

# Open Source Property

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# 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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## Typeface and Editing Conventions

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 1

## 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.

## 1.1 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—most toddlers have a sense for what property is, as they go around calling everything “mine”—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. So the concept of “property” involves not just things, but also multiple people. Property is about the legal relationships among them.

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

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\*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

1.1. **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*.

1.2. 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.

**1.3. 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.

**1.4. 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.

**1.5. 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 1.2 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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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 availing 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**

1.6. 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 their argument for why that feature is key, how it differs from Hohfeld, and why they think Hohfeld was wrong.

1.7. 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?

1.8. 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?

1.9. 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?

## 1.2 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, because 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 decisionmak-

ing 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).

## 1.3 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

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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.

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 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 beyond the scope of this book].

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 public 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. . . .

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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).

### Notes and Questions

1.10. 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.' 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?

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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),

1.11. 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?

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

1.13. 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?”

1.14. 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?

1.15. 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 opera-

tors 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 2

## 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 2.1:** 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.

## 2.1 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 2.1, 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 2.2:** 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 2.2 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 2.2.

## 2.2 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

2.1. 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?

## 2.3 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

2.2. 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?

2.3. 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?

2.4. 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?

2.5. 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?

2.6. 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?

2.7. 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?

2.8. 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?

2.9. 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?

## 2.4 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.

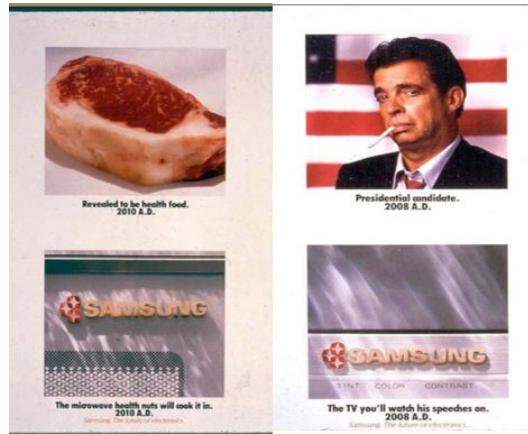
dants Samsung Electronics America, Inc. (Samsung) and David Deutsch Associates, Inc. (Deutsch) attempted to capitalize on White's fame to enhance their fortune. White sued, alleging infringement of various intellectual property rights, but the district court granted summary judgment in favor of the defendants.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

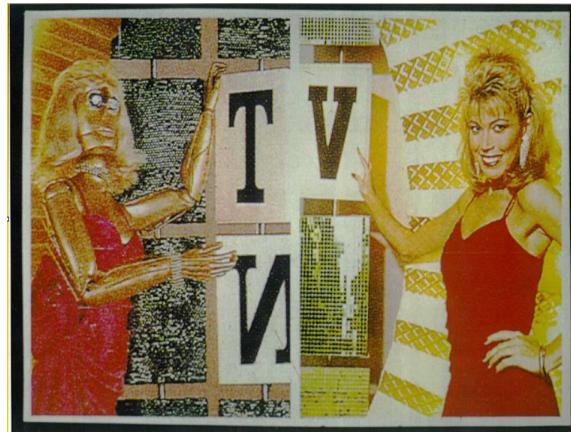
Following the circulation of the robot ad, White sued Samsung and Deutsch in federal district court . . . . The district court granted summary judgment against White on each of her claims. White now appeals. . . .



**Figure 2.3:** Other advertisements in Samsung's campaign.



**Figure 2.4:** The advertisement in dispute.



**Figure 2.5:** 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

2.10. 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!”)

2.11. 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.

2.12. 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 3

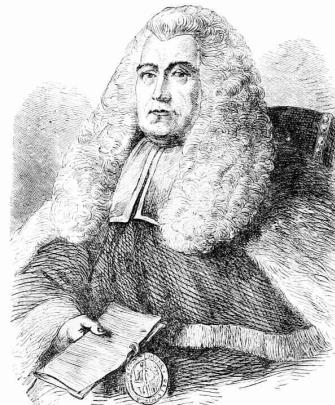
## The Right to Exclude

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 3.1:** 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**

- 3.1. 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?

3.2. 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?

3.3. 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"?

3.4. 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?

## 3.1 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.

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

<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.

## 3.2 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**

3.5. 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?

