

Chapter 7 – The Property System

Problem of Limited Resources

The state comes into existence because of limited resources. It is incumbent upon the state to establish a legal framework for dealing with the problem of limited resources.

The two main legal frameworks that exist are the capitalist society or system based on extensive private property ownership and the command economy or society. This involves state ownership of the means of production.

A strong legal system is necessary in a society where private property ownership prevails. The heart of a legal system in a capitalist system is contract law.

Property is usually considered as a “bundle of rights,” such as the rights to possess, use, and transfer (exchange) resources. *But*, property can also be envisioned primarily as a negative blanket right, the right to exclude others, including the state.

Property and Prosperity

That acquiring and possessing resources appears to be very natural to humans and thus a system that encourages this tendency within very broad limits will generate the maximum possibility of prosperity.

That property promotes incentive to generate new resources.

How property helps establish the conditions necessary for capital formation and how capital refers to that quality of resources that produces new or different resources, e.g., turning a business idea of physical assets into money through incorporation or a mortgage loan.

How property divisibility facilitates the development of resources.

Since the institution of property promotes individual prosperity and permits unequal accumulation of resources, it is easy to see why some people may associate property with greed and materialism. Some people may not appreciate that the resources that property protects are not a finite total and that the function of the private market is to generate new resources, new wealth.

Point out the poverty of Cuba and North Korea as examples of what happens to incentive in the absence of property.

Two Basic Divisions of Property

The two basic divisions are real property and personal property.

Real property – applies to land and interests in land such as mining rights or leases.

Personal property – all property that does not involve land or interests in land.

Fixture – personal property that has become real property by physical annexation to the land or its buildings or whose use has become closely associated with the use to which the land is put.

The Rights of Property Owners

Ownership in Fee Simple

Life Estates

A life estate lasts for the life of some specified individual. The text describes the rights of the tenant of a life estate, and limits on those rights – use without waste, extraction of resources by existing facilities only, mortgage for periods shorter than the life term. A life tenant's duties include maintaining the value of the property.

Future Interests

The interest, or right, in the property that an owner retains on a fee simple defeasible or life estate is a future interest. The text divides future interests into three categories: (1) reversionary interest (retained by the original owner or his or her heirs); (2) remainder (held by someone other than the original owner or his or her heirs); and (3) executory interests (held by someone other than the original owner or his or her heirs, but does not take effect immediately on the expiration of the prior estate).

Nonpossessory Interests

Transfer of Ownership

Below are numerous examples of means to transfer ownership.

Deeds

The elements of a valid deed (and the requirement of delivery for a transfer) are listed in the text. Warranty deeds and quitclaim deeds are defined, and the covenants included in a warranty deed are listed and defined (covenant of seisin, covenant of the right to convey, covenant against encumbrances, and covenant of quiet enjoyment). The purpose of recording statutes is also mentioned.

Warranty deed – promises the grantee that the grantor has good ownership and the full power to convey the property.

Special warranty deed – certain legal claims against the land, such as mortgages, exist, but guarantees that no other claims exist.

Quitclaim deed – makes no guarantees other than that the grantor surrenders all claim against the land.

Adverse Possession

Adverse possession is a means of obtaining title to land without delivery of a deed. The elements of adverse possession are listed in the text, and the public-policy reasons for the doctrine are briefly stated: adverse possession statutes aid in the resolution of boundary disputes and in quieting title when it is in dispute, adverse possession statutes encourage the use of property by assuring that it remains in the stream of commerce, by depriving owners who sit on their rights too long of their property, and by rewarding possessors who put land to productive use.

Eminent Domain

Leasehold Estates

Tenancy for Years

A tenancy for years is created by an express contract (which can sometimes be oral) by which property is leased for a specified period of time, such as a month, a year, or a period of years. Some of the incidents of a tenancy for years are mentioned—that, at the end of the period, the lease ends without notice, and so on.

Periodic Tenancy

A periodic tenancy is created by a lease that does not specify how long it is to last but does specify that rent is to be paid at certain intervals. Some of the incidents of a periodic tenancy are discussed—that, at the end of a period, the tenancy is automatically renewed, termination requires notice, and so on.

