Property Spring 2014
University Of Maryland
Professor Grimmelmann

Course Supplement

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ASSIGNMENT 1: FIRST POSSESSION

We start with the creation of personal property rights through first possession. The first three cases use wild animals as an example. What constitutes "possession," it turns out, is both factually and legally complex. *Haslem v. Lockwood* illustrates the other end of property's life-cycle: abandoned property becomes unowned, and subject to the rule of first possession again. But what constitutes "abandonment" is subject to some of the same ambiguities as first possession, and they are resolved in similar ways.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Pierson v. Post	82	81
Ghen v. Rich and note 1	90	88
Keeble v. Hickeringill	93	92
Haslem v. Lockwood	Supplement	

Haslem v. Lockwood
37 Conn. 500 (1871)

Trover, for a quantity of manure ...

On the trial it was proved that the plaintiff employed two men to gather into heaps, on the evening of April 6th, 1869, some manure that lay scattered along the side of a public highway, for several rods, in the borough of Stamford, intending to remove the same to his own land the next evening. The men began to scrape the manure into heaps at six o'clock in the evening, and after gathering eighteen heaps, or about six cart-loads, left the same at eight o'clock in the evening in the street. The heaps consisted chiefly of manure made by horses hitched to the railing of the public park in, and belonging to, the borough of Stamford, and was all gathered between the center of the highway and the park; the rest of the heaps consisting of dirt, straw and the ordinary scrapings of highways. The defendant on the next morning, seeing the heaps, endeavored without success to ascertain who had made them, and inquired of the warden of the borough if he had given permission to any one to remove them, and ascertained from him that he had not. He thereupon, before noon on that day, removed the heaps, and also the rest of the manure scattered along the side of the highway adjacent to the park, to his own land.

... No notice was left on the heaps or near by, by the plaintiff or his workmen, to indicate who had gathered them, nor had the plaintiff or his workmen any actual possession of the heaps after eight o'clock in the evening on the 6th of April.

... The six loads were worth one dollar per load. The plaintiff, on ascertaining that the defendant had removed the manure, demanded payment for the same, which the defendant refused. ...

Park, J. ...

The manure originally belonged to the travelers whose animals dropped it, but it being worthless to them was immediately abandoned; and whether it then became

the property of the borough of Stamford which owned the fee of the land on which the manure lay, it is unnecessary to determine; for, if it did, the case finds that the removal of the filth would be an improvement to the borough, and no objection was made by any one to the use that the plaintiff attempted to make of it. Considering the character of such accumulations upon highways in cities and villages, and the light in which they are everywhere regarded in closely settled communities, we cannot believe that the borough in this instance would have had any objection to the act of the plaintiff in removing a nuisance that affected the public health and the appearance of the streets. ...

It is further claimed that if the plaintiff had a right to the property by virtue of occupancy, he lost the right when he ceased to retain the actual possession of the manure after scraping it into heaps.

We do not question the general doctrine, that where the right by occupancy exists, it exists no longer than the party retains the actual possession of the property, or till he appropriates it to his own use by removing it to some other place. If he leaves the property at the place where it was discovered, and does nothing whatsoever to enhance its value or change its nature, his right by occupancy is unquestionably gone. But the question is, if a party finds property comparatively worthless, as the plaintiff found the property in question, owing to its scattered condition upon the highway, and greatly increases its value by his labor and expense, does he lose his right if he leaves it a reasonable time to procure the means to take it away, when such means are necessary for its removal?. ...

A reasonable time for the removal of this manure had not elapsed when the defendant seized and converted it to his own use. The statute regulating the rights of parties in the gathering of sea-weed, gives the party who heaps it upon a public beach twenty-four hours in which to remove it, and that length of time for the removal of the property we think would not be unreasonable in most cases like the present one.

ASSIGNMENT 2: FINDERS AND THIEVES

Next, we turn from those who take possession of unowned property to those who take possession of already-owned property. We start with a discussion of the criminal and civil remedies available against thieves. The materials cover the traditional common-law personal-property torts, as well as a new and perhaps surprising use of restitution: not as a measure of contract damages, but as a remedy for the deliberate misuse of property. Then we consider what kind of rights those who find or "find" property obtain, not as against its owner, but as against third parties. We conclude with contraband: items the mere possession of which is a crime. Unsurprisingly, this has led to attempts to stretch the meaning of "possession" in precisely the opposite direction than in the cases about finders' rights.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Maryland Code, Criminal Law (personal property crimes)	Supplement	
Note on civil actions protecting personal property	372	410
Olwell v. Nye & Nissen Co.	Supplement	
Armory v. Delamirie and notes	220	220
Clark v. Maloney and notes	222	222
Anderson v. Gouldberg and notes	223	224
Note on relativity of title	225	226
Commonwealth v. Rambo	Supplement	

Maryland Code, Criminal Law (personal property crimes)

§ 6-301. Malicious destruction

(a) Prohibited. — A person may not willfully and maliciously destroy, injure, or deface the real or personal property of another.

§ 7-104. General theft provisions

(a) Unauthorized control over property. -- A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person [has a culpable mental state to deprive the owner of the property].

(b) Unauthorized control over property -- By deception. -- A person may not obtain control over property by willfully or knowingly using deception, if the person [has a culpable mental state to deprive the owner of the property].

(c) Possessing stolen personal property. --

> (1) A person may not possess stolen personal property knowing that it has been stolen, or believing that it probably has been stolen, if the person [has a sufficiently culpable mental state to deprive the owner of the property]. ...

(d) Control over property lost, mislaid, or delivered by mistake. -- A person may not obtain control over property knowing that the property was lost, mislaid, or was

delivered under a mistake as to the identity of the recipient or nature or amount of the property, if the person

(1) knows or learns the identity of the owner ...

(2) fails to take reasonable measures to restore the property to the owner; and

(3) intends to deprive the owner permanently ...

Olwell v. Nye & Nissen Co.
173 P.2d 652 (Wash. 1946)

Mallery, Justice:

On May 6, 1940, plaintiff, E. L. Olwell, sold and transferred to the defendant corporation his one-half interest in Puget Sound Egg Packers, a Washington corporation having its principal place of business in Tacoma. By the terms of the agreement, the plaintiff was to retain full ownership in an 'Eggsact' egg-washing machine, formerly used by Puget Sound Egg Packers. ... It appears that the plaintiff arranged for and had the machine stored in a space adjacent to the premises occupied by the defendant but not covered by its lease. Due to the scarcity of labor immediately after the outbreak of the war, defendant's treasurer, without the knowledge or consent of the plaintiff, ordered the egg washer taken out of storage. The machine was put into operation by defendant on May 31, 1941, and thereafter for a period of three years was used approximately one day a week in the regular course of the defendant's business. Plaintiff first discovered this use in January or February of 1945 when he happened to be at the plant on business and heard the machine operating. Thereupon plaintiff offered to sell the machine to defendant for $600 or half of its original cost in 1929. A counter offer of $50 was refused and approximately one month later this action was commenced to recover the reasonable value of defendant's use of the machine, and praying for $25 per month from the commencement of the unauthorized use until the time of trial. A second cause of action was alleged but was not pressed and hence is not here involved. The court entered judgment for plaintiff in the amount of $10 per week for the period of 156 weeks covered by the statute of limitations, or $1,560, and gave the plaintiff his costs.

Defendant has appealed to this court assigning error upon the judgment, upon the trial of the cause on the theory of unjust enrichment, upon the amount of damages, and upon the court's refusal to make a finding as to the value of the machine and in refusing to consider such value in measuring damages.

The theory of the respondent was that the tort of conversion could be 'waived' and suit brought in quasi-contract, upon a contract implied in law, to recover, as restitution, the profits which inured to appellant as a result of its wrongful use of the machine. With this the trial court agreed and in its findings of facts found that the use of the machine 'resulted in a benefit to the users, in that said use saves the users approximately $1.43 per hour of use as against the expense which would be incurred

were eggs to be washed by hand; that said machine was used by Puget Sound Egg Packers and defendant, on an average of one day per week from May of 1941, until February of 1945 at an average saving of $10.00 per each day of use.'

In substance, the argument presented by the assignments of error is that the principle of unjust enrichment, or quasi-contract, is not of universal application, but is imposed only in exceptional cases because of special facts and circumstances and in favor of particular persons; that respondent had an adequate remedy in an action at law for replevin or claim and delivery; that any damages awarded to the plaintiff should be based upon the use or rental value of the machine and should bear some reasonable relation to its market value. Appellant therefore contends that the amount of the judgment is excessive.

It is uniformly held that in cases where the defendant tortfeasor has benefited by his wrong, the plaintiff may elect to 'waive the tort' and bring an action in assumpsit for restitution. Such an action arises out of a duty imposed by law devolving upon the defendant to repay an unjust and unmerited enrichment. It is clear that the saving in labor cost which appellant derived from its use of respondent's machine constituted a benefit.

According to the Restatement of Restitution, § 1(b), p. 12,

> A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. *He confers a benefit not only where he adds to the property of another, but also where he* saves the other from expense or loss. The word 'benefit,' therefore denotes any form of advantage.

It is also necessary to show that while appellant benefited from its use of the egg-washing machine, respondent thereby incurred a loss. It is argued by appellant that since the machine was put into storage by respondent, who had no present use for it, and for a period of almost three years did not know that appellant was operating it and since it was not injured by its operation and the appellant never adversely claimed any title to it, nor contested respondent's right of repossession upon the latter's discovery of the wrongful operation, that the respondent was not damaged because he is as well off as if the machine had not been used by appellant.

The very essence of the nature of property is the right to its exclusive use. Without it, no beneficial right remains. However plausible, the appellant cannot be heard to say that his wrongful invasion of the respondent's property right to exclusive use is not a loss compensable in law. To hold otherwise would be subversive of all property rights since his use was admittedly wrongful and without claim of right. The theory of unjust enrichment is applicable in such a case.

We agree with appellant that respondent could have elected a 'common garden variety of action,' as he calls it, for the recovery of damages. It is also true that except

where provided for by statute, punitive damages are not allowed, the basic measure for the recovery of damages in this state being compensation. If, then, respondent had been limited to redress in tort for damages, as appellant contends, the court below would be in error in refusing to make a finding as to the value of the machine. In such case the award of damages must bear a reasonable relation to the value of the property.

But respondent here had an election. He chose rather to waive his right of action in tort and to use in assumpsit on the implied contract. Having so elected, he is entitled to the measure of restoration which accompanies the remedy.

> Actions for restitution have for their primary purpose taking from the defendant and restoring to the plaintiff something to which the plaintiff is entitled, or if this is not done, causing the defendant to pay the plaintiff an amount which will restore the plaintiff to the position in which he was before the defendant received the benefit. If the value of what was received and what was lost were always equal, there would be no substantial problem as to the amount of recovery, since actions of restitution are not punitive. In fact, however, the plaintiff frequently had lost more than the defendant has gained, and sometimes the defendant has gained more than the plaintiff has lost.
>
> In such cases the measure of restitution is determined with reference to the tortiousness of the defendant's conduct or the negligence or other fault of one or both of the parties in creating the situation giving rise to the right to restitution. If the defendant was tortious in his acquisition of the benefit he is required to pay for what the other has lost although that is more than the recipient benefited. *If he was consciously tortious in acquiring the benefit, he is also deprived of any profit derived from his subsequent dealing with it*. If he was no more at fault than the claimant, he is not required to pay for losses in excess of benefit received by him and he is permitted to retain gains which result from his dealing with the property. Restatement of Restitution, pp. 595, 596.

Respondent may recover the profit derived by the appellant from the use of the machine. ...

Commonwealth v. Rambo

488 Pa. 334 (1980)

Roberts, Justice:

Appellant Robert D. Rambo was tried by a jury and found guilty of possession with intent to deliver hashish, a Schedule I controlled substance, in violation of the Controlled Substance, Drug, Device and Cosmetic Act. ...

At trial the evidence disclosed that on July 1, 1974, a United States Postal Inspector initiated an investigation with respect to two parcels which were mailed to this country from Tangiers, Morocco. One of the packages was addressed to Robert Rambo at English Village Apartments, Building Number 8, Apartment A-6, North Wales, Pa. 19454, and the other was addressed to Mrs. P. Krammer, English Village Apartments, Building Number 8, Apartment 537 R.D., North Wales, Pa. [The sender was Donald Rambo, defendant's brother; Mrs. Krammer was Donald Rambo's girlfriend.] Both packages had been intercepted in New York by the United States Bureau of Customs after a routine inspection revealed that the packages contained over ten pounds of hashish. A "controlled delivery" of the packages was arranged for July 6, 1976.

On that date an agent of the Pennsylvania Bureau of Narcotics obtained a search warrant for appellant's apartment, and a special mail carrier delivered both packages to appellant. Appellant accepted the packages and signed a receipt for each one. Appellant placed the packages on the floor of his apartment without opening them, and left the apartment. Forty-five minutes later, the Narcotics Bureau agent, with the search warrant, entered the unoccupied apartment and seized the packages. The police left a note for appellant informing him of the search and asking him to report to the police station. Upon arrival at the police station, appellant was arrested for possession with intent to deliver a controlled substance. ...

Appellant contends that the evidence presented at trial, and all reasonable inferences arising therefrom, did not establish beyond a reasonable doubt that appellant knew that there was hashish in the packages. Such knowledge is required by statute and our case law in order to prove possession of a controlled substance. Section 780-113(a)(30) of the Controlled Substance, Drug, Device and Cosmetic Act makes unlawful:

> (e)xcept as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

Section 301 of the Crimes Code defines possession as:

> an act, within the meaning of this section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

Our cases have construed this "knowledge" or "awareness" element as the exercise of conscious dominion or control over the controlled substance. In Commonwealth v. Fortune, supra, this Court held "(w)hen the illegal possession of contraband is charged, the evidence must establish that the appellant had a conscious dominion over the contraband," 456 Pa. at 368. The requirement of a

showing of an intent to control consistently appears in this Commonwealth's possession cases. See, e. g., Commonwealth v. Armstead, 452 Pa. 49 (1973) (insufficient evidence to support conviction for unlawful possession of firearm, where gun found in car after appellant and driver told to get out of car); Commonwealth v. Davis, 444 Pa. 11 (1971) (insufficient evidence of conscious control or dominion over stolen goods where goods found in locked cupboard with key in possession of appellant's mistress); Commonwealth v. Tirpak, 441 Pa. 534 (1971) (drug possession conviction reversed for insufficient evidence of constructive possession where appellants at "pot party" had no drugs on their person and were not observed using drugs). The requirement of knowledge has also been recognized with approval by commentators:

> For legal purposes other than criminal law e. g., the law of finders one may possess something without knowing of its existence, but possession in a criminal statute is usually construed to mean conscious possession. So construed, knowingly receiving an item or retention after awareness of control over it could be considered a sufficient act or omission to serve as the proper basis for a crime.

W. LaFave & A. Scott, Jr., Handbook on Criminal Law s 25, p. 182 (1972) (footnotes omitted). ...

The Superior Court majority concluded that a jury could reasonably infer that appellant was expecting the packages, that he would open them, and that he expected them to contain hashish based only on the following facts: (1) appellant signed for the packages, (2) one of the packages was addressed to him, (3) he had received pottery from his brother on at least two prior occasions, and (4) he had visited his brother in Morocco two months earlier while travelling in Europe. We do not believe this evidence could reasonably support an inference of appellant's knowledge sufficient to sustain a finding of guilt beyond a reasonable doubt. ...

At trial appellant provided no inculpatory testimony. Rather, appellant testified that he and his brother had arranged for appellant to accept deliveries of pottery, antiques and tapestry. Appellant testified he never knew that his brother was involved in drugs until after appellant's arrest and that he did not discuss the presence of drugs in the pottery with his brother until several days after his arrest. Assuming, as we must, that this testimony was disbelieved by the jury, still all the evidence presented by the Commonwealth was insufficient to support a conviction. Indeed, the Commonwealth presented no evidence that prior packages received by appellant from his brother contained contraband, or that drugs were ever discussed by appellant and his brother during their visit. Nor was there any other evidence which would establish, beyond a reasonable doubt, that appellant knew the packages contained hashish. ...

ASSIGNMENT 3: MORE RIGHTS OF POSSESSORS

You may have gathered by now that "possession" is a slippery, chameleonic concept. Today we consider some further consequences of possession, both actual and constructive. The day's first major theme is that the owners of certain kinds of property—especially land—will be deemed to be in possession of certain other kinds of property, even when they are unaware of its existence. We explore this idea through a discussion of the conflicting rights of landowners and finders. The day's second major theme is that possession can confer rights even against property's true (or perhaps "former") owner. Both physical transformation and the passage of time can extinguish an owner's rights. Along the way, we meet restitution again, this time in a very different guise.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
McAvoy v. Medina	Supplement	
Goddard v. Winchell	229	229
Note on increase and notes	161	165
Wetherbee v. Green and notes 2–5	162	166
Songbyrd v. Estate of Grossman and notes 2–3	215	214

McAvoy v. Medina

93 Mass. 548 (1866)

[T]he 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. *Bridges* v. *Hawkesworth*, 7 Eng. Law & Eq. R. 424.

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* 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.

ASSIGNMENT 4: TRANSFERS

Next, we turn to the various mechanisms available for the voluntary transfer of property from one owner to another, principally gifts, wills, and sales. We are particularly concerned with the role of formalities in all three kinds of transactions. For gifts, the crucial issue is typically delivery; for wills, it is proper execution; and for sales, the range of familiar contractual problems. In each case, it is also important to consider what happens if the transaction fails: intestacy statutes provide a specific, and detailed, answer in the case of those who die with no valid will. The assignment finishes with an introduction to the crucial (if intuitive) idea of chains of title—that one can establish ownership of a thing by tracing one's interest back to someone whose ownership is unquestioned.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Lon L. Fuller, *Consideration and Form*	Supplement	
John H. Langbein, *Substantial Compliance with the Wills Act*	Supplement	
Irons v. Smallpiece and note 1	863	537
Note on estate planning	533	577
Maryland Code, Estates and Trusts (intestacy)	Supplement	
Maryland Code, Estates and Trusts (will formalities)	Supplement	
Stephens v. Casdorph	Supplement	
Kunstammlungen zu Weimar v. Elicofon and note before	885	884

Lon L. Fuller, *Consideration and Form*

41 COLUM. L. REV. 799 (1941)

I. THE FUNCTIONS PERFORMED BY LEGAL FORMALITIES

§ 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.

Maryland Code, Estates and Trusts (intestacy)

§ 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 ...

Maryland Code, Estates and Trusts (will formalities)

§ 4-102. Writing; signature; attestation

Except [for holographic wills and wills valid in the state where they were made], every will shall be (1) in writing, (2) signed by the testator, or by some other person for him, in his presence and by his express direction, and (3) attested and signed by two or more credible witnesses in the presence of the testator.

§ 4-103. Holographic will

(a) Signed by person in armed services. — A will entirely in the handwriting of a testator who is serving in the armed services of the United States is a valid holographic will if signed by the testator outside of a state of the United States, the District of Columbia, or a territory of the United States even if there are no attesting witnesses. ...

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.[1] 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

[1] Mr. Miller was elderly and confined to a wheelchair.

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. ...[4]

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. 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,*

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[4] 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. ...

119 W. Va. 596, 195 S.E. 339 (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.

ASSIGNMENT 5: PURCHASERS, BAILEES, AND LENDERS

We are now ready to tackle one of the most difficult problems in all of property law: how to protect the legitimate expectations of third parties dealing with a person in possession of property. (We have seen numerous cases in which the possessor of property—a fox hunter, a finder of a jewel, a lumber thief—is not its true owner, according to the law.) *Kotis* introduces the good-faith-purchaser for value doctrine, under which, remarkably, a buyer can sometimes obtain clear title to property from a possessor, cutting off the true owner's rights. The remaining cases then deal with two extraordinarily common (and entirely legitimate) circumstances in which possession and ownership of personal property are divided: bailments and security interests. In a bailment, the owner, or "bailor," parts with possession; the bailee is under a duty to safeguard the property and to return it. In a security interest, the owner's rights are qualified by a lender's power to seize the property, take ownership of it, and use it to satisfy a debt. Both bailments and security interests raise the same problem of ostensible ownership we have been struggling with, and we will pay close attention to when the law preserves the owner's rights and when it chooses to cut them off.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Maryland Commercial Law (title to goods)	Supplement	
Kotis v. Nowlin Jewelry and notes before and after	891	890
Allen v. Hyatt-Regency and note before	464	497
Maryland Code, Commercial Law (warehouses and carriers)	Supplement	
*Tappenden v. Artus*s	Supplement	
Williams v. Ford Motor Credi	394	434

Maryland Commercial Law (title to goods)

§ 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.

Maryland Code, Commercial Law (warehouses and carriers)

§ 7-204. Duty of care; contractual limitation of liability of warehouse

(a) A warehouse is liable for damages for loss of or injury to the goods caused by its failure to exercise care with regard to the goods that a reasonably careful person would exercise under similar circumstances. Unless otherwise agreed, the warehouse is not liable for damages that could not have been avoided by the exercise of that care. ...

§ 7-309. Duty of care; contractual limitation of carrier's liability; presentment of claims

(a) A carrier that issues a bill of lading, whether negotiable or nonnegotiable, shall exercise the degree of care in relation to the goods which a reasonably careful person would exercise under similar circumstances. This subsection does not affect any statute, regulation, or rule of law that imposes liability upon a common carrier for damages not caused by its negligence.

(b) 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. ...

Tappenden v. Artus[1]

Court of Appeal (U.K.)

[1964] 2 Q.B. 185

... The plaintiff, Anthony A. Tappenden (trading as English and American Autos), hereinafter referred to as "the bailor," was a motor dealer who on August 30, 1961, had in stock a Bedford Dormobile van. The first defendant, William Artus, hereinafter referred to as "the bailee," entered into negotiations with the bailor with a view to purchasing the van upon hire-purchase terms at a cash price of £200. He was unable immediately to raise the amount of the initial payment of £40, the minimum initial payment required by the Hire Purchase and Credit Sales Agreements (Control) Order, 1960 , which was then in force. The bailor was willing to make an allowance of £15 in respect of another vehicle belonging to the bailee, to be given in part exchange. The difficulty arose in connection with the required balance of £25.

The bailee required the van immediately for use for the purposes of his business, which apparently consisted of organising "Bingo" sessions at cinemas in Romford, and it was agreed between him and the bailor that, pending completion of the hire-purchase agreement, the bailor should let the bailee use the van on condition that he licensed and insured it. As the tyres of the van were worn, the bailor also gave to the bailee express permission to put other tyres on the van. On August 31 the bailee in fact took out a road fund licence for the vehicle for four months in his own name at a cost of £5 10s. and obtained a temporary insurance cover for 14 days from August 31, 1961, on comprehensive terms in his own name as assured at the cost of £3. The bailor made sure that this was done before he parted with possession of the van to the bailee.

On September 1 or 2, 1961, the van, while in the possession of the bailee, broke down on the Southend arterial road. Nothing was known of the circumstances of the breakdown, for the bailee, though a defendant, did not appear in the county court, nor did he appear on the appeal. What was known was that very shortly after the breakdown, having apparently been given a lift by a passing motorist, the bailee called at the garage premises of the second defendants, Rayleigh Garage Ltd., who carried on business as motor mechanics on the arterial road at some distance from where the breakdown had taken place.

The bailee informed the second defendants of the breakdown and instructed them to tow the van to their garage and execute the necessary repairs. The second defendants made no inquiries as to the ownership of the van, nor did they see the road fund licence or certificate of insurance. They did not even see the bailee in actual possession of the van; they simply assumed that the bailee was the owner. The repairs were duly executed, and an invoice therefor was rendered to the bailee, but no payment was received from him.

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[1] [Ed; some of the passages in this opinion have been reordered.]

Shortly after the breakdown, when the van was already in the possession of the second defendants, the bailor sought out the bailee and withdrew his permission to the bailee to retain possession of the van. The bailee told him that the van was with a friend for repairs, but refused to let him know where it was. It was not until some four to six weeks later, by which time the bailor was clearly entitled to determine the bailment, that the bailor discovered the whereabouts of the van and demanded its return. The second defendants, who had executed repairs to the clutch, the gearbox and the brakes of the van at a charge of £40 0s. 10d., refused to deliver it up to the bailor except on payment of that sum. On December 5, 1962, the bailor started proceedings in the Southend County Court against the bailee and against the second defendants, claiming return of the van and damages for its detention. The bailee took no part in the proceedings. The second defendants, while admitting that they held the van, denied that the bailor was entitled to its return. They claimed that the vehicle was upon their premises in pursuance of oral instructions given to them by the bailee to remove it to their premises and fit new parts, that they had performed those services and supplied work and materials amounting to £40 0s. 10d., which sum had not been paid despite frequent demands, and they accordingly claimed a lien upon the vehicle until payment or satisfaction of their charges. They counterclaimed for a declaration that they had a lien on the van for the material and work performed by them. The county court judge held that the second defendants were not entitled to rely on their artificer's lien, entered judgment for the plaintiff and made an order for the return of the motor van. He dismissed the counterclaim.

