

Introduction

From your smartphone to your apartment, the concept of property is the basis for the very belief that something is “yours.” The concept of property influences everything we do and everything we have. It defines our culture and our way of life. It affects our relationships with others, and it is fundamental to our economic system.

Because the concept of property underlies so much of our human experience, the rules that govern property introduce issues over which many disputes and conflicts arise. Lives can be made affluent or entirely ruined by simple rules and issues in property law. Those rules and issues fall into three categories. The first category concerns restrictions on property. Restrictions come in many forms and pose a variety of burdens for property owners. For instance, the law may restrict an owner from using land for commercial purposes. The requirements for, and effects of, creating restrictions on property introduce many rules that yield myriad legal issues.

The second category concerns transfers of property. Transferring property requires specific steps for legal title to move from one person to another. From giving a simple gift to selling a house, all property transfers must satisfy certain requirements to be legally effective. Especially in the context of land transfers, many rules govern the transfer process, so many issues arise.

The third category concerns relationships between property owners. Specific types of relationships define the rights and duties between people holding interests in the same object of property. Marriage, landlord-tenant, and co-ownership are a few examples of these types of relationships. Hence, certain relationships in property law call for specific rules that produce a variety of issues.

This book presents these three categories of rules and issues—restrictions, transfers, and relationships—in three corresponding units. Each unit sets forth specific topics through individual chapters. Each chapter provides a straightforward explanation of rules, along with examples, explanations, and practice problems. In many instances, chapters include case-law opinions that illustrate issues arising in a rule’s application. Ultimately, all this material will enable an understanding of the rules and issues in property law—a necessity for success on the bar exam and in practice.

Unit 1— Restrictions on Property

Suppose that you are now a licensed attorney. A client walks into your office telling you that he is about to start a new computer business. He is planning to sell computers out of a nicely furnished shed in his backyard, located behind his house. You ask him if he thinks that any neighbors will object. He doesn't seem to care. "It's my property," he declares, "so I can do what I want with it!" Yet despite this firm belief, your client wants you to look into whether he'll have any legal problems by starting this computer business in his backyard.

You first check his deed to the property. The deed states that the former owner of his property granted title to your client "on condition that the property be used only for residential-living purposes." Not a good sign. You also notice a statement on the deed that your client takes the property subject to restrictions from the homeowners association ("HOA"). In your client's HOA file is a document called Covenants, Conditions & Restrictions ("CC&R"). The CC&R includes a restriction stating that "no homeowner may run a business on their property." This is troubling. But that is not the worst part. You check the city government website and discover that his neighborhood is zoned for residential uses only. It looks like you'll have some bad news for your client.

This example illustrates different ways that the law might restrict land. Restrictions may exist through the title that is transferred through a deed, through promises that a current or prior owner has made to others (such as the HOA covenant), and through local laws that specify land uses (i.e., zoning laws). This Unit focuses on these three ways to restrict property rights in land (or in other words, in *real property*). Yet before we can discuss these, we must understand what "property" actually is. Only with an accurate understanding of property can we understand how it may be restricted.

This Unit thus proceeds as follows: Chapter 1 discusses the meaning of property. Chapters 2, 3, and 4 present these three types of restrictions on real property. Specifically, Chapter 2 covers restrictions that arise through a deed's title; Chapter 3 covers restrictions that arise through promises between private entities; and Chapter 4 covers restrictions that arise through zoning laws.

Chapter 1

Definition of Property

What is property? Most people probably think of property as a thing that they own. That sounds right, but then again, what does ownership mean? We probably think of ownership (and thereby property) as an ability to control a thing—to exercise dominion over it. That is, if I own a thing, I can determine how it is used, whether and to whom I will sell or give it, and whether anyone else can even touch it. No one else can interfere with me doing those things. Property, then, suggests that a person has certain rights against others over a thing.

The rights that I may assert as an owner of a thing are referred to as a ***bundle of rights***. A person who owns property may assert a bundle of rights against someone else with respect to a particular thing. The thing over which a person may assert the property rights is called the ***res***. The rights that a person may assert as to the res are usually described as follows:

- (1) the right to exclude;
- (2) the right to possess;
- (3) the right to transfer;
- (4) the right to use or enjoy; and
- (5) the right to destroy.

The ***right to exclude*** enables the owner to exclude anyone from gaining access to the res. This right is the most fundamental of any other property right. The right of exclusion extends to the physical boundaries of the res. A book, a car, a rock—all have a clearly defined physical shape that defines the legal boundaries of the right of exclusion. My right to exclude prevents someone from touching any part of my book, my car, or my rock. Similarly, with respect to land, the right of exclusion is defined by the boundaries of the land plot. Under that right, then, a landowner may exclude anyone from entering his or her land.

