CHAPTER I

WHAT IS PROPERTY?

A. TWO CONCEPTIONS OF PROPERTY

What is property? There is a surprisingly wide range of answers to this basic question. We start with two conceptions of property. One may be familiar to you already: property as a right to a thing good against the world. In contrast to this traditional everyday view, many theorists adopt a competing conception of property as a collection ("bundle") of rights, with content that varies according to context and policy choices. As a way into these conceptions and the study of property law, we present in this Chapter a series of cases about interferences with legal interests in land. The cases provide an introduction to some basic legal concepts important to the study of property, including trespass and nuisance, the use of contracts to resolve property disputes, and the conditions for awarding injunctions rather than damages for violations of property rights. We also use the cases to raise more fundamental issues about the nature of property.

1. TRESPASS TO LAND

Jacque v. Steenberg Homes, Inc.

Supreme Court of Wisconsin, 1997.
563 N.W.2d 154.

■ WILLIAM A. BABLITCH, JUSTICE. 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, but argued that no compensatory damages had been proved, and that punitive damages could not be awarded without compensatory damages. 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. * * *

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. The Jacques were sensitive about allowing others on their land because they had lost property valued at over $10,000 to other neighbors in an adverse possession action in the mid-1980's. Despite repeated refusals from the Jacques, Steenberg decided to sell the mobile home, which was to be used as a summer cottage, and delivered it on February 15, 1994.

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. He told them that Steenberg had been refused permission to cross the Jacques' 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. Mr. Jacque testified that he told Steenberg to "[F]ollow the road, that is what the road is for." Steenberg employees left the meeting without permission to cross the 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 other Steenberg employee confirmed this testimony and further testified that the assistant manager told him to park the company truck in such a way that no one could get down the town road to see the route the employees were taking with the home. The assistant manager denied

giving these instructions, and Steenberg argued that the road was blocked for safety reasons.

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. One employee testified that upon returning to the office and informing the assistant manager that they had gone across the field, the assistant manager reacted by giggling and laughing. The other employee confirmed this testimony. The assistant manager disputed this testimony.

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. * * *

This case presents three issues: (1) whether an award of nominal damages for intentional trespass to land may support a punitive damage award and, if so; (2) whether the law should apply to Steenberg or should only be applied prospectively and, if we apply the law to Steenberg; (3) whether the $100,000 in punitive damages awarded by the jury is excessive. * * *

Figure 1–1
The Mobile Home at Its Final Resting Place after Being Dragged Across the Jacques' Field

Courtesy of Patrick A. Dewane, Jr., attorney for Harvey and Lois Jacque.

II.

* * * Steenberg 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. * * *

The general rule was stated in *Barnard v. Cohen*, 162 N.W. 480 (Wis. 1917), where the question presented was: "In an action for libel, can there be a recovery of punitory damages if only nominal compensatory damages are found?" With the bare assertion that authority and better reason supported its conclusion, the *Barnard* court said no. *Barnard* continues to state the general rule of punitive damages in Wisconsin. The rationale for the compensatory damage requirement is that if the individual cannot show actual harm, he or she has but a nominal interest, hence, society has little interest in having the unlawful, but otherwise harmless, conduct deterred, therefore, punitive damages are inappropriate. Jacque v. Steenberg Homes, Inc., 548 N.W.2d 80 (Wis. Ct. App. 1996); Maxwell v. Kennedy, 7 N.W. 657, 658–59 (Wis. 1880).

However, whether nominal damages can support a punitive damage award in the case of an intentional trespass to land has never been squarely addressed by this court. Nonetheless, Wisconsin law is not without reference to this situation. In 1854 the court established punitive damages, allowing the assessment of "damages as a punishment to the defendant for the purpose of making an example." McWilliams v. Bragg, 3 Wis. 424, 425 (1854).[3] The *McWilliams* court related the facts and an illustrative tale from the English case of *Merest v. Harvey,* 128 Eng. Rep. 761 (C.P. 1814), to explain the rationale underlying punitive damages.

In *Merest,* a landowner was shooting birds in his field when he was approached by the local magistrate who wanted to hunt with him. Although the landowner refused, the magistrate proceeded to hunt. When the landowner continued to object, the magistrate threatened to have him jailed and dared him to file suit. Although little actual harm had been caused, the English court upheld damages of 500 pounds, explaining "in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?" McWilliams, 3 Wis. 424 at 428.

