of the state to regulate. Property owners sometimes challenge property regulations as being so onerous that it is as if the state has appropriated property and compensation is therefore due. This chapter will review the Supreme Court's case law on these so-called "regulatory takings."

*Pennsylvania Coal Co. v. Mahon* is generally treated as the origin of the regulatory takings doctrine. A mining company held property rights to mine coal in a certain area, but sold the surface rights for private houses. Subsequently, Pennsylvania enacted a law prohibiting coal mining in ways that might cause subsidence of a house, rendering the mining company's rights worthless. Justice Holmes, for the Supreme Court, recognized the tension in calling the mining regulation a taking:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.

But does that mean that the regulated property owner must always eat the costs of public-beneficial regulation? No:

In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant

achieving the desire by a shorter cut than the constitutional way of paying for the change.

Accordingly, the Court concluded that the regulation was a taking:

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

The three cases in this section will explore what “too far” means. The first establishes the general balancing test used for regulatory takings. The other cases explore two major exceptions in which a regulation is considered a *per se* taking without need for balancing: (1) where the property’s economic value is entirely wiped out, and (2) where the regulation causes a physical occupation of property.

As you read these cases, consider the many different areas that the U.S. government regulates: the environment, food quality, pharmaceuticals, telecommunications, electricity, and more. What do these cases say about the government’s regulatory powers? How could you use the concepts and doctrines of property, expansive over many types of subject matter, to advance or forestall these regulatory objectives on behalf of your clients or in the public interest? Besides being an especially controversial and debate-worthy area of law, the regulatory takings doctrine demonstrates the rhetorical and doctrinal power of this concept of “property” that we have explored.

## 26.1 The *Penn Central* Test

### *Penn Central Transportation Co. v. City of New York* 438 U.S. 104 (1978)

**Mr. Justice BRENNAN delivered the opinion of the Court.**

The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a “taking” requiring the payment of “just compensation.” Specifically, we must decide whether the application of New York City’s Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has “taken” its owners’ property in violation of the Fifth and Fourteenth Amendments.

**I****A**

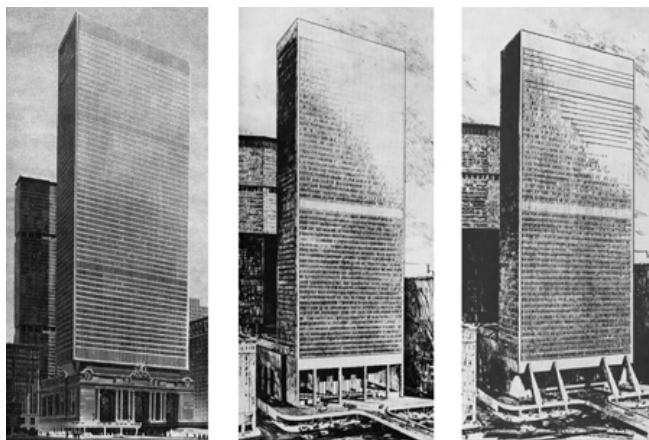
New York City . . . adopted its Landmarks Preservation Law in 1965. [Under the law, the Landmarks Preservation Commission designates buildings as "landmarks," subject to hearings, city approval, and judicial review.] Thus far, 31 historic districts and over 400 individual landmarks have been finally designated, and the process is a continuing one.

Final designation as a landmark results in restrictions upon the property owner's options concerning use of the landmark site. First, the law imposes a duty upon the owner to keep the exterior features of the building "in good repair" to assure that the law's objectives not be defeated by the landmark's falling into a state of irremediable disrepair. Second, the Commission must approve in advance any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site, thus ensuring that decisions concerning construction on the landmark site are made with due consideration of both the public interest in the maintenance of the structure and the landowner's interest in use of the property. . . .

**B**

This case involves the application of New York City's Landmarks Preservation Law to Grand Central Terminal (Terminal). The Terminal, which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central), is one of New York City's most famous buildings. Opened in 1913, it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style. . . .

On August 2, 1967, following a public hearing, the Commission designated the Terminal a "landmark" . . . . On January 22, 1968, appellant Penn Central, to increase its income, entered into a renewable 50-year lease and sublease agreement with appellant UGP Properties, Inc. (UGP), a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation. Under the terms of the agreement, UGP was to construct a multistory office building above the Terminal. [UGP and Penn Central developed several proposals for such an office building, but the Landmarks Preservation Commission rejected all of them. UGP and Penn Central filed



**Figure 26.1:** Reproductions of the proposals. From Marcel Breuer Papers, 1920–1986, box 23, reel 5731, frames 1281–1288 (Smithsonian Institution, Archives of Am. Art, c. 1969), [link](#), via Detroit's Grand Central: Michigan Central Station, ARCHITAKES (May 27, 2015), [link](#).

suit in New York state court alleging a Fifth Amendment taking. The trial court agreed, but the state appellate courts reversed, holding that no taking had occurred.]

## II

....

### A

... The question of what constitutes a “taking” for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. . . . This Court, quite simply, has been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely upon the particular circumstances in that case.

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The

economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,” and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. . . .

[The Court gave examples of non-taking regulations: taxation, water management, zoning under *Euclid*, cutting down trees to prevent infestation, and nuisance laws against operating certain industries in areas. It also discussed cases where regulations were considered takings: *Mahon*, as described previously, and *United States v. Causby*, where low-flying government planes traveled through a chicken farmer’s airspace and literally scared the chickens to death.]

## B

[The Court rejected several arguments attempting to distinguish the landmark designation from permissible zoning. Among these arguments:] Appellants first observe that the airspace above the Terminal is a valuable property interest, citing *United States v. Causby, supra*. They urge that the Landmarks Law has deprived them of any gainful use of their “air rights” above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has “taken” their right to this superadjacent airspace, thus entitling them to “just compensation” measured by the fair market value of these air rights.