3.6. 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*?

3.7. 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?

### 3.3 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**

3.8. 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.

3.9. 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?

3.10. 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).

3.11. 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?

3.12. 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?

3.13. 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 4

## 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?

### 4.1 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.

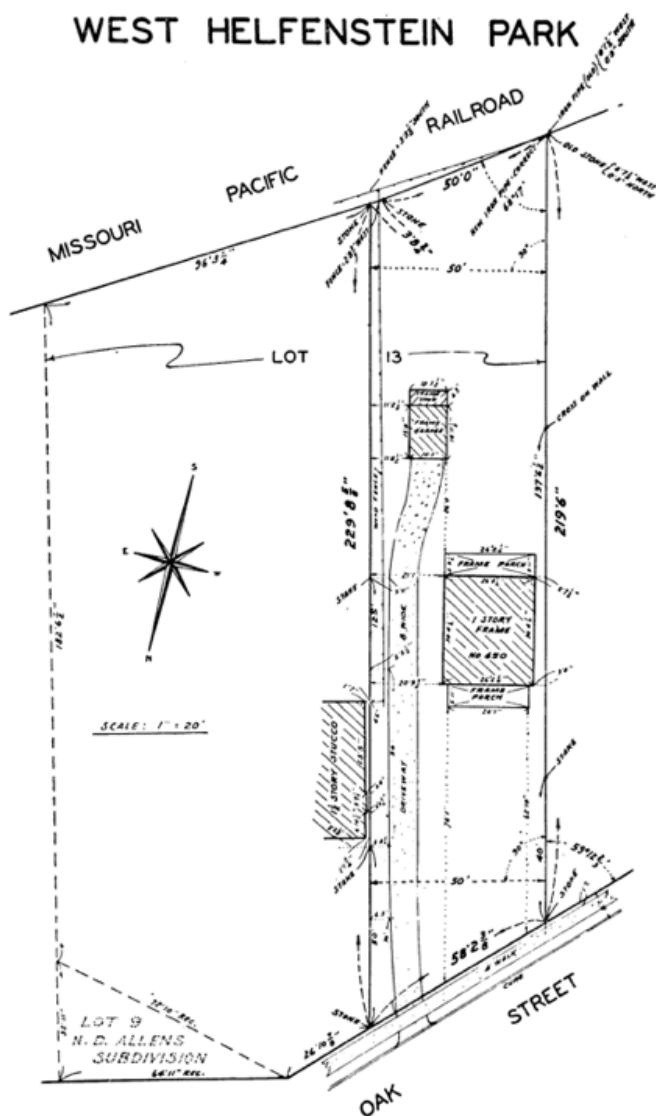
The common source of title is Fred F. Wolf and Rose E. Wolf, husband and wife, who in 1922 acquired the whole of Lot 13 of West Helfenstein Park, as shown by plat thereof recorded in St. Louis County. In 1924, Mr. and Mrs. Wolf conveyed to Charles Arthur Forse and wife the following described portion 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 4.1:** 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**

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

4.2. 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?

4.3. 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?

4.4. 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?

## 4.2 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

4.5. 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).

4.6. 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?

4.7. 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”?

4.8. **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. The doctrine of nuisance, not covered in this book, is another option.)

4.9. 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?

## 4.3 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 said 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 said 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**

4.10. *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?

4.11. *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?

4.12. 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?

4.13. 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?

## 4.4 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 4.2:** 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 *scenes a 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 5

## 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 personalty: 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).

## 5.1 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

5.1. 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?

5.2. 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?

5.3. 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?

5.4. 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?

5.5. 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

5.6. 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*?

5.7. 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*?

5.8. 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?”

5.9. 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. (These rules themselves are not as simple as “first possessor wins.”). How easy is it to tell the three apart? Why?

5.10. 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?

5.11. 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?

5.12. 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?

## 5.2 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

5.13. 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?

5.14. 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?

5.15. 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?

5.16. 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?

5.17. 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?

### 5.3 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**

5.18. 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?

5.19. 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?

5.20. 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?

5.21. 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 6

## 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).

## 6.1 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 Uniao 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.