The second defendants appealed. ...

Diplock, L.J.: ...

The only defence with which we are concerned in this appeal is that of the second defendants, hereinafter called "the artificer," who relied upon their common law lien. The question of law is whether upon the facts which we have stated the artificer was entitled to assert his common law lien against the true owner of the van, the bailor. The county court judge held that he was not so entitled.

The common law lien of an artificer is of very ancient origin, dating from a time when remedies by action upon contracts not under seal were still at an early and imperfect stage of development. Because it arises in consequence of a contract, it is tempting to a twentieth-century lawyer to think of a common law lien as possessing the characteristics of a contractual right, express or implied, created by mutual agreement between the parties to the contract. But this would be to mistake its legal nature. Like a right of action for damages, it is a remedy for breach of contract which the common law confers upon an artificer to whom the possession of goods is lawfully given for the purpose of his doing work upon them in consideration of a money payment. If, pursuant to the contract, the artificer does his work, he is entitled to retain possession of the goods so long as his charges, whether agreed in advance or (if not so agreed) payable upon a quantum meruit, are satisfied. ...

The common law remedy of a possessory lien, like other primitive remedies such as abatement of nuisance, self-defence or ejection of trespassers to land, is one of self-help. It is a remedy in rem exercisable upon the goods, and its exercise requires no intervention by the courts, for it is exercisable only by an artificer who has actual possession of the goods subject to the lien. Since, however, the remedy is the exercise of a right to continue an existing actual possession of the goods, it necessarily involves a right of possession adverse to the right of the person who, but for the lien, would be entitled to immediate possession of the goods. A common law lien, although not enforceable by action, thus affords a defence to an action for recovery of the goods by a person who, but for the lien, would be entitled to immediate possession.

Since a common law lien is a right to continue an existing actual possession of goods (that is to say, to refuse to put an end to a bailment) it can only be exercised by an artificer if his possession was lawful at the time at which the lien first attached. To entitle him to exercise a right of possession under his common law lien adverse to the owner of the goods, he must thus show that his possession under the original delivery of the goods to him was lawful and continued to be lawful until some work was done by him upon the goods. Where, therefore, as in the present case, possession of the goods was originally given to the artificer not by the owner himself, but by a bailee of the owner, the test whether the artificer can rely upon his common law lien as a defence in an action for detinue brought against him by the owner is whether the owner authorised (or is estopped as against the artificer from denying that he authorised) the bailee to give possession of the goods to the artificer. … Where the owner of goods has specifically authorised his bailee to give possession of them to an artificer for the latter to do work upon them, no question arises. The cases are thus concerned with the general authority given by the owner to his bailee. …

These cases, all of which fall upon one side of the line, seem to us to do no more than support the propositions that where no question of ostensible authority arises, (1) the mere fact of delivery of possession of goods by an owner to a bailee does not of itself give the bailee authority to deliver possession of the goods to a third party; and (2) that whether the bailee has such authority depends in each case upon the purpose of the bailment and terms of the contract (if any) under which the goods are bailed to him. …

This, in our view, lays down the correct test for determining what authority is conferred by the owner of goods upon the bailee to part with possession of the goods when the purpose of the bailment is the use of the goods by the bailee. He is entitled to make reasonable use of the goods, and if it is reasonably incidental to such use for the bailee to give possession of them to a third person in circumstances which may result in such person acquiring the common law remedy of lien against the goods, the bailee has the authority of the owner to give lawful possession of the goods to the third person. This is not strictly an "implied term" in … the contract between the

bailor and the bailee. The grant of authority to use goods is itself to be construed as authority to do in relation to the goods all things that are reasonably incidental to their reasonable use. If the bailor desires to exclude the right of the bailee to do in relation to the goods some particular thing which is reasonably incidental to their reasonable use, he can, of course, do so, but he must do so expressly. ...

In the present case the purpose of the bailment of the Dormobile van was clearly for use on the roads by the bailee. ... It was a term of the bailment that the bailee, not the bailor, should license the van at his own expense and insure it upon comprehensive terms. ...

It is a statutory offence to use a motor vehicle on the highway which is in an unroadworthy condition. If the van should become unroadworthy during the period of the bailment the bailee could not use it for the purposes of the bailment unless he were to have it repaired. In the ordinary way, save in the case of minor adjustments, a motor vehicle can be repaired only by delivering possession of it to an expert mechanic to effect the repairs; and in our view the giving of actual possession of a motor vehicle to an artificer for the purpose of effecting repairs necessary to render it roadworthy is an act reasonably incidental to the bailee's reasonable use of the vehicle. If the bailor desires to exclude the bailee's authority to do this, he must do so expressly. In the present case it is not suggested that there was any express exclusion of this right by the bailor; but Mr. Forbes has argued that on the facts of the present case such authority is to be excluded by necessary implication because the bailor himself carried on business as a motor mechanic. It is contended that he can hardly have intended that if the van became unroadworthy, it should be repaired by any artificer other than himself so as to give the other artificer a remedy of lien against the van for the costs of the repairs. Even if it were possible to exclude the authority of a bailee for use by implication (which we do not think that it is), we would not be impressed by this submission. The bailee was not restricted in his use of the van; the unroadworthiness might have developed at a considerable distance from the bailor's premises. Furthermore, the bailor, as owner of the vehicle, would obtain the benefit of the repairs by whomever they were executed, and there is nothing unreasonable in his having to pay for them if his bailee makes default in doing so.

Different considerations would apply to repairs which were not necessary to make the van roadworthy, for the execution of such repairs might not be reasonably necessary to the reasonable use of the van by the bailee, which was the purpose of the bailment; but there is no suggestion in the evidence that any of the repairs in respect of which the lien was claimed were not necessary to make the van roadworthy.

We are, therefore, of opinion that the artificer was entitled to a common law lien upon the van in respect of the repairs which he effected, and he is entitled to assert that lien against the bailor because the bailor gave the bailee authority to give lawful possession of the van to the artificer for the purpose of effecting such repairs as were necessary to make the van roadworthy.

Albemarle Supply Co. v. Hind & Co., [1928] 1 K.B. 307; 43 T.L.R. 783 , C.A., which was also cited, is on a different point, namely, the ostensible authority of the bailee. It was another case of a hire-purchase agreement, but the agreement contained a term which expressly excluded the hirer's right to create a lien on the vehicles in respect of repairs. The artificer to whom possession of the vehicles was delivered for the purpose of repair was aware that the vehicles were bailed to the hirer under a hire-purchase agreement, but was not aware of the express exclusion of his right to create a lien. It was held that vis-à-vis the artificer the owner had given the hirer ostensible authority to give possession of the vehicles to the artificer for the purpose of effecting repairs, and could not rely upon a secret limitation upon the terms upon which the hirer was authorised to do so, that is, upon terms excluding the artificer's common law remedy of lien. It was a case where the owner was estopped from denying that he had conferred on his bailee authority to give up possession of the vehicles to the artificer on the ordinary terms, and thus subject to the ordinary remedy of lien.

Finally there is *Bowmaker Ltd. v. Wycombe Motors Ltd.*, [1946] K.B. 505. ... But there is a passage in the judgment of Goddard L.J. which summarises with his usual accuracy and clarity the true ratio decidendi of the cases. He said this: " ... These cases have also held, and quite understandably, that an arrangement between the owner and the hirer that the hirer shall not be entitled to create a lien, does not affect the repairer. A repairer has a lien although the owner has purported to limit the hirer's authority to create a lien in that way. That seems to me to depend upon this: Once an artificer exercises his art upon a chattel, the law gives the artificer a lien upon that chattel which he can exercise against the owner of the chattel if the owner of the chattel has placed it with him or has authorised another person to place it with him. If I send my servant with my chattel to get it repaired, the artificer will get the lien which the law gives him on that chattel although I may have told my servant that he is not to create a lien. The fact is that the lien arises by operation of law because the work has been done on the chattel."

To this statement of principle we would only add the rider that the latter part of it which deals with ostensible authority should be understood as restricted to cases where the artificer has no express notice of the limit upon the authority of the person to whom the owner has given possession of the chattel. ...

The actual decision in [*Albemarle*] is not germane to the present appeal, for the artificer here relies solely upon the actual authority conferred by the bailor on the bailee, and not upon any ostensible authority in excess of that actual authority. ...

For these reasons we allow this appeal.

Next, we consider how property rights are affected—or sometimes created—by paper transactions. We start with an examination of automobile titles. Do they *follow* ownership of automobiles, do they *evidence* ownership, or do they *determine* ownership? The materials are drawn from different states, which follow different rules.

Then we turn to promises to pay money. As between the parties, they are contracts (or not), but once the right to enforce payment can be transferred to third parties, they are effectively a species of property. Indeed, they are a new thing for us: *intangible* personal property. A promissory note may be a tangible document, but what makes it valuable is not the paper is written on, but the intangible rights it represents. We examine an extension of the good faith purchaser rules: the commercial-law doctrine of negotiability. *Swift v. Tyson* (a case famous in the civil procedure canon for entirely other reasons) illustrates the old roots of the doctrine; the UCC shows its modern face.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Note on automobile title records	913	913
Maryland Code, Transportation (vehicle certificates of title)	Supplement	
Nationwide Mutual Insurance Company v. Hayes	Supplement	
Note on cash and negotiability	917	917
Swift v. Tyson	Supplement	
Maryland Code, Commercial Law (negotiable instruments)	Supplement	
Maryland Commercial Law (bailees' documents of title)	Supplement	

Maryland Code, Transportation (vehicle certificates of title)

§ 13-101.1. Certificate of title required for vehicles in State

Except as provided in § 13-102 of this subtitle, the owner of each vehicle that is in this State and for which the Administration has not issued a certificate of title shall apply to the Administration for a certificate of title of the vehicle.

§ 13-112. Transfer of interest in vehicle from owners ...

Delivery of certificate of title to transferee

(b) Except as provided in § 13-113 of this subtitle, if an owner transfers his interest in a vehicle, other than by the creation of a security interest, the owner shall, at the time of the delivery of the vehicle, deliver the certificate of title to the transferee.

Application for new certificate of title by transferee

(c)

> (1) Except as provided in § 13-113 of this subtitle, promptly after delivery to the transferee of the vehicle, the transferee shall:

(i) Complete an application for a new certificate of title ...

§ 13-116. Issuance of new certificate of title

(a) On receipt of a properly assigned certificate of title, an application for a new certificate of title, the required fee, and any other documents and information required by law, the Administration shall issue a new certificate of title in the name of the transferee as owner and mail it to him. ...

§ 13-202. Method of perfecting security interest

Security interest not valid unless perfected

(a) Unless excepted by § 13-201 of this subtitle, a security interest in a vehicle is not valid against any creditor of the owner or any subsequent transferee or secured party unless the security interest is perfected as provided in this subtitle.

Method of perfecting security interest

(b)

(1) A security interest is perfected by:

(i) Delivery to the Administration of every existing certificate of title of the vehicle and an application for certificate of title on the form and containing the information about the security interest that the Administration requires ...

§ 13-205. Release of security interest ...

Delivery of copies of release

(b) When a security interest in a vehicle is satisfied, the secured party shall immediately deliver copies of the release to:

(1) The owner;

(2) The Administration ...

Release of right on certificate or issuance of new certificate

(c) After it receives a release and the certificate of title, the Administration shall release the secured party's right on the certificate of title or issue a new certificate of title.

Nationwide Mutual Insurance Company v. Hayes
174 S.E. 2d 511 (N.C. 1970)

Branch, Justice: ...

Plaintiff seeks an adjudication as to which of the two insurance policies afforded coverage for claims against Hayes growing out of the accident which occurred on 27 January 1968. This question will be determined by fixing the date on which Hayes acquired ownership of the Pontiac automobile which he was operating at the time of the accident. ...

Some jurisdictions hold that title passes pursuant to the provisions of the Uniform Commercial Code, particularly section 2-401(2), upon physical delivery of the vehicle, without completion of the statutory registration formalities. ...

The provisions of G.S. § 20-72(b) contain specific, definite and comprehensive terms concerning the transfer of ownership of a motor vehicle. Conversely, the Uniform Commercial Code does not refer to transfer of ownership of motor vehicles, but only refers to the passing of title to property generally described as "goods." As applied to the framework of this case, G.S. § 20-72(b) is a special statute and the Uniform Commercial Code is a general statute. Thus, the special statute, even though earlier in point of time, must prevail. ...

We hold that ... for purposes of tort law and liability insurance coverage, no ownership passes to the purchaser of a motor vehicle which requires registration under the Motor Vehicle Act of 1937 until (1) the owner executes, in the presence of a person authorized to administer oaths, an assignment and warranty of title on the reverse of the certificate of title, including the name and address of the transferee, (2) there is an actual or constructive delivery of the motor vehicle, and (3) the duly assigned certificate of title is delivered to the transferee.

Swift v. Tyson

41 U.S. 1 (1842)

Mr. Justice Story delivered the opinion of the Court. ...

The action was brought by the plaintiff, Swift, as endorsee, against the defendant, Tyson, as acceptor, upon a bill of exchange dated at Portland, Maine, on the first day of May, 1836, for the sum of one thousand five hundred and forty dollars, thirty cents, payable six months after date and grace, drawn by one Nathaniel Norton and one Jairus S. Keith upon and accepted by Tyson, at the city of New York, in favour of the order of Nathaniel Norton, and by Norton endorsed to the plaintiff. The bill was dishonoured at maturity.

At the trial the acceptance and endorsement of the bill were admitted, and the plaintiff there rested his case. The defendant then introduced in evidence the answer of Swift to a bill of discovery, by which it appeared that Swift took the bill before it became due, in payment of a promissory note due to him by Norton and Keith; that he understood that the bill was accepted in part payment of some lands sold by Norton to a company in New York; that Swift was a bona fide holder of the bill, not having any notice of any thing in the sale or title to the lands, or otherwise, impeaching the transaction, and with the full belief that the bill was justly due. The particular circumstances are fully set forth in the answer in the record; but it does not seem necessary farther to state them. The defendant then offered to prove, that the bill was accepted by the defendant 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, and also represented to be of great value, and contracted to

convey a good title thereto; and that the representations were in every respect fraudulent and false, and Norton and Keith had no title to the lands, and that the same were of little or no value. The plaintiff objected to the admission of such testimony, or of any testimony, as against him, impeaching or showing a failure of the consideration, on which the bill was accepted, under the facts admitted by the defendant, and those proved by him, by reading the answer of the plaintiff to the bill of discovery. The judges of the Circuit Court thereupon divided in opinion upon the following point or question of law; Whether, under the facts last mentioned, the defendant was entitled to the same defence to the action as if the suit was between the original parties to the bill, that is to say, Norton, or Norton and Keith, and the defendant; and whether the evidence so offered was admissible as against the plaintiff in the action. And this is the question certified to us for our decision.

There is no doubt, that a bona fide holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an endorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support. As little doubt is there, that the holder of any negotiable paper, before it is due, is not bound to prove that he is a bona fide holder for a valuable consideration, without notice; for the law will presume that, in the absence of all rebutting proofs, and therefore it is incumbent upon the defendant to establish by way of defence satisfactory proofs of the contrary, and thus to overcome the prima facie title of the plaintiff.

In the present case, the plaintiff is a bona fide holder without notice for what the law deems a good and valid consideration, that is, for a pre-existing debt; and the only real question in the cause is, whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. ...

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. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. 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 circuity to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? 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. ...

Maryland Code, Commercial Law (negotiable instruments)

§ 3-103. Definitions ...

(6) "Order" means a written instruction to pay money signed by the person giving the instruction. ...

(9) "Promise" means a written undertaking to pay money signed by the person undertaking to pay. ...

§ 3-104. Instruments, defined

(a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money ... if it:

> (1) Is payable ... at the time it is issued or first comes into possession of a holder;
>
> (2) Is payable on demand or at a definite time; and
>
> (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money ...

(b) "Instrument" means a negotiable instrument. ...

(d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this title.

§ 3-201. Negotiation

(a) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder. ... [Where the instrument is payable to an identified person, negotiation also requires that person's signature; where the instrument is payable to the bearer, negotiation does not require a signature.]

§ 3-302. Holder in due course

(a) Subject to subsection (c) and § 3-106(d), "holder in due course" means the holder of an instrument 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 described in § 3-306, and (vi) without notice that any party has a defense or claim in recoupment described in § 3-305(a). ...

§ 3-305. Defenses to obligations of payment

(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. ...

§ 3-306. Holders in due course

A person taking an instrument, other than a person having rights of a holder in due course, is subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds. A person having rights of a holder in due course takes free of the claim to the instrument.

Maryland Commercial Law (bailees' documents of title)

§ 1-201. General definitions ...

(16) "Document of title" includes a bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of the document is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

§ 7-502. Rights acquired by due negotiation

(a) [A] holder to which a negotiable document of title has been duly negotiated acquires thereby:

(1) Title to the document;

(2) Title to the goods; ...

ASSIGNMENT 7: TRUSTS AND CORPORATIONS

In a trust, the legal owner of the property holds it as a *trustee* for another, the *beneficiary*. This may remind you of a bailment, except that the trustee really is the legal owner of the property, and has the power to use and sell it consistent with the terms of the trust. A trust's beneficiary has "equitable title" to the trust's assets; we discuss the implications this characteristic division of legal and equitable title has, and how they make the trust a profoundly useful way of holding property. *Broadway National Bank* shows that the trustee, not the beneficiary, really is the owner of the trust property.; *Rothko* discusses the fiduciary duties that hold trustees accountable to beneficiaries.

Then we turn to corporations. Instead of owning property directly, a corporation's shareholders own the corporation, a separate legal entity, and the corporation owns the property. This two-level structure turns out to be quite useful for organizing businesses—and also for some surprising non-business purposes. (*Pullman* shows how the corporate form can be used for shared ownership of land and the governance of cooperative housing; note the striking contrast between the business judgment rule it applies and the fiduciary responsibilities of trustees.) It also requires some careful thought about what property is available to whom and for what purposes; *Walkovszky* demonstrates the crucial corporate features of limited liability, asset partitioning, and the separation of ownership and control.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Note on trusts	778	801
Broadway National Bank v. Adams	781	804
Rothko v. Reis	786	809
Note on corporations and partnerships	803	826
Walkovszky v. Carlton	Supplement	
40 W. 67th St. v. Pullman and notes 1–3	763	793

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. ...

ASSIGNMENT 8: PATENTS, COPYRIGHTS, & TRADEMARKS

A particularly important variety of intangible property is intellectual property: exclusive rights in information. As as resource, information is unlike any we have studied so far for two reasons. First, it is *non-exclusive*: it is hard or impossible to prevent someone from using it once it has been shared with them. And second, it is *non-rival*: I can use a fact without inhibiting your ability to use it. These characteristics mean that the process of defining boundaries in intellectual property is extremely different than it is for other kinds of property, and the nature of the rights an owner has are also quite different. We discuss the three most common forms of intellectual property: patents (*Bowman*), trademarks (*Dixi-Cola*), and copyrights (*Nchols*).

Bowman is concerned with the vitally important distinction between the rights in the *patent* and the rights in a particular *item* covered by the patent. The former is intellectual property, the latter is personal property; they can, and frequently do, have different owners. I have given you a short excerpt from the patent at issue in *Bowman*. What is important is not the specifics, but that this language—the patent's "claims"—define the scope of the patent owner's rights. No one may make, use, or sell a "chimeric gene" as described in the claim except with the patent owner's permission. Compare this to the techniques used in *Dixi-Cola* and *Nichols* to determine the scope of the owner's rights.

The final case, *Cheney Bros.*, shows an important baseline principle: there is no general common-law intellectual property right. Information that does not fall into one of the recognized forms of intellectual property is in the public domain, and remains free for anyone to use.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
U.S. Patent No. 5,352,605		Supplement
Bowman v. Monsanto Co.		Supplement
Dixi-Cola Laboratories v. Coca-Cola Co.		Supplement
Nichols v. Universal Pictures		Supplement
Cheney Bros. v. Doris Silk Co.		Supplement

U.S. Patent No. 5,352,605
(Oct. 4, 1994)

We claim:

1. A chimeric gene which is expressed in plant cells comprising a promoter from a cauliflower mosaic virus, said promoter selected from the group consisting of a CaMV (35S) promoter isolated from CaMV protein-encoding DNA sequences and a CaMV (19S) promoter isolated from CaMV protein-encoding DNA sequences, and a structural sequence which is heterologous with respect to the promoter. …

Bowman v. Monsanto Co.

__ U.S. __ (2013)

Justice Kagan delivered the opinion of the Court:

Under the doctrine of patent exhaustion, the authorized sale of a patented article gives the purchaser, or any subsequent owner, a right to use or resell that article. Such a sale, however, does not allow the purchaser to make new copies of the patented invention. The question in this case is whether a farmer who buys patented seeds may reproduce them through planting and harvesting without the patent holder's permission. We hold that he may not.

I

Respondent Monsanto invented a genetic modification that enables soybean plants to survive exposure to glyphosate, the active ingredient in many herbicides (including Monsanto's own Roundup). Monsanto markets soybean seed containing this altered genetic material as Roundup Ready seed. Farmers planting that seed can use a glyphosate-based herbicide to kill weeds without damaging their crops. Two patents issued to Monsanto cover various aspects of its Roundup Ready technology, including a seed incorporating the genetic alteration.

Monsanto sells, and allows other companies to sell, Roundup Ready soybean seeds to growers who assent to a special licensing agreement. That agreement permits a grower to plant the purchased seeds in one (and only one) season. He can then consume the resulting crop or sell it as a commodity, usually to a grain elevator or agricultural processor. But under the agreement, the farmer may not save any of the harvested soybeans for replanting, nor may he supply them to anyone else for that purpose. These restrictions reflect the ease of producing new generations of Roundup Ready seed. Because glyphosate resistance comes from the seed's genetic material, that trait is passed on from the planted seed to the harvested soybeans: Indeed, a single Roundup Ready seed can grow a plant containing dozens of genetically identical beans, each of which, if replanted, can grow another such plant —and so on and so on. The agreement's terms prevent the farmer from co-opting that process to produce his own Roundup Ready seeds, forcing him instead to buy from Monsanto each season.

Petitioner Vernon Bowman is a farmer in Indiana who, it is fair to say, appreciates Roundup Ready soybean seed. He purchased Roundup Ready each year, from a company affiliated with Monsanto, for his first crop of the season. In accord with the agreement just described, he used all of that seed for planting, and sold his entire crop to a grain elevator (which typically would resell it to an agricultural processor for human or animal consumption).

Bowman, however, devised a less orthodox approach for his second crop of each season. Because he thought such late-season planting “risky,” he did not want to pay the premium price that Monsanto charges for Roundup Ready seed. He therefore went to a grain elevator; purchased “commodity soybeans” intended for

human or animal consumption; and planted them in his fields. Those soybeans came from prior harvests of other local farmers. And because most of those farmers also used Roundup Ready seed, Bowman could anticipate that many of the purchased soybeans would contain Monsanto's patented technology. When he applied a glyphosate-based herbicide to his fields, he confirmed that this was so; a significant proportion of the new plants survived the treatment, and produced in their turn a new crop of soybeans with the Roundup Ready trait. Bowman saved seed from that crop to use in his late-season planting the next year—and then the next, and the next, until he had harvested eight crops in that way. Each year, that is, he planted saved seed from the year before (sometimes adding more soybeans bought from the grain elevator), sprayed his fields with glyphosate to kill weeds (and any non-resistant plants), and produced a new crop of glyphosate-resistant—i.e., Roundup Ready—soybeans.

After discovering this practice, Monsanto sued Bowman for infringing its patents on Roundup Ready seed. Bowman raised patent exhaustion as a defense, arguing that Monsanto could not control his use of the soybeans because they were the subject of a prior authorized sale (from local farmers to the grain elevator). The District Court rejected that argument, and awarded damages to Monsanto of $84,456. The Federal Circuit affirmed. It reasoned that patent exhaustion did not protect Bowman because he had "created a newly infringing article." The "right to use" a patented article following an authorized sale, the court explained, "does not include the right to construct an essentially new article on the template of the original, for the right to make the article remains with the patentee." Accordingly, Bowman could not "'replicate' Monsanto's patented technology by planting it in the ground to create newly infringing genetic material, seeds, and plants."