The ***right to possess*** enables an owner to occupy the property. Possession allows one to physically take up space on land or to hold onto a movable object, otherwise known as a ***chattel***. Note, however, that possession does not necessarily involve exclusion. Suppose that a landowner gave me a right to possess his house for a month, but specified that other people might come onto his property at that time. I would hold a right of possession but not a right of exclusion.

The **right to transfer** (also known as the right to dispose) enables an owner to sell, rent, or give away the res (and its associated property rights) to another person. By exercising the right to transfer a res, you can sell this book, rent your home, or donate money to charity—assuming you own all these things. This characteristic of transferability is called **alienability**. Not all property bundles include this right, however. Property lacking the right to transfer is *inalienable*. Consider a driver's license. When issuing the license, the state authority prevents a recipient from transferring the license to another person. Or consider a bodily organ. Most states prevent you from selling your organs (although you may give them away). So, do your property rights in your organs include the right of transfer? *Answer:* Yes, but the right is restricted. You can exercise it only through the specific means of a gift.

The **right to use** (also known as the right to enjoy) enables an owner to use the res as he or she desires. You might pay someone for a right to use a building or a car, for instance. How is this different from the right of possession? It would seem that if I can possess something, I could use it. *Answer:* There is certainly overlap between the rights of possession and use, but the two rights are not exactly the same. My use of a res might be restricted, or altogether prohibited, even if I am allowed to possess a res. For instance, a person might hold a right of possession in a car (to store it) without being allowed to drive it.

The right of use may be exercised insofar as the use does not injure others' enjoyment of their res (otherwise I would be committing a **nuisance**). Simply put, I cannot build a nuclear waste dump on my property if doing so would interfere with my neighbor's enjoyment of her property.

The **right to destroy** enables the owner to terminate the existence of the thing. You can burn this book, for instance. And this makes sense: if I own it, I should be able to do whatever I want with it, including destroy it. On the other hand, social policy might counsel against recognizing a right to destroy because destruction of a valuable resource is a waste to society. Suppose that when I die, my will instructs my executor to burn my estate. Should the law uphold my desire? Jurisdictions vary on this question.

The two cases below draw upon this concept that property consists of a bundle of rights. The first case, *Jacque v. Steenberg Homes, Inc.*, deals with the right to exclude. It emphasizes the importance of protecting this right to preserve meaningful value in property. The second case, *Eyeman v. Mercantile Trust Co.*, examines the right to destroy. Against a dissenting judge, the *Eyeman* court's majority refuses to enforce the right to destroy for reasons of public policy. Together, these cases illustrate that property involves specific rights that a

person may (or in some instances may not) assert against another person with respect to a particular res.

Jacque v. Steenberg Homes, Inc.

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

BABLITCH, J.

Steenberg Homes had a mobile home to deliver. Unfortunately for Harvey and Lois Jacque (the Jacques), the easiest route of delivery was across their land. Despite adamant protests by the Jacques, Steenberg plowed a path through the Jacques' snow-covered field and via that path, delivered the mobile home. Consequently, the Jacques sued Steenberg Homes for intentional trespass.

At trial, Steenberg Homes conceded the intentional trespass. Although the jury awarded the Jacques \$1 in nominal damages and \$100,000 in punitive damages, the circuit court set aside the jury's award of \$100,000. The court of appeals affirmed, reluctantly concluding that it could not reinstate the punitive damages because it was bound by precedent establishing that an award of nominal damages will not sustain a punitive damage award. We conclude that when nominal damages are awarded for an intentional trespass to land, punitive damages may, in the discretion of the jury, be awarded.

Accordingly, we reverse and remand for reinstatement of the punitive damage award.

I.

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

Steenberg determined that the easiest route to deliver the mobile home was across the Jacques' land. Steenberg preferred transporting the home across the Jacques' land because the only alternative was a private road which was covered in up to seven feet of snow and contained a sharp curve which would require sets of "rollers" to be used when maneuvering the home around the curve. Steenberg asked the Jacques on several separate occasions whether it could move the home across the Jacques' farm field. The Jacques refused.

On the morning of delivery, Mr. Jacque observed the mobile home parked on the corner of the town road adjacent to his property. He decided to find out where the movers planned to take the home. The movers, who were Steenberg employees, showed Mr. Jacque the path they planned to take with the mobile home to reach the neighbor's lot. The path cut across the Jacques' land. Mr. Jacque informed the movers that it was the Jacques' land they were planning to cross and that Steenberg did not have permission to cross their land. One of Steenberg's employees called the assistant manager, who then came out to the Jacques' home.

In the meantime, the Jacques called and asked some of their neighbors and the town chairman to come over immediately. Once everyone was present, the Jacques showed the assistant manager an aerial map and plat book of the township to prove their ownership of the land, and reiterated their demand that the home not be moved across their land.

