

# Sample Student Property Outline

Fall 2001, Wiggins

## I. Acquisition of Property:

### A. Introduction:

- i. **Property Rights Defined:** A property right is **protection by the state** of a claim to valuable resources.

### B. Theories, Doctrines and Policies Underlying Acquisition:

#### i. Theories:

1. **Fist In Time**

2. **Labor Theory**

- a. **Private Property Exists To Reward Labor**

- b. **Two Bases:**

- i. **Moral Base:** It is immoral not to award title to property either created or enhanced by the owner.

- ii. **Utility Base:** Rejects moral base and states that the purpose of rewarding labor is to promote productive behavior.

3. **Economic Theory:**

- a. **Strictly Utilitarian.**

- b. **Efficiency.**

- c. **Internalizing Cost.**

4. **Personality Theory:**

- a. **Privacy**

- b. **Liberty**

- c. **Autonomy**

- d. **Power to Exclude**

- e. **Independence From Community**

- f. **Bending to the Common Good**

#### ii. Doctrines:

1. **Discovery**

2. **Capture**

3. **Malicious Interference**

4. **Adverse Possession**

5. **Gift**

#### iii. Policies:

1. **Certainty:**

- a. **Certainty Of Legal Result**

- b. **Easily Predictable Results**

- c. **Avoid Litigation**

2. **Security:**

- a. **Confidence**

- b. **Stability**

- c. **Not Cheaply Taken**

- d. **Claims Against All The World**

- e. **Law Backs Us Up**

3. **Reliance:**

- a. **Planning**

- b. **Vindicate the Plan**

- c. **Concrete Behavior**

- d. **Transfer of Land**

4. **Justice and Morality**

5. **Domestication and Capture of Animals and Resources**

6. **Most Efficient Use of Real/Personal Property**

### C. First in Time and Rule of Capture:

- i. **A Fundamental Rule:** The most fundamental rule in property law is that the first person to take possession of a thing owns it. Also known as the **rule of capture** this rule implements the policies of **rewarding labor** and **security of resources**. The rule developed as a way for the international community to avoid conflict over newly discovered lands.

### D. Acquisition by Discovery:

- i. **General Rule:** A person who first captures resources is entitled to them. **Whoever is first in time prevails.** Discovery entails the sighting, landing and taking possession of unknown territory. This rule has little relevance today because there are virtually no unknown territories.
- ii. **Discovery of America:** “In the beginning all the world was America.” The world was up for grabs to those who were first in time. Europe held that discovery of America gave title to the government of the country making the discovery.
- iii. **Title by Conquest:** Conquest is the taking of enemy territory by force. This was used as an alternative to discovery in asserting superior title Indians who were actually first in time. Conquest is also not relevant today because the international community forbids it.
- iv. **Native American Right of Occupancy:** Indians did not have absolute title but were granted a right of occupancy which was subject to control by Congress. The Indians had the right to **transfer possession** but not title. Courts have recognized this right and have held that it cannot be taken from them without purchase or conquest.
  1. **Compensation?** The Europeans trace their title back to the Indians and regarded the land paid for through Christianity, civilization and independence. The Indians were seen as incapable of ownership because of their “primitive” ways of possessing the land without cultivating or improving it.
- v. **Lessons From The Discovery of America:** The discovery of America taught two major lessons about property: 1) Possession is an elastic which is **culturally determined**. To the Indians, the idea of “possessing” the land was totally foreign; 2) The determination and enforcement of property rights depends on the **power of the state** to impose its will. Thus property both **confers and rests on power**. The state stands behind these right, thus it is power over **persons not only things**.
  1. **Johnson v. M'Intosh:** D acquired title to land under grant from the United States; P acquired title to the same land by purchase from the Painkeshaw Indians.
    - a. **Held:** Discovery of land in America by a European power gives absolute title subject only to the Indian right of occupancy.
  2. **Why No Indian Title:** The Indians were seen as savages incapable of owning land. The **labor theory** required that a man only owns what he mixes his labor with by cultivating and improving. The Europeans saw the Indians as not efficiently using the land, thus they did not own it.