Apart from our own disagreement with appellants’ characterization of the effect of the New York City law, the submission that appellants may establish a “taking” simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. “Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to deter-

mine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the “landmark site.”

[And:] It is true, as appellants emphasize, that both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellants’ suggestions, landmark laws are not like discriminatory, or “reverse spot,” zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

....

## C

Rejection of appellants’ broad arguments is not, however, the end of our inquiry . . . . We now must consider whether the interference with appellants’ property is of such a magnitude that “there must be an exercise of eminent domain and compensation to sustain [it].” *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 413. That inquiry may be narrowed to the question of the severity of the impact of the law on appellants’ parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.

[The Court observed that current uses of the Terminal would still be allowed, that shorter or different office building plans might be permitted, and that a provision in the Landmarks Preservation Law opened up additional development opportunities on other city land parcels.] On this record, we conclude that the application of New York City’s Landmarks Law has not effected a “taking” of appellants’ property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also

afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.

*Affirmed.*

**Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE and Mr. Justice STEVENS join, dissenting.**

Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks. The owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects, historians, and city planners for such a singular distinction. But he may well discover, as appellant Penn Central Transportation Co. did here, that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation. The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of "landmarks" within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.

Only in the most superficial sense of the word can this case be said to involve "zoning." Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another. In the words of Mr. Justice Holmes, speaking for the Court in *Pennsylvania Coal Co. v. Mahon*, there is "an average reciprocity of advantage."

Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial—in this case, several million dollars—with no comparable reciprocal benefits. And the cost associated with landmark legislation is likely to be of a completely different order of magnitude than that which results from the imposition of normal zoning restrictions. Unlike the regime affected by the latter, the landowner

is not simply prohibited from using his property for certain purposes, while allowed to use it for all other purposes. Under the historic-landmark preservation scheme adopted by New York, the property owner is under an affirmative duty to *preserve* his property *as a landmark* at his own expense. To suggest that because traditional zoning results in some limitation of use of the property zoned, the New York City landmark preservation scheme should likewise be upheld, represents the ultimate in treating as alike things which are different. . . .

### Notes and Questions

26.1. **The Penn Central test.** The *Penn Central* factors are generally listed as an inquiry into “[1] the regulation’s economic effect on the landowner, [2] the extent to which the regulation interferes with reasonable investment-backed expectations, and [3] the character of the government action.” *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). The first factor concerns diminution of value, an issue raised by *Pennsylvania Coal*. As you see, the Court resisted the conceptual severance claim, rejecting the notion that “air rights” were something to be evaluated independently of the property as a whole.

26.2. **Distinct Investment-Backed Expectations.** The meaning of the second factor as something distinct from the first is a matter of debate. Unhelpfully, the Court later described the question as being one of “reasonable” investment-backed expectations in *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

The idea is frequently credited to an article by Frank Michelman, who argued that the principle more accurately captures what may rise to the level of a taking than simple diminution of value:

The customary labels—magnitude of the harm test, or diminution of value test—obscure the test’s foundations by conveying the idea that it calls for an arbitrary pinpointing of a critical proportion (probably lying somewhere between fifty and one hundred percent). More sympathetically perceived, however, the test poses not nearly so loose a question of degree; it does not ask “how much,” but rather (like the physical-occupation test) it asks “whether or not”: whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.

The nature and relevance of this inquiry may emerge more clearly if we notice one other familiar line of doctrine . . . when a new zoning scheme is instituted, for “established” uses which would be violations were the scheme applied with full retrospective vigor. The standard practice of granting dispensations for such “nonconforming uses” seems to imply an understanding that simply to ban them without payment of compensation, thus seriously reducing the property’s market value, would be wrong and perhaps unconstitutional. But a ban on potential uses not yet established may destroy market value as effectively as does a ban on activity already in progress. The ban does not shed its retrospective quality simply because it affects only prospective uses. What explains, then, the universal understanding that only those nonconforming uses are protected which were demonstrably afoot by the time the regulation was adopted? The answer seems to be that actual establishment of the use demonstrates that the prospect of continuing it is a discrete twig out of his fee simple bundle to which the owner makes explicit reference in his own thinking, so that enforcement of the restriction would, as he looks at the matter, totally defeat a distinctly crystallized expectation.

Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1232-34 (1967) (footnotes omitted); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984) (“A ‘reasonable investment-backed expectation’ must be more than a “unilateral expectation or an abstract need.”) (citing *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). As the excerpted text notes, the principle of nonconforming uses in zoning law reflects the importance of property owner expectations in uses that preexist the arrival of new zoning rules.

Michelman’s argument, and some precedent, suggests that investment-backed expectations are less likely to be found where the property in question is purchased against a backdrop of regulation. Does that mean that takings challenges are doomed whenever the property is acquired after the offending regulations are in place? In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Court held in the negative. Ever straining for eloquence, Justice Kennedy concluded that “[t]he State may not put so potent a Hobbesian stick into the Lockean bundle. . . . Were we to accept the State’s rule, the postenactment transfer of title would absolve the State of

its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.” *Id.* at 627.

26.3. **Character of the Governmental Action.** Here, too, the Court is less than clear, as its example of how this factor might be weighed in the property owner’s favor, a permanent physical invasion, was later held to be a taking as a categorical matter in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). That sort of invasion is juxtaposed against an interference “from some public program adjusting the benefits and burdens of economic life to promote the common good,” suggesting room for judgment when a program falls short (e.g., when someone is unfairly singled out for the burdens, whether there is a reciprocity of advantage, etc.). See, e.g., Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649, 664 (2012) (“Several lower courts have picked up on the idea that the character factor is designed to measure the distributional impact of the challenged governmental action. These courts favor broad-based laws that offer reciprocity of advantage and find suspect laws that single out particular owners for severe burdens while conferring benefits on others.”).