At that point, the assistant manager asked Mr. Jacque how much money it would take to get permission. Mr. Jacque responded that it was not a question of money; the Jacques just did not want Steenberg to cross their land.

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

II.

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

We turn first to the individual landowner's interest in protecting his or her land from trespass. The United States Supreme Court has recognized that the private

landowner's right to exclude others from his or her land is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."¹ This court has long recognized every person's constitutional right to the exclusive enjoyment of his own property for any purpose which does not invade the rights of another person. Thus, both this court and the Supreme Court recognize the individual's legal right to exclude others from private property.

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

[T]hat is property to which the following label can be attached:

To the world:

Keep off X unless you have my permission, which I may grant or withhold.

Signed: Private Citizen

Endorsed: The state²

Harvey and Lois Jacque have the right to tell Steenberg Homes and any other trespasser, "No, you cannot cross our land." But that right has no practical meaning unless protected by the State. And, as this court recognized as early as 1854, a [nominal] award does not constitute state protection.

The law recognizes actual harm in every trespass to land whether or not compensatory damages are awarded. Thus, in the case of intentional trespass to land, the nominal damage award represents the recognition that, although immeasurable in mere dollars, actual harm has occurred.

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

¹ *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

² Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).

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

Accordingly, we reverse and remand to the circuit court for reinstatement of the punitive damage award.

NOTES

1. Steenberg Homes did not damage the Jacques' land when it trespassed. Given this fact, why did the Supreme Court of Wisconsin sustain a jury's punitive damages award of \$100,000?
2. If you were on the jury, what amount would you deem sufficient to ensure that Steenberg Homes would never trespass again—without being excessive? What is the basis for the dollar number that you reach?
3. Consider the quotation from Felix Cohen in the court's opinion. In so many words, Professor Cohen argues that property is anything that a person can exclude from the world insofar as that asserted exclusion is endorsed by the state. Why must the state endorse the asserted right in order for the thing to be considered property?
4. Why does society hold an interest in preserving the integrity of the legal system? How does this interest suggest the outcome of this case?

Eyerman v. Mercantile Trust Co.

524 S.W.2d 210 (Mo. Ct. App. 1975)

RENDLEN, J.

Louise Woodruff Johnston, owner of a house at #4 Kingsbury Place in the City of St. Louis, died January 14, 1973. By her will, she directed the executor "to cause our home at 4 Kingsbury Place to be razed and to sell the land upon which it is located and to transfer the proceeds of the sale to the residue of my estate."

Except for one vacant lot, the subdivision of Mrs. Johnston's house is occupied by handsome, spacious two and three-story homes, and all must be used exclusively as private residences.

Plaintiffs are neighboring property owners. They are seeking an injunction to prevent demolition of a house. Defendant is the executor of Mrs. Johnston's estate. The trial court denied their petition for an injunction.

I.

Whether #4 Kingsbury Place should be razed is an issue of public policy involving individual property rights and the community at large. Demolition of the dwelling will result in an unwarranted loss to this estate, the plaintiffs and the public. The uncontradicted testimony was that the current value of the house and land is \$40,000.00; yet the estate could expect no more than \$5,000.00 for the empty lot, less the cost of demolition at \$4,350.00, making a grand loss of \$39,350.33 if the unexplained and capricious direction to the executor is effected. Only \$650.00 of the \$40,000.00 asset would remain.

Kingsbury Place is an area of high architectural significance, representing excellence in urban space utilization. Razing the home will depreciate adjoining property values by an estimated \$10,000.00 and effect corresponding losses for other neighborhood homes. The cost of constructing a house of comparable size and architectural exquisiteness would approach \$200,000.00.

The importance of this house to its neighborhood and the community is reflected in the action of the St. Louis Commission on Landmarks and Urban Design designating Kingsbury Place as a landmark of the City of St. Louis. This designation, under consideration prior to the institution of this suit, points up the aesthetic and historical qualities of the area and assists in stabilizing Central West End St. Louis.

The executive director of Heritage St. Louis, an organization operating to preserve the architecture of the city, testified to the importance of preserving Kingsbury Place intact:

The reason for making Kingsbury Place a landmark is that it is a definite piece of urban design and architecture. There is a long corridor of space, furnished with a parkway in the center, with houses on either side of the street. The existence of this piece of architecture depends on the continuity of both sides. Breaks in this continuity would be as holes in this wall, and would detract from the urban design qualities of the streets. And the richness of the street is this belt of green lot on either side, with rich tapestry of the individual houses along the sides.

To remove #4 Kingsbury from the street was described as having the effect of a missing front tooth. The space created would permit direct access to Kingsbury Place from the adjacent alley, increasing the likelihood the lot will be subject to uses detrimental to the health, safety and beauty of the neighborhood. The mere possibility that a future owner might build a new home with the inherent architectural significance of the present dwelling offers little support to sustain the condition for destruction.