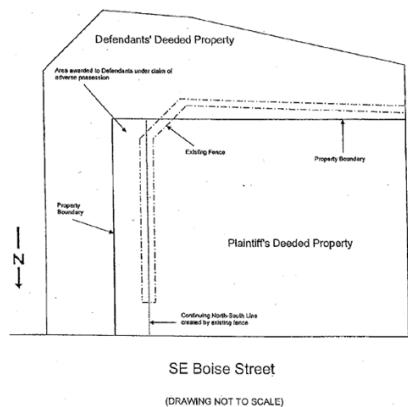
***Tieu v. Morgan***  
265 P.3d 98 (Or. Ct. App. 2011)

**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

6.1. 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?

6.2. *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.

6.3. 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?

6.4. **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?

**6.5. 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”).

6.6. **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?

#### 6.7. **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.

6.8. **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?

6.9. **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.").

6.10. **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.

## 6.2 "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

6.11. **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).

6.12. 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?

6.13. A minority of states, as *Dombkowski* indicates, 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 actions 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?

### 6.3 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., Nечow 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 6.1. 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	
	<input type="checkbox"/> the property claimed is only a portion of this parcel ID	
Date of filing	Date claimant entered into possession of property	
Legal description of property claimed <small>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.</small>		
This property has been: <small>(Check all that apply.)</small>	<input type="checkbox"/> protected by substantial enclosure	<input type="checkbox"/> cultivated, maintained, or improved in a usual manner
Describe your use of the property, in detail below.		
Dates of payments of any outstanding taxes or liens levied by the state, county or municipality:		
<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>		
Signature of claimant(s) _____		
State of Florida _____ County of _____		
This instrument was sworn to and subscribed before me on _____ by _____ <small>personally known to me or who produced _____ as identification.</small>		
_____ Signature and seal, notary public		
<b>COMPLETED BY PROPERTY APPRAISER</b>		
Received in the office of the property appraiser of _____ County, Florida, on _____ <small>A signed copy of this return has been delivered to the claimant(s). A copy will be sent to the owner of record.</small>		
_____ Signature, property appraiser or deputy _____ Date _____		
<b>TO THE OWNER OF RECORD</b>		
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.)		
This return is a public record and may be inspected by any person under s. 119.01, F.S.		

**Figure 6.1:** Florida's adverse possession form.

## 6.4 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).

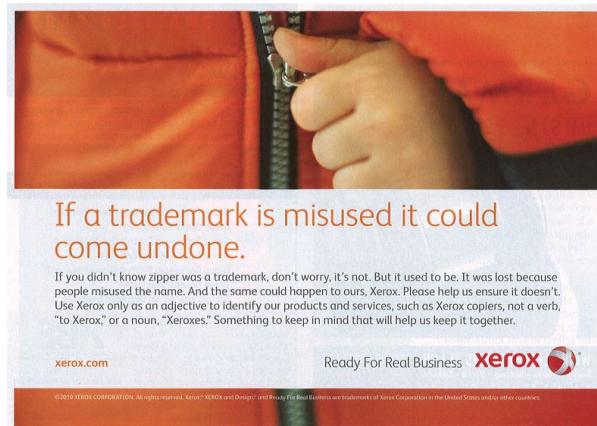
“Although there is a social cost when a mark becomes generic—the trademark owner has to invest in a new trademark to identify his brand—there is also a social benefit, namely the addition to ordinary language.” *Ty Inc. v. Perryman*, 306 F.3d 509, 514 (7th Cir.2002). Furthermore, when a trademark becomes 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**

6.14. 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 6.2:** An advertisement by Xerox, run in the ABA Journal. Via Eric E. Johnson, *Please Help, if You Can*, PRAWFSBLAWG (June 29, 2010), *link*.

6.15. 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.

6.16. 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?

6.17. 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 6.2. 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 7

## 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.

## 7.1 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 grantee in possession by handing over a clod of dirt. The grantee would swear homage to the grantor, and the grantor would swear to defend the grantee'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**

7.1. What is the difference between these two sections? Why are both necessary?

7.2. 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**

7.3. 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?

7.4. 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?

7.5. 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?

7.6. *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?

7.7. 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?

## 7.2 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

7.8. **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?

7.9. **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)).

7.10. **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

7.11. 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?

## 7.3 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**

7.12. 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?

7.13. 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?

7.14. 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?

7.15. 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?