26.4. In takings cases, you may encounter citations to *Agins v. City of Tiburon* for the proposition that “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests.” 447 U.S. 255, 260 (1980). Does this mean that compensation must be paid if the state cannot meet a higher burden than the one required for regulation under the Due Process Clause? No. In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540-42 (2005), the Court observed the phrase was “regrettably imprecise” and clarified that “it has no proper place in our takings jurisprudence.”

26.5. Several articles report that the government generally prevails under the *Penn Central* test in the lower courts. F. Patrick Hubbard et al., *Do Owners Have A Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVT'L. L. & POL'Y F. 121 (2003); Basil H. Mattingly, *Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 WILLAMETTE L. REV. 695 (2000). One such study argues that calling the factors a balancing test misstates what is actually going on.

The analysis reveals that the Courts of Appeals for the First, Ninth, and Federal Circuits, and the trial courts within the Ninth Circuit, all decided *Penn Central* cases utilizing fewer than three factors in a majority of the cases reaching the merits: on av-

erage, the circuit courts of appeals utilized three factors only slightly more than one-third of the time (37.8%). Complementing these findings is data on how often the courts actually applied *Penn Central* as a balancing test. The data shows that applying *Penn Central* as a balancing test is statistically rare. Averaging the cases that reached the merits of a takings claim, the courts applied *Penn* as a balancing test less than 7% of the time. As an average percentage of cases applying all three *Penn Central* factors (cases that themselves are less than half of all cases reaching the merits), courts applied it as a balancing test less than 14% of the time. Together this data indicates that the predominant practice of the federal courts is not to use *Penn Central* as a balancing test.

Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 FED. CIR. B.J. 677, 704 (2013). Pomeroy argues that regulatory takings claims prevail only when the court concludes that the regulation looks like an act that is normally a taking as a categorical matter. *Id.* at 696 (“It seems that instead of balancing factual situations, the courts of appeals have found regulatory takings under *Penn Central* only when a claim falls barely short being a taking under one of the categorical rules.”).

## 26.2 “Wipeouts”

### *Lucas v. South Carolina Coastal Council*

505 U.S. 1003 (1992)

**Justice SCALIA delivered the opinion of the Court.**

In 1986, petitioner David H. Lucas paid \$975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. A state trial court found that this prohibition rendered Lucas’s parcels “valueless.” This case requires us to decide whether the Act’s dramatic effect on the economic value of Lucas’s lots

accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of “just compensation.”

## I

### A

....

In the late 1970’s, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the city of Charleston. Toward the close of the development cycle for one residential subdivision known as “Beachwood East,” Lucas in 1986 purchased the two lots at issue in this litigation for his own account. [At that time, South Carolina’s Coastal Zone Management Act did not impose restrictions on development of single-family residences, which Lucas intended to build.]

The Beachfront Management Act brought Lucas’s plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a “baseline” connecting the landward-most “point[s] of erosion . . . during the past forty years” in the region of the Isle of Palms that includes Lucas’s lots. In action not challenged here, the Council fixed this baseline landward of Lucas’s parcels. That was significant, for under the Act construction of occupiable improvements was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline. The Act provided no exceptions.

### B

Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act’s construction bar effected a taking of his property without just compensation. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina’s police power, but contended that the Act’s complete extinguishment of his property’s value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives. [The trial court agreed and ordered just compensation of \$1.2 million. The Supreme Court of South Carolina reversed, concluding that regulation “to prevent serious public harm” is not a taking regardless no matter the effect on property values.]

## III

## A

Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property or the functional equivalent of a "practical ouster of [the owner's] possession." Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "set formula" for determining how far is too far, preferring to "engag[e] in . . . essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. [This will be discussed in the *Cedar Point Nursery v. Hassid* case below.]

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. . . .<sup>7</sup>

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<sup>7</sup>Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically

We have never set forth the justification for this rule. Perhaps it is simply . . . that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. “[F]or what is the land but the profits thereof[?]” 1 E. Coke, *Institutes*, ch. 1, § 1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply “adjusting the benefits and burdens of economic life,” *Penn Central*, in a manner that secures an “average reciprocity of advantage” to everyone concerned, *Mahon*. And the *functional* basis for permitting the government, by regulation, to affect property values without compensation—that “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law”—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. . . .

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.<sup>8</sup>

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beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. We avoid this difficulty in the present case, since the “interest in land” that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas’s beachfront lots without economic value.

<sup>8</sup>[In response to Justice Stevens’s dissent:] It is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these “all-or-nothing” situations. . . .

**B**

[The Supreme Court does not explain this explicitly, but the South Carolina Supreme Court reached its result of no taking based on a rule that “a taking has not been found when the regulation exists to prevent serious harm” (i.e., a nuisance). The U.S. Supreme Court responded as follows.]

The distinction between “harm-preventing” and “benefit-conferring” regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on Lucas’s land is necessary in order to prevent his use of it from “harming” South Carolina’s ecological resources; or, instead, in order to achieve the “benefits” of an ecological preserve. . . .<sup>12</sup>

. . . The legislature’s recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court’s approach would essentially nullify *Mahon*’s affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of “harmful use” prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant’s land.