Tenancy at Will

The text defines a tenancy at will by example, and discusses the most notable of this tenancy's incidents—that it is terminable without notice.

Tenancy at Sufferance

A tenancy at sufferance is the possession of land without right, created when another tenancy ends and the tenant remains in possession without the owner's consent.

OWNERSHIP INTERESTS IN REAL PROPERTY	
TYPE OF INTEREST OR OWNERSHIP	DEFINITIONS
Fee Simple Absolute	The most complete form of real property ownership; owner holds all rights in the property and can transfer or sell them to another as he or she wishes. On the owner's death, the property can be transferred to another or others either by will or by inheritance laws to the legal heirs of the owner.
Fee Simple Defeasible	Ownership is not absolute but conditional. The fee simple can be terminated if the condition fails—i.e., if a specified action or event occurs (or fails to occur).
Life Estate	Lasts for the life of a specified individual, after which time ownership rights reverts to the original owner or to a party designated by the original owner.
Future Interests	<i>Reversionary Interests</i> —Residuary interests that are retained by the original owner when he or she conveys a lesser estate. <i>Nonreversionary Interest</i> —Residuary interests that are transferred by the owner to someone else when the future interest comes into existence. Remainders and executory interests are nonreversionary interests.
Nonpossessory Interests	<i>Easement</i> —The right of a person to make limited use of another person's property without taking anything from the property (e.g., a roadway or pathway across another's property). <i>Profit</i> —The right of a person to go onto land in another's possession and remove some part of the land or products of the land. <i>License</i> —The revocable right of a person to come onto another person's property (e.g., a ticket to attend a movie).
Leasehold Estates	<i>Tenancy for Years</i> —Tenancy for period of time stated by express contract. <i>Periodic Tenancy</i> —Tenancy for a period determined by frequency of rent payments. <i>Tenancy at Will</i> —Tenancy for as long as both parties agree; no notice of termination is required. <i>Tenancy at Sufferance</i> —Possession of real property without legal right.

Bailments

A bailment is the temporary transfer of personal property to another person. Specifically, a bailment is the relationship created when one person (the bailor) transfers the possession of personal property by delivery, without transfer of title, to another (the bailee) for the accomplishment of a certain purpose, after which the bailee is to return the property to the bailor or dispose of it according to the bailor's directions.

Essential Elements of a Bailment

Delivery of Possession

Possession by a bailee involves (1) the bailee's power to control the personal property and (2) either the bailee's intention to control the property or awareness that the rightful possessor has given up physical control of it.

Personal Property

A bailment can exist only with respect to personal property, but the bailed property need not be tangible. Intangible property that is evidenced by written instruments and is therefore deliverable is frequently the subject matter of bailments—for example, promissory notes, corporate bonds, shares of stock, documents of title, and life insurance policies.

Rights and Duties of Bailor and Bailee

Bailee's Duty to Exercise Due Care

The bailee must exercise due care not to permit injury to or destruction of the property by himself or by third parties. The degree of care depends on the nature of the bailment relationship and the character of the property.

The duty of care ranges from least where the bailment is for the sole benefit of the bailor to greatest where the bailment is for the sole benefit of the bailee; the duty of care is ordinary when the bailment is for the mutual benefit of the bailee and bailor.

But the amount of care also will vary with the character of the property. In a commercial bailment, from which both parties derive mutual benefit, the law requires the bailee to exercise the care that a reasonably prudent person would exercise under the same circumstances.

When the property is lost, damaged, or destroyed while in the bailee's possession, the law aids the bailor by presuming that the bailee was at fault. The bailor is merely required to show that certain property was delivered by way of bailment and that the bailee either has failed to return it or has returned it in a damaged condition. The burden is then on the bailee to prove that he exercised the degree of care required of him.

Bailee's Absolute Liability to Return Property

Generally the bailee is free from liability if he has exercised the degree of care required of him while the property was in his control. But there are important exceptions, where the law imposes an absolute liability (strict liability) on the bailee.