To explain the need for punitive damages, even where actual harm is slight, *McWilliams* related the hypothetical tale from *Merest* of an intentional trespasser:

> Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser permitted to say "here is a halfpenny

[3] Because *McWilliams* was an action of trespass for assault and battery, we cite it not for its precedential value, but for its reasoning.

> for you which is the full extent of the mischief I have done."
> Would that be a compensation? I cannot say that it would be. . . .

McWilliams, 3 Wis. at 428. Thus, in the case establishing punitive damages in this state, this court recognized that in certain situations of trespass, the actual harm is not in the damage done to the land, which may be minimal, but in the loss of the individual's right to exclude others from his or her property and, the court implied that this right may be punished by a large damage award despite the lack of measurable harm.

* * * The Jacques argue that both the individual and society have significant interests in deterring intentional trespass to land, regardless of the lack of measurable harm that results. We agree with the Jacques. An examination of the individual interests invaded by an intentional trespass to land, and society's interests in preventing intentional trespass to land, leads us to the conclusion that the *Barnard* rule should not apply when the tort supporting the award is intentional trespass to land.

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." Dolan v. City of Tigard, 512 U.S. 374, 384 (1994). This court has long recognized "[e]very person['s] constitutional right to the exclusive enjoyment of his own property for any purpose which does not invade the rights of another person." Diana Shooting Club v. Lamoreaux, 89 N.W. 880, 886 (Wis. 1902) (holding that the victim of an intentional trespass should have been allowed to take judgment for nominal damages and costs). 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 state

Felix S. Cohen, Dialogue on Private Property, 9 Rutgers Law Review 357, 374 (1954). 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 "halfpenny" award does not constitute state protection.

The nature of the nominal damage award in an intentional trespass to land case further supports an exception to *Barnard.* Because a legal right is involved, the law recognizes that actual harm occurs in every trespass. The action for intentional trespass to land is directed at vindication of the legal right. The law infers some damage from every direct entry upon the land of another. 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.

The potential for harm resulting from intentional trespass also supports an exception to *Barnard.* A series of intentional trespasses, as the Jacques had the misfortune to discover in an unrelated action, can threaten the individual's very ownership of the land. The conduct of an intentional trespasser, if repeated, might ripen into prescription or adverse possession and, as a consequence, the individual landowner can lose his or her property rights to the trespasser. See Wis. Stat. § 893.28.

In sum, the individual has a strong interest in excluding trespassers from his or her land. Although only nominal damages were awarded to the Jacques, Steenberg's intentional trespass caused actual harm. We turn next to society's interest in protecting private property from the intentional trespasser.

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. In *McWilliams,* the court recognized the importance of " 'prevent[ing] the practice of dueling, [by permitting] juries [ ] to *punish* insult by exemplary damages.' " McWilliams, 3 Wis. at 428. Although dueling is rarely a modern form of self-help, 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.

People expect wrongdoers to be appropriately punished. Punitive damages have the effect of bringing to punishment types of conduct that, though oppressive and hurtful to the individual, almost invariably go unpunished by the public prosecutor. The $30 forfeiture was certainly not an appropriate punishment for Steenberg's egregious trespass in the eyes of the Jacques. It was more akin to Merest's "halfpenny." 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.

In sum, as the court of appeals noted, the *Barnard* rule sends the wrong message to Steenberg Homes and any others who contemplate trespassing on the land of another. It implicitly tells them that they are free to go where they please, regardless of the landowner's wishes. As long as they cause no compensable harm, the only deterrent intentional trespassers face is the nominal damage award of $1, the modern equivalent of *Merest's* halfpenny, and the possibility of a Class B forfeiture under Wis. Stat. § 943.13. We conclude that both the private landowner and society have much more than a nominal interest in excluding others from private land. Intentional trespass to land causes actual harm to the individual, regardless of whether that harm can be measured in mere dollars. Consequently, the *Barnard* rationale will not support a refusal to allow punitive damages when the tort involved is an intentional trespass to land. Accordingly, assuming that the other requirements for punitive damages have been met, we hold that nominal damages may support a punitive damage award in an action for intentional trespass to land. * * *

In conclusion, we hold that when nominal damages are awarded for an intentional trespass to land, punitive damages may, in the discretion of the jury, be awarded. Our decision today shall apply to Steenberg Homes. Finally, we hold that the $100,000 punitive damages awarded by the jury is not excessive. Accordingly, we reverse and remand to the circuit court for reinstatement of the punitive damage award.

