§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

FIGURE 11.1 Section 402A of the Restatement (Second) of Torts

manufacturers, wholesalers, or retailers of defective goods were responsible for their injuries. Also, the traditional requirement of privity limited the manufacturer's liability in tort and warranty actions to the person who purchased the defective product, often the wholesaler or retailer. Reformers argued that too often consumers assumed the full cost of the losses. They believed that it would be more just and economically wise to shift the cost of injuries to manufacturers, since manufacturers could purchase insurance and could distribute the costs of the premiums among those who purchased their products.

In contrast to breach of warranty and negligence remedies, which focus on the manufacturer's conduct, modern strict liability focuses on the product itself. A plaintiff who relies on strict liability has to prove that the product was unreasonably dangerous and defective and that the defect proximately caused the injury (although the unreasonably dangerous requirement is disregarded by some courts).

INTERNET TIP

Leichtamer v. American Motors Corporation is a strict liability case involving a Jeep CJ-7 that pitched over while being driven, killing two people and injuring two others. The plaintiffs brought suit, claiming a design defect was responsible for their injuries. The Ohio Supreme Court refers to Section 402A of the Restatement of Torts (see Figure 11.1) in this case and adopts it as part of Ohio law. You can read this case on the textbook's website.

Tort Reform

The hotly contested battle over tort reform continues to rage on, with "reformers" seeking to limit plaintiff's venue choices; increase the immunities available to physicians, pharmacists, and physician assistants; reduce the liability of pharmaceutical manufacturers in product liability cases; and cap noneconomic and punitive damages. Many advocates of reform insist that trial attorney greed is at the core of the problem. Others maintain that without tort reform it will be impossible to reduce the seemingly unstoppable increases in health costs.

Reform opponents point to reports that thousands of people die annually in the United States because of medical errors.[6] They argue that reforms ultimately seek to arbitrarily deny injured people the just recovery they are entitled to because of the circumstances and the nature and extent of their injuries. They point out that the damage awards are large only in cases in which the injuries are horrific and the tortfeasor's liability is great. They also argue that corporations must be held fully accountable for their tortious acts, or they

will not have any economic incentive to act in the public's interest.

The battle has played out at the state level: Thirty-five states have enacted laws intended to lessen recoveries, especially in medical malpractice cases.[7] Reform proposals typically eliminate joint and several liability, limit a plaintiff's choice of venues, cap noneconomic damages, shorten statute of limitations periods, and cap punitive damages.

Joint and Several Liability

Under the common law, if Sarah, Jose, and Soyinni commit a tort at the same time and are at fault, liability for the entire harm is imposed on each of the tortfeasors jointly and individually. This means that the judgment creditors could recover one-third from each judgment debtor, or the entire judgment from one defendant. This common law approach favors plaintiffs. It allows a judgment creditor to collect the entire judgment from the tortfeasor that has the "deepest pockets." This unfortunate person then has to go to court and seek "contribution" from the other tortfeasors (assuming they are neither bankrupt nor judgment proof). Reformers favor modifying the rule so that a judgment debtor who has been found to be only 10 percent liable is not required to pay for 100 percent of the judgment. Virginia is one of the states that still follow the common law rule. The Virginia statute establishing joint and several liability can be seen in Figure 11.2. Most states, however, have made modifications to the common law approach.

INTERNET TIP

Minnesota is one of the states that have modified the common law rule regarding joint and several liability. Interested readers will find Minnesota's apportionment of damages statute included with the Chapter XI materials on the textbook's website. Readers are encouraged to look at both the Virginia statute (Figure 11.2) and the Minnesota statute, and notice how they differ.

> A judgment against one of several joint wrongdoers shall not bar the prosecution of an action against any or all the others, but the injured party may bring separate actions against the wrongdoers and proceed to judgment in each, or, if sued jointly, he may proceed to judgment against them successively until judgment has been rendered against, or the cause has been otherwise disposed of as to, all of the defendants, and no bar shall arise as to any of them by reason of a judgment against another, or others, until the judgment has been satisfied. If there be a judgment against one or more joint wrongdoers, the full satisfaction of such judgment accepted as such by the plaintiff shall be a discharge of all joint wrongdoers, except as to the costs; provided, however, this section shall have no effect on the right of contribution between joint wrongdoers as set out in § 8.01-34.

FIGURE 11.2 Va. Code Ann. § 8.01-443. Joint Wrongdoers; Effect of Judgment Against One

Limitations on Venue Choice

Reformers allege that plaintiffs' lawyers are taking advantage of jurisdictions that permit forum shopping. In recent years, certain counties in some states have developed a reputation for consistently awarding large verdicts and have been designated "tort hellholes" by reform advocates.[8] Reformers suggest that plaintiffs be limited to filing suit in the county of the state in which the tort occurred.

Caps on Noneconomic Damages

Many states have tried to lower jury awards by statutorily establishing ceilings on recoveries for noneconomic damages such as pain and suffering, loss of consortium, and loss of enjoyment of life (hedonic damages). Proponents of "tort reform" often urge lawmakers to establish financial "caps" on the amount of damages a successful tort plaintiff

can receive. The rationale generally given is that doctors cannot afford to pay the cost of malpractice insurance premiums and establishing ceilings on damage awards will reduce the overall cost of medical care.

The following case from Georgia is illustrative of how this very controversial issue can generate institutional conflict between state legislatures and state supreme courts.

Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt
S09A1432
Supreme Court of Georgia
March 22, 2010.

Hunstein, Chief Justice

This case requires us to assess the constitutionality of OCGA § 51-13-1, which limits awards of noneconomic damages in medical malpractice cases to a predetermined amount. The trial court held that the statute violates the Georgia Constitution by encroaching on the right to a jury trial, … In January 2006, Harvey P. Cole, M.D., of Atlanta Oculoplastic Surgery, d/b/a Oculus, performed… laser resurfacing and a full facelift on appellee Betty Nestlehutt. In the weeks after the surgery, complications arose, resulting in Nestlehutt's permanent disfigurement. Nestlehutt, along with her husband, sued Oculus for medical malpractice. The case proceeded to trial, ending in a mistrial. On retrial, the jury returned a verdict of $1,265,000, comprised of $115,000 for past and future medical expenses; $900,000 in noneconomic damages for Ms. Nestlehutt's pain and suffering; and $250,000 for Mr. Nestlehutt's loss of consortium. Appellees then moved to have OCGA § 51-13-1, which would have reduced the jury's noneconomic damages award by $800,000 to the statutory limit of $350,000, declared unconstitutional. The trial court granted the motion and thereupon entered judgment for appellees in the full amount awarded by the jury. Oculus moved for a new trial, which was denied, and this appeal ensued.

1. In relevant part, OCGA § 51-13-1 provides,

> In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against one or more health care providers, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00, regardless of the number of defendant health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.
>
> … (b). "Noneconomic damages" is defined as damages for physical and emotional pain, discomfort, anxiety, hardship, distress, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, injury to reputation, and all other nonpecuniary losses of any kind or nature.

… In addition to capping noneconomic damages against health care providers … the statute also limits noneconomic damages awards against a single medical facility to $350,000; limits such awards to $700,000 for actions against more than one medical facility; and limits such awards to $1,050,000 for actions against multiple health care providers and medical facilities ….

Enacted as part of a broad legislative package known as the Tort Reform Act of 2005, the damages caps were intended to help address what the General Assembly determined to be a "crisis affecting the provision and quality of health care services in this state." … Specifically, the Legislature found that health care providers and facilities were being negatively affected by diminishing access to and increasing costs of procuring liability insurance, and that these problems in the liability insurance market bore the potential to reduce Georgia citizens' access to health care services, thus degrading their health and well-being… The provisions of the Tort Reform Act were therefore intended by the Legislature to "promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and … thereby assist in promoting the provision of health care liability insurance by insurance providers."…

2. We examine first the trial court's holding that the noneconomic damages cap violates our state Constitution's guarantee of the right to trial by jury.

Duly enacted statutes enjoy a presumption of constitutionality. A trial court must uphold a statute unless the party seeking to nullify it shows that it "manifestly infringes upon a constitutional provision or violates the rights of the people." The constitutionality of a statute presents a question of law. Accordingly, we review a trial court's holding regarding the constitutionality of a statute de novo….

The Georgia Constitution states plainly that "[t]he right to trial by jury shall remain inviolate."…. It is well established that Article I, Section I, Paragraph XI (a) "guarantees the right to a jury trial only with respect to cases as to which there existed a right to jury trial at common law or by statute at the time of the adoption of the Georgia Constitution in 1798…. Prior to adoption of the 1798 Constitution, the General Assembly had adopted the common law of England and all statutes in force as of 1776 as the law of Georgia… Thus, the initial step in our analysis must necessarily be an examination of the right to jury trial under late eighteenth century English common law…. See Rouse v. State … (1848) (referring to Blackstone, "whose commentaries constituted the law of this State, before and since the Revolution," as authoritative on jury trial right as of 1798)….

(a) The antecedents of the modern medical malpractice action trace back to the 14th century.

The first recorded case in England on the civil [liability] of a physician was an action brought before the Kings Bench in 1374 against a surgeon by the name of J. Mort involving the treatment of a wounded hand. The physician was held not liable because of a legal technicality, but the court clearly enunciated the rule that if negligence is proved in such a case the law will provide a remedy.

… By the mid-18th century, the concept of "mala praxis" [malpractice] was sufficiently established in legal theory as to constitute one of five classes of "private wrongs" described by Sir William Blackstone in his Commentaries…. The concept took root in early American common law, the earliest reported medical negligence case in America dating to 1794…. Given the clear existence of medical negligence claims as of the adoption of the Georgia Constitution of 1798, we have no difficulty concluding that such claims are encompassed within the right to jury trial… under Art. I, Sec. I, Par. XI (a). This conclusion is bolstered by the fact that medical negligence claims appear in Georgia's earliest systematically reported case law…, and the fact that the tort of medical malpractice was included in Georgia's earliest Code. See Code of 1861, § 2915 (effective Jan. 1, 1863)….

As with all torts, the determination of damages rests "peculiarly within the province of the jury."… Because the amount of damages sustained by a plaintiff is ordinarily an issue of fact, this has been the rule from the beginning of trial by jury…. Hence, "[t]he right to a jury trial includes the right to have a jury determine the amount of … damages, if any, awarded to the [plaintiff]."…

Noneconomic damages have long been recognized as an element of total damages in tort cases, including those involving medical negligence…. Based on the foregoing, we conclude that at the time of the adoption of our Constitution of 1798, there did exist the common law right to a jury trial for claims involving the negligence of a health care provider, with an attendant right to the award of the full measure of damages, including noneconomic damages, as determined by the jury.

(b) We next examine whether the noneconomic damages caps in OCGA § 51-12-1 unconstitutionally infringe on this right. By requiring the court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit, OCGA § 51-13-1 clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function…. Consequently, we are compelled to conclude that the caps infringe on a party's constitutional right, as embodied in Article I, Section I, Paragraph XI (a), to a jury determination as to noneconomic damages…. The fact that OCGA § 51-13-1 permits full recovery of noneconomic damages up to the significant amount of $350,000 cannot save the statute from constitutional attack. "[I]f the legislature may constitutionally cap recovery at [$350,000], there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1"… The very existence of the caps, in any amount, is violative of the right to trial by jury….

Though we agree with the general principle… that the Legislature has authority to modify or abrogate the common law, we do not agree with the notion that this general authority empowers the Legislature to abrogate constitutional rights that may inhere in common law causes of action… Likewise, while we have held that the Legislature generally has the authority to define, limit, and modify available legal remedies… the exercise of such authority simply cannot stand when the resulting legislation violates the constitutional right to jury trial.

Nor does…the existence of statutes authorizing double or treble damages attest to the validity of the caps on noneconomic damages. While it is questionable whether any cause of action involving an award thereof would constitute an analogue to a 1798 common law cause of action so as to trigger the right to jury trial in the first place,… to the extent the right to

jury trial did attach, treble damages do not in any way nullify the jury's damages award but rather merely operate upon and thus affirm the integrity of that award....

In sum, based on the foregoing, we conclude that the noneconomic damages caps in OCGA § 51-13-1 violate the right to a jury trial as guaranteed under the Georgia Constitution....

3. "The general rule is that an unconstitutional statute is wholly void and of no force and effect from the date it was enacted."...

In this case, we do not find that the...factors militate in favor of deviation from the general rule of retroactivity....

4. We find no abuse of the trial court's discretion in granting appellees' motion to exclude certain evidence, because that ruling was necessitated by the trial court's earlier grant of appellant's motion in limine.... As to appellant's claim that the evidence was relevant to establishing the bias of appellee's expert witness, the record establishes that the trial court's ruling in no manner precluded appellant from attempting to show the witness' bias through cross-examination or other means. Accordingly, this enumeration lacks merit.

For the foregoing reasons, we affirm the judgment of the trial court.

Judgment affirmed....

Case Questions

1. Why did the Georgia Supreme Court feel it necessary to examine English legal precedents going back as far as 1374 in order to decide a case before it for decision in 2010?
2. Why did the Georgia Supreme Court conclude that the statute was unconstitutional?

Statutes of Limitations

Legislatures often attempt to limit a potential defendant's exposure to tort liability by shortening the statute of limitations. Although this proposal is intended to benefit defendants, it does so at the expense of injured plaintiffs who will be denied the opportunity for their day in court if they fail to file their suits in a timely manner.

Caps on Punitive Damages

Many states have abolished punitive damages unless such awards are specifically permitted by statute. Increasingly, states are requiring that punitive damages be proven clearly and convincingly rather than by a preponderance of the evidence, and others require bifurcated trials for punitive damages. Reformers urge legislatures to impose dollar ceilings on punitive damage awards in medical malpractice and product liability cases. According to U.S. Bureau of Justice Statistics data, only 3 percent of tort plaintiffs were awarded punitive damages in 2005.[9]

CHAPTER SUMMARY

The chapter began with brief discussions of the historical development of the modern tort action and the functions of tort law in contemporary America. This was followed with an overview of intentional torts in general and discussions and cases focusing on such intentional torts as assault, battery, conversion, trespass to land, malicious prosecution, false imprisonment, defamation, interference with contract relations, infliction of mental distress, and invasion of privacy. The focus then shifted to negligence. The elements of a negligence claim were discussed, with an emphasis on the "duty of care" and "proximate cause" requirements. The workings of the comparative negligence approach, which

involves an apportionment of fault between the plaintiff and defendant was explained and illustrated in accompanying cases. The third type of tort, strict liability for abnormally dangerous activities and product defects, was then addressed. The chapter concluded with a brief overview of tort reform.

CHAPTER QUESTIONS

1. Jack McMahon and his wife Angelina decided to take a break from driving and stopped at a Mobil minimart for a take-out coffee. Angelina took the plastic lid off the Styrofoam cup as Jack resumed driving. She spilled coffee on her lap while trying to pour some of the coffee into another cup, and suffered second- and third-degree burns. Angelina experienced considerable pain for several months and sustained scarring on one of her thighs and on her abdomen. The McMahons settled their claims against the manufacturers of the cup and lid, but brought suit against the manufacturer of the coffee-making machine, the Bunn-O-Matic Corporation. The plaintiffs alleged that the machine was defective because it brewed the coffee at too high a tem-perturb, 179 degrees Fahrenheit (the industry average is between 175 and 185), and that the heat caused the cup to deteriorate. They also claimed that Bunn was negligent in failing to warn customers about the magnitude of the injuries (second- and third-degree burns) that could result from spilled coffee at this temperature. Did Bunn, in your opinion, have a legal duty to give plaintiffs the requested warnings?

   McMahon v. Bunn-O-Matic Corp., 150 F.3d 651 (7th Cir. 1998)

2. Patrick Reddell and Derek Johnson, both eighteen years of age, wanted to take part in a BB gun war "game." They agreed not to fire their weapons above the waist and that their BB guns would be pumped no more than three times, thereby limiting the force of the BBs' impact when striking the other person. They also promised each other only to fire a BB gun when the other person was "in the open." While participating in this activity, Johnson shot Reddell in the eye, causing seriously impaired vision. Reddell sued Johnson for gross negligence and for recklessly aiming his weapon above the waist. Johnson answered by denying liability and asserting the defenses of *assumption of risk* and *contributory negligence*. Both parties then filed motions for summary judgment. How should the trial judge rule on the motions?

   Reddell v. Johnson, 942 P.2d 200 (1997)

3. Shannon Jackson was injured while driving her car on a farm-to-market road when her vehicle hit and killed a horse named Tiny that was standing in the road. The force of the collision severely damaged her vehicle, which was totaled. Jackson brought a negligence suit against Tiny's owner, Naomi Gibbs, for failing to prevent Tiny from wandering onto the road. Gibbs defended by saying she owed Jackson no duty on a farm-to-market road that was within a "free-range" area. The trial court rejected the defense, and a jury found the defendant negligent and liable for damages of $7,000. The state intermediate appeals court affirmed the trial court, ruling that although there was no statutory duty to keep Tiny off the road, the court recognized a common law duty "to keep domestic livestock from roaming at large on public roads." This was a case of first impression before the state supreme court. Texas courts prior to this case had rejected the English common law rule imposing a duty on the owner of a domestic animal to prevent it from trespassing on a neighbor's property. English common law imposed no corresponding duty to keep an animal from wandering onto a

public road unless the animal had "vicious propensities." In light of the above, Texas law generally permitted healthy, nonvicious animals to roam freely, a condition associated with "free range" jurisdictions. An exception to the free-range law was statutorily recognized where a "local stock law" was enacted to keep animals off of a state highway. What arguments might be made supporting and opposing the new common law rule recognized by the intermediate court of appeals?

Gibbs v. Jackson, 97-0961, Supreme Court of Texas (1998)

4. The plaintiff became ill in the defendant's store. The defendant undertook to render medical aid to the plaintiff, keeping the plaintiff in an infirmary for six hours without medical care. It was determined that when the plaintiff finally received proper medical care, the extended lapse of time had seriously aggravated the plaintiff's illness. Discuss what action, if any, the plaintiff has.

Zelenka v. Gimbel Bros., Inc., 287 N.Y.S. 134 (1935)

5. Plaintiff came into defendant's grocery store and purchased some cigarettes. He then asked if the store had any empty boxes he could use. The defendant instructed the plaintiff that he could find some in the back room and told the plaintiff to help himself. Plaintiff entered the room, which was dark. While searching for a light switch, the plaintiff fell into an open stairwell and was injured. What is the status of the plaintiff (invitee, licensee, trespasser)? How will the status affect the plaintiff's ability to recover from the defendant, if at all? Do you think the fact that the defendant is operating a business should affect his duty?

Whelan v. Van Natta Grocery, 382 S.W.2d 205 (Ky. 1964)

6. Plaintiff's intestate was killed when the roof of the defendant's foundry fell in on him. Plaintiff alleges that the defendant failed to make proper repairs to the roof, and that such neglect of the defendant caused the roof to collapse. The defendant claims, however, that the roof collapsed during a violent storm, and that, even though the roof was in disrepair, the high winds caused the roof to fall. What issue is raised, and how would you resolve it?