We are constrained to take judicial notice of the pressing need of the community for dwelling units as demonstrated by recent U.S. Census Bureau figures showing a decrease of more than 14% in St. Louis City housing units during the decade of the 60's. It becomes apparent that no individual, group of individuals nor the community generally benefits from the senseless destruction of the house; instead, all are harmed and only the caprice of the dead testatrix is served. Destruction of the house harms the neighbors, detrimentally affects the community, causes monetary loss in excess of \$39,000.00 to the estate and is without benefit to the dead woman. No reason, good or bad, is suggested by the will or record for the eccentric condition. This is not a living person who seeks to exercise a right to reshape or dispose of her property; instead, it is an attempt by will to confer the power to destroy upon an executor who is given no other interest in the property. To allow an executor to exercise such power stemming from apparent whim and caprice of the testatrix contravenes public policy.

The phrase "against public policy" has been characterized as that which conflicts with the morals of the time and contravenes any established interest of society. Acts are said to be against public policy when the law refuses to enforce or recognize them, on the ground that they have a mischievous tendency, so as to

be injurious to the interests of the state, apart from illegality or immorality. Public policy may be found in the Constitution, statutes and judicial decisions of this state or the nation. In a case of first impression where there are no guiding statutes, judicial decisions or constitutional provisions, a judicial determination of the question becomes an expression of public policy provided it is so plainly right as to be supported by the general will.

Although public policy may evade precise, objective definition, it is evident from the authorities cited that this senseless destruction serving no apparent good purpose is to be held in disfavor. A well-ordered society cannot tolerate the waste and destruction of resources when such acts directly affect important interests of other members of that society. It is clear that property owners in the neighborhood of #4 Kingsbury, the St. Louis Community as a whole and the beneficiaries of testatrix's estate will be severely injured should the provisions of the will be followed. No benefits are present to balance against this injury and we hold that to allow the condition in the will would be in violation of the public policy of this state.

The judgment is reversed.

CLEMENS, J. (*dissenting*)

I dissent.

As much as our aesthetic sympathies might lie with neighbors near a house to be razed, those sympathies should not so interfere with our considered legal judgment as to create a questionable legal precedent. Mrs. Johnston had the right during her lifetime to have her house razed, and I find nothing which precludes her right to order her executor to raze the house upon her death. It is clear that the law favors the free and untrammelled use of real property. This applies to testamentary dispositions. An owner has exclusive control over the use of his property subject only to the limitation that such use may not substantially impair another's right to peaceably enjoy his property. Plaintiffs have not shown that such impairment will arise from the mere presence of another vacant lot on Kingsbury Place.

NOTES

1. Why does the majority refuse to allow Mrs. Johnston's executor to destroy her house? What public policy grounds justify the majority's decision?

2. In dissent, Judge Clemens relies on the premise that Mrs. Johnston “had the right during her lifetime to have her house razed.” Under the majority’s reasoning, do you believe that this premise is true? Assuming that it is true, should Mrs. Johnston’s right to destroy her home have been enforceable even after she died? Do you agree with the dissent? Why or why not?
3. Why do you think Mrs. Johnston directed her executor to destroy the house?
4. Is there a benefit to society if the law were to uphold Mrs. Johnston’s right to destroy her property after she had died?

Given the five rights that comprise property, consider the follow situations and questions that follow:

- (1) The government issues a driver’s license to a person, Abe, under the condition that the license is “non-transferable.” Does Abe hold property rights in the license? If so, how does the non-transferable condition affect those rights? Suppose Abe asks a friend, Claire, to hold onto his license for safekeeping while he is out of the country. Does Abe still hold property rights in the license after he gives it to Claire? Suppose that David offers Abe \$200 for his license, so Abe sells his license to David. Does the David hold property rights in the license?
- (2) The government bans the possession of certain drugs (such as cocaine). Suppose that a person, Chris, possesses cocaine in violation of the statute. Does that mean that another person, Alexa, can dispossess Chris of the cocaine without violating any property rights of Chris?
- (3) Karen is an artist who creates a painting. She sells her painting to Doug. Doug later attempts to burn the painting. Can Karen preclude Doug from burning the painting?
- (4) Zander is the father of Denise, who is the mother of Tommy. In his old age, Zander gives a gift to Denise and Tommy – Zander’s valuable comic collection. The note on the car from Zander to Denise and Tommy states: “I am giving my comic book collection to Denis for the benefit of Tommy. While Tommy is still a boy, Denise will have the responsibility and right to take care of the comics so that Tommy can use them. Once Tommy is an adult, they are his and his alone.” When Zander dies, Tommy is 10 years old. He wants to sell the comic book collection. Can he do so? Denise wants to let her niece, Katrina, use the collection, but Tommy does not want Katrina to use them. What rights do Denis and Tommy each hold in the comic book collection?