- Where the bailee has an obligation by express agreement with the bailor or by custom to insure the property against certain risks but fails to do so, and the property is destroyed or damaged through such risks, the bailee is liable for the damage or nondelivery, even though he has exercised due care.
- Where the bailee uses the bailed property in a manner not authorized by the bailor or by the character of the bailment, and during such use the property is damaged or destroyed without fault on the bailee's part, the bailee is nonetheless absolutely liable for the damage or destruction. The wrongful use by the bailee automatically terminates his lawful possession: he becomes a trespasser as to the property and, as such, is absolutely liable for whatever harm befalls it.

Bailee's Right To Compensation

A bailee who by express or implied agreement undertakes to perform work on or render services in connection with bailed goods is entitled to reasonable compensation for those services. The bailee is still entitled to compensation if, after completion or performance of work but before the goods are redelivered to the bailor, the goods are lost or damaged through no fault of the bailee.

Bailor's Duties

In a bailment for the sole benefit of the bailee, the bailor warrants that she is unaware of any defects in the bailed property. In all other cases, the bailor has a duty to warn the bailee of all defects she knows of or should have discovered upon a reasonable inspection of the property. Article 2 implied warranties and strict liability may apply. If Article 2A has been adopted, it imposes implied warranties on the lease of goods.

Special Types of Bailments

Warehousers, innkeepers, and common carriers are said to be extraordinary bailees, whereas all other bailees are ordinary bailees. This distinction is based on the character and extent of the liability of these classes of bailees for the loss of or injury to bailed goods. Whereas an ordinary bailee is liable for only the loss or injury that results from his failure to exercise ordinary or reasonable care, the extraordinary bailee has absolute liability. The extraordinary bailee insures the safety of the goods without regard to the question of his care or negligence.

Pledges

The bailee (secured party) takes possession of the property in order to secure a debt. The secured party does not take title but may assign her interest in the property despite objections by the debtor.

Warehousing

A warehouseman is a bailee who, for compensation, receives goods to be stored in a warehouse. Under the common law, a warehouseman's duties and liabilities were the same as those of an ordinary bailee for compensation, who must exercise reasonable care to protect the safety of the stored goods and to deliver them to the proper person. Today, however, warehousemen are subject to extensive state and federal regulation. Also, the receipts warehousemen issue for storage are regarded as documents of title and are governed by Article 7 of the UCC.

Safe Deposit Box

A majority of States hold that persons who rent a safe deposit box from a bank enter into a bailment relationship. As a mutual benefit bailment the bailee bank owes the customer the duty to act with ordinary due care and is only liable if negligent.

Carriers of Goods

Anyone who transports goods from one place to another, either gratuitously or for compensation, is a carrier. Carriers are classified primarily as common carriers and private carriers. A common carrier offers its services and facilities (called "carriage") for compensation to the general public. Common carriers include railroad, steamship, aircraft, public trucking and pipeline companies. Common carriers are extraordinary bailees, approaching the status of an insurer. Still, a common carrier is permitted, by contract with the shipper, to limit its liability, provided the carrier gives the shipper notice of this limitation and the opportunity to declare a higher value for the goods.

Trademarks and Related Property

A **trademark** is a distinctive mark, motto, device, or implement that a manufacturer stamps prints, or otherwise affixes to the goods it produces so that they may be identified on the map and their origin vouched for. Statutory protection of trademarks and related property is provided for the federal level by the Lanham Trademark Act of 1946, which incorporates the common law for trademarks. Many states also have trademark statutes.

Trademark Registration

To register for federal protection, an application must be filed with the U.S. Patent and Trademark Office in Washington, D.C. A mark can be registered (1) if it is currently in commerce or (2) if the applicant intends to put the mark into commerce within six months. (Under some circumstances, the six-month period can be extended to three years.) Registration is renewable between the fifth and sixth years after the initial registration and every twenty years thereafter.

Trademark Infringement

When a trademark is copied to a substantial degree or used in its entirety by another, it has been infringed. A person need not have registered a trademark to sue for trademark infringement, but registration is proof of the date of inception of the trademark's use.