Kimble v. Mackintosh Hemphill Co., 59 A.2d 68 (1948)

7. The plaintiff's intestate, who had been drinking, was crossing Broadway when he was negligently struck by one of defendant's cabs. As a result of the accident, the plaintiff's intestate was thrown about twenty feet, his thigh was broken, and his knee injured. He immediately became unconscious and was rushed to a hospital, where he died of delirium tremens (a disease characterized by violent shaking, often induced by excessive alcohol consumption). Defendant argued that the deceased's alcoholism might have caused delirium tremens and death at a later date, even if defendant had not injured him. What is the main issue presented here? Who should prevail and why?

McCahill v. N.Y. Transportation Co., 94 N.E. 616 (1911)

8. Plaintiff, while a spectator at a professional hockey game, is struck in the face by a puck. The defendant shot the puck attempting to score a goal, but shot too high, causing the puck to go into the spectator area. Plaintiff brings suit, and defendant claims assumption of risk. Who prevails? Suppose the defendant had been angry at crowd reaction and intentionally shot the puck into the crowd. Would the outcome change?

9. Clay Fruit, a life insurance salesman, was required to attend a business convention conducted by his employer. The convention included social as well as business events, and Fruit was encouraged to mix freely with out-of-state agents in order to learn as much as possible about sales techniques. One evening, after all scheduled business and social events had concluded, Fruit drove to a nearby bar and restaurant, looking for some out-of-state colleagues. Finding none, he drove back toward his hotel. On the journey back, he negligently

struck the automobile of the plaintiff, causing serious injuries to plaintiff's legs. Was Fruit in the course and scope of his employment at the time of the accident? From whom will the plaintiff be able to recover?

Fruit v. Schreiner, 502 P.2d 133 (Alaska 1972)

NOTES

1. T. F. F. Plucknett, *A Concise History of the Common Law* (Boston: Little, Brown and Co., 1956), p. 372.
2. A. K. R. Kiralfy, *Potter's Historical Introduction to English Law* (4th ed.) (London: Sweet and Maxwell Ltd., 1962), pp. 376–377.
3. R. Walsh, *A History of Anglo-American Law* (Indianapolis: Bobbs-Merrill Co., 1932), p. 323.
4. Kiralfy, pp. 305–307; Walsh, p. 344.
5. More discussion about the different types of damages can be found in Chapter VII.
6. "A tragic error," *Newsweek*, March 3, 2003, p. 22.
7. "Ohio's Tort Reform Law Hasn't Lowered Health-Care Costs," *The Plain Dealer* (March 20, 2010), http//blog.cleveland.com/open/index.ssf/2010/03/ohios_tort_reform_law_hasnt_lo.html
8. "Tort Reform Advances in Mississippi (for starters)," *National Law Journal* (February 3, 2003), pp. A1, A10–A11.
9. U.S. Department of Justice Bureau of Justice Statistics Bulletin, November 2009, NCJ 228129, p. 6.

XII

Property

CHAPTER OBJECTIVES

1. *Understand the historical origins of property law.*
2. *Explain the true meaning of the term "property."*
3. *Identify two ways in which property is classified.*
4. *Understand the importance of intellectual property rights.*
5. *Identify the primary ways that government takes and limits the exercise of private property rights.*
6. *Understand the basic concept of an "estate in land."*
7. *Explain the differences between easements and licenses.*
8. *Identify the different ways personal property can be acquired.*
9. *Understand the essential elements of a bailment.*

Property refers to a person's ownership rights to things and to a person's interests in things owned by someone else. Property includes the rights to possess, use, and dispose of things. These may be tangible objects, such as a car, book, or item of clothing, or they may be intangible—the technology in a camera, a song, or the right of publicity. Although many people refer to the objects themselves as property, "property" actually refers only to ownership rights and interests.

HISTORICAL DEVELOPMENT OF THE REGULATION OF REAL PROPERTY

When we discuss property law, we must remember that the English common law greatly influenced legal thinking in the prerevolutionary colonies and in the new American states.[1] Private property was thought to be essential to individual liberty, a proposition advanced by the English philosopher John Locke (1632–1704). Locke was a "natural law" philosopher who argued that before the creation of governments, people existed in a natural state in which they had total control over their life, liberty, and property. He reasoned that people who established governments retained these inalienable rights and were entitled to resist any government that failed to respect them. Locke's emphasis on the inviolability of private property was reflected in the decisions of colonial legislatures, judges, and political leaders.[2]

Although American law was significantly influenced by the common law, most colonies were willing to take a different path when solutions provided by common law seemed inappropriate. The Puritans in New England, for example, refused to follow a rule of English common law (which was accepted in southern colonies[3]) that prevented a husband from conveying land without his wife's consent. They believed this was a bad social policy because it treated husbands and wives as individuals with separate legal interests rather than as a single, unified entity. They changed the law to allow husbands to make unilateral decisions for the family regarding the sale of real property.[4]

Before the industrial revolution, the economies of America and England were primarily based on agriculture. England's industrial revolution began with the rise of the textile industry in the 1700s. At this time most economic and political power was held by large landowners such as the church, monarchy, military, and landed gentry.[5] There, as in colonial America, the law recognized property owners as having absolute dominion over their land.[6] But no one could use his or her land in a manner that caused injury to any other landowner. For example, a landowner could not divert the natural flow of a navigable river or stream in order to establish a mill if it created a detriment to another landowner.[7] The fact that economic and social benefits would result from the operation of a new mill was of no consequence.[8]

Legal attitudes toward property began to change as America became industrialized in the 1800s and moved toward a market economy. After the Civil War, courts began to recognize that encouraging competition and economic development benefitted the public.[9] When one landowner's property use conflicted with another's, the courts balanced the nature of the infringement against its socially desirable economic benefits, and the developers usually prevailed.[10] This legal preference for development continued throughout the nineteenth and into the twentieth century. Although it produced new technology, new products, and an expanding economy, it also resulted in environmental pollution, the exploitation of workers, hazardous work environments, and labor–management conflict. These conditions resulted in legislative reform efforts throughout the century designed to protect society. Around 1900, the U.S. Supreme Court began to strike down state laws that interfered with employer–employee contracts with respect to wages, hours, and working conditions.[11] The court concluded that these laws exceeded the state's legislative power because they infringed upon the individual's constitutionally protected due process liberty interest in freedom of contract.

Since the 1930s, the individual's property rights in land have declined as legislatures have acted to protect society from irresponsible and harmful uses of private property. Today, for example, zoning laws regulate land use and building codes regulate building construction. Environmental laws prohibit landowners from filling in wetlands and control the discharge of pollutants into the air, ground, and water.

As environmental regulations have increased in number, they have affected an increasing number of landowners. A heated ongoing national debate has

resulted between supporters and opponents of the legal status quo. Opponents have charged that the existing legislation and case law are excessively anti-development and that government agencies are overzealous in enforcing environmental protection regulations. Environmental protection, they conclude, is often achieved without regard for the legitimate rights of landowners. Supporters of current environmental policies maintain that removing the regulations will produce a precipitous decline in habitat for endangered species and, in many instances, will ultimately lead to extinction. They also argue that backsliding from current standards will produce serious environmental hazards to the public's air, water, and land resources. In the 1990s, the Congress, many state legislatures, and federal and state courts, however, began questioning whether our nation's environmental laws properly balanced society's dual interests in protecting the environment and private property rights. We examine this question in more detail later in this chapter when we discuss takings and eminent domain.

CLASSIFICATIONS OF PROPERTY

Property can be classified as real, personal (tangible or intangible), or fixtures. Property interests can also be classified as either contingent or vested. These distinctions matter. Tax rates, for example, often differ for realty, fixtures, and personalty. A second example is the determination of what body of law will be used to determine title. Thus, the common law of each state governs title to real property, whereas the Uniform Commercial Code often governs personalty.[12]

Real property, or realty, includes land and things that are attached permanently to land. It is distinguishable from personal property in that real property is immovable.

Personal property, also called personalty, can classified as either tangible or intangible. **Tangible personal property** consists of physical objects (which are neither realty nor fixtures) such as a book, a boat, or a piece of furniture. **Intangible personal property** is personalty that has no physical form. Ownership of intangible property is usually evidenced by some type of legal document that sets forth the ownership rights. For example, a bank account is intangible personal property. A person who deposits money into the account receives from the bank intangible rights equal to the amount of the deposit plus interest (if it is an interest-bearing account). The deposit receipt and bank statement are evidence of the holder's title and right to possession of the funds contained in the account. Money, stocks, and bonds are considered to be intangible property because they are paper substitutes for certain ownership rights. Trademarks, patents, and copyrights are also intangible personal property, as are the intangible rights, duties, and obligations arising out of the ownership of physical objects. Thus personal property includes not only a physical or representative object, but also the right to own, use, sell, or dispose of it as provided by law.

Items of personal property are often the subject of both tangible and intangible property rights. For example, suppose that you buy a digital camera, the design and technology of which is protected by valid federal patents. Although you have acquired a piece of tangible personal property that you can use to take pictures, and you can give it as a gift or otherwise dispose of it in any legal manner, the law will recognize that you do not have all the rights vis-à-vis the camera. The patent holders, for example, have intangible property rights in the camera's technology. The purchaser does not have any such rights and therefore cannot sell duplicates of the product or the technology without permission. Thus the patent holders and the purchaser have concurrent property rights in the camera.

A **fixture** is a category of property between realty and personalty. For example, a dishwasher, which is classified as personalty when it is purchased at an appliance store, becomes a fixture when it is permanently built into the buyer's kitchen.

Lastly, property rights are classified in terms of when they become fully effective. A right is said to be **contingent** when some future event must occur for the right to become **vested** (fully effective). For example, employers often require that employees

work for a company for a specified period of time before their vacation and pension rights mature. Once pension rights vest, they belong to the employees even if the employees subsequently leave the company.

TRADEMARKS, PATENTS, AND COPYRIGHTS

When one normally thinks of personal property, one generally thinks in terms of tangible property—the rights to things that have a physical existence. However, some of the most valuable property rights have no physical attributes. One who owns intellectual property rights (the rights to trademarks, patents, and copyrights) owns intangible personal property.

Trademarks

The distinctive Nike "Swoosh" is a **trademark** of the Nike Corporation. The company affixes this mark to its many products in order to distinguish them from those of competitors. Customers learn to associate trademarks with quality and style attributes—a matter of great importance to manufacturers and retailers. The name of a type of product, such as "microwave" or "DVD," cannot be a trademark. Sometimes, however, a company's trademark becomes recognized by the public as the name of the product itself and loses its legal status as a trademark. Aspirin, thermos, and escalator are examples of trademarks that lost their trademark status because they became words used for the product category. The Coca-Cola Company works diligently to ensure that the term *Coke* does not lose its status as a trademark by becoming a synonym for "soft drink." Similarly, the Xerox Corporation is most concerned that its trademark *Xerox* does not become a synonym for "photocopy." Trademarks to be used in interstate commerce are required to be registered with the U.S. Department of Commerce's Patent and Trademark Office, pursuant to the Lanham Act of 1946.

An infringement of a trademark occurs, for example, when an infringing mark is so similar to a well-established mark that it is likely to confuse, deceive, or mislead customers into believing that they are doing business with the more established company.

Federal and state statutes create causes of action for trademark infringement. The Lanham Act of 1946 and the Trademark Law Revision Act of 1988 are the principal federal statutes. At the state level, statutes authorize causes of action for trademark infringement and the common law also provides a basis for such suits. Successful plaintiffs can obtain treble damages, injunctive relief, an award of the defendant's profits, damages, costs, and attorney's fees in exceptional cases.

The plaintiff in the following case sought to trademark the words "Best Beer in America," and appealed the Trademark Trial and Appeal Board's decision to reject the proposed trademark application.

In re The Boston Beer Company Ltd. Partnership
198 F.3d 1370
U.S. Court of Appeals, Federal Circuit
December 7, 1999

Mayer, Chief Judge
The Boston Beer Company Limited Partnership ("Boston Beer") appeals from a decision of the U.S. Patent and Trademark Office Trademark Trial and Appeal Board affirming the final rejection of trademark application Serial No. 74/464,118 seeking to register "The Best Beer In America" on the principal register...

Background
On November 30, 1993, the Boston Beer Company filed an application to register "The Best Beer In America" on the principal register for "beverages, namely beer and ale," in Class 32. Boston Beer claimed use since 1985 and asserted that the words sought to be registered have acquired distinctiveness under 15 U.S.C.

§§ 1052(f). Boston Beer claimed secondary meaning based on annual advertising expenditures in excess of ten million dollars and annual sales under the mark of approximately eighty-five million dollars. Specifically, Boston Beer spent about two million dollars on promotions and promotional items which included the phrase "The Best Beer in America."

In support of its claims, Boston Beer submitted an affidavit of its founder and co-president, James Koch, asserting that the words sought to be registered had developed secondary meaning as a source-indicator for its goods by virtue of extensive promotion and sales of beer under the mark since June 1985. It also submitted an advertisement for a competitor's product, Rolling Rock Bock beer, which included an invitation to sample "the beer that bested 'The Best Beer in America,'" as evidence that Rolling Rock regards "The Best Beer in America" as Boston Beer's trademark. The examining attorney rejected the pro-posed mark as merely descriptive and cited articles retrieved from the NEXIS database showing the proposed mark used by Boston Beer and others as a laudatory phrase to refer to superior beers produced by a number of different brewers. All of the beers mentioned had either won comparison competitions or had been touted as the best in America by their makers or others. Boston Beer responded by submitting articles showing its use of the proposed mark to refer to its product and in promoting its beer as a winner of the annual beer competition in Denver. Additionally, it argued that if marks such as "Best Products" and "American Airlines" can be registered even though they are also used descriptively, then the proposed mark should be similarly registered. The examining attorney issued a final refusal to register under 15 U.S.C. §§ 1052(e)(1), holding that Boston Beer had failed to establish that the mark had become distinctive.

Boston Beer filed a notice of appeal and attached further exhibits to its appeal brief. The application was remanded to the examiner on his request for consideration of the new evidence. Another office action was issued denying registration for lack of distinctiveness which noted that the phrase sought to be registered was selected and used after Boston Beer received awards at the Great American Beer Festival. The board then allowed Boston Beer to file a supplemental brief. Action on the appeal was suspended and the board remanded the application.

The examiner concluded that the proposed mark is the name of a genus of goods, namely "beers brewed in America that have won taste competitions or were judged best in taste tests," and included printouts from the Boston Beer Internet web site to show that it had adopted the proposed mark after it had won such competitions. He therefore issued an office action rejecting the proposed mark as generic and thus incapable of registration. Boston Beer submitted a second supplemental brief to respond to the genericness rejection. After the examiner filed his appeal brief, Boston Beer filed a third supplemental brief arguing against genericness and moved to strike portions of the examiner's brief. Boston Beer argued that the examiner was limited to responding to the issues raised in the second supplemental brief, namely genericness, and could not address descriptiveness and acquired distinctiveness. Boston Beer argued that its proposed mark was not generic because there was no single category at the Great American Beer Festival and thus no "best beer in America" award. The board rejected the motion to strike.

The board found the proposed mark to be merely descriptive because it is only laudatory and "simply a claim of superiority, i.e., trade puffery."… The proposed mark was found not to be generic because the examiner's characterization of the genus or class of goods as "'beers brewed in America which have won taste competitions or were judged best in taste tests' stretches the limits of our language and is inconsistent with common usage."… The board held, however, that the proposed mark inherently cannot function as a trademark because such "claims of superiority should be freely available to all competitors in any given field to refer to their products or services."… Finally, the board said that "even if [it] were to find this expression to be capable of identifying applicant's beer and distinguishing it from beer made or sold by others, [the board] also would find, in view of the very high degree of descriptiveness which inheres in these words, that applicant has failed to establish secondary meaning in them as an identification of source."…This appeal followed.

Discussion

We review the board's legal conclusions, such as its interpretation of the Lanham Act, 15 U.S.C. §§ 1051-1127, de novo. We uphold the board's factual findings unless they are arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence…

"Marks that are merely laudatory and descriptive of the alleged merit of a product are also regarded as being descriptive…. Self-laudatory or puffing marks are regarded as a condensed form of describing the character or quality of the goods." 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair*

Competition §§ 11:17 (4th ed. 1996) (internal quotations omitted). "If the mark is merely descriptive it may nevertheless acquire distinctiveness or secondary meaning and be registrable under Section 1052(f), although … the greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning."… To acquire secondary meaning, section 1052(f) requires that the mark must have become "distinctive of the applicant's goods." 15 U.S.C. §§ 1052(f) (1994).

Boston Beer provided evidence of advertising expenditures, an affidavit from its co-president, and an advertisement from a competitor. It argues that the use of the mark by others was either referring to Boston Beer's products or merely descriptive of the goods of others and was not used as a trademark. This argument is unavailing. The examples of use of the phrase by others in its descriptive form support the board's conclusion that the mark had not acquired distinctiveness. Therefore, on the facts of this case, and considering the highly descriptive nature of the proposed mark, Boston Beer has not met its burden to show that the proposed mark has acquired secondary meaning.

Boston Beer does not dispute that "The Best Beer in America" is a generally laudatory phrase. We have held that laudation does not per se prevent a mark from being registrable … As Boston Beer correctly notes, there is an assortment of generally laudatory terms that serve as trademarks. But that is not invariably true; the specific facts of the case control … As in this case, a phrase or slogan can be so highly laudatory and descriptive as to be incapable of acquiring distinctiveness as a trademark. The proposed mark is a common, laudatory advertising phrase which is merely descriptive of Boston Beer's goods. Indeed, it is so highly laudatory and descriptive of the qualities of its product that the slogan does not and could not function as a trademark to distinguish Boston Beer's goods and serve as an indication of origin. The record shows that "The Best Beer in America" is a common phrase used descriptively by others before and concurrently with Boston Beer's use, and is nothing more than a claim of superiority. Because the board's conclusion of non-registrability is supported by substantial evidence, is not arbitrary and capricious, and is not an abuse of discretion, we agree that "The Best Beer in America" is incapable of registration as a trademark…

Accordingly, the decision of the board is affirmed….

Case Questions

1. Why did the Court of Appeals affirm the examiner and refuse to grant the trademark?
2. The Court of Appeals referred to a provision in the Lanham Act that permits recognition of a mark if the proposed mark has acquired a secondary meaning. What do you think that means?

Patents

A patent is a grant of rights to an inventor from the government. The inventor, or owner of the rights, has the exclusive right to make, use, license others to use, and sell an invention for a period of years (twenty years for most inventions, fourteen years for design patents). After the term of years has expired, the invention goes into the public domain. Patents are only granted for inventions that are beneficial, original, and involve ingenuity. Patents are granted for new machines, methods, uses, and improvements to existing inventions. Patents are also granted for genetically engineered plants.

Copyrights

Authors of literary pieces, musical compositions, dramatic works, photographs, graphic works of various types, video and audio recordings, and computer software can acquire federal legal protection against most unauthorized uses by placing a prescribed copyright notice on publicly disseminated copies of the work. An owner or author of a copyrighted work is required to register with the Copyright Office in Washington, DC, prior to bringing suit for copyright infringement.