7.16. 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 8

## 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.

## 8.1 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**

8.1. 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

8.2. 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?

8.3. 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?

8.4. § 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 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 5.17 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).

## 8.2 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**

8.5. 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?

8.6. 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?

### **8.3 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, \_\_\_\_\_ 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**

8.7. 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**

8.8. 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?

8.9. 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?

8.10. 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?

8.11. 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?

8.12. 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?

## 8.4 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**

8.13. 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.

8.14. 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?

8.15. 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 9

## Estates and Future Interests

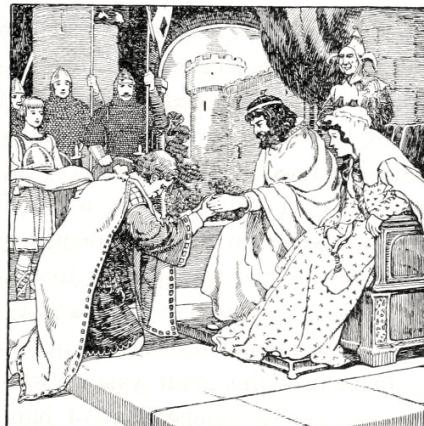
All land under the dominion of the English crown is held “mediately or immediately, of the king”—that is, the crown has “radical title” to all land under its political dominion. William the Conqueror declared that all land in England was literally the king’s property; everyone else had to settle for 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 9.1:** 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.”

## 9.1 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.

## 9.2 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.

### 9.2.1 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.

### 9.2.2 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*.

### 9.2.3 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.

#### 9.2.4 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

9.1. 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?

9.2. 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?

## 9.3 Working Out Problems

To grasp how the 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 9.1. (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.

## 9.4 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 10

## Issues with Estates

### 10.1 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

**10.1. 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*.

**10.2. 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?

**10.3. 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?

**10.4. 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?

## 10.2 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

10.5. 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?

10.6. 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).

10.7. **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*?

10.8. **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.

10.9. 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?

## 10.3 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**

10.10. 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?)

10.11. 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?

10.12. 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.

*Numerus 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).

10.13. 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?

10.14. 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.

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**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).

10.15. 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**

10.16. 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?

10.17. 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?

10.18. 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

10.19. **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?

10.20. **Restraints on Alienation vs. Restrictions on Use.** In *Wills* the court seemed to be concerned that the condition subsequent restricting the grantee'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?

10.21. 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 11

## 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.

## 11.1 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**

11.1. 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?

11.2. 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?

11.3. 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?

11.4. 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?

11.5. 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](#).

11.6. 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**

11.7. *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.

11.8. 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?

11.9. 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?

11.10. 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?

11.11. *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.

11.12. 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*?

## 11.2 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

11.13. 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) 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.

11.14. 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.

11.15. 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.

11.16. 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?

11.17. 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?

11.18. 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?

11.19. 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?

11.20. 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.

## 11.3 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**

11.21. 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?

11.22. *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 12

## 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.

## 12.1 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

**12.1. 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?

**12.2. 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?

**12.3. 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?

**12.4. Institutional competence.** Are courts or legislatures better positioned to create new property forms?

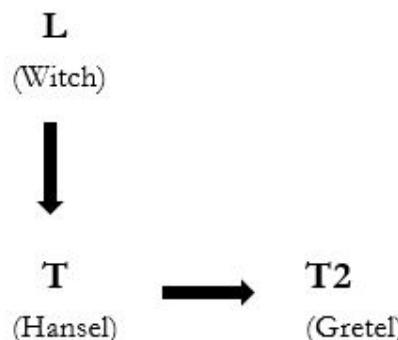
**12.5. The background story.** Lena Effel lived in the house owned by her nephews for over 20 years. Before that, her twin brother (Henry and Jack's father)

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?

## 12.2 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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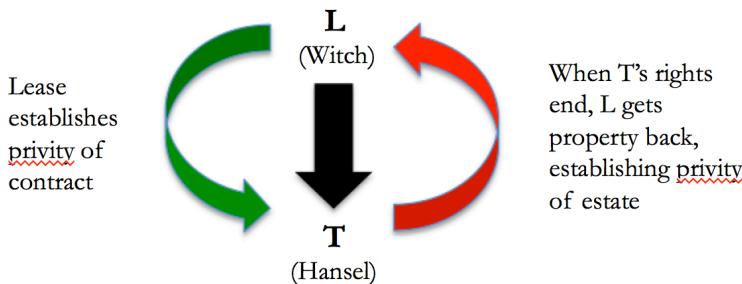
<sup>2</sup>The medieval mind thought of rent as something that came from the land itself: the tenant paid the land-lord out of the fruits of the land, sometimes metaphorically but sometimes literally, with crops harvested from the land being leased.