We granted certiorari to consider the important question of patent law raised in this case, and now affirm.

II

The doctrine of patent exhaustion limits a patentee's right to control what others can do with an article embodying or containing an invention. Under the doctrine, the initial authorized sale of a patented item terminates all patent rights to that item. And by "exhaust[ing] the [patentee's] monopoly" in that item, the sale confers on the purchaser, or any subsequent owner, "the right to use [or] sell" the thing as he sees fit. *United States v. Univis Lens Co.*, 316 U.S. 241, 249–250 (1942). We have explained the basis for the doctrine as follows: "[T]he purpose of the patent law is fulfilled with respect to any particular article when the patentee has received his reward ... by the sale of the article"; once that "purpose is realized the patent law affords no basis for restraining the use and enjoyment of the thing sold." *Id.*, at 251.

Consistent with that rationale, the doctrine restricts a patentee's rights only as to the "particular article" sold, ibid.; it leaves untouched the patentee's ability to prevent a buyer from making new copies of the patented item. The purchaser of the

patented machine ... does not acquire any right to construct another machine either for his own use or to be vended to another. Rather, a second creation of the patented item calls the monopoly, conferred by the patent grant, into play for a second time. That is because the patent holder has "received his reward" only for the actual article sold, and not for subsequent recreations of it. *Univis*, 316 U.S., at 251. If the purchaser of that article could make and sell endless copies, the patent would effectively protect the invention for just a single sale. Bowman himself disputes none of this analysis as a general matter: He forthrightly acknowledges the "well settled" principle "that the exhaustion doctrine does not extend to the right to 'make' a new product."

Unfortunately for Bowman, that principle decides this case against him. Under the patent exhaustion doctrine, Bowman could resell the patented soybeans he purchased from the grain elevator; so too he could consume the beans himself or feed them to his animals. Monsanto, although the patent holder, would have no business interfering in those uses of Roundup Ready beans. But the exhaustion doctrine does not enable Bowman to make additional patented soybeans without Monsanto's permission (either express or implied). And that is precisely what Bowman did. He took the soybeans he purchased home; planted them in his fields at the time he thought best; applied glyphosate to kill weeds (as well as any soy plants lacking the Roundup Ready trait); and finally harvested more (many more) beans than he started with. That is how "to 'make' a new product," to use Bowman's words, when the original product is a seed. Because Bowman thus reproduced Monsanto's patented invention, the exhaustion doctrine does not protect him.[2]

Were the matter otherwise, Monsanto's patent would provide scant benefit. After inventing the Roundup Ready trait, Monsanto would, to be sure, "receiv [e] [its] reward" for the first seeds it sells. *Univis*, 316 U.S., at 251. But in short order, other seed companies could reproduce the product and market it to growers, thus depriving Monsanto of its monopoly. And farmers themselves need only buy the seed once, whether from Monsanto, a competitor, or (as here) a grain elevator. The grower could multiply his initial purchase, and then multiply that new creation, ad infinitum—each time profiting from the patented seed without compensating its inventor. Bowman's late-season plantings offer a prime illustration. After buying beans for a single harvest, Bowman saved enough seed each year to reduce or eliminate the need for additional purchases. Monsanto still held its patent, but

[2] This conclusion applies however Bowman acquired Roundup Ready seed: The doctrine of patent exhaustion no more protected Bowman's reproduction of the seed he purchased for his first crop (from a Monsanto-affiliated seed company) than the beans he bought for his second (from a grain elevator). The difference between the two purchases was that the first—but not the second—came with a license from Monsanto to plant the seed and then harvest and market one crop of beans. We do not here confront a case in which Monsanto (or an affiliated seed company) sold Roundup Ready to a farmer without an express license agreement. For reasons we explain below, we think that case unlikely to arise. And in the event it did, the farmer might reasonably claim that the sale came with an implied license to plant and harvest one soybean crop.

received no gain from Bowman's annual production and sale of Roundup Ready soybeans. The exhaustion doctrine is limited to the "particular item" sold to avoid just such a mismatch between invention and reward. ...

Bowman principally argues that exhaustion should apply here because seeds are meant to be planted. The exhaustion doctrine, he reminds us, typically prevents a patentee from controlling the use of a patented product following an authorized sale. And in planting Roundup Ready seeds, Bowman continues, he is merely using them in the normal way farmers do. Bowman thus concludes that allowing Monsanto to interfere with that use would "creat[e] an impermissible exception to the exhaustion doctrine" for patented seeds and other "self-replicating technologies.

But it is really Bowman who is asking for an unprecedented exception—to what he concedes is the "well settled" rule that "the exhaustion doctrine does not extend to the right to 'make' a new product." Reproducing a patented article no doubt "uses" it after a fashion. But as already explained, we have always drawn the boundaries of the exhaustion doctrine to exclude that activity, so that the patentee retains an undiminished right to prohibit others from making the thing his patent protects. See, e.g., *Cotton–Tie Co. v. Simmons*, 106 U.S. 89, 93–94 (1882) (holding that a purchaser could not "use" the buckle from a patented cotton-bale tie to "make" a new tie). That is because, once again, if simple copying were a protected use, a patent would plummet in value after the first sale of the first item containing the invention. The undiluted patent monopoly, it might be said, would extend not for 20 years (as the Patent Act promises), but for only one transaction. And that would result in less incentive for innovation than Congress wanted. Hence our repeated insistence that exhaustion applies only to the particular item sold, and not to reproductions.

Nor do we think that rule will prevent farmers from making appropriate use of the Roundup Ready seed they buy. Bowman himself stands in a peculiarly poor position to assert such a claim. As noted earlier, the commodity soybeans he purchased were intended not for planting, but for consumption. Indeed, Bowman conceded in deposition testimony that he knew of no other farmer who employed beans bought from a grain elevator to grow a new crop. So a non-replicating use of the commodity beans at issue here was not just available, but standard fare. And in the more ordinary case, when a farmer purchases Roundup Ready seed qua seed—that is, seed intended to grow a crop—he will be able to plant it. Monsanto, to be sure, conditions the farmer's ability to reproduce Roundup Ready; but it does not—could not realistically—preclude all planting. No sane farmer, after all, would buy the product without some ability to grow soybeans from it. And so Monsanto, predictably enough, sells Roundup Ready seed to farmers with a license to use it to make a crop. Applying our usual rule in this context therefore will allow farmers to benefit from Roundup Ready, even as it rewards Monsanto for its innovation.

Still, Bowman has another seeds-are-special argument: that soybeans naturally "self-replicate or 'sprout' unless stored in a controlled manner," and thus "it was the planted soybean, not Bowman" himself, that made replicas of Monsanto's patented

invention. Brief for Petitioner 42; see Tr. of Oral Arg. 14 ("[F]armers, when they plant seeds, they don't exercise any control ... over their crop" or "over the creative process"). But we think that blame-the-bean defense tough to credit. Bowman was not a passive observer of his soybeans' multiplication; or put another way, the seeds he purchased (miraculous though they might be in other respects) did not spontaneously create eight successive soybean crops. As we have explained, Bowman devised and executed a novel way to harvest crops from Roundup Ready seeds without paying the usual premium. He purchased beans from a grain elevator anticipating that many would be Roundup Ready; applied a glyphosate-based herbicide in a way that culled any plants without the patented trait; and saved beans from the rest for the next season. He then planted those Roundup Ready beans at a chosen time; tended and treated them, including by exploiting their patented glyphosate-resistance; and harvested many more seeds, which he either marketed or saved to begin the next cycle. In all this, the bean surely figured. But it was Bowman, and not the bean, who controlled the reproduction (unto the eighth generation) of Monsanto's patented invention.

Our holding today is limited—addressing the situation before us, rather than every one involving a self-replicating product. We recognize that such inventions are becoming ever more prevalent, complex, and diverse. In another case, the article's self-replication might occur outside the purchaser's control. Or it might be a necessary but incidental step in using the item for another purpose. Cf. 17 U.S.C. § 117(a)(1) ("[I]t is not [a copyright] infringement for the owner of a copy of a computer program to make ... another copy or adaptation of that computer program provide[d] that such a new copy or adaptation is created as an essential step in the utilization of the computer program"). We need not address here whether or how the doctrine of patent exhaustion would apply in such circumstances. In the case at hand, Bowman planted Monsanto's patented soybeans solely to make and market replicas of them, thus depriving the company of the reward patent law provides for the sale of each article. Patent exhaustion provides no haven for that conduct. We accordingly affirm the judgment of the Court of Appeals for the Federal Circuit.

Dixi-Cola Laboratories v. Coca-Cola Co.
117 F. 2d 352 (4th Cir. 1941)

Soper, Circuit Judge: ...

The plaintiff is the owner of the trademark "Coca-Cola" for a syrup to be used with carbonated water as a beverage. The defendants make and sell a concentrate and a syrup to be used in the production of a similar beverage under the names, MarBert the Distinctive Cola and Dixi-Cola. The defendants do not use the word "coca"; but they claim the right to use the word "cola" in the combinations mentioned. The evidence shows that they have also used other terms, such as Apola Cola and Lola-Kola, but as to them they now make no defense. The plaintiff

concedes that the names Dixi-Cola and MarBert the Distinctive Cola are not so similar to the name Coca-Cola, that a purchaser of the beverage known as Dixi-Cola or MarBert the Distinctive Cola would be led to believe that he was buying the beverage Coca-Cola, but the plaintiff nevertheless charges infringement on the ground that the use of the word "cola" in defendants' trade-marks or trade-names leads the public to believe that their products originate with the plaintiff. ...

The broad claim of the plaintiff to the exclusive use of the word "cola" in a trade-mark or trade-name is based upon the contention that Coca-Cola is a technical common-law trade-mark, adopted as a fanciful and arbitrary word by the first producer of the beverage in 1886. The plaintiff also relies on five registrations of the mark in the United States Patent Office, one under the Act of March 3, 1881, 21 Stat. 502, and four under the Act of February 20, 1905, 33 Stat. 724, 15 U.S.C.A. § 81 et seq. ...

It is certainly beyond dispute that the word "Coca-Cola" is the exclusive property of the Coca-Cola Company. The evidence in the pending case shows that what was said of the name in *Coca-Cola Co. v. Koke Co.*, 254 U.S. 143 [(1920)], and *Coca-Cola Co. v. Old Dominion Beverage Corp.*, [271 F. 600 (4th Cir. 1921)], is equally true today. There has been no let-up in the popular demand for the drink or in the extent of its advertising. On the contrary, both have greatly increased. In 1920 the gallons of syrup sold were 18,656,445 and the advertising expense $2,330,710.40, while in 1938 the gallons sold were 48,508,414, and the advertising expense $7,122,863.31. No one else can lawfully use the word "Coca-Cola" for a trade-mark, even though it originally may have been a descriptive name.

The plaintiff, however, is not content with this measure of protection. It insists in addition that no one shall use the word "cola" in a trade-mark, even in connection with a prefix that prevents all confusion with the name Coca-Cola. The reason given is that the word is so closely associated with Coca-Cola in the public mind that any drink, bearing the word as part of its name, will be thought to proceed from the same source. Forty-one witnesses from Baltimore, Springfield and Birmingham testified that when they saw goods labeled by a name containing the suffix "cola," they were led to believe, not that the goods were Coca-Cola, but that they originated with the Coca-Cola Company. Hence, it is said, the defendants have appropriated the result of the plaintiff's efforts and expenditures, and imperiled the reputation of the Coca-Cola Company and its product.

Confusion of origin, as well as confusion of goods, from the use of the same trade-mark, may constitute infringement, especially when the name has a fanciful and arbitrary character. We must, therefore, consider the defense now set up to this phase of the plaintiff's case that the word "cola" is a descriptive and generic term, open to all the world, which may be lawfully used as part of a trademark by competitors so long as the whole trade-mark is not confusingly similar to Coca-Cola.

There are many cases which hold that it is not infringement for a trader to use as part of his trade-name to designate his product a descriptive or generic word which

has already been adopted by another, provided that the competing marks, taken as a whole, are clearly distinguishable. Thus "Sal-Vet" was held not infringed by "Sal Tone", since the word "Sal", meaning salt, was descriptive of the principal ingredient of both products, and no ordinary purchaser would confuse one of the complete names with the other. *S. R. Feil Co. v. John E. Robins Co*. [220 F .650 (7th Cir. 1915)].

In the light of these decisions, it is important to inquire whether or not the word "cola" has a descriptive significance apart from its use in the trade-mark Coca-Cola, and has become a generic term, generally used to indicate a class of beverage. The answer is to be found, we believe, in scientific and popular literature, in the discussions of Coca-Cola cases by the courts, and the attitude of the Coca-Cola Company itself in the conduct of its business. The beverage was devised and the name Coca-Cola was adopted by John S. Pemberton in Atlanta in 1886. The product was sold under a label registered in the Patent Office, which advertised Coca-Cola syrup as an extract for carbonated beverages possessing a peculiar flavor and the tonic and nerve stimulant qualities of the coca plant and cola nuts. Both of these substances were well known at that time. The word "cola" was recognized as the name of a tree native to Africa, which bears the small brown "cola nut" that was introduced in England in 1865 and later in the United States. Prior to 1886 the stimulant qualities of the cola nut were frequently referred to in pharmaceutical and scientific publications and periodicals, and it was suggested that it could be used to make a beverage that would successfully compete with tea and coffee as a refreshing and invigorating drink.

These facts led to the contention in the court below that at best the word Coca-Cola, taken as a whole, is a descriptive name, entitled to protection only because it has acquired a secondary significance. But the contention was rejected. It was said that while relatively small amounts of coca and cola extracts are found in the drink, the basic ingredients are sugar, phosphoric acid and a small amount of caffeine; and also that the words comprising the mark were so little known to the general public when adopted that they did not suggest at that time that the beverage was made from coca leaves or cola nuts. Hence it was decided that the name is not clearly descriptive of the product, but should be considered a coined word with all the characteristics of a technical trade mark. Other courts have reached the same conclusion. [citing cases]. ...

The decision of the Supreme Court in *Coca-Cola Co. v. Koke Co.* has already been mentioned. The court rejected the charge that the right to protection against infringement because of misrepresentations implied by the name that the product contained cocaine, which had formerly been used in small amounts, but had been eliminated after the passage of the Food and Drug Act. The court said, "We are dealing here with a popular drink not with a medicine, and although what has been said might suggest that its attraction lay in producing the expectation of a toxic effect the facts point to a different conclusion. Since 1900 the sales have increased at a very great rate corresponding to a like increase in advertising. The name now

characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source, and well known to the community. It hardly would be too much to say that the drink characterizes the name as much as the name the drink. In other words 'Coca-Cola' probably means to most persons the plaintiff's familiar product to be had everywhere rather than a compound of particular substances. ... The coca leaves and whatever of cola nut is employed may be used to justify the continuance of the name or they may affect the flavor as the plaintiff contends, but before this suit was brought the plaintiff had advertised to the public that it must not expect and would not find cocaine, and had eliminated every thing tending to suggest cocaine effects except the name and the picture of the leaves and nuts, which probably conveyed little or nothing to most who saw it. It appears to us that it would be going too far to deny the plaintiff relief against a palpable fraud because possibly here and there an ignorant person might call for the drink with the hope for incipient cocaine intoxication. The plaintiff's position must be judged by the facts as they were when the suit was begun, not by the facts of a different condition and an earlier time." ...

It must be concluded, we think, from this history that the word "Coca-Cola," taken as a whole, is in some sense descriptive of the drink which it designates. It is true that the name identifies the goods of the plaintiff, but it has also come to characterize them. This process has been hastened by the fact that the combination of extract of coca leaves and extract of cola nuts employed by Pemberton was new, and it gave to the product a new and distinctive flavor for which there was no other name than that which he employed. Hence the drink came to be known to the public by this name in much the same fashion as other soft drinks are named for a small quantity of flavoring ingredient rather than the large quantities of sugar and water that mainly compose them. The process was further stimulated by the great public response to the drink and the activities of numerous competitors who speedily entered the field and were enabled lawfully to make the same or a similar beverage, since Coca-Cola was not covered by a patent.

The record is replete with references to the number of competing drinks in this class. The District Judge in his opinion said that "since Coca-Cola appeared, there has been a veritable flood of drinks of this type, as evidenced by the fact that there have been no less than 143 registrations in the United States Patent Office of names embodying the word 'cola' as a suffix." In 1907 the Supreme Court of Mississippi, in the case of *Coca-Cola Co. v. Skillman*, 91 Miss. 677, 44 So. 985, discussed a statute imposing a privilege tax on Coca-Cola, Celery-Cola, Afri-Cola, Hecks Cola, Cola-Beta, Colavin, Nervola, and Nervocola, or any similar or proprietary drinks. Some cola drinks have had a long and continuous history. Thus the record shows that Lime-Cola has been made for more than twenty years in the United States and that Pepsi-Cola has been in existence as a beverage for more than thirty-five years.

The adoption of the word "cola" to characterize a class of drinks thus came about very naturally, to some extent with the consent of the Coca-Cola Company, as

we shall see, and to a greater extent because in the course of events it could not be prevented. It was attended by a vast increase after 1886 in the literature relating to the cola nut and its uses. Publications of various types recognized the fact that it could be used as an ingredient of a soft drink. Numerous references to the cola nut and to cola syrup and extract and their use in beverages, called cola drinks, appeared throughout the following years in dictionaries, encyclopedias, pharmaceutical magazines, trade journals and government publications. During the same period the word was adopted as part of the trade name of a large number of competing beverages. The result is that today the phrase "cola drinks" indicates to the general public beverages which in taste and appearance resemble Coca-Cola. ...

It must not be supposed that the Coca-Cola Company has not fought vigorously to protect its valuable right from invasion. Suits against competitors have averaged one a week during the last thirty years. Many of these competitors have been guilty of fraud and unfair competition, and all of them, it is safe to say, have sought to participate in the profits which experience had shown could be derived from making a drink like Coca-Cola. ...

None of these reported decisions goes further than the decision of this court in *Coca-Cola Co. v. Old Dominion Beverage Corp.*, involving the use of the name "Taka Cola," and the unreported decision of the present writer in *Coca-Cola Co. v. Philips Bros.* in the District Court of Maryland, involving the word "Champion-Cola." In both cases the names were regarded as so close to the name "Coca-Cola" as to be likely to result in the confusion of the goods. In both there was unfair competition in the simulation of the color scheme, of the script of the Coca-Cola Company, or in the confusing display of the competing name. ...

No reported case has come to our attention which distinctly holds that the word "cola" cannot be used as part of a name of a beverage provided that the whole name is not confusingly similar to Coca-Cola. It is urged, however, that we should make such a decision in this case for the reasons, which found favor in the District Court, that no such thing as a cola beverage in the present sense of the term, was known or spoken of prior to the advent of Coca-Cola in 1886, and that the Coca-Cola Company has always asserted its claim to the exclusive use of the term. In our opinion, these considerations, even if sustained by the evidence, are not controlling in the face of the fact that the word "cola" does not today indicate the plaintiff's product but a class of drinks to which the goods of the defendants and many other competitors belong. The applicable rule, supported by authority, is thus stated in the Restatement of Torts: "§ 735. (1) A designation which is initially a trade-mark or trade name ceases to be such when it comes to be generally understood as a generic or descriptive designation for the type of goods, services or business in connection with which it is used." Comment (a) to the foregoing sub-section (1) reads as follows: "Significance of change in meaning. When one has a monopoly of the initial distribution of a specific article over a period of time, and especially if the descriptive name for the article is one difficult to pronounce or remember, there is a likelihood that the

designation which he adopts as his trade-mark for the article will be incorporated into the language as the usual generic designation for an article of that type. When that happens, the designation becomes merely descriptive of the goods and no longer identifies a particular brand or performs any of the functions of a trade-mark or trade name. Moreover, the designation must then be used by others if there is to be any effective competition in the sale of the goods. It is immaterial that the person first adopting the designation made every reasonable effort to avoid this result or that the designation was coined by him and derived meaning only from his use. The designation may be used by others, subject to the limitations of Sub-Section (2) and of Sec. 712 relating to fraudulent marketing."

We are, however, in accord with the conclusion of the District Court that the conduct of the defendants has been such as to justify a decree restricting their business activities in the future along certain lines. The evidence amply justifies the finding that distributors of their products in New England, New York and St. Louis, and to a less extent in Baltimore, have attempted to sell and have sold their syrup to customers, engaged in the fountain trade, with the understanding that the drink made therefrom should be sold as and for Coca-Cola. The officers of the defendant corporation had knowledge of these activities and participated therein. The sale of syrup to the fountain trade constituted about ten per cent of the total business of the defendant.

The evidence also justifies the finding that the bottled beverage made by bottlers from defendant's concentrate was passed off as Coca-Cola in various bars and taverns. It is difficult to ascertain how wide-spread this practice has been, but there is some evidence that an officer of the corporation encouraged the practice. The defendants were also fully aware of the use of the infringing word "Lola-Kola""by bottlers, and indeed agreed to place this word on all packages of its concentrate sold to Lola Bottlers, Inc. Under these circumstances, it is a reasonable conclusion that the defendants have conspired with their customers to palm off their goods for those of the Coca-Cola Company whenever it was safe to do so.

The remedy for these illegal acts, which appears in the decree, is the issuance of an injunction against the defendants enjoining them from committing any acts calculated to cause any product other than the plaintiff's to be known or sold as "Coca-Cola" or "Koke," or any colorable imitation thereof. The defendants are also enjoined "(f) From giving to any part of their merchandise not sold by defendants, their agents or distributors, in bottles to consumers, a color imitating or resembling the color of plaintiff's product, if or when defendants know, or in the exercise of reasonable care should know, that the purchaser thereof intends to dispense such merchandise to the consumer other than in bottles, or intends to bottle the beverage made from such product and to use on the bottles, labels or caps some extrinsic, deceiving element that in conjunction with the color imitating plaintiff's color enables such purchaser to pass off his, her or their product for plaintiff's product." ...

Nichols v. Universal Pictures
45 F.2d 119 (2nd Cir. 1930)

L. Hand, Circuit Judge:

The plaintiff is the author of a play, "Abie's Irish Rose," which it may be assumed was properly copyrighted ... . The defendant produced publicly a motion picture play, "The Cohens and The Kellys," which the plaintiff alleges was taken from it. As we think the defendant's play too unlike the plaintiff's to be an infringement, we may assume, arguendo, that in some details the defendant used the plaintiff's play, as will subsequently appear, though we do not so decide. It therefore becomes necessary to give an outline of the two plays.

"Abie's Irish Rose" presents a Jewish family living in prosperous circumstances in New York. The father, a widower, is in business as a merchant, in which his son and only child helps him. The boy has philandered with young women, who to his father's great disgust have always been Gentiles, for he is obsessed with a passion that his daughter-in-law shall be an orthodox Jewess. When the play opens the son, who has been courting a young Irish Catholic girl, has already married her secretly before a Protestant minister, and is concerned to soften the blow for his father, by securing a favorable impression of his bride, while concealing her faith and race. To accomplish this he introduces her to his father at his home as a Jewess, and lets it appear that he is interested in her, though he conceals the marriage. The girl somewhat reluctantly falls in with the plan; the father takes the bait, becomes infatuated with the girl, concludes that they must marry, and assumes that of course they will, if he so decides. He calls in a rabbi, and prepares for the wedding according to the Jewish rite.

Meanwhile the girl's father, also a widower, who lives in California, and is as intense in his own religious antagonism as the Jew, has been called to New York, supposing that his daughter is to marry an Irishman and a Catholic. Accompanied by a priest, he arrives at the house at the moment when the marriage is being celebrated, but too late to prevent it, and the two fathers, each infuriated by the proposed union of his child to a heretic, fall into unseemly and grotesque antics. The priest and the rabbi become friendly, exchange trite sentiments about religion, and agree that the match is good. Apparently out of abundant caution, the priest celebrates the marriage for a third time, while the girl's father is inveigled away. The second act closes with each father, still outraged, seeking to find some way by which the union, thus trebly insured, may be dissolved.