Congress enacted its first copyright statute in 1790 and that statute provided authors with

exclusive rights to their works for two fourteen-year periods. Although the law has been amended many times, in recent decades substantial revisions occurred in 1978 and 1998. In 1978, Congress abolished common law copyrights and federalized the copyright process, and, in most instances extended the length of the copyright protection from a maximum of fifty-six years after publication to the author's life plus fifty years. In 1998, Congress enacted the Sonny Bono Copyright Extension Act, which extended copyright protections even further, to the life of the author plus seventy years for works that were produced after 1978 and to a maximum of ninety-five years for works produced prior to 1978. Proponents argue that extending the length of U.S. copyright protections brings the United States in line with similar provisions in existing international conventions. Opponents contend that a creator's copyright protections were intended by the founders to be limited. Even the most profitable works should ultimately make their way into the public domain (where anyone can freely use them without having to pay royalties).

The constitutionality of this statute was upheld by the U.S. Supreme Court in the 2003 case of *Eldred v. Ashcroft.* The court ruled that Congress had legal authority to extend the terms of copyright protections as provided in the statute.

The appellant in the following copyright case was sued by BMG Music for downloading music. She appealed the trial court's decision to grant summary judgment in favor of appellees to the U.S. Court of Appeals for the Seventh Circuit, claiming that her conduct should have been recognized by the trial court as fair use under the copyright statute.

BMG Music v. Cecilia Gonzalez
430 F.3d 888
U.S. Court of Appeals for the Seventh Circuit
December 9, 2005

Easterbrook, Circuit Judge.

Last June the Supreme Court held in *MGM Studios, Inc. v. Grokster, Ltd.* … (2005), that a distributed file-sharing system is engaged in contributory copyright infringement when its principal object is the dissemination of copyrighted material. The foundation of this holding is a belief that people who post or download music files are primary infringers…

In this appeal Cecilia Gonzalez, who downloaded copyrighted music through the Kazaa file-sharing network … contends that her activities were fair use rather than infringement. The district court disagreed and granted summary judgment for the copyright proprietors (to which we refer collectively as BMG Music).… The court enjoined Gonzalez from further infringement and awarded $22,500 in damages.…

A "fair use" of copyrighted material is not infringement. Gonzalez insists that she was engaged in fair use … or at least that a material dispute entitles her to a trial. It is undisputed, however, that she downloaded more than 1,370 copyrighted songs during a few weeks and kept them on her computer until she was caught. Her position is that she was just sampling music to determine what she liked enough to buy at retail. Because this suit was resolved on summary judgment, we must assume that Gonzalez is telling the truth when she says that she owned compact discs containing some of the songs before she downloaded them and that she purchased others later. She concedes, however, that she has never owned legitimate copies of 30 songs that she downloaded. (How many of the remainder she owned is disputed.)

Instead of erasing songs that she decided not to buy, she retained them. It is these 30 songs about which there is no dispute concerning ownership that formed the basis of the damages award.… The files that Gonzalez obtained … were posted in violation of copyright law; there was no license covering a single transmission or hearing—and, to repeat, Gonzalez kept the copies.…

[Title 17 U.S Code] Section 107 provides that when considering a defense of fair use the court must take into account "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

Gonzalez was not engaged in a nonprofit use; she downloaded (and kept) whole copyrighted songs (for

which, as with poetry, copying of more than a couplet or two is deemed excessive); and she did this despite the fact that these works often are sold per song as well as per album. This leads her to concentrate on the fourth consideration: "the effect of the use upon the potential market for or value of the copyrighted work."

As she tells the tale, downloading on a try-before-you-buy basis is good advertising for copyright proprietors, expanding the value of their inventory. The Supreme Court thought otherwise in *Grokster*, with considerable empirical support. As file sharing has increased over the last four years, the sales of recorded music have dropped by approximately 30%. Perhaps other economic factors contributed, but the events likely are related. Music downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying originals. That is exactly what Gonzalez did for at least 30 songs. It is no surprise, therefore, that the only appellate decision on point has held that downloading copyrighted songs cannot be defended as fair use, whether or not the recipient plans to buy songs she likes well enough to spring for....

Although BMG Music sought damages for only the 30 songs that Gonzalez concedes she has never purchased, all 1,000+ of her downloads violated the statute. All created copies of an entire work. All undermined the means by which authors seek to profit. Gonzalez proceeds as if the authors' only interest were in selling compact discs containing collections of works. Not so; there is also a market in ways to introduce potential consumers to music.

Think of radio. Authors and publishers collect royalties on the broadcast of recorded music, even though these broadcasts may boost sales.... Downloads from peer-to-peer networks such as Kazaa compete with licensed broadcasts and hence undermine the income available to authors. This is true even if a particular person never buys recorded media.... Many radio stations stream their content over the Internet, paying a fee for the right to do so. Gonzalez could have listened to this streaming music to sample songs for purchase; had she done so, the authors would have received royalties from the broadcasters (and reduced the risk that files saved to disk would diminish the urge to pay for the music in the end).

Licensed Internet sellers, such as the iTunes Music Store, offer samples—but again they pay authors a fee for the right to do so, and the teasers are just a portion of the original. Other intermediaries (not only Yahoo! Music Unlimited and Real Rhapsody but also the revived Napster, with a new business model) offer licensed access to large collections of music; customers may rent the whole library by the month or year, sample them all, and purchase any songs they want to keep. New technologies, such as SNOCAP, enable authorized trials over peer-to-peer systems....

Authorized previews share the feature of evanescence: if a listener decides not to buy (or stops paying the rental fee), no copy remains behind. With all of these means available to consumers who want to choose where to spend their money, downloading full copies of copyrighted material without compensation to authors cannot be deemed "fair use." Copyright law lets authors make their own decisions about how best to promote their works; copiers such as Gonzalez cannot ask courts (and juries) to second-guess the market and call wholesale copying "fair use" if they think that authors err in understanding their own economic interests or that Congress erred in granting authors the rights in the copyright statute. Nor can she defend by observing that other persons were greater offenders; Gonzalez's theme that she obtained "only 30" (or "only 1,300") copyrighted songs is no more relevant than a thief's contention that he shoplifted "only 30" compact discs, planning to listen to them at home and pay later for any he liked.

BMG Music elected to seek statutory damages under 17 U.S.C. § 504(c)(1) instead of proving actual injury. This section provides that the author's entitlement, per infringed work, is "a sum of not less than $750 or more than $30,000 as the court considers just." But if an "infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200."... Gonzalez asked the district court to reduce the award under this proviso, but the judge concluded that § 402(d) bars any reduction in the minimum award. This subsection provides: "If a notice of copyright in the form and position specified by this section appears on the published phonorecord or phonorecords to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages." It is undisputed that BMG Music gave copyright notice as required—"on the surface of the phonorecord, or on the phonorecord label or container."... It is likewise undisputed that Gonzalez had "access" to records and compact disks bearing the proper notice. She downloaded data rather than discs, and the data lacked copyright notices, but the statutory question is

whether "access" to legitimate works was available rather than whether infringers earlier in the chain attached copyright notices to the pirated works. Gonzalez readily could have learned, had she inquired, that the music was under copyright.

As for the injunction: Gonzalez contends that this should be vacated because she has learned her lesson, has dropped her broadband access to the Internet, and is unlikely to download copyrighted material again. A private party's discontinuation of unlawful conduct does not make the dispute moot, however. An injunction remains appropriate to ensure that the misconduct does not recur as soon as the case ends... The district court did not abuse its discretion in awarding prospective relief.

Affirmed.

Case Questions

1. What was the basis for Gonzalez's appeal?
2. How did the U.S. Court of Appeals for the Seventh Circuit respond to Gonzalez's claim?

An item of personal property that is the subject of both tangible and intangible property rights is called a **fixture.** For example, suppose that you buy a camera, the design of which is protected by a valid federal patent. Although you have acquired a piece of tangible personal property that you can use and dispose of in any legal manner, the law will recognize that you do not have all the right vis-à-vis the camera. The patent holder, for example, has intangible property rights in the camera's technology that prevent a purchaser from selling duplicates of the product or the technology without permission. Thus, both the patent holder and the purchaser have property rights to the same object.

A fixture is a category of property between realty and personalty. For example, a dishwasher is classified as personalty when it is purchased at an appliance store. When it is permanently built into the buyer's kitchen, however, it becomes a fixture.

Property rights are **contingent** when some future event must occur for the right to become **vested** (fully effective). For example, employers often require that employees work for a company for a specified number of years before their pension rights mature. Once pension rights vest, they belong to the employees even if they subsequently leave the company.

These distinctions are based on practical considerations; for example, tax rates may differ for realty, fixtures, and personalty. In addition, the common law of each state governs real property, whereas the Uniform Commercial Code often governs personalty.[12]

Property Ownership

Property can be owned in several different forms, including **severalty ownership, concurrent ownership**, and **community property**. Severalty ownership exists when property is owned by one person. Concurrent ownership exists when property is held simultaneously by more than one person. This can occur in one of three ways—**joint tenancy, tenancy in common**, and **tenancy by the entirety**.[13] In joint tenancy, each joint tenant takes an equal, undivided interest in the ownership of property from the same source and at the same time. Each joint tenant also has an undivided right of survivorship. Thus in a joint tenancy involving three tenants, the entire tenancy passes to the two survivors upon the death of the third and bypasses the deceased person's will and heirs. Tenancy in common is similar to a joint tenancy; however, there is no automatic passing of the deceased's rights to the surviving tenants. Instead, the deceased's rights pass according to the will. Tenancies in common can be sold, inherited, and given as a gift. Tenancy by the entirety can exist only between legally married husbands and wives and can be ended only through death, divorce, or mutual

consent. Upon the death of one of the tenants, title passes to the surviving spouse. If a divorce occurs, the tenancy is converted into a tenancy in common.

The following case requires that the court determine whether a brother and sister hold title to real property as tenants in common or whether the brother holds title as the severalty owner.

In re Estate of Clayton Gulledge
637 A.2d 1278
District of Columbia Court of Appeals
April 4, 1996.

Schelb, Associate Justice

The issue…is whether the unilateral transfer by one of two joint tenants of his interest to a third party, without the consent of the other joint tenant, converts the joint tenancy into a tenancy in common. We hold that it does.

I.

The dispositive facts are undisputed. Clayton and Margie Gulledge owned a house at 532 Somerset Place, N.W. (the Somerset property) as tenants by the entirety. They had three children—Bernis Gulledge, Johnsie Walker, and Marion Watkins. Margie Gulledge died in 1970. Clayton Gulledge remarried the following year, but his second marriage was apparently unsuccessful.

In order to avert the possible loss, in any divorce proceedings, of the Somerset property, Bernis Gulledge advanced to his father the funds necessary to satisfy the second Mrs. Gulledge's financial demands. In exchange, Clayton Gulledge created a joint tenancy in the Somerset property, naming Bernis and himself as joint tenants. Bernis evidently expected that his father would predecease him, and that the right of survivorship which is the essence of a joint tenancy would enable him to acquire the entire property upon his father's death.

In 1988, however, Clayton Gulledge conveyed his interest in the Somerset property to his daughter, Marion Watkins, "in fee simple tenants in common." In 1991, Clayton Gulledge died, and he was survived by his three children. Bernis Gulledge died in 1993 and Johnsie B. Walker died in 1994. In the now consolidated proceedings relating to the estates of Clayton Gulledge, Bernis Gulledge, and Johnsie Walker, appellant Deborah Walker, Bernis' personal representative claims that when Clayton died, Bernis, as the surviving joint tenant, became the sole owner of the Somerset property. Ms. Watkins, on the other hand, contends that Clayton Gulledge's earlier conveyance of his interest to her severed the joint tenancy, thereby destroying Clayton's right of survivorship, and that Ms. Watkins and Bernis became tenants in common. The trial court agreed with Ms. Watkins….

II

The parties agree that Clayton Gulledge's interest in the joint tenancy was alienable. They disagree only as to the nature of the interest which Clayton transferred to Ms. Watkins. The Estate of Bernis Gulledge (the Estate) argues that an owner cannot convey to a third party a greater interest than his own … and that because Clayton Gulledge's interest was subject to Bernis' right of survivorship, the interest which Ms. Watkins received from Clayton must be similarly restricted. Ms. Watkins contends, on the other hand, that Clayton's conveyance to her converted the joint tenancy into a tenancy in common by operation of law, and that she received from Clayton an undivided one-half interest in the property.

The question whether a joint tenant severs a joint tenancy by ultimately conveying his interest to a third party without the consent of the other joint tenant has not been squarely decided in the District of Columbia. The issue is one of law, and our review is therefore de novo…. The applicable rule in a large majority of jurisdictions is that either party to a joint tenancy may sever that tenancy by unilaterally disposing of his interest, that the consent of the other tenant is not required, and that the transfer converts the estate into a tenancy in common…

Although no decision by a court in this jurisdiction is directly on point, the discussion of joint tenancy that can be found in District of Columbia cases is consistent with the majority approach. In *Harrington v. Emmerman* … the court explained that "Joint tenancy cannot exist unless there be present unity of interest, title, time *and possession* that is to say, the interests must be identical, they must accrue by the same conveyance, they must commence at the same time and the estate

must be held by the same undivided possession." (Emphasis added.) The interests of Bernis Gulledge and Marion Watkins were not created by the same conveyance, nor did they commence at the same time; the conveyance to Ms. Watkins thus destroyed the unities of title and time…

In *Coleman v. Jackson*, … the court held that where a marriage was invalid, the deed purporting to convey property to the couple as tenants by the entireties created a joint tenancy instead. Contrasting the two types of estates, the court pointed out that "[o]f course, joint tenancy lacks the feature of inalienability which tenancy by the entireties possesses…. [I]nalienability is an incident only of estates by the entireties…"

In *In re Estate of Wall*, the court restated the principle of *Coleman* and distinguished a tenancy by the entireties from a joint tenancy upon the ground that a tenancy by the entireties creates a "unilateral indestructible right of survivorship," while a joint tenancy does not. The court further stated that "survivorship incidental to joint tenancy differs because it may be frustrated … by alienation or subjection to debts of a cotenant's undivided share or by compulsory partition."

Although the foregoing authorities do not conclusively settle the question before us, they provide no support for the notion that this court should reject the majority rule. Moreover, "[b]ecause District of Columbia law is derived from Maryland law, decisions of the Court of Appeals of Maryland, and particularly those relating to the law of property, are accorded the most respectful consideration by our courts … Under Maryland law, the transfer of an interest in a joint tenancy by either joint tenant will sever the joint tenancy and cause the share conveyed to become property held as tenants in common with the other cotenants." … We adopt the same rule here.

For the foregoing reasons, we conclude that when Clayton Gulledge conveyed his interest to Ms. Watkins, she and Bernis Gulledge both became owners of an undivided one-half interest in the property as tenants in common. Upon Bernis' death, his estate replaced Bernis as a tenant in common with Ms. Watkins. Accordingly, the trial court correctly held that Ms. Watkins and the Estate of Bernis Gulledge are tenants in common, and that each holds an undivided half interest in the Somerset property.

Affirmed.

Case Questions

1. What was the nature of the interest that Clayton transferred to his daughter, Marion Watkins?
2. Why didn't Bernis become the severalty owner of the Somerset property upon Clayton's death?
3. How was it possible for Clayton to create a joint tenancy in the property, with himself and his son Bernis as joint tenants?

Community Property

Community property is recognized by the states of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. In community property states, each spouse is legally entitled to a percentage of what the state defines as community property, and this varies by jurisdiction. Although states differ, community property is usually defined as including the earnings of both spouses and property rights acquired with those earnings during the marriage. State statutes, however, usually exclude from community property rights acquired prior to marriage, spousal inheritances, and gifts received during the marriage. These are classified as separate property. Community property states differ on whether earnings from separate property should be treated as community property.

Title

Title refers to ownership rights in property. For example, when a student purchases a textbook from a bookstore, he or she is purchasing the seller's title to the book. This means that the bookstore is selling all its rights in the book to the student. The bookstore will provide the purchaser with a receipt (bill of sale) to evidence the purchase of these rights and the transfer of ownership. If the student purchased the textbook from a thief, however, the

student would not obtain title to the book. The larceny victim would still have the title, and the thief would be an unlawful possessor.[14]

A student who has purchased title to a textbook has many rights vis-à-vis that object. The student may decide to loan possessory rights to the book temporarily to another student. The student also has the right to decide whether to dispose of the book after completion of the course. For instance, the student might decide to make a gift of the book, sell his or her rights in the book to another student, or sell it back to the bookstore.

A bookstore does not have to produce a written document to establish its ownership when it sells a textbook to a student. However, the law does require the use of title documents to provide evidence of title for some property items. A seller of a motor vehicle, for example, must have a valid title document from the state to transfer ownership rights to the purchaser, and purchases of land require a title document called a deed.

GOVERNMENT'S RIGHT TO REGULATE AND TAKE PRIVATE PROPERTY

State government bears the primary responsibility for defining and limiting the exercise of private property rights through the police power. The police power refers to the authority of state legislatures to enact laws regulating and restraining private rights and occupations for the promotion of the public health, welfare, safety, and morals. The police power of the states is not a grant derived from a written constitution; the federal Constitution assumes the preexistence of the police power, and the Tenth Amendment reserves to the states any power not delegated to the federal government in Article I. Limitations on the police power have never been drawn with precision or determined by a general formula. But the Fifth and Fourteenth Amendments' Due Process Clauses require that state actions based on the police power be exercised in the public interest, be reasonable, and be consistent with the rights implied or secured in the Constitution. Government uses of the police power with respect to property are promulgated as environmental protection laws, administrative regulations (such as environmental rules), legislation (zoning, eminent domain, taxation), and tort law (for example, nuisance suits). See Figure 12.1 for an overview of the government's role in regulating private property.

Environmental Laws and Natural Resources Regulations: The Northern Spotted Owl Case

Historically, landowners have opposed governmental restrictions that prevent them from developing their land and harvesting its natural resources. In states where logging is big business and a major source of employment, limitations on commercial logging on privately owned timberland are very controversial. Environmentalists counter that it is essential that there be some legal regulation of commercial development on private property. They argue that the cumulative effect of decisions made independently by individual private landowners can produce destruction of critical habitat and cause already endangered species to become extinct.