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.\* Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already

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<sup>12</sup>In Justice BLACKMUN’s view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

\*The remainder of the majority opinion has been reorganized and heavily edited. Alterations are not marked. —Eds.

place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise. When, however, a regulation that declares “off-limits” all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

In the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, a property owner ought to be aware of the possibility that new regulation might even render his property economically worthless. See *Andrus v. Allard*, 444 U.S. 51, 66–67 (1979) (prohibition on sale of eagle feathers). Or the owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others’ land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land’s only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner’s land; they rarely support prohibition of the “essential use” of land. The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found.

**Justice KENNEDY, concurring in the judgment.**

. . . I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe

restrictions. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit. . . .

**Justice BLACKMUN, dissenting.**

Today the Court launches a missile to kill a mouse. . . . My fear is that the Court's new policies will spread beyond the narrow confines of the present case. For that reason, I, like the Court, will give far greater attention to this case than its narrow scope suggests—not because I can intercept the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage. . . .

The Court creates its new takings jurisprudence based on the trial court's finding that the property had lost all economic value. This finding is almost certainly erroneous. Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping. Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house. . . .

Clearly, the Court was eager to decide this case. . . .

The threshold inquiry for imposition of the Court's new rule, "deprivation of all economically valuable use," itself cannot be determined objectively. As the Court admits, whether the owner has been deprived of all economic value of his property will depend on how "property" is defined. The "composition of the denominator in our 'deprivation' fraction" is the dispositive inquiry. Yet there is no "objective" way to define what that denominator should be. . . .

Even more perplexing, however, is the Court's reliance on common-law principles of nuisance in its quest for a value-free takings jurisprudence. In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: They determine whether the use is harmful. Common-law public and private nuisance law is simply a determination whether a particular use causes harm. There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as

state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators? There simply is no reason to believe that new interpretations of the hoary common-law nuisance doctrine will be particularly “objective” or “value free.” Once one abandons the level of generality of *sic utere tuo ut alienum non laedas*, one searches in vain, I think, for anything resembling a principle in the common law of nuisance.

**Justice STEVENS, dissenting.**

... In addition to lacking support in past decisions, the Court’s new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land’s full value. The case at hand illustrates this arbitrariness well. The Beachfront Management Act not only prohibited the building of new dwellings in certain areas, it also prohibited the rebuilding of houses that were “destroyed beyond repair by natural causes or by fire.” 1988 S.C. Acts 634, § 3. Thus, if the homes adjacent to Lucas’ lot were destroyed by a hurricane one day after the Act took effect, the owners would not be able to rebuild, nor would they be assured recovery. Under the Court’s categorical approach, Lucas (who has lost the opportunity to build) recovers, while his neighbors (who have lost *both* the opportunity to build *and* their homes) do not recover. The arbitrariness of such a rule is palpable.

Moreover, because of the elastic nature of property rights, the Court’s new rule will also prove unsound in practice. In response to the rule, courts may define “property” broadly and only rarely find regulations to effect total takings. . . . On the other hand, developers and investors may market specialized estates to take advantage of the Court’s new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking. . . .

[Regarding the nuisance exception:] The Court’s holding today effectively freezes the State’s common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property. Until today, I had thought that we had long abandoned this approach to constitutional law. More than a century ago we recognized that “the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.” *Munn v. Illinois*, 94 U.S. 113 (1877). . . .

Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined “property.” On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species, the importance of wetlands, and the vulnerability of coastal, shapes our evolving understandings of property rights.

Of course, some legislative redefinitions of property will effect a taking and must be compensated—but it certainly cannot be the case that every movement away from common law does so. There is no reason, and less sense, in such an absolute rule. We live in a world in which changes in the economy and the environment occur with increasing frequency and importance. . . .

**Statement of Justice SOUTER.**

I would dismiss the writ of certiorari in this case as having been granted improvidently. After briefing and argument it is abundantly clear that an unreviewable assumption on which this case comes to us[, namely that Lucas had been deprived of his entire economic interest,] is both questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Court’s ability to render certain the legal premises on which its holding rests. . . .

**Notes and Questions**

26.6. For some before-and-after photos of the Lucas lot, visit William A. Fischel, *A Photographic Update on Lucas v South Carolina Coastal Council: A Photographic Essay* (last updated Mar. 30, 2000), [link](#). Writing about *Lucas*, Carol Rose observes that much of what made the case seem unfair to the reviewing courts—the “singling out” of Lucas’s lot—was a byproduct of an effort to limit political opposition to the state’s coastal preservation program by curtailing its regulatory reach. It also limited the ability of the regulations to combat the problems of development. Carol M. Rose, *The Story of Lucas: Environmental Land Use Regulation Between Developers and the Deep Blue Sea* at 24, in ENVIRONMENTAL STORIES (Richard J. Lazarus and Oliver A.

Houck, eds., Foundation Press, 2005), *link*. Bad optics notwithstanding, Rose notes that the impacts of development do not accumulate in a linear manner. It may very well make sense to impose restrictions after a period of unchecked growth.

. . . Environmental resources typically have some threshold below which use is not harmful, but beyond which marginal costs rise not just additively but exponentially. Bodies of water, for example, can tolerate some organic materials, but over a threshold, each increment of additional waste is not just additively but exponentially more damaging to wildlife, vegetation, and water quality. The smoke from an old-fashioned house furnace or two will dissipate without damage, but if you burn enough, you run the risk of a killer fog. Beachfront management is another clear example of this pattern of exponentially rising costs. A single revetment or seawall would have had little impact on South Carolina's beaches or their ability to replenish themselves; what threatened to become devastating was the accumulation of ever more armored structures . . . .

That is why a conventional notion of equality is inadequate with respect to environmental uses, including land uses. If early uses are relatively harmless, it would be pointless and overly intrusive to try to regulate them. But something has to be done when later uses slice far enough out on the salami. At that later point, it can be an invitation to environmental disaster to look around at pre-existing uses, and to say that new users should all receive the same old lax treatment, as Scalia suggested in Lucas.