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. The property law concept of “covenants,” not covered in this book, deals with which promises “run with the land.” For now, it’s enough to know that transferees can only enforce promises that concern the property or land.

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.

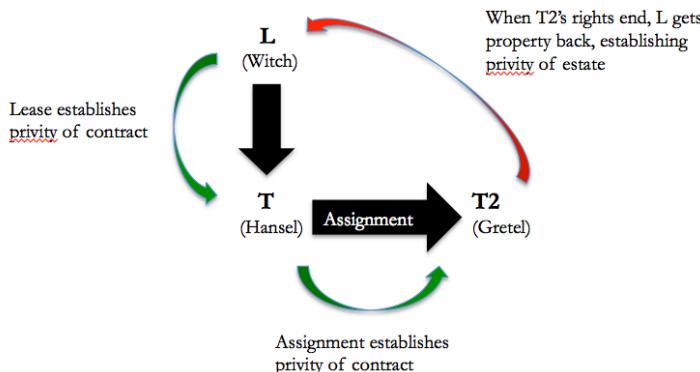
Figuring out which parties stand in privity of estate can initially cause a lot of confusion. However, asking two quick questions can help define these relationships. The first step is to ask, “Have any tenants made an assignment of their rights?” If a tenant has assigned their rights they have no chance 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:



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.

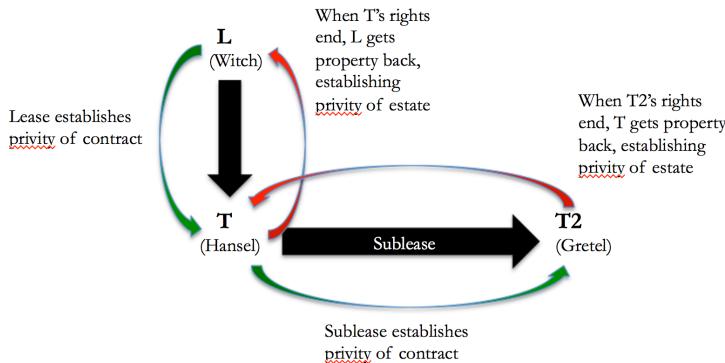
The relationships change if T assigns his rights to a new party, T2. The diagram of an assignment is below:



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**

12.6. 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?

12.7. 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.

12.8. 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).

12.9. 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?

12.10. 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?

## 12.3 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?

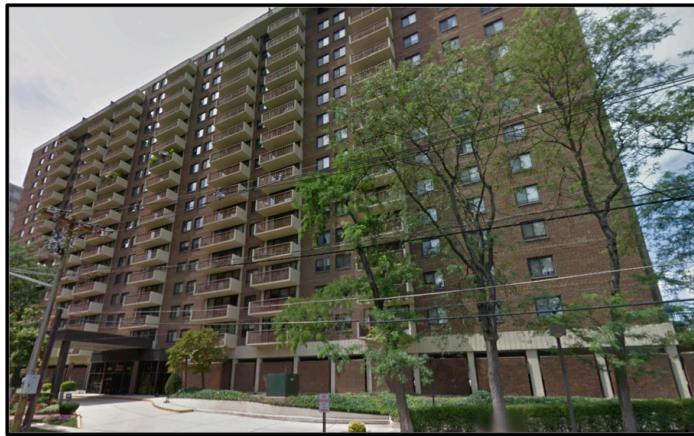
### ***Sommer v. Kridel*** 378 A.2d 767 (N.J. 1977)

**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 12.1:** 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

**12.11. 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.

**12.12. 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.

**12.13. 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).

**12.14. 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?

**12.15. 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.

## 12.4 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**

12.16. Would you rather be a tenant in a place like Houston—where evictions happen quickly—or in San Francisco—where they do not?

12.17. 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

**12.18. 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?

**12.19. 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?

12.20. **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”?