This problem gained national prominence in 2006 when environmentalists in Washington sought to prevent small private landowners from logging portions of their forest land that threaten the Northern Spotted Owl's habitat. The triggering event was a federal lawsuit brought by the Seattle and Kittitas Audubon Societies against the Weyerhaeuser Company and state officials for allegedly violating the Endangered Species Protection Act. The plaintiffs wanted to prevent further destruction of owl habitat on Weyerhaeuser land and on other privately held forest timberland. They sought declaratory and injunctive relief, and a hearing was held over the granting of a temporary injunction that would prevent any new logging within the targeted forest areas pending the conclusion of the litigation. The plaintiffs explained to the court that they feared that state officials would, if not enjoined, allow private landowners to engage

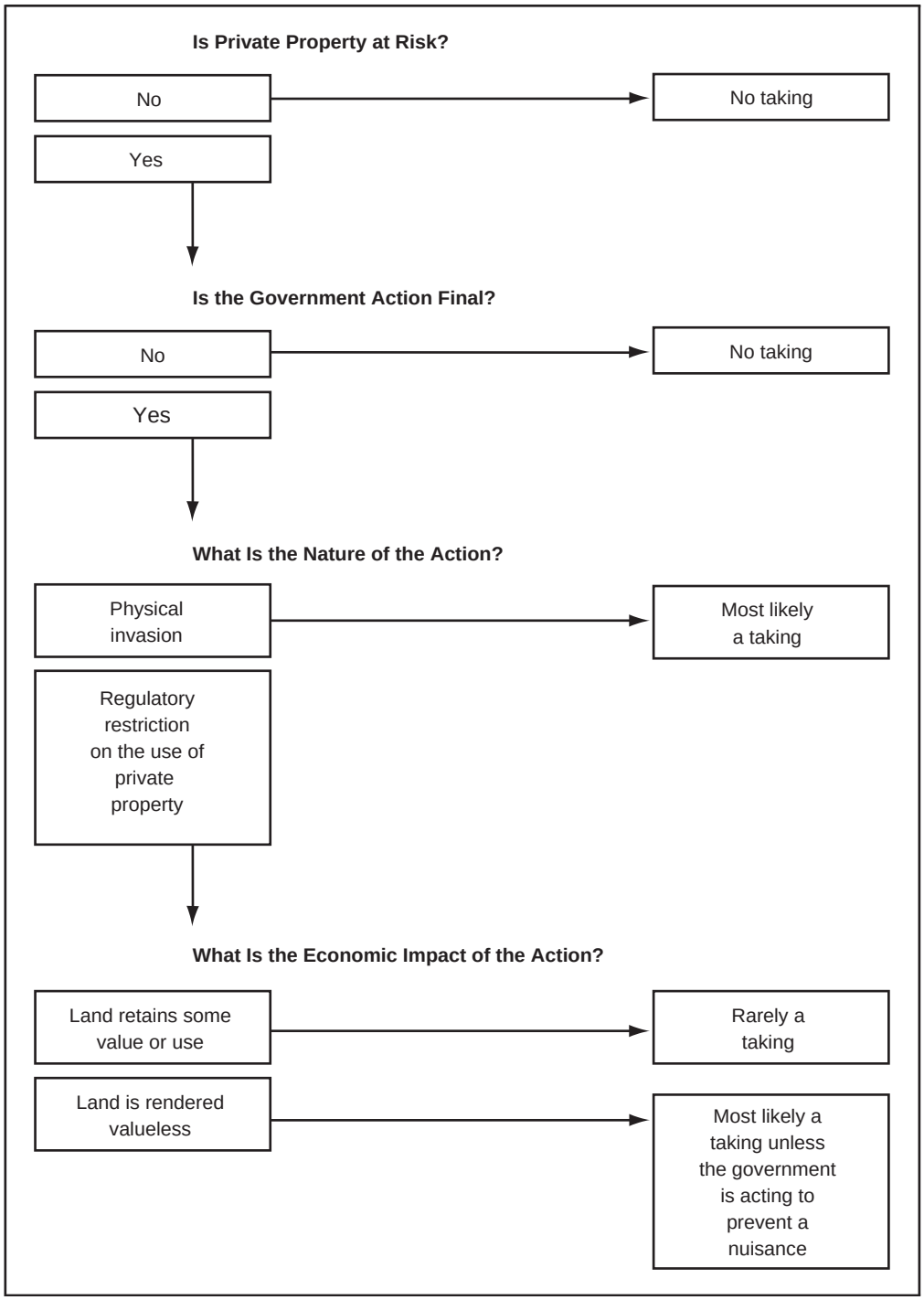

FIGURE 12.1 When Does Government Action Become a Taking of Private Property?

Source: Kathleen C. Zimmerman and David Abelson, "Takings Law: A Guide to Government, Property, and the Constitution," Copyright © 1993 by The Land & Water Fund of the Rockies, Inc.

in logging activities that could harm owls present within owl habitat located on their timberland properties. The plaintiffs identified by location 266 owl habitat administrative zones called "owl circles" that they believed warranted legal protection from logging pending the resolution of the suit. Four of the "owl circles" were located on Weyerhaeuser property, with the remaining 262 situated on other privately owned sites. The district court agreed with the plaintiffs with respect to the Weyerhaeuser owl circles and issued the injunction. But the court refused to enjoin the state, concluding that the plaintiff's proof was legally insufficient to support an injunction. The plaintiffs had only provided evidence that owls were actually present in 44 of the 262 owl circles. Also lacking was proof as to how much owl habitat actually existed in any of the 262 administrative zones. The only habitat-specific evidence presented was limited to the four owl circles on Weyerhaeuser land.[15]

The district judge's rulings on the injunctions may have caused the parties to rethink the wisdom of resolving their differences in a judicial forum. The plaintiffs may have concluded that the cost of obtaining the missing data, paying the costs of a trial, and litigating this and other similar cases in the future just did not make economic sense. What is certain is that in July 2008 the parties jointly announced that they had reached a settlement. Although not all of the settlement terms were revealed, the parties reported that they had agreed to work collaboratively as members of a "policy working group" and to scientifically determine the best strategies for identifying, improving and preserving spotted owl habitat that is located on privately owned land. Weyerhaeuser also agreed to protect the four owl circles on its land.

In 2010, the working group initiated a "pilot project" for eastern Washington that focuses on protecting owl habitat located on privately held land that is frequently subject to forest fires.

The federal government, recognizing the need to encourage small forest landowners to participate voluntarily in protecting endangered species habitat, has attempted to address some of the landowners' concerns. Because many private owners of timberland fear governmental land restrictions, they find it necessary to discourage the presence of an endangered species on their forested land. Having recognized the fear, and wishing to overcome this disincentive, the U.S. Fish and Wildlife Service developed a "Safe Harbor Agreements" program. Under this program, the FWS can negotiate agreements with private landowners to encourage them to manage their private property actively in ways that benefit endangered species. The landowners benefit from these agreements because the government provides them with written "assurances." The government, in essence, promises that landowners who help in building and retaining habitat as specified in the agreement will not be subjected to enhanced levels of land regulation in the future. These agreements can also include provisions allowing a landowner to alter an endangered habitat in specified ways (including some logging), if in the end there is a "net conservation benefit" to the endangered species.

Zoning

State legislatures originally authorized local governments to enact zoning regulations to promote public health and safety by separating housing districts from incompatible commercial and industrial uses. Today, zoning ordinances also preserve a community's historically significant landmarks and neighborhoods and restrict adult entertainment. State and local environmental protection agencies often resort to zoning ordinances in deciding whether to grant licenses to land developers where a proposed land use threatens wetlands or natural habitat, or increases air or water pollution. Zoning ordinances can be very controversial, such as when they prohibit trailer parks or require that structures and lots be large (and therefore often unaffordable to low-income people). In the Family Law chapter (Chapter IX), you can see another example of restrictive zoning. In that 1977 case decided by the U.S. Supreme Court, entitled *Moore v. City of East Cleveland*, governmental authorities unsuccessfully

sought to use a zoning ordinance to prohibit a grandmother from living with her two grandchildren.

Eminent Domain

The government can take private property for a public purpose over the objection of a landowner pursuant to what is called the power of **eminent domain.** The Fifth Amendment's Takings Clause provides that whenever the federal government takes property to benefit the public, it must pay just compensation. This constitutional control on government has been incorporated into the Fourteenth Amendment and is also binding on the states. The Takings Clause protects individual private property rights by ensuring that taxpayers, rather than targeted private individuals, pay for public benefits.

Government obtains title to private land through condemnation proceedings in which a court ensures that statutory and constitutional requirements are satisfied. In a related proceeding, a court will determine the fair market value of the land that will be paid to the property owner.

The U.S. Supreme Court has been unsuccessful to date in precisely establishing what constitutes a "taking." It has, however, recognized that takings can assume different forms. One obvious example is where the government takes title to land for the purpose of building a public highway. Other takings, however, are less obvious. The Supreme Court found in 1946 that a taking had occurred where low-flying military aircraft created so much noise while flying over a chicken farm that the farm went out of business.[16] The Court ruled that under these circumstances the government had exploited and in effect taken airspace above it for a flight path (a public purpose), to the commercial detriment of the farmer. The farmer, said the Court, was entitled to compensation.

In a 1978 case, the U.S. Supreme Court had to rule on whether New York City, as part of a historic landmarks preservation program, could impose limitations on the development or redevelopment of historic sites such as Grand Central Station. The city wanted to prevent the construction of a large office building above the station. To the developer, the restrictions imposed by the Landmark Preservation Law amounted to a taking of private property (the airspace above the station) for a public purpose, for which compensation was due. The Court ruled in favor of the city, largely because the law served a public purpose (improving the quality of life for all New Yorkers) and provided the developer with a reasonable economic return on investment.

Historically, landowners have argued that they should be compensated when their property values fall as a result of governmental restrictions that prevent them from commercially developing their land and its natural resources. Defenders maintained that such regulations were necessary because the cumulative effect of the individual actions of private landowners would likely result in endangered species becoming extinct. Legislative initiatives designed to protect the environment, and preserve aesthetic and cultural landmarks, have generally been upheld by the Supreme Court.

The Controversial Decision in the *Kelo* Case

The U.S. Supreme Court's decision in *Susette Kelo v. City of New London*, 545 U.S. 469 (§2005), attracted national attention and considerable outrage throughout the nation. The case arose out of an attempt by the state of Connecticut and the city of New London to revitalize an "economically distressed" area of New London. The proponents of the redevelopment plan sought to use the power of eminent domain to acquire the title to parcels owned by persons who rejected the city's offers to buy them out. Susette Kelo was one of the owners unwilling to sell. Those favoring the plan argued that implementation of the plan would create jobs, improve New London's image, strengthen its tax base and generally enhance its downtown and waterfront areas.

Susette Kelo claimed that the Takings Clause prohibited New London from acquiring her property by way of eminent domain in order to implement an economic development plan. The justices disagreed over whether to commit the federal judiciary to using the Fifth Amendment's Takings Clause to

establish national standards for the nation with respect to the potentially endless battles between developers and landowners. The Supreme Court ruled 5–4 that the states should have this responsibility.

Justice Stevens, for the majority, explained that the Takings Clause only required that a condemned parcel be used for a "public purpose" if the taking of the private property occurred pursuant to a "carefully considered development plan." In *Kelo*, Stevens argued that Susette Kelo's house had been taken by eminent domain as part of a comprehensive economic development plan, which had been specifically authorized by Connecticut statute. Justice Stevens acknowledged that many states might believe the federal "public purpose" standard to be too low, and he rejected imposing a "one-size-fits-all" approach on the country. He basically left it up to the states to decide for themselves what standard should apply, explaining it this way:

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law … while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised…. As the submissions of the parties and their amici make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate…. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution….

The public reaction to the *Kelo* decision was loud and negative. Within one year, over half of the states took action by statute or constitutional amendment and increased the restrictions on the use of eminent domain. That number has increased to approximately forty states. In this manner, the U.S. Supreme Court kept countless cases out of the federal judicial system, dodged having to define and defend a national standard in these complex cases, and transferred the brunt of the problem to the state legislatures. This will probably mean that a variety of solutions will emerge over time, and the law will continue to evolve to meet the needs of each jurisdiction.

INTERNET TIP

Interested readers can find an edited version of the majority opinion in *Kelo v. New London* and Justice O'Connor's thought-provoking dissent with the Chapter XII materials on the textbook's website.

Introduction to *Goldstein v. Urban Development Corporation*

The petitioners-appellants in *Goldstein v. Urban Development Corporation* are property owners in Brooklyn, New York who had their property taken by eminent domain by the UDC as part of an economic development initiative. They brought suit in state court, saying, in essence, that Justice Sandra Day O'Connor's conclusion in her *Kelo* dissent that "economic development takings" were unconstitutional under the federal constitution was also applicable to the New York constitution. The development project to be completed in Brooklyn was intended to replace the existing lesser-value properties with higher-value uses including an office tower, apartments, and a new arena for the New Jersey Nets NBA basketball team, to be constructed in time for the 2012–2013 season.

The respondent–appellee, Urban Development Corporation (UDC), is a public benefit corporation created by the New York legislature to help finance economic and job development throughout the state of New York. Because it is a hybrid entity (partly governmental and partly private) it can issue bonds for which the state has no responsibility and can circumvent the debt limitation provisions in the state constitution. It can also exercise the power of eminent domain to achieve its public

purposes. UDC's claimed justification for using eminent domain to take private homes located on land essential to the completion of this project was similar to New London's rationale in the *Kelo* case . The use of eminent domain was for a public purpose. It would provide employment, affordable housing (30 percent of the apartments would have to be leased to low- or middle-income people), attract retail businesses to the area, and generate tax revenue for the city and state.

Daniel Goldstein v. Urban Development Corporation

921 N.E.2d 164
Court of Appeals of New York.
November 24, 2009

Chief Judge Lippman

We are asked to determine whether respondent's exercise of its power of eminent domain to acquire petitioners' properties for purposes of the proposed land use improvement project, known as Atlantic Yards, would be in conformity with certain provisions of our State Constitution. We answer in the affirmative.

On December 8, 2006, respondent Empire State Development Corporation (ESDC) issued a determination pursuant to Eminent Domain Procedure Law (EDPL) § 204, finding that it should use its eminent domain power to take certain privately owned properties located in downtown Brooklyn for inclusion in a 22-acre mixed-use development proposed, and to be undertaken, by private developer Bruce Ratner and the real estate entities of which he is a principal, collectively known as the Forest City Ratner Companies (FCRC)….

The project is to involve, in its first phase, construction of a sports arena to house the NBA Nets franchise, as well as various infrastructure improvements—most notably reconfiguration and modernization of the Vanderbilt Yards rail facilities and access upgrades to the subway transportation hub already present at the site. The project will also involve construction of a platform spanning the rail yards and connecting portions of the neighborhood now separated by the rail cut. Atop this platform are to be situated, in a second phase of construction, numerous high rise buildings and some eight acres of open, publicly accessible landscaped space. The 16 towers planned for the project will serve both commercial and residential purposes. They are slated to contain between 5,325 and 6,430 dwelling units, more than a third of which are to be affordable either for low and/or middle income families.

The project has been sponsored by respondent ESDC as a "land use improvement project"… upon findings that the area in which the project is to be situated is "substandard and insanitary"… or, in more common parlance, blighted. It is not disputed that the project designation and supporting blight findings are appropriate with respect to more than half the project footprint, which lies within what has, since 1968, been designated by the City of New York as the Atlantic Terminal Urban Renewal Area (ATURA). To the south of ATURA, however, and immediately adjacent to the Vanderbilt Yards cut, are two blocks and a fraction of a third which, although within the project footprint, have not previously been designated as blighted. FCRC has purchased many of the properties in this area, but there remain some that it has been unsuccessful in acquiring, whose transfer ESDC now seeks to compel in furtherance of the project, through condemnation. In support of its exercise of the condemnation power with respect to these properties, some of which are owned by petitioners, ESDC, based on studies conducted by a consulting firm retained by FCRC, has made findings that the blocks in which they are situated possess sufficient indicia of actual or impending blight to warrant their condemnation for clearance and redevelopment … and that the proposed land use improvement project will, by removing blight and creating in its place the above-described mixed-use development, serve a "public use, benefit or purpose."…

The Appellate Division, although rejecting respondent's contention that the proceeding was time-barred, found for respondent on the merits….

I

[The court's decision not to bar this appeal on procedural grounds been omitted to conserve space].

II

Turning now to the merits, petitioners first contend that the determination authorizing the condemnation of their properties for the Atlantic Yards project is unconstitutional because the condemnation is not for the purpose of putting their properties to "public use" within the meaning of article I, § 7 (a) of the State

Constitution—which provides that "[p]rivate property shall not be taken for public use without just compensation"—but rather to enable a private commercial entity to use their properties for private economic gain with, perhaps, some incidental public benefit. The argument reduces to this: that the State Constitution has from its inception, in recognition of the fundamental right to privately own property, strictly limited the availability of condemnation to situations in which the property to be condemned will actually be made available for public use, and that, with only limited exceptions prompted by emergent public necessity, the State Constitution's Takings Clause, unlike its federal counterpart, has been consistently understood literally to permit a taking of private property only for "public use," and not simply to accomplish a public purpose.

Even if this gloss on this State's takings laws and jurisprudence were correct—and it is not … it is indisputable that the removal of urban blight is a proper, and, indeed, constitutionally sanctioned, predicate for the exercise of the power of eminent domain. It has been deemed a "public use" within the meaning of the State Constitution's Takings Clause at least since … 1936 … and is expressly recognized by the Constitution as a ground for condemnation. Article XVIII, § 1 of the State Constitution grants the Legislature the power to "provide in such manner, by such means and upon such terms and conditions as it may prescribe … for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas," and section 2 of the same article provides "[f]or and in aid of such purposes, notwithstanding any provision in any other article of this constitution … the legislature may … grant the power of eminent domain to any … public corporation."… Pursuant to article XVIII, respondent ESDC has been vested with the condemnation power by the Legislature … and has here sought to exercise the power for the constitutionally recognized public purpose or "use" of rehabilitating a blighted area.

Petitioners, of course, maintain that the blocks at issue are not, in fact, blighted and that the allegedly mild dilapidation and inutility of the property cannot support a finding that it is substandard and insanitary within the meaning of article XVIII. They are doubtless correct that the conditions cited in support of the blight finding at issue do not begin to approach in severity the dire circumstances of urban slum dwelling described by the *Muller* court in 1936.… We, however, have never required that a finding of blight by a legislatively designated public benefit corporation be based upon conditions replicating those to which the Court and the Constitutional Convention responded in the midst of the Great Depression. To the contrary, in construing the reach of the terms "substandard and insanitary" as they are used in article XVIII—and were applied in the early 1950s to the Columbus Circle area upon which the New York Coliseum was proposed to be built—we observed:

"Of course, none of the buildings are as noisome or dilapidated as those described in Dickens' novels or Thomas Burke's 'Limehouse' stories of the London slums of other days, but there is ample in this record to justify the determination of the city planning commission that a substantial part of the area is 'substandard and insanitary' by modern tests."…

And, subsequently, in *Yonkers Community Dev. Agency v Morris* … [1975]), in reviewing the evolution of the crucial terms' signification and permissible range of application, we noted:

"Historically, urban renewal began as an effort to remove 'substandard and insanitary' conditions which threatened the health and welfare of the public, in other words 'slums'…, whose eradication was in itself found to constitute a public purpose for which the condemnation powers of government might constitutionally be employed. Gradually, as the complexities of urban conditions became better understood, it has become clear that the areas eligible for such renewal are not limited to 'slums' as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose….

It is important to stress that lending precise content to these general terms has not been, and may not be, primarily a judicial exercise. Whether a matter should be the subject of a public undertaking—whether its pursuit will serve a public purpose or use—is ordinarily the province of the Legislature, not the Judiciary, and the actual specification of the uses identified by the Legislature as public has been largely left to quasi-legislative administrative agencies. It is only where there is no room for reasonable difference of opinion as to whether an area is blighted, that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out for those of the legislatively designated agencies; where, as here, "those bodies have made their finding, not corruptly or irrationally or baselessly, there is nothing for the courts to do about it, unless every act and decision of other departments of government is subject to revision by the courts."…

It is quite possible to differ with ESDC's findings that the blocks in question are affected by numerous conditions indicative of blight, but any such difference would not, on this record, in which the bases for the agency findings have been extensively documented photographically and otherwise on a lot-by-lot basis,

amount to more than another reasonable view of the matter; such a difference could not, consonant with what we have recognized to be the structural limitations upon our review of what is essentially a legislative prerogative, furnish a ground to afford petitioners relief….