Distinctiveness of Mark

Only trademarks deemed sufficiently distinctive from competing trademarks are protected, however. Fanciful, arbitrary, or suggestive trademarks are generally considered to be the most distinctive trademarks. Descriptive terms, geographical terms, and personal names are not inherently distinctive and do not receive protection until they acquire a secondary meaning (such as "London Fog" for coats with "London Fog" labels). Whether a secondary meaning becomes attached to a term or name depends on how extensively the product is advertised, the market for the product, the number of sales, and other factors. Generic terms, such as *bicycle* or *computer*, cannot be trademarked, even if they acquire secondary meanings (but they still cannot be used to deceive consumers).

Patents

A patent gives an inventor the exclusive right to make, use, and sell an invention for a period of twenty years and a design for fourteen years. To qualify, an applicant must satisfy the U.S. Patent and Trademark Office that the invention, discovery, process, or design is genuine, novel, useful, and not obvious in light of current technology. Unlike most other countries, the United States grants patent to the inventor rather than to the first person to file a patent application.

A firm that makes, uses, or sells another's patented design, product, or process without the patent owner's permission commits patent infringement. Because patent litigation is costly, however, the patent holder will often license use of the patented design, product, or process rather than sue.

Copyrights

A copyright is an intangible right granted by federal statute (the copyright Act of 1976) to the author or originator of certain literary or artistic productions. The right is granted automatically (registration is not required). Protection lasts for the life of the author plus 70 years. Copyrights owned by publishing houses expire 95 years from the date of publication or 120 years from the day of creation, whichever is first. For works by more than one author, the copyright expires 70 years after the death of the last surviving author.

What is Protected Expression?

Copyright law protects works that are original and fall into one of the following categories: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreography works; (5) pictorial, graphic, and sculptural works; (6) films and other audiovisual works and (7) sound recordings. The work must be “fixed in a durable medium” from which it can be perceived, reproduced, or communicated.

Protection is not available for any “idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied.” Ideas may be freely used by anyone—what can be copyrighted is the way in which an idea is expressed. If an idea and its expression are inseparable, the expression cannot be copyrighted. Generally, anything that is not original—widely known facts and part numbers, for example—will not qualify for protection. Compilations of facts will. A compilation is “a work formed by the collection and assembling of preexisting materials of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”

Copyright Protection for Computer Software

The Computer Software Copyright Act of 1980 extended Copyright Act protection to computer programs. A computer program is a “set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.” A program’s source code (that part of a program readable by humans) was clearly included. Protection has also been extended to the binary object code (readable only by computers). Program structure, sequence and organization have been held copyrightable (thus, as with other literary works, infringement can occur even when there is no substantial similarity between programs’ literal elements). A current issue is whether protection should extend to programs’ “look and feel” (the general appearance, command structure, video images, menus, windows, and other screen displays). It has been held in at least one case that menu command structure—including the choice of command terms, the structure and order of those terms, their presentation on the screen, and the long prompts—was copyrightable.

Copyright Infringement

Copyright infringement occurs when the form or expression of an idea is copied in substantial part (a copy does not have to mirror the original or reproduce it entirely). Penalties and remedies range from actual damages plus the infringer's profits or statutory damages not exceeding \$100,000 imposed at the discretion of the court, to criminal proceedings for willful violation which may result in fines or imprisonment.

The reproduction of copyrighted material is permitted without payment of royalties under the Copyright Act's *fair use doctrine*. In deciding whether a use qualifies as a fair use, courts must consider "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

Trade Secrets

Some business processes and information that cannot be patented, copyrighted, or trademarked are protected against appropriation by a competitor as trade secrets. Customer lists, plans, research and development, pricing information, marketing techniques, production techniques, formulas, and generally anything that makes an individual company unique and that would have value to a competitor constitute trade secrets.

To reduce the unpredictability of common law with respect to trade secrets, the Uniform Trade Secrets Act, was presented to the states in 1979 for adoption. Parts of it have been adopted in over twenty states. In 1996, Congress passed the Economic Espionage Act, which made the theft of trade secrets a federal crime. Protection of trade secrets extends to ideas and their expression, and there are no filing or registration requirements (which makes it suitable for software). To protect trade secrets, businesses have employees with access to the secrets promise never to disclose them. Theft of confidential data by industrial spying is theft of trade secrets.