The last act takes place about a year later, the young couple having meanwhile been abjured by each father, and left to their own resources. They have had twins, a boy and a girl, but their fathers know no more than that a child has been born. At Christmas each, led by his craving to see his grandchild, goes separately to the young folks' home, where they encounter each other, each laden with gifts, one for a boy, the other for a girl. After some slapstick comedy, depending upon the insistence of

each that he is right about the sex of the grandchild, they become reconciled when they learn the truth, and that each child is to bear the given name of a grandparent. The curtain falls as the fathers are exchanging amenities, and the Jew giving evidence of an abatement in the strictness of his orthodoxy.

"The Cohens and The Kellys" presents two families, Jewish and Irish, living side by side in the poorer quarters of New York in a state of perpetual enmity. The wives in both cases are still living, and share in the mutual animosity, as do two small sons, and even the respective dogs. The Jews have a daughter, the Irish a son; the Jewish father is in the clothing business; the Irishman is a policeman. The children are in love with each other, and secretly marry, apparently after the play opens. The Jew, being in great financial straits, learns from a lawyer that he has fallen heir to a large fortune from a great-aunt, and moves into a great house, fitted luxuriously. Here he and his family live in vulgar ostentation, and here the Irish boy seeks out his Jewish bride, and is chased away by the angry father. The Jew then abuses the Irishman over the telephone, and both become hysterically excited. The extremity of his feelings makes the Jew sick, so that he must go to Florida for a rest, just before which the daughter discloses her marriage to her mother.

On his return the Jew finds that his daughter has borne a child; at first he suspects the lawyer, but eventually learns the truth and is overcome with anger at such a low alliance. Meanwhile, the Irish family who have been forbidden to see the grandchild, go to the Jew's house, and after a violent scene between the two fathers in which the Jew disowns his daughter, who decides to go back with her husband, the Irishman takes her back with her baby to his own poor lodgings. The lawyer, who had hoped to marry the Jew's daughter, seeing his plan foiled, tells the Jew that his fortune really belongs to the Irishman, who was also related to the dead woman, but offers to conceal his knowledge, if the Jew will share the loot. This the Jew repudiates, and, leaving the astonished lawyer, walks through the rain to his enemy's house to surrender the property. He arrives in great dejection, tells the truth, and abjectly turns to leave. A reconciliation ensues, the Irishman agreeing to share with him equally. The Jew shows some interest in his grandchild, though this is at most a minor motive in the reconciliation, and the curtain falls while the two are in their cups, the Jew insisting that in the firm name for the business, which they are to carry on jointly, his name shall stand first.

It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations. That has never been the law, but, as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that, as was recently well said by a distinguished judge, the decisions cannot help much in a new case. When plays are concerned, the plagiarist may excise a separate scene or he may appropriate part of the dialogue. Then the question is whether the part so taken is "substantial" ... it is the same question as arises in the case of any other copyrighted work. But when the plagiarist does not

take out a block in situ, but an abstract of the whole, decision is more troublesome. Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can. In some cases the question has been treated as though it were analogous to lifting a portion out of the copyrighted work but the analogy is not a good one, because, though the skeleton is a part of the body, it pervades and supports the whole. In such cases we are rather concerned with the line between expression and what is expressed. As respects plays, the controversy chiefly centers upon the characters and sequence of incident, these being the substance.

... But we do not doubt that two plays may correspond in plot closely enough for infringement. How far that correspondence must go is another matter. Nor need we hold that the same may not be true as to the characters, quite independently of the "plot" proper, though, as far as we know, such a case has never arisen. If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's "ideas" in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species. It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.

In the two plays at bar we think both as to incident and character, the defendant took no more — assuming that it took anything at all — than the law allowed. The stories are quite different. One is of a religious zealot who insists upon his child's marrying no one outside his faith; opposed by another who is in this respect just like him, and is his foil. Their difference in race is merely an obbligato to the main theme, religion. They sink their differences through grandparental pride and affection. In the other, zealotry is wholly absent; religion does not even appear. It is true that the parents are hostile to each other in part because they differ in race; but the marriage of their son to a Jew does not apparently offend the Irish family at all, and it exacerbates the existing animosity of the Jew, principally because he has become rich, when he learns it. They are reconciled through the honesty of the Jew and the generosity of the Irishman; the grandchild has nothing whatever to do with it. The only matter common to the two is a quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation.

If the defendant took so much from the plaintiff, it may well have been because her amazing success seemed to prove that this was a subject of enduring popularity. Even so, granting that the plaintiff's play was wholly original, and assuming that novelty is not essential to a copyright, there is no monopoly in such a background. Though the plaintiff discovered the vein, she could not keep it to herself; so defined, the theme was too generalized an abstraction from what she wrote. It was only a part of her "ideas."

Nor does she fare better as to her characters. It is indeed scarcely credible that she should not have been aware of those stock figures, the low comedy Jew and Irishman. The defendant has not taken from her more than their prototypes have contained for many decades. If so, obviously so to generalize her copyright, would allow her to cover what was not original with her. But we need not hold this as matter of fact, much as we might be justified. Even though we take it that she devised her figures out of her brain de novo, still the defendant was within its rights.

There are but four characters common to both plays, the lovers and the fathers. The lovers are so faintly indicated as to be no more than stage properties. They are loving and fertile; that is really all that can be said of them, and anyone else is quite within his rights if he puts loving and fertile lovers in a play of his own, wherever he gets the cue. The plaintiff's Jew is quite unlike the defendant's. His obsession is his religion, on which depends such racial animosity as he has. He is affectionate, warm and patriarchal. None of these fit the defendant's Jew, who shows affection for his daughter only once, and who has none but the most superficial interest in his grandchild. He is tricky, ostentatious and vulgar, only by misfortune redeemed into honesty. Both are grotesque, extravagant and quarrelsome; both are fond of display; but these common qualities make up only a small part of their simple pictures, no more than any one might lift if he chose. The Irish fathers are even more unlike; the plaintiff's a mere symbol for religious fanaticism and patriarchal pride, scarcely a character at all. Neither quality appears in the defendant's, for while he goes to get his grandchild, it is rather out of a truculent determination not to be forbidden, than from pride in his progeny. For the rest he is only a grotesque hobbledehoy, used for low comedy of the most conventional sort, which any one might borrow, if he chanced not to know the exemplar.

... We assume that the plaintiff's play is altogether original, even to an extent that in fact it is hard to believe. We assume further that, so far as it has been anticipated by earlier plays of which she knew nothing, that fact is immaterial. Still, as we have already said, her copyright did not cover everything that might be drawn from her play; its content went to some extent into the public domain. We have to decide how much, and while we are as aware as any one that the line, whereever it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases. Whatever may be the difficulties a priori, we have no question on which side of the line this case falls. A comedy based upon

conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of Romeo and Juliet. ...

Cheney Bros. v. Doris Silk Co.
35 F.2d 279 (2nd Cir. 1929)

L. Hand, Circuit Judge:

The plaintiff, a corporation is a manufacturer of silks, which puts out each season many new patterns, designed to attract purchasers by their novelty and beauty. Most of these fail in that purpose, so that not much more than a fifth catch the public fancy. Moreover, they have only a short life, for the most part no more than a single season of eight or nine months. It is in practice impossible, and it would be very onerous if it were not, to secure design patents upon all of these; it would also be impossible to know in advance which would sell well, and patent only those. Besides, it is probable that for the most part they have no such originality as would support a design patent. Again, it is impossible to copyright them under the Copyright Act (17 USCA § 1 et seq.), or at least so the authorities of the Copyright Office hold. So it is easy for any one to copy such as prove successful, and the plaintiff, which is put to much ingenuity and expense in fabricating them, finds itself without protection of any sort for its pains.

Taking advantage of this situation, the defendant copied one of the popular designs in the season beginning in October, 1928, and undercut the plaintiff's price. This is the injury of which it complains. The defendant, though it duplicated the design in question, denies that it knew it to be the plaintiff's, and there thus arises an issue which might be an answer to the motion. However, the parties wish a decision upon the equity of the bill, and, since it is within our power to dismiss it, we shall accept its allegation, and charge the defendant with knowledge.

The plaintiff asks for protection only during the season, and needs no more, for the designs are all ephemeral. It seeks in this way to disguise the extent of the proposed innovation, and to persuade us that, if we interfere only a little, the solecism, if there be one, may be pardonable. But the reasoning which would justify any interposition at all demands that it cover the whole extent of the injury. A man whose designs come to harvest in two years, or in five, has prima facie as good right to protection as one who deals only in annuals. Nor could we consistently stop at designs; processess, machines, and secrets have an equal claim. The upshot must be that, whenever any one has contrived any of these, others may be forbidden to copy it. That is not the law. In the absence of some recognized right at common law, or under the statutes -- and the plaintiff claims neither -- a man's property is limited to the chattels which embody his invention. Others may imitate these at their pleasure.

True, it would seem as though the plaintiff had suffered a grievance for which there should be a remedy, perhaps by an amendment of the Copyright Law, assuming that this does not already cover the case, which is not urged here. It seems

a lame answer in such a case to turn the injured party out of court, but there are larger issues at stake than his redress. Judges have only a limited power to amend the law; when the subject has been confided to a Legislature, they must stand aside, even though there be an hiatus in completed justice. An omission in such cases must be taken to have been as deliberate as though it were express, certainly after long-standing action on the subject-matter. Indeed, were are not in any position to pass upon the questions involved, as Brandeis, J., observed in International News Service v. Associated Press. We must judge upon records prepared by litigants, which do not contain all that may be relevant to the issues, for they cannot disclose the conditions of this industry, or of the others which may be involved. Congress might see its way to create some sort of temporary right, or it might not. Its decision would certainly be preceded by some examination of the result upon the other interests affected. Whether these would prove paramount we have no means of saying; it is not for us to decide. Our vision is inevitably contracted, and the whole horizon may contain much which will compose a very different picture.

ASSIGNMENT 9: PROPERTY'S LIMITS

We have now covered personal property in some detail, along with how intellectual property is like and is different from it. Today's class asks how far the idea of "property" can extend, and what work it does. We begin with *Kremen*, a case that is unusually forthright in considering just what it takes to determine that something is capable of being "property."

We move from there to a particularly controversial boundary of property: property in people, or parts thereof. *Prigg* explores the legal consequences of treating slaves as property. It provides us a window on the moral dimensions of property—and also on the relationship between property and state power. *Moore* then brings the conversation into this century as we think about property in body parts.

Reading	Casebook (2nd edition)	Casebook (1st edition)
Kremen v. Cohen	Supplement	
Prigg v. Pennsylvania	Supplement	
United States Constitution, Amendment XIII	Supplement	
Moore v. Regents of the University of California	243	255
Questions on *Moore*	Supplement	

Kremen v. Cohen

337 F.3d 1024 (9th Cir. 2003)

Kozinski, Circuit Judge:

We decide whether Network Solutions may be liable for giving away a registrant's domain name on the basis of a forged letter.

BACKGROUND

"Sex on the Internet?," they all said. "*That'll* never make any money." But computer-geek-turned-entrepreneur Gary Kremen knew an opportunity when he saw it. The year was 1994; domain names were free for the asking, and it would be several years yet before Henry Blodget and hordes of eager NASDAQ day traders would turn the Internet into the Dutch tulip craze of our times. With a quick e-mail to the domain name registrar Network Solutions, Kremen became the proud owner of sex.com. He registered the name to his business, Online Classifieds, and listed himself as the contact.

Con man Stephen Cohen, meanwhile, was doing time for impersonating a bankruptcy lawyer. He, too, saw the potential of the domain name. Kremen had gotten it first, but that was only a minor impediment for a man of Cohen's boundless resource and bounded integrity. Once out of prison, he sent Network Solutions what purported to be a letter he had received from Online Classifieds. It claimed the company had been "forced to dismiss Mr. Kremen," but "never got around to changing our administrative contact with the internet registration [sic] and now our Board of directors has decided to *abandon* the domain name sex.com." Why was this

unusual letter being sent via Cohen rather than to Network Solutions directly? It explained:

> Because we do not have a direct connection to the internet, we request that you notify the internet registration on our behalf, to delete our domain name sex.com. Further, we have no objections to your use of the domain name sex.com and this letter shall serve as our authorization to the internet registration to transfer sex.com to your corporation.[2]

Despite the letter's transparent claim that a company called "*Online* Classifieds" had no Internet connection, Network Solutions made no effort to contact Kremen. Instead, it accepted the letter at face value and transferred the domain name to Cohen. When Kremen contacted Network Solutions some time later, he was told it was too late to undo the transfer. Cohen went on to turn sex.com into a lucrative online porn empire.

And so began Kremen's quest to recover the domain name that was rightfully his. He sued Cohen and several affiliated companies in federal court, seeking return of the domain name and disgorgement of Cohen's profits. The district court found that the letter was indeed a forgery and ordered the domain name returned to Kremen. ... It awarded $ 40 million in compensatory damages and another $ 25 million in punitive damages.

Kremen, unfortunately, has not had much luck collecting his judgment. The district court froze Cohen's assets, but Cohen ignored the order and wired large sums of money to offshore accounts. His real estate property, under the protection of a federal receiver, was stripped of all its fixtures-- even cabinet doors and toilets—in violation of another order. The court commanded Cohen to appear and show cause why he shouldn't be held in contempt, but he ignored that order, too. ... Cohen, so far as the record shows, remains at large.

[I]t should come as no surprise that Kremen seeks to hold someone else responsible for his losses. That someone is Network Solutions, the exclusive domain name registrar at the time of Cohen's antics. Kremen sued it for mishandling his domain name. ... The district court granted summary judgment in favor of Network Solutions on all claims. ...

CONVERSION

Kremen's conversion claim is another matter. To establish that tort, a plaintiff must show "ownership or right to possession of property, wrongful disposition of the property right and damages." *G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Service, Inc.,* 958 F.2d 896, 906 (9th Cir. 1992). The preliminary question, then, is whether

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[2] The letter was signed "Sharon Dimmick," purported president of Online Classifieds. Dimmick was actually Kremen's housemate at the time; Cohen later claimed she sold him the domain name for $ 1000. This story might have worked a little better if Cohen hadn't misspelled her signature.

registrants have property rights in their domain names. Network Solutions all but concedes that they do. . . .

Property is a broad concept that includes "every intangible benefit and prerogative susceptible of possession or disposition." We apply a three-part test to determine whether a property right exists: "First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity." Domain names satisfy each criterion. Like a share of corporate stock or a plot of land, a domain name is a well-defined interest. Someone who registers a domain name decides where on the Internet those who invoke that particular name—whether by typing it into their web browsers, by following a hyperlink, or by other means—are sent. Ownership is exclusive in that the registrant alone makes that decision. Moreover, like other forms of property, domain names are valued, bought and sold, often for millions of dollars ...

Finally, registrants have a legitimate claim to exclusivity. Registering a domain name is like staking a claim to a plot of land at the title office. It informs others that the domain name is the registrant's and no one else's. Many registrants also invest substantial time and money to develop and promote websites that depend on their domain names. Ensuring that they reap the benefits of their investments reduces uncertainty and thus encourages investment in the first place, promoting the growth of the Internet overall.

Kremen therefore had an intangible property right in his domain name, and a jury could find that Network Solutions "wrongfully disposed of" that right to his detriment by handing the domain name over to Cohen. The district court nevertheless rejected Kremen's conversion claim. It held that domain names, although a form of property, are intangibles not subject to conversion. This rationale derives from a distinction tort law once drew between tangible and intangible property: Conversion was originally a remedy for the wrongful taking of another's lost goods, so it applied only to tangible property. Virtually every jurisdiction, however, has discarded this rigid limitation to some degree. Many courts ignore or expressly reject it. . . .

Indeed, the leading California Supreme Court case rejects the tangibility requirement altogether. In *Payne v. Elliot,* 54 Cal. 339 (1880), the Court considered whether shares in a corporation (as opposed to the share certificates themselves) could be converted. It held that they could, reasoning: "The action no longer exists as it did at common law, but has been developed into a remedy for the conversion of *every species of personal property*." *Id*. at 341 (emphasis added). While *Payne*'s outcome might be reconcilable with the Restatement, its rationale certainly is not: It recognized conversion of shares, not because they are customarily represented by

share certificates, but because they are a species of personal property and, perforce, protected. *Id.* at 342.[7] ...

The evidence supported a claim for conversion, and the district court should not have rejected it.

Prigg v. Pennsylvania
41 U.S. 539 (1842)

Mr. Justice Story delivered the opinion of the Court:

The facts are briefly these: The plaintiff in error was indicted in the Court of Oyer and Terminer for York county, for having, with force and violence, taken and carried away from that county to the state of Maryland, a certain negro woman, named Margaret Morgan, with a design and intention of selling and disposing of, and keeping her as a slave or servant for life, contrary to a statute of Pennsylvania, passed on the 26th of March, 1826. That statute in the first section, in substance, provides, that if any person or persons shall from and after the passing of the act, by force and violence take and carry away, or cause to be taken and carried away, and shall by fraud or false pretence, seduce, or cause to be seduced, or shall attempt to take, carry away, or seduce any negro or mulatto from any part of that commonwealth, with a design and intention of selling and disposing of, or causing to be sold, or of keeping and detaining, or of causing to be kept and detained, such negro or mulatto as a slave or servant for life, or for any term whatsoever; every such person or persons, his or their aiders or abettors, shall, on conviction thereof, be deemed guilty of a felony, and shall forfeit and pay a sum not less than five hundred, nor more than one thousand dollars; and moreover, shall be sentenced to undergo a servitude for any term or terms of years, not less than seven years nor exceeding twenty-one years; and shall be confined and kept to hard labour, &c. There are many other provisions in the statute which is recited at large in the record, but to which it is in our view unnecessary to advert upon the present occasion.

The plaintiff in error pleaded not guilty to the indictment; and at the trial the jury found a special verdict, which, in substance, states, that the negro woman, Margaret Morgan, was a slave for life, and held to labour and service under and according to the laws of Maryland, to a certain Margaret Ashmore a citizen of Maryland; that the slave escaped and fled from Maryland into Pennsylvania in 1832; that the plaintiff in error, being legally constituted the agent and attorney of the said Margaret Ashmore, in 1837, caused the said negro woman to be taken and apprehended as a fugitive from labour by a state constable, under a warrant from a Pennsylvania magistrate; that the said negro woman was thereupon brought before the said magistrate, who refused to take further cognisance of the case; and thereupon the plaintiff in error did remove, take, and carry away the said negro

[7] Intangible interests in *real* property, on the other hand, remain unprotected by conversion, presumably because trespass is an adequate remedy. ...

woman and her children out of Pennsylvania into Maryland, and did deliver the said negro woman and her children into the custody and possession of the said Margaret Ashmore. The special verdict further finds, that one of the children was born in Pennsylvania, more than a year after the said negro woman had fled and escaped from Maryland.

Upon this special verdict, the Court of Oyer and Terminer of York county, adjudged that the plaintiff in error was guilty of the offence charged in the indictment. A writ of error was brought from that judgment to the Supreme Court of Pennsylvania, where the judgment was, pro forma, affirmed. From this latter judgment, the present writ of error has been brought to this Court. ...

[Article IV, section 2 of the Constitution provides, in part, "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."]

The last clause is that, the true interpretation whereof is directly in judgment before us. Historically, it is well known, that the object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding states, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

By the general law of nations, no nation is bound to recognise the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favour of the subjects of other nations where slavery is recognised. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. ...

We have said that the clause contains a positive and unqualified recognition of the right of the owner in the slave ... . If this be so, then all the incidents to that right attach also; the owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own state confer upon him as property; and we all know that this right of seizure and recaption is universally acknowledged in all the slaveholding states. Indeed, this is no more than a mere affirmance of the principles of the common law applicable to this very subject. Mr. Justice Blackstone (3 Bl. Comm. 4) lays it down as unquestionable doctrine. "Recaption or reprisal (says he) is another species of remedy by the mere act of the party injured. This happens when

any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master may lawfully claim and retake them, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace." Upon this ground we have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence. ...

[The Court then turned to the question of whether a slaveowner could call upon judicial assistance in recapturing a fugitive slave in addition to self-help.]

It is plain, then, that where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person; and inasmuch as the right is a right of property capable of being recognised and asserted by proceedings before a Court of justice, between parties adverse to each other, it constitutes, in the strictest sense, a controversy between the parties, and a case "arising under the Constitution" of the United States; within the express delegation of judicial power given by that instrument. Congress, then, may call that power into activity for the very purpose of giving effect to that right; and if so, then it may prescribe the mode and extent in which it shall be applied, and how, and under what circumstances the proceedings shall afford a complete protection and guaranty to the right.

[The Court reviewed the history of the Fugitive Slave Act of 1793, held that it fell within Congress's enumerated powers, and held that Congress had exclusive authority to legislative on the subject.]

Upon these grounds, we are of opinion that the act of Pennsylvania upon which this indictment is founded, is unconstitutional and void. It purports to punish as a public offence against that state, the very act of seizing and removing a slave by his master, which the Constitution of the United States was designed to justify and uphold.

United States Constitution, Amendment XIII

1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

Questions on *Moore*

(1) Is *Moore* a case about property rights in Moore's cells, or about property rights in the information in those cells?

(2) What consequences does *Moore* have for organ donation? For selling kidneys?

(3) If a woman freezes her eggs, and then dies, does property law have anything to say about who decides what to do with them? Does the answer change if she freezes them after they have been fertilized?

(4) Does *Moore* affect the law governing the handling of bodies after death? What if, for example, a hospital does an autopsy against the family's wishes? Or takes a decedent's corneas for transplants?

(5) Does *Moore* regulate (or not) the use DNA samples in criminal investigations? Does it matter how the samples are collected?

ASSIGNMENT 10: REAL PROPERTY

Now we turn to real property. The first half of the assignment considers the question of where ownership in real property comes from. The answer is inextricably bound up with governmental authority over territory, so we explore both the process by which the United States took control of much of the land of North America, and the process by which it has assigned ownership rights in smaller pieces of that land. But even in real property, first possession still sometimes has a role to play.

In the second half of the assignment, we turn to the rights of landowners. Trespass is in some ways a completely run-of-the-mill tort, and in others a remarkable one. It is sometimes said that the essence of property is the right to exclude others, and *Jacque* shows the right to exclude in full force.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Johnson v. M'Intosh and notes 1–2	113	110
Note on land grants from the federal public domain	124	121
Guano Islands Act	Supplement	
Jacque v. Steenberg Homes and notes 1–2, 4–5	1	1
Note on criminal laws protecting real property	369	401
Note on civil actions protecting real property	371	409

Guano Islands Act

[An Act to Authorize Protection to Be Given to Citizens of the United States Who May Discover Deposites of Guano]

Aug. 18, 1856, 11 Stat. 119, codified in Title 48, United State Code

§ 1411 – Guano districts; claim by United States

Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.

§ 1412 – Notice of discovery of guano and proofs

The discoverer shall, as soon as practicable, give notice verified by affidavit, to the Department of State, of such discovery, occupation, and possession, describing the island, rock, or key, and the latitude and longitude thereof, as near as may be, and

showing that such possession was taken in the name of the United States; and shall furnish satisfactory evidence to the State Department that such island, rock, or key was not, at the time of the discovery thereof, or of the taking possession and occupation thereof by the claimants, in the possession or occupation of any other government or of the citizens of any other government, before the same shall be considered as appertaining to the United States.

48 U.S.C. § 1414 – Exclusive privileges of discoverer

The discoverer, or his assigns, being citizens of the United States, may be allowed, at the pleasure of Congress, the exclusive right of occupying such island, rocks, or keys, for the purpose of obtaining guano, and of selling and delivering the same to citizens of the United States, to be used therein, and may be allowed to charge and receive for every ton thereof delivered alongside a vessel, in proper tubs, within reach of ship's tackle, a sum not exceeding $8 per ton for the best quality, or $4 for every ton taken while in its native place of deposit.

ASSIGNMENT 11: EXCLUSION

Jacque's emphatic protection for landowners is the high-water-mark for the view of property rights as absolute. In this assignment, we walk back the doctrine to reveal some of its limits. The first part of the assignment deals with laws that restrict a landowner's discretion in deciding whom to exclude; the second part deals with the remedies available (or not) against trespassers. Our good friends damages, injunctions, and restitution all make appearances.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Madden v. Queens County Jockey Club	Supplement	
Civil Rights Act of 1964	Supplement	
Baker v. Howard County Hunt	44	42
Pile v. Pedrick (both opinions)	52	50
Golden Press v. Rylands and notes 1-5	55	51
Producers Lumber v. Olney and notes 1-4	65	68

Madden v. Queens County Jockey Club
296 N.Y. 249 (1947)

Fuld, Justice:

"Owney" Madden was named by one Frank Costello in 1943 as a bookmaker with whom he placed bets. "Coley" Madden, plaintiff herein, a self-styled "patron of the races", was barred by defendant from its Aqueduct Race Track in 1945, under the mistaken belief that he was Costello's bookmaker. Plaintiff thereupon sought a declaratory judgment declaring that he has a right, as citizen and taxpayer - upon paying the required admission price - to enter the race course and patronize the pari-mutuel betting there conducted. Defendant, on the other hand, asserted an unlimited power of exclusion. . . .