NOTES AND QUESTIONS

1. There is no dispute in this case that Steenberg Homes committed an intentional trespass by moving the mobile home across the Jacques' farm field. The law of intentional trespass is "exceptionally simple and exceptionally rigorous." William L. Prosser, Handbook of the Law of Torts 63 (4th ed. 1971). Any intentional intrusion that deprives another of possession of land, even if only temporarily, is considered a trespass. Restatement (Second) of Torts § 158. The only intent required is to go onto the land; it is not necessary to show that the defendant knew where the boundary was or that the land belonged to someone else. Intentional trespass is sometimes said to be a strict liability tort, because there is no inquiry into the balance of interests between the plaintiff and defendant or whether the intrusion was reasonable. Perhaps most strikingly, someone who commits an intentional trespass is subject to liability "irrespective of whether he thereby causes *any* harm to any legally protected interest of the other." Id. (emphasis added). In this sense, trespass to land is like the tort of battery. As one English judge

put it: "So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there." Ashby v. White, 92 Eng. Rep. 126, 137 (K.B. 1703) (Holt, C.J.). Does this suggest that a person's land is seen as an extension of her body, and that the law protects both in order to vindicate fundamental rights of personal autonomy? As we will see in Chapter IV, the law is not so protective of personal property, or chattels (movable things). The *Restatement of Torts* says that a trespass to chattels will result in liability only if it causes harm to the owner of the thing. Restatement (Second) of Torts § 218 cmt. e. What might account for this difference?

2. One historical explanation for the absence of any harm requirement is that the action for trespass to land was often used to resolve disputes over title to land. Suppose A and B are neighbors and they disagree about the location of the boundary between their properties. Even though neither has done anything to harm the other, A can sue B (or vice versa) for trespass, and the court, in the course of deciding the dispute, will determine where in fact the boundary lies between their two parcels. If a showing of harm were required, then either A or B would have to take some action—like erecting a fence or trampling a flower bed—in order to get the boundary dispute resolved, but it is obviously undesirable to require harmful acts from persons who would not otherwise undertake them, simply in order to resolve their respective rights to land. With the twentieth-century development of so-called quiet title actions (in which any interested person can seek a declaratory judgment resolving a dispute over title to land), however, this rationale has lost most of its force. Does this reform suggest that the action for trespass should now be limited to intrusions that cause actual harm?

3. Did the Jacques have a sound reason for refusing permission to Steenberg Homes to move the mobile home across their field? The Jacques testified that they were sensitive about intrusions on their land because they had lost some of their property in an adverse possession lawsuit. Adverse possession, which we take up in Chapter II, is a transfer of ownership that takes place when someone occupies land *without permission*, and the statute of limitations runs before the owner challenges the occupation. If the Jacques had given their permission to Steenberg employees to cut across their land, there would have been no basis to assert a claim for adverse possession. In any event, the statute of limitations for challenging trespass to land in Wisconsin is 20 years, Wis. Stat. § 893.25, and the Steenberg moving operation would last only a few hours. So the Jacques' stated reason for objecting to the shortcut had no objective basis in law. Should this make a difference in deciding whether they should be allowed to sue for trespass, or to whether they should be allowed to recover $100,000 in punitive damages?

4. Even if the Jacques had no sound reason for objecting to Steenberg Homes cutting across their land, why might the legal system want a rule that always (or nearly always) requires permission of the owner before people are allowed to intrude? Most of the Wisconsin Supreme Court's

discussion of this point seems to assume the conclusion: The right to exclude must be enforced because it is an important right. The court suggests two reasons for strictly enforcing such a right: to avoid potential violence and protect privacy rights. But is either concern implicated in the facts of this case? Should that matter in deciding whether to apply the strict rule? Are these arguments ultimately circular? People might not resort to violence to repel intruders if they understood that they did not have the right to exclude trespasses that do no injury to their land. And people might not be so sensitive about their privacy rights if these trespasses were tolerated. Can you think of other reasons for giving owners a near-absolute right to exclude others?

5. Maneuvering a mobile home around a sharp curve in a country road with seven feet of snow on the ground sounds as if it might be quite dangerous, and could risk bodily injury to Steenberg employees or physical damage to the mobile home. Do you think the court should have taken this into account? Courts in some circumstances have recognized a defense of necessity to an action for trespass (see Chapter IV). It is well established that travelers have a right to deviate from a public road when it is rendered impassable, and, as we will see, this exception to the right to exclude sometimes comes under the heading of "necessity." Dwyer v. Staunton, [1947] 4 D.L.R. 393 (Alberta Dist. Ct.) (holding there to be no trespass in a case of travel on private land where public road was made impassable by snow, despite the objection of the owner). Should Steenberg Homes be able to claim necessity here? If not, why not?