It may be that the bar has now been set too low—that what will now pass as "blight," as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and businesses. But any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts. Properly involved in redrawing the range of the sovereign prerogative would not be a simple return to the days when private property rights were viewed as virtually inviolable, even when they stood in the way of meeting compelling public needs, but a reweighing of public as against private interests and a reassessment of the need for and public utility of what may now be outmoded approaches to the revivification of the urban landscape. These are not tasks courts are suited to perform. They are appropriately situated in the policy-making branches of government….

While there remains a hypothetical case in which we might intervene to prevent an urban redevelopment condemnation on public use grounds—where "the physical conditions of an area might be such that it would be irrational and baseless to call it substandard or insanitary"… this is not that case….

Here too, all that is at issue is a reasonable difference of opinion as to whether the area in question is in fact substandard and insanitary. This is not a sufficient predicate for us to supplant respondent's determination.

III

Petitioners' remaining contention is that the proposed condemnation should not have been authorized because the land use improvement project it is to advance is not in conformity with article XVIII, § 6 of the State Constitution, which states:

"No loan, or subsidy shall be made by the state to aid any project unless such project is in conformity with a plan or undertaking for the clearance, replanning and reconstruction or rehabilitation of a substandard and unsanitary area or areas and for recreational and other facilities incidental or appurtenant thereto. The legislature may provide additional conditions to the making of such loans or subsidies consistent with the purposes of this article. The occupancy of any such project shall be restricted to persons of low income as defined by law and preference shall be given to persons who live or shall have lived in such area or areas" (emphasis added).

Petitioners understand this provision as requiring that any housing built as part of a land use improvement project receiving a state loan or subsidy be reserved for low income tenants. In alleging that Atlantic Yards, as presently configured, does not comply with article XVIII, § 6, they point out that although it is a land use improvement project expressly governed by article XVIII … that has already received some $100 million in state financing and is expected to be the recipient of additional state aid earmarked for affordable housing, the majority of the project's housing units are slated to be rented or sold at market rates.

Petitioners' understanding of section 6 does not capture the provision's intendment….

Article XVIII was, as noted, adopted and approved in the late 1930s to empower government, in partnership with private entities, to deal with the emergent problem of slums, which then spread over large portions of the urban landscape like running sores, endangering the health and well-being of their occupants and the civic life of the municipalities in which they were situated. What was envisioned was the use of the condemnation power to clear large swaths of slum dwellings—in some cases entire neighborhoods. The feasibility and ultimate purpose of this scenario, entailing the massive direct displacement of slum dwellers, required the creation of replacement low cost housing, and it is clear from the record of the 1938 Constitutional Convention that it was to address this need that the last sentence of article XVIII, § 6 was crafted… and, after extended separate consideration and revision, agreed upon…. The sentence in essence assures that if housing is created in connection with a slum clearance project, and the project is aided by state loans or subsidies, the new housing will replace the low rent accommodations lost during the clearance….

The situation before us is, as petitioners have elsewhere acknowledged and indeed urged, very different from the scenario addressed by the framers of section 6's occupancy restriction. The land use improvement plan at issue is not directed at the wholesale eradication of slums, but rather at alleviating relatively mild conditions of urban blight principally attributable to a large and, of course, uninhabited subgrade rail cut. The contemplated clearance will not cause direct displacement of large concentrations of low income individuals; only 146 persons lived within the project footprint at the time

of the final environmental impact statement, and not all of those were persons of low income. It does not seem plausible that the constitutionality of a project of this sort was meant to turn upon whether its occupancy was restricted to persons of low income. While the creation of low income housing is a generally worthy objective, it is not constitutionally required under article XVIII, § 6 as an element of a land use improvement project that does not entail substantial slum clearance....

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Case Questions

1. What exactly did New York's highest court actually decide in this case?
2. Can you see any consequences that might flow from this decision?
3. Did you agree with the decision? Explain.

INTERNET TIP

Judge Smith dissented in *Goldstein v. Urban Development Corporation*. His opinion can be found with the Chapter XII materials on the textbook's website.

Taxation

A property owner is usually required to pay taxes to the government based on the value and use of the property. Failure to pay these taxes can result in the filing of a lien and eventually in the public taking of the property to satisfy the taxes. Government frequently uses tax concessions to encourage property uses it favors.

Nuisance

A **nuisance** exists when an owner's use of his or her property unreasonably infringes on other persons' use and enjoyment of their property rights. Nuisances are classified as public, private, or both. A **public nuisance** exists when a given use of land poses a generalized threat to the public. It is redressed by criminal prosecution and injunctive relief. Examples of public nuisances include houses of prostitution, actions affecting the public health (such as water and air pollution), crack houses, and dance halls. A **private nuisance** is a tort that requires proof of an injury that is distinct from that suffered by the general public. (It differs from trespass because the offensive activity does not occur on the victim's property.) A party injured by a private nuisance can obtain both damages and injunctive relief.

Hugh and Jackie Evans claimed that the conduct of the defendant, Lochmere Recreation Club, interfered with their right to the enjoyment and use of their property and constituted a private nuisance. They appealed from a trial court's decision to dismiss their complaint for failing to state a claim on which relief could be granted.

Hugh K. Evans v. Lochmere Recreation Club, Inc.
627 S.E.2d 340
Court of Appeals of North Carolina
March 21, 2006

Bryant, Judge.
Hugh K. Evans and Jackie Evans (plaintiffs) appeal from an order entered 27 April 2005 dismissing their claims against Lochmere Recreation Club, Inc. (defendant) ...

Facts & Procedural History
In 1994, plaintiff Hugh Evans (Evans) filed suit against MacGregor Development Co. (MacGregor) and Lochmere Swim & Tennis Club, Inc. (LSTC), claiming the

noise from the speakers and crowds located at the Swim Club interfered with the use and enjoyment of his property. At trial, a jury found in favor of Evans and awarded him $50,000.00 in compensatory damages and $135,000.00 in punitive damages. The trial court further granted a permanent injunction and restraining order against MacGregor and LSTC instructing them to take measures, such as repositioning their speakers, to reduce the noise encroachment on plaintiff's property. This final judgment was affirmed on appeal.... In 1998 defendant Lochmere Recreation Club acquired the property from LSTC.

Plaintiffs initiated the instant civil action against defendant on 22 December 2004, alleging that between May and September of each year from 1998–2004, defendant operated their swim and tennis club in a manner that created a nuisance. Plaintiff's complaint listed several different ways in which plaintiffs assert that defendant caused an unreasonable interference with the enjoyment of their home.... On 13 January 2005, defendant moved to dismiss plaintiffs' complaint...

Defendant's motion was heard on 5 April 2005.... On 27 April 2005, the trial court granted defendant's motion to dismiss.... Plaintiffs appeal.

Plaintiffs argue that the trial court erred in dismissing their claim for private nuisance...

Standard of Review

"The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." In considering a Rule 12 (b)(6) motion to dismiss, the trial court must determine whether the factual allegations in the complaint state a claim for relief.... A plaintiff must state the "substantive elements of a legally recognized claim" in order to survive a Rule 12(b)(6) motion to dismiss.... To support a complaint for private nuisance, a plaintiff must allege "sufficient facts from which it may be determined what liability forming conduct is being complained of and what injury plaintiffs have suffered."... When hearing a motion to dismiss, the trial court must take the complaint's allegations as true and determine whether they are "'sufficient to state a claim upon which relief may be granted under some legal theory.'"...

Sufficiency of Complaint

"[A] private nuisance exists in a legal sense when one makes an improper use of his own property and in that way injures the land or some incorporeal right of one's neighbor." ... In their complaint plaintiffs alleged several specific actions which would support a private nuisance claim against defendant, including that defendant "has used amplified sound from speakers aimed directly at [plaintiffs'] premises" and that when the public address system is used, "it can be clearly heard in plaintiffs' home even with all plaintiffs' doors and windows closed and their television playing."... As the complaint is to be liberally construed, we find it is sufficient on its face to "provide defendant sufficient notice of the conduct on which the claim is based to enable defendant to respond and prepare for trial" and "states enough ... to satisfy the substantive elements" of a private nuisance claim against defendant...

Affirmed in part, reversed in part, and remanded for further proceedings on plaintiffs' claim for private nuisance...

Case Questions

1. What does the court mean when it says that the complaint is to be liberally construed?
2. What is required to change a private nuisance into a public nuisance?

REAL PROPERTY

The laws that govern real property in America have their origins in medieval England. Under feudal law all land was derived from the king; thus it was possible for someone to own an **estate** in land but not the actual land itself. Estates were classified according to their duration, a practice that continues in American law today.

Estates in Land

The word estate is derived from the Latin word for status. An estate in land, therefore, is the amount of interest a person has in land. Some estates in land can be inherited. A person who holds an estate in what is known as **fee simple** can pass his or her interest on to heirs. This represents the maximum ownership right to land that is permissible by law. A

person who has an estate in land for the duration of his or her life has a **life estate** in land. Life estates cannot be passed on to heirs.

A person who leases real property has only a possessory interest in land called a leasehold. **Leaseholds** allow tenants to obtain **possessory** interests in real property for a month, a year, or even at will.

A landowner has the right to minerals that exist beneath the surface of the land. Landowners also have the right to control and use the airspace above their land. Governmental regulations regarding the height of buildings, as well as engineering limitations that are associated with a particular property, often limit the exercise of this right.

Easements

Easements and licenses are interests in land that do not amount to an estate but affect the owner's use of land. An **easement** is a nonpossessory property right in land; it is one person's right to use another person's land. For example, B might grant A an easement that permits her to use a private road on B's property. Because B continues to own the land, B can grant similar easements to persons C and D. B can grant these additional easements without having to obtain permission from A because A lacks possessory rights on B's land. Easements are often classified as affirmative or negative. An affirmative easement would exist where landowner A conveys to B the right to lay a pipeline across A's land. A negative easement would exist where A conveys part of her land to B and retains an easement that forbids B to burn trash or plant trees within five yards of A's property line.

An easement also may be created by eminent domain. In such a case, the landowner is constitutionally entitled to receive just compensation. Easements often are created by deed, and usually have to be in writing to be legally enforceable. They can be limited to a specific term or event or they can be of infinite duration. It is commonly said that easements "run with the land," meaning that the burden or benefit of the easement is transferred with the land to the subsequent owners.

Licenses

A **license** is a temporary grant of authority to do specified things on the land of another, for example, hunt or fish. A license can be oral because it is not an actual estate in land and therefore is not subject to the statute of frauds (see Chapter X). Licenses can generally be revoked at will.

Covenants

To protect themselves from sellers who don't have title, purchasers of land often require the seller to make certain promises in the deed that are called **covenants.** The grantor's covenants ensure that he or she has possessory rights to the premises and that the title is good and is free of encumbrances. The grantor will further promise to defend this title against the claims and demands of other people.

Other covenants that affect land use are those that run with the land. Historically, restrictive covenants have discriminated against people because of race, religion, or national origin. Today such covenants are illegal and contrary to public policy and would not be enforced in any court. Courts will, in appropriate cases, enforce nondiscriminatory covenants that run with the land and that create contractual rights in property. Although easements have traditionally been used to affect land use, lawyers began to resort to covenants to augment the kind of restrictions sellers could require of purchasers beyond the scope of easements. A baker, for example, might be willing to sell an adjacent lot that he owns; however, he might protect his business by requiring the purchaser to covenant that the premises conveyed will not be used for the operation or maintenance of a bakery, lunchroom, or restaurant.

Covenants that run with the land are regulated closely by courts because they restrict the use of property. For a covenant to run with the land and bind successive landowners, the original grantor and grantee must have intended that the restrictions on the covenant go with the land. In addition, a close, direct relationship known as **privity of estate** must exist between a grantor and a grantee. The privity

requirement is satisfied, for example, when land developer A deeds part of her land to B, and B covenants not to put up a fence on B's land without A's written approval. Finally, covenants must "touch and concern" land; they may not be promises that are personal and unrelated to land. Successors in interest to the original grantor and grantee will be bound by the terms of a properly created covenant that runs with the land.

Adverse Possession

A person who has no lawful right of possession can obtain title to another's land by complying with the rules for **adverse possession** (also known as an **easement by prescription**). The law requires property owners to ensure that no one else uses the land without permission, and a person who fails to use or protect his or her land for many years may one day lose title to an adverse possessor. In order to obtain title by adverse possession, the adverse possessor must take actual possession of the land; the possession must be hostile (without the consent of the owner); the possession must be adverse (against the owner's interest); the possession must be open and notorious (obvious and knowable to anyone who is interested); and the possession must be continuous for a statutorily determined period of time, often twenty years. A successful adverse possessor cannot sell the land until he or she has a marketable title (clear ownership of the land). To obtain a marketable title, the adverse possessor has to file what is called a quiet title action. If the court rules in favor of the adverse possessor, he or she will have a clear title to the land.

Introduction to *Steuk v. Easley*

The defendant/appellant in the next case, Dr. Newell Easley, appealed a trial judge's decision that Easley's neighbors to the east, Peter and Barbara Steuk, had acquired title to seventeen acres of Easley's land by adverse possession. The Steuks had purchased their property from Dale Daggett in 2001, who had in turn purchased this parcel in 1974 from Gordon Daniels. The Daniels/Daggett/Steuk property was adjacent to an essentially undeveloped seventeen-acre parcel which Easley. purchased in 1987. The Steuks (referred to as the plaintiffs in the court's opinion) filed suit claiming that they had acquired title to the seventeen acres through adverse possession. They offered as proof the testimony of their predecessors in title (Daggett and Daniels). Daggett and Daniels testified that while they were owners of the property now owned by the Steuks, they had hunted on the seventeen acres. When their years of hunting were added to the Steuks' possession, it added up to twenty-nine consecutive years on that parcel. Both maintained that throughout that twenty-nine–year period they had been unaware that the land belonged to Easley.

The question before the intermediate court of appeals was: Were the hunters adverse possessors or merely trespassers?

Steuck v. Easley
2009AP757
Court of Appeals of Wisconsin, District IV
May 13, 2010.

Vergeront, J.
This adverse possession claim concerns approximately seventeen acres of undeveloped land in a larger tract of several hundred acres primarily used for hunting by the titleholder, Newell Easley.... Easley appeals the circuit court's determination that the plaintiffs established title to the disputed area by adverse possession....

Background
Easley owns at least 360 acres of undeveloped land in the Township of Shields, Marquette County. He uses his land primarily for hunting and also for activities such as gathering firewood, picking apples, and hiking on the hiking trails. He has set aside some of his land as a sanctuary for the purpose of managing, growing and protecting a deer herd....

The complaint alleges that the use of the disputed area by the plaintiffs' predecessors in title for more than twenty years has established ownership by adverse possession as provided in Wis. Stat. § 893.25….

At the trial to the court, Dale Daggett, the plaintiffs' predecessor in title, testified that when he purchased the property in 2001, he believed he owned the disputed area and he treated it as his. He bow hunted there in the fall of 2003; he went four-wheeling there three or four times in 2003 and a couple times in 2004; he took friends to walk there; and he cleared brush off a trail. He never saw anyone else in that area….

Easley testified that he and one or more of his family and friends are on his land approximately 180 days per year. They do not hunt in the sanctuary, which includes the disputed area. He goes into the disputed area once or twice a year and tries to observe it from a distance because walking through it defeats the purpose of a sanctuary. He never noticed persons trespassing in the disputed area nor saw anything that caused him to believe someone was doing something of a permanent nature. No one in his family or his hunting group gave him any indication there was hunting or other activities going on in the disputed area. He did see two tree stands in the area, but they were very old, and he was sure they had been there for many years prior to his purchase of the property.

The court concluded that the plaintiffs had established title by adverse possession to the disputed area and entered judgment granting full right and title to that property to the plaintiffs….

Discussion

On appeal Easley contends: (1) the circuit court disregarded the presumption in favor of the titleholder and improperly placed the burden on him to prove he had taken measures to keep people off his property; (2) the evidence is insufficient to establish adverse possession when the correct legal standard is applied; and (3) the evidence is insufficient to show he acquiesced to the man-made ditch as the boundary between his property in Lot 6 and the plaintiffs' property….

I. Adverse Possession under WIS. STAT. § 893.25

Pursuant to WIS. STAT. § 893.25(2)(a) and (b), real estate is possessed adversely only if "the person possessing it, in connection with his or her predecessors in interest, is in actual continued occupation under claim of title, exclusive of any other right," and "[o]nly to the extent that it is actually occupied." In addition, the property must be "protected by a substantial enclosure" or "usually cultivated or improved." § 893.25(2)(b). Pursuant to § 893.25(1), the adverse possession must be uninterrupted for twenty years….

In order to constitute adverse possession, "the use of the land must be open, notorious, visible, exclusive, hostile and continuous, such as would apprise a reasonably diligent landowner and the public that the possessor claims the land as his own."… "Hostile" in this context does not mean a deliberate and unfriendly animus; rather, the law presumes the element of hostile intent if the other requirements of open, notorious, continuous, and exclusive use are satisfied…. "Both … the fact of possession and its real adverse character" must be sufficiently open and obvious to "apprize the true owner … in the exercise of reasonable diligence of the fact and of an intention to usurp the possession of that which in law is his own."…. The size and nature of the disputed area are relevant in deciding if the use is sufficient to apprise the true owner of an adverse claim….

The party seeking to claim title by adverse possession bears the burden of proving the elements by clear and positive evidence…. The evidence must be strictly construed against the claimant and all reasonable presumptions must be made in favor of the true owner…. One of these presumptions is that "actual possession is subordinate to the right of [the true] owner."…

We consider first Easley's assertion that the circuit court ignored the presumption in favor of the titleholder and improperly placed the burden on him. Easley points to the court's several references to Easley's failure, until 2006, to post no-trespassing signs on the eastern boundary of the disputed area to keep out people entering from the plaintiffs' property. The court contrasted Easley's failure to take "anti-trespasser actions" regarding the disputed area with his posting of the rest of his property and his concern with trespassers on the rest of his property. The court also apparently found it significant that there was no trail cut from the lower portion of Lot 6 into the disputed area.

The circuit court acknowledged that a titleholder need not use his or her land at all in order to retain title and that the burden was on the plaintiffs to prove adverse possession. However, we agree with Easley that certain of the court's findings and comments appear to require that Easley prove efforts to keep trespassers out, to post his land, and to patrol it. We clarify here that this is not the law. The elements of adverse possession are directed to the claimant's use of the land, and the claimant has the burden to prove those elements by clear and positive evidence…. If the claimant's use gives the titleholder reasonable notice that the claimant is asserting ownership and the titleholder does nothing, that failure to respond may result in losing title. However, in the absence of such use by

the claimant, the titleholder is not obligated to do anything in order to retain title….