*Id.* at 38.

26.7. What if someone "comes to" the regulation by purchasing a property *after* the objected-to regulation has been imposed. Does that preclude a takings challenge? As noted previously, the Court held that takings claims remain available lest the state "put an expiration date on the Takings Clause." *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

26.8. **Can judges take?** On the question of nuisance definition, what if the state actor declaring/redefining property interests is a court? In *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, a four-Justice plurality opinion would have recognized judicial takings as a viable claim (though in the case at hand it would have found no taking). 560 U.S. 702, 715 (2010) (plurality) ("[T]he Takings Clause bars the State from taking private property without paying for it, no matter

which branch is the instrument of the taking.”). But don’t judges adjust the contours of property law all the time? How could this basic function of the courts continue if challengeable as a taking? Some of these issues were taken up in the concurrences in *Stop the Beach* and the academic commentary that followed.

Courts frequently issue decisions that change the scope or coverage of intellectual property rights. *Alice Corp. Pty. Ltd. v. CLS Bank International*, for example, rendered a wide range of patents on software and business method technologies invalid, depriving those patents of their entire economic value. See 573 U.S. 208 (2014). Is this a taking under *Lucas*? Try to come up with arguments on both sides.

26.9. **“Inverse condemnation” procedures.** In regulatory takings cases, the government typically denies that a taking has occurred, so there is no condemnation proceeding. Instead, the property owner brings suit seeking relief. The Tucker Act provides an avenue for federal claimants. The statute waives United States sovereign immunity for claims founded on the Constitution, a statute, a regulation, or an express or implied-in-fact contract. 28 U.S.C. § 1491(a)(1). The “Little Tucker Act,” § 1346(a)(2), establishes concurrent jurisdiction in the district courts for claims of less than \$10,000. If a state government is the offending regulator, the property owner may look to available state remedies, but may also proceed under the federal civil rights statute. 42 U.S.C. § 1983. A litigant pursuing a § 1983 action need not pursue state remedies first. *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2177 (2019) (“[A] government violates the Takings Clause when it takes property without compensation, and that a property owner may bring a Fifth Amendment claim under § 1983 at that time. . . . Given the availability of post-taking compensation, barring the government from acting will ordinarily not be appropriate. But because the violation is complete at the time of the taking, pursuit of a remedy in federal court need not await any subsequent state action.”).

26.10. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), held that compensation is required for temporary takings. This opened the door to the argument that regulations temporarily suspending certain land uses are takings under the *Lucas* categorical rule.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Supreme Court considered an 8-month moratorium on development around Lake Tahoe while a state agency conducted environmental studies. Land developers contended that this temporary moratorium constituted a *Lucas* taking, because

the developers were deprived of all economically viable use during the period. The Supreme Court disagreed:

Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners’ “conceptual severance” argument is unavailing because it ignores *Penn Central*’s admonition that in regulatory takings we must focus on “the parcel as a whole.” . . .

An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner’s interest. Both dimensions must be considered if the interest is to be viewed in its entirety. . . . Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.

What if one of the land developers only held a life estate or an 8-month lease?

### 26.3 Physical Occupations

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), a New York statute required landlords to allow cable television companies to install a cable and outlets on the leased property. The installed components were tiny—a box four inches to the side, plus wiring—and actually improved the value of the property, according to the courts. Was such a regulation a taking? The Supreme Court held that it categorically was a taking, short-circuiting the *Penn Central* test, because of the physical occupation:

[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. . . . To borrow a metaphor, the government does not simply take a single “strand” from the “bundle” of property rights: it chops through the bundle, taking a slice from every strand.

Among other things, the Court claimed that its *per se* rule “presents relatively few problems of proof” and “will rarely be subject to dispute.” Is it so easy? Consider this case.

***Cedar Point Nursery v. Hassid***

141 S. Ct. 2063 (2021)

**Chief Justice ROBERTS delivered the opinion of the Court.**

A California regulation grants labor organizations a “right to take access” to an agricultural employer’s property in order to solicit support for unionization. Agricultural employers must allow union organizers onto their property for up to three hours per day, 120 days per year. The question presented is whether the access regulation constitutes a *per se* physical taking under the Fifth and Fourteenth Amendments.

**I**

[The California Agricultural Labor Relations Board enacted a regulation requiring agricultural employers to permit union organizers onto their property for up to 120 days a year. Per the regulation, a set number of organizers “may enter the employer’s property for up to one hour before work, one hour during the lunch break, and one hour after work. Organizers may not engage in disruptive conduct, but are otherwise free to meet and talk with employees as they wish.”]

[Cedar Point Nursery is a strawberry grower, whose property was accessed by the United Farm Workers union.] Believing that the union would likely attempt to enter their property again in the near future, the growers filed suit in Federal District Court against several Board members in their official capacity. The growers argued that the access regulation effected an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments by appropriating without compensation an easement for union organizers to enter their property. . . .

**II****A**

. . . When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation. . . . The government commits

a physical taking when it uses its power of eminent domain to formally condemn property. The same is true when the government physically takes possession of property without acquiring title to it. . . .

When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies. . . . To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central*, balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. . . .

## B

The access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.

The right to exclude is "one of the most treasured" rights of property ownership. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). According to Blackstone, the very idea of property entails "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. Blackstone, *Commentaries on the Laws of England* 2 (1766). In less exuberant terms, we have stated that the right to exclude is "universally held to be a fundamental element of the property right," and is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179–180 (1979).

Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation. The Court has often described the property interest taken as a servitude or an easement.

. . . .