The question posed ... is whether the operator of a race track can, without reason or sufficient excuse, exclude a person from attending its races. In our opinion he can; he has the power to admit as spectators only those whom he may select, and to exclude others solely of his own volition, as long as the exclusion is not founded on race, creed, color or national origin.

At common law, a person engaged in a public calling, such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. A race track, of course, falls within that classification.

The common-law power of exclusion, noted above, continues until changed by legislative enactment. In this State, a statute — explicitly covering "race courses" —

limits the power by prohibiting discrimination on account of race, creed, color, or national origin. That, then, is the measure of the restriction.

Plaintiff, however, asserts a right founded upon the constitutional guaranty of equal protection of the laws. The argument is based on [the assumption that] the license to conduct horse racing is a franchise to perform a public purpose. ...

There is little need to cite authority for the proposition that a race track is normally considered a place of amusement and that - with the possible exception of ancient Rome - amusement of the populace has never been regarded as a function or purpose of government. Horse racing does not become a function of government merely because, in sanctioning it, the Legislature anticipated a consequent, though incidental, advantage to the public in "improving the breed of horses." There is, then, nothing inherent in the nature of horse racing which makes operation of a race track the performance of a public function. If plaintiff's assumption were valid, it would follow that the mere fact of licensing makes the purpose a public one and the license in effect a franchise. Such, however, is not the law.

Civil Rights Act of 1964

Title 42, United States Code

§ 2000a – Prohibition against discrimination or segregation in places of public accommodation

(a) 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.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter ...

> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; ...

ASSIGNMENT 12: USE

Today, we switch from the right to *exclude* others from land to the right to *use* land. As we shall see, the right to use is hardly absolute. The first half of the assignment expands on the coverage of nuisance from your Torts course. *Hendricks v. Stalnaker* probes the question of which of two incompatible land uses constitutes the nuisance; *Acme Printing* illustrates one of the many environmental statutes that overlay and supplement the common law of nuisance. The second half of the assignment turns to adverse possession, which you have already seen for personal property in *Songbyrd*. The two cases illustrate common fact patterns in adverse possession disputes, as well as courts' divergent reactions to them.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Hendricks v. Stalnaker and note 3	23	23
Acme Printing Ink Co. v. Menard	Supplement	
Note on purposes of adverse possession	200	200
Carpenter v. Ruperto and note 1 (casebook 203-07)	203	203
Howard v. Kunto and notes (casebook 208-14)	208	208

Acme Printing Ink Co. v. Menard

870 F. Supp. 1465 (E.D. Wisc. 1995)

Warren, District Judge:

... Plaintiff Acme Printing Ink, Co. ("Acme") has moved the Court for partial summary judgment against defendant Menard, Inc. ("Menard") as to Menard's liability under ... the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607.

I. BACKGROUND

Between 1970 and 1982, the property at the center of this dispute in the 6800 block of South 27th Street in Franklin, Wisconsin was owned by Edward J. Fadrowski. During that period, Fadrowski operated an unregulated and unlicensed landfill and Christmas tree farm on the property. Because the site was unlicensed, Fadrowski could only legally dump earth fill containing less than 25% by volume of brick, concrete, and building stone.

Fadrowski also owned and operated a waste collection and transportation company called Ed's Masonry and Trucking ("Ed's Trucking"). During that time period, Ed's Trucking was licensed by the Wisconsin Department of Natural Resources (DNR) to collect and transport noncombustible waste, wood matter, refuse and garbage. The motto of Ed's Trucking was "You call, We haul." And haul it did, picking up rubbish and solid waste from various area businesses and dumping it at several landfills in the area, including the site at South 27th Street. Clients of Ed's

Trucking included the plaintiff, Acme Printing Ink Company (“Acme”), as well as others ...

In the late 1970s and early 1980s, several incidents occurred which suggest that Fadrowski was illegally hauling and dumping hazardous wastes. The first documented incident involved Ed’s Trucking. On October 20, 1978, Fadrowski's driver, Tony Ivancich, spilled a significant quantity of sludge waste that he was transporting from Lubricants, Inc. onto South 84th Street. Mr. Fadrowski was billed by the City of Greenfield for the costs incurred cleaning-up the spilled sludge. Ivancich later admitted that this type of waste was not only frequently hauled by Ed’s Trucking, but was also commonly transported to the site. The next incident occurred in February of 1981, when Roger Klett, a DNR landfill inspector, inspected the Fadrowski site and found that Fadrowski was dumping regulated wastes illegally. Mr. Klett notified the City of Franklin's City Engineer, Mr. John Bennett, of the results of his inspection.

On July 6, 1981, the Wisconsin DNR received a complaint from Marcia Smith, a Fadrowski employee, about operations at the Fadrowski site. Ms. Smith alleged that Fadrowski was illegally dumping drums of hazardous wastes from Acme Printing Ink Company and Lubricants, Inc. at the site. An inspection on July 6, 1981 by Klett and Victor Pappas, also of the Wisconsin DNR, revealed the existence of regulated wastes that had been illegally deposited at the site. However, the DNR was unable to confirm the existence of any drums containing the material described by Smith. The DNR did not pursue the investigation further because Ms. Smith refused to submit an affidavit in support of her allegations. The DNR issued Fadrowski a warning but never required him to get a permit.

As a result of several of these incidents, on December 8, 1981, Franklin City Engineer John Bennett met with Mr. Fadrowski to request that he bring the his landfill up to standards required by the City and State Codes. Later Bennett sent Fadrowski a letter confirming the arrangements they had made to bring the site up to code.

In December of 1982, Menard decided to purchase the property at South 27th Street, along with other adjacent plots, to build a Menard’s retail outlet. Before purchasing Fadrowski's property, Marv Prochaska, Menard Vice President of Real Estate, conducted a physical inspection of the site. Prochaska made inquiries of the realtor regarding what materials were disposed of in the Fadrowski landfill, and was assured that the landfill contained only construction materials, concrete, and dirt. Menard also checked the files on the Fadrowski site at the offices of the City of Franklin. The files contained the above mentioned correspondence between the City Engineer, Bennett, and Fadrowski. However, Menard never followed up with a more complete investigation.

On January 5, 1983, the sale of the Fadrowski site to Menard was finalized. Shortly thereafter, Menard began work on its new facility. Excavation of the site was started by Menard's contractor on April 8, 1993, and continued virtually

uninterrupted through June 28, 1983. On June 28, 1983, while excavating the site, workers operating mechanized shovels and bulldozers broke open several containers which had been buried at the site. The workers continued their work even though their machines were spreading liquid waste around the site. Several containers were broken open before one of the bulldozers was hit by a stream of liquid waste that erupted from one of the containers. The workman in the bulldozer, Everett Morgan, was so overcome by fumes he shut down his bulldozer and reported the incident to his foreman. The Franklin Fire Department was contacted and it in turn contacted the DNR. When the DNR inspector arrived at the site, the workers had uncovered and spread about the site black, red, green, orange, and yellow sludge that had a distinct odor of paint or solvent.

Upon further inspection and analysis, it was determined that the Fadrowski site did in fact contain hazardous wastes. Eventually, the site was placed on the National Priority List ("NPL") by the Environmental Protection Agency ("EPA"). On April 17, 1987, Acme entered into a consent order with the EPA and DNR, in which Acme agreed to undertake a Remedial Investigation and Feasibility Study ("RI/FS") in connection with the site. Acme filed this action on July 19, 1989 seeking contribution from Menard and many other potentially responsible parties ("PRPs") for the response costs that it allegedly incurred in connection with the site.

II. Legal Standard ...

2. CERCLA

CERCLA was designed to force the clean-up of abandoned hazardous waste sites that pose some risk to public health or the environment. The statute gives the federal government the power to clean-up sites contaminated by hazardous substances, either by arranging for the clean-up itself or by ordering a potentially responsible party ("PRP") to do so. 42 U.S.C. §§ 9604, 9606. CERCLA also authorizes cost recovery actions by private parties who have incurred costs in undertaking clean-up activities. 42 U.S.C. § 9607. ...

While the statute allows EPA to initiate and perform clean-up action at a site, EPA may also request and, if need be, force, PRPs to do the work. 42 U.S.C. § 9606. EPA may also enter into agreements with private parties to perform any necessary response work if EPA determines that the work will be done properly by such party. 42 U.S.C. § 9622(a), (d)(3). ...

CERCLA creates broad liability for any response costs incurred in connection with the actual or threatened release of hazardous substances. 42 U.S.C. § 9607. Liability for such costs may be imposed on: (1) the current owner or operator of the facility; (2) the owner or operator of the facility at the time hazardous materials were disposed of; (3) any person who arranged for the disposal of hazardous materials at

the facility; and (4) any person who transported the hazardous waste to the disposal facility. 42 U.S.C. § 9607(a).[3]

Cost recovery actions against PRPs may be brought by the federal government, by a state or local agency, or by "any other person" that has incurred response costs ... for which someone else may or should be liable. 42 U.S.C. § 9607(a)(1)–(4). The only defenses to liability are those specifically set forth in the statute, and include: (1) an act of God; (2) an act of war; (3) an act or omission of an unrelated third party; or (4) any combination of the foregoing. 42 U.S.C. § 9607(b).

III. DISCUSSION ...

2. CERCLA Liability

In its motion for partial summary judgment, Acme seeks a declaration of liability against Menard pursuant to section 107 of CERCLA. Acme is entitled to summary judgment on Menard's liability if it can establish each of the elements on which CERCLA liability is based, and Menard cannot establish the applicability of any defense listed in the statute. The plaintiff may establish liability under CERCLA section 107 if: (1) the site in question is a "facility" as defined in 42 U.S.C. § 9601(9); (2) the defendant is a responsible person under § 9607(a); (3) a release or threatened release of a hazardous substance has occurred; and (4) the release or threatened release has caused the plaintiff to incur response costs.

That Acme has satisfied these elements of liability is not in dispute. First, section 101(9) defines "facility" to include just about every place hazardous waste might be found. See e.g., *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 185 (W.D. Mo.1985) (defining facility to include "every place where hazardous substances come to be located"). Therefore, the Fadrowski site is a "facility" under § 9601(9). Second, responsible parties include current or past owners and operators of the site, persons who arrange for the disposal of hazardous waste at the site or persons who transport hazardous waste to the side. 42 U.S.C. § 9607(a). Menard is the current owner of that site and thus a responsible person under § 9607(a)4. Third, hazardous substances were present at the Fadrowski site and were released into the environment when Menard excavated the landfill. Finally, the release has caused Acme to incur response costs; pursuant to the EPA consent order, Acme has expended substantial funds in performing the RI/FS.

Because Acme has established a prima facie case of CERCLA liability, the only matter at issue in this motion is whether Menard can establish one of the affirmative defenses set forth at 42 U.S.C. § 9607(b). Menard contends that it can establish one such defense, claiming that there is a genuine issue as to whether it is an innocent landowner/purchaser under section 107(b)(3). That section provides:

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[3] [Acme was an "arranger" under (3); it sought to hold Menard responsible for contribution as a "current owner" under (1).]

> There shall be no liability ... for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
>
> * * * * * *
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant ... if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned ... and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

42 U.S.C. § 9607(b).

Because section 107(b)(3) is an affirmative defense, Menard has the burden of establishing by a preponderance of the evidence that it is not liable under CERCLA because it is an innocent landowner. Thus, Menard has the burden to make a showing sufficient to establish the existence of a material dispute of fact as to whether each of the following elements in the innocent landowner defense can be satisfied:

> 1. The release or threatened release of a hazardous substance and the resulting damages were caused solely by an act or omission of a third party;
> 2. The third party's act or omission did not occur in connection with a contractual relationship with the defendant;
> 3. The defendant exercised due care with respect to the hazardous substance; and
> 4. The defendant took precautions against the third party's foreseeable acts or omissions and the foreseeable consequences resulting therefrom.

United States v. Pacific Hide & Fur Depot, Inc. 716 F. Supp. 1341, 1346–47 (D. Idaho 1989)

The first, and most glaring defect in Menard's claim to the innocent landowner defense is the undisputed fact that Menard played a significant role in causing the release of hazardous substances at the Fadrowski site. Menard's excavation of the site in 1983 caused barrels of waste to be unearthed and ruptured. In its brief, however, Menard contends that the sole cause of the release or threatened release was the illegal dumping of hazardous substances by an as yet undetermined third party. Nonetheless, Menard admits that "[s]ome hazardous substances may have been spilled from the illegally dumped barrels when Menard's contractor was excavating the site." Clearly then because Menard played some role in the release of the

hazardous substances at the site, the undetermined third party was not the sole cause of the release. Therefore, it cannot invoke the innocent landowner defense.

Although Menard's failure to establish the first element of the section 107(b)(3) defense is dispositive, the Court concludes that it is also extremely unlikely that Menard could satisfy the other elements of the defense. For example, in order to show that it had no contractual relationship with Fadrowski and is thus absolved from CERCLA liability, Menard would have to establish that—after undertaking all appropriate inquiry into the prior ownership and use of the property—it neither knew, nor had reason to know, that any hazardous substances were disposed of at the Fadrowski site. 42 U.S.C. § 9601(35). Putting aside the complex issue of whether Menard undertook an appropriate inquiry, the Court concludes Menard should have known that hazardous substances may have been disposed of at the site.

The simple fact that the site was used as a dump by Fadrowski should have put Menard on notice that hazardous substances might be present there. Moreover, Ed's Trucking was licensed to carry a wide variety of wastes including some that are considered hazardous under CERCLA. Therefore, it was not at all unlikely that Ed's Trucking company could have dumped some hazardous substances at the site. Finally, Menard admitted conducting a pre-purchase search of the City of Franklin files on the Fadrowski site. At that time, the city's files contained the letter written by City of Franklin Engineer, John Bennett, requesting that Fadrowski bring the site into compliance with the City and State codes. A request of this nature by the City Engineer should have alerted a prudent, sophisticated purchaser, like Menard, that the site was not currently in compliance. All of the information Menard did discover in its investigation should have, at a minimum, led it to inquire further into the prior use of the site.

Therefore, because the Court is satisfied Acme has established all the elements of Menard's liability under section 107(a) of CERCLA and that Menard cannot satisfy several elements of the innocent purchaser defense, the Court concludes that there is no triable issue of fact as to whether Menard is liable to Acme for the response costs it incurred. Accordingly, Acme's motion for partial summary judgment will be granted. ...

ASSIGNMENT 13: NATURAL RESOURCES

In this assignment, we take up the process by which property rights in natural resources are established. Our three examples are travel, water, and broadcasting. In each case, the crucial questions are (1) what rules apply to users of the resource, given the need to respect other users' interests, (2) who determines what rules will apply, and (3) what other choices were available. Are the systems we have the best possible ones, or just accidents of history? Are they consistent with the rules (first possession, an owner's right to exclude, well-defined rights, etc.) we have studied in other contexts?

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Hinman v. Pacific Air Transport and notes 1–4	10	9
Note on the navigation servitude	291	308
Evans v. Merriwether and notes	325	350
Coffin v. Left Hand Ditch Co. and notes 2, 6, 7	330	355
Tribune Co v. Oak Leaves Broadcasting Station and notes 1–4	347	373

ASSIGNMENT 14: FEE SIMPLE AND LIFE ESTATE

Now that we understand the basic rights of property owners, and where those rights come from, we are ready to tackle the largest, trickiest, and most important part of the course: the common law's extensive menu of different and overlapping property interests. This assignment and the next two are based around the "freehold estates in land," the core of the Anglo-American property tradition. For this assignment, we will discuss two "possessory estates," one that lasts forever (the fee simple absolute) and one for the lifetime of a specified person (the life estate). Because all men are mortal, something has to happen to the property of of the owners of life estates when they die; the corresponding "future interests" are called reversions and remainders.

I will lecture on the rules, and we will discuss the two cases to understand what it means to own "only" a life estate in property. Do not worry about the defeasible fees and their corresponding future interests. Do not worry about vesting.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
History of the estates in land system (background, skim)	*Understanding* ch. 8	
Present estate (fee simple and life estate)	*id.* §§ 9.05[A], [B], [D]	
Note on the conservation of estates	518	562
Introductory note on the flexibility of the estate system	532	576
White v. Brown	Supplement	
Maryland Code, Real Property (estates in land)	Supplement	
Brokaw v. Fairchild and notes 4-5	552	596

White v. Brown

558 S.W.2d 938 (Tenn. 1977)

Brock, Justice:

This is a suit for the construction of a will. The Chancellor held that the will passed a life estate, but not the remainder, in certain realty, leaving the remainder to pass by inheritance to the testatrix's heirs at law. The Court of Appeals affirmed.

Mrs. Jessie Lide died on February 15, 1973, leaving a holographic will which, in its entirety, reads as follows:

> April 19, 1972
>
> I, Jessie Lide, being in sound mind declare this to be my last will and testament. I appoint my niece Sandra White Perry to be the executrix of my estate. I wish Evelyn White to have my home to live in and not to be sold.
>
> I also leave my personal property to Sandra White Perry. My house is not to be sold.
>
> Jessie Lide
>
> (Underscoring by testatrix).

Mrs. Lide was a widow and had no children. Although she had nine brothers and sisters, only two sisters residing in Ohio survived her. These two sisters quitclaimed any interest they might have in the residence to Mrs. White. The nieces and nephews of the testatrix, her heirs at law, are defendants in this action.

Mrs. White, her husband, who was the testatrix's brother, and her daughter, Sandra White Perry, lived with Mrs. Lide as a family for some twenty-five years. After Sandra married in 1969 and Mrs. White's husband died in 1971, Evelyn White continued to live with Mrs. Lide until Mrs. Lide's death in 1973 at age 88.

Mrs. White, joined by her daughter as executrix, filed this action to obtain construction of the will, alleging that she is vested with a fee simple title to the home. The defendants contend that the will conveyed only a life estate to Mrs. White, leaving the remainder to go to them under our laws of intestate succession. The Chancellor held that the will unambiguously conveyed only a life interest in the home to Mrs. White and refused to consider extrinsic evidence concerning Mrs. Lide's relationship with her surviving relatives. Due to the debilitated condition of the property and in accordance with the desire of all parties, the Chancellor ordered the property sold with the proceeds distributed in designated shares among the beneficiaries.

I.

1

Our cases have repeatedly acknowledged that the intention of the testator is to be ascertained from the language of the entire instrument when read in the light of surrounding circumstances. But, the practical difficulty in this case, as in so many other cases involving wills drafted by lay persons, is that the words chosen by the testatrix are not specific enough to clearly state her intent. Thus, in our opinion, it is not clear whether Mrs. Lide intended to convey a life estate in the home to Mrs. White, leaving the remainder interest to descend by operation of law, or a fee interest with a restraint on alienation. Moreover, the will might even be read as conveying a fee interest subject to a condition subsequent (Mrs. White's failure to live in the home).

In such ambiguous cases it is obvious that rules of construction, always yielding to the cardinal rule of the testator's intent, must be employed as auxiliary aids in the courts' endeavor to ascertain the testator's intent.

In 1851 our General Assembly enacted two such statutes of construction, thereby creating a statutory presumption against partial intestacy.

Chapter 33 of the Public Acts of 1851 (now codified as T.C.A. ss 64-101 and 64-501) reversed the common law presumption that a life estate was intended unless the intent to pass a fee simple was clearly expressed in the instrument. T.C.A. s 64-501 provides:

> 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.

Chapter 180, Section 2 of the Public Acts of 1851 (now codified as T.C.A. s 32-301) was specifically directed to the operation of a devise. In relevant part, T.C.A. s 32-301 provides:

> A will . . . shall convey all the real estate belonging to (the testator) or in which he had any interest at his decease, unless a contrary intention appear by its words and context.

2

Thus, under our law, unless the "words and context" of Mrs. Lide's will clearly evidence her intention to convey only a life estate to Mrs. White, the will should be construed as passing the home to Mrs. White in fee. If the expression in the will is doubtful, the doubt is resolved against the limitation and in favor of the absolute estate.

Several of our cases demonstrate the effect of these statutory presumptions against intestacy by construing language which might seem to convey an estate for life, without provision for a gift over after the termination of such life estate, as passing a fee simple instead. In *Green v. Young*, 40 S.W.2d 793 (1931), the testatrix's disposition of all of her property to her husband "to be used by him for his support and comfort during his life" was held to pass a fee estate. Similarly, in *Williams v. Williams*, 65 S.W.2d 561 (1933), the testator's devise of real property to his children "for and during their natural lives" without provision for a gift over was held to convey a fee. And, in *Webb v. Webb*, 385 S.W.2d 295 (1964), a devise of personal property to the testator's wife "for her maintenance, support and comfort, for the full period of her natural life" with complete powers of alienation but without provision for the remainder passed absolute title to the widow.

II.

Thus, if the sole question for our determination were whether the will's conveyance of the home to Mrs. White "to live in" gave her a life interest or a fee in the home, a conclusion favoring the absolute estate would be clearly required. The question, however, is complicated somewhat by the caveat contained in the will that the home is "not to be sold" a restriction conflicting with the free alienation of property, one of the most significant incidents of fee ownership. We must determine, therefore, whether Mrs. Lide's will, when taken as a whole, clearly evidences her intent to convey only a life estate in her home to Mrs. White.

Under ordinary circumstances a person makes a will to dispose of his or her entire estate. If, therefore, a will is susceptible of two constructions, by one of which the testator disposes of the whole of his estate and by the other of which he disposes

of only a part of his estate, dying intestate as to the remainder, this Court has always preferred that construction which disposes of the whole of the testator's estate if that construction is reasonable and consistent with the general scope and provisions of the will. A construction which results in partial intestacy will not be adopted unless such intention clearly appears. It has been said that the courts will prefer any reasonable construction or any construction which does not do violence to a testator's language, to a construction which results in partial intestacy. Ledbetter, supra.

The intent to create a fee simple or other absolute interest and, at the same time to impose a restraint upon its alienation can be clearly expressed. If the testator specifically declares that he devises land to A "in fee simple" or to A "and his heirs" but that A shall not have the power to alienate the land, there is but one tenable construction, viz., the testator's intent is to impose a restraint upon a fee simple. To construe such language to create a life estate would conflict with the express specification of a fee simple as well as with the presumption of intent to make a complete testamentary disposition of all of a testator's property. ...

In our opinion, testatrix's apparent testamentary restraint on the alienation of the home devised to Mrs. White does not evidence such a clear intent to pass only a life estate as is sufficient to overcome the law's strong presumption that a fee simple interest was conveyed.

Accordingly, we conclude that Mrs. Lide's will passed a fee simple absolute in the home to Mrs. White. Her attempted restraint on alienation must be declared void as inconsistent with the incidents and nature of the estate devised and contrary to public policy.

Harbison, Justice, dissenting:

With deference to the views of the majority, and recognizing the principles of law contained in the majority opinion, I am unable to agree that the language of the will of Mrs. Lide did or was intended to convey a fee simple interest in her residence to her sister-in-law, Mrs. Evelyn White.

The testatrix expressed the wish that Mrs. White was "to have my home to live in and not to be sold." The emphasis is that of the testatrix, and her desire that Mrs. White was not to have an unlimited estate in the property was reiterated in the last sentence of the will, to wit: "My house is not to be sold." ...

The will does not seem to me to be particularly ambiguous, and like the Chancellor and the Court of Appeals, I am of the opinion that the testatrix gave Mrs. White a life estate only, and that upon the death of Mrs. White the remainder will pass to the heirs at law of the testatrix. ...

In the present case the testatrix knew how to make an outright gift, if desired. She left all of her personal property to her niece without restraint or limitation. As to her sister-in-law, however, she merely wished the latter have her house "to live in," and expressly withheld from her any power of sale.

The majority opinion holds that the testatrix violated a rule of law by attempting to restrict the power of the donee to dispose of the real estate. Only by thus striking a portion of the will, and holding it inoperative, is the conclusion reached that an unlimited estate resulted.

In my opinion, this interpretation conflicts more greatly with the apparent intention of the testatrix than did the conclusion of the courts below, limiting the gift to Mrs. White to a life estate. I have serious doubt that the testatrix intended to create any illegal restraint on alienation or to violate any other rules of law. It seems to me that she rather emphatically intended to provide that her sister-in-law was not to be able to sell the house during the lifetime of the latter a result which is both legal and consistent with the creation of a life estate. ...