We next examine whether the facts as found by the circuit court are sufficient to fulfill the legal standard that the use of the disputed area by Daggett and Daniels was open, notorious, visible, exclusive, hostile, and continuous. The circuit court determined that the regular use of the disputed area for hunting in the various annual hunting seasons by Daggett and Daniels and their friends, the dirt road and trail, and the deer stands should have been noticed by anyone who claimed title to the disputed area. The exclusivity of this use, in the circuit court's opinion, was demonstrated by an incident Daniels described, occurring in approximately 1998, in which he cut down a tree in the disputed area because a tree stand that did not belong to him or his friends was in the tree. The use was continuous, the court determined, because it occurred regularly according to the seasonal nature of hunting.

For the following reasons, we conclude the regular use of the disputed area for hunting, the deer stands, and the dirt road and trail do not constitute open, notorious, visible, exclusive and hostile use. Because of this conclusion, we do not discuss the requirement of continuous use.

There was no finding that Easley ever met Daniels, Daggett or their friends hunting in the disputed area. The circuit court found that Easley could have and should have heard the gunshots during spring and fall gun seasons. We do not agree that the sound of gunshots gives a reasonably diligent titleholder notice of adverse possession. Even assuming that the shots come from the titleholder's property and not from someone else's property beyond, the gunshots would have been consistent with trespassers. As for the deer stands, the testimony was that they were portable deer stands, some kept in place all year. Even if visible, the deer stands, too, are consistent with trespassers. The dirt road and the trail continuing on to the lake are consistent with an easement to the lake rather than adverse possession of the seventeen acres…..

We also do not agree that Daniels' act of cutting down a tree on one occasion because it held someone else's tree stand showed Easley and the public that Daniels was attempting to keep others out of the disputed area. Given the nature and size of the disputed area, this is not reasonable notice of an exclusive claim by another. Notably, neither Daggett nor Daniels posted the disputed area, which would have been notice to Easley that someone else claimed it….

The circuit court and the plaintiffs rely on the statement in *Burkhardt* [*v. Smith*, … (1962)] … that "actual occupancy" for purposes of adverse possession is "the ordinary use of which the land is capable and such as an owner would make of it." … The circuit court reasoned, and the plaintiffs argue on appeal, that the "highest and best use" of the disputed area was hunting, and the plaintiffs' predecessors used the area for hunting just as much as a true owner would or could. However, the quoted sentence from *Burkhardt* is followed by the italicized sentence:

Actual occupancy is not limited to structural encroachment which is common but is not the only physical characteristic of possession. Actual occupancy means the ordinary use of which the land is capable and such as an owner would make of it. *Any actual visible means, which gives notice of exclusion from the property to the true owner or to the public and of the defendant's domination over it, is sufficient*….

In other words, although the use need be only the ordinary use an owner would make of it, the use must also be open, notorious, visible, exclusive, and hostile (as well as continuous)….

The necessary implication of a determination of adverse possession based on the facts here is that a titleholder of large areas of hunting land must either fence or post his or her lands and be diligent about keeping trespassers off in order to avoid the risk of losing title. This result is … not supported in this case by evidence that satisfies the legal standard for adverse possession with the presumption favoring the titleholder and the burden properly allocated to the plaintiffs.

The next issue we take up is that of the substantial enclosure requirement in WIS. STAT. § 893.25(2)(b)1…. Although we could conclude our discussion of adverse possession without addressing this issue, we choose to address it. Doing so will provide a more complete analysis of the adverse possession arguments of the parties and will be useful in addressing their arguments on acquiescence.

The purpose of the substantial enclosure requirement is to alert a reasonable person to the possibility of a border dispute…. "The boundaries may be artificial in part and natural in part if the circumstances are such as to clearly indicate that the inclosure, partly artificial and partly natural, marks the boundaries of the adverse occupancy." … In addition, the enclosure "must be of a substantial character in the sense of being appropriate and effective to reasonably fit the premises for some use to which they are adapted." … However, the enclosure need not actually prevent others from entering….

Given the configuration of the disputed area and the location of the lake, the issue of a substantial enclosure in this case focuses on the southern boundary of the disputed area. As noted above, the court found that there was a substantial enclosure of the

disputed property on the south, consisting of the swampy area and a man-made drainage ditch that runs approximately 200 feet from that swampy area to the eastern boundary of Lot 6….

With respect to the swampy area, a natural, swampy area on a titleholder's property does not provide reasonable notice that someone else is or may be claiming title to land on the other side. Therefore, the fact that the swampy area may make it harder to access the disputed area from the southern portion of Lot 6 than from the plaintiffs' property is irrelevant to the issue of a substantial enclosure. This difficulty of natural access does not contribute to providing notice to the Lot 6 titleholder that the owner of the property to the east is or may be claiming ownership of a part of Lot 6.

With respect to the man-made drainage ditch … this ditch does not alert a reasonable titleholder of Lot 6 that someone else is or might be claiming land on the north side of the ditch in Lot 6. The ditch had already been on Lot 6 for at least three decades when Easley purchased it….

We conclude the evidence does not establish that Daggett's and Daniels' use of the disputed area was open, notorious, visible, exclusive, and hostile, and also does not establish that the disputed area was protected by a substantial enclosure as required by WIS. STAT. § 893.25(2)(b)1.

II. Acquiescence

The parties dispute whether the plaintiffs have established adverse possession by showing that Easley acquiesced for twenty years to the man-made ditch as the northern boundary line of his property in Lot 6. As we explain below, it is not clear whether the doctrine of acquiescence remains a distinct means of proving adverse possession when, as here, there is no issue concerning the twenty-year time period. However, whatever the precise relationship between adverse possession and the doctrine of acquiescence, we conclude the evidence does not establish acquiescence.

As already noted, the "hostile" requirement of adverse possession does not refer to a particular state of mind on the part of the claimant…. However, the law at one time did require a hostile intent—knowledge that the land was owned by another and the intent to dispossess the true owner…. The result was that "one who occupied part of his neighbor's land, due to an honest mistake as to the location of his boundary" could never establish adverse possession…. Thus, courts developed the doctrine of acquiescence under which, even though a hostile intent was absent, a party could acquire land by adverse possession if the true owner acquiesced in such possession for twenty years…. More specifically, "acquiescence by adjoining owners in the location of a fence as establishing the common boundary line of their respective properties was conclusive as to the location of such line" where the fence had stood in the same location for more than twenty years….

With the focus now on the acts of possession rather than on the subjective intent of the parties, it would appear that the elements of adverse possession—actual occupancy that is open, notorious, visible, exclusive, hostile, and continuous, plus a substantial enclosure—can be established with the evidence that has sufficed under the case law to show occupancy up to a fence line for twenty years, without the need for specific proof of acquiescence by the titleholder….

If we assume the doctrine of acquiescence remains a distinct means of proving adverse possession where there is no dispute regarding the twenty-year requirement, that assumption does not aid the plaintiffs. The cases on which the plaintiffs rely … all involve visible activities such as gardening, planting, farming or building up to a fence or fence line for twenty years without objection from the titleholder. The visible nature of the activity together with the commonly understood purpose of a fence to define property lines forms the basis for the reasonable inference that the titleholder's lack of objection constitutes acquiescence to that boundary line….

We have already concluded that the activity of the plaintiffs' predecessors in the disputed area was not open and visible. We have also concluded that the swampy area and man-made ditch do not provide reasonable notice to the titleholder of a potential adverse claim. Even if we assume a fence is not essential to the acquiescence doctrine, the boundary must be physically defined in some equivalent way that makes it reasonable to infer the titleholder understood it as the boundary. The swampy area and man-made ditch do not meet this standard….

Accordingly, we conclude the plaintiffs have not established adverse possession under the doctrine of acquiescence, assuming this doctrine remains a distinct means of establishing adverse possession.

Conclusion

We conclude the plaintiffs have not established adverse possession of the disputed area. We therefore reverse and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

Case Questions

1. What was the decision of the trial court?
2. Why did Easley appeal?
3. What decision was made by the Wisconsin Court of Appeals? How did the court explain its decision?

INTERNET TIP

Judge Dykman dissented in the Easley case, saying, "I believe that the majority has re-weighed the evidence, focused on evidence it finds more persuasive than the evidence relied on by the trial court, and therefore is able to reach a conclusion contrary to that of the trial court." Readers can find this dissent included with the Chapter XII materials on the textbook's website.

The Recording System

The **recording system** gives purchasers of land notice of claims against real property. It also helps resolve questions of priority if, for example, a seller deeds land to one person and then deeds the same land to a second person. In every county there is a governmental office called the registry of deeds, usually located in the county courthouse. There the registrar of deeds maintains an index of documents relating to all real property transactions. These include deeds, easements, options, and mortgages. The recording system permits buyers of real property to evaluate the quality of the seller's title. In addition, the purchaser's attorney or a bank's attorney may obtain a document called a title abstract or an insurance company's agreement to insure the title. The abstract is a report that summarizes all the recorded claims that affect the seller's title. If a dispute arises between competing claimants, the recording statutes help the courts resolve who the law will recognize as having title to the property.

PERSONAL PROPERTY

There are many ways by which title to personal property is acquired. These include purchase, creation, capture, accession, finding, confusion, gift, and inheritance. In addition, one person may acquire the personal property of another, though not the title to that property, through bailment.

Purchase

The purchase or sale of goods is the most common means of obtaining or conveying ownership rights to personal property. Most purchases involve an exchange of money for the ownership rights to goods. This is a contractual relationship and is governed by the Uniform Commercial Code.

Creation

A person who manufactures products out of raw materials through physical or mental labor has title to the items created. Thus, a person who builds a boat, writes a song, makes a quilt, or develops a software program will have title to that item. A person who is employed to produce something, however, will not have title; ownership rights will belong to the employer.

Capture

A person who acquires previously unowned property has title to the items captured. For example, a person who catches fish on the high seas has title by way of **capture.** Such captures usually require the purchase of a fishing or hunting license. This license authorizes the holder to take title by way of capture according to established regulations that define the size of the daily catch and determine the season, for example.

Accession

A person can take title to additions that occur to his or her property because of natural increases. This

means that the owner of animals has title to the offspring by way of **accession.** Similarly, the owner of a savings account has title to the interest that is earned on that account by way of accession.

Finding

A finder of lost property has title that is good against everyone except the true owner. Some states provide that a finder of a lost item above some designated dollar value has a duty to turn the item over to an agency (often the police) for a period of time. If the true owner fails to claim the item, the finder takes title, and the true owner's ownership rights are severed. A finder has a duty to make reasonable efforts to locate the true owner, although no expenses must be incurred to satisfy this obligation. Lost property differs from mislaid and abandoned property. If you inadvertently leave your jacket in a classroom after a class, you have mislaid it. As we see in the next case, a finder who is a trespasser acquires neither possessory nor ownership rights.

Favorite v. Miller
407 A.2d 974
Supreme Court of Connecticut
December 12, 1978

Bogdanski, Associate Justice

On July 9, 1776, a band of patriots, hearing news of the Declaration of Independence, toppled the equestrian statue of King George III, which was located in Bowling Green Park in lower Manhattan, New York. The statue, of gilded lead, was then hacked apart and the pieces ferried over Long Island Sound and loaded onto wagons at Norwalk, Connecticut, to be hauled some fifty miles northward to Oliver Wolcott's bullet-molding foundry in Litchfield, there to be cast into bullets. On the journey to Litchfield, the wagoners halted at Wilton, Connecticut, and while the patriots were imbibing, the loyalists managed to steal back pieces of the statue. The wagonload of the pieces lifted by the Tories was scattered about in the area of the Davis Swamp in Wilton and fragments of the statue have continued to turn up in that area since that time.

Although the above events have been dramatized in the intervening years, the unquestioned historical facts are: (1) the destruction of the statue; (2) cartage of the pieces to the Wolcott Foundry; (3) the pause at Wilton where part of the load was scattered over the Wilton area by loyalists; and (4) repeated discoveries of fragments over the last century.

In 1972, the defendant, Louis Miller, determined that a part of the statue might be located within property owned by the plaintiffs. On October 16 he entered the area of the Davis Swamp owned by the plaintiffs although he knew it to be private property. With the aid of a metal detector, he discovered a statuary fragment fifteen inches square and weighing twenty pounds which was embedded ten inches below the soil. He dug up this fragment and removed it from the plaintiffs' property. The plaintiffs did not learn that a piece of the statue of King George III had been found on their property until they read about it in the newspaper, long after it had been removed.

In due course, the piece of the statue made its way back to New York City, where the defendant agreed to sell it to the Museum of the City of New York for $5500. The museum continues to hold it pending resolution of this controversy.

In March of 1973, the plaintiffs instituted this action to have the fragment returned to them and the case was submitted to the court on a stipulation of facts. The trial court found the issues for the plaintiffs, from which judgment the defendant appealed to this court. The sole issue presented on appeal is whether the claim of the defendant, as finder, is superior to that of the plaintiffs, as owners of the land upon which the historic fragment was discovered.

Traditionally, when questions have arisen concerning the rights of the finder as against the person upon whose land the property was found, the resolution has turned upon the characterization given the property. Typically, if the property was found to be "lost" or "abandoned," the finder would prevail, whereas if the property was characterized as "mislaid," the owner or occupier of the land would prevail.

Lost property has traditionally been defined as involving an involuntary parting, i.e., where there is no intent on the part of the loser to part with the ownership of the property.

Abandonment, in turn, has been defined as the voluntary relinquishment of ownership of property without reference to any particular person or purpose; i.e., a "throwing away" of the property concerned; ...

while mislaid property is defined as that which is intentionally placed by the owner where he can obtain custody of it, but afterwards forgotten.

It should be noted that the classification of property as "lost," "abandoned," or "mislaid" requires that a court determine the intent or mental state of the unknown party who at some time in the past parted with the ownership or control of the property.

The trial court in this case applied the traditional approach and ruled in favor of the landowners on the ground that the piece of the statue found by Miller was "mislaid." The factual basis for that conclusion is set out in the finding, where the court found that "the loyalists did not wish to have the pieces [in their possession] during the turmoil surrounding the Revolutionary War and hid them in a place where they could resort to them [after the war], but forgot where they put them."

The defendant contends that the finding was made without evidence and that the court's conclusion "is legally impossible now after 200 years with no living claimants to the fragment and the secret of its burial having died with them." While we cannot agree that the court's conclusion was legally impossible, we do agree that any conclusion as to the mental state of persons engaged in events which occurred over two hundred years ago would be of a conjectural nature and as such does not furnish an adequate basis for determining rights of twentieth-century claimants.

The defendant argues further that his rights in the statue are superior to those of anyone except the true owner (i.e., the British government). He presses this claim on the ground that the law has traditionally favored the finder as against all but the true owner, and that because his efforts brought the statue to light, he should be allowed to reap the benefits of his discovery. In his brief, he asserts: "As with archeologists forever probing and unearthing the past, to guide man for the betterment of those to follow, explorers like Miller deserve encouragement, and reward, in their selfless pursuit of the hidden, the unknown."

There are, however, some difficulties with the defendant's position. The first concerns the defendant's characterization of himself as a selfless seeker after knowledge. The facts in the record do not support such a conclusion. The defendant admitted that he was in the business of selling metal detectors and that he has used his success in finding the statue as advertising to boost his sales of such metal detectors, and that the advertising has been financially rewarding. Further, there is the fact that he signed a contract with the City Museum of New York for the sale of the statuary piece and that he stands to profit thereby.

Moreover, even if we assume his motive to be that of historical research alone, that fact will not justify his entering upon the property of another without permission. It is unquestioned that in today's world even archeologists must obtain permission from owners of property and the government of the country involved before they can conduct their explorations. Similarly, mountaineers must apply for permits, sometimes years in advance of their proposed expeditions. On a more familiar level, backpackers and hikers must often obtain permits before being allowed access to certain of our national parks and forests, even though that land is public and not private. Similarly, hunters and fishermen wishing to enter upon private property must first obtain the permission of the owner before they embark upon their respective pursuits.

Although few cases are to be found in this area of the law, one line of cases which have dealt with this issue has held that except where the trespass is trivial or merely technical, the fact that the finder is trespassing is sufficient to deprive him of his normal preference over the owner of the place where the property was found. The presumption in such cases is that possession of the article found is in the owner of the land and that the finder acquires no rights to the article found.

The defendant, by his own admission, knew that he was trespassing when he entered upon the property of the plaintiffs. He admitted that he was told by Gertrude Merwyn, the librarian of the Wilton Historical Society, *before* he went into the Davis Swamp area, that the land was privately owned and that Mrs. Merwyn recommended that he call the owners, whom she named, and obtain permission before he began his explorations. He also admitted that when he later told Mrs. Merwyn about his discovery, she again suggested that he contact the owners of the property, but that he failed to do so.

In the stipulation of facts submitted to the court, the defendant admitted entering the Davis Swamp property "with the belief that part of the 'King George Statue' … might be located within said property and with the intention of removing [the] same if located." The defendant has also admitted that the piece of the statue which he found was embedded in the ground ten inches below the surface and that it was necessary for him to excavate in order to take possession of his find.

In light of those undisputed facts the defendant's trespass was neither technical nor trivial. We conclude that the fact that the property found was embedded in the earth and the fact that the defendant was a trespasser are sufficient to defeat any claim to the

property which the defendant might other-wise have had as a finder.

Where the trial court reaches a correct decision but on mistaken grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it. The present case falls within the ambit of that principle of law and we affirm the decision of the court below.

There is no error.

Case Questions

1. On what grounds did the trial court hold for the plaintiff?
2. Why did the Supreme Court of Connecticut disagree with the lower court's reasoning?

Why, in your opinion, should anyone be expected to act "ethically" unless it is in the person's self-interest to do so?

Confusion

Confusion involves the blending or intermingling of **fungible goods**—goods of a similar character that may be exchanged or substituted for one another; for example, wheat, corn, lima beans, or money. Once similar items are mingled, it is impossible to separate the original owner's money or crops from those of others. In such cases each depositor owns an equivalent tonnage or number of bushels of the crop in an elevator or an equivalent dollar amount on deposit with a bank.

Gift

A person who has title to an item can make a gift by voluntarily transferring all rights in the item to another. A person making a gift is called a donor and the recipient of the gift is called a donee. The donor has donative intent—he or she is parting with all property rights and expects nothing (except love or appreciation) in return. The law requires that a donor make an actual or constructive delivery of the item. This means that if the donor is making a gift of a car, for example, the donor must bring the car to the donee (actual delivery) or present the car keys to the donee (constructive delivery). The donee must accept for a valid gift to occur.

Rick Kenyon believed himself to be the owner of a very valuable painting, which he had purchased for twenty-five dollars at a Salvation Army thrift store. But Claude Abel, the painting's previous owner, claimed that he was still the rightful owner, because the painting had been inadvertently packed and unintentionally shipped with items being donated to the Salvation Army. The Wyoming Supreme Court had to determine who had title to the painting.

Rick Kenyon v. Claude Abel
36 P.3d 1161
Supreme Court of Wyoming
December 27, 2001

Hill, Justice

This dispute concerns the ownership of a painting by the noted Western artist Bill Gollings. Rick Kenyon (Kenyon) purchased the painting, valued between $8,000 and $15,000, for $25 at a Salvation Army thrift store. Claude Abel (Abel) filed suit against Kenyon seeking return of the painting, which had belonged to his late aunt. Abel claimed that the Salvation Army mistakenly took the painting from his aunt's home when the box in which it was packed was mixed with items being donated to the thrift store. Kenyon

appeals the district court's decision awarding the painting to Abel.…

Abel's aunt, Rillie Taylor (Taylor), was a friend of the artist Bill Gollings, whose works were known for their accurate portrayal of the Old West. Sometime before his death in 1932, Gollings gave a painting to Taylor depicting a Native American on a white horse in the foreground with several other Native Americans on horses in the background traveling through a traditional western prairie landscape. The painting remained in Taylor's possession at her home in Sheridan until her death on August 31, 1999.