In *Loretto v. Teleprompter Manhattan CATV Corp.*, we made clear that a permanent physical occupation constitutes a *per se* taking regardless whether it results in only a trivial economic loss. New York adopted a law requiring landlords to allow cable companies to install equipment on their properties. Loretto alleged that the installation of a  $\frac{1}{2}$ -inch diameter cable and two  $1\frac{1}{2}$ -cubic-foot boxes on her roof caused a taking. We agreed, stating that where government action results in a “permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.”

We reiterated that the appropriation of an easement constitutes a physical taking in *Nollan v. California Coastal Commission*. The Nollans sought a permit to build a larger home on their beachfront lot. The California Coastal Commission issued the permit subject to the condition that the Nollans grant the public an easement to pass through their property along the beach. As a starting point to our analysis, we explained that, had the Commission simply required the Nollans to grant the public an easement across their property, “we have no doubt there would have been a taking.”

More recently, in *Horne v. Department of Agriculture*, we observed that “people still do not expect their property, real or personal, to be actually occupied or taken away.” The physical appropriation by the government of the raisins in that case was a *per se* taking, even if a regulatory limit with the same economic impact would not have been. “The Constitution,” we explained, “is concerned with means as well as ends.”

The upshot of this line of precedent is that government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation. As in those cases, the government here has appropriated a right of access to the growers’ property, allowing union organizers to traverse it at will for three hours a day, 120 days a year. The regulation appropriates a right to physically invade the growers’ property—to literally “take access,” as the regulation provides. It is therefore a *per se* physical taking under our precedents. Accordingly, the growers’ complaint states a claim for an uncompensated taking in violation of the Fifth and Fourteenth Amendments.

**C**

[The Court rejected arguments that the regulation was not a taking because the unions only had access to agricultural property for a fraction of time.]

**D**

In its thoughtful opinion, the dissent advances a distinctive view of property rights. The dissent encourages readers to consider the issue “through the lens of ordinary English,” and contends that, so viewed, the “regulation does not *appropriate* anything.” Rather, the access regulation merely “*regulates . . .* the owners’ right to exclude,” so it must be assessed “under *Penn Central*’s fact-intensive test.” . . .

With respect, our own understanding of the role of property rights in our constitutional order is markedly different. In “ordinary English” “appropriation” means “*taking as one’s own*,” 1 Oxford English Dictionary 587 (2d ed. 1989) (emphasis added), and the regulation expressly grants to labor organizers the “right to *take* access,” Cal. Code Regs., tit. 8, § 20900(e)(1)(C) (emphasis added). We cannot agree that the right to exclude is an empty formality, subject to modification at the government’s pleasure. On the contrary, it is a “fundamental element of the property right,” *Kaiser Aetna*, 444 U.S. at 179–180, that cannot be balanced away.

**III**

The Board, seconded by the dissent, warns that treating the access regulation as a *per se* physical taking will endanger a host of state and federal government activities involving entry onto private property. That fear is unfounded.

*First*, our holding does nothing to efface the distinction between trespass and takings. Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right. This basic distinction is firmly grounded in our precedent. See *Portsmouth*, 260 U.S. at 329–330 (“[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [the intent to take property]. Every successive trespass adds to the force of the evidence.”) . . .

*Second*, many government-authorized physical invasions will not amount to takings because they are consistent with longstanding back-

ground restrictions on property rights. As we explained in *Lucas v. South Carolina Coastal Council*, the government does not take a property interest when it merely asserts a “pre-existing limitation upon the land owner’s title.” For example, the government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place.

These background limitations also encompass traditional common law privileges to access private property[, such as necessity, to effect an arrest, or to conduct a Fourth Amendment search].

*Third*, the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking. Under this framework, government health and safety inspection regimes will generally not constitute takings. When the government conditions the grant of a benefit such as a permit, license, or registration on allowing access for reasonable health and safety inspections, both the nexus and rough proportionality requirements of the constitutional conditions framework should not be difficult to satisfy.

None of these considerations undermine our determination that the access regulation here gives rise to a *per se* physical taking. Unlike a mere trespass, the regulation grants a formal entitlement to physically invade the growers’ land. Unlike a law enforcement search, no traditional background principle of property law requires the growers to admit union organizers onto their premises. And unlike standard health and safety inspections, the access regulation is not germane to any benefit provided to agricultural employers or any risk posed to the public. . . .

**Justice KAVANAUGH, concurring.**

I join the Court’s opinion, which carefully adheres to constitutional text, history, and precedent. I write separately to explain that, in my view, the Court’s precedent in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), also strongly supports today’s decision.

In *Babcock*, the National Labor Relations Board argued that the National Labor Relations Act afforded union organizers a right to enter company property to communicate with employees. . . . Against the backdrop of the Constitution’s strong protection of property rights, the Court interpreted the Act to afford access to union organizers only when “needed”—that is, when the employees live on company property and union organizers have no other reasonable means of communicating with the employees. As I read

it, *Babcock* recognized that employers have a basic Fifth Amendment right to exclude from their private property, subject to a “necessity” exception similar to that noted by the Court today.

**Justice BREYER, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.**

The Court holds that the provision’s “access to organizers” requirement amounts to a physical appropriation of property. . . . But this regulation does not “appropriate” anything; it regulates the employers’ right to exclude others. At the same time, our prior cases make clear that the regulation before us allows only a *temporary* invasion of a landowner’s property and that this kind of temporary invasion amounts to a taking only if it goes “too far.” In my view, the majority’s conclusion threatens to make many ordinary forms of regulation unusually complex or impractical. . . .

[Justice Breyer’s dissent is wide-ranging, and only a selection of its arguments are presented here.]