Maryland Code, Real Property (estates in land)

§ 2-102. Estates in tail

Any person seized of an estate tail, in possession, reversion, or remainder, in any land, tenement, or hereditament may grant and sell it in the form of a grant as if he were seized of an estate in fee simple and the grant is good and available, to all intents and purposes, against every person whom the grantor might debar by any mode of common recovery, or by any other means.

§ 4-105. Words of inheritance

No words of inheritance are necessary to create an estate in fee simple ... Unless a contrary intention appears by express terms or is necessarily implied, every grant of land passes a fee simple estate ...

ASSIGNMENT 15: DEFEASIBLE ESTATES

A *defeasible* estate is one that can terminate when some event takes place (other than the natural expiration of a life estate at the death of the measuring person). It is important to know about the logic behind defeasible estates—and the corresponding limitations on when they can be used; it is much less important to master the terminology.

There are no readings on the Rule Against Perpetuities. I will lecture on the Rule, and eliminate many of the distracting complexities. The cases help us explore what grantors can and cannot do with defeasible interests.

This assignment concludes with a set of problems. Come to class having prepared answers to all of them. Being right is less important than having thought through the issues they raise.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Defeasible estates	*Understanding* §§ 9.06–.08	
Klamath Falls v. Bell and notes 1–5	523	568
Mountain Brow Lodge v. Toscano and notes 2–3	567	607
Problems 1–11	517	561
Maryland Code, Real Property (future interests)	Supplement	

Maryland Code, Real Property (future interests)

§ 6-101. Thirty-year limitations period for possibility of reverter or condition subsequent to right of entry ...[4]

(c) If the specified contingency of a special limitation creating a possibility of reverter or of a condition subsequent creating a right of entry for condition broken does not occur within 30 years of the effective date of the instrument creating the possibility or condition, the possibility or condition no longer is valid thereafter.

§ 6-103. Restrictions relating to actions for recovery or entry of land

No person may commence an action for the recovery of land, nor make an entry on it, by reason of a breach of a condition subsequent, or by reason of the termination of an estate of fee-simple determinable, unless the action is commenced or entry is made within seven years after breach of the condition or from the time when the fee-simple determinable estate terminates. ... Possession of land after breach of a condition subsequent or after termination of an estate of fee-simple determinable is adverse and hostile from the first breach of a condition subsequent or from the occurrence of the event terminating the fee-simple determinable estate.

[4] [This section applies to instruments taking effect after July 1, 1969. The statute has a complicated system for interests created under older instruments.]

ASSIGNMENT 16: CO-OWNERSHIP

The previous assignments concerned ownership divided in time: first A has the right to possession, then B and then C. The common law has also left us a rich—almost certainly too rich—menu of ways to divide ownership among multiple people, all of whom are presently entitled to the rights and responsibilities of possession. They share a common core: co-owners are each allowed to use the property, and none of them may exclude the others. What distinguishes the two most common forms of co-ownership, the *tenancy in common* and the *joint* tenancy, is the question of survivorship: what happens to the property at the death of one of the owners. The different consequences are dramatic, which leads us back to the question of how people choose between the options. In the second part of the assignment, we deal with partition: what happens when co-owners find they can no longer get along, and one of them asks a court to terminate the relationship.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Note on concurrent and marital estates	595	633
James v. Taylor	Supplement	
Harms v. Sprague and notes 1–3, 6–7	611	650
Maryland Code, Real Property (co-tenancies)	Supplement	
Delfino v. Vealencis and note 1	599	637
Gillmor v. Gillmor and note 1	606	645

James v. Taylor
969 S.W.2d 672 (Ark. 1998)

Pittman, Judge:

The issue in this case is whether a deed from the late Eura Mae Redmon to her three children, W.C. Sewell, Billy Sewell, and appellee Melba Taylor, was a conveyance to them as tenants in common or as joint tenants with the right of survivorship. The chancellor held that Mrs. Redmon intended for her children to take the property as joint tenants with the right of survivorship. We reverse and remand.

The deed in question was executed by Mrs. Redmon on January 14, 1993. The conveyance was made to the three grantees "jointly and severally, and unto their heirs, assigns and successors forever," with the grantor retaining a life estate. W.C. Sewell and Billy Sewell died on November 18, 1993, and May 11, 1995, respectively. Mrs. Redmon died on February 17, 1997. Shortly thereafter, appellee filed a complaint in White County Chancery Court seeking a declaration that her mother had intended to convey the property to the grantees as joint tenants, thereby making appellee, by virtue of her brothers' deaths, sole owner of the property. Appellants, who are descendants of W.C. and Billy Sewell, opposed the complaint on the ground that the deed created a tenancy in common among the grantees. ...

Appellants and appellee agree that the term "jointly and severally" as used to describe an estate in property is ambiguous. However, they disagree over the rule of construction to be applied in the face of such ambiguity. Appellants contend that, under Arkansas law, a deed to two or more persons presumptively creates a tenancy in common unless the deed expressly creates a joint tenancy. They cite Ark.Code Ann. § 18-12-603 (1987), which reads as follows: "Every interest in real estate granted or devised to two (2) or more persons, other than executors and trustees as such, shall be in tenancy in common unless expressly declared in the grant or devise to be a joint tenancy." According to appellants, the very existence of an ambiguity within the deed means that, under the statute, a tenancy in common has been created. Appellee, on the other hand, points to the well-established rule that, when faced with an ambiguity in a deed, the trial court may determine the intent of the grantor by looking to extraneous circumstances to decide what was really intended by the language in the deed. Because, appellee argues, the chancellor in this case had strong evidence before him that Mrs. Redmon intended to create a joint tenancy in her children, his finding should not be overturned unless clearly erroneous.

The extrinsic evidence considered by the chancellor in this case weighs in favor of appellee. That evidence consisted of appellee's testimony that her mother had informed her attorney 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; that shortly after the death of W.C. Sewell, Mrs. Redmon executed a new will leaving her property to Billy Sewell and appellee and leaving nothing to W.C.'s children; that Mrs. Redmon had set up bank accounts payable upon her death to her children, and, after W.C. and Billy died, deleted their names leaving the name of the surviving child; and that Mrs. Redmon was upset before her death upon learning that there was a problem with the deed. However, we hold that the considerations expressed in Ark. Code Ann. § 18-12-603 override the rule of construction urged by appellee.

Section 18-12-603 is a statute like one of many throughout the country. At common law, joint tenancy was favored and, where possible, that estate was held to exist. However, in Arkansas, and in many other states, statutes have been adopted which presumptively construe an instrument to create a tenancy in common rather than a joint tenancy. These statutes do not prohibit joint tenancies but merely provide for a construction against a joint tenancy if the intention to create it is not clear. A statute such as section 18-12-603 is not an expression of a public policy against joint tenancies but is merely a choice by the legislature of a rule of construction that selects one of two possible interpretations of a provision otherwise ambiguous. ...

Nothing appears from the four corners of the deed in this case to indicate Mrs. Redmon's intent to convey a survivorship interest, unless that intention is to be found in the term "jointly and severally." Appellants do not cite, nor have we discovered through our own research, any Arkansas case in which a grant of ownership was made to two or more parties "jointly and severally." As the chancellor

noted below, "jointly and severally" are words of tort, not property. They have no meaning in the world of estates. In the context of an ownership interest, such a term is a legal anomaly; several ownership is, by definition, a denial of joint ownership. ...

In *Montgomery v. Clarkson*, 585 S.W.2d 483 (Mo.1979), property was deeded to two grantees "jointly." The Missouri court, relying on a statute virtually identical to ours, held that a joint tenancy was not created by the use of such language. ...

If use of the word "jointly" is not sufficient to create a joint tenancy, the term "jointly and severally," with its elusive connotation, cannot do so either. Further, Arkansas recognizes that the practice of divining the intent of a grantor or testator is subject to the qualification that such practice must not conflict with settled principles of law and rules of property.

Appellee argues that, given the deed's ambiguity, our focus should be on the intent of the grantor as gleaned not only from the instrument itself but from the extrinsic evidence presented at trial. However, evidence of the grantor's intention cannot prevail over the statute. To allow that would be to render section 18-12-603 meaningless.

Based upon the foregoing, we hold that the deed in this case did not create a joint tenancy in the grantees. The language of the deed is insufficient to overcome the statutory presumption of a tenancy in common. We therefore reverse and remand with directions for entry of an order consistent with this opinion. ...

Maryland Code, Real Property (co-tenancies)

§ 2-117. Estates in joint tenancy

No deed, will, or other written instrument which affects land or personal property, creates an estate in joint tenancy, unless the deed, will, or other written instrument expressly provides that the property granted is to be held in joint tenancy.

ASSIGNMENT 17: LEASES

Our taxonomy of interests in land continues with another form of simultaneous divided ownership: the lease. The landlord, typically in exchange for rent, transfers to the tenant the right to possess the land. In this, the first of two assignments on leases, we consider landlords' and tenants' duties toward each other. In particular, we focus on the landlord's duty to deliver possession of the premises, and on the landlord's duty to make the premises habitable. Both duties have undergone immense transformation over the centuries, almost entirely in tenants' favor. We will note a crucial distinction between commercial and residential leases, and start exploring the all-important question of what happens to one party's duties when the other is in breach. Leases sit somewhere on the boundary between property and contract, and ideas from both fields are clearly at work.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Paradine v. Jane and notes 1–3, 5–6	653	691
Smith v. McEnany and note 1	656	694
Sutton v. Temple and notes 1–4	660	696
Blackett v. Olanoff and notes before and after	666	703
Javins v. First National Realty and notes	685	719

ASSIGNMENT 18: ENDING LEASES

If the previous assignment was about how leases start, the present one is about how they end. The first part of the assignment deals with the landlord's options when the tenant either leaves early (*Sommer*) or refuses to leave (*Berg*). The second part deals with the question of what happens when either the landlord or the tenant seeks to transfer their interest in the lease to someone else. *Mullendore* focuses on the landlord's transfer of its reversionary interest. It provides a crucial introduction to the distinction between promises that are purely contractual and affect only the parties to them, and promises that "run with the land" and affect successors in interest. *Ernst* focuses on the tenant's transfer of its leasehold interest; there are, in theory, two different ways to do so. The case is an exercise in substance and form: what are the consequences of characterizing a transaction as a sublease versus as an assignment? I highly recommend that you diagram both cases as you read them.

Reading	Casebook (2nd edition)	Casebook (1st edition)
Sommer v. Kridel and notes 1–2	702	735
Berg v. Wiley and notes	388	428
Mullendore Theaters v. Growth Realty and notes	710	743
Note on assignment and sublease	713	746
Ernst v. Condit	Supplement	

Ernst v. Conditt

390 S.W.2d 703 (Tenn. Ct. App. 1964)

Chattin, Judge:

Complainants, B. Walter Ernst and wife, Emily Ernst, leased a certain tract of land in Davidson County, Tennessee, to Frank D. Rogers on June 18, 1960, for a term of one year and seven days, commencing on June 23, 1960.

Rogers went into possession of the property and constructed an asphalt race track and enclosed the premises with a fence. He also constructed other improvements thereon such as floodlights for use in the operation of a Go-Cart track.

We quote those paragraphs of the lease pertinent to the question for consideration in this controversy:

> 3. Lessee covenants to pay as rent for said leased premises the sum of $4,200 per annum, payable at the rate of $350 per month or 15% of all gross receipts, whether from sales or services occurring on the leased premises, whichever is the larger amount. …
>
> 5. Lessee shall have no right to assign or sublet the leased premises without prior written approval of Lessors. In the event of any assignment or sublease, Lessee is still liable to perform the covenants of this lease, including the covenant to pay rent, and nothing herein shall be construed as releasing Lessee from his liabilities and obligations hereunder. …

Rogers operated the business for a short time. In July, 1960, he entered into negotiations with the defendant, A. K. Conditt, for the sale of the business to him. During these negotiations, the question of the term of the lease arose. Defendant desired a two-year lease of the property. He and Rogers went to the home of complainants and negotiated an extension of the term of the lease which resulted in the following amendment to the lease, and the sublease or assignment of the lease as amended to Conditt by Rogers:

'By mutual consent of the parties, the lease executed the 18th day of June 1960, between B. Walter Ernst and wife, Emily H. Ernst, as Lessors, and Frank G. Rogers as Lessee, is amended as follows:

> 1. Paragraph 2 of said lease is amended so as to provide that the term will end July 31, 1962 and not June 30, 1961.
>
> 2. The minimum rent of $350 per month called for in paragraph 3 of said lease shall be payable by the month ...
>
> 5. Lessor hereby consents to the subletting of the premises to A. K. Conditt, but upon the express condition and understanding that the original Lessee, Frank K. Rogers, will remain personally liable for the faithful performance of all the terms and conditions of the original lease and of this amendment to the original lease.
>
> Except as modified by this amendment, all terms and conditions of the original lease dated the 18th day of June, 1960, by and between the parties shall remain in full force and effect.
>
> [Signed by the Ernsts, Rogers, and Conditt]

Conditt operated the Go-Cart track from August until November, 1960. He paid the rent for the months of August, September and October, 1960, directly to complainants. In December, 1960, complainants contacted defendant with reference to the November rent and at that time defendant stated he had been advised he was not liable to them for rent. However, defendant paid the basic monthly rental of $350.00 to complainants in June, 1961. This was the final payment received by complainants during the term of the lease as amended. The record is not clear whether defendant continued to operate the business after the last payment of rent or abandoned it. Defendant, however, remained in possession of the property until the expiration of the leasehold.

On July 10, 1962, complainants, through their Attorneys, notified Conditt by letter the lease would expire as of midnight July 31, 1962; and they were demanding a settlement of the past due rent and unless the improvements on the property were removed by him as provided in paragraph 9 of the original lease; then, in that event, they would have same removed at his expense. Defendant did not reply to this demand.

On August 1, 1962, complainants filed their bill in this cause seeking a recovery of $2,404.58 which they alleged was the balance due on the basic rent of $350.00 per month for the first year of the lease and the sum of $4,200.00, the basic rent for the

second year, and the further sum necessary **706 for the removal of the improvements constructed on the property.

The theory of the bill is that the agreement between Rogers, the original lessee, and the defendant, Conditt, is an assignment of the lease; and, therefore, defendant is directly and primarily liable to complainants.

The defendant by his answer insists the agreement between Rogers and himself is a sublease and therefore Rogers is directly and primarily liable to complainants. ...

As stated in complainants' brief, the liability of defendant to complainants depends upon whether the transfer of the leasehold interest in the premises from Rogers is an assignment of the lease or a sublease. If the transfer is a sublease, no privity of contract exists between complainants and defendant; and, therefore, defendant could not be liable to complainants on the covenant to pay rent and the expense of the removal of the improvements. But, if the transfer is an assignment of the lease, privity of contract does exist between complainants and defendant; and defendant would be liable directly and primarily for the amount of the judgment.

The general rule as to the distinction between an assignment of a lease and a sublease is an assignment conveys the whole term, leaving no interest nor reversionary interest in the grantor or assignor. Whereas, a sublease may be generally defined as a transaction whereby a tenant grants an interest in the leased premises less than his own, or reserves to himself a reversionary interest in the term.

The common law distinction between an assignment of a lease and a sublease is succinctly stated in the case of *Jaber v. Miller*, 239 S.W.2d 760 (1951):

> 'If the instrument purports to transfer the lessee's estate for the entire remainder of his term it is an assignment, regardless of its form or of the parties' intention. Conversely, if the instrument purports to transfer the lessee's estate for less than the entire term—even for a day less—it is a sublease, regardless of its form or of the parties' intention.'

The modern rule which has been adopted in this State for construing written instruments is stated in the case of *City of Nashville v. Lawrence*, 153 Tenn. 606, 284 S.W. 882:

> 'The cardinal rule to be followed in this state, in construing deeds and other written instruments, is to ascertain the intention of the parties.' ...

It is our opinion under either the common law or modern rule of construction the agreement between Rogers and defendant is an assignment of the lease.

The fact that Rogers expressly agreed to remain liable to complainants for the performance of the lease did not create a reversion nor a right to re-enter in Rogers either express or implied. The obligations and liabilities of a lessee to a lessor, under the express covenants of a lease, are not in anywise affected by an assignment or a subletting to a third party, in the absence of an express or implied agreement or some action on his part which amounts to a waiver or estops him from insisting upon compliance with the covenants. This is true even though the assignment or

sublease is made with the consent of the lessor. By an assignment of a lease the privity of estate between the lessor and lessee is terminated, but the privity of contract between them still remains and is unaffected. Neither the privity of estate or contract between the lessor and lessee are affected by a sublease.

Thus, the express agreement of Rogers to remain personally liable for the performance of the covenants of the lease created no greater obligation on his part or interest in the leasehold, other than as set forth in the original lease.

The argument that since the agreement between Rogers and defendant contains the words, 'sublet' and 'subletting' is conclusive the instrument is to be construed as a sublease is, we think, unsound.

> 'A consent to sublet has been held to include the consent to assign or mortgage the lease; and a consent to assign has been held to authorize a subletting.' 51 C.J.S. Landlord and Tenant § 36, page 552.

Prior to the consummation of the sale of the Go-Cart business to defendant, he insisted upon the execution of the amendment to the lease extending the term of the original lease. For value received and on the promise of the defendant to perform all of the conditions of the lease as amended, Rogers parted with his entire interest in the property. Defendant went into possession of the property and paid the rent to complainants. He remained in possession of the property for the entire term. By virtue of the sale of the business, defendant became the owner of the improvements with the right to their removal at the expiration of the lease.

Rogers reserved no part or interest in the lease; nor did he reserve a right of re-entry in event of a breach of any of the conditions or covenants of the lease on the part of defendant.

It is our opinion the defendant, under the terms of the agreement with Rogers, had a right to the possession of the property for the entire term of the lease as amended, including the right to remove the improvements after the expiration of the lease. Rogers merely agreed to become personally liable for the rent and the expense of the removal of the improvements upon the default of defendant. He neither expressly, nor by implication, reserved the right to re-enter for a condition broken by defendant.

Thus, we are of the opinion the use of the words, 'sublet' and 'subletting' is not conclusive of the construction to be placed on the instrument in this case; it plainly appearing from the context of the instrument and the facts and circumstances surrounding the execution of it the parties thereto intended an assignment rather than a sublease. ...

ASSIGNMENT 19: TRANSFERS

Now we turn to transfers of land. Because of the Statute of Frauds, land transactions are paper transactions, which raises a series of distinctive questions. First, what formalities are necessary to cause a transfer of property to take place? Second, what does a deed actually convey? Third, what does a deed promise about the quality of the property, or about the conveyor's rights in it? And fourth, what happens during the executory period in a land sale—after the promise to convey land becomes binding, but before the land is actually conveyed? All of these doctrines 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.

Reading	Casebook (2nd edition)	Casebook (1st edition)
Maryland Code, Real Property (statute of frauds)		Supplement
Wiggill v. Cheney		Supplement
Walters v. Tucker		Supplement
New York Real Property Law (statutory deed forms)		Supplement
McMurray v. Housworth		Supplement
Brush Grocery Kart, Inc. v. Sure Fine Market, Inc.		Supplement

Maryland Code, Real Property (statute of frauds)

§ 5-101. Parol estates with force and effect of estates or interests at will

Every corporeal estate, leasehold or freehold, or incorporeal interest in land created by parol and not in writing and signed by the party creating it, or his agent lawfully authorized by writing, has the force and effect of an estate or interest at will only, and has no other or greater force or effect, either in law or equity.

§ 5-102. Section 5-101 not applicable to leasehold estates not exceeding one year term

Section 5-101 of this title is not applicable to a leasehold estate not exceeding a term of one year.

Wiggill v. Cheney
597 P.2d 1351 (Utah 1979)

Maughan, Justice:

The material facts are undisputed. Specifically, on the 25th day of June, 1958, Lillian W. Cheney signed a deed to certain real property located in the city of Ogden, Utah, wherein the defendant, Flora Cheney, was named grantee. Thereafter Lillian Cheney placed this deed in a sealed envelope and deposited it in a safety deposit box in the names of herself and the plaintiff, Francis E. Wiggill. Following the deposition of the deed, Lillian Cheney advised plaintiff his name was on the safety deposit box

and instructed plaintiff that upon her death, he was to go to the bank where he would be granted access to the safety deposit box and its contents. Lillian Cheney further instructed, "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." At all times prior to her death, Lillian Cheney was in possession of a key to the safety deposit box and had sole and complete control over it. Plaintiff was never given the key to the safety deposit box.

Following the death of Lillian Cheney, plaintiff, after gaining access to the safety deposit box, delivered the deed contained therein to Flora Cheney, the named grantee.

The sole issue presented here on appeal is whether or not the acts of plaintiff constitute a delivery of the deed such as will render it enforceable as a valid conveyance.

The rule is well settled that a deed, to be operative as a transfer of the ownership of land, or an interest or estate therein, must be delivered. It was equally settled in this and the vast majority of jurisdictions that a valid delivery of a deed requires it pass beyond the control or domain of the grantor. The requisite relinquishment of control or dominion over the deed may be established, notwithstanding the fact the deed is in possession of the grantor at her death, by proof of facts which tend to show delivery had been made with the intention to pass title and to explain the grantor's subsequent possession. However, in order for a delivery effectively to transfer title, the grantor must part with possession of the deed or the right to retain it.

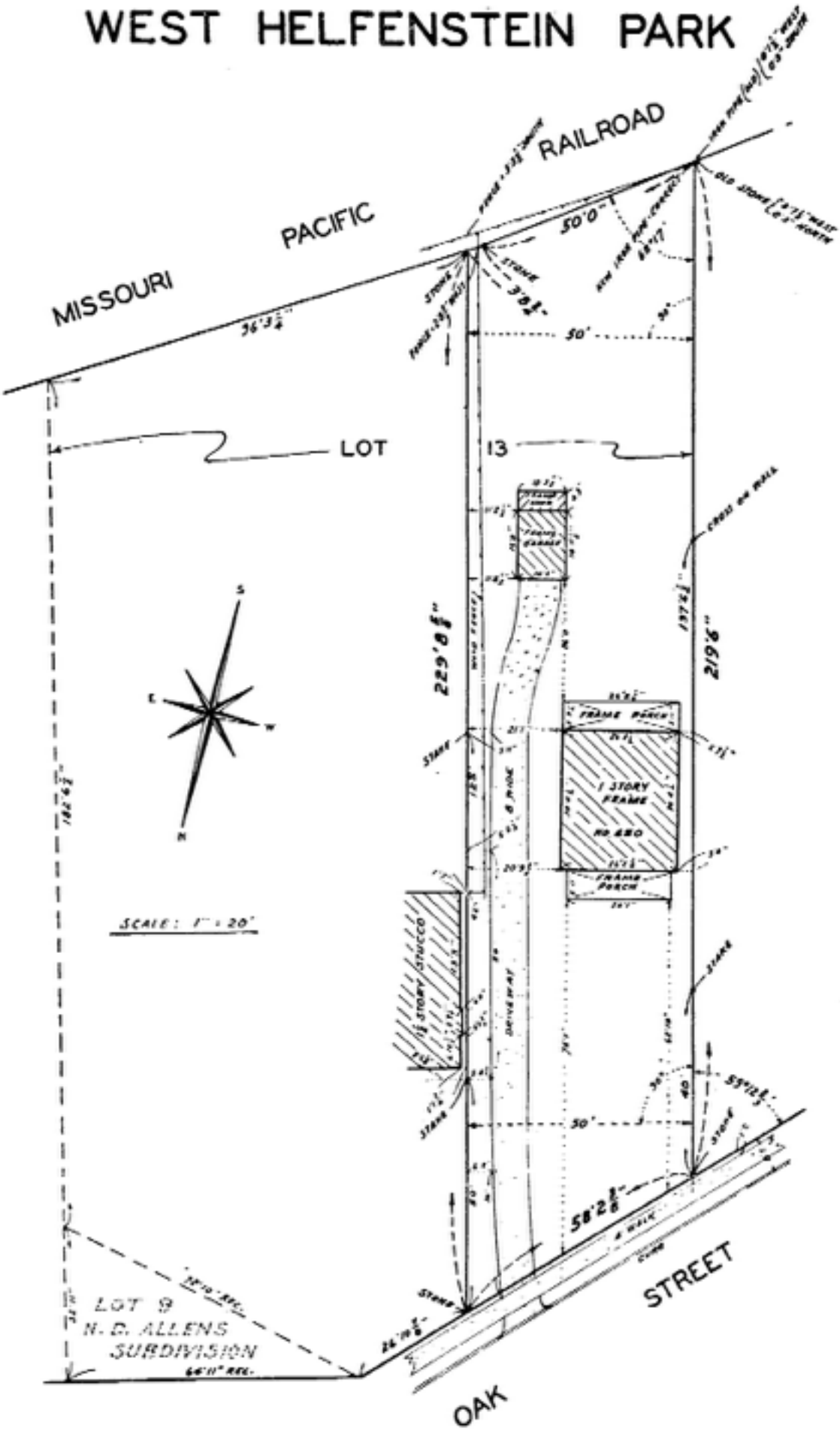
The evidence presented in the present case establishes Lillian Cheney remained in sole possession and control of the deed in question until her death. Because no actual delivery of the deed occurred prior to the death of the grantor, the subsequent manual delivery of the deed by plaintiff to defendant conveyed no title to the property described therein, or any part thereof, or any of its contents.