#### E. Occupancy and First In Time:

- i. **Origin:** The riches of the earth were once held in common. But scarcity lead to conflict thus private property was developed to keep the peace. Once governments became established, these preexisting property rights became honored and protected. Thus, the institution of property became an agreement between men respecting a formal right of ownership in the first person to possess property.
  1. **Policy Bases For First In Time:** First in time is easy to prove thereby avoiding conflict; it is more objective; it seems intuitive; promotes security and peace; and follows usage and custom.
  2. **Criticism of First In Time:** Not always ethical and conceivably limitless.
- ii. **The Labor Theory:** John Locke theorized that the idea of property was a law of nature that existed long before the conventions of men. Property rightfully belonged to those who, by the work of their hands, liberated it from a state or uselessness and put it to a beneficial use.
  1. **The Law of Accession:** The law of accession states that if A adds to the property of B, the property rightfully belongs to A. If A finds virtually useless property and through his labor adds to its use and value by labor, A owns the enhanced product by virtue of his labor.
  2. **Policy Base:** Society benefits from **active use**; it is **moral** to reward labor; and society rests on protection of what you create.
  3. **Criticism:** It is **subjective** and requires a bias social context; it discriminates against those who do not have intellectual or financial capital; and it is **difficult to measure** – many people add to property to make it useful – who owns the final product?
  4. **Ethnocentricity:** Locke shared the ideas expressed by the settlers that the Indians did not own the land because they did not sufficiently cultivate or improve it. This demonstrates how possession rests on **ethnocentric** ideas about what amounts to ownership.

#### F. Acquisition by Capture:

- i. **The Capture of Wild Animals:** Captured wild animals **belong to their captors**. But **capture or mortal wounding is required**; merely chasing the animal is not enough.
  1. **Policy Base:** Encouraging **competition** that helps ensure the capture of and beneficial use of resources. By rewarding only the captor, more will be brought to the hunt. Also, this promotes **fair competition** by protecting against monopolies. Awarding the captor is an **objective test** as opposed to pursuit which is inherently **subjective** – thus capture promotes **certainty and efficient administration** of the law.
  2. **Problem of Overcapture:** This rule developed in the 19<sup>th</sup> century when wild animals were plentiful. Today, this rule leads to overcapture and overinvestment in capture technology.