It is important to understand, however, that, technically speaking, the majority is wrong. The regulation does not *appropriate* anything. It does not take from the owners a right to invade (whatever that might mean). It does not give the union organizations the right to exclude anyone. It does not give the government the right to exclude anyone. What does it do? It gives union organizers the right temporarily to invade a portion of the property owners’ land. It thereby limits the landowners’ right to exclude certain others. The regulation *regulates* (but does not *appropriate*) the owners’ right to exclude.

Why is it important to understand this technical point? Because only then can we understand the issue before us. That issue is whether a regulation that *temporarily* limits an owner’s right to exclude others from property *automatically* amounts to a Fifth Amendment taking. Under our cases, it does not.

[Justice Breyer reviewed takings precedents, concluding that they supported distinguishing permanent and temporary rights of access.] That distinction serves an important purpose. We live together in communities. (Approximately 80% of Americans live in urban areas.) Modern life in these communities requires different kinds of regulation. Some, perhaps many, forms of regulation require access to private property (for government officials or others) for different reasons and for varying periods of time. Most such temporary-entry regulations do not go “too far.” And it is impracti-

cal to compensate every property owner for any brief use of their land. As we have frequently said, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” *Pennsylvania Coal Co.*, 260 U.S. at 413. Thus, the law has not, and should not, convert all temporary-access-permitting regulations into *per se* takings automatically requiring compensation.

Consider the large numbers of ordinary regulations in a host of different fields that, for a variety of purposes, permit temporary entry onto (or an “invasion of”) a property owner’s land. They include activities ranging from examination of food products to inspections for compliance with preschool licensing requirements.

[The exceptions in section III of the majority opinion were, in Justice Breyer’s view, insufficient to address this problem. In particular, regarding the Court’s position that “the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking”:]

Labor peace (brought about through union organizing) is one such benefit, at least in the view of elected representatives. They wrote laws that led to rules governing the organizing of agricultural workers. Many of them may well have believed that union organizing brings with it “benefits,” including community health and educational benefits, higher standards of living, and (as I just said) labor peace. A landowner, of course, may deny the existence of these benefits, but a landowner might do the same were a regulatory statute to permit brief access to verify proper preservation of wetlands or the habitat enjoyed by an endangered species or, for that matter, the safety of inspected meat. So, if a regulation authorizing temporary access for purposes of organizing agricultural workers falls outside of the Court’s exceptions and is a *per se* taking, then to what other forms of regulation does the Court’s *per se* conclusion also apply?

### Notes and Questions

**26.11. The baseline scope of the *per se* rule.** Both the majority and dissent appear to agree that state-mandated intrusions into the right to exclude are common and that many (most? some?) of these regulations are not takings. So what makes

this intrusion a taking as a categorical matter while, say, a mandatory health inspection is (presumably) not?

Let's begin with the apparent scope of the *per se* rule. The majority declares that the access regulation is a *per se* physical taking because it "appropriates a right to invade the growers' property." What does that mean, precisely? Does the "right to invade" parallel any property interest we have discussed in this course? (And does it matter if it doesn't?) Could any regulation of the right to exclude (e.g., a rent control law) be similarly characterized as an appropriation of a right to invade? The Court also states that "the regulation appropriates for the enjoyment of third parties the owners' right to exclude." Why isn't the same true for the mandate to a restaurant to admit a health inspector?

As addressed in following notes, the majority proffers arguments for why health inspection regimes are *not* takings (at least if reasonable in the Court's eyes) and that concerns to the contrary are "unfounded." Before we turn to them, there is a question of their purpose. Does the survival of any access regulation now depend on the regulation's ability to fit itself into one of these exceptions? Stated another way, have we now flipped the baseline on regulations that regulate the right to exclude from being presumptively constitutional to presumptively suspect?

26.12. **The trespass/takings distinction.** First, the majority observes that "our holding does nothing to efface the distinction between trespass and takings. Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right." Justice Breyer's dissent raises the critique that it is uncertain what will distinguish "isolated physical invasions" from "appropriations." In any case, this provision likely has little applicability to regulatory programs, as inspectors would seem to have a "granted right of access."

26.13. **Background principles.** Second, the majority argues that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." This justification is taken from the discussion in *Lucas* of "pre-existing limitation upon the land owner's title." There, it was invoked to note a potential exception to the "wipeout" categorical rule. *Lucas* focused on the prospect of a regulation preventing a nuisance, which, being a nuisance, the landowner never had a right to maintain in the first place. In *Lucas*, the majority indicated that this class of cases is small, provoking the Justice Blackmun to observe in dissent that, "There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries

can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators?” Justice Breyer’s dissent echoes this concern, asking if “only those exceptions that existed in, say, 1789 count?”

For the majority, the relevant background principles are broader than preventing nuisance and include the expectation that some government activities may require grants of access. These include matters of public or private necessity (concerning the need to prevent disaster or “serious harm”), entry to effect an arrest, and the conduct of a search. Here, the Court invokes the body of case law concerning the Fourth Amendment’s applicability to administrative searches. In *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967), cited by the majority, the Court held that a warrant was required before a building inspector could enter premises without consent. *Camara* explains, however, that the requirements for probable cause in the administrative context are weaker than in the criminal setting.

This is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an inference of “probable cause” to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of warrant.

*Id.* at 538. The ins and outs of what the Fourth Amendment requires in the administrative search context constitute, as might be expected, a complicated body of law. See, e.g., *New York v. Burger*, 482 U.S. 691, 702-03 (1987) (warrantless inspections of businesses in “pervasively regulated” allowed if industries may be searched without a warrant when they are justified by a substantial government interest, necessary to further the regulatory scheme and provide protections to the searched that effectively substitute for the protections of a warrant).