Walters v. Tucker

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

Hollingsworth, Judge:

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.


WEST HELFENSTEIN PARK
RAILROAD
PACIFIC
MISSOURI
LOT
13
50'0"
50'
229'8"
219'6"
1 STORY FRAME
FRAME PORCH
FRAME GARAGE
1½ STORY STUCCO
DRIVEWAY
SCALE: 1" = 20'
LOT 9
N. D. ALLENS
SUBDIVISION
STREET
OAK

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.

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 shown above 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.

New York Real Property Law (statutory deed forms)

§ 258. Short forms of deeds and mortgages.

The use of the following forms of instruments for the conveyance and mortgage of real property is lawful, but this section does not prevent or invalidate the use of other forms:

Statutory Form A (Individual)
DEED WITH FULL COVENANTS.

This indenture, made the ..... day of ..... nineteen hundred and ....., between ..... (insert residence) party of the first part, and ..... (insert residence) party of the second part,

Witnesseth, that the party of the first part, in consideration of ..... dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, ... and assigns forever, all ..... (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. 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:

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 property, 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 roadway 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.

Brush Grocery Kart, Inc. v. Sure Fine Market, Inc.
47 P.3d 680 (Colo. 2002)

Justice Coats delivered the opinion of the court: …

In October 1992 Brush Grocery Kart, Inc. and Sure Fine Market, Inc. entered into a five-year "Lease with Renewal Provisions and Option to Purchase" for real property, including a building to be operated by Brush as a grocery store. Under the contract's purchase option provision, any time during the last six months of the lease, Brush could elect to purchase the property at a price equal to the average of the appraisals of an expert designated by each party.

Shortly before expiration of the lease, Brush notified Sure Fine of its desire to purchase the property and begin the process of determining a sale price. Although each party offered an appraisal, the parties were unable to agree on a final price by the time the lease expired. Brush then vacated the premises, returned all keys to Sure Fine, and advised Sure Fine that it would discontinue its casualty insurance covering the property during the lease. Brush also filed suit, alleging that Sure Fine failed to negotiate the price term in good faith and asking for the appointment of a special master to determine the purchase price. Sure Fine agreed to the appointment of a special master and counterclaimed, alleging that Brush negotiated the price term in bad faith and was therefore the breaching party.

During litigation over the price term, the property was substantially damaged during a hail storm. With neither party carrying casualty insurance, each asserted that the other was liable for the damage. The issue was added to the litigation at a stipulated amount of $60,000. … The court then found that under the doctrine of equitable conversion, Brush was the equitable owner of the property and bore the risk of loss. It therefore declined to abate the purchase price or award damages to Brush for the loss.

Brush appealed the loss allocation, and the court of appeals affirmed on similar grounds. ...

In the absence of statutory authority, the rights, powers, duties, and liabilities arising out of a contract for the sale of land have frequently been derived by reference to the theory of equitable conversion. This theory or doctrine, which has been described as a legal fiction, is based on equitable principles that permit the vendee to be considered the equitable owner of the land and debtor for the purchase money and the vendor to be regarded as a secured creditor. The changes in rights and liabilities that occur upon the making of the contract result from the equitable right to specific performance. Even with regard to third parties, the theory has been relied on to determine, for example, the devolution, upon death, of the rights and liabilities of each party with respect to the land, and to ascertain the powers of creditors of each party to reach the land in payment of their claims.

The assignment of the risk of casualty loss in the executory period of contracts for the sale of real property varies greatly throughout the jurisdictions of this country. What appears to yet be a slim majority of states places the risk of loss on the vendee from the moment of contracting, on the rationale that once an equitable conversion takes place, the vendee must be treated as owner for all purposes. Once the vendee becomes the equitable owner, he therefore becomes responsible for the condition of the property, despite not having a present right of occupancy or control. In sharp contrast, a handful of other states reject the allocation of casualty loss risk as a consequence of the theory of equitable conversion and follow the equally rigid "Massachusetts Rule," under which the seller continues to bear the risk until actual transfer of the title, absent an express agreement to the contrary. A substantial and growing number of jurisdictions, however, base the legal consequences of no-fault casualty loss on the right to possession of the property at the time the loss occurs. This view has found expression in the Uniform Vendor and Purchaser Risk Act, and while a number of states have adopted some variation of the Uniform Act, others have arrived at a similar position through the interpretations of their courts. ...

In *Wiley v. Lininger*, 204 P.2d 1083, [(1949)] where fire destroyed improvements on land occupied by the vendee during the multi-year executory period of an installment land contract, we held, according to the generally accepted rule, that neither the buyer nor the seller, each of whom had an insurable interest in the property, had an obligation to insure the property for the benefit of the other. We also adopted a rule, which we characterized as "the majority rule," that "the vendee under a contract for the sale of land, being regarded as the equitable owner, assumes the risk of destruction of or injury to the property *where he is in possession*, and the destruction or loss is not proximately caused by the negligence of the vendor." *Id*. (emphasis added). The vendee in possession was therefore not relieved of his obligation to continue making payments according to the terms of the contract, despite material loss by fire to some of the improvements on the property. ...

Those jurisdictions that indiscriminately include the risk of casualty loss among the incidents or “attributes" of equitable ownership do so largely in reliance on ancient authority or by considering it necessary for consistent application of the theory of equitable conversion. Under virtually any accepted understanding of the theory, however, equitable conversion is not viewed as entitling the purchaser to every significant right of ownership, and particularly not the right of possession. As a matter of both logic and equity, the obligation to maintain property in its physical condition follows the right to have actual possession and control rather than a legal right to force conveyance of the property through specific performance at some future date. See 17 Samuel Williston, A Treatise On the Law of Contracts § 50:46, at 457-58 (Richard A. Lord ed., 4th ed. 1990) (“[I]t is wiser to have the party in possession of the property care for it at his peril, rather than at the peril of another.”).

The equitable conversion theory is literally stood on its head by imposing on a vendee, solely because of his right to specific performance, the risk that the vendor will be unable to specifically perform when the time comes because of an accidental casualty loss. It is counterintuitive, at the very least, that merely contracting for the sale of real property should not only relieve the vendor of his responsibility to maintain the property until execution but also impose a duty on the vendee to perform despite the intervention of a material, no-fault casualty loss preventing him from ever receiving the benefit of his bargain. Such an extension of the theory of equitable conversion to casualty loss has never been recognized by this jurisdiction, and it is neither necessary nor justified solely for the sake of consistency.

By contrast, there is substantial justification, both as a matter of law and policy, for not relieving a vendee who is entitled to possession before transfer of title, like the vendee in *Wiley*, of his duty to pay the full contract price, notwithstanding an accidental loss. In addition to having control over the property and being entitled to the benefits of its use, an equitable owner who also has the right of possession has already acquired virtually all of the rights of ownership and almost invariably will have already paid at least some portion of the contract price to exercise those rights. By expressly including in the contract for sale the right of possession, which otherwise generally accompanies transfer of title, the vendor has for all practical purposes already transferred the property as promised, and the parties have in effect expressed their joint intention that the vendee pay the purchase price as promised. ...

In the absence of a right of possession, a vendee of real property that suffers a material casualty loss during the executory period of the contract, through no fault of his own, must be permitted to rescind and recover any payments he had already made. ...

Here, Brush was clearly not in possession of the property as the equitable owner. Even if the doctrine of equitable conversion applies to the option contract between Brush and Sure Fine and could be said to have converted Brush's interest to an equitable ownership of the property at the time Brush exercised its option to

purchase, neither party considered the contract for sale to entitle Brush to possession. Brush was, in fact, not in possession of the property, and the record indicates that Sure Fine considered itself to hold the right of use and occupancy and gave notice that it would consider Brush a holdover tenant if it continued to occupy the premises other than by continuing to lease the property. The casualty loss was ascertainable and in fact stipulated by the parties, and neither party challenged the district court's enforcement of the contract except with regard to its allocation of the casualty loss. Both the court of appeals and the district court therefore erred in finding that the doctrine of equitable conversion required Brush to bear the loss caused by hail damage.

ASSIGNMENT 20: TITLE RECORDS

Today, we return to the problem of conflicting transfers of the same property. The basic rules here are the same as for personal property: *memo dat;* first in time, first in right; a thief takes no title and can give none; *bona fide* purchasers for value and without notice take good title even if one of the transfers in their chain of title was fraudulently obtained. But real property raises distinctive issues of its own, for two reasons. First, thanks as noted in the previous assignment, most transfers of real property are paper transactions, which creates new opportunities for mistake and fraud. Second, real property is sufficiently important that it is subject to a recording system: official land records both provide notice of claims and protect those who rely on the absence of such notice.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Harding v. Ja Laur	Supplement	
Notes on recording acts	918–23	917–23
Maryland Code, Real Property (recording act)	Supplement	
Problems 1–6 (answer using the Maryland recording act)	926	923
Hood v. Webster	929	924

Harding v. Ja Laur
315 A.2d 132 (Md. Ct. 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."Atthat 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 demurrers 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. ...

Maryland Code, Real Property (recording act)

§ 3-101. Deeds required to be executed and recorded; exceptions; memorandum of lease

(a) General rule. -- Except as otherwise provided in this section, no estate of inheritance or freehold, declaration or limitation of use, estate above seven years, or deed may pass or take effect unless the deed granting it is executed and recorded. ...

§ 3-102. Other instruments which may be recorded

(a) In general. —

(1) Any other instrument affecting property ... may be recorded. ...

§ 3-202. Possession under an unrecorded deed

If a grantee under an unrecorded deed is in possession of the land and his possession is inconsistent with the record title, his possession constitutes constructive notice of what an inquiry of the possessor would disclose as to the existence of the unrecorded deed.

§ 3-203. Subsequent deed; priority of deed first recorded

Every recorded deed or other instrument takes effect from its effective date as against the grantee of any deed executed and delivered subsequent to the effective date, unless the grantee of the subsequent deed has:

(1) Accepted delivery of the deed or other instrument:

(i) In good faith;

(ii) Without constructive notice under § 3-202; and

(iii) For a good and valuable consideration; and

(2) Recorded the deed first.

ASSIGNMENT 21: MORTGAGES

The "mortgage" is a device for financing land purchases; most people, when they think of a mortgage, think of a loan. But a mortgage loan is interesting from a property point of view because it is a secured loan: the lender can "foreclose" on the property if the borrower fails to make the promised payments. The history of mortgage law is a history of back-and-forth between lenders seeking reliable protection for their loans and borrowers seeking relief from unfair terms or unexpected bad fortune. Be warned that while the idea of a mortgage is conceptually simple, it has been implemented through a dizzying variety of different transactional forms, and states have responded with an equally dizzying array of doctrines to regulate the mortgage process. *Murphy* explores the basics of the mortgage loan and the foreclosure process. *Skendzel* explores the question of which kinds of transactions are "really" mortgages in disguise and should be treated as such by the legal system.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Introductory material on mortgages	*Understanding* § 22.01–.03	
Murphy v. Financial Development Corp.	825	847
Skendzel v. Marshall and note 1	833	855

ASSIGNMENT 22: EASEMENTS

In this assignment and the next, we consider devices used by neighbors to coordinate their uses of land. Today we discuss easements, which give one party the right to use the land of another, usually to cross over it for specific purposes. The first conceptual challenge posed by easements is how to distinguish them from *licenses*: simple (and revocable) grants of permission from the landowner. *Marrone* illustrates the difference; we will debate how convincingly it does so.

Then we discuss two common ways of creating easements. *Marcus Cable* involves an express grant, which of course raises the question of how to interpret the language in the instrument creating one. *Holbrook*, on the other hand, involves an easement created by conduct. It shows two diametrically opposed doctrines at work: the heart of the easement by prescription is the use of land without permission, while the heart of the easement by estoppel is the use of land with permission. (Note that we will not be discussing easements by prior use or easements by necessity, which raise doctrinal complexities out of all proportion to their importance.) Finally, *Fontainbleau* illustrates some of the issues that arise at the boundary between easement and nuisance.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Marrone v. Washington Jockey Club	Supplement	
Note on varieties of easements	986	978
Marcus Cable Associates v. Krohn	Supplement	
Holbrook v. Taylor	997	997
Fontainbleau v. Eden Roc and notes 2–4	1013	1001

Marrone v. Washington Jockey Club

227 U.S. 633 (1913)

This is an action of trespass for forcibly preventing the plaintiff from entering the Bennings Race Track in this District after he had bought a ticket of admission, and for doing the same thing, or turning him out, on the following day just after he had dropped his ticket into the box. There was also a count charging that the defendants conspired to destroy the plaintiff's reputation and that they excluded him on the charge of having 'doped' or drugged a horse entered by him for a race a few days before, in pursuance of such conspiracy. But as no evidence of a conspiracy was introduced and as no more force was used than was necessary to prevent the plaintiff from entering upon the race track, the argument hardly went beyond an attempt to overthrow the rule commonly accepted in this country from the English cases, and adopted below, that such tickets do not create a right *in rem*.

We see no reason for declining to follow the commonly accepted rule. The fact that the purchase of the ticket made a contract is not enough. A contract binds the person of the maker but does not create an interest in the property that it may

concern, unless it also operates as a conveyance. The ticket was not a conveyance of an interest in the race track, not only because it was not under seal but because by common understanding it did not purport to have that effect. There would be obvious inconveniences if it were construed otherwise. But if it did not create such an interest, that is to say, a right *in rem* valid against the landowner and third persons, the holder had no right to enforce specific performance by self-help. His only right was to sue upon the contract for the breach. It is true that if the contract were incidental to a right of property either in the land or in goods upon the land, there might be an irrevocable right of entry, but when the contract stands by itself it must be either a conveyance or a license subject to be revoked.

Marcus Cable Associates v. Krohn

90 S.W.3d 697 (Tex. 2002)

Justice O'Neill delivered the opinion of the Court: ...

This case centers around the scope of a property interest granted over sixty years ago. In 1939, Alan and Myrna Krohn's predecessors in interest granted to the Hill County Electric Cooperative an easement that allows the cooperative to use their property for the purpose of constructing and maintaining "an electric transmission or distribution line or system." ...

n 1991, Hill County Electric entered into a "Joint Use Agreement" with a cable television provider, which later assigned its rights under the agreement to Marcus Cable Associates, L.P. Under the agreement, Marcus Cable obtained permission from Hill County Electric to attach its cable lines to the cooperative's poles. ...

Seven years later, the Krohns sued Marcus Cable, alleging that the company did not have a valid easement and had placed its wires over their property without their knowledge or consent. The Krohns asserted a trespass claim, and alleged that Marcus Cable was negligent in failing to obtain their consent before installing the cable lines. The Krohns sought an injunction ordering the cable wires' removal, as well as actual and exemplary damages. In defense, Marcus Cable asserted a right to use Hill County Electric's poles under the cooperative's easement and under Texas statutory law. ...

A property owner's right to exclude others from his or her property is recognized as one of the most essential sticks in the bundle of rights that are commonly characterized as property. A landowner may choose to relinquish a portion of the right to exclude by granting an easement, but such a relinquishment is limited in nature. Unlike a possessory interest in land, an easement is a nonpossessory interest that authorizes its holder to use the property for only particular purposes.

Marcus Cable claims rights under Hill County Electric's express easement, that is, an easement conveyed by an express grant. While the common law recognizes that certain easements may be assigned or apportioned to a third party, the third party's use cannot exceed the rights expressly conveyed to the original easement

holder. Marcus Cable's rights, therefore, turn on whether the cooperative's easement permits the Krohns' property to be used for the purpose of installing cable-television lines. ...

We apply basic principles of contract construction and interpretation when considering an express easement's terms. The contracting parties' intentions, as expressed in the grant, determine the scope of the conveyed interest. ...

The common law does allow some flexibility in determining an easement holder's rights. In particular, the manner, frequency, and intensity of an easement's use may change over time to accommodate technological development. But such changes must fall within the purposes for which the easement was created, as determined by the grant's terms. Thus, contrary to Marcus Cable's argument, an express easement encompasses only those technological developments that further the particular purpose for which the easement was granted. Otherwise, easements would effectively become possessory, rather than nonpossessory, land interests. ...

Finally, Marcus Cable contends that its use should be allowed because attaching cable-television wires to Hill County Electric's utility poles does not materially increase the burden to the servient estate. But again, if a use does not serve the easement's express purpose, it becomes an unauthorized presence on the land whether or not it results in any noticeable burden to the servient estate. Thus, the threshold inquiry is not whether the proposed use results in a material burden, but whether the grant's terms authorize the proposed use. With these principles in mind, we turn to the easement at issue in this case. ...

The easement granted Hill County Electric the right to use the Krohns' property for the purpose of constructing and maintaining an "electric transmission or distribution line or system." The terms "electric transmission" and "electric distribution" are commonly and ordinarily associated with power companies conveying electricity to the public. Texas cases decided around the time the cooperative's easement was granted strongly suggest that this was the commonly understood meaning of those terms. Accordingly, we construe the easement's terms to allow use of the property for facilities to transmit electricity.

... While cable television may utilize electrical impulses to transmit communications, as Marcus Cable claims, television transmission is not a more technologically advanced method of delivering electricity.

Marcus Cable cites only two cases involving easements whose grants did not include telephone or telegraph services, and neither supports its position. In *Centel Cable Television, Inc. v. Cook*, the court interpreted easement language that permitted its holder to maintain "a line for the transmission and/or distribution of electric energy thereover, *for any and all purposes for which electric energy is now, or may hereafter be used*." 567 N.E.2d 1010, 1014 (Ohio 1991) (emphasis added). Observing that cable-television broadcasting "*utilize[s]* ... 'electric energy,'" the court concluded that the grant language was broad enough to encompass cable television. Id. (emphasis added). And *Hise v. BARC Electric Cooperative*, 492 S.E.2d 154, 158 (Va.

1997), involved a right-of-way easement by prescription that had been used for cabletelevision lines during the prescriptive period and that was later widened through eminent domain. It did not involve a privately-negotiated, express easement. The easements in Marcus Cable's cited cases are simply not comparable to the more limited, express easement presented here. ...

In sum, the easement language here, properly construed, does not permit cabletelevision lines to be strung across the Krohns' land without their consent. However laudable the goal of extending cable service might be, we cannot disregard the easement's express terms to enlarge its purposes beyond those intended by the contracting parties. To the extent the trial court granted Marcus Cable summary judgment on this basis, it erred, and the court of appeals correctly reversed.

ASSIGNMENT 23: COVENANTS

Suppose that your next-door neighbor has a beautiful oak, which casts a cool late-afternoon shadow on your yard on hot summer days. You might ask her to leave the oak standing for as long as it remains healthy. If she agrees, the two of you could write up the promise not to cut the oak in a contract, which you can enforce should she ever try to change her mind. But what happens if she sells her house next year? The buyer isn't a party to the contract and will be free take an axe to the oak. And what if you want to sell your house? Your buyer isn't a party to the contract either, and may not be able to enforce it.

This problem—how to make such "covenants" enforceable by and against successors in interest—has challenged landowners and lawyers for centuries. This assignment is the story of how the common law of property did what contracts alone cannot: create covenants that would "run with the land." *Tulk*, *Neponsit*, and *Sanborn* illustrate the fancy doctrinal and conceptual footwork required.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
Tulk v. Moxhay and introductory note	1025	1014
Neponsit v. Emigrant, introductory note, and notes 2–4	1030	1019
Note on the requirements for covenants to run	1038	1026
Sanborn v. McLean	1046	1034

ASSIGNMENT 24: ZONING

This assignment and the next deal with permissible and impermissible government regulation of property. Today, we start with zoning, one of the most significant and widespread forms of such regulation. *Euclid* is both a good illustration of the purposes and practice of zoning and the leading opinion upholding its constitutionality. The remaining cases demonstrate some common kinds of zoning in action: improving the aesthetics of a neighborhood (*Anderson*) and to dealing with unusually shaped or situated properties (*Detwiler*).

Reading	Casebook (2nd edition)	Casebook (1st edition)
Introductory note on zoning	1062	1049
Village of Euclid v. Ambler Realty	1064	1052
Anderson v. City of Issaquah	Supplement	
Detwiler v. Zoning Hearing Board	Supplement	

Anderson v. City of Issaquah

70 Wn. App. 64 (Ct. App. 1993)

Appellants M. Bruce Anderson, Gary D. LaChance, and M. Bruce Anderson, Inc. (hereinafter referred to as Anderson), challenge the denial of their application for a land use certification, arguing, inter alia, that the building design requirements contained in Issaquah Municipal Code (IMC) 16.16.060 are unconstitutionally vague. The Superior Court rejected this constitutional challenge. We reverse and direct that Anderson's land use certification be issued. ...

FACTS

Anderson owns property located at 145 N.W. Gilman Boulevard in the city of Issaquah (City). In 1988, Anderson applied to the City for a land use certification to develop the property. The property is zoned for general commercial use. Anderson desired to build a 6,800-square-foot commercial building for several retail tenants.

After obtaining architectural plans, Anderson submitted the project to various City departments for the necessary approvals. The process went smoothly until the approval of the Issaquah Development Commission (Development Commission) was sought. This commission was created to administer and enforce the City's land use regulations. It has the authority to approve or deny applications for land use certification.

Section 16.16.060 of the IMC enumerates various building design objectives which the Development Commission is required to administer and enforce. Insofar as is relevant to this appeal, the Development Commission is to be guided by the following criteria:

IMC 16.16.060(B). Relationship of Building and Site to Adjoining Area.

1. Buildings and structures shall be made compatible with adjacent buildings of conflicting architectural styles by such means as screens and site breaks, or other suitable methods and materials.

2. Harmony in texture, lines, and masses shall be encouraged.

...

IMC 16.16.060(D). Building Design.

1. Evaluation of a project shall be based on quality of its design and relationship to the natural setting of the valley and surrounding mountains.

2. Building components, such as windows, doors, eaves and parapets, shall have appropriate proportions and relationship to each other, expressing themselves as a part of the overall design.

3. Colors shall be harmonious, with bright or brilliant colors used only for minimal accent.

4. Design attention shall be given to screening from public view all mechanical equipment, including refuse enclosures, electrical transformer pads and vaults, communication equipment, and other utility hardware on roofs, grounds or buildings.

5. Exterior lighting shall be part of the architectural concept. Fixtures, standards and all exposed accessories shall be harmonious with the building design.

6. Monotony of design in single or multiple building projects shall be avoided. Efforts should be made to create an interesting project by use of complimentary details, functional orientation of buildings, parking and access provisions and relating the development to the site. In multiple building projects, variable siting of individual buildings, heights of buildings, or other methods shall be used to prevent a monotonous design.

As initially designed, Anderson's proposed structure was to be faced with off-white stucco and was to have a blue metal roof. It was designed in a "modern" style with an unbroken "warehouse" appearance in the rear, and large retail-style windows in the front. The City moved a Victorian era residence, the "Alexander House", onto the neighboring property to serve as a visitors' center. Across the street from the Anderson site is a gasoline station that looks like a gasoline station. Located nearby and within view from the proposed building site are two more gasoline stations, the First Mutual Bank Building built in the "Issaquah territorial style", an Elks hall which is described in the record by the Mayor of Issaquah as a "box building", an auto repair shop, and a veterinary clinic with a cyclone-fenced dog run. The area is described in the record as "a natural transition area between old downtown Issaquah and the new village style construction of Gilman [Boulevard]."