12.21. **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?

12.22. **Costs.** Who does the demise of self-help hurt?

12.23. **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.

**12.24. 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 13

## 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.

## 13.1 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

**13.1. 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*.

**13.2. 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.

**13.3. 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?

**13.4. 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.

13.5. **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?

13.6. **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?

## 13.2 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

13.7. **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.

13.8. **What is habitability?** Do all defects in an apartment amount to violations? What is the standard of habitability as laid out in *Hilder*?

13.9. **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?

13.10. **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?

13.11. **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?

13.12. **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.

13.13. 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**

13.14. 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?

### 13.3 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

13.15. **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.

13.16. **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?

13.17. **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?

13.18. **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?

13.19. **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*?

13.20. **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?

13.21. **Remedies.** What's the appropriate remedy for a tenant who wins a retaliatory eviction case?

13.22. **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.

13.23. **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.

## 13.4 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



## **Part VII**

# **Simultaneous Owners**



# Chapter 14

## 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.

### 14.1 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.

### 14.1.1 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

**14.1. 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.

14.2. **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?

14.3. **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).

**14.4. 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).

**14.5. 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).

**14.6. 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.

**14.7. 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 14.9 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.

**14.8. 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?

**14.9. 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?

14.10. **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)?

14.11. **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).

14.12. **Intangible assets.** Intellectual property is also subject to concurrent ownership. For example, co-authors of a work are treated as joint owners of the copyright in that work. ("Joint" here does not refer to joint tenancy; it is an unfortunately imprecise colloquialism in copyright law.) The typical rule is that each author owns an equal share of the copyright, and has the full unilateral power to license

the work and permit others to use it—even against the will of the co-authors. How does this compare with tenancy in common?

**14.13. 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?

## 14.1.2 Partition

### *Delfino v. Vealencis*

436 A.2d 27 (Conn. 1980)

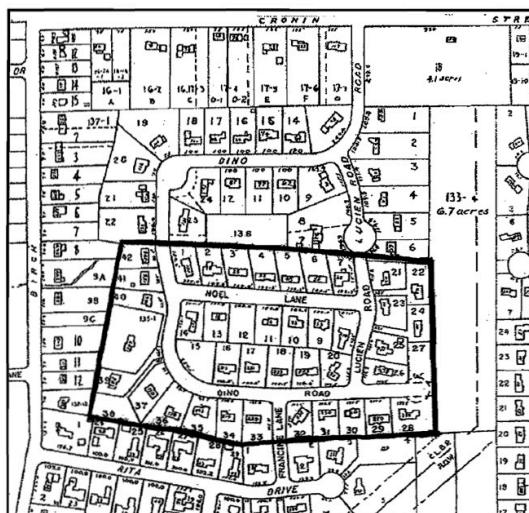
**ARTHUR H. HEALEY, Associate Justice.**

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,

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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 14.1:** Subdivision plot plan for the 20.5 acre parcel

Connecticut. The property consists of an approximately 20.5 acre parcel of land and the dwelling of the defendant thereon. The plaintiffs own an undivided 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

<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.

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 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

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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.

on the party requesting a partition by sale to demonstrate that such a sale would better promote the owners' interests.

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 prop-

erty; 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

14.14. **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).

14.15. **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.”

**14.16. 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 oweltly 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).

**14.17. 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.”

**14.18. 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.

**14.19. 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).

**14.20. 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.

14.21. **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?

## 14.2 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.

### 14.2.1 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?

### 14.2.2 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**

14.22. 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?

14.23. 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?

14.24. 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).

14.25. 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?

**14.26. 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 Gulledge*, 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.

**14.27. 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).

14.28. **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?

14.29. **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.

14.30. **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.

**14.31. 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 15

## 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.

## 15.1 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

15.1. 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"

15.2. 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.

15.3. 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?

15.4. 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?

15.5. 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?

15.6. 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 15.1:** 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?)

15.7. 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.”

## 15.2 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

15.8. 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.

15.9. 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?

15.10. 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?

15.11. 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?

15.12. 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.

## 15.3 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?

### 15.3.1 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**

15.13. *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?

15.14. **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).

15.15. **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.

15.16. **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).

15.17. **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).

15.18. **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.

### 15.3.2 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.