6. The U.S. Supreme Court has held that "grossly excessive or arbitrary" punitive damages awards violate due process, State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003), and has indicated that ratios of punitive to compensatory damages exceeding nine to one are presumptively suspect as a matter of constitutional law. The punitive damages in *Jacque* are 100,000 times the compensatory damages. The Court also has instructed that one factor in determining whether an award is excessive is the relationship between the award and the maximum civil or criminal penalty the state authorizes for similar conduct. State Farm, 583 U.S. at 428; BMW of North America, Inc. v. Gore, 517 U.S. 559, 583 (1996). According to an omitted portion of the opinion in *Jacque,* the maximum fine under Wisconsin law for misdemeanor trespass was $1,000. The award in *Jacque* is 100 times this amount. On both measures, therefore, the punitive damages award seems suspect. On the other hand, the Court has also noted that an award in excess of nine times compensatory damages "may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." State Farm, supra, at 426 (internal quotations marks omitted, citing BMW, 517 U.S. at 582) (noting that a higher ratio might be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"). Does this exception apply here? Is the $1,000 ceiling set by the legislature for misdemeanor trespass an accurate benchmark of the social consequences of intentional trespass to unenclosed land? Is it possible that the purpose of the criminal trespass provision is not really to deter

trespasses, so much as to provide a mechanism for the sheriff's department to mediate disputes like the one between the Jacques and Steenberg Homes? See Chapter IV, Part A.

Hinman v. Pacific Air Transport

United States Court of Appeals, Ninth Circuit, 1936.
84 F.2d 755.

■ HANEY, CIRCUIT JUDGE. From decrees sustaining motions to dismiss filed by defendants in two suits, appellants appeal and bring for review by this court the rights of a landowner in connection with the flight of aircraft above his land. Appellant filed one bill against Pacific Air Transport, an Oregon corporation, and another bill against United Air Lines Transport Corporation, a Delaware corporation, in each of which the allegations are nearly identical. Although two appeals are before the court, briefs filed discuss both cases, and therefore we will consider them together. * * *

It is * * * alleged that defendants are engaged in the business of operating a commercial air line, and that at all times "after the month of May, 1929, defendants daily, repeatedly and upon numerous occasions have disturbed, invaded and trespassed upon the ownership and possession of plaintiffs' tract"; that at said times defendants have operated aircraft in, across, and through said airspace at altitudes less than 100 feet above the surface; that plaintiffs notified defendants to desist from trespassing on said airspace; and that defendants have disregarded said notice, unlawfully and against the will of plaintiffs, and continue and threaten to continue such trespasses. * * *

The prayer asks an injunction restraining the operation of the aircraft through the airspace over plaintiffs' property and for $90,000 damages in each of the cases.

Appellees contend that it is settled law in California that the owner of land has no property rights in superjacent airspace, either by code enactments or by judicial decrees and that the ad coelum doctrine* does not apply in California. We have examined the statutes of California, particularly California Civil Code, § 659 and § 829, as well as Grandona v. Lovdal, 21 P. 366 (Cal. 1889); Wood v. Moulton, 80 P. 92 (Cal. 1905); and Kafka v. Bozio, 218 P. 753 (Cal. 1923), but we find nothing therein to negative the ad coelum formula. Furthermore, if we should adopt this formula as being the law, there might be serious doubt as to whether a state statute could change it without running counter to the Fourteenth amendment to the Constitution of the United States. If we could accept and literally construe the ad coelum doctrine, it would simplify the solution of this case; however, we reject that doctrine. We think it is not the law, and that it never was the law.

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* [*Ad coelum* is short for *cujus est solum, ejus est usque ad coelum et ad inferos*, which means "whoever owns the soil owns also to the sky and to the depths."—eds.]

Figure 1–2
Timetable for Pacific Air Transport, February 1, 1928

From the Collection of Craig Morris.

This formula "from the center of the earth to the sky" was invented at some remote time in the past when the use of space above land actual or conceivable was confined to narrow limits, and simply meant that the owner of the land could use the overlying space to such an extent as he was able, and that no one could ever interfere with that use.

This formula was never taken literally, but was a figurative phrase to express the full and complete ownership of land and the right to whatever superjacent airspace was necessary or convenient to the enjoyment of the land.