After Taylor's death, Abel traveled from his home in Idaho to Sheridan for the funeral and to settle the estate. Abel was the sole heir of Taylor's estate so he inherited all of her personal belongings, including the Gollings painting. Abel and his wife sorted through Taylor's belongings selecting various items they would keep for themselves. Abel and his wife, with the help of a local moving company, packed those items into boxes marked for delivery to their home in Idaho. Items not being retained by Abel were either packed for donation to the Salvation Army or, if they had sufficient value, were taken by an antiques dealer for auction. The scene at the house was apparently one of some confusion as Abel attempted to vacate the residence as quickly as possible while attempting to make sure all of the items went to their designated location. The painting was packed by Abel's wife in a box marked for delivery to Idaho. However, in the confusion and unbeknownst to Abel, the box containing the Gollings painting was inadvertently picked up with the donated items by the Salvation Army. The painting was priced at $25.00 for sale in the Salvation's Army Thrift Store where Kenyon purchased the painting.

After returning to Idaho, Abel discovered that the box containing the painting was not among those delivered by the moving company. Through local sources, Abel learned that the painting had gone to the Salvation Army and was then purchased by Kenyon.… Abel sought possession of the painting through two causes of action: replevin and conversion. Kenyon countered that he was a "good faith purchaser" of the painting under the Uniform Commercial Code (UCC). The district court concluded that Abel was entitled to possession of the painting under either the common law doctrines of gift or conversion or the statutory provisions of the UCC. Kenyon now appeals…

The key to resolving this dispute, under either common law or the UCC, is determining whether or not the painting was voluntarily transferred from Abel to the Salvation Army. The district court concluded that Abel had no intent to give the painting to the Salvation Army. This is a factual conclusion that we will reverse only upon a showing that it is clearly erroneous. Our review convinces us that the district court's conclusion that Abel did not voluntarily transfer the painting to the Salvation Army is supported by the record and is not, therefore, clearly erroneous.

Abel's testimony during the trial disclosed the following facts. Abel's aunt received the painting as a gift from the artist. Abel testified that his aunt often expressed to him the importance of the painting to her and her desire that it remain in the family's possession. He indicated that the painting had a lot of value to him and the family beyond its monetary worth because of his family's personal relationship with the artist. The aunt rejected at least one offer to buy the painting for about $5,000. After inheriting the painting, Abel's wife packed it in a box marked for delivery to their home in Idaho. On the day the painting was packed for moving, there was much confusion around the house as Abel and his wife tried to sort through all of the items and designate them for delivery to the appropriate location. In that confusion, the Salvation Army came to the house to pick up various items. The Salvation Army apparently took the painting, along with the items specifically donated to it. Abel testified that he did not intend to include the painting with the goods that were meant to go to the Salvation Army and, at that time, he had no idea that the painting had been taken by them. According to Abel, he did not learn that the painting was missing until after the moving company had delivered all of the boxes to Idaho. Upon finding that the painting was missing, Abel testified that he immediately contacted an acquaintance in Sheridan who was able to trace the painting from the Salvation Army to Kenyon. Thereupon, Abel attempted to contact Kenyon about the painting's return. Kenyon rebuffed Abel's attempts to discuss the painting thus leading to this action.

The testimony of Abel is sufficient to support the district court's conclusion that the transfer of the painting to the Salvation Army was involuntary. Abel specifically denied any intent to make such a transfer. That denial is supported by reasonable inferences that could be drawn from the painting's acknowledged sentimental value to Abel and his family and from Abel's actions in attempting to recover the painting immediately upon discovery of its loss. Under these circumstances, the district court's conclusion was not clearly erroneous.…

The district court awarded Abel possession of the painting on the basis of two common law doctrines: the law of gifts and the law of conversion. A valid gift consists of three elements: (1) a present intention to make an immediate gift; (2) actual or constructive delivery of the gift that divests the donor of dominion

and control; and (3) acceptance of the gift by the donee.... The pivotal element in this case is the first one: whether an intention to make a gift existed. As we noted above, we have upheld the district court's conclusion that Abel did not have any intent to donate the painting to the Salvation Army. Therefore, the district court correctly ruled that the transfer of the painting to the Salvation Army did not constitute a valid gift...

The district court held that the sale of the painting constituted conversion by the Salvation Army. The record supports the district court's decision: (1) as the heir to his aunt's estate Abel had legal title to the painting; (2) Abel possessed the painting at the time it was removed from his aunt's residence; (3) the Salvation Army exercised dominion over the property in such a manner that denied Abel the right to enjoy and use the painting, *i.e.*, it sold the painting; (4) Abel demanded the return of the painting from Kenyon, who effectively refused by denying any knowledge of it; and (5) Abel has suffered damages through the loss of a valuable asset without compensation. As a good faith purchaser of converted property, Kenyon is also a converter and must answer in damages to the true owner.... This is true because a converter has no title whatsoever (*i.e.*, his title is void) and, therefore, nothing can be conveyed to a bona fide purchaser for value....

UCC

Kenyon seeks to escape the consequences of the common law doctrines of gifts and conversion by arguing that the UCC is the applicable law in this instance. For purposes of resolving this case, we will assume that the UCC applies to the transaction between Ken-yon and the Salvation Army because, as we shall see, it does not provide the benefit to Kenyon he claims it will.

The district court correctly noted that a distinction exists between a "void" and a "voidable" title. Section 2-403(1)(d) [of the UCC] provides, in effect, that a voidable title is created whenever the transferor voluntarily delivers goods to a purchaser even though that delivery was procured through fraud punishable as larcenous under the criminal law.... [T]his subsection is predicated on the policy that where a transferor has voluntarily delivered the goods to purchaser, he, the transferor, ought to run the risk of the purchaser's fraud as against innocent third parties...

It should be noted that Section 2-403(1)(d) does not create a voidable title where the goods have been wrongfully taken, as by theft or robbery. If the goods have been stolen, the thief acquires no ownership and has no power, except in rare cases of estoppel, to pass a good title to a bona fide purchaser. Nothing in Section 2-403 changes this common-law rule. Section 2-403(1)(d) does not create a situation where the goods are wrongfully taken, as contrasted with delivered voluntarily because of the concepts of "delivery" and "purchaser" which are necessary preconditions. "Delivery" is defined ... to mean "voluntary transfer of possession." By analogy, it should be held that goods are not delivered for purposes of Section 2-403 unless they are voluntarily transferred. Additionally, Section 2-403(1)(d) is limited by the requirement that the goods "have been delivered under a transaction of purchase." "Purchase" is defined ... to include only voluntary transactions. A thief who wrongfully takes goods is not a purchaser within the meaning of this definition.... The Salvation Army, of course, did not steal the painting from Abel. However, the key here is the voluntariness of the transfer from the original owner....

The Salvation Army did not acquire the painting in a voluntary transaction from Abel. A third party purchaser could only acquire rights in the painting to the extent of the interest possessed by the Salvation Army. Since the Salvation Army possessed a void title, the original owner was entitled to recover the painting from the third party purchaser. Accordingly, the district court's order granting possession of the painting to Abel is affirmed.

Case Question

Why wouldn't the appellate court recognize Abel's title to the painting that he purchased from the Salvation Army, which had obtained possession of the painting from Rick Kenyon?

Inheritance

A person can acquire property from the estate of a deceased person. This is called an inheritance. When a person making a will (a **testator** or **testatrix**) makes a bequest of property, the title to the item will be transferred from a deceased's estate. If

the person died without a will (intestate), property is transferred according to a statutory plan enacted by the state legislature (called a statute of descent).

BAILMENT

A **bailment** relationship exists when one person (called the **bailor**) delivers personal property to another person (called the **bailee**) without conveying title. Although the possession of the object is transferred in a bailment, the bailor intends to recover possession of the bailed object, and thus does not part with the title. When a person borrows, loans, or rents a videotape or leaves one's lawn mower or car for repair, for example, a bailment is created.

Some bailments primarily benefit only one person, either the bailee or the bailor. These are called gratuitous bailments. For example, the bailee primarily benefits when he or she borrows a lawn mower from a neighbor. Other bailments primarily benefit the bailor, for example, when he or she asks to leave a motor vehicle in the bailee's garage for a month. Some bailments are mutually beneficial, such as when the bailor leaves shoes for repair at a shoe repair shop or takes clothes to the dry cleaners.

Some bailments are created by contract, such as when a person rents a car from a car rental company. Other bailments are created by a delivery and acceptance of the object, such as when one student loans a textbook to another student. Here there is no consideration.

All types of bailments involve rights and obligations. In a mutual benefit bailment, the bailee has the duty to exercise reasonable care toward the bailed object. The bailee is not allowed to use the bailed object for his benefit, but may work on the object for the benefit of the bailor. The bailor's duties include paying the bailee and warning the bailee of any hidden dangers associated with the bailed object.

With a gratuitous bailment for the benefit of the bailor, the bailee must exercise at least slight care and store the bailed object in the agreed-upon manner. There is no compensation or quid pro quo involved.

With respect to a bailment for the benefit of the bailee, a bailee must exercise a high degree of care. Since the bailor is acting solely out of friendship and is not receiving any benefit and the bailee is allowed to use the bailed object without charge, the bailee must use the bailed object in the proper manner and return it in good condition when the bailment period ends. The bailee is responsible in negligence for any damages caused to the bailed object. As we see in the next case, the bailor can end the bailment period at any time and ask for the return of the bailed object.

James Croskey and Leach Brothers Automobile Services entered into a contract pursuant to which Leach Brothers was to install an engine and transmission into Croskey's 1985 Buick. When Croskey discovered that the Buick had been stolen and damaged while in Leach Brothers' possession, he brought suit, claiming the breach of a mutual benefit bailment. Leach Brothers lost at trial and appealed to the Ohio Court of Appeals.

James W. Croskey v. Carl Leach
C-010721
Court of Appeals of Ohio
October 18, 2002

Painter, Presiding Judge

Plaintiff-appellee James W. Croskey left his car at a repair shop for installation of an engine and transmission after a first attempted repair failed, only to have his car stolen from the shop's lot twice. The owners of the repair shop, defendants-appellants, Carl Leach and Joe Leach, d/b/a Leach Brothers Automotive Services and d/b/a Joe Leach Service Center, appeal a Hamilton County Municipal Court judgment in Croskey's favor. The court found the Leaches liable for failure to redeliver Croskey's car due to their failure to exercise ordinary care to protect against loss or damages, further

ruling that the Leaches had violated the Ohio Consumer Sales Practices Act. The court awarded treble damages plus reasonable attorney fees to Croskey....

A Failed Repair—And Two Thefts

In June 1999, Croskey and his aunt, Ruth St. Hilaire, took Croskey's 1985 Buick to the Leaches for replacement of the engine and transmission. St. Hilaire agreed to pay for the repairs to Croskey's Buick, with the understanding that Croskey would pay her back over time. The Leaches put in a used engine and transmission, and St. Hilaire paid the $2077.60 bill in cash.

Within two weeks, Croskey brought the Buick back to the Leaches because of noise and leaking fluid from the new transmission. The Leaches added transmission fluid and supplied Croskey with additional quarts of fluid, but otherwise refused to service the car until Croskey could produce the receipt for the previous work. Because St. Hilaire had the receipt and was out of town, Croskey continued to drive the Buick and to replace the leaking transmission fluid. The engine soon died, and the car was towed back to the Leaches' business.

Upon St. Hilaire's return to the city, either the 17th or 18th of August 1999, she delivered the receipt to the Leaches. The Leaches agreed to replace the engine and transmission with used parts. Carl Leach told Croskey and his aunt that he did not have a 1985 Buick engine in his inventory and that he would have to wait until he received one, but they had no knowledge or appreciation of the length of the ensuing delay.

During the delay, which lasted until December 1999, the car was stolen twice from the Leaches' lot. The first time, in September, the North College Hill Police Department contacted Croskey and Carl Leach to inform them that someone had stolen Croskey's Buick, driven it into the wall of the store next door, and then fled from the scene. The police investigation revealed that the Leaches had left the keys in the Buick after closing hours. The car had damage to the bumper and fender, and it was returned to the Leaches' lot.

On October 2, 1999, the Leaches' business was again broken into, and this time keys to customer automobiles were taken. It was not until December 2, however, that either Leach or Croskey realized that Croskey's car had been stolen. On December 2, Croskey, tired of the delay, came to the Leaches' business to retrieve his car. When they could not find the car, Croskey called the police and reported it stolen. The police soon located the stripped Buick and stored it at an impoundment lot.

Croskey sued the Leaches, alleging that they had breached a bailment and violated the Ohio Consumer Sales Practices Act, R.C. Chapter 1345. The trial court ruled that the Leaches were liable for their failure to redeliver Croskey's automobile because they had failed to exercise ordinary care to protect the car from damage or loss, and that the Leaches had breached their repair and ser-vices agreement by failing to install an operable transmission and engine. The court also held that the Leaches had engaged in several unfair and deceptive acts under the Ohio Consumer Sales Practices Act. The court ordered the Leaches to pay treble damages of $6,232.80, plus reasonable attorney fees of $3,450, for a total award of $9,682.80.

A Failed Bailment

In their one assignment of error, the Leaches ... argue that the trial court's judgment was contrary to the manifest weight of the evidence....

The trial court concluded that the transaction between the Leaches and Croskey was, in law, a mutual-benefit bailment. The court then found that the Leaches were liable for their failure to redeliver Croskey's automobile, because they had failed to exercise ordinary care to protect the car from loss or damages.

Where one person delivers personal property to another to be held for a specific purpose, a bailment is created; the bailee must hold the property in accordance with the terms of the bailment. When a bailor delivers property to a bailee and the bailee fails to redeliver the property undamaged, the bailor has a cause of action against the bailee, in either contract or tort. To establish a prima facie case in contract, a bailor must prove (1) the contract of bailment, (2) delivery of the bailed property to the bailee, and (3) failure of the bailee to redeliver the bailed property undamaged at the termination of the bailment.

The record indicates that Croskey left his car with the Leaches after the initial repair failed, with the understanding that the Leaches would install another used engine and transmission. Carl Leach testified that, after the first break-in and robbery of the repair shop, the Leaches took no new or extra precautions to protect the keys from theft, because they believed they were not responsible for cars parked on their outer lots.

After the second theft, the Leaches did not inventory the cars on their lots to determine if Croskey's car had been stolen, and they did not inform Croskey about the theft of his car key. When Croskey finally discovered that his car had been stolen and that

it was in the police impoundment lot, the Leaches denied responsibility for recovering it or returning it to their lot.

There is competent and credible evidence in the record to support the trial court's judgment that the Leaches were liable for failing to redeliver Croskey's car. The evidence also supports the court's conclusion that the Leaches had failed to provide minimum security to protect the keys from theft, and that they had breached their agreement to install an operable engine and transmission....

For ... the foregoing reasons, the Leaches' ... assignment of error is not well taken. The trial court's judgment is accordingly affirmed.

Case Questions

1. Why was this bailment a mutual benefit bailment?
2. What duty did the Leach Brothers fail to meet in this case? What should they have done that they didn't do?

CHAPTER SUMMARY

The chapter began with an historical overview of real property law and a discussion of how property is classified. Intellectual property, the law of trademarks, patents, and copyrights, was next. Readers also learned about the common forms of property ownership—severalty, joint tenancies, tenancies in common and tenancies by the entireties. The discussion then turned to the controversial U.S. Supreme Court case of *Kelo v. New London*, and what happened in the aftermath of that decision. Special emphasis was given to the government's use of the power of eminent domain. The section on real property followed, where students learned about estates in land, easements, licenses, covenants, adverse possession, and the recording system.

The discussion of personal property included eight different ways in which personal property is acquired: purchase, creation, capture, accession, finding, confusion, gift, and inheritance. The chapter concluded with an overview of the law of bailments.

CHAPTER QUESTIONS

1. Jackson Chapel Church believed it had ownership rights over a small parcel of land which the church's neighbors, the Mobleys, had begun to develop. The church filed suit seeking ejectment, declaratory judgment, and injunctive relief. The trial court ruled that the church was entitled to a portion of the disputed parcel because it had acquired title by adverse possession. The portion not used by the church still belonged to the Mobleys. The Mobleys appealed to the Georgia Supreme Court. They claimed that their remote predecessor in title, while building on a small portion of the parcel decades ago, had a paper title to the entire parcel. They argued that this gave them the right to possess constructively the entire parcel, despite the trial court's adverse possession ruling in favor of the church. Should the appellate court affirm or reverse the trial court's adverse possession ruling regarding the portion of the Mobleys' parcel that had been used continuously for over 100 years by the church.

Mobley v. Jackson Chapel Church, 636 S.E.2d 535 (2006)

2. C/R TV, Inc. is a cable television company that sought to provide its services to a private housing subdivision (Shannondale). The subdivision had contracted with Mid-Atlantic Cable Services, Inc., one of C/R's competitors, to provide exclusive cable services to Shannondale. C/R, however, believed it had a lawful right to string cable on existing telephone poles in the subdivision pursuant to a 1972 licensing agreement with Potomac Edison. Shannondale had granted easements to Potomac Edison for electrical and telephone services in most of the subdivision in 1955 and in part of the development in 1991. The Shannondale president threatened a trespass action against C/R TV when he learned that the company had installed over six miles of cable wiring in the subdivision. C/R TV responded by bringing a declaratory judgment action against Shannondale. The trial judge ruled in favor of Shannondale, concluding that the 1955 easements were not "sufficiently broad to provide for television cable facilities." The trial court did rule that the part of the subdivision covered by the 1991 easements could be serviced by the plaintiff. C/R TV appealed. Should the 1955 easements, which were granted to Potomac Edison "for the purpose of installation, erection, maintenance, repair and operation of electric transmission and distribution pole lines, and electric service lines, with telephone lines thereon," be interpreted so as to permit Potomac Edison's licensee the right to install cable-television wiring over Shannondale's objections?
C/R TV, Inc. v. Shannondale, Inc., 27 F.3d (1994)

3. Tracy Price took her English bulldog to Dr. Nancy Brown, a veterinarian, for a surgery, which was performed on August 30, 1991. When Tracy visited her dog the next evening at the veterinary hospital, the animal appeared groggy and was panting heavily. Tracy requested that the dog be monitored all day and night and was assured that this would be done. The dog died on the morning of September 1. Tracy filed suit on May 4, 1993. She claimed that she had entrusted her dog to Dr. Brown based on Brown's assurances that appropriate surgery would be performed and the dog returned to her in a healthy condition. Tracy demanded damages in the amount of $1,200, the fair market value of the animal. She claimed that her dog had been entrusted to the veterinarian for surgical treatment and that it had died while in the doctor's care as a result of the doctor's negligence. Has Tracy stated a cause of action for breach of a bailment agreement?
Price v. Brown, 680 A.2d 1149 (1996)

4. The Kingsmen, a rock band formed in 1958, recorded a rock classic entitled "Louie Louie." The band members contracted with Spector Records in 1968, which provided that the band would receive 9 percent of the future licensing fees and profits generated by the song. Spector subsequently assigned its rights under the agreement to Gusto Records and G.M.L., Inc. In 1993, the Kingsmen sued Gusto, G.M.L., and Highland Music for rescission of the contract and back royalties calculated from the date that the suit was filed. They sought rescission because that would result in the restoration of their title to and possession of the master. The band alleged that the defendants and their predecessors in title had for thirty years failed to pay the band its contracted share of royalties. The defendants argued that the action was barred by the four-year statute of limitations and that the plaintiffs were not entitled to income produced pursuant to licenses that predated the rescission. The trial court ruled in favor of the Kingsmen. The defendants appealed to the U.S. Court of Appeals (9th Circuit). Should the Kingsmen prevail on appeal?
Peterson v. Highland Music, Nos. 95-56393, 97-55597, and 97-55599 (1998)

5. Hiram Hoeltzer, a professional art restorer, sought declaratory relief to quiet title to a large mural that

once was affixed to the walls of the Stamford High School. This mural had been painted as part of the Works Progress Administration (WPA) in 1934. Workers removed the mural when the high school was renovated in the summer of 1970. They cut it into thirty pieces and placed it on top of a heap of construction debris, adjacent to a Dumpster. This was done despite oral and written requests from school officials that the mural be taken down and preserved. A 1970 graduate of Stamford High, recognizing the value of the mural, placed the mural pieces into his car and took them home. The student took the mural to Karel Yasko, a federal official responsible for supervising the restoration of WPA artwork. Yasko suggested that the mural be taken to Hiram Hoeltzer. In 1980, city officials and other interested people began contacting Hoeltzer about the mural. In 1986, the city formally wrote to Hoeltzer and claimed title. Hoeltzer, however, who had retained possession of the mural for ten years, claimed that he was the rightful owner of the mural. Who has legal title to the mural? Why?