3. **Wounded or Trapped Animal:** If an animal has been **mortally wounded** or **trapped** so that capture is virtually certain, the animal is treated as captured. But if the animal is only in the process of being trapped, and the door has not **snapped shut** it has not been captured.
  - a. **Pierson v. Post:** P was hunting a fox with his dogs on a piece of wild, unpossessed wasteland. P chased the fox and just when he was in view of it D stepped in and killed it. D knew that P was pursuing the fox but killed and took it away regardless.
    - i. **Held:** In order to claim a right of possession, one must mortally wound or capture the wild animal so as to deprive it of its natural liberty and render escape impossible. **Mere pursuit** is not sufficient to vest title in the hunter. This is to **prevent litigation, promote certainty and peace and order in society.**
    - ii. **Dissent:** Since foxes are a public nuisance, killing them should be **encouraged.** A rule that allows a pursuer to acquire title to a wild animal if he is in reach of the animal or if he has a reasonable prospect of capturing the animal would accomplish this goal.
  - b. **Advantages of the Rule of Capture:** The advantages of the rule from **Pierson** are the encouragement of the efficient use of property, certainty, ease of administration and reduction of litigation.
  - c. **Disadvantages of the Rule of Capture:** The rule from **Pierson** can also be inflexible and lead to unjust results and inefficiency. The law may have to sacrifice efficiency for flexibility.
  - d. **Instrumental Reasoning:** In **Pierson** the dissent attempts to serve the policy of **efficient use of property** by fostering competition and thus facilitating the capture of wild animals. A rule of **first pursuit** seeks to do this in the absence of binding authority.
  - e. **The “Arbitration of Sportsmen”:** The internal custom of hunters in **Pierson** was to give possession to the first hunter in **“hot pursuit”** in contrast to the majority holding. The dissent argues that this custom should have governed the case.
- ii. **Custom:** The general rule of capture is **physical possession.** However, in certain trades a **custom** which is better suited to the effective capture of wild animals may dictate a different result. For instance, the custom among whalers was to allow a ship to leave a dead whale to float to the surface while they went off to hunt other whales – thus their time was efficiently maximized and more whales were harvested for beneficial use.
  1. **Factors:** Custom will be recognized by the courts as giving possession if: 1) It governs a **small, specialized industry;** The custom is **undisputed** in the community; 3) The custom rules the **entire industry;** and 4) It is necessary for the **survival** of the industry.
  2. **Policy Base:** Custom is often tailored to maximize the **efficient use of property** which is a fundamental goal of property law.
    - a. **Ghen v. Rich:** P shot and killed a whale, which sank to the bottom of the sea. Three days later Ellis found the whale on the shore and sold it to D.
      - i. **Held:** If the rule is of **very limited application, prevails generally** in that business and is **required for the survival of the industry** then title to a wild animal is acquired when a hunter apprehends the beast in accordance with that custom.
- iii. **Interference by Non-Competitor:** The rule of capture allows a competitor who also seeks to capture an animal to interfere with the other’s mere pursuit. However, a person who does **not seek to capture** an animal, but rather to interfere with the other’s capture seeks to disrupt the efficient use of resources and must be stopped.
  1. **Conservation:** This rule promotes killing but not conservation of wild life which may also be a beneficial goal of society.
    - a. **Keeble v. Hickeringill:** P owned a duck decoy pond as part of his lawful trade in capturing wild animals. D fired off gun shots in an effort to scare the ducks away. The wild fowl were permanently frightened away.
      - i. **Held:** Damages may be recovered for the intentional frightening of wild animals off of another’s land. There are two public policy reasons why a landowner may, in pursuit of his trade, lawfully capture wild animals free from the malicious interference of others. First, every man should be able to **enjoy the use of his land** as he sees fit so long as the use is lawful. Second, the capture of wild animals in pursuit of trade is **profitable;** it creates wealth for tradesmen, for employees and for the nation at large.
  2. **Policy Base:** One goal of property is to promote the **efficient use of property.** Thus, if a man scares animals away no one captures them – this is inefficient. However, a man may engage in **competition** to ensure the animal’s capture.

3. **Ratione Soli:** A landowner who never has physical possession of wild animals on his land may nevertheless be in **constructive possession** of them. This is the doctrine of **ratione soli** which states that an owner of land has constructive possession of all wild animals on his property until the animal leaves. This **promotes peace and discourages trespass**.
  4. **Wild Animals with Habit of Return:** Captured wild animals with a **habit of return** continue to belong to their captors even when they roam at large. Once someone has spent the **labor** to domesticate a wild animal that should be rewarded as an efficient use of property by protecting the ownership interest. However, a counterargument is that it is more efficient that these animals be killed.
  5. **Wild Animals with No Habit of Return:** If a captured wild animal has no habit of return and it escapes then the owner loses possession and is subject to capture by another – domestication is not in play. However, if the animal is **non-native** the subsequent finder may be on notice that it belongs to another thus vitiating any **reliance interest**. He then may not capture the animal for himself.
  6. **Limits on the Capture of Wild Animals:** Today these rules lead to overkill and inefficiency. Thus, states have used their police power to put statutory limits on the killing of wild animals in the name of conservation.
- iv. **Fugitive Resources:** The rule of capture applies to fugitive resources such as **oil and gas**. Thus, like wild animals, if a fugitive resource “**escapes**” from underneath the property of one landowner, the adjacent land owner may capture it and put it to a beneficial use.
1. **Water:** As a fugitive resource, water has several rules regarding its capture:
    - a. **Absolute Ownership:** The English applied a rule of absolute ownership meaning that water was deemed part of the soil and the landowner could withdraw freely without regard to the effect on his neighbors.
    - b. **Reasonable Use:** Americans developed a rule of reasonable use which states that water could be extracted as long as it was not **wasted** in that it harms neighbors. Today, water rights are controlled by legislation.