In applying a rule of law, or construing a statute or constitutional provision, we cannot shut our eyes to common knowledge, the progress of civilization, or the experience of mankind. A literal construction of this formula will bring about an absurdity. The sky has no definite location. It is that which presents itself to the eye when looking upward; as we approach it, it recedes. There can be no ownership of infinity, nor can equity prevent a supposed violation of an abstract conception.

The appellants' case, then, rests upon the assumption that as owners of the soil they have an absolute and present title to all the space above the earth's surface, owned by them, to such a height as is, or may become, useful to the enjoyment of their land. This height, the appellants assert in the bill, is of indefinite distance, but not less than 150 feet. * * * This, then, is appellants' premise, and upon this proposition they rest their case. Such an inquiry was never pursued in the history of jurisprudence until the occasion is furnished by the common use of vehicles of the air.

We believe, and hold, that appellants' premise is unsound. The question presented is applied to a new status and little aid can be found in actual precedent. The solution is found in the application of elementary legal principles. The first and foremost of these principles is that the very essence and origin of the legal right of property is dominion

over it. Property must have been reclaimed from the general mass of the earth, and it must be capable by its nature of exclusive possession. Without possession, no right in it can be maintained.

The air, like the sea, is by its nature incapable of private ownership, except in so far as one may actually use it. This principle was announced long ago by Justinian. It is in fact the basis upon which practically all of our so-called water codes are based.

We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land. This right is not fixed. It varies with our varying needs and is coextensive with them. The owner of land owns as much of the space above him as he uses, but only so long as he uses it. All that lies beyond belongs to the world.

When it is said that man owns, or may own, to the heavens, that merely means that no one can acquire a right to the space above him that will limit him in whatever use he can make of it as a part of his enjoyment of the land. To this extent his title to the air is paramount. No other person can acquire any title or exclusive right to any space above him.

Any use of such air or space by others which is injurious to his land, or which constitutes an actual interference with his possession or his beneficial use thereof, would be a trespass for which he would have remedy. But any claim of the landowner beyond this cannot find a precedent in law, nor support in reason.

It would be, and is, utterly impracticable and would lead to endless confusion, if the law should uphold attempts of landowners to stake out, or assert claims to definite, unused spaces in the air in order to protect some contemplated future use of it. Such a rule, if adopted, would constitute a departure never before attempted by mankind, and utterly at variance with the reason of the law. If such a rule were conceivable, how will courts protect the various landowners in their varying claims of portions of the sky? How enforce a right of ejectment or restitution? Such a rule is not necessary for the protection of the landowner in any right guaranteed him by the Constitution in the enjoyment of his property. If a right like this were recognized and upheld by the courts, it would cause confusion worse confounded. It is opposed to common sense and to all human experience.

We cannot shut our eyes to the practical result of legal recognition of the asserted claims of appellants herein, for it leads to a legal implication to the effect that any use of airspace above the surface owner of land, without his consent would be a trespass either by the operator of an airplane or a radio operator. We will not foist any such chimerical concept of property rights upon the jurisprudence of this country.

We now consider the allegation of the bill that appellees' airplanes, in landing, glide through the air, within a distance of less than 100 feet to the surface of appellants' land, or possibly to a distance within five feet thereof, at one end of his tract. This presents another question for

discussion. Whether such close proximity to appellants' land may constitute an impairment of his full enjoyment of the same is a question of fact. If it does, he may be entitled to relief in a proper case.

Appellants are not entitled to injunctive relief upon the bill filed here, because no facts are alleged with respect to circumstances of appellants' use of the premises which will enable this court to infer that any actual or substantial damage will accrue from the acts of the appellees complained of.

The case differs from the usual case of enjoining a trespass. Ordinarily, if a trespass is committed upon land, the plaintiff is entitled to at least nominal damages without proving or alleging any actual damage. In the instant case, traversing the airspace above appellants' land is not, of itself, a trespass at all, but it is a lawful act unless it is done under circumstances which will cause injury to appellants' possession.

Appellants do not, therefore, in their bill state a case of trespass, unless they allege a case of actual and substantial damage. The bill fails to do this. It merely draws a naked conclusion as to damages without facts or circumstances to support it. It follows that the complaint does not state a case for injunctive relief. * * *

The decree of the District Court is affirmed.

■ MATHEWS, CIRCUIT JUDGE, dissents.

NOTES AND QUESTIONS

1. