# I. ENTRE EL DERECHO FEUDAL Y EL IUSNATURALISMO

## A. EL ALCANCE DEL DERECHO DE COSAS ESTADOUNIDENSE

### EL DOMINIO DIRECTO

JOHNSON and GRAHAM'S Lessee v. WILLIAM M'INTOSH. Supreme Court of the United States 21 U.S. 543; 5 L. Ed. 681. February 28, 1823, Decided
OPINION BY: MARSHALL

[*571] Mr. Chief Justice MARSHALL delivered the opinion of the Court. The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain [*572] Indian tribes, constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognised in the Courts of the United States?

The facts, as stated in the case agreed, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewis show, that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.

As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is

acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered and [*573] ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

[*574] In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants

of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title.

France, also, founded her title to the vast territories she claimed in America on discovery. However [*575] conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians. Her monarch claimed all Canada and Acadie, as colonies of France, at a time when the French population was very inconsiderable, and the Indians occupied almost the whole country. He also claimed Louisiana, comprehending the immense territories watered by the Mississippi, and the rivers which empty into it, by the title of discovery. The letters patent granted to the Sieur Demonts, in 1603, constitute him Lieutenant General, and the representative of the King in Acadie, which is

described as stretching from the 40th to the 46th degree of north latitude; with authority to extend the power of the French over that country, and its inhabitants, to give laws to the people, to treat with the natives, and enforce the observance of treaties, and to parcel out, and give title to lands, according to his own judgment.

The States of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe. They allege, as we are told by Smith, in his History of New-York, that Henry Hudson, who sailed, as they say, under the orders of their East India Company, discovered the country from the Delaware to the Hudson, up which he sailed to the 43d degree of north latitude; and this country they claimed under the title acquired by this voyage. [*576] Their first object was commercial, as appears by a grant made to a company of merchants in 1614; but in 1621, the States General made, as we are told by Mr. Smith, a grant of the country to the West India Company, by the name of New Netherlands.

The claim of the Dutch was always contested by the English; not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title. Their pretensions were finally decided by the sword.

No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission, is confined to

countries "then unknown to all Christian people;" and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession, [*577] notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.

The same principle continued to be recognised. The charter granted to Sir Humphrey Gilbert, in 1578, authorizes him to discover and take possession of such remote, heathen, and barbarous lands, as were not actually possessed by any Christian prince or people. This charter was afterwards renewed to Sir Walter Raleigh, in nearly the same terms.

By the charter of 1606, under which the first permanent English settlement on this continent was made, James I. granted to Sir Thomas Gates and others, those territories in America lying on the seacoast, between the 34th and 45th degrees of north latitude, and which either belonged to that monarch, or were not then possessed by any other Christian prince or people. The grantees were divided into two companies at their own request. The first, or southern colony, was directed to settle between the 34th and 41st degrees of north latitude; and the second, or northern colony, between the 38th and 45th degrees.

In 1609, after some expensive and not very successful attempts at settlement had been made, a new and more enlarged charter was given by the crown to the first colony, in which the king granted to the "Treasurer and Company of Adventurers of the city of London for the first colony in Virginia," in absolute property, the lands extending along the seacoast four hundred miles, and [*578] into the land throughout from sea to sea. This charter, which is a part of the special verdict in this cause, was annulled, so far as respected the rights of the company, by the judgment of the Court of King's Bench on a writ of quo warranto; but the whole effect allowed to this judgment was, to revest in the crown the powers of government, and the title to the lands within its limits.

At the solicitation of those who held under the grant to the second or northern colony, a new and more enlarged charter was granted to the Duke of Lenox and others, in 1620, who were denominated the Plymouth Company, conveying to them in absolute property all the lands between the 40th and 48th degrees of north latitude.

Under this patent, New-England has been in a great measure settled. The company conveyed to Henry Rosewell and others, in 1627, that territory which is now Massachusetts; and in 1628, a charter of incorporation, comprehending the powers of government, was granted to the purchasers.

Great part of New-England was granted by this company, which, at length, divided their remaining lands among themselves; and, in 1635, surrendered their charter to the crown. A patent was granted to Gorges for Maine, which was allotted to him in the division of property.

All the grants made by the Plymouth Company, so far as we can learn, have been respected. In pursuance of the same principle, the king, in 1664, granted to the Duke of York the country of New-England as far south as the Delaware [*579] bay. His royal highness transferred New-Jersey to Lord Berkeley and Sir George Carteret.

In 1663, the crown granted to Lord Clarendon and others, the country lying between the 36th degree of north latitude and the river St. Mathes; and, in 1666, the proprietors obtained from the crown a new charter, granting to them that province in the king's dominions in North America which lies from 36 degrees 30 minutes north latitude to the 29th degree, and from the Atlantic ocean to the South sea.

Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government, the king claimed and exercised the right of granting lands, and of dismembering the

government at his will. The grants made out of the two original colonies, after the resumption of their charters by the crown, are examples of this. The governments of New-England, New-York, New-Jersey, Pennsylvania, Maryland, and a part of Carolina, were thus created. In all of them, the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants. In some instances, the soil was conveyed by the crown unaccompanied by the powers of government, as in the case of the northern neck of Virginia. It has never [*580] been objected to this, or to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only, would never contain words expressly granting the land, the soil, and the waters. Some of them purport to convey the soil alone; and in those cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed; and, in some instances, even after the powers of government were revested in the crown, the title of the proprietors to the soil was respected.

Charles II. was extremely anxious to acquire the property of Maine, but the grantees sold it to Massachusetts, and he did not venture to contest the right of that colony to the soil. The Carolinas were originally proprietary governments. In 1721 a revolution was effected by the people, who shook off their obedience to the proprietors, and declared their dependence immediately on the crown. The king, however, purchased the title of those who were disposed to sell. One of them, Lord Carteret, surrendered his interest in the government, but retained his title to the

soil. That [*581] title was respected till the revolution, when it was forfeited by the laws of war.

Further proofs of the extent to which this principle has been recognised, will be found in the history of the wars, negotiations, and treaties, which the different nations, claiming territory in America, have carried on, and held with each other.

The contests between the cabinets of Versailles and Madrid, respecting the territory on the northern coast of the gulf of Mexico, were fierce and bloody; and continued, until the establishment of a Bourbon on the throne of Spain, produced such amicable dispositions in the two crowns, as to suspend or terminate them.

Between France and Great Britain, whose discoveries as well as settlements were nearly contemporaneous, contests for the country, actually covered by the Indians, began as soon as their settlements approached each other, and were continued until finally settled in the year 1763, by the treaty of Paris.

Each nation had granted and partially settled the country, denominated by the French, Acadie, and by the English, Nova Scotia. By the 12th article of the treaty of Utrecht, made in 1703, his most Christian Majesty ceded to the Queen of Great Britain, "all Nova Scotia or Acadie, with its ancient boundaries." A great part of the ceded territory was in the possession of the Indians, and the extent of the cession could not be adjusted by the commissioners to whom it was to be referred.

The treaty of Aix la Chapelle, which was made [*582] on the principle of the status ante bellum, did not remove this subject of controversy. Commissioners for its adjustment were appointed, whose very able and elaborate, though unsuccessful arguments, in favour of the title of their respective sovereigns, show how entirely each relied on the title given by discovery to lands remaining in the possession of Indians.

After the termination of this fruitless discussion, the subject was transferred to Europe, and taken up by the cabinets of

Versailles and London. This controversy embraced not only the boundaries of New-England, Nova Scotia, and that part of Canada which adjoined those colonies, but embraced our whole western country also. France contended not only that the St. Lawrence was to be considered as the centre of Canada, but that the Ohio was within that colony. She founded this claim on discovery, and on having used that river for the transportation of troops, in a war with some southern Indians.

This river was comprehended in the chartered limits of Virginia; but, though the right of England to a reasonable extent of country, in virtue of her discovery of the seacoast, and of the settlements she made on it, was not to be questioned; her claim of all the lands to the Pacific ocean, because she had discovered the country washed by the Atlantic, might, without derogating from the principle recognised by all, be deemed extravagant. It interfered, too, with the claims of France, founded on the same principle. She therefore sought to strengthen her original title to [*583] the lands in controversy, by insisting that it had been acknowledged by France in the 15th article of the treaty of Utrecht. The dispute respecting the construction of that article, has no tendency to impair the principle, that discovery gave a title to lands still remaining in the possession of the Indians. Whichever title prevailed, it was still a title to lands occupied by the Indians, whose right of occupancy neither controverted, and neither had then extinguished.

These conflicting claims produced a long and bloody war, which was terminated by the conquest of the whole country east of the Mississippi. In the treaty of 1763, France ceded and guarantied to Great Britain, all Nova Scotia, or Acadie, and Canada, with their dependencies; and it was agreed, that the boundaries between the territories of the two nations, in America, should be irrevocably fixed by a line drawn from the source of the Mississippi, through the middle of that river and the lakes Maurepas and Ponchartrain, to the sea. This treaty expressly cedes, and

has always been understood to cede, the whole country, on the English side of the dividing line, between the two nations, although a great and valuable part of it was occupied by the Indians. Great Britain, on her part, surrendered to France all her pretensions to the country west of the Mississippi.It has never been supposed that she surrendered nothing, although she was not in actual possession of a foot of land. She surrendered all right to acquire the country; and any after attempt to purchase it from the Indians, would have been considered [*584] and treated as an invasion of the territories of France.

By the 20th article of the same treaty, Spain ceded Florida, with its dependencies, and all the country she claimed east or southeast of the Mississippi, to Great Britain. Great part of this territory also was in possession of the Indians.

By a secret treaty, which was executed about the same time, France ceded Louisiana to Spain; and Spain has since retroceded the same country to France. At the time both of its cession and retrocession, it was occupied, chiefly, by the Indians.

Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?

By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the "propriety and territorial rights of the United States," whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these States. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It [*585] has never been doubted, that either the United States, or the several States, had a clear title to all

the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.

Virginia, particularly, within whose chartered limits the land in controversy lay, passed an act, in the year 1779, declaring her "exclusive right of pre-emption from the Indians, of all the lands within the limits of her own chartered territory, and that no person or persons whatsoever, have, or ever had, a right to purchase any lands within the same, from any Indian nation, except only persons duly authorized to make such purchase; formerly for the use and benefit of the colony, and lately for the Commonwealth." The act then proceeds to annul all deeds made by Indians to individuals, for the private use of the purchasers.

Without ascribing to this act the power of annulling vested rights, or admitting it to countervail the testimony furnished by the marginal note opposite to the title of the law, forbidding purchases from the Indians, in the revisals of the Virginia statutes, stating that law to be repealed, it may safely be considered as an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained, that the exclusive right to purchase from the Indians resided in the government.

In pursuance of the same idea, Virginia proceeded, at the same session, to open her land [*586] office, for the sale of that country which now constitutes Kentucky, a country, every acre of which was then claimed and possessed by Indians, who maintained their title with as much persevering courage as was ever manifested by any people.

The States, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the Union. The lands in controversy lay

within the chartered limits of Virginia, and were ceded with the whole country northwest of the river Ohio. This grant contained reservations and stipulations, which could only be made by the owners of the soil; and concluded with a stipulation, that "all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation," &c. "according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever."

The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.

[*587] After these States became independent, a controversy subsisted between them and Spain respecting boundary. By the treaty of 1795, this controversy was adjusted, and Spain ceded to the United States the territory in question. This territory, though claimed by both nations, was chiefly in the actual occupation of Indians.

The magnificent purchase of Louisiana, was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are in fact independent. Yet, any attempt of others to intrude into that country, would be considered as an aggression which would justify war.

Our late acquisitions from Spain are of the same character; and the negotiations which preceded those acquisitions, recognise and elucidate the principle which has been received as the foundation of all European title in America.

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase

or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never [*588] been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it.An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title [*589] to a vast portion of the lands we now hold, originates in them. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, [*590] or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled [*591] into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed,

while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be [*592] adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

This question is not entirely new in this Court. The case of Fletcher v. Peck, grew out of a sale made by the State of Georgia of a large tract of country within the limits of that State, the grant of which was afterwards resumed. The action was brought by a sub-purchaser, on the contract of sale, and one of the covenants in the deed was, that the State of Georgia was, at the time of sale, seised in fee of the premises. The real question presented by the issue was, whether the seisin in fee was in the State of Georgia, or in the United States. After stating, that this controversy between the several States and the United States, had been compromised, the Court thought it necessary to notice the Indian title, which, although entitled to the respect of all Courts until it should be legitimately extinguished, was declared not to be such as to be absolutely repugnant to a seisin in fee on the part of the State.

This opinion conforms precisely to the principle which has been supposed to be recognised by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment.

Another view has been taken of this question, [*593] which deserves to be considered. The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it,

still he could acquire only that title.Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.

As such a grant could not separate the Indian from his nation, nor give a title which our Courts could distinguish from the title of his tribe, as it might still be conquered from, or ceded by his tribe, we can perceive no legal principle which will authorize a Court to say, that different consequences are attached to this purchase, because it was made by a stranger. By the treaties concluded [*594] between the United States and the Indian nations, whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States, without any reservation of their title. These nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens. Their cession of the country, without a reservation of this land, affords a fair presumption, that they considered it as of no validity.They ceded to the United States this very property, after having used it in common with other lands, as their own, from the date of their deeds to the time of cession; and the attempt now made, is to set up their title against that of the United States.

The proclamation issued by the King of Great Britain, in 1763, has been considered, and, we think, with reason, as constituting an additional objection to the title of the plaintiffs.

By that proclamation, the crown reserved under its own dominion and protection, for the use of the Indians, "all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest," and strictly forbade all British subjects from making any purchases or settlements whatever, or taking possession of the reserved lands.

It has been contended, that, in this proclamation, the king transcended his constitutional powers; and the case of Campbell v. Hall, (reported by Cowper,) is relied on to support this position.

[*595] It is supposed to be a principle of universal law, that, if an uninhabited country be discovered by a number of individuals, who acknowledge no connexion with, and owe no allegiance to, any government whatever, the country becomes the property of the discoverers, so far at least as they can use it. They acquire a title in common. The title of the whole land is in the whole society. It is to be divided and parcelled out according to the will of the society, expressed by the whole body, or by that organ which is authorized by the whole to express it.

If the discovery be made, and possession of the country be taken, under the authority of an existing government, which is acknowledged by the emigrants, it is supposed to be equally well settled, that the discovery is made for the whole nation, that the country becomes a part of the nation, and that the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains, by that organ in which all vacant territory is vested by law.

According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It

has been already shown, that this principle was as fully recognised in America as in the island of Great Britain. All the lands we hold were originally granted by the crown; and the establishment of a regal government has never been considered as [*596] impairing its right to grant lands within the chartered limits of such colony. In addition to the proof of this principle, furnished by the immense grants, already mentioned, of lands lying within the chartered limits of Virginia, the continuing right of the crown to grant lands lying within that colony was always admitted. A title might be obtained, either by making an entry with the surveyor of a county, in pursuance of law, or by an order of the governor in council, who was the deputy of the king, or by an immediate grant from the crown. In Virginia, therefore, as well as elsewhere in the British dominions, the complete title of the crown to vacant lands was acknowledged.

So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.

According to the theory of the British constitution, the royal prerogative is very extensive, so far as respects the political relations between Great Britain and foreign nations. The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required, that means should be adopted for [*597] the preservation of peace; and that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the whites; and the power to do this was never, we believe, denied by the colonies to the crown.

In the case of Campbell against Hall, that part of the proclamation was determined to be illegal, which imposed a tax on a conquered province, after a government had been bestowed upon it. The correctness of this decision cannot be questioned, but its application to the case at bar cannot be admitted. Since the expulsion of the Stuart family, the power of imposing taxes, by proclamation, has never been claimed as a branch of regal prerogative; but the powers of granting, or refusing to grant, vacant lands, and of restraining encroachments on the Indians, have always been asserted and admitted.

The authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our Courts.

In the argument of this cause, the counsel for the plaintiffs have relied very much on the opinions expressed by men holding offices of trust, and on various proceedings in America, to sustain titles to land derived from the Indians.

The collection of claims to lands lying in the western country, made in the 1st volume of the Laws of the United States, has been referred to; but we find nothing in that collection to support the argument. Most of the titles were derived [*598] from persons professing to act under the authority of the government existing at the time; and the two grants under which the plaintiffs claim, are supposed, by the person under whose inspection the collection was made, to be void, because forbidden by the royal proclamation of 1763. It is not unworthy of remark, that the usual mode adopted by the Indians for granting lands to individuals, has been to reserve them in a treaty, or to grant them under the sanction of the commissioners with whom the treaty was negotiated. The practice, in such case, to grant to the crown, for the use of the individual, is some evidence of a general understanding, that the validity even of such a grant depended on its receiving the royal sanction.

The controversy between the colony of Connecticut and the Mohegan Indians, depended on the nature and extent of a

grant made by those Indians to the colony; on the nature and extent of the reservations made by the Indians, in their several deeds and treaties, which were alleged to be recognised by the legitimate authority; and on the violation by the colony of rights thus reserved and secured. We do not perceive, in that case, any assertion of the principle, that individuals might obtain a complete and valid title from the Indians.

It has been stated, that in the memorial transmitted from the Cabinet of London to that of Versailles, during the controversy between the two nations, respecting boundary, which took place in 1755, the Indian right to the soil is recognised. [*599] But this recognition was made with reference to their character as Indians, and for the purpose of showing that they were fixed to a particular territory. It was made for the purpose of sustaining the claim of his Britannic majesty to dominion over them.

The opinion of the Attorney and Solicitor General, Pratt and Yorke, have been adduced to prove, that, in the opinion of those great law officers, the Indian grant could convey a title to the soil without a patent emanating from the crown. The opinion of those persons would certainly be of great authority on such a question, and we were not a little surprised, when it was read, at the doctrine it seemed to advance. An opinion so contrary to the whole practice of the crown, and to the uniform opinions given on all other occasions by its great law officers, ought to be very explicit, and accompanied by the circumstances under which it was given, and to which it was applied, before we can be assured that it is properly understood. In a pamphlet, written for the purpose of asserting the Indian title, styled "Plain Facts," the same opinion is quoted, and is said to relate to purchases made in the East Indies. It is, of course, entirely inapplicable to purchases made in America. Chalmers, in whose collection this opinion is found, does not say to whom it applies; but there is reason to believe, that the author of Plain Facts is, in this respect, correct. The opinion commences thus: "In respect to such places as have

been, or shall be acquired, by treaty or grant, from any of the Indian princes or governments, [*600] your majesty's letters patent are not necessary." The words "princes or governments," are usually applied to the East Indians, but not to those of North America. We speak of their sachems, their warriors, their chiefmen, their nations or tribes, not of their "princes or governments." The question on which the opinion was given, too, and to which it relates, was, whether the king's subjects carry with them the common law wherever they may form settlements. The opinion is given with a view to this point, and its object must be kept in mind while construing its expressions.

Much reliance is also placed on the fact, that many tracts are now held in the United States under the Indian title, the validity of which is not questioned.

Before the importance attached to this fact is conceded, the circumstances under which such grants were obtained, and such titles are supported, ought to be considered. These lands lie chiefly in the eastern States. It is known that the Plymouth Company made many extensive grants, which, from their ignorance of the country, interfered with each other. It is also known that Mason, to whom New-Hampshire, and Gorges, to whom Maine was granted, found great difficulty in managing such unwieldy property. The country was settled by emigrants, some from Europe, but chiefly from Massachusetts, who took possession of lands they found unoccupied, and secured themselves in that possession by the best means in their power. The disturbances in [*601] England, and the civil war and revolution which followed those disturbances, prevented any interference on the part of the mother country, and the proprietors were unable to maintain their title. In the mean time, Massachusetts claimed the country, and governed it. As her claim was adversary to that of the proprietors, she encouraged the settlement of persons made under her authority, and encouraged, likewise, their securing themselves in possession, by purchasing the acquiescence and forbearance of the Indians.

After the restoration of Charles II., Gorges and Mason, when they attempted to establish their title, found themselves opposed by men, who held under Massachusetts, and under the Indians. The title of the proprietors was resisted; and though, in some cases, compromises were made and in some, the opinion of a Court was given ultimately in their favour, the juries found uniformly against them. They became wearied with the struggle, and sold their property. The titles held under the Indians, were sanctioned by length of possession; but there is no case, so far as we are informed, of a judicial decision in their favour.

Much reliance has also been placed on a recital contained in the charter of Rhode-Island, and on a letter addressed to the governors of the neighbouring colonies, by the king's command, in which some expressions are inserted, indicating the royal approbation of titles acquired from the Indians.

The charter to Rhode-Island recites, "that the said John Clark, and others, had transplanted [*602] themselves into the midst of the Indian nations, and were seised and possessed, by purchase and consent of the said natives, to their full content, of such lands," &c. And the letter recites, that "Thomas Chifflinch, and others, having, in the right of Major Asperton, a just propriety in the Narraghanset country, in New-England, by grants from the native princes of that country, and being desirous to improve it into an English colony," &c. "are yet daily disturbed."

The impression this language might make, if viewed apart from the circumstances under which it was employed, will be effaced, when considered in connexion with those circumstances.

In the year 1635, the Plymouth Company surrendered their charter to the crown. About the same time, the religious dissentions of Massachusetts expelled from that colony several societies of individuals, one of which settled in Rhode-Island, on lands purchased from the Indians. They were not within the chartered limits of Massachusetts, and

the English government was too much occupied at home to bestow its attention on this subject. There existed no authority to arrest their settlement of the country. If they obtained the Indian title, there were none to assert the title of the crown. Under these circumstances, the settlement became considerable. Individuals acquired separate property in lands which they cultivated and improved; a government was established among themselves; and no power existed in America which could rightfully interfere with it.

On the restoration of Charles II., this small society [*603] hastened to acknowledge his authority, and to solicit his confirmation of their title to the soil, and to jurisdiction over the country. Their solicitations were successful, and a charter was granted to them, containing the recital which has been mentioned.

It is obvious, that this transaction can amount to no acknowledgment, that the Indian grant could convey a title paramount to that of the crown, or could, in itself, constitute a complete title. On the contrary, the charter of the crown was considered as indispensable to its completion.

It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right. The object of the crown was to settle the seacoast of America; and when a portion of it was settled, without violating the rights of others, by persons professing their loyalty, and soliciting the royal sanction of an act, the consequences of which were ascertained to be beneficial, it would have been as unwise as ungracious to expel them from their habitations, because they had obtained the Indian title otherwise than through the agency of government. The very grant of a charter is an assertion of the title of the crown, and its words convey the same idea.The country granted, is said to be "our island called Rhode-Island;" and

the charter contains an actual grant of the soil, as well as of the powers of government.

[*604] The letter was written a few months before the charter was issued, apparently at the request of the agents of the intended colony, for the sole purpose of preventing the trespasses of neighbours, who were disposed to claim some authority over them.The king, being willing himself to ratify and confirm their title, was, of course, inclined to quiet them in their possession.

This charter, and this letter, certainly sanction a previous unauthorized purchase from Indians, under the circumstances attending that particular purchase, but are far from supporting the general proposition, that a title acquired from the Indians would be valid against a title acquired from the crown, or without the confirmation of the crown.

The acts of the several colonial assemblies, prohibiting purchases from the Indians, have also been relied on, as proving, that, independent of such prohibitions, Indian deeds would be valid. But, we think this fact, at most, equivocal. While the existence of such purchases would justify their prohibition, even by colonies which considered Indian deeds as previously invalid, the fact that such acts have been generally passed, is strong evidence of the general opinion, that such purchases are opposed by the soundest principles of wisdom and national policy.

After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the Court is decidedly of opinion, that the plaintiffs do not exhibit a title which can [*605] be sustained in the Courts of the United States; and that there is no error in the judgment which was rendered against them in the District Court of Illinois.

Judgment affirmed, with costs.

 ¿Bajo qué títulos adquieren los europeos el dominio sobre el suelo americano desde una concepción

iusnaturalista? ¿No es, acaso, paupérrima la doctrina jurídica inglesa en comparación a los debates castellanos sobre la justificación del dominio europeo? ¿Cómo pasa el dominio directo consolidado por Guillermo El Conquistador al gobierno federal de los Estados Unidos de América?

## LA ESCLAVITUD

THE UNITED STATES, APPELLANTS, v. THE LIBELLANTS AND CLAIMANTS OF THE SCHOONER AMISTAD, HER TACKLE, APPAREL, AND FURNITURE, TOGETHER WITH HER CARGO, AND THE AFRICANS MENTIONED AND DESCRIBED IN THE SEVERAL LIBELS AND CLAIMS, APPELLEES.
Supreme Court of the United States 40 U.S. 518; 10 L. Ed. 826. March 9, 1841, Decided
OPINION BY: STORY
This is the case of an appeal from the decree of the Circuit Court of the District of Connecticut, sitting in admiralty. The leading facts, as they appear upon the transcript of the proceedings, are as follows: On the 27th of June, 1839, the schooner L'Amistad, being the property of Spanish subjects, cleared out from the port of Havana, in the island of Cuba, for Puerto Principe, in the same island. On board of the schooner were the captain, Ransom Ferrer, and Jose Ruiz, and Pedro Montez, all Spanish subjects. The former had with him a negro boy, named Antonio, claimed to be his slave. Jose Ruiz had with him forty-nine negroes, claimed by him as his slaves, and stated to be his property, in a certain pass or document, signed by the Governor General of Cuba. Pedro Montez had with him four other negroes, also claimed by him as his slaves, and stated to be his property, in a similar pass or document, also signed by the Governor General [*588] of Cuba. On the voyage, and before the arrival of the vessel at her port of destination, the negroes rose, killed the captain, and took possession of her. On the 26th of August, the vessel was discovered by Lieutenant Gedney, of the United States brig Washington,

at anchor on the high seas, at the distance of half a mile from the shore of Long Island. A part of the negroes were then on shore at Culloden Point, Long Island; who were seized by Lieutenant Gedney, and brought on board. The vessel, with the negroes and other persons on board, was brought by Lieutenant Gedney into the district of Connecticut, and there libeled for salvage in the District Court of the United States. A libel for salvage was also filed by Henry Green and Pelatiah Fordham, of Sag Harbour, Long Island. On the 18th of September, Ruiz and Montez filed claims and libels, in which they asserted their ownership of the negroes as their slaves, and of certain parts of the cargo, and prayed that the same might be "delivered to them, or to the representatives of her Catholic majesty, as might be most proper." On the 19th of September, the Attorney of the United states, for the district of Connecticut, filed an information or libel, setting forth, that the Spanish minister had officially presented to the proper department of the government of the United States, a claim for the restoration of the vessel, cargo, and slaves, as the property of Spanish subjects, which had arrived within the jurisdictional limits of the United States, and were taken possession of by the said public armed brig of the United States; under such circumstances as made it the duty of the United States to cause the same to be restored to the true proprietors, pursuant to the treaty between the United States and Spain: and praying the Court, on its being made legally to appear that the claim of the Spanish minister was well founded, to make such order for the disposal of the vessel, cargo, and slaves, as would best enable the United States to comply with their treaty stipulations. But if it should appear, that the negroes were persons transported from Africa, in violation of the laws of the United States, and brought within the United States contrary to the same laws; he then prayed the Court to make such order for their removal to the coast of Africa, pursuant to the laws of the United States, as it should deem fit.

[*589] On the 19th of November, the Attorney of the United States filed a second information or libel, similar to the first, with the exception of the second prayer above set forth in his former one. On the same day, Antonio G. Vega, the vice-consul of Spain, for the state of Connecticut, filed his libel, alleging that Antonio was a slave, the property of the representatives of Ramon Ferrer, and praying the Court to cause him to be delivered to the said vice-consul, that he might be returned by him to his lawful owner in the island of Cuba.

On the 7th of January, 1840, the negroes, Cinque and others, with the exception of Antonio, by their counsel, filed an answer, denying that they were slaves, or the property of Ruiz and Montez, or that the Court could, under the Constitution or laws of the United States, or under any treaty, exercise any jurisdiction over their persons, by reason of the premises; and praying that they might be dismissed. They specially set forth and insist in this answer, that they were native born Africans; born free, and still of right ought to be free and not slaves; that they were, on or about the 15th of April, 1839, unlawfully kidnapped, and forcibly and wrongfully carried on board a certain vessel on the coast of Africa, which was unlawfully engaged in the slave trade, and were unlawfully transported in the same vessel to the island of Cuba, for the purpose of being there unlawfully sold as slaves; that Ruiz and Montez, well knowing the premises, made a pretended purchase of them: that afterwards, on or about the 28th of June, 1839, Ruiz and Montez, confederating with Ferrer, (captain of the Amistad,) caused them, without law or right, to be placed on board of the Amistad, to be transported to some place unknown to them, and there to be enslaved for life; that, on the voyage, they rose on the master, and took possession of the vessel, intending to return therewith to their native country, or to seek an asylum in some free state; and the vessel arrived, about the 26th of August, 1839, off Montauk Point, near Long Island; a part of them were sent on shore, and were seized by Lieutenant Gedney, and carried on

board; and all of them were afterwards brought by him into the district of Connecticut.

On the 7th of January, 1840, Jose Antonio Tellincas, and Messrs. Aspe and Laca, all Spanish subjects, residing in Cuba, filed their [*590] claims, as owners to certain portions of the goods found on board of the schooner L'Amistad.

On the same day, all the libellants and claimants, by their counsel, except Jose Ruiz and Pedro Montez, (whose libels and claims, as stated of record, respectively, were pursued by the Spanish minister, the same being merged in his claims,) appeared, and the negroes also appeared by their counsel; and the case was heard on the libels, claims, answers, and testimony of witnesses.

On the 23d day of January, 1840, the District Court made a decree. By that decree, the Court rejected the claim of Green and Fordham for salvage, but allowed salvage to Lieutenant Gedney and others, on the vessel and cargo, of one-third of the value thereof, but not on the negroes, Cinque and others; it allowed the claim of Tellincas, and Aspe and Laca with the exception of the above-mentioned salvage; it dismissed the libels and claims of Ruiz and Montez, with costs, as being included under the claim of the Spanish minister; it allowed the claim of the Spanish vice-consul for Antonio, on behalf of Ferrer's representatives; it rejected the claims of Ruiz and Montez for the delivery of the negroes, but admitted them for the cargo, with the exception of the above-mentioned salvage; it rejected the claim made by the Attorney of the United States on behalf of the Spanish minister, for the restoration of the negroes under the treaty; but it decreed that they should be delivered to the President of the United States, to be transported to Africa, pursuant to the act of 3d March, 1819.

From this decree the District Attorney, on behalf of the United States, appealed to the Circuit Court, except so far as related to the restoration of the slave Antonio. The claimants, Tellincas, and Aspe and Laca, also appealed

from that part of the decree which awarded salvage on the property respectively claimed by them. No appeal was interposed by Ruiz or Montez, or on behalf of the representatives of the owners of the Amistad. The Circuit Court, by a mere pro forma decree, affirmed the decree of the District Court, reserving the question of salvage upon the claims of Tellincas, and Aspe and Laca. And from that decree the present appeal has been brought to this Court.

The cause has been very elaborately argued, as well upon the [*591] merits, as upon a motion on behalf of the appellees to dismiss the appeal. On the part of the United States, it has been contended, 1. That due and sufficient proof concerning the property has been made to authorize the restitution of the vessel, cargo, and negroes to the Spanish subjects on whose behalf they are claimed pursuant to the treaty with Spain, of the 27th of October, 1795. 2. That the United States had a right to intervene in the manner in which they have done, to obtain a decree for the restitution of the property, upon the application of the Spanish minister. These propositions have been strenuously denied on the other side. Other collateral and incidental points have been stated, upon which it is not necessary at this moment to dwell.

Before entering upon the discussion of the main points involved in this interesting and important controversy, it may be necessary to say a few words as to the actual posture of the case as it now stands before us. In the first place, then, the only parties now before the Court on one side, are the United States, intervening for the sole purpose of procuring restitution of the property as Spanish property, pursuant to the treaty, upon the grounds stated by the other parties claiming the property in their respective libels. The United States do not assert any property in themselves, or any violation of their own rights, or sovereignty, or laws, by the acts complained of. They do not insist that these negroes have been imported into the United States, in contravention of our own slave trade acts. They do not seek to have these negroes delivered up for the purpose of being

transported to Cuba as pirates or robbers, or as fugitive criminals against the laws of Spain. They do not assert that the seizure, and bringing the vessel, and cargo, and negroes into port, by Lieutenant Gedney, for the purpose of adjudication, is a tortious act. They simply confine themselves to the right of the Spanish claimants to the restitution of their property, upon the facts asserted in their respective allegations.

In the next place, the parties before the Court on the other side as appellees, are Lieutenant Gedney, on his libel for salvage, and the negroes, (Cinque, and others,) asserting themselves, in their answer, not to be slaves, but free native Africans, kidnapped [*592] in their own country, and illegally transported by force from that country; and now entitled to maintain their freedom.

No question has been here made, as to the proprietary interests in the vessel and cargo. It is admitted that they belong to Spanish subjects, and that they ought to be restored. The only point on this head is, whether the restitution ought to be upon the payment of salvage or not? The main controversy is, whether these negroes are the property of Ruiz and Montez, and ought to be delivered up; and to this, accordingly, we shall first direct our attention.

It has been argued on behalf of the United States, that the Court are bound to deliver them up, according to the treaty of 1795, with Spain, which has in this particular been continued in full force, by the treaty of 1819, ratified in 1821. The sixth article of that treaty, seems to have had, principally, in view cases where the property of the subjects of either state had been taken possession of within the territorial jurisdiction of the other, during war. The eighth article provides for cases where the shipping of the inhabitants of either state are forced, through stress of weather, pursuit of pirates, or enemies, or any other urgent necessity, to seek shelter in the ports of the other. There may well be some doubt entertained, whether the present case, in its actual circumstances, falls within the purview of this article. But it does not seem necessary, for reasons

hereafter stated, absolutely to decide it. The ninth article provides, "that all ships and merchandise, of what nature soever, which shall be rescued out of the hands of any pirates or robbers, on the high seas, shall be brought into some port of either state, and shall be delivered to the custody of the officers of that port, in order to be taken care of and restored entire to the true proprietor, as soon as due and sufficient proof shall be made concerning the property thereof." This is the article on which the main reliance is placed on behalf of the United States, for the restitution of these negroes. To bring the case within the article, it is essential to establish, First, That these negroes, under all the circumstances, fall within the description of merchandise, in the sense of the treaty. Secondly, That there has been a rescue of them on the high seas, out of the hands of the pirates and robbers; which, in the present case, can only be, by showing that they [*593] themselves are pirates and robbers; and, Thirdly, That Ruiz and Montez, the asserted proprietors, are the true proprietors, and have established their title by competent proof.

If these negroes were, at the time, lawfully held as slaves under the laws of Spain, and recognised by those laws as property capable of being lawfully bought and sold; we see no reason why they may not justly be deemed within the intent of the treaty, to be included under the denomination of merchandise, and, as such, ought to be restored to the claimants: for, upon that point, the laws of Spain would seem to furnish the proper rule of interpretation. But, admitting this, it is clear, in our opinion, that neither of the other essential facts and requisites has been established in proof; and the onus probandi of both lies upon the claimants to give rise to the causes foederis. It is plain beyond controversy, if we examine the evidence, that these negroes never were the lawful slaves of Ruiz or Montez, or of any other Spanish subjects. They are natives of Africa, and were kidnapped there, and were unlawfully transported to Cuba, in violation of the laws and treaties of Spain, and the most solemn edicts and declarations of that

government. By those laws, and treaties, and edicts, the African slave trade is utterly abolished; the dealing in that trade is deemed a heinous crime; and the negroes thereby introduced into the dominions of Spain, are declared to be free. Ruiz and Montez are proved to have made the pretended purchase of these negroes, with a full knowledge of all the circumstances. And so cogent and irresistible is the evidence in this respect, that the District Attorney has admitted in open Court, upon the record, that these negroes were native Africans, and recently imported into Cuba, as alleged in their answers to the libels in the case. The supposed proprietary interest of Ruiz and Montez, is completely displaced, if we are at liberty to look at the evidence of the admissions of the District Attorney.

If, then, these negroes are not slaves, but are kidnapped Africans, who, by the laws of Spain itself, are entitled to their freedom, and were kidnapped and illegally carried to Cuba, and illegally detained and restrained on board of the Amistad; there is no pretence to say, that they are pirates or robbers. We may lament the dreadful acts, by which they asserted their liberty, and took possession of the Amistad, and endeavoured to regain their native [*594] country; but they cannot be deemed pirates or robbers in the sense of the law of nations, or the treaty with Spain, or the laws of Spain itself; at least so far as those laws have been brought to our knowledge. Nor do the libels of Ruiz or Montez assert them to be such.

This posture of the facts would seem, of itself, to put an end to the Whole inquiry upon the merits. But it is argued, on behalf of the United States, that the ship, and cargo, and negroes were duly documented as belonging to Spanish subjects, and this Court have no right to look behind these documents; that full faith and credit is to be given to them; and that they are to be held conclusive evidence in this cause, even although it should be established by the most satisfactory proofs, that they have been obtained by the grossest frauds and impositions upon the constituted authorities of Spain. To this argument we can, in no wise,

assent. There is nothing in the treaty which justifies or sustains the argument. We do not here meddle with the point, whether there has been any connivance in this illegal traffic, on the part of any of the colonial authorities or subordinate officers of Cuba; because, in our view, such an examination is unnecessary, and ought not to be pursued, unless it were indispensable to public justice, although it has been strongly pressed at the bar. What we proceed upon is this, that although public documents of the government, accompanying property found on board of the private ships of a foreign nation, certainly are to be deemed prima facie evidence of the facts which they purport to state, yet they are always open to be impugned for fraud; and whether that fraud be in the original obtaining of these documents, or in the subsequent fraudulent and illegal use of them, when once it is satisfactorily established, it overthrows all their sanctity, and destroys them as proof. Fraud will vitiate any, even the most solemn transactions; and an asserted title to property, founded upon it, is utterly void. The very language of the ninth article of the treaty of 1795, requires the proprietor to make due and sufficient proof of his property. And how can that proof be deemed either due or sufficient, which is but a connected, and stained tissue of fraud? This is not a mere rule of municipal jurisprudence. Nothing is more clear in the law of nations, as an established rule to regulate their rights, and duties, [*595] and intercourse, than the doctrine, that the ship's papers are but prima facie evidence, and that, if they are shown to be fraudulent, they are not to be held proof of any valid title. This rule is familiarly applied, and, indeed, is of every-days occurrence in cases of prize, in the contests between belligerents and neutrals, as is apparent from numerous cases to be found in the Reports of this Court; and it is just as applicable to the transactions of civil intercourse between nations in times of peace. If a private ship, clothed with Spanish papers, should enter the ports of the United States, claiming the privileges, and immunities, and rights belonging to bona fide subjects of Spain, under our treaties

or laws, and she should, in reality, belong to the subjects of another nation, which was not entitled to any such privileges, immunities, or rights, and the proprietors were seeking, by fraud, to cover their own illegal acts, under the flag of Spain; there can be no doubt, that it would be the duty of our Courts to strip off the disguise, and to look at the case according to its naked realities. In the solemn treaties between nations, it can never be presumed that either state intends to provide the means of perpetrating or protecting frauds; but all the provisions are to be construed as intended to be applied to bona fide transactions. The seventeenth article of the treaty with Spain, which provides for certain passports and certificates, as evidence of property on board of the ships of both states, is, in its terms, applicable only to cases where either of the parties is engaged in a war. This article required a certain form of passport to be agreed upon by the parties, and annexed to the treaty. It never was annexed; and, therefore, in the case of the Amiable Isabella, 6 Wheaton, 1, it was held inoperative.

It is also a most important consideration in the present case, which ought not to be lost sight of, that, supposing these African negroes not to be slaves, but kidnapped, and free negroes, the treaty with Spain cannot be obligatory upon them; and the United States are bound to respect their rights as much as those of Spanish subjects. The conflict of rights between the parties under such circumstances, becomes positive and inevitable, and must be decided upon the eternal principles of justice and international law. If the contest were about any goods on board of this ship, to which American citizens asserted a title, which was [*596] denied by the Spanish claimants, there could be no doubt of the right of such American citizens to litigate their claims before any competent American tribunal, notwithstanding the treaty with Spain. A fortiori, the doctrine must apply where human life and human liberty are in issue; and constitute the very essence of the controversy. The treaty with Spain never could have intended to take away the

equal rights of all foreigners, who should contest their claims before any of our Courts, to equal justice; or to deprive such foreigners of the protection given them by other treaties, or by the general law of nations. Upon the merits of the case, then, there does not seem to us to be any ground for doubt, that these negroes ought to be deemed free; and that the Spanish treaty interposes no obstacle to the just assertion of their rights.

There is another consideration growing out of this part of the case, which necessarily rises in judgment. It is observable, that the United States, in their original claim, filed it in the alternative, to have the negroes, if slaves and Spanish property, restored to the proprietors; or, if not slaves, but negroes who had been transported from Africa, in violation of the laws of the United States, and brought into the United States contrary to the same laws, then the Court to pass an order to enable the United States to remove such persons to the coast of Africa, to be delivered there to such agent as may be authorized to receive and provide for them. At a subsequent period, this last alternative claim was not insisted on, and another claim was interposed, omitting it; from which the conclusion naturally arises that it was abandoned. The decree of the District Court, however, contained an order for the delivery of the negroes to the United States, to be transported to the coast of Africa, under the act of the 3d of March, 1819, ch. 224. The United States do not now insist upon any affirmance of this part of the decree; and, in our judgment, upon the admitted facts, there is no ground to assert that the case comes within the purview of the act of 1819, or of any other of our prohibitory slave trade acts. These negroes were never taken from Africa, or brought to the United States in contravention of those acts. When the Amistad arrived she was in possession of the negroes, asserting their freedom; and in no sense could they possibly intend to import themselves here, as [*597] slaves, or for sale as slaves. In this view of the matter, that part of the decree of the District Court is unmaintainable, and must be reversed.

The view which has been thus taken of this case, upon the merits, under the first point, renders it wholly unnecessary for us to give any opinion upon the other point, as to the right of the United States to intervene in this case in the manner already stated. We dismiss this, therefore, as well as several minor points made at the argument.

As to the claim of Lieutenant Gedney for the salvage service, it is understood that the United States do not now desire to interpose any obstacle to the allowance of it, if it is deemed reasonable by the Court. It was a highly meritorious and useful service to the proprietors of the ship and cargo; and such as, by the general principles of maritime law, is always deemed a just foundation for salvage. The rate allowed by the Court, does not seem to us to have been beyond the exercise of a sound discretion, under the very peculiar and embarrassing circumstances of the case.

Upon the whole, our opinion is, that the decree of the Circuit Court, affirming that of the District Court, ought to be affirmed, except so far as it directs the negroes to be delivered to the President, to be transported to Africa, in pursuance of the act of the 3d of March, 1819; and, as to this, it ought to be reversed: and that the said negroes be declared to be free, and be dismissed from the custody of the Court, and go without day.

DISSENT BY: BALDWIN

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the District of Connecticut, and was argued by counsel. On consideration whereof, it is the opinion of this Court, that there is error in that part of the decree of the Circuit Court, affirming the decree of the District Court, which ordered the said negroes to be delivered to the President of the United States, to be transported to Africa, in pursuance of the act of Congress, of the 3d of March, 1819; and that, as to that part, it ought to be reversed: and, in all other respects, that the said decree of the [*598] Circuit Court ought to be affirmed. It is therefore ordered adjudged, and

decreed by this Court, that the decree of the said Circuit Court be, and the same is hereby, affirmed, except as to the part aforesaid, and as to that part, that it be reversed; and that the cause be remanded to the Circuit Court, with directions to enter, in lieu of that part, a decree, that the said negroes be, and are hereby, declared to be free, and that they be dismissed from the custody of the Court, and be discharged from the suit and go thereof quit without day.

 ¿Por qué los territorios dependientes de la corona castellana acabaron racialmente integrados en comparación con las colonias inglesas? ¿El derecho de la esclavitud castellano, al asentarse en la tradición del derecho romano, favorecía la manumisión? ¿El derecho de la esclavitud estadounidense se asentaba, en cambio, en el derecho público? ¿Estaba prohibida la manumisión en la colonia de Virginia? ¿Los libertos no tenían, acaso, que dejar el territorio para obtener su liberación? ¿La derrota confederada en la Guerra de Secesión devastó la economía de la colonia de Virginia, cuna de la Constitución Política federal?

## LA PSEUDO PROPIEDAD

 JOHN MOORE, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Repondents. Supreme Court of California 51 Cal. 3d 120; 793 P.2d 479; 271 Cal. Rptr. 146. July 9, 1990
OPINION BY: PANELLI
I. Introduction
We granted review in this case to determine whether plaintiff has stated a cause of action against his physician and other defendants for using his cells [*125] in potentially lucrative medical research without his permission. Plaintiff alleges that his physician failed to disclose preexisting research and economic interests in the cells before obtaining consent to the medical procedures by which they were extracted. The superior court sustained all

defendants' demurrers to the third amended complaint, and the Court of Appeal reversed. We hold that the complaint states a cause of action for breach of the physician's disclosure obligations, but not for conversion.

II. Facts

Our only task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action. Accordingly, we assume that the complaint's properly pleaded material allegations are true and give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context. (Phillips v. Desert Hospital Dist. (1989) 49 Cal.3d 699, 702 [263 Cal. Rptr. 119, 780 P.2d 349]; Blank v. Kirwan (1985) 39 Cal.3d 311, 318 [216 Cal. Rptr. 718, 703 P.2d 58]; Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167, 170 [164 Cal. Rptr. 839, 610 P.2d 1330, 9 A.L.R.4th 314].) We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law. (Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, 713 [63 Cal. Rptr. 724, 433 P.2d 732].) For these purposes we briefly summarize the pertinent factual allegations of the 50-page complaint.

The plaintiff is John Moore (Moore), who underwent treatment for hairy-cell leukemia at the Medical Center of the University of California at Los Angeles (UCLA Medical Center). The five defendants are: (1) Dr. David W. Golde (Golde), a physician who attended Moore at UCLA Medical Center; (2) the Regents of the University of California (Regents), who own and operate the university; (3) Shirley G. Quan, a researcher employed by the Regents; (4) Genetics Institute, Inc. (Genetics Institute); and (5) Sandoz Pharmaceuticals Corporation and related entities (collectively Sandoz).

Moore first visited UCLA Medical Center on October 5, 1976, shortly after he learned that he had hairy-cell leukemia. After hospitalizing Moore and "withdr[awing] extensive amounts of blood, bone marrow aspirate, and other bodily substances," Golde confirmed that diagnosis. At this time all [*126] defendants, including Golde, were

aware that "certain blood products and blood components were of great value in a number of commercial and scientific efforts" and that access to a patient whose blood contained these substances would provide "competitive, commercial, and scientific advantages."

On October 8, 1976, Golde recommended that Moore's spleen be removed. Golde informed Moore "that he had reason to fear for his life, and that the proposed splenectomy operation… was necessary to slow down the progress of his disease." Based upon Golde's representations, Moore signed a written consent form authorizing the splenectomy.

Before the operation, Golde and Quan "formed the intent and made arrangements to obtain portions of [Moore's] spleen following its removal" and to take them to a separate research unit. Golde gave written instructions to this effect on October 18 and 19, 1976. These research activities "were not intended to have… any relation to [Moore's] medical… care." However, neither Golde nor Quan informed Moore of their plans to conduct this research or requested his permission. Surgeons at UCLA Medical Center, whom the complaint does not name as defendants, removed Moore's spleen on October 20, 1976.

Moore returned to the UCLA Medical Center several times between November 1976 and September 1983. He did so at Golde's direction and based upon representations "that such visits were necessary and required for his health and well-being, and based upon the trust inherent in and by virtue of the physician-patient relationship…" On each of these visits Golde withdrew additional samples of "blood, blood serum, skin, bone marrow aspirate, and sperm." On each occasion Moore travelled to the UCLA Medical Center from his home in Seattle because he had been told that the procedures were to be performed only there and only under Golde's direction.

"In fact, [however,] throughout the period of time that [Moore] was under [Golde's] care and treatment,… the defendants were actively involved in a number of activities

which they concealed from [Moore]…" Specifically, defendants were conducting research on Moore's cells and planned to "benefit financially and competitively… [by exploiting the cells] and [their] exclusive access to [the cells] by virtue of [Golde's] ongoing physician-patient relationship…"

[*127] Sometime before August 1979, Golde established a cell line from Moore's T-lymphocytes. 2 On January 30, 1981, the Regents applied for a patent on the cell line, listing Golde and Quan as inventors. "[B]y virtue of an established policy…, [the] Regents, Golde, and Quan would share in any royalties or profits… arising out of [the] patent." The patent issued on March 20, 1984, naming Golde and Quan as the inventors of the cell line and the Regents as the assignee of the patent. (U.S. Patent No. 4,438,032 (Mar. 20, 1984).)

With the Regents' assistance, Golde negotiated agreements for commercial development of the cell line and products to be derived from it. Under an agreement with Genetics Institute, Golde "became a paid consultant" and "acquired the rights to 75,000 shares of common stock." Genetics Institute also agreed to pay Golde and the Regents "at least $ 330,000 over three years, including a pro-rata share of [Golde's] salary and fringe benefits, in exchange for… exclusive access to the materials and research performed" on the cell line and products derived from it. On June 4, 1982, [*128] Sandoz "was added to the agreement," and compensation payable to Golde and the Regents was increased by $ 110,000. "[T]hroughout this period, . . . Quan spent as much as 70 [percent] of her time working for [the] Regents on research" related to the cell line.

Based upon these allegations, Moore attempted to state 13 causes of action. Each defendant demurred to each purported cause of action. The superior court, however, expressly considered the validity of only the first cause of action, conversion. Reasoning that the remaining causes of action incorporated the earlier, defective allegations, the superior court sustained a general demurrer to the entire

complaint with leave to amend. In a subsequent proceeding, the superior court sustained Genetics Institute's and Sandoz's demurrers without leave to amend on the grounds that Moore had not stated a cause of action for conversion and that the complaint's allegations about the entities' secondary liability were too conclusory. In accordance with its earlier ruling that the defective allegations about conversion rendered the entire complaint insufficient, the superior court took the remaining demurrers off its calendar: (1) "Conversion"; (2) "lack of informed consent"; (3) "breach of fiduciary duty"; (4) "fraud and deceit"; (5) "unjust enrichment"; (6) "quasi-contract"; (7) "bad faith breach of the implied covenant of good faith and fair dealing"; (8) "intentional infliction of emotional distress"; (9) "negligent misrepresentation"; (10) "intentional interference with prospective advantageous economic relationships"; (11) "slander of title"; (12) "accounting"; and (13) "declaratory relief."

The superior court did not reach (a) any defendant's general demurrer to the causes of action numbered 2 through 13; (b) any defendant's demurrer on the ground of the statute of limitations; (c) Golde's, Quan's, and the Regents' demurrers on the grounds of governmental immunity; or (d) Genetics Institute's and Sandoz's numerous demurrers for uncertainty.

With one justice dissenting, the Court of Appeal reversed, holding that the complaint did state a cause of action for conversion. The Court of Appeal agreed with the superior court that the allegations against Genetics Institute and Sandoz were insufficient, but directed the superior court to give Moore leave to amend. The Court of Appeal also directed the superior court to decide "the remaining causes of action, which [had] never been expressly ruled upon."

III. Discussion

A. Breach of Fiduciary Duty and Lack of Informed Consent

(2a) Moore repeatedly alleges that Golde failed to disclose the extent of his research and economic interests in Moore's cells before obtaining consent to the medical procedures by

which the cells were extracted. These allegations, in our view, state a cause of action against Golde for invading a [*129] legally protected interest of his patient. This cause of action can properly be characterized either as the breach of a fiduciary duty to disclose facts material to the patient's consent or, alternatively, as the performance of medical procedures without first having obtained the patient's informed consent.

(3) Our analysis begins with three well-established principles. First, "a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment." (Cobbs v. Grant (1972) 8 Cal.3d 229, 242 [104 Cal. Rptr. 505, 502 P.2d 1]; cf. Schloendorff v. New York Hospital (1914) 211 N.Y. 125 [105 N.E. 92, 93].) Second, "the patient's consent to treatment, to be effective, must be an informed consent." ( Cobbs v. Grant, supra, 8 Cal.3d at p. 242.) Third, in soliciting the patient's consent, a physician has a fiduciary duty to disclose all information material to the patient's decision. (Id., at pp. 242, 246; see also Stafford v. Schultz (1954) 42 Cal.2d 767, 777 [270 P.2d 1]; Nelson v. Gaunt (1981) 125 Cal. App.3d 623, 635 [178 Cal. Rptr. 167]; Berkey v. Anderson (1969) 1 Cal. App.3d 790, 805 [82 Cal. Rptr. 67]; Bowman v. McPheeters (1947) 77 Cal. App.2d 795, 800 [176 P.2d 745].)

These principles lead to the following conclusions: (1) a physician must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect the physician's professional judgment; and (2) a physician's failure to disclose such interests may give rise to a cause of action for performing medical procedures without informed consent or breach of fiduciary duty.

To be sure, questions about the validity of a patient's consent to a procedure typically arise when the patient alleges that the physician failed to disclose medical risks, as in malpractice cases, and not when the patient alleges that the physician had a personal interest, as in this case. The

concept of informed consent, however, is broad enough to encompass the latter. "The scope of the physician's communication to the patient . . . must be measured by the patient's need, and that need is whatever information is material to the decision." ( Cobbs v. Grant, supra, 8 Cal.3d at p. 245.)

Indeed, the law already recognizes that a reasonable patient would want to know whether a physician has an economic interest that might affect the physician's professional judgment. As the Court of Appeal has said, "[c]ertainly a sick patient deserves to be free of any reasonable suspicion that his doctor's judgment is influenced by a profit motive." (Magan Medical Clinic v. Cal. State Bd. of Medical Examiners (1967) 249 Cal. App.2d 124, 132 [57 Cal. Rptr. 256].) The desire to protect patients from possible conflicts of interest has also motivated legislative enactments. Among these is Business and Professions Code section 654.2. Under that section, a physician [*130] may not charge a patient on behalf of, or refer a patient to, any organization in which the physician has a "significant beneficial interest, unless [the physician] first discloses in writing to the patient, that there is such an interest and advises the patient that the patient may choose any organization for the purposes of obtaining the services ordered or requested by [the physician]." ( Bus. & Prof. Code, § 654.2, subd. (a). See also Bus. & Prof. Code, § 654.1 [referrals to clinical laboratories].) Similarly, under Health and Safety Code section 24173, a physician who plans to conduct a medical experiment on a patient must, among other things, inform the patient of "[t]he name of the sponsor or funding source, if any, . . . and the organization, if any, under whose general aegis the experiment is being conducted." 7 ( Health & Saf. Code, § 24173, subd. (c)(9).)

It is important to note that no law prohibits a physician from conducting research in the same area in which he practices. Progress in medicine often depends upon physicians, such as those practicing at the university

hospital where Moore received treatment, who conduct research while caring for their patients.

Yet a physician who treats a patient in whom he also has a research interest has potentially conflicting loyalties. This is because medical treatment decisions are made on the basis of proportionality—weighing the benefits to the patient against the risks to the patient. As another court has said, "the determination as to whether the burdens of treatment are worth enduring for any individual patient depends upon the facts unique in each case," and "the patient's interests and desires are the key ingredients of the decision-making process." (Barber v. Superior Court (1983) 147 Cal. App.3d 1006, 1018-1019 [195 Cal. Rptr. 484, 47 A.L.R.4th 1].) A physician who adds his own research interests to this balance may be tempted to order a scientifically useful procedure or test that offers marginal, or no, benefits to the patient. The possibility that an interest extraneous to the patient's health has affected the physician's judgment is something that a reasonable patient would want to know in deciding whether to consent to a proposed course of treatment. It is material to the patient's decision and, thus, a prerequisite to informed consent. (See Cobbs v. Grant, supra, 8 Cal.3d at p. 245.)

[*131] Golde argues that the scientific use of cells that have already been removed cannot possibly affect the patient's medical interests. The argument is correct in one instance but not in another. If a physician has no plans to conduct research on a patient's cells at the time he recommends the medical procedure by which they are taken, then the patient's medical interests have not been impaired. In that instance the argument is correct. On the other hand, a physician who does have a preexisting research interest might, consciously or unconsciously, take that into consideration in recommending the procedure. In that instance the argument is incorrect: the physician's extraneous motivation may affect his judgment and is, thus, material to the patient's consent.

We acknowledge that there is a competing consideration. To require disclosure of research and economic interests may corrupt the patient's own judgment by distracting him from the requirements of his health. 9 But California law does not grant physicians unlimited discretion to decide what to disclose. Instead, "it is the prerogative of the patient, not the physician, to determine for himself the direction in which he believes his interests lie." ( Cobbs v. Grant, supra, 8 Cal.3d at p. 242.) "Unlimited discretion in the physician is irreconcilable with the basic right of the patient to make the ultimate informed decision . . . ." ( Id., at p. 243.)

A related problem may arise with excessive disclosure of the risks of medical treatment. As we recognized in Cobbs v. Grant, supra, disclosure of risks in some cases can "so seriously upset the patient" as to affect the patient's ability to weigh "dispassionately . . . the risks of refusing to undergo the recommended treatment." ( Cobbs v. Grant, supra, 8 Cal.3d at p. 246.) Under those circumstances, "[a] disclosure need not be made beyond that required within the medical community . . . ." (Ibid.)

However, we made that statement in the context of a physician-patient relationship unaffected by possible conflicts of interest. Cobbs v. Grant, supra, permits a physician acting solely in the patient's best interests to consider whether excessive disclosure will harm the patient. Disclosure of possible conflicts of interest raises different considerations. To illustrate, a physician who orders a procedure partly to further a research interest unrelated to the patient's health should not be able to avoid disclosure with the argument that the patient might object to participation in research. In some cases, however, a physician's research interest might play such an insignificant role in the decision to recommend a medically indicated procedure that disclosure should not be required because the interest is not material. By analogy, we have not required disclosure of "remote" risks ( Cobbs v. Grant, supra, 8 Cal.3d at p. 245) that "are not central to the

decision to administer or reject [a] procedure." (Truman v. Thomas (1980) 27 Cal.3d 285, 293 [165 Cal. Rptr. 308, 611 P.2d 902].)

Accordingly, we hold that a physician who is seeking a patient's consent for a medical procedure must, in order to satisfy his fiduciary duty and to obtain the patient's informed consent, disclose personal interests unrelated [*132] to the patient's health, whether research or economic, that may affect his medical judgment.

2. The Remaining Defendants

The Regents, Quan, Genetics Institute, and Sandoz are not physicians. In contrast to Golde, none of these defendants stood in a fiduciary relationship with Moore or had the duty to obtain Moore's informed consent to medical procedures. If any of these defendants is to be liable for breach of fiduciary duty or performing medical procedures without informed consent, it can only be on account of Golde's acts and on the basis of a recognized theory of secondary liability, such as respondeat superior. The procedural posture of this case, however, makes it unnecessary for us to address the sufficiency of Moore's secondary-liability allegations.

As already mentioned, the superior court addressed only the purported cause of action for conversion. Because the superior court found that Moore [*134] had not stated such a cause of action, it had no occasion to address the sufficiency of Moore's allegation that the Regents and Quan were acting as Golde's "agent[s]" and "joint venturer[s]." 12 In a later proceeding, however, the superior court did find that the same allegations were too conclusory to state a cause of action against Genetics Institute and Sandoz…

As discussed below, we reject the conclusion that Moore can state a cause of action for conversion against any defendant.

Thus, we express no opinion on whether Moore has stated, or can state, a cause of action against the Regents for

Golde's alleged torts under the doctrine of respondeat superior…

B. Conversion

(4a) Moore also attempts to characterize the invasion of his rights as a conversion—a tort that protects against interference with possessory and ownership interests in personal property. He theorizes that he continued to own his cells following their removal from his body, at least for the purpose of directing their use, and that he never consented to their use in potentially [*135] lucrative medical research. Thus, to complete Moore's argument, defendants' unauthorized use of his cells constitutes a conversion. As a result of the alleged conversion, Moore claims a proprietary interest in each of the products that any of the defendants might ever create from his cells or the patented cell line.

No court, however, has ever in a reported decision imposed conversion liability for the use of human cells in medical research. While that fact does not end our inquiry, it raises a flag of caution. In effect, what Moore is asking us to do is to impose a tort duty on scientists to investigate the consensual pedigree of each human cell sample used in research. To impose such a duty, which would affect medical research of importance to all of society, implicates policy concerns far removed from the traditional, two-party ownership disputes in which the law of conversion arose. Invoking a tort theory originally used to determine whether the loser or the finder of a horse had the better title, Moore claims ownership of the results of socially important medical research, including the genetic code for chemicals that regulate the functions of every human being's immune system.

We have recognized that, when the proposed application of a very general theory of liability in a new context raises important policy concerns, it is especially important to face those concerns and address them openly. (Cf. Nally v. Grace Community Church, supra, 47 Cal.3d 278, 291-300 [declining to expand negligence law to encompass theory

of "clergyman malpractice"]; Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 694-700 [*136] [254 Cal. Rptr. 211, 765 P.2d 373] [declining to apply tort remedies for breach of the covenant of good faith in the employment context]; Brown v. Superior Court (1988) 44 Cal.3d 1049, 1061-1066 [245 Cal. Rptr. 412, 751 P.2d 470] [declining to apply strict products liability to pharmaceutical manufacturers].) Moreover, we should be hesitant to "impose [new tort duties] when to do so would involve complex policy decisions" (Nally v. Grace Community Church, supra, 47 Cal.3d at p. 299), especially when such decisions are more appropriately the subject of legislative deliberation and resolution. (See Foley v. Interactive Data Corp., supra, 47 Cal.3d at p. 694 & fn. 31.) This certainly is not to say that the applicability of common law torts is limited to the historical or factual contexts of existing cases. But on occasions when we have opened or sanctioned new areas of tort liability, we "have noted that the 'wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework.'" ( Nally v. Grace Community Church, supra, 47 Cal.3d at p. 298, quoting Peter W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal. App.3d 814, 824 [131 Cal. Rptr. 854].)

Accordingly, we first consider whether the tort of conversion clearly gives Moore a cause of action under existing law. We do not believe it does. Because of the novelty of Moore's claim to own the biological materials at issue, to apply the theory of conversion in this context would frankly have to be recognized as an extension of the theory. Therefore, we consider next whether it is advisable to extend the tort to this context.

1. Moore's Claim Under Existing Law

"To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession…Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion." 19 (Del E.

Webb Corp. v. Structural Materials Co. (1981) 123 Cal. App.3d 593, 610-611 [176 Cal. Rptr. 824], italics added. See also General Motors A. Corp. v. Dallas (1926) 198 Cal. 365, 370 [245 P. 184].)

While it ordinarily suffices to allege ownership generally (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 654, p. 103), it is well established that a complaint's contentions or conclusions of law do not bind us. (Daar v. Yellow Cab Co., supra, 67 Cal.2d at p. 713.) Moore's novel allegation that he "owns" the biological materials involved in this case is both a contention and a conclusion of law.

Since Moore clearly did not expect to retain possession of his cells following their removal, to sue for their conversion he must have retained [*137] an ownership interest in them. But there are several reasons to doubt that he did retain any such interest. First, no reported judicial decision supports Moore's claim, either directly or by close analogy. Second, California statutory law drastically limits any continuing interest of a patient in excised cells. Third, the subject matters of the Regents' patent—the patented cell line and the products derived from it—cannot be Moore's property.

In his complaint, Moore does not seek possession of his cells or claim the right to possess them. This is consistent with Health and Safety Code section 7054.4, which provides that "human tissues… following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety."

Neither the Court of Appeal's opinion, the parties' briefs, nor our research discloses a case holding that a person retains a sufficient interest in excised cells to support a cause of action for conversion. We do not find this surprising, since the laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects *sui generis*, regulating their disposition to achieve policy goals rather than abandoning

them to the general law of personal property. It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.

Lacking direct authority for importing the law of conversion into this context, Moore relies, as did the Court of Appeal, primarily on decisions [*138] addressing privacy rights. One line of cases involves unwanted publicity. ( Lugosi v. Universal Pictures (1979) 25 Cal.3d 813 [160 Cal. Rptr. 323, 603 P.2d 425, 10 A.L.R.4th 1150]; Motschenbacher v. R. J. Reynolds Tobacco Company (9th Cir. 1974) 498 F.2d 821 [interpreting Cal. law].) These opinions hold that every person has a proprietary interest in his own likeness and that unauthorized, business use of a likeness is redressible as a tort. But in neither opinion did the authoring court expressly base its holding on property law. (Lugosi v. Universal Pictures, supra, 25 Cal.3d at pp. 819, 823-826; Motschenbacher v. R. J. Reynolds Tobacco Company, supra, 498 F.2d at pp. 825-826.) Each court stated, following Prosser, that it was "pointless" to debate the proper characterization of the proprietary interest in a likeness. ( Motschenbacher v. R. J. Reynolds Tobacco Company, supra, 498 F.2d at p. 825, quoting Prosser, Law of Torts (4th ed. 1971) at p. 807; Lugosi v. Universal Pictures, supra, 25 Cal.3d at pp. 819, 824.) For purposes of determining whether the tort of conversion lies, however, the characterization of the right in question is far from pointless. Only property can be converted.

Not only are the wrongful-publicity cases irrelevant to the issue of conversion, but the analogy to them seriously misconceives the nature of the genetic materials and research involved in this case. Moore, adopting the analogy originally advanced by the Court of Appeal, argues that "[i]f the courts have found a sufficient proprietary interest in one's persona, how could one not have a right in one's own genetic material, something far more profoundly the essence of one's human uniqueness than a name or a face?" However, as the defendants' patent makes clear—and the

complaint, too, if read with an understanding of the scientific terms which it has borrowed from the patent—the goal and result of defendants' efforts has been to manufacture lymphokines. Lymphokines, unlike a name or a face, [*139] have the same molecular structure in every human being and the same, important functions in every human being's immune system. Moreover, the particular genetic material which is responsible for the natural production of lymphokines, and which defendants use to manufacture lymphokines in the laboratory, is also the same in every person; it is no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin.

Because all normal persons possess the genes responsible for production of lymphokines, it is sometimes possible to make normal cells into overproducers. (See OTA Rep., supra, at p. 55.) According to a research paper to which defendants contributed, Moore's cells overproduced lymphokines because they were infected by a virus, HTLV-II (human T-cell leukemia virus type II). (Chen, Quan & Golde, Human T-cell Leukemia Virus Type II Transforms Normal Human Lymphocytes (Nov. 1983) 80 Proceedings Nat. Acad. Sci. USA 7006.) The same virus has been shown to transform normal T-lymphocytes into overproducers like Moore's. (Ibid.)

Another privacy case offered by analogy to support Moore's claim establishes only that patients have a right to refuse medical treatment. (Bouvia v. Superior Court (1986) 179 Cal. App.3d 1127 [225 Cal. Rptr. 297].) In this context the court in Bouvia wrote that "'[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . .'" ( Id., at p. 1139, quoting from Schloendorff v. New York Hospital, supra, 211 N.Y. 125 [105 N.E. 92, 93].) 31 Relying on this language to support the proposition that a patient has a continuing right to control the use of excised cells, the Court of Appeal in this case concluded that "[a] patient must have the ultimate power to control what becomes of

his or her [*140] tissues. To hold otherwise would open the door to a massive invasion of human privacy and dignity in the name of medical progress." Yet one may earnestly wish to protect privacy and dignity without accepting the extremely problematic conclusion that interference with those interests amounts to a conversion of personal property. Nor is it necessary to force the round pegs of "privacy" and "dignity" into the square hole of "property" in order to protect the patient, since the fiduciary-duty and informed-consent theories protect these interests directly by requiring full disclosure.

The next consideration that makes Moore's claim of ownership problematic is California statutory law, which drastically limits a patient's control over excised cells. Pursuant to Health and Safety Code section 7054.4, "[n]otwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety." Clearly the Legislature did not specifically intend this statute to resolve the question of whether a patient is entitled to compensation for the nonconsensual use of excised cells. A primary object of the statute is to ensure the safe handling of potentially hazardous biological waste materials. 33 Yet one cannot escape the conclusion that the statute's practical effect is to limit, drastically, a patient's control over excised cells. By restricting how excised cells may be [*141] used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to "property" or "ownership" for purposes of conversion law.

It may be that some limited right to control the use of excised cells does survive the operation of this statute. There is, for example, no need to read the statute to permit "scientific use" contrary to the patient's expressed wish. A

fully informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve. That right, however, as already discussed, is protected by the fiduciary-duty and informed-consent theories.

The cell line in this case, for example, after many replications began to generate defective and rearranged forms of the HTLV-II virus. A published research paper to which defendants contributed suggests that "the defective forms of virus were probably generated during the passage [or replication] of the cells rather than being present in the original tumour cells of the patient." Possibly because of these changes in the virus, the cell line has developed new abilities to grow in different media. (Chen, McLaughlin, Gasson, Clark & Golde, Molecular Characterization of Genome of a Novel Human T-cell Leukaemia Virus, Nature (Oct. 6, 1983) vol. 305, p. 505.)…

2. Should Conversion Liability Be Extended?

As we have discussed, Moore's novel claim to own the biological materials at issue in this case is problematic, at best. Accordingly, his attempt to apply the theory of conversion within this context must frankly be recognized as a request to extend that theory. While we do not purport to hold that excised cells can never be property for any purpose whatsoever, the novelty of Moore's claim demands express consideration of the policies to be served by extending liability (cf. Nally v. Grace Community Church, supra, 47 Cal.3d at pp. 291-300; Foley v. Interactive Data Corp., supra, 47 Cal.3d at pp. 694-700; Brown v. Superior Court, supra, 44 Cal.3d at pp. 1061-1066) rather than blind deference to a complaint alleging as a legal conclusion the existence of a cause of action.

There are three reasons why it is inappropriate to impose liability for conversion based upon the allegations of Moore's complaint. First, a fair balancing of the relevant policy considerations counsels against extending the tort. Second, problems in this area are better suited to legislative resolution. Third, the tort of conversion is not necessary to

protect patients' [*143] rights. For these reasons, we conclude that the use of excised human cells in medical research does not amount to a conversion.

To be sure, the threat of liability for conversion might help to enforce patients' rights indirectly. This is because physicians might be able to avoid liability by obtaining patients' consent, in the broadest possible terms, to any conceivable subsequent research use of excised cells. Unfortunately, to extend the conversion theory would utterly sacrifice the other goal of protecting innocent parties. (8) (See fn. 38.) (4d) Since conversion is a strict liability tort, it would impose liability on all those into whose hands the cells come, whether or not the particular defendant participated in, or knew of, the inadequate disclosures that violated the patient's right to make an informed decision. In contrast to the conversion theory, the fiduciary-duty and informed-consent theories protect the patient directly, without punishing innocent parties or creating disincentives to the conduct of socially beneficial research…

Research on human cells plays a critical role in medical research. This is so because researchers are increasingly able to isolate naturally occurring, medically useful biological substances and to produce useful quantities of such substances through genetic engineering. These efforts are beginning to bear fruit. Products developed through biotechnology that have already been approved for marketing in this country include treatments and tests for leukemia, cancer, diabetes, dwarfism, hepatitis-B, kidney transplant rejection, emphysema, osteoporosis, ulcers, anemia, infertility, and gynecological tumors, to name but a few. (Note, Source Compensation for Tissues and Cells Used in Biotechnical Research: Why a Source Shouldn't Share in the Profits (1989) 64 Notre Dame L. Rev. 628 & fn. 1 (hereafter Note, Source Compensation); see also OTA Rep., supra, at pp. 58-59.)

The extension of conversion law into this area will hinder research by restricting access to the necessary raw

materials. Thousands of human cell lines already exist in tissue repositories, such as the American Type Culture Collection and those operated by the National Institutes of Health and the American Cancer Society. These repositories respond to tens of thousands [*145] of requests for samples annually. Since the patent office requires the holders of patents on cell lines to make samples available to anyone, many patent holders place their cell lines in repositories to avoid the administrative burden of responding to requests. (OTA Rep., supra, at p. 53.) At present, human cell lines are routinely copied and distributed to other researchers for experimental purposes, usually free of charge. 39 This exchange of scientific materials, which still is relatively free and efficient, will surely be compromised if each cell sample becomes the potential subject matter of a lawsuit. (OTA Rep., supra, at p. 52.)…

As in Brown, the theory of liability that Moore urges us to endorse threatens to destroy the economic incentive to conduct important medical research. If the use of cells in research is a conversion, then with every cell sample a researcher purchases a ticket in a litigation lottery. Because liability for conversion is predicated on a continuing ownership interest, "companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists." (OTA Rep., supra, at p. 27.) 41 In our view, borrowing again from Brown, "[i]t is not unreasonable to conclude in these circumstances that the imposition of a harsher test for liability would not further the public interest in the development and availability of these important products." ( Brown v. Superior Court, supra, 44 Cal.3d at p. 1065.) [*147] Indeed, this is a far more compelling case for limiting the expansion of tort liability than Brown . In Brown, eliminating strict liability made it more difficult for plaintiffs to recover actual damages for serious physical injuries resulting from their mothers' prenatal use of the drug diethylstilbestrol (DES). (Brown v. Superior Court,

supra, 44 Cal.3d at pp. 1054-1055.) In this case, by comparison, limiting the expansion of liability under a conversion theory will only make it more difficult for Moore to recover a highly theoretical windfall. Any injury to his right to make an informed decision remains actionable through the fiduciary-duty and informed-consent theories.

If the scientific users of human cells are to be held liable for failing to investigate the consensual pedigree of their raw materials, we believe the Legislature should make that decision. Complex policy choices affecting all society are involved, and "[l]egislatures, in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties present evidence and express their views…" ( Foley v. Interactive Data Corp., supra, 47 Cal.3d at p. 694, fn. 31.) Legislative competence to act in this area is demonstrated by the existing statutes governing the use and disposition of human biological materials. 43 Legislative interest is demonstrated by the extensive study recently commissioned by the United States Congress. (OTA Rep., supra.) Commentators are also recommending legislative solutions. (See Danforth, Cells, Sales, and Royalties: The Patient's Right to a Portion of the Profits (1988) 6 Yale L. & Pol'y Rev. 179, 198-201; Note, Source Compensation, supra, 64 Notre Dame L. Rev. at pp. 643-645.)

Finally, there is no pressing need to impose a judicially created rule of strict liability, since enforcement of physicians' disclosure obligations will protect patients against the very type of harm with which Moore was threatened. So long as a physician discloses research and economic interests that may affect his judgment, the patient is protected from conflicts of interest.

DISSENT BY: BROUSSARD

Given the novel scientific setting in which this case arises and the considerable interest this litigation has engendered within the medical research community and the public

generally, it is easy to lose sight of the fact that the specific allegations on which the complaint in this case rests are quite unusual, setting this matter apart from the great majority of instances in which donated organs or cells provide the raw materials for the advancement of medical science and the development of new and beneficial medical products. Ordinarily, when a patient consents to the use of a body part for scientific purposes, the potential value of the excised organ or cell is discovered only through subsequent experimentation or research, often months or years after the removal of the organ. In this case, however, the complaint alleges that plaintiff's doctor recognized the peculiar research and commercial value of plaintiff's cells before their removal from plaintiff's body. Despite this knowledge, the doctor allegedly failed to disclose these facts or his interest in the cells to plaintiff, either before plaintiff's initial surgery or throughout the ensuing seven-year period during which the doctor continued to obtain additional cells from plaintiff's body in the course of periodic medical examinations.

The majority opinion, of course, is not oblivious to the significance of these unusual allegations. It relies on those allegations in concluding that the complaint states a cause of action for breach of fiduciary duty. I concur fully in that holding.

[*151] When it turns to the conversion cause of action, however, the majority opinion fails to maintain its focus on the specific allegations before us. Concerned that the imposition of liability for conversion will impede medical research by innocent scientists who use the resources of existing cell repositories—a factual setting not presented here—the majority opinion rests its holding, that a conversion action cannot be maintained, largely on the proposition that a patient generally possesses no right in a body part that has already been removed from his body. Here, however, plaintiff has alleged that defendants interfered with his legal rights before his body part was removed. Although a patient may not retain any legal

interest in a body part after its removal when he has properly consented to its removal and use for scientific purposes, it is clear under California law that before a body part is removed it is the patient, rather than his doctor or hospital, who possesses the right to determine the use to which the body part will be put after removal. If, as alleged in this case, plaintiff's doctor improperly interfered with plaintiff's right to control the use of a body part by wrongfully withholding material information from him before its removal, under traditional common law principles plaintiff may maintain a conversion action to recover the economic value of the right to control the use of his body part. Accordingly, I dissent from the majority opinion insofar as it rejects plaintiff's conversion cause of action…

If this were a typical case in which a patient consented to the use of his removed organ for general research purposes and the patient's doctor had no prior knowledge of the scientific or commercial value of the patient's organ or cells, I would agree that the patient could not maintain a conversion action. In that common scenario, the patient has abandoned any interest in the removed organ and is not entitled to demand compensation if it should later be discovered that the organ or cells have some unanticipated value. I cannot agree, however, with the majority that a patient may never maintain a conversion action for the unauthorized use of his excised organ or cells, even against a party who knew of the value of the organ or cells before they were removed and breached a duty to disclose that value to the patient. Because plaintiff alleges that defendants wrongfully interfered with his right to determine, prior to the removal of his body parts, how those parts would be used after removal, I conclude that the complaint states a cause of action under traditional, common law conversion principles.

In analyzing the conversion issue, the majority properly begins with the established requirements of a common law conversion action, explaining that a plaintiff is required to

demonstrate an actual interference with his "ownership or right of possession" in the property in question. (Maj. opn., ante, p. 136.) Although the majority opinion, at several points, appears to suggest that a removed body part, by its nature, may never constitute "property" for purposes of a conversion action (see maj. opn., ante, pp. 138, 140), there is no reason to think that the majority opinion actually intends to embrace such a broad or dubious proposition. If, for example, another medical center or drug company had stolen all of the cells in question from the UCLA Medical Center laboratory and had used them for its own benefit, there would be no question but that a cause of action for conversion would properly lie against the thief, and the majority opinion does not suggest otherwise. Thus, the majority's analysis cannot rest on the broad proposition that a removed body part is not property, but rather rests on the [*154] proposition that a patient retains no ownership interest in a body part once the body part has been removed from his or her body.

The majority opinion fails to recognize, however, that, in light of the allegations of the present complaint, the pertinent inquiry is not whether a patient generally retains an ownership interest in a body part after its removal from his body, but rather whether a patient has a right to determine, before a body part is removed, the use to which the part will be put after removal. Although the majority opinion suggests that there are "reasons to doubt" that a patient retains "any" ownership interest in his organs or cells after removal (maj. opn., ante, p. 137), the opinion fails to identify any statutory provision or common law authority that indicates that a patient does not generally have the right, before a body part is removed, to choose among the permissible uses to which the part may be put after removal. On the contrary, the most closely related statutory scheme—the Uniform Anatomical Gift Act ( Health & Saf. Code, § 7150 et seq.)—makes it quite clear that a patient does have this right…

Although, as noted, the Uniform Anatomical Gift Act applies only to anatomical gifts that take effect on or after the death of the donor, the general principle of "donor control" which the act embodies is clearly not limited to that setting. In the transplantation context, for example, it is [*155] common for a living donor to designate the specific donee—often a relative—who is to receive a donated organ. If a hospital, after removing an organ from such a donor, decided on its own to give the organ to a different donee, no one would deny that the hospital had violated the legal right of the donor by its unauthorized use of the donated organ. Accordingly, it is clear under California law that a patient has the right, prior to the removal of an organ, to control the use to which the organ will be put after removal.

It is also clear, under traditional common law principles, that this right of a patient to control the future use of his organ is protected by the law of conversion. As a general matter, the tort of conversion protects an individual not only against improper interference with the right of possession of his property but also against unauthorized use of his property or improper interference with his right to control the use of his property. Sections 227 and 228 of the Restatement Second of Torts specifically provide in this regard that "[o]ne who uses a chattel in a manner which is a serious violation of the right of another to control its use is subject to liability to the other for conversion" and that "[o]ne who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated." California cases have also long recognized that "unauthorized use" of property can give rise to a conversion action. (See Hollywood M. P. Equipment Co. v. Furer (1940) 16 Cal.2d 184, 189 [105 P.2d 299]. See generally 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 622, p. 716.)

The application of these principles to the present case is evident. If defendants had informed plaintiff, prior to removal, of the possible uses to which his body part could be put and plaintiff had authorized one particular use, it is clear under the foregoing authorities that defendants would be liable for conversion if they disregarded plaintiff's decision and used the body part in an unauthorized manner for their own economic benefit. Although in this case defendants did not disregard a specific directive from plaintiff with regard to the future use of his body part, the complaint alleges that, before the body part was removed, defendants intentionally withheld material information that they were under an obligation to disclose to plaintiff and that was necessary for his exercise of control over the body part; the complaint also alleges that defendants withheld such information in order to appropriate the control over the future use of such body part for their own economic benefit. If these allegations are true, defendants clearly improperly interfered with plaintiff's right in his body part at a time when he had the authority to determine the future use of such part, thereby misappropriating plaintiff's right of control for their own advantage. Under [*156] these circumstances, the complaint fully satisfies the established requirements of a conversion cause of action…

A comment to the section of the model Uniform Anatomical Gift Act on which section 7155 was based explains the basis for the prohibition on sale of body parts for transplantation or therapy: "'Altruism and a desire to benefit other members of the community are important moral reasons which motivate many to donate. Any perception on the part of the public that transplantation unfairly benefits those outside the community, those who are wealthy enough to afford transplantation, or that it is undertaken primarily with an eye toward profit rather than therapy will severely imperil the moral foundations, and thus the efficacy of the system.'" (8A, West's U. Laws Annot. (1990 pocket pt.) Anatomical Gift Act (1987) § 10, p. 25.) The drafters of the provision apparently concluded

that this rationale did not warrant extending the prohibition on purchase or sale to the sale of body parts that are to be used for any of the statutorily authorized purposes other than transplantation or therapy.

Given the current provisions of the Uniform Anatomical Gift Act, there is no basis to conclude that there is a general public policy in this state prohibiting hospitals or medical centers from giving, or prohibiting patients from receiving, valuable consideration for body parts which are to be used for medical research or the advancement of medical science.

Because I conclude that plaintiff's complaint states a cause of action for conversion under traditional common law principles, I dissent from the majority opinion insofar as it rejects such a claim.

DISSENT BY: MOSK

Contrary to the principal holding of the Court of Appeal, the majority conclude that the complaint does not—in fact cannot—state a cause of action for conversion. I disagree with this conclusion for all the reasons [*161] stated by the Court of Appeal, and for additional reasons that I shall explain. For convenience I shall discuss the six premises of the majority's conclusion in the order in which they appear.

1.

The majority first take the position that Moore has no cause of action for conversion under existing law because he retained no "ownership interest" in his cells after they were removed from his body. (Maj. opn., ante, p. 137.) To state a conversion cause of action a plaintiff must allege his "ownership or right to possession of the property at the time of the conversion" ( Baldwin v. Marina City Properties, Inc. (1978) 79 Cal. App.3d 393, 410). Here the complaint defines Moore's "Blood and Bodily Substances" to include inter alia his blood, his bodily tissues, his cells, and the cell lines derived therefrom. Moore thereafter alleges that "he is the owner of his Blood and Bodily Substances and of the by-products produced therefrom . . ." And he further alleges that such blood and bodily

substances "are his tangible personal property, and the activities of the defendants as set forth herein constitute a substantial interference with plaintiff's possession or right thereto, as well as defendants' wrongful exercise of dominion over plaintiff's personal property rights in his Blood and Bodily Substances."

The majority impliedly hold these allegations insufficient as a matter of law, finding three "reasons to doubt" that Moore retained a sufficient ownership interest in his cells, after their excision, to support a conversion cause of action. (Maj. opn., ante, p. 137.) In my view the majority's three reasons, taken singly or together, are inadequate to the task.

The majority's first reason is that "no reported judicial decision supports Moore's claim, either directly or by close analogy." (Maj. opn., ante, p. 137.) Neither, however, is there any reported decision rejecting such a claim. The issue is as new as its source—the recent explosive growth in the commercialization of biotechnology.

The majority next cite several statutes regulating aspects of the commerce in or disposition of certain parts of the human body, and conclude in effect that in the present case we should also "look for guidance" to the Legislature rather than to the law of conversion. (Id. at p. 137.) Surely this argument is out of place in an opinion of the highest court of this state. As the majority acknowledge, the law of conversion is a creature of the common law. "'The inherent capacity of the common law for growth and change is [*162] its most significant feature. Its development has been determined by the social needs of the community which it serves. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society, and adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country.' [Citation.] [para.] In short, as the United States Supreme Court has aptly said, 'This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.' [Citation.] . . . Although the Legislature may of course

speak to the subject, in the common law system the primary instruments of this evolution are the courts, adjudicating on a regular basis the rich variety of individual cases brought before them." ( Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal.3d 382, 394 [115 Cal. Rptr. 765, 525 P.2d 669].)

Especially is this true in the field of torts. I need not review the many instances in which this court has broken fresh ground by announcing new rules of tort law: time and again when a new rule was needed we did not stay our hand merely because the matter was one of first impression. 2 For example, in Sindell v. Abbott Laboratories (1980) 26 Cal.3d 588 [163 Cal. Rptr. 132, 607 P.2d 924, 2 A.L.R.4th 1061], we adopted a "market share" theory of liability for injury resulting from administration of a prescription drug and suffered by a plaintiff who without fault cannot trace the particular manufacturer of the drug that caused the harm. Like the opinion in the case at bar, the dissent in Sindell objected that market share liability was "a wholly new theory" and an "unprecedented extension of liability" ( Id. at pp. 614-615), and urged that in view of the economic, social, and medical effects of this new rule the decision to adopt it should rest with the Legislature ( Id. at p. 621). We nevertheless declared the new rule for sound policy reasons, explaining that "In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs." ( Id. at p. 610.) We took the latter course. 3

The case at bar, of course, does not involve a drug-induced injury. Yet it does present a claim arising, like Sindell's, from "advances in science and technology" that could not have been foreseen when traditional tort doctrine [*163]—here, the law of conversion—was formulated. My point is that if the cause of action for conversion is otherwise an appropriate remedy on these facts, we should not refrain

from fashioning it simply because another court has not yet so held or because the Legislature has not yet addressed the question. We need not wait on either event, because neither is a precondition to an exercise of our long-standing "power to insure the just and rational development of the common law in our state" ( Rodriguez v. Bethlehem Steel Corp., supra, 12 Cal.3d 382, 394). 4

2.

The majority's second reason for doubting that Moore retained an ownership interest in his cells after their excision is that "California statutory law . . . drastically limits a patient's control over excised cells." (Maj. opn., ante, p. 140.) For this proposition the majority rely on Health and Safety Code section 7054.4 (hereafter section 7054.4), set forth in the margin. The majority concede that the statute was not meant to directly resolve the question whether a person in Moore's position has a cause of action for conversion, but reason that it indirectly resolves the question by limiting the patient's control over the fate of his excised cells: "By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to 'property' or 'ownership' for purposes of conversion law." (Maj. opn., ante, pp. 140-141.) As will appear, I do not believe section 7054.4 supports the just quoted conclusion of the majority.

"As used in this section, 'infectious waste' means any material or article which has been, or may have been, exposed to contagious or infectious disease."

First, in my view the statute does not authorize the principal use that defendants claim the right to make of Moore's tissue, i.e., its commercial exploitation. In construing section 7054.4, of course, "we look first to the words of the statute themselves" ( Long Beach Police Officers Assn. v. City of [*164] Long Beach (1988) 46 Cal.3d 736, 741 [250 Cal. Rptr. 869, 759 P.2d 504]), and give those words their usual and ordinary meaning (

California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 698 [170 Cal. Rptr. 817, 621 P.2d 856]).

By its terms, section 7054.4 permits only "scientific use" of excised body parts and tissue before they must be destroyed. We must therefore determine the usual and ordinary meaning of that phrase. I would agree that "scientific use" at least includes routine postoperative examination of excised tissue conducted by a pathologist for diagnostic or prognostic reasons (e.g., to verify preoperative diagnosis or to assist in determining postoperative treatment). I might further agree that "scientific use" could be extended to include purely scientific study of the tissue by a disinterested researcher for the purpose of advancing medical knowledge—provided of course that the patient gave timely and informed consent to that use. It would stretch the English language beyond recognition, however, to say that commercial exploitation of the kind and degree alleged here is also a usual and ordinary meaning of the phrase "scientific use."

The majority dismiss this difficulty by asserting that I read the statute to define "scientific use" as "not-for-profit scientific use," and by finding "no reason to believe that the Legislature intended to make such a distinction." (Maj. opn., ante, p. 141, fn. 34.) The objection misses my point. I do not stress the concept of profit, but the concept of science: the distinction I draw is not between nonprofit scientific use and scientific use that happens to lead to a marketable by-product; it is between a truly scientific use and the blatant commercial exploitation of Moore's tissue that the present complaint alleges. Under those allegations, defendants Dr. David W. Golde and Shirley G. Quan were not only scientists, they were also full-fledged entrepreneurs: the complaint repeatedly declares that they appropriated Moore's tissue in order "to further defendants' independent research and commercial activities and promote their economic, financial and competitive

interests." The complaint also alleges that defendant Regents of the University of California (hereafter Regents) actively assisted the individual defendants in applying for patent rights and in negotiating with bioengineering and pharmaceutical companies to exploit the commercial potential of Moore's tissue. Finally, the complaint alleges in detail the contractual arrangements between the foregoing defendants and defendants Genetics Institute, Inc., and Sandoz Pharmaceuticals Corporation, giving the latter companies exclusive rights to exploit that commercial potential while providing substantial financial benefits to the individual defendants in the form of cash, stock options, consulting fees, and fringe benefits. To exclude such traditionally commercial activities from the phrase "scientific use," as I do here, does not [*165] give it a restrictive definition; rather, it gives the phrase its usual and ordinary meaning, as settled law requires.

Secondly, even if section 7054.4 does permit defendants' commercial exploitation of Moore's tissue under the guise of "scientific use," it does not follow that—as the majority conclude—the statute "eliminates so many of the rights ordinarily attached to property" that what remains does not amount to "property" or "ownership" for purposes of the law of conversion. (Maj. opn., ante, p. 141.)

The concepts of property and ownership in our law are extremely broad. (See Civ. Code, §§ 654, 655.) A leading decision of this court approved the following definition: "'The term "property" is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value.'" ( Yuba River Power Co. v. Nevada Irr. Dist. (1929) 207 Cal. 521, 523 [279 P. 128].)

Being broad, the concept of property is also abstract: rather than referring directly to a material object such as a parcel of land or the tractor that cultivates it, the concept of

property is often said to refer to a "bundle of rights" that may be exercised with respect to that object — principally the rights to possess the property, to use the property, to exclude others from the property, and to dispose of the property by sale or by gift. "Ownership is not a single concrete entity but a bundle of rights and privileges as well as of obligations." (Union Oil Co. v. State Bd. of Equal. (1963) 60 Cal.2d 441, 447 [34 Cal. Rptr. 872, 386 P.2d 496].) But the same bundle of rights does not attach to all forms of property. For a variety of policy reasons, the law limits or even forbids the exercise of certain rights over certain forms of property. For example, both law and contract may limit the right of an owner of real property to use his parcel as he sees fit. Owners of various forms of personal property may likewise be subject to restrictions on the time, place, and manner of their use. Limitations on the disposition of real [*166] property, while less common, may also be imposed. Finally, some types of personal property may be sold but not given away, while others may be given away but not sold, and still others may neither be given away nor sold.

In each of the foregoing instances, the limitation or prohibition diminishes the bundle of rights that would otherwise attach to the property, yet what remains is still deemed in law to be a protectible property interest. "Since property or title is a complex bundle of rights, duties, powers and immunities, the pruning away of some or a great many of these elements does not entirely destroy the title . . . ." ( People v. Walker (1939) 33 Cal. App.2d 18, 20 [90 P.2d 854] [even the possessor of contraband has certain property rights in it against anyone other than the state].) The same rule applies to Moore's interest in his own body tissue: even if we assume that section 7054.4 limited the use and disposition of his excised tissue in the manner claimed by the majority, Moore nevertheless retained valuable rights in that tissue. Above all, at the time of its excision he at least had the right to do with his own tissue whatever the defendants did with it: i.e., he could have

contracted with researchers and pharmaceutical companies to develop and exploit the vast commercial potential of his tissue and its products. Defendants certainly believe that their right to do the foregoing is not barred by section 7054.4 and is a significant property right, as they have demonstrated by their deliberate concealment from Moore of the true value of his tissue, their efforts to obtain a patent on the Mo cell line, their contractual agreements to exploit this material, 0] their exclusion of Moore from any participation in the profits, and their vigorous defense of this lawsuit. The Court of Appeal summed up the point by observing that "Defendants' position that plaintiff cannot own his tissue, but that they can, is fraught with irony." It is also legally untenable. As noted above, the majority cite no case holding that an individual's right to develop and exploit the commercial potential of his own tissue is not a right of sufficient worth or dignity to be deemed a protectible property interest. In the absence of such authority — or of legislation to the same effect — the right falls within the traditionally broad concept of property in our law.

[*167] 3.

The majority's third and last reason for their conclusion that Moore has no cause of action for conversion under existing law is that "the subject matter of the Regents' patent—the patented cell line and the products derived from it—cannot be Moore's property." (Maj. opn., ante, p. 141.) The majority then offer a dual explanation: "This is because the patented cell line is both factually and legally distinct from the cells taken from Moore's body." (Ibid., italics added.) Neither branch of the explanation withstands analysis.

First, in support of their statement that the Mo cell line is "factually distinct" from Moore's cells, the majority assert that "Cells change while being developed into a cell line and continue to change over time," and in particular may acquire an abnormal number of chromosomes. (Maj. opn., ante, p. 141, fn. 35.) No one disputes these assertions, but they are nonetheless irrelevant. For present purposes no

distinction can be drawn between Moore's cells and the Mo cell line. It appears that the principal reason for establishing a cell line is not to "improve" the quality of the parent cells but simply to extend their life indefinitely, in order to permit long-term study and/or exploitation of the qualities already present in such cells. The complaint alleges that Moore's cells naturally produced certain valuable proteins in larger than normal quantities; indeed, that was why defendants were eager to culture them in the first place. Defendants do not claim that the cells of the Mo cell line are in any degree more productive of such proteins than were Moore's own cells. Even if the cells of the Mo cell line in fact have an abnormal number of chromosomes, at the present stage of this case we do not know if that fact has any bearing whatever on their capacity to produce proteins; yet it is in the commercial exploitation of that capacity—not simply in their number of chromosomes—that Moore seeks to assert an interest. For all that appears, therefore, the emphasized fact is a distinction without a difference.

Second, the majority assert in effect that Moore cannot have an ownership interest in the Mo cell line because defendants patented it. The majority's point wholly fails to meet Moore's claim that he is entitled to compensation for defendants' unauthorized use of his bodily tissues before defendants [*168] patented the Mo cell line: defendants undertook such use immediately after the splenectomy on October 20, 1976, and continued to extract and use Moore's cells and tissue at least until September 20, 1983; the patent, however, did not issue until March 20, 1984, more than seven years after the unauthorized use began. Whatever the legal consequences of that event, it did not operate retroactively to immunize defendants from accountability for conduct occurring long before the patent was granted.

Nor did the issuance of the patent in 1984 necessarily have the drastic effect that the majority contend. To be sure, the patent granted defendants the exclusive right to make, use,

or sell the invention for a period of 17 years. (35 U.S.C. § 154.) But Moore does not assert any such right for himself. Rather, he seeks to show that he is entitled, in fairness and equity, to some share in the profits that defendants have made and will make from their commercial exploitation of the Mo cell line. I do not question that the cell line is primarily the product of defendants' inventive effort. Yet likewise no one can question Moore's crucial contribution to the invention—an invention named, ironically, after him: but for the cells of Moore's body taken by defendants, there would have been no Mo cell line. Thus the complaint alleges that Moore's "Blood and Bodily Substances were absolutely essential to defendants' research and commercial activities with regard to his cells, cell lines, [and] the Mo cell-line, . . . and that defendants could not have applied for and had issued to them the Mo cell-line patent and other patents described herein without obtaining and culturing specimens of plaintiff's Blood and Bodily Substances." Defendants admit this allegation by their demurrers, as well they should: for all their expertise, defendants do not claim they could have extracted the Mo cell line out of thin air.

Nevertheless the majority conclude that the patent somehow cut off all Moore's rights—past, present, and future— to share in the proceeds of defendants' commercial exploitation of the cell line derived from his own body tissue. The majority cite no authority for this unfair result, and I cannot believe it is compelled by the general law of patents: a patent is not a license to defraud. Perhaps the answer lies in an analogy to the concept of "joint inventor." I am aware that "patients and research subjects who contribute cells to research will not be considered inventors." (OTA Rep., supra, at p. 71.) Nor is such a person, strictly speaking, a "joint inventor" within the [*169] meaning of the term in federal law. (35 U.S.C. § 116.) But he does fall within the spirit of that law: "The joint invention provision guarantees that all who contribute in a substantial way to a product's development benefit from the reward that the product brings. Thus, the

protection of joint inventors encourages scientists to cooperate with each other and ensures that each contributor is rewarded fairly.

"Although a patient who donates cells does not fit squarely within the definition of a joint inventor, the policy reasons that inform joint inventor patents should also apply to cell donors. Neither John Moore nor any other patient whose cells become the basis for a patentable cell line qualifies as a 'joint inventor' because he or she did not further the development of the product in any intellectual or conceptual sense. Nor does the status of patients as sole owners of a component part make them deserving of joint inventorship status. What the patients did do, knowingly or unknowingly, is collaborate with the researchers by donating their body tissue… By providing the researchers with unique raw materials, without which the resulting product could not exist, the donors become necessary contributors to the product. Concededly, the patent is not granted for the cell as it is found in nature, but for the modified biogenetic product. However, the uniqueness of the product that gives rise to its patentability stems from the uniqueness of the original cell. A patient's claim to share in the profits flowing from a patent would be analogous to that of an inventor whose collaboration was essential to the success of a resulting product. The patient was not a coequal, but was a necessary contributor to the cell line." (Danforth, Cells, Sales, & Royalties: The Patient's Right to a Portion of the Profits (1988) 6 Yale L. & Pol'y Rev. 179, 197, fns. omitted, italics added (hereafter Danforth).)

Under this reasoning, which I find persuasive, the law of patents would not be a bar to Moore's assertion of an ownership interest in his cells and their products sufficient to warrant his sharing in the proceeds of their commercial exploitation.

4.

Having concluded—mistakenly, in my view—that Moore has no cause of action for conversion under existing law,

the majority next consider whether to "extend" the conversion cause of action to this context…

To begin with, if the relevant exchange of scientific materials was ever "free and efficient," it is much less so today. Since biological products of genetic engineering became patentable in 1980 (Diamond v. Chakrabarty [*171] (1980) 447 U.S. 303 [65 L. Ed. 2d 144, 100 S. Ct. 2204]), human cell lines have been amenable to patent protection and, as the Court of Appeal observed in its opinion below, "The rush to patent for exclusive use has been rampant." Among those who have taken advantage of this development, of course, are the defendants herein: as we have seen, defendants Golde and Quan obtained a patent on the Mo cell line in 1984 and assigned it to defendant Regents. With such patentability has come a drastic reduction in the formerly free access of researchers to new cell lines and their products: the "novelty" requirement for patentability prohibits public disclosure of the invention at all times up to one year before the filing of the patent application. (35 U.S.C. § 102(b).) Thus defendants herein recited in their patent specification, "At no time has the Mo cell line been available to other than the investigators involved with its initial discovery and only the conditioned medium from the cell line has been made available to a limited number of investigators for collaborative work with the original discoverers of the Mo cell line."

An even greater force for restricting the free exchange of new cell lines and their products has been the rise of the biotechnology industry and the increasing involvement of academic researchers in that industry. When scientists became entrepreneurs and negotiated with biotechnological and pharmaceutical companies to develop and exploit the commercial potential of their discoveries — as did defendants in the case at bar — layers of contractual restrictions were added to the protections of the patent law.

In their turn, the biotechnological and pharmaceutical companies demanded and received exclusive rights in the

scientists' discoveries, and frequently placed those discoveries under trade secret protection. Trade secret protection is popular among biotechnology companies because, among other reasons, the invention need not meet the strict standards of [*172] patentability and the protection is both quickly acquired and unlimited in duration. (Note, Patent and Trade Secret Protection in University-Industry Research Relationships in Biotechnology (1987) 24 Harv. J. on Legis. 191, 218-219.) Secrecy as a normal business practice is also taking hold in university research laboratories, often because of industry pressure (id. at pp. 204-208): "One of the most serious fears associated with university-industry cooperative research concerns keeping work private and not disclosing it to the researcher's peers. [Citation.] . . . Economic arrangements between industry and universities inhibit open communication between researchers, especially for those who are financially tied to smaller biotechnology firms." (Howard, supra, 44 Food Drug Cosm. L.J. at p. 339, fn. 72.)…

In any event, in my view whatever merit the majority's single policy consideration may have is outweighed by two contrary considerations, i.e., policies that are promoted by recognizing that every individual has a legally protectible property interest in his own body and its products. First, our society acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona. One manifestation of that respect is our prohibition against direct abuse of the body by torture or other forms of cruel or unusual punishment. Another is our prohibition against indirect abuse of the body by its economic exploitation [*174] for the sole benefit of another person. The most abhorrent form of such exploitation, of course, was the institution of slavery. Lesser forms, such as indentured servitude or even debtor's prison, have also disappeared. Yet their specter haunts the laboratories and boardrooms of today's biotechnological research-industrial complex. It arises

wherever scientists or industrialists claim, as defendants claim here, the right to appropriate and exploit a patient's tissue for their sole economic benefit— the right, in other words, to freely mine or harvest valuable physical properties of the patient's body: "Research with human cells that results in significant economic gain for the researcher and no gain for the patient offends the traditional mores of our society in a manner impossible to quantify. Such research tends to treat the human body as a commodity — a means to a profitable end. The dignity and sanctity with which we regard the human whole, body as well as mind and soul, are absent when we allow researchers to further their own interests without the patient's participation by using a patient's cells as the basis for a marketable product." (Danforth, supra, 6 Yale L. & Pol'y Rev. at p. 190, fn. omitted.)

A second policy consideration adds notions of equity to those of ethics. Our society values fundamental fairness in dealings between its members, and condemns the unjust enrichment of any member at the expense of another. This is particularly true when, as here, the parties are not in equal bargaining positions. We are repeatedly told that the commercial products of the biotechnological revolution "hold the promise of tremendous profit." ( Toward the Right of Commerciality, supra, 34 UCLA L. Rev. at p. 211.) In the case at bar, for example, the complaint alleges that the market for the kinds of proteins produced by the Mo cell line was predicted to exceed $ 3 billion by 1990. These profits are currently shared exclusively between the biotechnology industry and the universities that support that industry. The profits are shared in a wide variety of ways, including "direct entrepreneurial ties to genetic-engineering firms" and "an equity interest in fledgling biotechnology firms" (Howard, supra, 44 Food Drug Cosm. L.J. at p. 338). Thus the complaint alleges that because of his development of the Mo cell line defendant Golde became a paid consultant of defendant Genetics Institute and acquired the rights to 75,000 shares of that firm's stock

at a cost of 1 cent each; that Genetics Institute further contracted to pay Golde and the Regents at least $ 330,000 over 3 years, including a pro rata share of Golde's salary and fringe benefits; and that defendant Sandoz Pharmaceuticals Corporation subsequently contracted to increase that compensation by a further $ 110,000…

There will be such equitable sharing if the courts recognize that the patient has a legally protected property interest in his own body and its products: "property rights in one's own tissue would provide a morally acceptable result by giving effect to notions of fairness and preventing unjust enrichment. . . . [para.] Societal notions of equity and fairness demand recognition of property rights. There are bountiful benefits, monetary and otherwise, to be derived from human biologics. To deny the person contributing the raw material a fair share of these ample benefits is both unfair and morally wrong." ( Toward the Right of Commerciality, supra, 34 UCLA L. Rev. at p. 229.) "Recognizing a donor's property rights would prevent unjust enrichment by giving monetary rewards to the donor and researcher proportionate to the value of their respective contributions. Biotechnology depends upon the contributions of both patients and researchers. If not for the patient's contribution of cells with unique attributes, the medical value of the bioengineered cells would be negligible. But for the physician's contribution of knowledge and skill in developing the cell product, the commercial value of the patient's cells would also be negligible. Failing to compensate the patient unjustly enriches the researcher because only the researcher's contribution is recognized." (Id. at p. 230.) In short, as the [*176] Court of Appeal succinctly put it, "If this science has become science for profit, then we fail to see any justification for excluding the patient from participation in those profits."

5.

The majority's second reason for declining to extend the conversion cause of action to the present context is that

"the Legislature should make that decision." (Maj. opn., ante, p. 147.)…
6.
The majority's final reason for refusing to recognize a conversion cause of action on these facts is that "there is no pressing need" to do so because the complaint also states another cause of action that is assertedly adequate to the task (maj. opn., ante, p. 147); that cause of action is "the breach of a fiduciary duty to disclose facts material to the patient's consent or, alternatively, . . . the performance of medical procedures without first having obtained the patient's informed consent" (id. at p. 129). 24 Although last, this reason is not the majority's least; in fact, it underlies much of the opinion's discussion of the conversion cause of action, recurring like a leitmotiv throughout that discussion…
I would affirm the decision of the Court of Appeal to direct the trial court to overrule the demurrers to the cause of action for conversion.

 ¿Pudo el demandante gozar siquiera de una mínima parte de las riquezas acumuladas a partir de la comercialización de sus células, mismas que fueron aisladas y tomadas sin su permiso? Nuevamente: ¿es atribuible el infradesarrollo del derecho de cosas muebles en la tradición del common law a su tutela por medio de acciones personales de responsabilidad extracontractual y no reales?

## B. LOS MODOS DE ADQUIRIR LA TENENCIA

### LA OCUPACIÓN

 PIERSON v. POST. Supreme Court of Judicature of New York 3 Cai. R. 175. August, 1805, Decided
OPINION BY: TOMPKINS
This cause comes before us on a return to a certiorari directed to one of the justices of Queens County.

The question submitted by the counsel in this cause for our determination is, whether Lodowick Post, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to, or property in, the fox as will sustain an action against Pierson for killing and taking him away?

The cause was argued with much ability by the counsel on both sides, and presents for our decision a novel and nice question. It is admitted that a fox is an animal fertoe naturoe, and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question of what acts amount to occupancy, applied to acquiring right to wild animals.

If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. Justinian's Institutes (lib. 2, tit. 1, sec. 13), and Fleta (lib. 3, ch. 2, p. 175), adopt the principle, that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognized by Breton (lib. 2, ch. 1, p. 8).

Puffendorf (lib. 4, ch. 6, sec. 2 and 10) defines occupancy of beasts feroe naturoe, to be the actual corporeal possession of them, and Bynkershock is cited as coinciding in this definition. It is indeed with hesitation that Puffendorf affirms that a wild beast mortally wounded or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of [*178] the person inflicting the wound continues. The foregoing authorities are decisive to show that mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.

It, therefore, only remains to inquire whether there are any contrary principles or authorities, to be found in other books, which ought to induce a different decision. Most of the cases which have occurred in England, relating to property in wild animals, have either been discussed and

decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which beasts feroe naturoe have been apprehended; the former claiming them by title of occupancy, and the latter ratione soli. Little satisfactory aid can, therefore, be derived from the English reporters.

Barbeyrac, in his notes on Puffendorf, does not accede to the definition of occupancy by the latter, but, on the contrary, affirms that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent, and as far as Barbeyrac appears to me to go, his objections to Puffendorf's definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since thereby the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So, also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labor, have used such means of apprehending them. Barbeyrac seems to have adopted and had in view in his notes, [*179] the more accurate opinion of Grotius, with respect to occupancy. That celebrated author (lib. 2, ch. 8, sec. 3, p. 309), speaking of occupancy, proceeds thus: "Requiritur autem corporalis quoedam possessio ad dominium adipiscendum; atque ideo, vulnerasse non sufficit." But in

the following section he explains and qualifies this definition of occupancy: "Sed possessio illa potest non solis manibus, sed instrumentis, ut decipulis, ratibus, laqueis dum duo adsint; primum ut ipsa instrumenta sint in nostra potestate, deinde ut fera, ita inclusa sit, ut exire inde nequeat." This qualification embraces the full extent of Barbeyrac's objection to Puffendorf's definition, and allows as great a latitude to acquiring property by occupancy, as can reasonably be inferred from the words or ideas expressed by Barbeyrac in his notes. The case now under consideration is one of mere pursuit, and presents no circumstances or acts which can bring it within the definition of occupancy by Puffendorf, or Grotius, or the ideas of Barbeyrac upon that subject.

The case cited from 11 Mod. 74, 130, I think clearly distinguishable from the present; inasmuch as there the action was for maliciously hindering and disturbing the plaintiff in the exercise and enjoyment of a private franchise; and in the report of the same case (3 Salk. 9), Holt, Ch. J., states, that the ducks were in the plaintiff's decoy pond, and so in his possession, from which it is obvious the court laid much stress in their opinion upon the plaintiff's possession of the ducks, ratione soli.

We are the more readily inclined to confine possession or occupancy of beasts feroe naturoe, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.

However uncourteous or unkind the conduct of Pierson towards Post, in this instance, may have been, yet this act was productive of no injury or damage for which a legal remedy [*180] can be applied. We are of opinion the judgment below was erroneous, and ought to be reversed.

LIVINGSTON, J. My opinion differs from that of the court. Of six exceptions, taken to the proceedings below, all are abandoned except the third, which reduces the controversy to a single question.

Whether a person who, with his own hounds, starts and hunts a fox on waste and uninhabited ground, and is on the point of seizing his prey, acquires such an interest in the animal as to have a right of action against another, who in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away.

This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited: they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor Reynard would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of Diana. But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal the correction of any mistake which we may be so unfortunate as to make. By the pleadings it is admitted that a fox is a "wild and noxious beast." Both parties have regarded him, as the law of nations does a pirate, "hostem humani generis," and although "de mortuis nil nisi bonum" be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barnyards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for [*181] hours together, "sub jove frigido," or a vertical sun,

pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honors or labors of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit? Whatever Justinian may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business, in the language of the declaration in this cause, "with hounds and dogs to find, start, pursue, hunt, and chase," these animals, and that, too, without any other motive than the preservation of Roman poultry; if this diversion had been then in fashion, the lawyers who composed his institutes, would have taken care not to pass it by, without suitable encouragement. If anything, therefore, in the digests or pandects shall appear to militate against the defendant in error, who, on this occasion, was the fox hunter, we have only to say tempora mutantur; and if men themselves change with the times, why should not laws also undergo an alteration?

It may be expected, however, by the learned counsel, that more particular notice be taken of their authorities. I have examined them all, and feel great difficulty in determining, whether to acquire dominion over a thing, before in common, it be sufficient that we barely see it, or know where it is, or wish for it, or make a declaration of our will respecting it; or whether, in the case of wild beasts, setting a trap, or lying in wait, or starting, or pursuing, be enough; or if an actual wounding, or killing, or bodily tact and occupation be necessary. Writers on general law, who have favored us with their speculations on these points, differ on them all; but, great as is the diversity of sentiment among them, some conclusion must be adopted on the question immediately before us. After mature deliberation, I embrace that of Barbeyrac as the most rational and least liable to objection. If at liberty, we might imitate the

courtesy of a certain emperor, who, to avoid giving [*182] offense to the advocates of any of these different doctrines, adopted a middle course, and by ingenious distinctions, rendered it difficult to say (as often happens after a fierce and angry contest) to whom the palm of victory belonged. He ordained, that if a beast be followed with large dogs and hounds, he shall belong to the hunter, not to the chance occupant; and in like manner, if he be killed or wounded with a lance or sword; but if chased with beagles only, then he passed to the captor, not to the first pursuer. If slain with a dart, a sling, or a bow, he fell to the hunter, if still in chase, and not to him who might afterwards find and seize him.

Now, as we are without any municipal regulations of our own, and the pursuit here, for aught that appears on the case, being with dogs and hounds of imperial stature, we are at liberty to adopt one of the provisions just cited, which comports also with the learned conclusion of Barbeyrac, that property in animals feroe naturoe may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a reasonable prospect (which certainly existed here) of taking what he has thus discovered an intention of converting to his own use.

When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a beast so pernicious and incorrigible, we cannot greatly err in saying that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporeal possession, or bodily seisin, confers such a right to the object of it, as to make any one a wrong-doer who shall interfere and shoulder the spoil. The justice's judgment ought, therefore, in my opinion, to be affirmed.

Judgment of reversal.

1 Wild bees in a bee-tree belong to the owner of the soil where the tree stands. Ferguson v. Miller, 1 Cow. 243.

Though another discover the bees, and obtain license from the owner to take them, and mark the tree with the initials

of his own name, this does not confer the ownership upon him, until he has taken actual possession of the bees. ld.
If he omit to take such possession, the owner of the soil may give the same license to another, who may take the bees without being liable to the first finder. Id.
The two parties, both having license, the one who takes possession first, acquires the title. Id.
Bees are animals feroe naturoe, but when hived and reclaimed, a qualified property may be acquired in them. Gillett v. Mason, 7 Johns. 16.
If a person find a tree, containing a hive of bees, on the land of another, and mark the tree, he does not thereby reclaim the bees, and vest a right of property in himself; and cannot maintain an action for carrying away the bees and honey. Id.
Though property in animal feroe naturoe may be acquired by occupancy, or by wounding it, so as to bring it within the power or control of the pursuer; yet, if after wounding the animal and continuing the pursuit of it until evening, the hunter abandons the pursuit, though his dogs continue chase, he acquires no property in the animal. Buster v. Newkirk, 20 Johns. 75; N. Y. Dig., Vol. I., p. 106, et seq.

 ¿Cuál es el deporte campestre, disfrutado por reyes, príncipes, nobles y buena parte de la clase terrateniente de Inglaterra? ¿Por qué es importante que el intruso se lleve la presa en terrenos baldíos? Nuevamente: ¿es atribuible el infradesarrollo del derecho de cosas muebles en la tradición del common law a su tutela por medio de acciones personales de responsabilidad extracontractual y no reales?

 GHEN v. RICH District Court, D. Massachusetts 8 F. 159. April 23, 1881
OPINION BY: NELSON
[*159] NELSON, D.J. This is a libel to recover the value of a fin-back whale. The libellant lives in Provincetown and the respondent in Wellfleet. The facts, as they appeared at the hearing, are as follows:

In the early spring months the easterly part of Massachusetts bay is frequented by the species of whale known as the fin-back whale. Fishermen from Provincetown pursue them in open boats from the shore, and shoot them with bomb-lances fired from guns made expressly for the purpose. When killed they sink at once to the bottom, but in the course of from one to three days they rise and float on the surface. Some of them are picked up by vessels [*160] and towed into Provincetown. Some float ashore at high water and are left stranded on the beach as the tide recedes. Others float out to sea and are never recovered. The person who happens to find them on the beach usually sends word to Provincetown, and the owner comes to the spot and removes the blubber. The finder usually receives a small salvage for his services. Try-works are established in Provincetown for trying out the oil. The business is of considerable extent, but, since it requires skill and experience, as well as some outlay of capital, and is attended with great exposure and hardship, few persons engage in it. The average yield of oil is about 20 barrels to a whale. It swims with great swiftness, and for that reason cannot be taken by the harpoon and line. Each boat's crew engaged in the business has its peculiar mark or device on its lances, and in this way it is known by whom a whale is killed.

The usage on Cape Cod, for many years, has been that the person who kills a whale in the manner and under the circumstances described, owns it, and this right has never been disputed until this case. The libellant has been engaged in this business for ten years past. On the morning of April 9, 1880, in Massachusetts bay, near the end of Cape Cod, he shot and instantly killed with a bomb-lance the whale in question. It sunk immediately, and on the morning of the 12th was found stranded on the beach in Brewster, within the ebb and flow of the tide, by one Ellis, 17 miles from the spot where it was killed. Instead of sending word to Princeton, as is customary, Ellis advertised the whale for sale at auction, and sold it to the respondent,

who shipped off the blubber and tried out the oil. The libellant heard of the finding of the whale on the morning of the 15th, and immediately sent one of his boat's crew to the place and claimed it. Neither the respondent nor Ellis knew the whale had been killed by the libellant, but they knew or might have known, if they had wished, that it had been shot and killed with a bomblance, by some person engaged in this species of business.

The libellant claims title to the whale under this usage. The respondent insists that this usage is invalid. It was decided by Judge Sprague, in Taber v. Jenny, 1 Sprague, 315, that when a whale has been killed, and is anchored and left with marks of appropriation, it is the property of the captors; and if it is afterwards found, still anchored, by another ship, there is no usage or principle of law by which the property of the original captors is diverted, even though the whale may have dragged from its anchorage. The learned judge says:

"When the whale had been killed and taken possession of by the boat of the Hillman, (the first taker,) it became the property of the owners of that ship, and all was done which was then practicable in order to secure it. They left it anchored, with unequivocal marks of appropriation."

In Bartlett v. Budd, 1 Low. 223, the facts were these: The first officer of the libellant's ship killed a whale in the Okhotsk sea, anchored it, attached a waif to the body, and then left it and went ashore at [*161] some distance for the night. The next morning the boats of the respondent's ship found the whale adrift, the anchor not holding, the cable coiled round the body, and no waif or irons attached to it. Judge Lowell held that, as the libellants had killed and taken actual possession of the whale, the ownership vested in them. In his opinion the learned judge says:

"A whale, being feroe naturoe, does not become property until a firm possession has been established by the taker. But when such possession has become firm and complete, the right of property is clear, and has all the characteristics of property."

He doubted whether a usage set up but not proved by the respondents, that a whale found adrift in the ocean is the property of the finder, unless the first taker should appear and claim it before it is cut in, would be valid, and remarked that "there would be great difficulty in upholding a custom that should take the property of A. and give it to B., under so very short and uncertain a substitute for the statute of limitations, and one so open to fraud and deceit." Both the cases cited were decided without reference to usage, upon the ground that the property had been acquired by the first taker by actual possession and appropriation.

In Swift v. Gifford, 2 Low. 110, Judge Lowell decided that a custom among whalemen in the Arctic seas, that the iron holds the whale, was reasonable and valid. In that case a boat's crew from the respondent's ship pursued and struck a whale in the Arctic ocean, and the harpoon and the line attached to it remained in the whale, but did not remain fast to the boat. A boat's crew from the libellant's ship continued the pursuit and captured the whale, and the master of the respondent's ship claimed it on the spot. It was held by the learned judge that the whale belonged to the respondents. It was said by Judge Sprague, in Bourne v. Ashley, an unprinted case referred to by Judge Lowell in Swift v. Gifford, that the usage for the first iron, whether attached to the boat or not, to hold the whale was fully established; and he added that, although local usages of a particular port ought not to be allowed to set aside the general maritime law, this objection did not apply to a custom which embraced an entire business, and had been concurred in for a long time by every one engaged in the trade.

In Swift v. Gifford, Judge Lowell also said:

"The rule of law invoked in this case is one of very limited application. The whale fishery is the only branch of industry of any importance in which [*162] it is likely to be much used, and if a usage is found to prevail generally in that business, it will not be open to the objection that it is

likely to disturb the general understanding of mankind by the interposition of an arbitrary exception."

I see no reason why the usage proved in this case is not as reasonable as that sustained in the cases cited. Its application must necessarily be extremely limited, and can affect but a few persons. It has been recognized and acquiesced in for many years. It requires in the first taker the only act of appropriation that is possible in the nature of the case. Unless it is sustained, this branch of industry must necessarily cease, for no person would engage in it if the fruits of his labor could be appropriated by any chance finder. It gives reasonable salvage for securing or reporting the property. That the rule works well in practice is shown by the extent of the industry which has grown up under it, and the general acquiescence of a whole community interested to dispute it. It is by no means clear that without regard to usage the common law would not reach the same result. That seems to be the effect of the decisions in Taber v. Jenny and Bartlett v. Budd. If the fisherman does all that it is possible to do to make the animal his own, that would seem to be sufficient. Such a rule might well be applied in the interest of trade, there being no usage or custom to the contrary. Holmes, Com. Law, 217. But be that as it may, I hold the usage to be valid, and that the property in the whale was in the libellant.

The rule of damages is the market value of the oil obtained from the whale, less the cost of trying it out and preparing it for the market, with interest on the amount so ascertained from the date of conversion. As the question is new and important, and the suit is contested on both sides, more for the purpose of having it settled than for the amount involved, I shall give no costs.

Decree for libellant for $71.05, without costs.

 En este caso, ¿cómo vienen las normas consuetudinarias de la industria ballenera a invertir la categoría jurídica de lo que se considera la ocupación?

KEEBLE v. HICKERINGILL, 11 East 574, 103 Eng. Rep. 1127, Court of Queen's Bench. 1707

OPINION BY: HOLT

Action upon the case. Plaintiff declares that he was, 8th November in the second year of the queen, lawfully possessed of a close of land called Minott's Meadow, et de quodam vivario, vocato a decoy pond, to which divers wildfowl used to resort and come; and the plaintiff had at his own costs and charges prepared and procured divers decoy-ducks, nets, machines, and other engines for the decoying and taking of the wildfowl, and enjoyed the benefit in taking them; the defendant, knowing which, and intending to damnify the plaintiff in his vivary, and to fright and drive away the wildfowl used to resort thither, and deprive him of his profit, did, on the 8th of November resort to the head of the said pond and vivary, and did discharge the said gun several times that was then charged with the gunpowder against the said decoy pond, whereby the wildfowl was frighted away, and did forsake the said pond [for four months]. Upon not guilty pleaded a verdict was found for the plaintiff and 20 pounds damages.

I am of opinion that this action doth lie. It seems to be new in its instance, but is not new in the reason or principle of it. For, First, this using or making a decoy is lawful. Secondly, this employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wildfowl or tame cattle. Then when a man uses his art or his skill to take them, to sell and dispose of for his profit this is his trade; and he that hinders another in his trade or livelihood is liable to an

action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? Though they do not affect any damage, yet are they mischievous in themselves; and therefore in their own nature productive of damage; and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him; though they do not charge him with any crime that may make him obnoxious to punishment; to say a merchant is broken, or that he is failing, or is not able to pay his debts. 1 Roll. 60, 1; all the cases there put. How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving profit by his employment. Now, there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action; though by grant from the king. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. 22 H. 6, 14, 15. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 H. 4. 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an

action for the loss of his scholars. 29 E. 3. 18. A man hath a market, to which he hath toll for horses sold: a man is bringing his horse to market to sell: a stranger hinders and obstructs him from going thither to the market: an action lies because it imports damage. Action upon the case lies against one that shall by threats fright away his tenant at will.2 9 H. 7. 8. 21 H. 6.31. 9 H. 7.7. 14 Ed. 4.7. Vide Rastal. 622. 2 Cro. 423. Trespass was brought for beating his servant, whereby he was hindered from taking his toll; the obstruction is a damage, though not the loss of his service. There was an objection that did occur to me, though I do not remember it to be made at the bar; which is, that it is not mentioned in the declaration what number or nature of wildfowl were frightened away by the defendant's shooting. As in 5 Rep 31, Playter's case. Trespass quare clausum suum fregit, et pisces suos cepit. After a verdict for the plaintiff, and the entire damages, it was moved in arrest of judgment, that the declaration was not good, because it was not set of what nature, the what number the fifhes were; which was held to be a fatal exception, not helped after verdict by the statute of jeosails. Resp. That indeed here is not the number stated. Now considering the nature of the case, it is not possible to declare of the number, that were freighted away; because the plaintiff had not possession of them, to count them. Where a man brings trespass for taking his goods, he must declare of the quantity, because he, by having had the possession, may know what he had, and therefore must know what he lost. This is plain by several authorities. 2 Cro. 123. Dent v. Oliver. Trespass for beating and hindering his servant from taking and collecting his toll, objection that it is not said what quantity of toll he was to take, but that could not be known. Owen Rep. 109. Ejcott v. Laurenny. Action upon the case because the defendant hindered him for taking toll of divers pieces of wool, and therewith not how many, yet the declaration was good. 2. Cro. 435. John v. Wilson. Trespass quare clausum fregit, et spinas suas ad valentiam succidit. Exception was taken to a declaration because the

number of the thorns was not mentioned, yet held not to be a good exception. Alleyn, 22. Lodge v. Weedon. Action upon the case, the plaintiff declared that the defendant killed diverse cattle infected with the murrain, and threw the entrails into plaintiff's field, per quod diversa averia of the plaintiff's interierunt. After verdict, exception was taken in arrest of judgdment, because it did not appear how many cattle of the plaintiff's did thereby perish, yet judgdment was given for the plaintiffs, because there need not be such certainty in an action upon the case, because the plaintiff is only to recover damages for them. 9 Rep. 43, 44. Earl of Salep's case. Action on the case for hindering the plaintiffs in taking the profits of the stewardship of such a manor, not showing what the profits were, or how much they amounted to. It was never questioned but the declaration was good. The plaintiff in this case brings his action for the apparent injury done him in the use of that employment of his freehold, his art, and skill that he uses thereby. Secondly, says Mr. Solicitor, here is not the nature of the wildfowl stated; for wildfowl are of several sorts; ducks, teal, mallard, and indeed all birds that are wild are wildfowl. Resp. It is true in the large signification of the word they are so, and also the word fowl comprehends all birds and poultry, but wildfowl are taken in a more restrained sense, pheasants and partridges are not thereby understood, for they are fowl of warren. Manwood's Forest Law, cap. 4, section 3. 1 Resgister, 93, 96. F.N.B. 86. Rastal, 531. Wildfowl are known in the law, and described by the statute of 25 H. 8. c 11, which doth take notice of wildfowl. The title of the statute is "against destroying of wildfowl." It recites that there has been within the realm great quantities of wildfowl, as ducks, mallards, wigeons, teals, wild geese and diverse other kinds of wildfowl, which is reasonable to be understood of that sort that to get their prey in that manner. The statute of 3 and 4 Ed. 6 c. 7, which repeals that of 26 H.S., takes notice of wildfowl, and has a general word wildfowl, without coming to particulars. Therefore when the declaration is so wildfowl, it is not to

be understood that sparrows, wrens, or robin-red breasts can be thereby included. Besides Fluminem Volucres, in Littleton's Dictionary, are understood wildfowl, as being the only words and Latin that we have to express it. Litt. Dict. tit. Wild Fowl. And when we do know that of long time in the kingdom these artificial contrivances of decoy ponds and decoy ducks have been used for enticing into those ponds wildfowl, in order to be taken for the profit of the owner of the pond, who is at the expense of servants, engines, and other management, whereby the markets of the nation may be furnished; there is great reason to give encouragement thereunto; that the people who are so instrumental by their skill and industry so to furnish the markets should reap the benefit and have their action. But in short, that which is the true reason, is, that this action is not brought to recover damage for the loss of the fowl, but for the disturbance. So is the useful and common way of declaring.


¿Es éste otro caso por demás histórico de una acción personal de responsabilidad extracontractual?


ARMORY v DELAMIRIE (1722) 1 Strange 505, 93 Eng. Rep. 664, Court of King's Bench. 31 July 1722
OPINION BY: PRATT
Finder of a jewel may maintain trover.
The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:
1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he

has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect. Jones v. Hart, Salk. 441. Cor. Holt C.J. Mead v. Hamond, supra. Grammer v. Nixon, post, 653.

3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

 HANNAH v. PEEL (1945) KB 509, 2 Eng. Rep. 288, King's Bench Division. 13 JUNE 1945

OPINION BY: BIRKETT

This is an interesting and a difficult point, and, in view of the conflicting state of the authorities, I thought I should like time to look into them. I am bound to say that my researches have been none too helpful, and, it would seem, there is need of an authoritative decision of a higher court.

The plaintiff in this case was Duncan Hannah and the defendant was Hugh Edmund Ethelston Peel. By the pleadings the plaintiff claimed the return of a brooch or the due value, on the ground that he was the finder of the said brooch and had a title against all the world save the true owner. The defendant, on the other hand, denied the plaintiff's right and set out that he was in fact the freeholder of the premises upon which the brooch was found and his title was superior to that of the finder, the plaintiff. Happily there was no dispute about the facts. Evidence was given by the plaintiff and by his commanding officer, Major Lawrie, and there was, in addition, an agreed statement of facts, but there was no issue of fact in the case.

For the purposes of my judgment the facts can be stated quite shortly. In August 1940, the plaintiff, Hannah, was serving as a lance-corporal in a battery of the Royal Artillery and was stationed at Gwernhaylod House, Overton-on-Dee, near Ellesmere, in the county of Shropshire. On 21 August 1940, he was occupying an upstairs room in that house which was being used as a sick bay, and whilst he was adjusting the black-out curtains his hand touched something loose which, at the time, he thought to be a piece of dirt or plaster. He got hold of it and dropped it outside the window on to the window-ledge. The next morning, in the daylight, he found that the thing which he had thought the previous evening, in the black-out, to be a piece of dirt or plaster was still upon the window-ledge outside the window, and it was a brooch, at that time covered with spider's web and dirt. At the moment of finding it in the daylight he thought it to be an object of little value from its appearance, but later at home he cleaned it and showed it to his wife. They then considered that it might be more valuable than was at first supposed, and at the end of October 1940, the plaintiff consulted the officer commanding, Major Lawrie, and took his advice; with the result that the brooch was handed by Major Lawrie on behalf of the plaintiff to Sergeant Blodwell Williams of the Flintshire police at the police station at Overton, and a receipt was given.

The plaintiff then made a statement in writing, and certain correspondence passed between the parties. In a letter of 22 November 1941, the agents to the defendant set up their claim in contradiction to the claim made by the plaintiff. The material words of that letter are:

'On the assumption that the brooch was in the wall crevice when Major Peel purchased the house the brooch is Major Peel's property.'

Major Peel offered the brooch to Spink & Son Ltd who offered him £ 60 for it and later raised that to £ 66. They themselves sold the brooch for £ 88.

The only other fact to be mentioned is that on 13 December 1938, the freehold of this house had been conveyed to the defendant. The defendant never occupied the house, and it remained unoccupied from the time when he bought it until 5 October 1939, when it was requisitioned under notice under the Defence Regulations. The house was then used for some months by the requisitioning authorities. It was then released and remained unoccupied until 16 July 1940, when it was again requisitioned. The defendant received £ 250 a year as compensation for the requisitioning.

The rival claims can be stated in this way: The plaintiff says: "I claim the brooch as the finder of the brooch and I have a good title against all the world save only the true owner." The defendant says: "My claim is superior to yours inasmuch as I am the freeholder. The brooch was found upon my property, although I was never in occupation, and my title, therefore, ousts yours and in the absence of the true owner I am entitled to the brooch or its value." Unhappily the law is in a very uncertain state. Obviously my difficulties would be resolved if it could be said with certainty either that the law is that the finder of a lost article, wherever found, has a good title against all the world save the true owner, or that the law is that the possessor of land is entitled as against the finder to all chattels found on the land. But unhappily those two conflicting statements are by no means clear, and the state of the authorities gives some support to both of them.

Armory v Delamirie which was referred to and relied upon by counsel for the plaintiff, is so well known that I need not read it in extenso. There:

'The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under a pretence of weighing it, took out the stones, and calling to the master to let him know it came to three-halfpence, the master offered the boy the money, who refused to take it and insisted to have the thing again; whereupon the apprentice delivered him back

the socket without the stones. [An action was brought in trover against the master, and] these points were ruled: (1) [the only one that affects this case] That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.'

Bridges v Hawkesworth, the next case upon which counsel for the plaintiff relied, is in process of becoming almost equally as famous because of the disputation which ranged around it. It is now nearly 100 years old. The headnote reads:

'The place in which a lost article is found does not constitute any exception to the general rule of law, that the finder is entitled to it as against all persons except the owner.'

The case was an appeal against a decision of the county court judge at Westminster. The facts appear to have been that in 1847:

'... the plaintiff, who was [a commercial traveller] called at Messrs. Byfield & Hawkesworth's on business, as he was in the habit of doing, and as he was leaving the shop he picked up a small parcel which was lying upon the floor. He immediately showed it to the shopman, and opened it in his presence, when it was found to consist of a quantity of Bank of England notes, to the amount of £ 65. The defendant, who was a partner in the firm of Byfield & Hawkesworth, was then called, and the plaintiff told him he had found the notes, and asked the defendant to keep them until the owner appeared to claim them. [Advertisements were put in the papers asking for the owner, but the true owner was never found.] No person having appeared to claim them, and three years having elapsed since they were found, the plaintiff applied to the defendant to have the notes returned to him, and offered to pay the expenses of the advertisements, and to give an indemnity. The defendant had refused to deliver them up to the plaintiff,

and an action had been brought in the county court of Westminster in consequence of that refusal.'

The county court judge decided that the defendant, the shopkeeper, was entitled to the custody of the notes as against the plaintiff, and gave judgment for the defendant. Therefore this appeal was brought which came before the court composed of Patteson and Wightman JJ and there was a most interesting argument upon both sides. The court considered its judgment, which is exceedingly important in this case and is relied upon very strongly by counsel for the plaintiff. At p 1082 Patteson J said:

'The notes which are the subject of this action were incidentally dropped, by mere accident, in the shop of the defendant, by the owner of them. The facts do not warrant the supposition that they had been deposited there intentionally, nor has the case been put at all upon that ground. The plaintiff found them on the floor, they being manifestly lost by someone. The general right of the finder to any article which has been lost, as against all the world, except the true owner, was established in the case of Armory v. Delamirie which has never been disputed. This right would clearly have accrued to the plaintiff had the notes been picked up by him outside the shop of the defendant; and if he once had the right, the case finds that he did not intend, by delivering the notes to the defendant, to waive the title (if any) which he had to them, but they were handed to the defendant merely for the purpose of delivering them to the owner, should he appear ... The case, therefore, resolves itself into the single point on which it appears that the learned judge decided it, namely, whether the circumstance of the notes being found inside the defendant's shop gives him, the defendant, the right to have them as against the plaintiff, who found them.'

Patteson J then discussed the cases and the argument, and said:

'If the discovery had never been communicated to the defendant, could the real owner have had any cause of action against him because they were found in his house?

Certainly not. The notes never were in the custody of the defendant, nor within the protection of his house, before they were found, as they would have been had they been intentionally deposited there; and the defendant has come under no responsibility, except from the communication made to him by the plaintiff, the finder, and the steps taken by way of advertisement ... We find, therefore, no circumstances in this case to take it out of the general rule of law, that the finder of a lost article is entitled to it as against all persons except the real owner, and we think that that rule must prevail, and that the learned judge was mistaken in holding that the place in which they were found makes any legal difference. Our judgment, therefore, is, that the plaintiff is entitled to these notes as against the defendant; that the judgment of the court below must be reversed ... '

It is to be observed that neither counsel put any argument upon the fact that the notes were found in a shop. Counsel for the appellant assumed throughout that the shop was the same as a private house, and the judge spoke of the protection of his house. The case for the appellant, through his counsel, was that the shopkeeper never knew of the notes. The second thing to be observed is that there was no suggestion that the place where the notes were found was at all material; indeed, the judge in giving the judgment of the court expressly repudiated it and said:

'... the learned judge was mistaken in holding that the place in which they were found makes any legal difference.'

In those circumstances it is a little remarkable that in the next case to which my attention was drawn, South Staffordshire Water Co v Sharman Lord Russell of Killowen LCJ., in delivering the judgment, referred to Bridges v Hawksworth, and said, at p 47:

'The case of Bridges v. Hawkesworth stands by itself, and on special grounds; and on those grounds it seems to me that the decision in that case was right. Someone had accidentally dropped a bundle of bank-notes in a public shop. The shopkeeper did not know they had been dropped,

and did not in any sense exercise control over them. The shop was open to the public, and they were invited to come there. [Stopping there one moment-that might be a matter of some doubt. Customers were invited there, but whether the public at large was might be open to some question.] A customer picked up the notes and gave them to the shopkeeper in order that he might advertise them. The owner of the notes was not found, and the finder then sought to recover them from the shopkeeper. It was held that he was entitled to do so, the ground of the decision being, as was pointed out by PATTESON, J., that the notes, being dropped in the public part of the shop, were never in the custody of the shopkeeper, or "within the protection of his house.'

Patteson J never made one single word of reference to the public part of the shop and, indeed, went out of his way to say that the county court judge was wrong in holding that the place where they were found made any legal difference at all. That shows some of the difficulties with which one is confronted in a case of this kind.

Bridges v Hawkesworth as I said, has been the subject of very considerable disputation by the text-book writers, some of them very distinguished names in law-eg, Oliver Wendell Holmes, one of the great figures in law, in The Common Law; another great figure, Sir Frederick Pollock, in Pollock and Wright on Possession in the Common Law; and another great figure, Sir John Salmond, in his book on Jurisprudence. They all deal with Bridges v Hawkesworth, and, whilst agreeing that the case was rightly decided, they differ as to the grounds upon which it was decided and put forward grounds, none of which, so far as I can discover, were ever put forward by the judges who decided the case. For example, O W Holmes deals with two kinds of intent, and so far as I can discover from the report of Bridges v Hawkesworth, the judges never referred to "intent" at all. Holmes says, at p 222:

'Common law judges and civilians would agree that the finder got possession first, and so could keep it as against

the shopkeeper. For the shopkeeper, not knowing of the thing, could not have the intent to appropriate it, and, having invited the public to his shop, he could not have the intent to exclude them from it.'

So he introduces the matter of two intents which are not referred to in the case. Sir Frederick Pollock, whilst he agrees with Holmes that Bridges v Hawkesworth was property decided, says, at p 39:

'In such a case as Bridges v. Hawkesworth, where a parcel of bank-notes was dropped on the floor in the part of a shop frequented by customers, it is impossible to say that the shopkeeper has any possession in fact. He does not expect objects of that kind to be on the floor of his shop, and some customer is more likely than the shopkeeper or his servant to see and take them up if they do come there.'

He emphasises the lack of de facto control on the part of the shopkeeper.

Sir John Salmond, when dealing with the case, says, at p 382:

'In Bridges v. Hawkesworth a parcel of bank-notes was dropped on the floor of the defendant's shop, where they were found by the plaintiff, a customer. It was held that the plaintiff had a good title to them as against the defendant. For the plaintiff, and not the defendant, was the first to acquire possession of them. The defendant had not the necessary animus, for he did not know of their existence.'

Professor Goodhart in our own day in Essays in Jurisprudence and the Common Law has put forward a further view that perhaps Bridges v Hawkesworth was wrongly decided.

I mention these matters to show that, whilst the decision in Bridges v Hawkesworth as it stands is quite clear, and, if the headnote is right, permits of no dispute, viz, "the place in which a lost article is found does not constitute any exception to the general rule of law, that the finder is entitled to it as against all persons except the owner," it is impossible to find any unambiguous ratio decidendi for that case. I think, however, that it is clear from Bridges v

Hawkesworth, so far as it affects the present case to-day, that the occupier of land does not in all cases possess an unattached thing on his land even though the true owner has lost possession of it. Bridges v Hawkesworth may perhaps be the authority at least for that proposition.

With regard to the cases relied upon by counsel for the defendant the first was the South Staffordshire Water Co v Sharman. I am not sure that the first line in the headnote is strictly accurate, but it reads thus:

'The possessor of land is generally entitled, as against the finder, to chattels found on the land. The defendant [Sharman] while cleaning out, under the plaintiff's orders, a pool of water on their land, found two rings [embedded in the mud at the bottom of the pool]. He declined to deliver them to the plaintiffs, but failed to discover the real owner.'

In an action brought by the plaintiffs, the South Staffordshire Water Co against Sharman in detinue it was held that the plaintiff company were entitled to the rings. Lord Russell of Killowen said that in his view the county court judge (who gave judgment for the defendant on the authority of Bridges v Hawkesworth) was wrong, and the decision must be reversed and judgment entered for the plaintiffs. At p 46 he said:

'The plaintiffs are the freeholders of the locus in quo, and as such they have the right to forbid anybody coming on their land or in any way interfering with it. They had the right to say that their pool should be cleaned out in any way that they thought fit, and to direct what should be done with anything found in the pool in the course of such cleaning out. It is no doubt right, as the counsel for the defendant contended, to say that the plaintiffs must show that they had actual control over the locus in quo and the things in it; but under the circumstances, can it be said that the Minster Pool and whatever might be in that pool were not under the control of the plaintiffs? In my opinion they were ... The principle on which this case must be decided, and the distinction which must be drawn between this case and that of Bridges v. Hawkesworth, is to be found in a passage in

Pollock and Wright's Essay on Possession in the Common Law, p. 41: "The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. [If that is right, it would clearly cover the case of the rings embedded in the mud of the pool, "attached to or under that land."] And it makes no difference that the possessor is not aware of the thing's existence ... It is free to anyone who requires a specific intention as part of a de facto possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real de facto possession constituted by the occupier's general power and intent to exclude unauthorised interference." That is the ground on which I prefer to base my judgment. There is a broad distinction between this case and those cited from Blackstone. Those were cases in which a thing was cast into a public place or into the sea-into a place, in fact, of which it could not be said that anyone had a real de facto possession, or a general power and intent to exclude unauthorised interference.'

Lord Russell of Killowen LCJ., then cited the passage I have already cited with regard to Bridges v Hawkesworth, and continued, at p 47:

'It is somewhat strange [I venture to echo those words] that there is no more direct authority on the question; but the general principle seems to me to be that where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the locus in quo.'

It is to be observed that Lord Russell of Killowen there is extending the quotation which he has made from Pollock and Wright. Pollock and Wright speak of the possession of everything which is attached to or under that land, but in this passage Lord Russell is saying, "the things which may

be upon or in it." Counsel for the defendant said that the South Staffordshire Water Co case was an authority in his favour and that this brooch, which was in the crevice by the window-sill, was covered by that authority. That case, too, has been the subject of some discussion. It puts the doctrine of the right of the finder on the ground that, if anyone finds a thing as the servant or agent of another, he finds it not for himself but for his employer. That seems a sufficient explanation of Sharman's case. The rings found at the bottom of the pond were not in the possession of the company, but it seems that though Sharman was the first to obtain possession of them, he obtained them for his employers and could claim no title for himself.

The only other case relied upon by counsel for the defendant to which I need refer is Elwes v Brigg Gas Co. There land had been demised to a gas company for 99 years with a reservation to the lessor of all mines and minerals. A prehistoric boat was embedded in the soil 6ft below the surface and was discovered by the lessees in the course of excavating for the foundations of the gas works. It was held:

'... that the boat, whether regarded as a mineral, or as part of the soil in which it was embedded when discovered, or as a chattel, did not pass to the lessees by the demise, but was the property of the lessor though he was ignorant of its existence at the time of granting the lease.'

At p 568, Chitty J said:

'The first question which does actually arise in this case is whether the boat belonged to the plaintiff at the time of the granting of the lease. I hold that it did, whether it ought to be regarded as a mineral, or as part of the soil within the maxim above cited, or as a chattel. If it was a mineral or part of the soil in the sense above indicated, then it clearly belonged to the owners of the inheritance as part of the inheritance itself. But if it ought to be regarded as a chattel, I hold the property in the chattel was vested in the plaintiff, for the following reasons.'

He then gave the reasons. Later he said, at pp 568, 569:

'The plaintiff then, being thus in possession of the chattel, it follows that the property in the chattel was vested in him. Obviously the right of the original owner could not be established; it had for centuries been lost or barred, even supposing that the property had not been abandoned when the boat was first left on the spot where it was found. The plaintiff, then, had a lawful possession, good against all the world, and, therefore, the property in the boat. In my opinion it makes no difference, in these circumstances, that the plaintiff was not aware of the existence of the boat.'

The statement of Chitty J that the plaintiff was entitled to the boat because he was in possession of the ground, was another authority, said counsel for the defendant, for his contention that the defendant was entitled to the brooch.

Those are the reasons which led me to say that the authorities are in a rather unsatisfactory state, and I observe that Salmond on Jurisprudence (9th Edn, p 383), after referring to Elwes v Brigg Gas Co, and The South Staffordshire Water Co says:

'Cases such as these, however, are capable of explanation on other grounds, and do not involve any necessary conflict either with the theory of possession or with the cases already cited, such as Bridges v. Hawkesworth. The general principle is that the first finder of a thing has a good title to it against all but the true owner, even though the thing is found on the property of another person (Armory v. Delamirie, Bridges v. Hawkes-Worth). This principle however, is subject to important exceptions, in which, owing to the special circumstances of the case, the better right is in him on whose property the thing is found. [He names three cases as the principal ones.] (1) When he on whose property the thing is found is already in possession not merely of the property, but of the thing itself; as in certain circumstances, even without specific knowledge, he undoubtedly may be ... (2) ... if anyone finds a thing as the servant or agent of another, he finds it not for himself, but for his employer ... (3) A third case in which a finder

obtains no title is that in which he gets possession only through a trespass or other act of wrongdoing.'

I think it is fairly clear from the authorities that this proposition would not be doubted, viz, that a man possesses everything which is attached to or under his land. Secondly, it would appear to be the law from the authorities I have cited, and particularly Bridges v Hawkesworth, that a man does not necessarily possess a thing which is lying unattached on the surface of his land even though the thing is not possessed by someone else. But the difficulty arises because the rule which governs things an occupier possesses as against those which he does not has never been very clearly formulated in our law. He may possess everything upon the land from which he intends to exclude others, if O W Holmes is right; or, he may possess those things over which he has a de facto control, if Sir Frederick Pollock is right. These things are not clearly laid down in cases. That is all that I think I can usefully say about the authorities. Neither do I think that a discussion of the merits helps at all.

There is no doubt that the brooch was lost in the ordinary connotation of that term, and from the appearance of the brooch when found, ie, the dirt and cobwebs, it had apparently been lost for a very considerable time. Indeed, from this correspondence it appears that at one time the predecessors in title of the defendant were considering making some claim. But the moment the plaintiff discovered that it might be of some value, he did the very proper thing, he took advice and handed it to the police. His conduct was most commendable and meritorious.

It is clear that the defendant, as I gather from the agreed statement of facts, was never physically in possession of these premises at any time. It is clear the brooch was never his in the ordinary acceptation of the term, in that he had the prior possession. He had no knowledge of it until it was brought to his knowledge by the finder. As I say, a discussion of the merits does not seem to help a great deal, but it is clear on the facts (i) that the brooch was lost in the

ordinary meaning of words, (ii) it appears to me clear that the brooch was found by the plaintiff in the ordinary meaning of words, and (iii) it is clear that the true owner of the brooch has never been found. The defendant was the owner of the premises and had his notice drawn to this matter by the plaintiff who found the brooch. In all those circumstances I asked for a little time in order that I might consider these authorities which are very difficult to reconcile. The conclusion to which I have come is that I propose to follow the decision in Bridges v Hawkesworth and I propose to give judgment in this case for the plaintiff. The brooch itself cannot now be returned, and the only matter of dispute in this case is whether the amount I should fix should be the sum of £ 66 or the sum of £ 88. £ 88 includes the profit which Spink made upon the sale of this brooch. £ 66 is the amount the defendant received. I propose to give judgment for the plaintiff for £ 66, with such costs as are permissible to a poor person.

LA DONACIÓN

JULIA NEWMAN v. F. W. BOST, ADMINISTRATOR OF J. F. VAN PELT. Supreme Court of North Carolina 122 N.C. 524, April 19, 1898, Decided
OPINION BY: FURCHES

[*527] The plaintiff in her complaint demands $ 3,000 collected by defendant, as the administrator of J. F. Van Pelt, on a life insurance policy, and now in his hands; $ 300, the value of a piano upon which said Van Pelt collected that amount of insurance money; $ 200.94, the value of household property sold by defendant as belonging to the estate of his intestate, and $ 45, the value of property in the plaintiff's bed-room and sold by the defendant as a part of the property belonging to the intestate's estate.

The $ 3,000, money collected on the life insurance policy, and the $ 200.94, the price for which the household property sold, plaintiff claims belonged to her by reason of a donatio causa mortis from said Van Pelt. The $ 45, the price for which her bed-room property sold, and the $ 300

insurance money on the piano, belonged to her also by reason of gifts inter vivos.

The rules of law governing all of these claims of the plaintiff are in many respects the same, and the discussion of one will be to a considerable extent a discussion of all.

To constitute a donatio causa mortis, two things are indispensably necessary: an intention to make the gift, and a delivery of the [*528] thing given. Without both of these requisites, there can be no gift causa mortis. And both these are matters of fact to be determined by the jury, where there is evidence tending to prove them.

The intention to make the gift need not be announced by the donor in express terms, but may be inferred from the facts attending the delivery —that is, what the donor said and did. But it must always clearly appear that he knew what he was doing, and that he intended a gift. So far, there was but little diversity of authority, if any.

As to what constitutes or may constitute delivery, has been the subject of discussion and adjudication in most or all the courts of the Union and of England, and they have by no means been uniform—some of them holding that a symbolical delivery—that is, some other article delivered in the name and stead of the thing intended to be given, is sufficient; others holding that a symbolical delivery is not sufficient, but that a constructive delivery—that is, the delivery of a key to a locked house, trunk or other receptacle is sufficient. They distinguish this from a symbolical delivery, and say that this is in substance a delivery of the thing, as it is the means of using and enjoying the thing given; while others hold that there must be an actual manual delivery to perfect a gift causa mortis.

This doctrine of donatio causa mortis was borrowed from the Roman Civil Law by our English ancestors. There was much greater need for such a law at the time it was incorporated into the civil law and into the English law than there is now. Learning was not so general, nor the facilities for making wills so great then as now. But the civilians, while they incorporated this doctrine into their law, did not

do so without guarding it with great care. They required that a [*529] donatio causa mortis should be established by at least five witnesses to the facts constituting the gift. And why it was that our English ancestors should have adopted the doctrine, without also adopting the manner in which it should be proved, seems to be unexplained. But they did so, and only required the facts to be proved by one witness, as in this case.

It seems to us that there was greater reason in England, as there is here, for requiring it to be established by five witnesses, than in Rome, after the statute of fraud and of wills, as this doctrine of causa mortis is in direct conflict with the spirit and purpose of those statutes—the prevention of fraud. It is a doctrine, in our opinion, not to be extended but to be strictly construed and confined within the bounds of our adjudged cases. We were at first disposed to confine it to cases of actual manual delivery, and are only prevented from doing so by our loyalty to our own adjudications. But it is apparent from the adjudications that our predecessors felt the restrictions of former adjudications, and that they were not disposed to extend the doctrine.

We will not go into the general review of the many cases cited in the well-considered briefs filed in the case on both sides. Were we to do this, it would lead us into a labyrinth of discussion without profit, as we would not feel bound by the decisions of other jurisdictions, and would put our own construction on the doctrine of donatio causa mortis, but for decisions of our own State. Many of the cases cited by the plaintiff are distinguishable from ours, if not all of them. Thomas v. Lewis (a Virginia case), 37 Am. St. Rep. 878, was probably more relied on by the plaintiff than any other case cited, and for that reason we [*530] mention it by name. This case, in its essential facts, is distinguishable from the case under consideration. There, the articles present were taken out of the bureau drawer, handed to the donor, and then delivered by him to the donee. According to all the authorities, this was a good gift causa mortis. The

box and safe, the key to which the donor delivered to the donee, were not present but were deposited in the vault of the bank; and so far as shown by the case it will be presumed, from the place where they were and the purpose for which things are usually deposited in a bank vault, that they were only valuable as a depository for such purposes, as holding and preserving money and valuable papers, bonds, stocks and the like. This box and safe would have been of little value to the donee for any other purpose. But more than this, the donor expressly stated that all you find in this box and this safe is yours. There is no mistake that it was the intention of the donor to give what was contained in the box and in the safe.

As my Lord Coke would say: "Note the diversity" between that case and the case at bar. There, the evidence of debt contained in the bureau which was present, were taken out, given to the donor, and by him delivered to the donee. This was an actual manual delivery, good under all the authorities. But no such thing was done in this case as to the life insurance policy. It was neither taken out of the drawer nor mentioned by the donor, unless it is included in the testimony of Enos Houston who, at one time, in giving in his testimony says that Van Pelt gave her the keys, saying "what is in this house is yours," and at another time on cross-examination, he said to Julia, "I intend to give you this furniture in this house," and at another time, "What property is in this house is yours." The bureau in which was found the life insurance [*531] policy, after the death of Van Pelt, was present in the room where the keys were handed to Julia, and the life insurance policy could easily have been taken out and handed to Van Pelt, and by him delivered to Julia, as was done in the case of Thomas v. Lewis, supra. But this was not done. The safe and box, in Thomas v. Lewis, were not present, so that the contents could not have been taken out and delivered to the donee by the donor. The ordinary use of a stand of bureaus is not for the purpose of holding and securing such things as a life insurance policy, though they may be often used for that

purpose, while a safe and a box deposited in the vault of a bank are. A bureau is an article of household furniture, used for domestic purposes, and generally belongs to the ladies' department of the household government, while the safe and box, in Thomas v. Lewis, are not. The bureau itself, mentioned in this case, was such property as would be valuable to the plaintiff.

We have very carefully compared the case of Thomas v. Lewis and this case for the purpose of noting the distinction between them, and, as we have already said, we have taken this case, since it was pressed upon our attention in the brief of the plaintiff's counsel, as being more nearly like the case at bar than any other cited, and as it was impossible for us to give a separate consideration to all of them.

It is held that the law of delivery in this State is the same in gifts inter vivos and causa mortis. Adams v. Hayes, 24 N.C. 361. And there are expressions used by Judge Gaston in the argument that would justify us in holding that, in all cases of gifts, whether inter vivos or causa mortis, there must be an absolute manual delivery to constitute, or probably more correctly speaking, to complete, a gift, as it [*532] takes, first, the intention to give, and then the delivery—as it is the inflexible rule that there can be no gift of either kind without both the intention to give and the delivery. Ward v. Turner, 1 White & Tudor's Leading Cases, 1205 and notes, English & American. There must be a delivery. Adams v. Hayes, supra; Shirley v. Dew, 36 N.C. 130; Medlock v. Powell, 96 N.C. 499, 2 S.E. 149; Golding v. Hobery, 35 Am. St. Rep. 357.

The leading case in this State is Adams v. Hayes and this cites and approves Ward v. Turner, supra, as the leading case on the subject of gifts causa mortis, and the correct exposition of the law on that subject. And we have felt it to be our duty to follow that case, so well considered by the very able Court as constituted at that time.

Following this case, founded on Ward v. Turner, we feel bound to give effect to constructive delivery, where it plainly appears that it was the intention of the donor to

make the gift, and where the things intended to be given are not present, or, where present, are incapable of manual delivery from their size or weight. But where the articles are present and are capable of manual delivery, this must be had. This is as far as we can go. It may be thought by some that this is a hard rule—that a dying man cannot dispose of his own. But we are satisfied that when properly considered, it will be found to be a just rule. But it is not a hard rule. The law provides how a man can dispose of all his property, both real and personal. To do this, it is only necessary for him to observe and conform to the requirements of these laws. It may be thought by some persons to be a hard rule that does not allow a man to dispose of his land by gift causa mortis, but such is the law. The law provides that every man may dispose of all of his property by will, [*533] when made in writing. And it is most singular how guarded the law is to protect the testator against fraud and imposition by requiring that every word of the will must be written and signed by the testator, or, if written by someone else, it must be attested by at least two subscribing witnesses who shall sign the same in his presence and at his request, or the will is void. This is as to written wills. But the law provides for another kind of will, not written before the testator's death, called "nuncupative wills." This kind only applies to personal property, and until recently they were limited to small amounts. See how much more guarded they are than gifts causa mortis. Such wills as these must be witnessed by at least two witnesses called by the testator specially for that purpose, and they must be reduced to writing within ten days, and proved and recorded within six months.

In gifts causa mortis it requires but one witness, probably one servant as a witness to a gift of all the estate a man has; no publicity is to be given that the gift has been made, and no probate or registration is required.

The statute of Wills is a statute against fraud, considered in England and in this State to be demanded by public policy. And yet, if symbolical deliveries of gifts causa mortis are to

be allowed, or if constructive deliveries be allowed to the extent claimed by the plaintiff, the statute of wills may prove to be of little value. For such considerations, we see every reason for restricting and none for extending the rules heretofore established as applicable to gifts causa mortis.

It being claimed and admitted that the life insurance policy was present in the bureau drawer in the room where it is claimed the [*534] gift was made, and being capable of actual manual delivery, we are of the opinion that the title of the insurance policy did not pass to the plaintiff, but remained the property of the intestate of the defendant.

But we are of the opinion that the bureau and any other article of furniture, locked and unlocked by any of the keys given to the plaintiff did pass and she became the owner thereof. This is upon the ground that while these articles were present, from their size and weight they were incapable of actual manual delivery; and that the delivery of the keys was a constructive delivery of these articles, equivalent to an actual delivery if the articles had been capable of manual delivery.

Still following Ward v. Turner, we are of the opinion that the other articles of household furniture (except those in the plaintiff's private bed chamber) did not pass to the plaintiff, but remained the property of the defendant's intestate.

We do not think the articles in the plaintiff's bed chamber passed by the donatio causa mortis, for the same reason that the other articles of household furniture did not pass—want of delivery—either constructive or manual. But as to the furniture in the plaintiff's bed room ($ 45) it seems to us that there was sufficient evidence of both gift and delivery to support the finding of the jury, as a gift inter vivos. The intention to give this property is shown by a number of witnesses and contradicted by none.

The only debatable ground is as to the sufficiency of the delivery. But when we recall the express terms in which he repeatedly declared that it was hers; that he had bought it for her and had given it to her; that it was placed in her private chamber, her bed room, where we must suppose

that she had the entire use and control of the same, it [*535] would seem that this was sufficient to constitute a delivery. There was no evidence, that we remember, disputing these facts. But, if there was, the jury have found for the plaintiff, upon sufficient evidence at least to go to the jury, as to this gift and its delivery. As to the piano there was much evidence tending to show the intention of Van Pelt to give it to the plaintiff, and that he had given it to her, and we remember no evidence to the contrary. And as to this, like the bed-room furniture, the debatable ground, if there is any debatable ground, is the question of delivery. It was placed in the intestate's parlor where it remained until it was burned. The intestate insured it as his property, collected and used the insurance money as his own, often saying that he intended to buy the plaintiff another piano, which he never did. It must be presumed that the parlor was under the dominion of the intestate, and not of his cook, housekeeper, and hired servant. And unless there is something more shown than the fact that the piano was bought by the intestate, placed in his parlor, and called by him "Miss Julia's piano," we cannot think this constituted a delivery. But, as the case goes back for a new trial, if the plaintiff thinks she can show a delivery she will have an opportunity of doing so. But she will understand that she must do so according to the rules laid down in this opinion—that she must show actual or constructive delivery equivalent to actual manual delivery. We see no ground upon which the plaintiff can recover the insurance money, if the piano was not hers.

We do not understand that there was any controversy as to the plaintiff's right to recover for her services, which the jury have estimated to be $ 125. The view of the case we have taken has relieved us from a discussion of the exceptions to evidence, and as to the charge of [*536] the Court. There is no such thing in this State as symbolical delivery in gifts either inter vivos or causa mortis. There is a hint in that direction in the case of Shirley v. Dew, supra, and this is now overruled. There is error.

MICHAEL S. GRUEN, Respondent, v. KEMIJA GRUEN, Appellant. Court of Appeals of New York 68 N.Y.2d 48; 496 N.E.2d 869; 505 N.Y.S.2d 849, July 8, 1986, Decided

OPINION BY: SIMONS

Plaintiff commenced this action seeking a declaration that he is the rightful owner of a painting which he alleges his father, now deceased, gave to him. He concedes that he has never had possession of the painting but asserts that his father made a valid gift of the title in 1963 reserving a life estate for himself. His father retained possession of the painting until he died in 1980. Defendant, plaintiff's stepmother, has the painting now and has refused plaintiff's requests that she turn it over to him. She contends that the purported gift was testamentary in nature and invalid insofar as the formalities of a will were not met or, alternatively, that a donor may not make a valid inter vivos gift of a chattel and retain a life estate with a complete right of possession. Following a seven-day nonjury trial, Special Term found that plaintiff had failed to establish any of the elements of an inter vivos gift and that in any event an attempt by a donor to retain a present possessory life estate in a chattel invalidated a purported gift of it. The Appellate Division held that a valid gift may be made reserving a life estate and, finding the elements of a gift established in this case, it reversed and remitted the matter for a determination of value (104 AD2d 171). That determination has now been made and defendant appeals directly to this court, pursuant to CPLR 5601 (d), from the subsequent final judgment entered in Supreme Court awarding plaintiff $ 2,500,000 in damages representing the value of the painting, plus interest. We now affirm.

The subject of the dispute is a work entitled "Schloss [*52] Kammer am Attersee II" painted by a noted Austrian modernist, Gustav Klimt. It was purchased by plaintiff's father, Victor Gruen, in 1959 for $ 8,000. On April 1, 1963 the elder Gruen, a successful architect with offices and

residences in both New York City and Los Angeles during most of the time involved in this action, wrote a letter to plaintiff, then an undergraduate student at Harvard, stating that he was giving him the Klimt painting for his birthday but that he wished to retain the possession of it for his lifetime. This letter is not in evidence, apparently because plaintiff destroyed it on instructions from his father. Two other letters were received, however, one dated May 22, 1963 and the other April 1, 1963. Both had been dictated by Victor Gruen and sent together to plaintiff on or about May 22, 1963. The letter dated May 22, 1963 reads as follows:

"Dear Michael:

"I wrote you at the time of your birthday about the gift of the painting by Klimt.

"Now my lawyer tells me that because of the existing tax laws, it was wrong to mention in that letter that I want to use the painting as long as I live. Though I still want to use it, this should not appear in the letter. I am enclosing, therefore, a new letter and I ask you to send the old one back to me so that it can be destroyed.

"I know this is all very silly, but the lawyer and our accountant insist that they must have in their possession copies of a letter which will serve the purpose of making it possible for you, once I die, to get this picture without having to pay inheritance taxes on it.

"Love,

"s/Victor".

Enclosed with this letter was a substitute gift letter, dated April 1, 1963, which stated:

"Dear Michael:

"The 21st birthday, being an important event in life, should be celebrated accordingly. I therefore wish to give you as a present the oil painting by Gustav Klimt of Schloss Kammer which now hangs in the New York living room. You know that Lazette and I [*53] bought it some 5 or 6 years ago, and you always told us how much you liked it.

"Happy birthday again.

"Love,
"s/Victor".

Plaintiff never took possession of the painting nor did he seek to do so. Except for a brief period between 1964 and 1965 when it was on loan to art exhibits and when restoration work was performed on it, the painting remained in his father's possession, moving with him from New York City to Beverly Hills and finally to Vienna, Austria, where Victor Gruen died on February 14, 1980. Following Victor's death plaintiff requested possession of the Klimt painting and when defendant refused, he commenced this action.

The issues framed for appeal are whether a valid inter vivos gift of a chattel may be made where the donor has reserved a life estate in the chattel and the donee never has had physical possession of it before the donor's death and, if it may, which factual findings on the elements of a valid inter vivos gift more nearly comport with the weight of the evidence in this case, those of Special Term or those of the Appellate Division. Resolution of the latter issue requires application of two general rules. First, to make a valid inter vivos gift there must exist the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee ( Matter of Szabo, 10 NY2d 94, 98; Matter of Kelly, 285 NY 139, 150 [dissenting in part opn]; Matter of Van Alstyne, 207 NY 298, 306; Beaver v Beaver, 117 NY 421, 428). Second, the proponent of a gift has the burden of proving each of these elements by clear and convincing evidence (Matter of Kelley, supra, at p 150; Matter of Abramowitz, 38 AD2d 387, 389-390, affd on opn 32 NY2d 654).

Donative Intent

There is an important distinction between the intent with which an inter vivos gift is made and the intent to make a gift by will. An inter vivos gift requires that the donor intend to make an irrevocable present transfer of ownership; if the intention is to make a testamentary

disposition effective only after death, the gift is invalid unless made by will (see, McCarthy v Pieret, 281 NY 407, 409; Gannon v McGuire, 160 NY 476, 481; Martin v Funk, 75 NY 134, 137-138).

[*54] Defendant contends that the trial court was correct in finding that Victor did not intend to transfer any present interest in the painting to plaintiff in 1963 but only expressed an intention that plaintiff was to get the painting upon his death. The evidence is all but conclusive, however, that Victor intended to transfer ownership of the painting to plaintiff in 1963 but to retain a life estate in it and that he did, therefore, effectively transfer a remainder interest in the painting to plaintiff at that time. Although the original letter was not in evidence, testimony of its contents was received along with the substitute gift letter and its covering letter dated May 22, 1963. The three letters should be considered together as a single instrument (see, Matter of Brandreth, 169 NY 437, 440) and when they are they unambiguously establish that Victor Gruen intended to make a present gift of title to the painting at that time. But there was other evidence for after 1963 Victor made several statements orally and in writing indicating that he had previously given plaintiff the painting and that plaintiff owned it. Victor Gruen retained possession of the property, insured it, allowed others to exhibit it and made necessary repairs to it but those acts are not inconsistent with his retention of a life estate. Furthermore, whatever probative value could be attached to his statement that he had bequeathed the painting to his heirs, made 16 years later when he prepared an export license application so that he could take the painting out of Austria, is negated by the overwhelming evidence that he intended a present transfer of title in 1963. Victor's failure to file a gift tax return on the transaction was partially explained by allegedly erroneous legal advice he received, and while that omission sometimes may indicate that the donor had no intention of making a present gift, it does not necessarily do so and it is not dispositive in this case.

Defendant contends that even if a present gift was intended, Victor's reservation of a lifetime interest in the painting defeated it. She relies on a statement from Young v Young (80 NY 422) that " '[any] gift of chattels which expressly reserves the use of the property to the donor for a certain period, or * * * as long as the donor shall live, is ineffectual' " ( id., at p 436, quoting 2 Schouler, Personal Property, at 118). The statement was dictum, however, and the holding of the court was limited to a determination that an attempted gift of bonds in which the donor reserved the interest for life failed because there had been no delivery of the gift, either actual or constructive [*55] (see, id., at p 434; see also, Speelman v Pascal, 10 NY2d 313, 319-320). The court expressly left undecided the question "whether a remainder in a chattel may be created and given by a donor by carving out a life estate for himself and transferring the remainder" ( Young v Young, supra, at p 440). We answered part of that question in Matter of Brandreth (169 NY 437, 441-442, supra) when we held that "[in] this state a life estate and remainder can be created in a chattel or a fund the same as in real property". The case did not require us to decide whether there could be a valid gift of the remainder.

Defendant recognizes that a valid inter vivos gift of a remainder interest can be made not only of real property but also of such intangibles as stocks and bonds. Indeed, several of the cases she cites so hold. That being so, it is difficult to perceive any legal basis for the distinction she urges which would permit gifts of remainder interests in those properties but not of remainder interests in chattels such as the Klimt painting here. The only reason suggested is that the gift of a chattel must include a present right to possession. The application of Brandreth to permit a gift of the remainder in this case, however, is consistent with the distinction, well recognized in the law of gifts as well as in real property law, between ownership and possession or enjoyment (see, Speelman v Pascal, 10 NY2d 313, 318, supra; McCarthy v Pieret, 281 NY 407, 409-411, supra;

Matter of Brandreth, 169 NY 437, 442, supra). Insofar as some of our cases purport to require that the donor intend to transfer both title and possession immediately to have a valid inter vivos gift (see, Gannon v McGuire, 160 NY 476, 481, supra; Young v Young, 80 NY 422, 430, supra), they state the rule too broadly and confuse the effectiveness of a gift with the transfer of the possession of the subject of that gift. The correct test is "'whether the maker intended the [gift] to have no effect until after the maker's death, or whether he intended it to transfer some present interest' " ( McCarthy v Pieret, 281 NY 407, 409, supra [emphasis added]; see also, 25 NY Jur, Gifts, § 14, at 156-157). As long as the evidence establishes an intent to make a present and irrevocable transfer of title or the right of ownership, there is a present transfer of some interest and the gift is effective immediately (see, Matter of Brady, 228 App Div 56, 60, affd no opn 254 NY 590; In re Sussman's Estate, 125 NYS2d 584, 589-591, affd no opn 283 App Div 1051; Matter of Valentine, 122 Misc 486, 489; Brown, Personal Property § 48, at 133-136 [2d [*56] ed]; 25 NY Jur, Gifts, § 30, at 173-174; see also, Farmers' Loan & Trust Co. v Winthrop, 238 NY 477, 485-486). Thus, in Speelman v Pascal (supra), we held valid a gift of a percentage of the future royalties to the play "My Fair Lady" before the play even existed. There, as in this case, the donee received title or the right of ownership to some property immediately upon the making of the gift but possession or enjoyment of the subject of the gift was postponed to some future time.

Defendant suggests that allowing a donor to make a present gift of a remainder with the reservation of a life estate will lead courts to effectuate otherwise invalid testamentary dispositions of property. The two have entirely different characteristics, however, which make them distinguishable. Once the gift is made it is irrevocable and the donor is limited to the rights of a life tenant not an owner. Moreover, with the gift of a remainder title vests immediately in the donee and any possession is postponed until the donor's death whereas under a will neither title nor

possession vests immediately. Finally, the postponement of enjoyment of the gift is produced by the express terms of the gift not by the nature of the instrument as it is with a will (see, Robb v Washington & Jefferson Coll., 185 NY 485, 493).

Delivery

In order to have a valid inter vivos gift, there must be a delivery of the gift, either by a physical delivery of the subject of the gift or a constructive or symbolic delivery such as by an instrument of gift, sufficient to divest the donor of dominion and control over the property (see, Matter of Szabo, 10 NY2d 94, 98-99, supra; Speelman v Pascal, 10 NY2d 313, 318-320, supra; Beaver v Beaver, 117 NY 421, 428-429, supra; Matter of Cohn, 187 App Div 392, 395). As the statement of the rule suggests, the requirement of delivery is not rigid or inflexible, but is to be applied in light of its purpose to avoid mistakes by donors and fraudulent claims by donees (see, Matter of Van Alstyne, 207 NY 298, 308, supra; Matter of Cohn, supra, at pp 395-396; Mechem, Requirement of Delivery in Gifts of Chattels and of Choses in Actions Evidenced by Commercial Instruments, 21 Ill L Rev 341, 348-349). Accordingly, what is sufficient to constitute delivery "must be tailored to suit the circumstances of the case" (Matter of Szabo, supra, at p 98). The rule requires that "'[ the] delivery necessary to consummate a gift must be as perfect as the nature of the property [*57] and the circumstances and surroundings of the parties will reasonably permit'" (id.; Vincent v Rix, 248 NY 76, 83; Matter of Van Alstyne, supra, at p 309; see, Beaver v Beaver, supra, at p 428).

Defendant contends that when a tangible piece of personal property such as a painting is the subject of a gift, physical delivery of the painting itself is the best form of delivery and should be required. Here, of course, we have only delivery of Victor Gruen's letters which serve as instruments of gift. Defendant's statement of the rule as applied may be generally true, but it ignores the fact that what Victor Gruen gave plaintiff was not all rights to the

Klimt painting, but only title to it with no right of possession until his death. Under these circumstances, it would be illogical for the law to require the donor to part with possession of the painting when that is exactly what he intends to retain.

Nor is there any reason to require a donor making a gift of a remainder interest in a chattel to physically deliver the chattel into the donee's hands only to have the donee redeliver it to the donor. As the facts of this case demonstrate, such a requirement could impose practical burdens on the parties to the gift while serving the delivery requirement poorly. Thus, in order to accomplish this type of delivery the parties would have been required to travel to New York for the symbolic transfer and redelivery of the Klimt painting which was hanging on the wall of Victor Gruen's Manhattan apartment. Defendant suggests that such a requirement would be stronger evidence of a completed gift, but in the absence of witnesses to the event or any written confirmation of the gift it would provide less protection against fraudulent claims than have the written instruments of gift delivered in this case.

Acceptance

Acceptance by the donee is essential to the validity of an inter vivos gift, but when a gift is of value to the donee, as it is here, the law will presume an acceptance on his part ( Matter of Kelsey, 26 NY2d 792, affg on opn at 29 AD2d 450, 456; Beaver v Beaver, 117 NY 421, 429, supra). Plaintiff did not rely on this presumption alone but also presented clear and convincing proof of his acceptance of a remainder interest in the Klimt painting by evidence that he had made several contemporaneous statements acknowledging the gift to his [*58] friends and associates, even showing some of them his father's gift letter, and that he had retained both letters for over 17 years to verify the gift after his father died. Defendant relied exclusively on affidavits filed by plaintiff in a matrimonial action with his former wife, in which plaintiff failed to list his interest in the painting as an asset. These affidavits were made over

10 years after acceptance was complete and they do not even approach the evidence in Matter of Kelly (285 NY 139, 148-149 [dissenting in part opn], supra) where the donee, immediately upon delivery of a diamond ring, rejected it as "too flashy". We agree with the Appellate Division that interpretation of the affidavit was too speculative to support a finding of rejection and overcome the substantial showing of acceptance by plaintiff.
Accordingly, the judgment appealed from and the order of the Appellate Division brought up for review should be affirmed, with costs.

¿No impacta la imprecisión del razonamiento del tribunal estadounidense en este caso al utilizar categorías del derecho feudal para bienes inmuebles en un caso de la donación de una cosa mueble?

## LA CREACIÓN

ALLURE JEWELERS, INC., Plaintiff, v. MUSTAFA ULU, et al., Defendants. United States District Court for the Southern District of Ohio, Western Division, 40 Media L. Rep. 2460. September 20, 2012, Filed
OPINION BY: BARRETT
I. BACKGROUND
According to the Third Amended Complaint, Allure is an internet provider of fine jewelry [*2] items and gold items. Goldia is a competitor of Allure. Both companies purchase products from Defendant Quality Gold. Allure's advertisements for its products include details about metal, metal purity, actual length, actual width, weight, style, finish, and features. Allure claims that Goldia has improperly "scraped" or copied this information for use in its own advertisements for the same products. These advertisements appear on Goldia's website and the websites of eBay.com and Amazon.com. Allure claims that Goldia has used the improperly obtained information to unfairly compete with Allure.

Allure brings claims for copyright infringement (Count One); conversion (Count Two); misappropriation under federal common law (Count Three); misappropriation of trade secrets under Ohio law (Count Four); unfair competition based on common law (Count Five); unfair competition based on contract (Count Six); business reputation (Count Seven); accounting (Count Eight); intentional interference with contractual relationship (Count Nine); and injunctive relief (Count Ten). However, in response [*3] to Defendant's Motion to Dismiss, Allure has voluntarily dismissed its claims for conversion (Count Two), unfair competition (Count Five), business relations (Count Seven), and intentional interference with contractual relationship (Count Nine). Allure explains that these claims will be a part if its Ohio Trade Secrets Act claim. Allure also clarifies that the claim for breach of contract (Count Six) states a claim against eBay.com, and does not state a claim against Goldia. Therefore, the causes of action which remain pending against Goldia are: copyright infringement, misappropriation under federal common law, and misappropriation under Ohio's Trade Secret Act, Ohio Revised Code § 1333.61 et seq.

II. ANALYSIS

A. Motion to Dismiss

When reviewing a 12(b)(6) motion to dismiss for failure to state a claim, this Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." Bassett v. NCAA, 528 F.3d 426, 430 (6th Cir. 2008) (quoting Directv, Inc. v. Treesh, 487 F.3d 471, 476 (6th Cir. 2007)). "[T]o survive a motion to dismiss, a complaint must contain [*4] (1) 'enough facts to state a claim to relief that is plausible,' (2) more than 'a formulaic recitation of a cause of action's elements,' and (3) allegations that suggest a 'right to relief above a speculative level.'" Tackett v. M & G Polymers, USA, LLC, 561 F.3d 478, 488 (6th Cir. 2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d

929 (2007)). A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

B. Copyright

Goldia argues that Allure's copyright claim should be dismissed because (1) Allure failed to obtain copyright registrations before filing its copyright infringement action; (2) Allure has not adequately alleged a copyright infringement claim under Federal Rule of Civil Procedure 8; and (3) the information about Allure's products is not sufficiently original to warrant copyright protection.

Copyright infringement may be proved by demonstrating: "(1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original." Bridgeport Music, Inc. v. WB Music Corp., 508 F.3d 394, 398 (6th Cir. 2007).

The [*5] Copyright Act states that "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." 17 U.S.C. § 411(a). The Supreme court has explained that "[Section 411(a)] establishes a condition-copyright registration-that plaintiffs ordinarily must satisfy before filing an infringement claim and invoking the Act's remedial provisions." Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 130 S.Ct. 1237, 1242, 176 L. Ed. 2d 18 (2010).

Several district courts within the Sixth Circuit have construed this registration requirement strictly, and dismissed the infringement claim if the plaintiff had not satisfied the precondition of registration before initiating suit. See, e.g., Sony/ATV Music Publ. LLC v. D.J. Miller Music Distribs., Inc., 2010 U.S. Dist. LEXIS 103795, 2010 WL 3872802, at *4 (M.D.Tenn. Sept. 28, 2010) (motion to dismiss infringement claims granted even though plaintiff obtained registration after lawsuit was filed); TreadmillDoctor.com, Inc. v. Johnson, 2011 U.S. Dist.

LEXIS 34652, 2011 WL 1256601, at *4-6 (W.D.Tenn. March 31, 2011) (dismissing infringement claims where plaintiff failed to satisfy the registration requirement of § 411(a)).

Here, [*6] as described in Allure's Motion for Leave to File a Third Amended Complaint (Doc. 30), and evidenced by the registration itself (Doc. 30-1), Allure did not obtain copyright registrations until after it filed suit. Because Allure did not meet the registration requirement of Section 411(a), the Court dismisses Allure's claim for copyright violation against Goldia.

C. Misappropriation of Trade Secrets under Ohio law

Defendants argue that Allure's claim for misappropriation of trade secrets is preempted by the Ohio Trade Secrets Act or the Copyright Act. Allure responds that its pricing information falls within the "hot news" exception established in International News Service v. Associated Press, 248 U.S. 215, 39 S. Ct. 68, 63 L. Ed. 211 (1918). Allure explains that the price of precious metals fluctuates frequently. Allure claims that it uses a program which takes the most recent information on the price of precious metals, calculates its effect on its products, and then updates the prices of its products accordingly.

In International News Service ("INS"), the Supreme [*7] Court recognized a common law tort of "misappropriation" that protects against the appropriation by a competitor of commercially valuable information otherwise in the public domain. 248 U.S. at 240. However, as Allure recognizes, the viability of INS is limited.

INS involved two competing wire services which transmitted news stories to its member newspapers. International News Service copied the facts reported in Associated Press' news bulletins and wired them to its own members. Id. at 231, 238. The Supreme Court held that INS's conduct was a common-law "misappropriation" of AP's property. Id. at 242. However, as the Second Circuit has explained:

INS itself is no longer good law. Purporting to establish a principal of federal common law, the law established by INS was abolished by Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), which largely abandoned federal common law.

Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 894 (2d Cir. 2011). Nevertheless, several courts have concluded that "[b]ased on legislative history of the 1976 [Copyright Act amendments], it is generally agreed that a 'hot-news' INS-like claim survives preemption." Id. [*8] (quoting National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir.1997); see also Nash v. CBS, Inc., 704 F.Supp. 823, 834-35 (N.D.Ill.1989) (noting that the Supreme Court of Illinois adopted the tort of misappropriation first recognized in INS and concluding that "hot news" misappropriation claims escape § 301 preemption), aff'd, 899 F.2d 1537 (7th Cir. 1990); X17, Inc. v. Lavandeira, 563 F. Supp. 2d 1102, 1107 (C.D. Cal. 2007) (concluding that California would recognize the "hot news" species of the misappropriation and avoids preemption). As such, "[s]ome seventy-five years after its death under Erie, INS thus maintains a ghostly presence as a description of a tort theory, not as precedential establishment of a tort cause of action." 650 F.3d at 894.

However, under Ohio law, there is no support for a "hot-news" INS-like claim. Accord Brainard v. Vassar, 561 F. Supp. 2d 922, 932 (M.D. Tenn. 2008) ("The plaintiffs have cited no case law indicating that the Tennessee courts have adopted New York's "hot-news" causes of action."); Ultra-Precision Mfg., Ltd. v. Ford Motor Co., 01-70302, 2002 U.S. Dist. LEXIS 27810, 2002 WL 32878308, *4 (E.D. Mich. May 31, 2002) (finding no support for a cause of action [*9] for commercial misappropriation under Michigan law). Therefore, Allure has failed to state a claim for common-law misappropriation.

To the extent that Allure brings a claim pursuant to Ohio's Trade Secret Act, the Court finds that Allure has also failed to state a claim. As this Court noted in its ruling on Allure's

Motion for Temporary Restraining Order, Allure has not alleged that it made efforts to guard the secrecy of the information about its products, and in fact published the information on the Internet. In its response to Goldia's Motion to Dismiss, Allure now claims that its "trade secret" is the program and method at which it arrives at the published price. However, there is no allegation in the Third Amended Complaint that Goldia had access to, or has made use of Allure's program or method.

Therefore, Allure has failed to state a claim for misappropriation under federal common law or Ohio's Trade Secret Act, and the Court dismisses those claims.

III. CONCLUSION

Based on the foregoing, it is hereby ORDERED that Defendant Goldia of NY, LLC's Motion to Dismiss is granted. Accordingly, Defendant Goldia is dismissed as a party and Plaintiff's Motion for Preliminary Injunction, seeking to enjoin Goldia, is denied as moot.

VANNA WHITE, Plaintiff-Appellant, v. SAMSUNG ELECTRONICS AMERICA, INC.; DAVID DEUTSCH ASSOCIATES, Defendants-Appellees. United States Court of Appeals for the Ninth Circuit, 989 F.2d 1512. March 18, 1993, Filed

OPINION BY: GOODWIN

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

DISSENT BY: KOZINSKI

I

Saddam Hussein wants to keep advertisers from using his picture in unflattering contexts. Clint Eastwood doesn't want tabloids to write about him. Rudolf Valentino's heirs want to control his film biography. The Girl Scouts don't want their image soiled by association with certain activities. George Lucas wants to keep Strategic Defense Initiative fans from calling it "Star Wars." Pepsico doesn't want singers to use the word "Pepsi" in their songs. Guy Lombardo wants an exclusive [*1513] property right to ads

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

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

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

[*1514] The panel's opinion is a classic case of overprotection. Concerned about what it sees as a wrong done to Vanna White, the panel majority erects a property right of remarkable and dangerous breadth: Under the majority's opinion, it's now a tort for advertisers to remind the public of a celebrity. Not to use a celebrity's name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity's image in the public's mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense allow. It conflicts with the Copyright Act and the Copyright Clause. It raises serious First

Amendment problems. It's bad law, and it deserves a long, hard second look.

II

Samsung ran an ad campaign promoting its consumer electronics. Each ad depicted a Samsung product and a humorous prediction: One showed a raw steak with the caption "Revealed to be health food. 2010 A.D." Another showed Morton Downey, Jr. in front of an American flag with the caption "Presidential candidate. 2008 A.D." The ads were meant to convey - humorously - that Samsung products would still be in use twenty years from now.

The ad that spawned this litigation starred a robot dressed in a wig, gown and jewelry reminiscent of Vanna White's hair and dress; the robot was posed next to a Wheel-of-Fortune-like game board. See Appendix. The caption read "Longest-running game show. 2012 A.D." The gag here, I take it, was that Samsung would still be around when White had been replaced by a robot.

Perhaps failing to see the humor, White sued, alleging Samsung infringed her right of publicity by "appropriating" her "identity." Under California law, White has the exclusive right to use her name, likeness, signature and voice for commercial purposes. Cal. Civ. Code § 3344(a); Eastwood v. Superior Court, 149 Cal. App. 3d 409, 417, 198 Cal. Rptr. 342, 347 (1983). But Samsung didn't use her name, voice or signature, and it certainly didn't use her likeness. The ad just wouldn't have been funny had it depicted White or someone who resembled her - the whole joke was that the game show host(ess) was a robot, not a real person. No one seeing the ad could have thought this was supposed to be White in 2012.

The district judge quite reasonably held that, because Samsung didn't use White's name, likeness, voice or signature, it didn't violate her right of publicity. 971 F.2d at 1396-97. Not so, says the panel majority: The California right of publicity can't possibly be limited to name and likeness. If it were, the majority reasons, a "clever advertising strategist" could avoid using White's name or

likeness but nevertheless remind people of her with impunity, "effectively eviscerating" her rights. To prevent this "evisceration," the panel majority holds that the right of publicity must extend beyond name and likeness, to any "appropriation" of White's "identity" - anything that "evokes" her personality. Id. at 1398-99.

III

But what does "evisceration" mean in intellectual property law? Intellectual property rights aren't like some constitutional rights, absolute guarantees protected against all kinds of interference, subtle as well as blatant. They cast no penumbras, emit no emanations: The very point of intellectual property laws is that they protect only against certain specific kinds of appropriation. I can't publish unauthorized copies of, say, Presumed Innocent; I can't make a movie out of it. But I'm [*1515] perfectly free to write a book about an idealistic young prosecutor on trial for a crime he didn't commit. So what if I got the idea from Presumed Innocent? So what if it reminds readers of the original? Have I "eviscerated" Scott Turow's intellectual property rights? Certainly not. All creators draw in part on the work of those who came before, referring to it, building on it, poking fun at it; we call this creativity, not piracy.

The majority isn't, in fact, preventing the "evisceration" of Vanna White's existing rights; it's creating a new and much broader property right, a right unknown in California law. It's replacing the existing balance between the interests of the celebrity and those of the public by a different balance, one substantially more favorable to the celebrity. Instead of having an exclusive right in her name, likeness, signature or voice, every famous person now has an exclusive right to anything that reminds the viewer of her. After all, that's all Samsung did: It used an inanimate object to remind people of White, to "evoke [her identity]," 971 F.2d at 1399.

Consider how sweeping this new right is. What is it about the ad that makes people think of White? It's not the robot's wig, clothes or jewelry; there must be ten million blond

women (many of them quasi-famous) who wear dresses and jewelry like White's. It's that the robot is posed near the "Wheel of Fortune" game board. Remove the game board from the ad, and no one would think of Vanna White. See Appendix. But once you include the game board, anybody standing beside it - a brunette woman, a man wearing women's clothes, a monkey in a wig and gown - would evoke White's image, precisely the way the robot did. It's the "Wheel of Fortune" set, not the robot's face or dress or jewelry that evokes White's image. The panel is giving White an exclusive right not in what she looks like or who she is, but in what she does for a living.

[*1516] This is entirely the wrong place to strike the balance. Intellectual property rights aren't free: They're imposed at the expense of future creators and of the public at large. Where would we be if Charles Lindbergh had an exclusive right in the concept of a heroic solo aviator? If Arthur Conan Doyle had gotten a copyright in the idea of the detective story, or Albert Einstein had patented the theory of relativity? If every author and celebrity had been given the right to keep people from mocking them or their work? Surely this would have made the world poorer, not richer, culturally as well as economically.

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

The intellectual property right created by the panel here has none of these essential limitations: No fair use exception; no right to parody; no idea-expression dichotomy. It impoverishes the public domain, to the detriment of future creators and the public at large. Instead of well-defined, limited characteristics such as name, likeness or voice, advertisers will now have to cope with vague claims of "appropriation of identity," claims often made by people with a wholly exaggerated sense of their own fame and significance. See pp. 1-3 & notes 1-10 supra. Future Vanna Whites might not get the chance to create their personae, because their employers may fear some celebrity will claim the persona is too similar to her own. The public will be robbed of parodies of celebrities, and [*1517] our culture will be deprived of the valuable safety valve that parody and mockery create.

Moreover, consider the moral dimension, about which the panel majority seems to have gotten so exercised. Saying Samsung "appropriated" something of White's begs the question: Should White have the exclusive right to something as broad and amorphous as her "identity"? Samsung's ad didn't simply copy White's schtick - like all parody, it created something new. True, Samsung did it to make money, but White does whatever she does to make money, too; the majority talks of "the difference between fun and profit," 971 F.2d at 1401, but in the entertainment industry fun is profit. Why is Vanna White's right to exclusive for-profit use of her persona - a persona that might not even be her own creation, but that of a writer, director or producer - superior to Samsung's right to profit by creating its own inventions? Why should she have such absolute rights to control the conduct of others, unlimited by the idea-expression dichotomy or by the fair use doctrine?

To paraphrase only slightly Feist Publications, Inc. v. Rural Telephone Service Co., 113 L. Ed. 2d 358, 111 S. Ct. 1282, 1289-90 (1991), it may seem unfair that much of the fruit of a creator's labor may be used by others without

compensation. But this is not some unforeseen byproduct of our intellectual property system; it is the system's very essence. Intellectual property law assures authors the right to their original expression, but encourages others to build freely on the ideas that underlie it. This result is neither unfair nor unfortunate: It is the means by which intellectual property law advances the progress of science and art. We give authors certain exclusive rights, but in exchange we get a richer public domain. The majority ignores this wise teaching, and all of us are the poorer for it.

IV

The panel, however, does more than misinterpret California law: By refusing to recognize a parody exception to the right of publicity, the panel directly contradicts the federal Copyright Act. Samsung didn't merely parody Vanna White. It parodied Vanna White appearing in "Wheel of Fortune," a copyrighted television show, and parodies of copyrighted works are governed by federal copyright law.

Copyright law specifically gives the world at large the right to make "fair use" parodies, parodies that don't borrow too much of the original. Fisher v. Dees, 794 F.2d 432, 435 (9th Cir. 1986). Federal copyright law also gives the copyright owner the exclusive right to create (or license the creation of) derivative works, which include parodies that borrow too much to qualify as "fair use." See Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1434-35 (6th Cir. 1992). When Mel Brooks, for instance, decided to parody Star Wars, he [*1518] had two options: He could have stuck with his fair use rights under 17 U.S.C. § 107, or he could have gotten a license to make a derivative work under 17 U.S.C. § 106(b) from the holder of the Star Wars copyright. To be safe, he probably did the latter, but once he did, he was guaranteed a perfect right to make his movie.

The majority's decision decimates this federal scheme. It's impossible to parody a movie or a TV show without at the same time "evoking" the "identities" of the actors. You can't have a mock Star Wars without a mock Luke

Skywalker, Han Solo and Princess Leia, which in turn means a mock Mark Hamill, Harrison Ford and Carrie Fisher. You can't have a mock Batman commercial without a mock Batman, which means someone emulating the mannerisms of Adam West or Michael Keaton. See Carlos V. Lozano, West Loses Lawsuit over Batman TV Commercial, L.A. Times, Jan. 18, 1990, at B3 (describing Adam West's right of publicity lawsuit over a commercial produced under license from DC Comics, owner of the Batman copyright). The public's right to make a fair use parody and the copyright owner's right to license a derivative work are useless if the parodist is held hostage by every actor whose "identity" he might need to "appropriate."

Our court is in a unique position here. State courts are unlikely to be particularly sensitive to federal preemption, which, after all, is a matter of first concern to the federal courts. The Supreme Court is unlikely to consider the issue because the right of publicity seems so much a matter of state law. That leaves us. It's our responsibility to keep the right of publicity from taking away federally granted rights, either from the public at large or from a copyright owner. We must make sure state law doesn't give the Vanna Whites and Adam Wests of the world a veto over fair use parodies of the shows in which they appear, or over copyright holders' exclusive right to license derivative works of those shows. In a case where the copyright owner isn't even a party - where no one has the interests of copyright owners at heart - the majority creates a rule that greatly diminishes the rights of copyright holders in this circuit.

V

The majority's decision also conflicts with the federal copyright system in another, more insidious way. Under the dormant Copyright Clause, state intellectual property laws can stand only so long as they don't "prejudice the interests of other States." Goldstein v. California, 412 U.S. 546, 558, 37 L. Ed. 2d 163, 93 S. Ct. 2303 (1973). A state law

criminalizing record piracy, for instance, is permissible because citizens of other states would "remain free to copy within their borders those works which may be protected elsewhere." Id. But the right of publicity isn't geographically limited. A right of publicity created by one state applies to conduct everywhere, so long as it involves a celebrity domiciled in that state. If a Wyoming resident creates an ad that features a California domiciliary's name or likeness, he'll be subject to California right of publicity law even if he's careful to keep the ad from being shown in California. See Acme Circus Operating Co. v. Kuperstock, 711 F.2d 1538, 1540 (11th Cir. 1983); Groucho Marx Prods. v. Day and Night Co., 689 F.2d 317, 320 (2d Cir. 1982); see [*1519] also Factors Etc. v. Pro Arts, 652 F.2d 278, 281 (2d Cir. 1981).

The broader and more ill-defined one state's right of publicity, the more it interferes with the legitimate interests of other states. A limited right that applies to unauthorized use of name and likeness probably does not run afoul of the Copyright Clause, but the majority's protection of "identity" is quite another story. Under the majority's approach, any time anybody in the United States - even somebody who lives in a state with a very narrow right of publicity - creates an ad, he takes the risk that it might remind some segment of the public of somebody, perhaps somebody with only a local reputation, somebody the advertiser has never heard of. See note 17 supra (right of publicity is infringed by unintentional appropriations). So you made a commercial in Florida and one of the characters reminds Reno residents of their favorite local TV anchor (a California domiciliary)? Pay up.

This is an intolerable result, as it gives each state far too much control over artists in other states. No California statute, no California court has actually tried to reach this far. It is ironic that it is we who plant this kudzu in the fertile soil of our federal system.

VI

Finally, I can't see how giving White the power to keep others from evoking her image in the public's mind can be squared with the First Amendment. Where does White get this right to control our thoughts? The majority's creation goes way beyond the protection given a trademark or a copyrighted work, or a person's name or likeness. All those things control one particular way of expressing an idea, one way of referring to an object or a person. But not allowing any means of reminding people of someone? That's a speech restriction unparalleled in First Amendment law.

What's more, I doubt even a name-and-likeness-only right of publicity can stand without a parody exception. The First Amendment isn't just about religion or politics - it's also about protecting the free development of our national culture. Parody, humor, irreverence are all vital components of the marketplace of ideas. The last thing we need, the last thing the First Amendment will tolerate, is a law that lets public figures keep people from mocking them, or from "evoking" their images in the mind of the public. 971 F.2d at 1399.

The majority dismisses the First Amendment issue out of hand because Samsung's ad was commercial speech. Id. at 1401 & n.3. So what? Commercial speech may be less protected by the First Amendment than noncommercial speech, but less protected means protected nonetheless. Central [*1520] Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980). And there are very good reasons for this. Commercial speech has a profound effect on our culture and our attitudes. Neutral-seeming ads influence people's social and political attitudes, and themselves arouse political controversy. "Where's the Beef?" turned from an advertising catchphrase into the only really memorable thing about the 1984 presidential campaign. Four years later, Michael Dukakis called George Bush "the Joe Isuzu of American politics."

In our pop culture, where salesmanship must be entertaining and entertainment must sell, the line between

the commercial and noncommercial has not merely blurred; it has disappeared. Is the Samsung parody any different from a parody on Saturday Night Live or in Spy Magazine? Both are equally profit-motivated. Both use a celebrity's identity to sell things - one to sell VCRs, the other to sell advertising. Both mock their subjects. Both try to make people laugh. Both add something, perhaps something worthwhile and memorable, perhaps not, to our culture. Both are things that the people being portrayed might dearly want to suppress. See notes 1 & 29 supra.

Commercial speech is a significant, valuable part of our national discourse. The Supreme Court has recognized as much, and has insisted that lower courts carefully scrutinize commercial speech restrictions, but the panel totally fails to do this. The panel majority doesn't even purport to apply the Central Hudson test, which the Supreme Court devised specifically for determining whether a commercial speech restriction is valid. The majority doesn't ask, as Central Hudson requires, whether the speech restriction is justified by a substantial state interest. It doesn't ask whether the restriction directly advances the interest. It doesn't ask whether the restriction is narrowly tailored to the interest. See id. at 566. These are all things the Supreme Court told us - in no uncertain terms - we must consider; the majority opinion doesn't even mention them.

Process matters. The Supreme Court didn't set out the Central Hudson test for its health. It devised the test because it saw lower courts were giving the First Amendment short shrift when confronted with commercial speech. See Central Hudson, 447 U.S. at 561-62, 567-68. The Central Hudson test was an attempt to constrain lower courts' discretion, to focus judges' thinking [*1521] on the important issues - how strong the state interest is, how broad the regulation is, whether a narrower regulation would work just as well. If the Court wanted to leave these matters to judges' gut feelings, to nifty lines about "the difference between fun and profit," 971 F.2d at 1401, it could have done so with much less effort.

Maybe applying the test would have convinced the majority to change its mind; maybe going through the factors would have shown that its rule was too broad, or the reasons for protecting White's "identity" too tenuous. Maybe not. But we shouldn't thumb our nose at the Supreme Court by just refusing to apply its test.

VII

For better or worse, we are the Court of Appeals for the Hollywood Circuit. Millions of people toil in the shadow of the law we make, and much of their livelihood is made possible by the existence of intellectual property rights. But much of their livelihood - and much of the vibrancy of our culture - also depends on the existence of other intangible rights: The right to draw ideas from a rich and varied public domain, and the right to mock, for profit as well as fun, the cultural icons of our time.

In the name of avoiding the "evisceration" of a celebrity's rights in her image, the majority diminishes the rights of copyright holders and the public at large. In the name of fostering creativity, the majority suppresses it. Vanna White and those like her have been given something they never had before, and they've been given it at our expense. I cannot agree.

## LA *ADVERSE POSSESSION*

G. SCOTT WALLING et al., Respondents, v. PAUL F. PRZYBYLO et al., Appellants. Court of Appeals of New York 7 N.Y.3d 228; 851 N.E.2d 1167; 818 N.Y.S.2d 816, June 13, 2006, Decided

OPINION BY: SMITH

This appeal arises from an action to quiet title by adverse possession. Because actual knowledge that another person is the title owner does not, in and of itself, defeat a claim of right by an adverse possessor, we affirm the order of the Appellate Division awarding summary judgment to plaintiffs.

Plaintiffs and defendants are owners of adjoining residential lots, 22 and 23, located in the Town of

Queensbury, County of Warren, New York. The disputed portion of the land is on the northern border of lot 23.

In January 1986, plaintiffs, the Wallings, purchased lot 22 on Butternut Hill Drive. In 1989, the Przybylos purchased lot 23. Both lots were unimproved land on which the parties built homes and swimming pools. On lot 22, the plaintiffs also built a small shed. Even though the defendants purchased their land in 1989, they did not construct their residence until 1991 and did not obtain a certificate of occupancy and move in until May 1994.

In May 1987, plaintiffs bulldozed and deposited fill and topsoil on defendants' northerly side yard, including the disputed parcel, dug a trench and installed PVC pipe for the purpose of carrying water from plaintiffs' eaves and downspouts to and [*231] under the disputed parcel, ultimately discharging the water in and over the disputed parcel. Also prior to defendants' arrival, plaintiffs constructed an underground dog wire fence to enclose their dog and continuously mowed, graded, raked, planted, and watered the grassy area in dispute. Also, on this portion of the land, the plaintiff installed 69 feet of four-inch PVC pipe in such a way that all of the pipe ran underground but finally surfaced within a "swale." Defendants admit that the lawn was in part cultivated before they moved in. In 1992, plaintiffs dug a hole near the northwesterly corner of the grassy part of the disputed territory and placed in it a post approximately 10 feet long on which they affixed a birdhouse. Since 1992, the post and birdhouse have remained in place.

In 2004, defendants had the land surveyed and discovered that they had title to the disputed portion of the land. Upon learning of this, plaintiffs brought an action to quiet title. On September 16, 2004, the Warren County Court granted plaintiffs' motion for summary judgment quieting title to the land. The court stated:

"Based on the facts of this case, it is clear that plaintiffs, as adverse users, 69] entered upon the disputed parcel of property in 1986 under the misapprehension that the parcel

was part of their land. Although not conceded by the defendants, it appears that each party was mutually mistaken as to the true location of the boundary line. Plaintiffs cultivated the parcel by having various excavation work performed on said property, by having topsoil installed and by establishing and maintaining a lawn on a significant portion of the dispute[d] parcel, a use consistent with the nature and character of the parcel. Surprisingly, defendants do not allege to have ever mowed the disputed parcel of property at any time."

On December 15, 2004, after a motion to renew, the motion court modified its decision by denying summary judgment to the plaintiffs. Based upon an affidavit by the previous owner of lot 22, and the 1986 survey of plaintiffs' property, the motion court found that there were triable issues of fact as to whether plaintiffs had actual knowledge of the true owners prior to making improvements on the land. The Appellate Division modified the order of County Court by reversing the denial of summary judgment to the plaintiffs and granting that motion. The Appellate [*232] Division determined: "In the absence of an overt acknowledgment, our courts have recognized since Humbert v Trinity Church [24 Wend 587 (1840)], that an adverse possessor's claim of right or ownership will not be defeated by mere knowledge that another holds legal title" (24 AD3d 1, 4, 804 NYS2d 435 [3d Dept 2005] [citation omitted]).

Adverse possession must be proven by clear and convincing evidence (Ray v Beacon Hudson Mtn. Corp., 88 NY2d 154, 159, 666 NE2d 532, 643 NYS2d 939 [1996]). "Where there has been an actual continued occupation of premises under a claim of title, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely" (RPAPL 521).

To establish a claim of adverse possession, the following five elements must be proved: Possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required

period (Belotti v Bickhardt, 228 NY 296, 302, 127 NE 239 [1920]; see also Van Valkenburgh v Lutz, 304 NY 95, 99, 106 NE2d 28 [1952]; Spiegel v Ferraro, 73 NY2d 622, 624, 541 NE2d 15, 543 NYS2d 15 [1989]; Ray v Beacon Hudson Mountain Corp., 88 NY2d at 159). Here the required period is at least 10 years (see Ray at 159).

Plaintiffs possessed the disputed parcel of land as early as 1986 in an open and notorious manner, hostile to the interests of the title owners and continuously for 20 years, 10 of which occurred after defendants moved into their residence. "The ultimate element in the rise of a title through adverse possession is the acquiescence of the real owner in the exercise of an obvious adverse or hostile ownership through the statutory period" (see Monnot v Murphy, 207 NY 240, 245, 100 NE 742 [1913]). It was not until April 21, 2004, close to 10 years after moving into the house and almost 15 years after purchasing the property, that defendants sought to assert their rights over the disputed parcel. The failure to assert their rights in a timely manner prevents defendants from prevailing on this appeal.

Defendants argue that there is no claim of right when the adverse possessor has actual knowledge of the true owner at 70] the time of possession. However, longstanding decisional law does not support this position. The adverse possessor must act under claim of right (see Van Valkenburgh). By definition, a claim of right is adverse to the title owner and also in opposition to the rights of the true owner. Conduct will prevail over knowledge, particularly when the true owners have acquiesced in the [*233] exercise of ownership rights by the adverse possessors (see Monnot v Murphy, supra). The fact that adverse possession will defeat a deed even if the adverse possessor has knowledge of the deed is not new (see Humbert v Rector Churchwardens & Vestrymen of Trinity Church, 24 Wend 587, 604 [1840] ["Possession by the defendant with a claim of title for twenty years, can no more be answered by averring that he knew he was wrong, than could the bar of two years, in slander, by the known

falsehood of the libel for which it is prosecuted"]). The issue is "actual occupation," not subjective knowledge (see id. [emphasis omitted]).

"Adverse possession, although not a favored method of procuring title, is a recognized one. It is a necessary means of clearing disputed titles and the courts adopt it and enforce it, because, when adverse possession is carefully and fully proven, it is a means of settling disputed titles and this is desirable" (Belotti v Bickhardt, 228 NY at 308; see generally Hindley v Manhattan Ry. Co., 185 NY 335, 355-356, 78 NE 276 [1906]).

The facts of Van Valkenburgh v Lutz (304 NY at 99-100) are distinguishable. In Van Valkenburgh, defendant admitted that he was aware of the rightful owner at the time that he built his shed on the disputed property (see 304 NY 95, 99 [1952]). Defendants point to this and other language in Van Valkenburgh that may seem inconsistent with our holding here. We do not, however, read Van Valkenburgh as contradicting the principle, well established since the nineteenth century, that an adverse possessor's actual knowledge of the true owner is not fatal to an adverse possession claim. The Van Valkenburgh court mentioned several bases for its holding, and any perhaps mistaken dictum in that case did not change the law as Humbert, Monnot and other cases previously stated it.

The evidence in this case was sufficient to establish title by adverse possession and to grant summary judgment to plaintiffs.

Accordingly, the order of the Appellate Division should be affirmed, with costs. The certified question should not be answered upon the ground that it is unnecessary.

## C. LA PROTECCIÓN DE LAS COSAS MEDIANTE ACCIONES DELICTUALES

### EL ENTUERTO DE *NUISANCE*

ESTANCIAS DALLAS CORPORATION, Appellant, v. T. R. SCHULTZ et ux., Appellees. Court of

Civil Appeals of Texas, Ninth District, Beaumont 500 S.W.2d 217, August 30, 1973
OPINION BY: STEPHENSON

[*218] This is an appeal from an order of the trial court granting a permanent injunction. Trial was by jury and judgment was rendered upon the jury verdict. The parties will be referred to here as they were in the trial court.

Plaintiffs, Thad Schultz and wife, brought this suit asking that defendant, Estancias Dallas Corporation, be permanently enjoined from operating the air conditioning equipment and tower on the property next to plaintiffs' residence. The jury found: that the noise emitted solely from defendant's air conditioning equipment constitutes a nuisance; that the nuisance began May 1, 1969; that it is permanent; that the nuisance has been continuous since it began; that Mrs. Schultz has been damaged $9000 and Thad Schultz $1000, considering material personal discomfort, inconvenience, annoyance and impairment of health as the elements of damages. The jury failed to find that the nuisance proximately caused material personal discomfort, inconvenience, annoyance and impairment of health to either plaintiff. The jury also failed to find that there was any unreasonable delay by plaintiffs in calling the nuisance to the attention of the defendant.

Defendant's first two points of error, briefed together, are that the trial court erred in granting the injunction because plaintiffs failed to secure a jury finding that the nuisance in question was a proximate cause of their alleged discomfort and because the trial court failed to balance the equities in its favor.

[*219] We proceed to consider first the matter as to balancing the equities. Even though this matter has arisen many times, we have found little in-depth writing on the subject. The case cited most frequently in this state is Storey v. Central Hide & Rendering Co., 148 Tex. 509, 226 S.W.2d 615 (1950). The rule of law was clearly established in this case that even though a jury finds facts constituting a nuisance, it was held that there should be a balancing of

equities in order to determine if an injunction should be granted. The Supreme Court then stated certain guidelines for the trial courts to follow in making such determinations by quoting as follows from 31 Tex.Jur. § 35 Nuisances:

"'According to the doctrine of "comparative injury" or "balancing of equities" the court will consider the injury which may result to the defendant and the public by granting the injunction as well as the injury to be sustained by the complainant if the writ be denied. If the court finds that the injury to the complainant is slight in comparison to the injury caused the defendant and the public by enjoining the nuisance, relief will ordinarily be refused. It has been pointed out that the cases in which a nuisance is permitted to exist under this doctrine are based on the stern rule of necessity rather than on the right of the author of the nuisance to work a hurt, or injury to his neighbor. The necessity of others may compel the injured party to seek relief by way of an action at law for damages rather than by a suit in equity to abate the nuisance.'

"'"Some one must suffer these inconveniences rather than that the public interest should suffer. * * * These conflicting interests call for a solution of the question by the application of the broad principles of right and justice, leaving the individual to his remedy by compensation and maintaining the public interests intact; this works hardships on the individual, but they are incident to civilization with its physical developments, demanding more and more the means of rapid transportation of persons and property.'"

"'On the other hand, an injunction may issue where the injury to the opposing party and the public is slight or disproportionate to the injury suffered by the complainant.'" (226 S.W.2d at 618-619)

We have found application of the doctrine of balancing the equities in the cases which follow.

Lee v. Bowles, 397 S.W.2d 923, 927 (Tex.Civ.App., San Antonio, 1965, no writ), wherein the jury found the operation of a race track to be a nuisance but the trial judge

balanced the equities and denied the injunction. The court of civil appeals affirmed the judgment with this statement:

"The evidence in this case justified a finding by the trial court that the public generally would benefit from the operation of this track, both from a standpoint of recreational value and as an economic asset. Further, there was no showing that the proposed location was unsuitable."

Schiller v. Raley, 405 S.W.2d 446, 447 (Tex.Civ.App., Waco, 1966, no writ), wherein the trial court enjoined the operation of a cattle feed lot which the jury had found to be a nuisance. The court of civil appeals reversed and remanded the case with this statement:

"There is evidence that the operation is 'essential to the meat supply of the city', and 'someone must do it'; that it is a useful and necessary business."

Garland Grain Co. v. D-C Home Owners Improve. Ass'n, 393 S.W.2d 635, 643 (Tex.Civ.App., Tyler, 1965, error ref. n.r.e.), wherein the trial court granted the injunction to abate the operation of cattle feeding pens as a nuisance. The court of [*220] civil appeals reversed and rendered the case, balancing the equities in favor of defendants, with this statement:

"In view of the fact that the question of health is not involved and that defendants' business is located in a rural area where many of the plaintiffs' cattle, to some extent at least, causes obnoxious odor and in view of the fact that there is no other place in this area of the state where such lawful business could be maintained without visiting the same burden on other people and in view of the fact that the cessation of defendants' business would result in harm to the public as well as defendants, we have concluded that the trial court was in error in finding that the equities were balanced in favor of the plaintiffs."

Texas Lime Company v. Hindman, 300 S.W.2d 112, 123 [Tex.Civ.App., Waco, 1957, affirmed 157 Tex. 592, 305 S.W.2d 947 (1957)], wherein the trial court enjoined the operation of a lime plant found to be a nuisance. The court

of civil appeals reversed and remanded the case with this statement:

"We are of the further view that since the lime plant owned by the Limestone Products Company and operated by Texas Lime Company is a lawful, useful and necessary business, and that it does and has contributed to the welfare and prosperity of the community in which it is located, as well as to the health and welfare of the people of the State of Texas, in that useful and necessary products are being produced, that considering the time the plant was located and the conditions surrounding, and all the facts and circumstances surrounding at the time of its location, that the granting of an injunction as requested by the appellees would be unjust, improper, inequitable and would result in an unbalancing of the equities in favor of a few individuals as against the public at large."

Fargason v. Economy Furniture, Inc., 356 S.W.2d 212, 215 (Tex.Civ.App., Austin, 1962, error ref. n.r.e.), wherein the jury found the operation of an incinerator in connection with a furniture plant to be a nuisance, but the trial court refused the injunction. The court of civil appeals affirmed the judgment, holding that the trial court did not abuse its discretion and stating:

"The abatement of a lawful business is a harsh remedy and there should be a balancing of equities by the Trial Court in order to determine if an injunction should be granted even though the jury found it to be a nuisance."

Lamb v. Kinslow, 256 S.W.2d 903 (Tex.Civ.App., Waco, 1953, error ref. n.r.e.), wherein the trial court granted an injunction against the burning of cotton burrs in connection with defendant's cotton gin. The jury found such burning to be a nuisance. The court of civil appeals affirmed the judgment and held it was proper for the trial court to balance the equities even though that question was raised for the first time on motion for judgment. The appellate court refused to hold that the trial court abused its discretion in not balancing the equities in favor of defendants.

Hill v. Villarreal, 383 S.W.2d 463, 465 (Tex.Civ.App., San Antonio, 1964, error ref. n.r.e.), wherein the trial court refused an injunction against a rendering plant even though the jury found the operation to be a nuisance. The court of civil appeals affirmed, holding the trial court did not abuse its discretion after balancing the equities. Among other factual statements, the following appears in the opinion:

"The issue presented in this case is thus one involving the conflicting rights of the parties in the respective uses of their properties. In resolving this issue favorably to appellees after balancing the equities, the trial court found: appellees are engaged in an essential and necessary business which promotes the general welfare and good health of the citizens of San Antonio; a rendering [*221] plant helps to conserve what would otherwise be wasted and helps to afford an efficient and economical means of disposing of dead animals, scraps and offal . . . ."

Georg v. Animal Defense League, 231 S.W.2d 807, 809-810 (Tex.Civ.App., San Antonio, 1950, error ref. n.r.e.), wherein the trial court denied an injunction sought to close an animal shelter for dogs although the jury found the operation to be a nuisance. The court of civil appeals affirmed, approving the balancing of the equities in favor of defendants, saying:

"In view of the public interest, it is the general rule that a group of private individuals are not entitled to an injunction restraining the operation of an establishment contributing to the common good, but such parties are relegated to their remedy at law in the form of an action for damages. A suit for injunction will lie only in the unusual case where there is a disproportion of equities, such as where an offensive although necessary undertaking is carried on in an unsuitable place when it could be as easily and economically carried on in some location where it would give no offense."

There is no point of error complaining of the definition of the term "nuisance" given by the trial court to the jury. That definition is as follows:

"You are instructed that by the term 'nuisance' as used in this Charge is meant any condition, brought about by one party in the use of his property, so unusual and excessive that it necessarily causes injury or damage or harm or inconvenience to another party in the use and enjoyment of his property, substantially, materially and unreasonably interfering with the latter's comfort and proper use and enjoyment of his property, taking into consideration the nature and use of the property of both parties and the character of community in which they are situated, and which condition would be substantially offensive, discomforting and annoying to persons of ordinary sensibilities, tastes and habits living in the locality where the premises are situated."

There is no specific mention in the judgment that the trial court balanced the equities. However, that question was raised by the pleadings, evidence was heard, and there is an implied finding that the trial court balanced the equities in favor of plaintiffs by entering the judgment granting the injunction. We do not find that the trial court abused its discretion in balancing the equities in favor of plaintiffs.

It is significant that the Supreme Court of Texas in the Storey case, supra, placed great emphasis upon public interest. Also, in all of the other cases cited above, the appellate courts in their opinions refer to the benefit to the public generally in permitting a nuisance to continue through the balancing of equities. We find little or no testimony in the record before us reflecting benefit to the public generally. There is no evidence that there is a shortage of apartments in the City of Houston and that the public would suffer by having no place to live.

Our record shows that this apartment complex was completed about March or April of 1969 with about 155 rentable apartments in eight buildings. The air conditioning unit complained of here served the entire complex. This unit is located at the back side of defendant's property, about five and one-half feet from plaintiffs' property line, about fifty-five feet from plaintiffs' back door, and about

seventy feet from plaintiffs' bedroom. According to much of the testimony, the unit sounds like a jet airplane or helicopter. The plaintiffs testified: That this was a quiet neighborhood before these apartments were constructed. That they can no longer do any entertaining in their backyard because of the noise. That they cannot carry on a normal conversation in their home with all their doors and windows closed. [*222] That the noise interferes with their sleep at night. Several of the neighbors gave similar testimony.

Plaintiffs testified that the value of their land before was $25,000 and $10,000 after the noise began. One of the neighbors, a real estate broker, placed the value at $25,000 before and $12,500 after. A witness who qualified as an expert metallurgical consultant testified as to the results of tests made at various points as to the sound factors in decibels before and after defendant made changes in an effort to reduce the noise.

A witness testified: That he was the original owner of the apartments. That it cost about $80,000 to construct this air conditioning system and that separate units for the eight buildings would have cost $40,000 more. That it would now cost $150,000 to $200,000 to change to that system. That these apartments could not be rented without air conditioning.

Applying the rules of law set forth above in the quotation from the Storey case, supra (226 S.W.2d at 619), the nuisance in this case will not be permitted to exist '"based on the stern rule of necessity rather than on the right of the author of the nuisance to work a hurt, or injury to his neighbor.'" There is not evidence before us to indicate the '"necessity of others . . . [compels] the injured party to seek relief by way of an action at law for damages rather than by a suit in equity to abate the nuisance.'" Furthermore, although plaintiffs had a count in their pleading seeking damages, in response to a motion made by defendant, the court forced plaintiffs to elect at the close of their evidence. Thus, defendant's own trial tactics prevented the

development of a full record upon which we could predicate the doctrine of balancing the equities.

Plaintiffs were not required to recover damages for a temporary nuisance, that is, for the time when the nuisance began until the date of the trial, in order to secure a permanent injunction. They were entitled to such injunction based upon the affirmative answers given by the jury as set out above. The failure on the part of the jury to give an affirmative answer to the proximate cause issues related to the damage issues or to a temporary nuisance and did not alter the situation. Columbian Carbon Co. v. Tholen, 199 S.W.2d 825 (Tex.Civ.App., Galveston, 1947, error ref.), and King v. Miller, 280 S.W.2d 331, 333 (Tex.Civ.App., Eastland, 1955, error ref. n.r.e.).

Defendant's two remaining points of error pertain to objections made to Special Issue No. 1 which reads as follows:

"Do you find from a preponderance of the evidence that the noise emitted solely from the Defendant's air conditioning equipment constitutes a nuisance, as that term is herein defined?"

The objections are that the court used the word "noise" instead of "sound" and also used the word "equipment" instead of specifying some particular part of the air conditioner. These points of error are overruled.

The use of the word "noise" instead of "sound" did not constitute a comment on the weight of the evidence because it was uncontroverted that "noise" came from the operation of this air conditioning unit. Every witness conceded this unit made a "noise" and the attorneys for all parties used that term in their interrogation of the witnesses. We consider the use of the word "equipment" as not being too broad in connection with the special issue. The jury could not have been confused or misled as none of the witnesses were that specific in their testimony as to the source of the sound.

Affirmed.

OSCAR H. BOOMER et al., Appellants, v.
ATLANTIC CEMENT COMPANY, INC., Respondent.
Court of Appeals of New York 26 N.Y.2d 219; 257 N.E.2d 870; 309 N.Y.S.2d 312, March 4, 1970, Decided
OPINION BY: BERGAN

[*222] Defendant operates a large cement plant near Albany. These are actions for injunction and damages by neighboring land owners alleging injury to property from dirt, smoke and vibration emanating from the plant. A nuisance has been found after trial, temporary damages have been allowed; but an injunction has been denied.

The public concern with air pollution arising from many sources in industry and in transportation is currently accorded ever wider recognition accompanied by a growing sense of responsibility in State and Federal Governments to control it. Cement plants are obvious sources of air pollution in the neighborhoods where they operate.

But there is now before the court private litigation in which individual property owners have sought specific relief from a single plant operation. The threshold question raised by the division of view on this appeal is whether the court should resolve the litigation between the parties now before it as equitably as seems possible; or whether, seeking promotion of the general public welfare, it should channel private litigation into broad public objectives.

A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.

Effective control of air pollution is a problem presently far from solution even with the full public and financial

powers of government. In large measure adequate technical procedures are yet to be developed and some that appear possible may be economically impracticable.

[*223] It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health. It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.

A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant — one of many — in the Hudson River valley.

The cement making operations of defendant have been found by the court at Special Term to have damaged the nearby properties of plaintiffs in these two actions. That court, as it has been noted, accordingly found defendant maintained a nuisance and this has been affirmed at the Appellate Division. The total damage to plaintiffs' properties is, however, relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs seek.

The ground for the denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction. This theory cannot, however, be sustained without overruling a doctrine which has been consistently reaffirmed in several leading cases in this court and which has never been disavowed here, namely that where a

nuisance has been found and where there has been any substantial damage shown by the party complaining an injunction will be granted.

The rule in New York has been that such a nuisance will be enjoined although marked disparity be shown in economic consequence between the effect of the injunction and the effect of the nuisance.

[*224] The problem of disparity in economic consequence was sharply in focus in Whalen v. Union Bag & Paper Co. (208 N. Y. 1). A pulp mill entailing an investment of more than a million dollars polluted a stream in which plaintiff, who owned a farm, was "a lower riparian owner". The economic loss to plaintiff from this pollution was small. This court, reversing the Appellate Division, reinstated the injunction granted by the Special Term against the argument of the mill owner that in view of "the slight advantage to plaintiff and the great loss that will be inflicted on defendant" an injunction should not be granted (p. 2). "Such a balancing of injuries cannot be justified by the circumstances of this case", Judge Werner noted (p. 4). He continued: "Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction" (p. 5).

Thus the unconditional injunction granted at Special Term was reinstated. The rule laid down in that case, then, is that whenever the damage resulting from a nuisance is found not "unsubstantial", viz., $ 100 a year, injunction would follow. This states a rule that had been followed in this court with marked consistency ( McCarty v. Natural Carbonic Gas Co., 189 N. Y. 40; Strobel v. Kerr Salt Co., 164 N. Y. 303; Campbell v. Seaman, 63 N. Y. 568).

There are cases where injunction has been denied. McCann v. Chasm Power Co. (211 N. Y. 301) is one of them. There, however, the damage shown by plaintiffs was not only unsubstantial, it was non-existent. Plaintiffs owned a rocky bank of the stream in which defendant had raised the level of the water. This had no economic or other adverse

consequence to plaintiffs, and thus injunctive relief was denied. Similar is the basis for denial of injunction in Forstmann v. Joray Holding Co. (244 N. Y. 22) where no benefit to plaintiffs could be seen from the injunction sought (p. 32). Thus if, within Whalen v. Union Bag & Paper Co. (supra) which authoritatively states the rule in New York, the damage to plaintiffs in these present cases from defendant's cement plant is "not unsubstantial", an injunction should follow.

Although the court at Special Term and the Appellate Division held that injunction should be denied, it was found that plaintiffs [*225] had been damaged in various specific amounts up to the time of the trial and damages to the respective plaintiffs were awarded for those amounts. The effect of this was, injunction having been denied, plaintiffs could maintain successive actions at law for damages thereafter as further damage was incurred.

The court at Special Term also found the amount of permanent damage attributable to each plaintiff, for the guidance of the parties in the event both sides stipulated to the payment and acceptance of such permanent damage as a settlement of all the controversies among the parties. The total of permanent damages to all plaintiffs thus found was $ 185,000. This basis of adjustment has not resulted in any stipulation by the parties.

This result at Special Term and at the Appellate Division is a departure from a rule that has become settled; but to follow the rule literally in these cases would be to close down the plant at once. This court is fully agreed to avoid that immediately drastic remedy; the difference in view is how best to avoid it. Respondent's investment in the plant is in excess of $ 45,000,000. There are over 300 people employed there.

One alternative is to grant the injunction but postpone its effect to a specified future date to give opportunity for technical advances to permit defendant to eliminate the nuisance; another is to grant the injunction conditioned on the payment of permanent damages to plaintiffs which

would compensate them for the total economic loss to their property present and future caused by defendant's operations. For reasons which will be developed the court chooses the latter alternative.

If the injunction were to be granted unless within a short period — e.g., 18 months — the nuisance be abated by improved methods, there would be no assurance that any significant technical improvement would occur.

The parties could settle this private litigation at any time if defendant paid enough money and the imminent threat of closing the plant would build up the pressure on defendant. If there were no improved techniques found, there would inevitably be applications to the court at Special Term for extensions of time to perform on showing of good faith efforts to find such techniques.

Moreover, techniques to eliminate dust and other annoying by-products of cement making are unlikely to be developed by [*226] any research the defendant can undertake within any short period, but will depend on the total resources of the cement industry Nationwide and throughout the world. The problem is universal wherever cement is made.

For obvious reasons the rate of the research is beyond control of defendant. If at the end of 18 months the whole industry has not found a technical solution a court would be hard put to close down this one cement plant if due regard be given to equitable principles.

On the other hand, to grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties. All of the attributions of economic loss to the properties on which plaintiffs' complaints are based will have been redressed.

The nuisance complained of by these plaintiffs may have other public or private consequences, but these particular parties are the only ones who have sought remedies and the judgment proposed will fully redress them. The limitation of relief granted is a limitation only within the four corners of these actions and does not foreclose public health or

other public agencies from seeking proper relief in a proper court.

It seems reasonable to think that the risk of being required to pay permanent damages to injured property owners by cement plant owners would itself be a reasonable effective spur to research for improved techniques to minimize nuisance.

The power of the court to condition on equitable grounds the continuance of an injunction on the payment of permanent damages seems undoubted. (See, e.g., the alternatives considered in McCarty v. Natural Carbonic Gas Co., supra, as well as Strobel v. Kerr Salt Co., supra.)

The damage base here suggested is consistent with the general rule in those nuisance cases where damages are allowed. "Where a nuisance is of such a permanent and unabatable character that a single recovery can be had, including the whole damage past and future resulting therefrom, there can be but one recovery" (66 C. J. S., Nuisances, § 140, p. 947). It has been said that permanent damages are allowed where the loss recoverable would obviously be small as compared with the cost of removal of the nuisance ( Kentucky-Ohio Gas Co. v. Bowling, 264 Ky. 470, 477).

[*227] The present cases and the remedy here proposed are in a number of other respects rather similar to Northern Indiana Public Serv. Co. v. Vesey (210 Ind. 338) decided by the Supreme Court of Indiana. The gases, odors, ammonia and smoke from the Northern Indiana company's gas plant damaged the nearby Vesey greenhouse operation. An injunction and damages were sought, but an injunction was denied and the relief granted was limited to permanent damages "present, past, and future" (p. 371).

Denial of injunction was grounded on a public interest in the operation of the gas plant and on the court's conclusion "that less injury would be occasioned by requiring the appellant [Public Service] to pay the appellee [Vesey] all damages suffered by it * * * than by enjoining the

operation of the gas plant; and that the maintenance and operation of the gas plant should not be enjoined" (p. 349).

The Indiana Supreme Court opinion continued: "When the trial court refused injunctive relief to the appellee upon the ground of public interest in the continuance of the gas plant, it properly retained jurisdiction of the case and awarded full compensation to the appellee. This is upon the general equitable principle that equity will give full relief in one action and prevent a multiplicity of suits" (pp. 353-354).

It was held that in this type of continuing and recurrent nuisance permanent damages were appropriate. See, also, City of Amarillo v. Ware (120 Tex. 456) where recurring overflows from a system of storm sewers were treated as the kind of nuisance for which permanent depreciation of value of affected property would be recoverable.

There is some parallel to the conditioning of an injunction on the payment of permanent damages in the noted "elevated railway cases" ( Pappenheim v. Metropolitan El. Ry. Co., 128 N. Y. 436, and others which followed). Decisions in these cases were based on the finding that the railways created a nuisance as to adjacent property owners, but in lieu of enjoining their operation, the court allowed permanent damages.

Judge Finch, reviewing these cases in Ferguson v. Village of Hamburg (272 N. Y. 234, 239-240), said: "The courts decided that the plaintiffs had a valuable right which was being [*228] impaired, but did not grant an absolute injunction or require the railway companies to resort to separate condemnation proceedings. Instead they held that a court of equity could ascertain the damages and grant an injunction which was not to be effective unless the defendant failed to pay the amount fixed as damages for the past and permanent injury inflicted." (See, also, Lynch v. Metropolitan El. Ry. Co., 129 N. Y. 274; Van Allen v. New York El. R. R. Co., 144 N. Y. 174; Cox v. City of New York, 265 N. Y. 411, and similarly, Westphal v. City of New York, 177 N. Y. 140.)

Thus it seems fair to both sides to grant permanent damages to plaintiffs which will terminate this private litigation. The theory of damage is the "servitude on land" of plaintiffs imposed by defendant's nuisance. (See United States v. Causby, 328 U.S. 256, 261, 262, 267, where the term "servitude" addressed to the land was used by Justice Douglas relating to the effect of airplane noise on property near an airport.)

The judgment, by allowance of permanent damages imposing a servitude on land, which is the basis of the actions, would preclude future recovery by plaintiffs or their grantees (see Northern Indiana Public Serv. Co. v. Vesey, supra, p. 351).

This should be placed beyond debate by a provision of the judgment that the payment by defendant and the acceptance by plaintiffs of permanent damages found by the court shall be in compensation for a servitude on the land.

Although the Trial Term has found permanent damages as a possible basis of settlement of the litigation, on remission the court should be entirely free to re-examine this subject. It may again find the permanent damage already found; or make new findings.

The orders should be reversed, without costs, and the cases remitted to Supreme Court, Albany County to grant an injunction which shall be vacated upon payment by defendant of such amounts of permanent damage to the respective plaintiffs as shall for this purpose be determined by the court.

DISSENT BY: JASEN

Jasen, J. (dissenting). I agree with the majority that a reversal is required here, but I do not subscribe to the newly enunciated doctrine of assessment of permanent damages, in [*229] lieu of an injunction, where substantial property rights have been impaired by the creation of a nuisance.

It has long been the rule in this State, as the majority acknowledges, that a nuisance which results in substantial continuing damage to neighbors must be enjoined. ( Whalen v. Union Bag & Paper Co., 208 N. Y. 1; Campbell

v. Seaman, 63 N. Y. 568; see, also, Kennedy v. Moog Servocontrols, 21 N Y 2d 966.) To now change the rule to permit the cement company to continue polluting the air indefinitely upon the payment of permanent damages is, in my opinion, compounding the magnitude of a very serious problem in our State and Nation today.

In recognition of this problem, the Legislature of this State has enacted the Air Pollution Control Act (Public Health Law, §§ 1264-1299-m) declaring that it is the State policy to require the use of all available and reasonable methods to prevent and control air pollution (Public Health Law, § 1265).

The harmful nature and widespread occurrence of air pollution have been extensively documented. Congressional hearings have revealed that air pollution causes substantial property damage, as well as being a contributing factor to a rising incidence of lung cancer, emphysema, bronchitis and asthma.

The specific problem faced here is known as particulate contamination because of the fine dust particles emanating from defendant's cement plant. The particular type of nuisance is not new, having appeared in many cases for at least the past 60 years. (See Hulbert v. California Portland Cement Co., 161 Cal. 239 [1911].) It is interesting to note that cement production has recently been identified as a significant source of particulate contamination in the Hudson Valley. This type of pollution, wherein very small particles escape and stay in the atmosphere, has been denominated as the type of air pollution [*230] which produces the greatest hazard to human health. We have thus a nuisance which not only is damaging to the plaintiffs, but also is decidedly harmful to the general public.

I see grave dangers in overruling our long-established rule of granting an injunction where a nuisance results in substantial continuing damage. In permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a continuing wrong. It is the same as saying to the cement company, you

may continue to do harm to your neighbors so long as you pay a fee for it. Furthermore, once such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing air pollution of an area without abatement.

It is true that some courts have sanctioned the remedy here proposed by the majority in a number of cases, but none of the authorities relied upon by the majority are analogous to the situation before us. In those cases, the courts, in denying an injunction and awarding money damages, grounded their decision on a showing that the use to which the property was intended to be put was primarily for the public benefit. Here, on the other hand, it is clearly established that the cement company is creating a continuing air pollution nuisance primarily for its own private interest with no public benefit.

This kind of inverse condemnation ( Ferguson v. Village of Hamburg, 272 N. Y. 234 may not be invoked by a private person or corporation for private gain or advantage. Inverse condemnation should only be permitted when the public is primarily served in the taking or impairment of property. ( Matter of New York City Housing Auth. v. Muller, 270 N. Y. 333, 343; Pocantico Water Works Co. v. Bird, 130 N. Y. 249, 258.) The [*231] promotion of the interests of the polluting cement company has, in my opinion, no public use or benefit.

Nor is it constitutionally permissible to impose servitude on land, without consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use. (See Fifth Ave. Coach Lines v. City of New York, 11 N Y 2d 342, 347; Walker v. City of Hutchinson, 352 U.S. 112.) This is made clear by the State Constitution (art. I, § 7, subd. [a]) which provides that "[private] property shall not be taken for public use without just compensation" (emphasis added). It is, of course, significant that the section makes no mention of taking for a private use.

In sum, then, by constitutional mandate as well as by judicial pronouncement, the permanent impairment of private property for private purposes is not authorized in the absence of clearly demonstrated public benefit and use.

I would enjoin the defendant cement company from continuing the discharge of dust particles upon its neighbors' properties unless, within 18 months, the cement company abated this nuisance.

It is not my intention to cause the removal of the cement plant from the Albany area, but to recognize the urgency of the problem stemming from this stationary source of air pollution, and to allow the company a specified period of time to develop a means to alleviate this nuisance.

I am aware that the trial court found that the most modern dust control devices available have been installed in defendant's plant, but, I submit, this does not mean that better and more effective dust control devices could not be developed within the time allowed to abate the pollution.

Moreover, I believe it is incumbent upon the defendant to develop such devices, since the cement company, at the time the plant commenced production (1962), was well aware of the plaintiffs' presence in the area, as well as the probable consequences of its contemplated operation. Yet, it still chose to build and operate the plant at this site.

[*232] In a day when there is a growing concern for clean air, highly developed industry should not expect acquiescence by the courts, but should, instead, plan its operations to eliminate contamination of our air and damage to its neighbors.

Accordingly, the orders of the Appellate Division, insofar as they denied the injunction, should be reversed, and the actions remitted to Supreme Court, Albany County to grant an injunction to take effect 18 months hence, unless the nuisance is abated by improved techniques prior to said date.

 ¿Es comparable el entuerto de *nuisance* en el common law con la doctrina del abuso del derecho en el derecho civil?

## EL ENTUERTO DE WASTE

 Patricia WOODRICK, Plaintiff-Appellant v. Catherine D. WOOD, ET AL., Defendants-Appellees. Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County 1994 WL 236287, May 26, 1994, Announced

OPINION BY: BLACKMON

This is an appeal from a judgment of the Cuyahoga County Court of Common Pleas denying a request by Patricia Woodrick, plaintiff-appellant, for an injunction prohibiting Catherine Wood, defendant-appellee, from removing a barn that partially rests on a parcel of land in which Woodrick has a remainder interest. Woodrick appeals from the trial court's decision and assigns the following error for our review: "I. The court erred in not restraining an act of waste by the life tenant."

Having reviewed the record and the arguments of the parties, we affirm the decision of the trial court. The apposite facts follow.

Catherine Wood and her [*2] husband, George Wood, owned several parcels of land including parcel number 105. George Wood died in 1987. In his will, he made the following bequests with respect to his property:

"I devise and bequeath to my beloved wife, Catherine Dorothy Wood, a life estate in my marital property located at 6207 Dora Blvd., Independence, Ohio, and all my other real estate.

Upon the death of my wife, Catherine Dorothy Wood, I direct that the property * * * be bequeathed one-half (50%) to my son, Sheridan George Wood, and one-half (50%) to my daughter, Patricia C. Woodrick."

In 1989, Sheridan Wood conveyed his interest in parcel #105 to Catherine Wood.

For over 25 years, a barn has been situated on the land. The barn was initially used as a stable but has not housed any horses for many years. Some of the wood in the structure has begun to rot. The barn is located partially on lot #105 and partially on lot #106. Catherine Wood has a life estate and a 75% remainder interest in Lot #105. Patricia Woodrick has a 25% remainder interest in Lot #105. Lot #106 is owned by Catherine Wood and Sheridan Wood. Patricia Woodrick has no ownership interest in Lot #106.

Catherine Wood and Sheridan [*3] Wood sought to raze the barn located on Lots 105 and 106. Woodrick filed a complaint against Catherine and Sheridan Wood seeking to enjoin them from razing the barn. Woodrick initially claimed that the 1989 conveyance from Sheridan Wood to Catherine Wood was fraudulent and contrary to the wishes of George Wood. Woodrick later dismissed her claims against Sheridan Wood.

After considering the facts as stipulated by the parties, the trial court rendered its decision. The trial court denied the injunction but ordered Catherine Wood to pay Woodrick the sum of $ 3200 (the appraised value of the barn) if the barn was torn down. This appeal followed.

The issue raised by this appeal is whether the holder of a remainder interest in a parcel of land may prohibit the life tenant of such property from destroying structures on the land. Woodrick alleges that the destruction of the barn would amount to waste since the barn has a value of $ 3200. Wood argues that the barn is in a state of disrepair and that the destruction of the barn would enhance the value of the property as residential property. She also claims that, due to changes in local zoning ordinances, the barn could no longer be used [*4] for its original purpose (a horse stable).

An injunction is an available remedy to prevent an act of waste. See Crockett et al. v. Crockett et al. (1853), 2 Ohio St. 180, 186. Consequently, our review of the trial court's decision to deny the injunction requires a mixed standard of review. The trial court's findings of fact must be accepted

as long as they are supported by competent and credible evidence. In the case sub judice, the operative facts were stipulated to by the parties. Therefore, our review is limited to whether the trial court correctly applied the law of waste to the facts. In determining whether the trial court correctly decided that the destruction of the barn would not constitute waste, we must conduct a plenary review of that decision. See Universal Minerals, Inc. v. C.A. Hughes & Co. (1981), 669 F.2d 98, 103.

Waste is defined as an abuse or destructive use of property by one in rightful possession. Blacks' Law Dictionary 5th ed. 1979. Wood was rightfully in possession of the land as a life tenant. R.C. 2103.07 provides that "a tenant in dower in real property who commits or suffers waste thereto will forfeit that part of the property to which such [*5] waste is committed or suffered to the person having the immediate estate in reversion or remainder and will be liable in damages to such person for the waste committed or suffered thereto."

At common law, anything which in any way altered the identity of leased premises was waste, regardless of whether the act happened to be beneficial or detrimental to the remainder interest. However, the common law rule has never been recognized in Ohio. Crockett et al. v. Crockett et al. (1853), 2 Ohio St. 180, 185. The Crockett court found that a widow who inherited a dower interest in her husband's undeveloped land should be able to make reasonable use of the land's timber to pay taxes and other things to her benefit and should not be charged with protecting the property for the mere benefit of the reversioner. Id. In the case sub judice, the life tenant sought to remove the barn in order to improve the value of the property. The preservation of the barn would require the property owner to forego the making of an improvement which would add to the value of the property. The Crockett court held that a life tenant had the right to make beneficial use of the property even though [*6] she would be altering the land in order to do so.

In Bellows Co. v. Covell (1927), 28 Ohio App. 277, 280, the court stated that acts which would technically constitute waste as defined under the common law would not be enjoined when they resulted in improving rather than injuring the property.

For actionable waste, substantial pecuniary damage to the reversion should be required and… the mere alteration of the demised premises which renders them unfit for their former use without decreasing their general value, is not enough. Id. at 281.

Woodrick claims that, since the barn itself has a monetary value of $ 3200, its destruction would diminish the value of the property by $ 3200 and would, therefore, constitute waste. This argument is refuted by the evidence submitted by the Woods which indicates that the removal of the barn would actually increase the value of the property. The trial court recognized the value of the barn by ordering the Woods to pay Woodrick $ 3200 if they destroyed the barn. This order adequately assured that Woodrick would be adequately compensated for the removal of the barn. The removal of the barn would increase the value of the [*7] property in which Woodrick had a remainder interest. The destruction of the barn, though objectionable to Woodrick, does not constitute waste to the property.

Woodrick also argues that the trial court's decision to award her the monetary value of the barn authorizes Wood as life tenant to commit waste as long as a proper price is paid. We find this argument unpersuasive. As discussed above, the removal of the barn does not constitute waste to the property since the value of the property will not be diminished by the barn's destruction. Woodrick presented evidence that the barn itself has value and that she has personal property stored there but has not shown that the presence of the barn on the property adds any value to the property. The relevant inquiry is always whether the contemplated act of the life tenant would result in diminution of the value of the property. The evidence in the record indicates that destroying the barn would increase the

value of the property. Since the act of destroying the barn would not result in diminution of the value of the property, it would not constitute waste. The trial court's decision to award Woodrick the value of the barn was not a payment [*8] to justify waste but was, instead, indicative of the trial court's intent to protect the rights of both parties and to reach a fair resolution of their dispute according to the law. Woodrick's assignment of error is not well taken.
Judgment affirmed.

 ¿La acción de *waste* en el common law, acaso, cumple la misma función que la caución usufructuaria en el derecho civil?

 TWO GUYS FROM HARRISON-N.Y., Inc., Appellant, v. S.F.R. REALTY ASSOCIATES et al., Respondents. Grace Retail Corporation, Additional Defendant on Counterclaims, and Vornado, Inc., Additional Appellant on Counterclaims. Court of Appeals of New York 63 N.Y.2d 396; 472 N.E.2d 315; 482 N.Y.S.2d 465, November 20, 1984, Decided
OPINION BY: COOKE
[*399] The question presented on this appeal is whether a tenant has the right to make substantial changes to the demised premises. Such a right may arise from statute or contract. When, however, the instrument governing the tenancy prohibits such alterations, the tenant may not proceed under either authority.
[*400] The individual respondents are the holders of a reversionary interest in property located in New Hyde Park which is under a long-term land lease that was originally executed by the predecessor in interest to respondent S.F.R. Realty Associates. Initially, an "anchor building" of 100,000 square feet in a shopping center was leased to W.T. Grant Company, which subsequently sold its interest to petitioner in 1976.
At the end of 1981, petitioner exercised an option to close its store. It vacated the premises in early 1982 and began

looking for a suitable subtenant for all or part of the building. It eventually reached an agreement with Grace Realty Corporation, which was to sublease approximately 51% of the floor area for use as a "Channel Home Center" store. To accommodate the sublessee, petitioner made substantial nonstructural changes inside and proposed four exterior changes: (1) extending an existing sign canopy, which would require piercing the roof's waterproofing membrane; (2) adding decorative brick fascia to the I-beams that would support the canopy extension; (3) installing a new ingress/egress door and a related glass front; and (4) adding a loading door at the rear of the building. It is obvious that these constituted substantial structural modifications. When petitioner gave notice of its intent to make these alterations, however, S.F.R. Realty objected and declared that they would violate the terms of the lease. Petitioner commenced this special proceeding, claiming that it had both a statutory and contractual right to make the proposed changes.

The essence of this controversy has its genesis in the law against waste. At common law, a tenant's only right was to make use of property; a right to alter the property did not arise unless the landlord expressly permitted it (see Agate v Lowenbein, 57 NY 604, 607-608). This principle was applied even when the tenant could not economically maintain the property without the change and the alteration would have increased the property's value (see Brokaw v Fairchild, 135 Misc 70, affd no opn 231 App Div 704, affd no opn 256 NY 670). The Legislature long ago acted to ameliorate the harsh effects of this doctrine (L 1937, ch 165), which effort is now codified in RPAPL 803. That [*401] statute sets forth certain conditions under which a tenant for life or for years may alter the property over the objections of any owner of a future interest. In brief, the tenant must establish that a prudent owner would make the same change, which will not reduce the market value of the future interests and does not violate any contract regulating the tenant's conduct. In addition, the tenancy must be

expected to continue for more than five years, and written notice of the intention to make the alteration must be given. Finally, the owner of a future interest may obtain security that the proposed alteration will be completed.

Petitioner asserted two grounds for its right to make the proposed changes to the building. First, it contended that the lease either expressly permitted the changes or was silent on the issue. Paragraph 6(a) authorized petitioner to "make any interior non-structural alterations, additions [*402] and improvements * * * which it may deem necessary or desirable provided Tenant does not thereby weaken the structure of the building" and "provided it does not interfere with the quiet enjoyment of other tenants, [to] remove all or any part of any wall of any building * * * to afford entrance to or connection with improvements on adjoining premises * * *". Petitioner secondly argued that, as a concomitant of its contractual right under Paragraph 12 to sublet or subdivide the premises, it was empowered to make exterior, structural changes.

Neither of the lower courts expressly addressed petitioner's second contention. The trial court concluded that petitioner satisfied the conditions of RPAPL 803 (subd 1) and was entitled to make the proposed exterior alterations. In reaching its determination, the court found the lease to be "silent and nonprohibitive" with respect to the proposed exterior alterations. The Appellate Division unanimously reversed on the reasoning that the express permission to undertake certain alterations granted in Paragraph 6(a) must be interpreted to implicitly prohibit all other alterations. This court now affirms.

Much of petitioner's argument before this court relies on the breadth that it proposes should be accorded to the Legislature's liberalization of the law of waste. This question would be especially pertinent if the controversy were focused on paragraphs a or b of RPAPL 803 (subd 1). Inasmuch as this statutory issue can be resolved on the basis that the lease prohibited the proposed alterations so as to preclude satisfying paragraph c, it is unnecessary to

[*403] decide the scope of the Legislature's amendment of the common law.

RPAPL 803 (subd 1, par c) permits a "proposed alteration or replacement [that] is not in violation of the terms of any agreement or other instrument regulating the conduct of the owner of the estate for life or for years or restricting the land in question". Applying this provision obviously calls for an interpretation of petitioner's contract. Under the present circumstances, this presents a question of law which this court may consider free of the lower courts' determinations (see West, Weir & Bartel v Mary Carter Paint Co., 25 NY2d 535). In construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless (see Corhill Corp. v S.D. Plants, Inc., 9 NY2d 595, 599; Muzak Corp. v Hotel Taft Corp., 1 NY2d 42, 46).

Paragraph 6(a) of the lease was the only provision of that contract discussing alterations to the building. Its title — "Alterations, Walls, Etc." — indicates that it was intended to be a comprehensive treatment of that subject. Having been prepared by petitioner's predecessor in interest, it is construed against the tenant (see 151 West Assoc. v Printsiples Fabric Corp., 61 NY2d 732, 734). Critically, Paragraph 6(a) omitted any reference to exterior structural alterations. The section expressly authorized two types of modifications: interior, nonstructural alterations, and removing walls to permit access to improvements on adjoining premises. In neither case did these authorize making structural changes to afford access between petitioner's premises and the parking lot. The first clearly did not apply to the exterior structural changes at issue here. The latter provision, viewed in context, must be read as concerning alterations to provide direct access from petitioner's building to the portions of the shopping center occupied by other tenants, not to the parking lot.

Thus, it must be determined whether the lease, prepared by the tenant, prohibited the changes proposed by petitioner. In considering this problem, guidance is provided [*404]

by the doctrine of "inclusio unius est exclusio alterius," an applicable maxim when interpreting contracts (see Woodmere Academy v Steinberg, 41 NY2d 746, 750). Under all the circumstances here, the specification of certain permitted activities in Paragraph 6(a) should be read as implicitly prohibiting other alterations.

Petitioner also posits that it was empowered to make external structural changes as a concomitant to its contractual right to sublet or subdivide granted in Paragraph 12 of the lease, relying on a single New York case ( Klein's Rapid Shoe Repair Co. v Sheppardel Realty Co., 136 Misc 332, affd no opn 228 App Div 688) and a number of out-of-State decisions ( Sherwood Med. Inds. v Building Leasing Corp., 527 SW2d 407 [Mo App]; Fair West Bldg. Corp. v Trice Floor Coverings, 394 SW2d 707 [Tex Civ App]; Turman v Safeway Stores, 132 Mont 273; Sparkman v Hardy, 223 Miss 452; Spring St. Realty Co. v Trask, 126 Cal App 765; Mayer v Texas Tire & Rubber Co., 223 SW 874 [Tex Civ App]; Kresge v Maryland Cas. Co., 154 Wis 627). These decisions support petitioner's argument only in the general sense that they recognize a power to make alterations as inherent in the right to sublet and subdivide. Only two, however, involved situations where the tenant was attempting to make structural or permanent changes, especially to an exterior wall (see Turman v Safeway Stores, supra; Spring St. Realty Co. v Trask, supra). In each instance, the courts relied on other lease provisions concerning alterations to justify a right in the tenant to make the challenged substantial modifications.

The sounder approach is to accept petitioner's basic premise — that a right to sublet or subdivide implicitly includes a power to make alterations — but recognize that Paragraph 6(a) was intended to describe the nature and scope of changes that could be made. The foremost feature recommending this analysis is that it would avoid rendering Paragraph 6(a) meaningless. Under petitioner's interpretation, Paragraph 12 gave it a broad power to alter the premises as it deemed necessary for subletting. As a

prohibitive clause, however, Paragraph 6(a) would be meaningless if not given effect here because all the conduct it restricts could be freely pursued under Paragraph 12.

[*405] This court has previously recognized that, generally, a contract which expressly permits an activity will not be construed to prohibit other conduct necessary to carrying out that activity. "[Since] the covenant permits the conduct of the business itself, the conclusion is almost inescapable that it permits whatever is customarily and necessarily incidental thereto. We may not construe the covenant as prohibiting in one subdivision that which it expressly sanctions in another" ( Premium Point Park Assn. v Polar Bar, 306 NY 507, 511). In Polar Bar, a refreshment stand was held to have an incidental right to maintain a parking lot, notwithstanding a restrictive covenant to the contrary, when the stand was located in an area not readily available to pedestrian traffic and 90% of the customers (which could reach 1,000 per day) arrived by car. In contrast, the record here does not demonstrate that petitioner's power to sublet or subdivide 100,000 square feet will be practically defeated if it is not allowed to make structural changes to the exterior wall, as opposed to being limited to erecting partitions and making other interior, nonstructural changes.

Petitioner has failed to establish either that the lease did not prohibit the proposed alterations or that it permitted them. As such, it has no right to make these modifications under RPAPL 803 or the contract.

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

Order affirmed, with costs.

## II. ¿HAY *NUMERUS APERTUS* DE FEUDOS EN EL DERECHO ANGLOAMERICANO?

### A. EL DOMINIO ÚTIL POSESORIO

#### EL FEUDO SENCILLO ABSOLUTO

FRANKIE IVEY AND OTHERS, Plaintiffs in Error, V. ELLA J. PEACOCK AND OTHERS, Defendants in