The Development Commission reviewed Anderson's application for the first time at a public hearing on December 21, 1988. Commissioner Nash commented that "the facade did not fit with the concept of the surrounding area." Commissioner McGinnis agreed. Commissioner Nash expressed concern about the building color and stated that he did not think the building was compatible with the image of Issaquah. Commissioner Larson said that he would like to see more depth to the building facade. Commissioner Nash said there should be some interest created along the blank back wall. Commissioner Garrison suggested that the rear facade needed to be redesigned.

At the conclusion of the meeting, the Development Commission voted to continue the hearing to give Anderson an opportunity to modify the building design.

On January 18, 1989, Anderson came back before the Development Commission with modified plans which included changing the roofing from metal to tile, changing the color of the structure from off-white to "Cape Cod" gray with "Tahoe" blue trim, and adding brick to the front facade. During the ensuing discussion among the commissioners, Commissioner Larson stated that the revisions to the front facade had not satisfied his concerns from the last meeting. In response to Anderson's request for more specific design guidelines, Commissioner McGinnis stated that the Development Commission had "been giving direction; it is the applicant's responsibility to take the direction/suggestions and incorporate them into a revised plan that reflects the changes." Commissioner Larson then suggested that "the facade can be broken up with sculptures, benches, fountains, etc." Commissioner Nash suggested that Anderson "drive up and down Gilman and look at both good and bad examples of what has been done with flat facades."

As the discussion continued, Commissioner Larson stated that Anderson "should present a [plan] that achieves what the Commission is trying to achieve through its comments/suggestions at these meetings" and stated that "architectural screens, fountains, paving of brick, wood or other similar methods of screening in lieu of vegetative landscaping are examples of design suggestions that can be used to break up the front facade." Commissioner Davis objected to the front facade, stating that he could not see putting an expanse of glass facing Gilman Boulevard. "The building is not compatible with Gilman." Commissioner O'Shea agreed. Commissioner Nash stated that "the application needs major changes to be acceptable." Commissioner O'Shea agreed. Commissioner Nash stated that "this facade does not create the same feeling as the building/environment around this site."

Commissioner Nash continued, stating that he "personally liked the introduction of brick and the use of tiles rather than metal on the roof." Commissioner Larson stated that he would like to see a review of the blue to be used: "Tahoe blue may be too dark." Commissioner Steinwachs agreed. Commissioner Larson noted that "the front of the building could be modulated [to] have other design techniques employed to make the front facade more interesting."

With this, the Development Commission voted to continue the discussion to a future hearing.

On February 15, 1989, Anderson came back before the Development Commission. In the meantime, Anderson's architects had added a 5-foot overhang and a 7-foot accent overhang to the plans for the front of the building. More brick had been added to the front of the building. Wood trim and accent colors had been added to the back of the building and trees were added to the landscaping to further break up the rear facade.

Anderson explained the plans still called for large, floor to ceiling windows as this was to be a retail premises: "[A] glass front is necessary to rent the space . . .". Commissioner Steinwachs stated that he had driven Gilman Boulevard and taken notes. The following verbatim statement by Steinwachs was placed into the minutes:

"My General Observation From Driving Up and Down Gilman Boulevard."

> I see certain design elements and techniques used in various combinations in various locations to achieve a visual effect that is sensitive to the unique character of our Signature Street. I see heavy use of brick, wood, and tile. I see minimal use of stucco. I see colors that are mostly earthtones, avoiding extreme contrasts. I see various methods used to provide modulation in both horizontal and vertical lines, such as gables, bay windows, recesses in front faces, porches, rails, many vertical columns, and breaks in roof lines. I see long, sloping, conspicuous roofs with large overhangs. I see windows with panels above and below windows. I see no windows that extend down to floor level. This is the impression I have of Gilman Boulevard as it relates to building design.

Commissioner Nash agreed stating, "There is a certain feeling you get when you drive along Gilman Boulevard, and this building does not give this same feeling." Commissioner Steinwachs wondered if the applicant had any option but to start "from scratch". Anderson responded that he would be willing to change from stucco to wood facing but that, after working on the project for 9 months and experiencing total frustration, he was not willing to make additional design changes.

At that point, the Development Commission denied Anderson's application, giving four reasons:

> 1. After four [sic] lengthy review meetings of the Development Commission, the applicant has not been sufficiently responsive to concerns expressed by the Commission to warrant approval or an additional continuance of the review.
>
> 2. The primary concerns expressed relate to the building architecture as it relates to Gilman Boulevard in general, and the immediate neighborhood in particular.

> 3. The Development Commission is charged with protecting, preserving and enhancing the aesthetic values that have established the desirable quality and unique character of Issaquah, reference IMC 16.16.010C. [3]
>
> 4. We see certain design elements and techniques used in various combinations in various locations to achieve a visual effect that is sensitive to the unique character of our Signature Street. On Gilman Boulevard we see heavy use of brick, wood and tile. We see minimal use of stucco. We see various methods used to provide both horizontal and vertical modulation, including gables, breaks in rooflines, bay windows, recesses and protrusions in front face. We see long, sloping, conspicuous roofs with large overhangs. We see no windows that extend to ground level. We see brick and wood panels at intervals between windows. We see earthtone colors avoiding extreme contrast.

Anderson, who by this time had an estimated $ 250,000 into the project, timely appealed the adverse ruling to the Issaquah City Council (City Council). After a lengthy hearing and much debate, the City Council decided to affirm the Development Commission's decision by a vote of 4 to 3. . . .

Anderson filed a complaint in King County Superior Court. ...

Following trial, the court dismissed Anderson's complaint, rejecting the same claims now raised in this appeal.

DISCUSSION ...

2. Constitutionality of IMC 16.16.060 (Building Design Provisions).

> [A] statute which either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). In the field of regulatory statutes governing business activities, statutes which employ technical words which are commonly understood within an industry, or which employ words with a well-settled common law meaning, generally will be sustained against a charge of vagueness. The vagueness test does not require a statute to meet impossible standards of specificity.

In the area of land use, a court looks not only at the face of the ordinance but also at its application to the person who has sought to comply with the ordinance and/or who is alleged to have failed to comply. The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcements of the law.

Looking first at the face of the building design sections of IMC 16.16.060, we note that an ordinary citizen reading these sections would learn only that a given building project should bear a good relationship with the Issaquah Valley and

surrounding mountains; its windows, doors, eaves and parapets should be of "appropriate proportions", its colors should be "harmonious" and seldom "bright" or "brilliant"; its mechanical equipment should be screened from public view; its exterior lighting should be "harmonious" with the building design and "monotony should be avoided." The project should also be "interesting". IMC 16.16.060(D)(1)-(6). If the building is not "compatible" with adjacent buildings, it should be "made compatible" by the use of screens and site breaks "or other suitable methods and materials." "Harmony in texture, lines, and masses [is] encouraged." The landscaping should provide an "attractive . . . transition" to adjoining properties. IMC 16.16.060(B)(1)-(3).

As is stated in the brief of amicus curiae, we conclude that these code sections "do not give effective or meaningful guidance" to applicants, to design professionals, or to the public officials of Issaquah who are responsible for enforcing the code. Although it is clear from the code sections here at issue that mechanical equipment must be screened from public view and that, probably, earthtones or pastels located within the cool and muted ranges of the color wheel are going to be preferred, there is nothing in the code from which an applicant can determine whether his or her project is going to be seen by the Development Commission as "interesting" versus "monotonous" and as "harmonious" with the valley and the mountains. Neither is it clear from the code just what else, besides the valley and the mountains, a particular project is supposed to be harmonious with, although "harmony in texture, lines, and masses" is certainly encouraged. IMC 16.16.060(B)(2).

In attempting to interpret and apply this code, the commissioners charged with that task were left with only their own individual, subjective "feelings" about the "image of Issaquah" and as to whether this project was "compatible" or "interesting". The commissioners stated that the City was "making a statement" on its "signature street" and invited Anderson to take a drive up and down Gilman Boulevard and "look at good and bad examples of what has been done wit h flat facades." One commissioner drove up and down Gilman, taking notes, in a no doubt sincere effort to define that which is left undefined in the code.

The point we make here is that neither Anderson nor the commissioners may constitutionally be required or allowed to guess at the meaning of the code's building design requirements by driving up and down Gilman Boulevard looking at "good and bad" examples of what has been done with other buildings, recently or in the past. We hold that the code sections here at issue are unconstitutionally vague on their face. The words employed are not technical words which are commonly understood within the professional building design industry. Neither do these words have a settled common law meaning.

As they were applied to Anderson, it is also clear the code sections at issue fail to pass constitutional muster. Because the commissioners themselves had no objective guidelines to follow, they necessarily had to resort to their own subjective "feelings". The "statement" Issaquah is apparently trying to make on its "signature

street" is not written in the code. In order to be enforceable, that "statement" must be written down in the code, in understandable terms. The unacceptable alternative is what happened here. The commissioners enforced not a building design code but their own arbitrary concept of the provisions of an unwritten "statement" to be made on Gilman Boulevard. The commissioners' individual concepts were as vague and undefined as those written in the code. This is the very epitome of discretionary, arbitrary enforcement of the law. ...

As well illustrated by the appendices to the brief of amicus curiae, aesthetic considerations are not impossible to define in a code or ordinance. Moreover, the procedural safeguards contained in the Issaquah Municipal Code (providing for appeal to the City Council and to the courts) do not cure the constitutional defects here apparent. . . .

Certainly, the IMC grants Anderson the right to appeal the adverse decision of the Development Commission. But just as IMC 16.16.060 provides no standards by which an applicant or the Development Commission or the City Council can determine whether a given building design passes muster under the code, it provides no ascertainable criteria by which a court can review a decision at issue, regardless of whether the court applies the arbitrary and capricious standard as the City argues is appropriate or the clearly erroneous standard as Anderson argues is appropriate. Under either standard of review, the appellate process is to no avail where the statute at issue contains no ascertainable standards and where, as here, the Development Commission was not empowered to adopt clearly ascertainable standards of its own. The procedural safeguards provided here do not save the ordinance. . . .

Clearly, however, aesthetic standards are an appropriate *component* of land use governance. Whenever a community adopts such standards they can and must be drafted to give clear guidance to all parties concerned. Applicants must have an understandable statement of what is expected from new construction. Design professionals need to know in advance what standards will be acceptable in a given community. It is unreasonable to expect applicants to pay for repetitive revisions of plans in an effort to comply with the unarticulated, unpublished "statements" a given community may wish to make on or off its "signature street". It is equally unreasonable, and a deprivation of due process, to expect or allow a design review board such as the Issaquah Development Commission to create standards on an *ad hoc* basis, during the design review process.

CONCLUSION

It is not disputed that Anderson's project meets all of the City's land use requirements except for those unwritten and therefore unenforceable requirements relating to building design which the Development Commission unsuccessfully tried to articulate during the course of several hearings. We order that Anderson's land use certification be issued, provided however, that those changes which Anderson agreed to through the hearing before the City Council may validly be imposed.

Detwiler v. Zoning Hearing Board
596 A.2d 1156 (Pa. Comm. Ct. 1991)

Barbieri, Senior Judge:

Philip and Babette Detwiler (Appellants) appeal an order of the Court of Common Pleas of Montgomery County which affirmed the decision of the Zoning Hearing Board of Lower Salford Township (Board), granting Donald and Mary Miller (Millers) a variance for the construction of a house.

The Millers own a lot, consisting of approximately 2.8 acres, in Lower Salford Township and would like to construct a house thereon. The lot is located in an R-1A Residence District. According to the Township's zoning ordinance, single-family detached dwellings are permitted in R-1A Residence Districts, as long as the premises, with the dwelling, complies with the area, width, and yard regulations of Article VI, Section 164-28 of the Lower Salford Township Code (Code), which provides, inter alia, that both the front and rear yards must be at least seventy-five feet deep and that the side yards must be at least forty feet wide.

On March 28, 1989, the Millers filed an application with the Board in which they requested a variance from the seventy-five foot rear yard requirement so that they could build a house on their lot. It is the Millers' position that the imposition of the minimum front and rear yard setback provisions, as applied to their lot, completely negates any practical residential development because of the absence of any appreciable "building envelope" within which a house of even the leanest proportions might be built.[5] As such, the Millers requested a variance for a reduction of the rear yard requirement from seventy-five feet to forty feet.

Appellants live directly across the street from the Millers' lot. Appellants''house, a restored Mennonite dwelling, is listed on the National Register of Historic Places. Appellants challenged the Millers" request for a variance on the ground that it would adversely impact their property, which, they contend, "serves as an asset to the community because of its historic value."

Despite Appellants' opposition, the Board granted the Millers' request for a variance, concluding that without the grant of a variance, the Millers' lot "could quite easily suffer the fate of terminal sterility." The Board further concluded that, in granting the Millers a variance, "there would appear to be no discernible adverse impact or consequence upon neighboring properties."

On appeal, the trial court, without taking any additional evidence, affirmed the decision of the Board. In its opinion, the trial court discussed each of the five requirements that must be satisfied in order to grant a variance under Section 910.2 of the Pennsylvania Municipalities Planning Code (MPC), and then concluded that the Millers' request satisfied each requirement. This appeal followed.

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[5] With all of the setbacks, the lot, absent a variance, would not permit any dwelling at all or, even if placed in the widest area of the lot, would only permit a dwelling of less than ten feet deep.

Pursuant to Section 910.2 of the MPC, five requirements must be met before a variance may be granted. To establish a right to a variance, a landowner must show that the effect of a zoning ordinance is to burden property with an unnecessary hardship that is unique to the property; that the hardship was not self-inflicted; that the granting of the variance will not have an adverse impact on the public health, safety and welfare; and that the variance sought is the minimum variance that will afford relief.

Appellants do not dispute that the unique configuration of the Millers' lot makes the lot unusable as a building lot, absent a variance. They do contend, however, that the fact that the lot is unusable as a building lot is not an unnecessary hardship for the Millers. It is Appellants' position that since the Millers' lot can be and, in fact, is currently being used for agricultural uses, which are permitted in R-1A Residence Districts as a matter of right, the variance should have been denied. We disagree.

According to Section 910.2(a)(2) of the MPC, 53 P.S. § 10910.2(a)(2), a board may grant a variance where, inter alia, it is necessary to enable a reasonable use of the property. In this case, the permitted uses for property located within an R-1A Residence District are single-family detached dwellings and agricultural. ...

At the hearing before the Board, the following testimony was elicited from Mr. Miller regarding the uses and characteristics of his lot:

> Q. What is the current use of the property?
>
> A. One of the local farmers takes the hay off it and I use it for some farm animals. I guess he sells it to other farms.
>
> * * * * * *
>
> Q. ... What are the physical aspects of the property?
>
> A. There are a couple of big trees on it. There is an old foundation, I guess an old barn from what Mrs. Brown told me, who used to own it. There is a fence line around the perimeter of the property, most of it's [sic] fallen down pretty badly now. It's held up by vines in the back.....

Initially, we note that it could be argued that the activities which are currently occurring on the Millers' lot do not pertain to "agriculture" as that word is defined by the Code. In any event, even if the lot is currently being used for some limited agricultural uses, it would be unreasonable to force the Millers to continue that use. The size of the Millers' lot as well as its physical characteristics are such that, to limit its use to agricultural purposes, would, for all intents and purposes, render the lot practically valueless. That fact, in and of itself, constitutes "unnecessary hardship."

Additionally, in evaluating hardship, the use of adjacent and surrounding land is unquestionably relevant. As noted by the trial court, the district in which the Millers' lot is situated is zoned residential. Indeed, from the record, it appears that the majority of the neighborhood surrounding the Millers' lot is residential, rather than agricultural. As such, it would not have been unreasonable for the Board to infer that the Millers' lot, so situated, would be undesirable and, hence, unmarketable for agricultural uses, thereby causing the lot to suffer the fate of terminal sterility.

Finally, we wish to emphasize that the use which the Millers desire for their lot, a single-family dwelling, is a permitted use within an R-1A Residence District. They are not seeking a use variance for their property, only a dimensional one. With regards to dimensional variances, we have held on numerous occasions that where, as here, the yard requirements make the construction of a residence impossible, an unnecessary hardship results to the landowner.

Appellants next argue that the Millers' asserted hardship is self-inflicted because they had advance knowledge of the zoning district in which their lot is located before they purchased it. Again, we must disagree.

A landowner's knowledge of zoning requirements prior to the purchase of property is not sufficient, in and of itself, to bar the grant of a variance. Hardship is self-inflicted only where a landowner has paid a high price for the property because he assumed that a variance which he anticipated would justify that price. Here, Appellants do not allege that the Millers paid a high price for their lot in anticipation of a dimensional variance. Indeed, the fact that the lot has been in the Miller family for some time suggests otherwise.

Moreover, as noted by the Board, the Millers' hardship was not self-inflicted since their lot, from its creation in 1960, has retained its integrity as an unimproved lot whose dimensions have remained unaltered. As such, the Millers have not caused, through any action of their own, the unique configuration of their lot. ...

Finally, Appellants argue that granting the Millers a variance will have an adverse impact on the public health, safety and welfare in that it will cause a house to be built directly across the street from their property, which is on the National Register of Historic Places. From our reading of the record, however, Appellants submitted no evidence to support their bald statement. It appears that Appellants simply do not want a house built across the street from their property. Specifically, the record reflects the following: ...

> MR. GIFFORD: How exactly is this proposal going to adversely impact you since the front yard, which separates the house from your house, is going to comply?
>
> MR. DETWILER: I think the location of the house on that ground will adversely impact the property that I own.
>
> MR. GIFFORD: I'm saying how?
>
> MR. DETWILER: By being there.
>
> MR. GIFFORD: What will it do to your property is my question?
>
> MR. DETWILER: It will place a structure across the street from my property which since the early seventeen hundreds as far as I know has been located fifty feet from the road. If my property were one hundred fifty feet from the road I don't think I would have that problem. But I bought that property and it's been there long before any of the circumstances involved in this application.

From the above-quoted testimony, it is evident that the interest which Appellants seek to protect in this suit is their own, rather than the public's.

Moreover, like the trial court, we cannot see how there would be an injury to the historic status of Appellants' house if the Millers constructed their house in accordance with the variance as granted. This is especially true in light of the fact that the Millers sought a variance with regard to their rear yard setback and Appellants' property is located across the street from the front of the Millers' lot.

Having determined that the Board did not abuse its discretion or commit an error of law in granting the Millers a variance, the decision of the trial court is hereby affirmed.

ASSIGNMENT 25: GOVERNMENT

Now we consider, in more generality, government's power over property, and the Constitutional constraints on that power. We begin with a quick survey of the different textual provisions that have been used as a basis for defending property rights against federal, state, and local action. Then we consider government's eminent domain power, under which government can take any property, so long as it pays "just compensation" and so long as the property is taken for a "public use." *Kelo* is the Supreme Court's latest statement on the meaning of "public use." Governments, of course, will prefer to act under another power to avoid paying compensation. *Alger* introduces the difficult problem of ascertaining whether a regulation is a taking by another name; *Penn Central* states the modern test for so-called "regulatory takings." I will lecture on a few additional doctrines; the casebook's editing of the relevant cases is loose, even by the book's loose standards.

Reading	**Casebook (2nd edition)**	**Casebook (1st edition)**
United States Constitution	Supplement	
Commonwealth v. Alger	Supplement	
*Kelo v. City of New London (*majority opinion only)	1223	1224
Penn Central v.. City of New York (majority opinion only)	1285	1269

United States Constitution

Article I, § 10

No state shall ... pass any ... law impairing the obligation of contracts ... .

Amendment V

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Commonwealth v. Alger
61 Mass. 53 (1851)

Shaw, Chief Justice: ...

The defendant has been indicted for having erected and built a wharf over and beyond certain lines, described as the commissioners' lines, into the harbor of Boston. ...

Assuming, then, that the defendant was owner in fee of the soil and flats upon which the wharf in question was built, it becomes necessary to inquire whether it was competent for the legislature to pass the acts establishing the harbor lines, and what is the legal validity and effect of those acts. ...

The fourth section of the act of April 26, 1847, St. 1847, c. 278, establishing certain lines in South Bay, is the statute upon which the present prosecution is instituted. ... This act provides, § 1, that no wharf or pier shall ever be extended beyond said line into or over the tide water of the commonwealth. Section 5 reiterates this prohibition, and § 6 provides that any person, offending against the provisions of the act, shall be deemed guilty of a misdemeanor, and may be prosecuted therefor and punished, by indictment; and that any erection or obstruction, which shall be made contrary to the provisions and intent of the act, shall be liable to be removed and abated as a public nuisance. ...

The manifest object of these statutes is to prevent injurious obstructions in the harbor of Boston, and to secure the free, common, and unobstructed use thereof, for the citizens of the commonwealth, and all other persons, for navigation with ships, boats, and vessels of all kinds, as a common and public right. If this can be done, without an unwarrantable encroachment on the rights of private property, it is an object of great importance, and one in which the holders of riparian rights, as well as all other holders of real estate, and the whole community, have a deep and abiding interest.

We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.

It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well ordered governments, and where its fitness is so obvious, that all well regulated minds will regard it as reasonable. Such are the laws to prohibit the use of warehouses for the storage of gunpowder near habitations or highways; to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate or other incombustible material; to prohibit buildings from being used for hospitals for contagious diseases, or for the carrying on of noxious or offensive trades; to prohibit the raising of a dam, and causing stagnant water to spread over meadows, near inhabited villages, thereby raising noxious exhalations, injurious to health and dangerous to life.

Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building, and cover it with shingles, he might obtain a larger profit of his land, than if obliged to build of stone or brick, with a slated roof. If the owner of a warehouse in a cluster of other buildings could store quantities of gunpowder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building for a smallpox hospital, or a slaughter-house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *sic utere tuo, ut alienum non laedas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain. The distinction, we think, is manifest in principle, although the facts and circumstances of different cases are so various, that it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these two acknowledged powers. …

But in reference to the present case, and to the act of the legislature, establishing lines in the harbor, beyond which private proprietors are prohibited from building wharves, it is urged that such a restraint upon the estate of an individual, debarring him to some extent from the most beneficial use of it, is in effect taking his estate. If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable. But we are to consider the subject matter, to which such restraint applies. The value of this species of estate, that of shore and flats, consists mainly in the means it affords of building wharves from the upland towards deep water, to place merchandise and build wharves upon, and principally to afford access, to vessels requiring considerable depth of water, from the sea to suitable landings. Now,

if along a shore where there are flats of considerable extent, one were restrained to a certain length, whilst others were allowed to extend further, the damage might be great. So if one were allowed to extend, and the coterminous proprietors adjacent were restrained, it would be obviously more injurious. The one extended would stop or check the current along the others, cause mud to accumulate near them, and thus render the water shoal at those wharves. But where all are permitted to extend alike, and all are restrained alike, by a line judiciously adapted to the course of the current, so that all have the benefit of access to their wharves, with the same depth of water, and the same strength of current at their heads, the damage must be comparatively less.

But of this the legislature must judge. ...

In regard to the other suggestion, that it is found by the case that the particular wharf of Mr. Alger did not obstruct or impede navigation, it is proper to say, that if we are right in principle, we are bound to hold that this circumstance can afford no defence. A consideration of this fact illustrates the principles we have been discussing. The reason why it is necessary to have a certain and authoritative law, is shown by the difficulty, not to say impracticability, of inquiring and deciding as a fact, in each particular case, whether a certain erection in tide water is a nuisance at common law or not; and when ascertained and adjudged, it affords no rule for any other case, and can have little effect in maintaining and protecting the acknowledged public right. It is this consideration, (the expediency and necessity of defining and securing the rights of the public,) which creates the exigency, and furnishes the legislature with the authority to make a general and precise law; but when made, because it was just and expedient, and because it is law, it becomes the duty of every person to obey it and comply with it. The question under the statute therefore is, not whether any wharf, built after the statute was made and promulgated, was an actual obstruction to navigation, but whether it was within the prohibited limit.

On the whole, the court are of opinion that the act fixing a line within the harbor of Boston, beyond which no riparian proprietor should erect a wharf or other permanent structure, although to some extent it prohibited him from building such structure on flats of which he owned the fee, was a constitutional law, and one which it was competent for the legislature to make; that it was binding on the defendant, and rendered him obnoxious to its penalties, if he violated its provisions.

ASSIGNMENT 26: THE MORTGAGE CRISIS

We finish with a contemporary application of what we have learned this semester, one of immense real-world importance: the mortgage crisis. The story of what went wrong in the housing market and the national economy in the late 2000s touches on numerous issues we have discussed, including negotiability, corporate property, transactional formalities, trusts, title records, mortgages, abandonment, government regulation, and the purposes of property.

A packet of readings for this class will be posted to Blackboard later in the semester.