26.14. **Exactions.** Third, the majority notes that “the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking.” Note that this is an invocation of exactions doctrine,

in which the state demands, as a condition to receiving a government benefit, that the property owner give up an interest that the state could not take without paying compensation. But *Cedar Point* is not a review of an exaction, but rather of a state regulation. Normally, economic regulations are evaluated under rational basis review, but here the Court seems to suggest that regulations involving access must meet the rough proportionality test of *Dolan* (at least if they do not want to run afoul of the *Cedar Point* *per se* rule). In effect, therefore, a certain class of regulations must now meet heightened scrutiny. Alternatively, has the Court greatly expanded the scope of state action considered to be an exaction?

Of course, regulatory regimes will often not reflect the exactions fact pattern. This can be seen here, as the majority notes that “the access regulation is not germane to any benefit provided to agricultural employers or any risk posed to the public.” But is that always true of the regulations that the majority says are safe from *Cedar Point*? And how direct must “public risk” be? Are measures to protect endangered species a sufficient necessity, or will later opinions see them as too attenuated? This ties to the dissent’s question of why “labor peace” is not a sufficiently important goal? Are courts in a better position to make these calls than democratically accountable actors? Likewise, why cannot the state make certain labor practices a condition of being able to practice agriculture on an industrial scale?

To be sure, the majority may just have determined that these interests are insufficiently important given the relative intrusiveness of the regulation. If so, that sounds an awful lot like balancing, doesn’t it? The very balancing that the majority says is inappropriate under its perhaps-not-so-categorical approach.

**26.15. A *Cedar Point* hypothetical.** Consider this law pertaining to land surveyors:

A professional land surveyor, or persons under his or her direct supervision, together with his or her survey party, who, in the course of making a survey, finds it necessary to go upon the land of a party or parties other than the one for whom the survey is being made is not liable for civil or criminal trespass and is liable only for any actual damage done to the land or property.

225 ILL. COMP. STAT. ANN. 330/45. Many states have similar measures. Is this a taking under *Cedar Point*? Is this a regulation about health or safety? Does it confer a benefit to the owner of the burdened property? What would be just compensation if this were adjudicated to be a taking?

*PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) ruled that it was not a taking for state law to require a shopping mall to permit speech and petition ac-

tivities by visitors, and the opinion evaluated the question using the *Penn Central* factors. *Cedar Point* distinguishes *PruneYard* as being about space open to the public. Why does openness to the public matter? What kind of openness to the public is necessary to be out from under the *Cedar Point per se* rule? Or is it the significance of the intruder's interest that matters?

Likewise, what is the precise doctrinal effect of openness to the public? Does it mean that the property is not subject to the *Cedar Point* rule—that is that the case does not involve an appropriation of a right to invade? Or does public openness flag a situation in which one of the majority's limitations to *Cedar Point*'s scope comes into effect (e.g., the openness of the mall to the public allows the state to demand an exaction)?

26.16. **How far is too far?** For the dissent, short of a permanent occupation, state access regulation should be evaluated under *Penn Central* unless the state's access rises to the level of a discrete property interest (e.g., being the equivalent of an easement, lease, or some such). If something allows access but doesn't rise to the level of a recognized property right, then *Penn Central* should apply. Would that formalist approach be sufficiently protective of property owners? To what extent might the majority be reacting to the difficulty to property owners of prevailing under the *Penn Central* analysis? Do considerations of landowner autonomy play a role insofar as having to tolerate an unwanted visitor might be seen as a particularly significant intrusion? On that note, consider this exchange from oral argument between Justice Barrett and the California Solicitor General:

JUSTICE BARRETT: . . . Let's imagine [my house is] situated on the corner of two busy streets and a city decides that it would be beneficial to allow people to protest on my lawn because it's so highly visible to the traffic that's passing by. But exactly like this one, you know, it says you can do it 120 days a year and three hours at a time just during rush hour. I take it, under your theory, that's not a *per se* taking, that would be subject to *Penn Central*.

MR. MONGAN: Yes, that would be a powerful *Penn Central* case.

JUSTICE BARRETT: Okay, but why would it be a powerful *Penn Central*? I mean, in the reply brief, your friends on the other side point out that the Ninth Circuit and the Federal Circuit couldn't identify any *Penn Central* cases in which a court has found a taking where the diminution in value is less than 50

percent. And, surely, my property value hasn't decreased more than 50 percent as a result of the regulation I just described. . . .

MR. MONGAN: [Penn Central] says that if there is a regulation authorizing a physical intrusion, courts should be more likely to find a taking. . . . And if there's a concern that courts are not properly applying *Penn Central* to this type of situation, then the solution would be to take that type of case, as I mentioned, and clarify how it should apply. . . .

JUSTICE BARRETT: . . . *Penn Central* is deliberately designed to be permissive towards regulations given the pervasiveness of regulations on property use in modern life. And so . . . it's stacked in favor of regulations. But . . . you're saying that physical occupations are different. So, if physical occupations are different, why isn't the easier way to handle them the rule that we announced in *Loretto*, which is to say they're subject to a *per se* rule?

26.17. **Just compensation.** Suppose California wants the access regulation to remain in force. What should it (or the union) have to pay to allow union representatives on the land under the terms of the regulation? How should the amount be calculated? Is there a market for such matters that can provide data on just compensation? If the value is low, does that lower the stakes?

26.18. **What about *State v. Shack*?** Recall *State v. Shack*. Is the New Jersey Supreme Court's dictate that "Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises" a reflection of New Jersey background principles that the *Cedar Point* majority would accept? Note that *Shack* uses the language of necessity ("Hence it has long been true that necessity, private or public, may justify entry upon the lands of another. . . ."). Does the fact that the farmers lived on the land fit the case within the distinction drawn by Justice Kavanaugh's concurrence?