Hoeltzer v. City of Stamford, Conn., 722 F.Supp. 1106 (1989)

6. Leonard and Bernard Kapiloff are stamp collectors. In 1976, they purchased two sets of stamps worth $150,400. Robert Ganter found the stamps in a dresser he had purchased for $30 in a used furniture store in 1979 or 1980. Ganter had taken the stamps to an auction house, and they were listed for sale in a nationally distributed catalogue that was read by the Kapiloff brothers. The brothers contacted Ganter and demanded the return of the stamps. Ganter refused. The brothers then contacted the FBI, which took physical possession of the stamps. The brothers then brought a replevin action against Ganter for the stamps and asked the court for a declaratory judgment that they were the true owners of the stamps. The person who originally sold the brothers the stamps supported the brothers' allegations that the stamps Ganter found were the same stamps that had belonged to the Kapiloffs. Who is the owner of the stamps?

Ganter v. Kapiloff, 516 A.2d 611 (1986)

7. The case of *Clevenger v. Peterson Construction Company* turned on the question of whether forty-four mobile trailers should be classified as personal property or fixtures. The trailers had axles, although they were without hitches or wheels. They were positioned on concrete blocks and not on permanent foundations, and were connected to utilities with flexible hoses. Which classification is more appropriate?

Clevenger v. Peterson Construction Company, Inc., 542 P.2d 470 (1975)

8. The District of Columbia enacted an ordinance that made it unlawful for any hotel to exclude any licensed taxicab driver from picking up passengers at hotel taxicab stands. The Washington Hilton did not have to operate a taxicab stand on its property but elected to do so for the convenience of its guests. The hotel was dissatisfied with the quality of service provided by some of the taxicab drivers and with the cleanliness of some of their vehicles. The hotel wanted to discriminate against some taxis in favor of others. It wanted to require cab drivers to obtain permits and pay an annual fee to use the hotel's taxicab stand. The city's attorney was consulted about these plans and ruled that they violated the Taxicab Act. Does this ordinance constitute a taking of the hotel's property by the district?

Hilton Washington Corporation v. District of Columbia, 777 F.2d 47 (1985)

9. Terry Bohn presented Tommie Louise Lowe with a ring in 1974 when they became engaged to be married. Tommie had a continuing series of strokes over the next ten years, and the marriage never took place. She still possessed the engagement ring at the time of her death in 1984. After her death, Terry brought suit against Tommie's estate to recover the engagement ring. Who has title to the ring?

A Matter of Estate of Lowe, 379 N.W.2d 485 (1985)

10. Robert Lehman and Aki Eveline Lehman were married in 1964. They separated in 1971. They became divorced in 1976. At the time of the separation, Aki retained possession of forty-three art objects that were in the house. Robert and Aki each claimed ownership rights to these objects. Robert claimed that forty-two of the items were either purchased by him or given to him by his father. One item was given to him by Aki. Aki claimed ownership of the items as a result of her purchases made with joint funds, as well as a result of gifts from Robert and Robert's father. Aki took all forty-three items to Paris when she and their children moved there in 1972. Robert demanded that Aki return his property. When she refused, he filed suit against Aki for replevin, conversion, and breach of bailment. At the time the lawsuit was filed, only thirteen items were still in Aki's possession. Aki testified at trial that she didn't know what had happened to the thirty missing items. The court determined that Robert was the exclusive owner of forty of the forty-three items, and Robert and Aki jointly owned the remaining three items. What relief will the court order? Why?

Lehman v. Lehman, 591 F.Supp 1523 (1984)

NOTES

1. P. C. Hoffer, *Law and People in Colonial America* (Baltimore: Johns Hopkins University Press, 1982), pp. 19–24; D. H. Flaherty, *Essays in the History of Early American Law* (Chapel Hill, NC: Institute of Early American History and Culture, 1969), pp. 272–273; B. Schwartz, *The Law in America* (New York: McGraw-Hill Book Co., 1974), pp. 8–18; M. Horwitz, *The Transformation of American Law 1780–1860* (Cambridge, MA: Harvard University Press, 1977), pp. 4–6.
2. Horwitz, pp. 7–9, 84.
3. L. Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), pp. 18–22.
4. Ibid., pp. 14–15, 22–25.
5. W. Hurst, Law and the Conditions of Freedom in the Nineteenth Century (Madison: University of Wisconsin Press, 1967), p. 8.
6. W. E. Nelson, *Americanization of the Common Law* (Cambridge, MA: Harvard University Press, 1975), p. 47; Horwitz, p. 102.
7. Horwitz, p. 35.
8. Nelson, p. 159; Horwitz, p. 36.
9. Horwitz, p. 102; Hurst, pp. 28–29.
10. Hurst, pp. 24–25.
11. *Lochner v. New York*, 198 U.S. 45 (1905).
12. The Uniform Commercial Code is not uniformly adopted from state to state. Each state legislature decides whether to adopt the Uniform Commercial Code and the extent to which they accept or modify its terms. Other differences can arise from judicial interpretations.
13. Many jurisdictions only recognize the tenancy by the entirety in conjunction with real property.
14. There are two exceptions to this general rule. A good faith purchaser of bearer bonds can take title from a thief, and a buyer in the ordinary course of business who purchases goods from a merchant can take title even if the merchant obtained the items from a thief. Public policy reasons support these exceptions because it is very important to the economy that people who buy goods from merchants can rely on the sellers' claims of title to the goods.
15. *Seattle Audubon Society v. Doug Sutherland* No. C06-1608MJP (W.D. Wash. Aug. 1, 2007).
16. *U.S. v. Causby*, 328 U.S. 256 (1946).

XIII

Administrative Law and Administrative Agencies

CHAPTER OBJECTIVES

1. *Understand the reasons for the creation of administrative agencies.*
2. *Explain the principal ways that federal administrative agencies are organizationally structured.*
3. *Explain the importance of an agency's enabling act.*
4. *Describe the powers typically delegated to administrative agencies.*
5. *Understand the limited role of judicial review of administrative decisions.*

A discussion of the U.S. legal system would not be complete without an examination of the government's use of statutory law and administrative rules to regulate business practices. This chapter addresses administrative law and the role of administrative agencies.

THE RISE OF ADMINISTRATIVE AGENCIES

Administrative agencies have existed at the federal level since the early 1800s, when Congress created the U.S. Patent Office (1802),[1] the Bureau of Indian Affairs (1824),[2] and the Army Corps of Engineers (1824).[3] The greatest growth occurred after 1900, however, when approximately two-thirds of current agencies were created.[4] Before President Franklin Roosevelt's New Deal, this

country operated on the premise that the federal government should be kept relatively small. That model of government changed during the 1930s in response to the serious social and economic problems associated with the Great Depression. Newly created agencies included the Federal Deposit Insurance Corporation (1933), the Tennessee Valley Authority (1933), the Federal Communications Commission (1933), the Securities and Exchange Commission (1934), and the National Labor Relations Board (1935). More recently, Congress has created agencies to address important social and public welfare goals, such as the Equal Employment Opportunity Commission (1965), the Occupational Safety and Health Review Commission (1970), and the Environmental Protection Agency (1970). These and a multitude of other commissions, boards, authorities, and departments administer legislation that affects many aspects of daily life (see Figure 13.1).

The enactment of the **Administrative Procedure Act (APA)** in 1946 helped to improve and strengthen the administrative regulatory process in the federal system and served as a model for states as well. The APA requirements vis-à-vis rulemaking, for example, were very influential.

Today, regulatory bodies are well established at both the state and local levels of government. State administrative agencies monitor environmental pollution, license drivers, determine automobile insurance rates, and oversee public utilities. They also regulate a wide range of professions and occupations, including hairdressers, barbers, teachers, doctors, lawyers, and psychologists. At the local level, administrative agencies operate zoning boards, housing authorities, water and sewer commissions, and historical commissions.

This chapter is concerned with the legal framework for administrative law. It does not include political analyses of the role that ideology and resources play in agency decision making. Nor does this chapter focus on process questions, such as how administrative agencies decide which of competing policy alternatives will be adopted. These most interesting issues are often addressed in conjunction with political science courses.

ORGANIZATION AND CLASSIFICATION OF FEDERAL AGENCIES

Administrative agencies are commonly classified in terms of their organizational structure. Agencies that are organized into commissions and boards and directed by commissioners include the Federal Maritime Commission (FMC), the Federal Reserve Board (FRB), the Interstate Commerce Commission (ICC), the National Labor Relations Board (NLRB), the Nuclear Regulatory Commission (NRC), and the Securities and Exchange Commission (SEC). (See, for example, the SEC organizational chart in Figure 13.2.) Agencies that are structured as cabinet-level departments or administrations and are headed by secretaries or administrators include the Department of the Interior, the Department of Agriculture, the Department of Labor, the Department of Homeland Security, and executive agencies such as the Environmental Protection Agency (EPA). (The EPA organizational chart can be seen in Figure 13.3.)

Commissioners, cabinet-level secretaries, and agency head administrators are nominated by the president and are subject to Senate confirmation. In general, commissions and boards are considered to be independent agencies because the commissioners do not serve at the pleasure of the president and can only be removed for cause, such as neglect of duty or inefficiency. In addition, Congress often requires that these agencies be bipartisan. The SEC, for example, has five members. The chairman is chosen by the president and normally is of the president's party. Because the SEC is a bipartisan agency, two Democrats and two Republicans will be chosen for the remaining four seats. Each commissioner serves a five-year staggered term; one term expires each June. Agencies headed by cabinet secretaries and head administrators are not independent, and their leaders serve at the pleasure of the president.

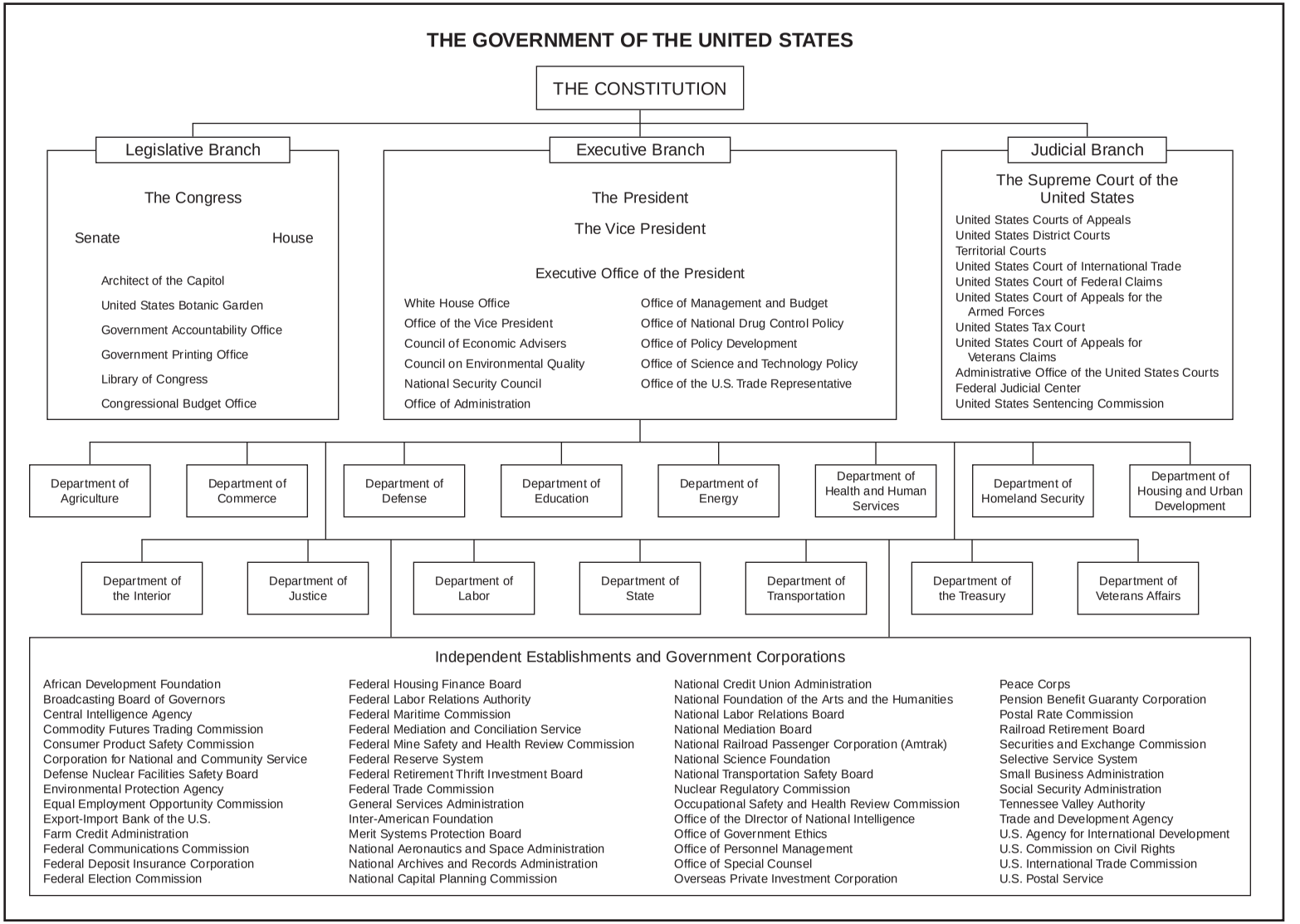

FIGURE 13.1 The Government of the United States

Source: Office of the Federal Register, National Archives and Records Administration, U.S. Government Manual, 2009–2010, p. 21.

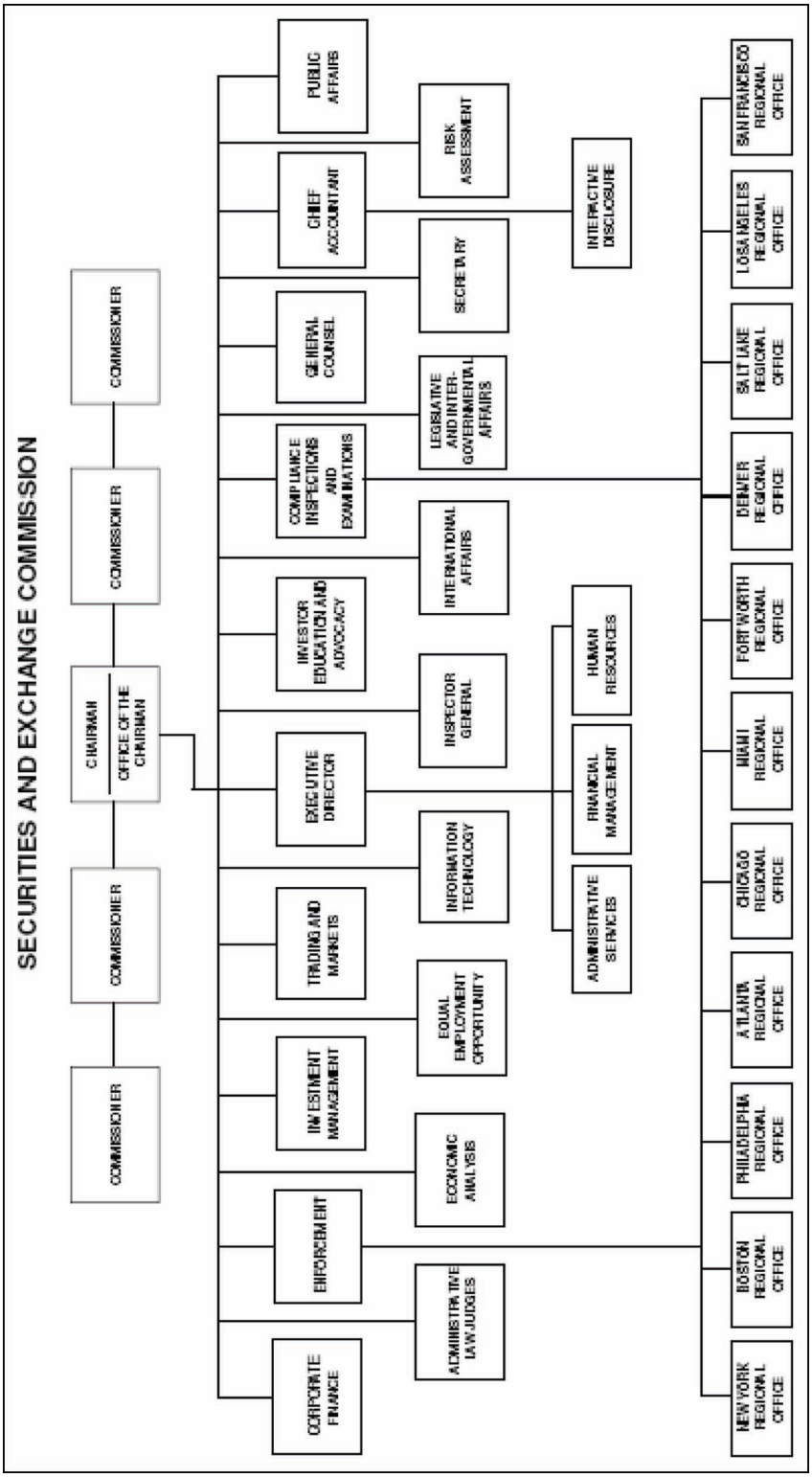

FIGURE 13.2 Securities and Exchange Commission

Source: Office of the Federal Register, National Archives and Records Administration, U.S. Government Manual, 2009–2010, p. 498.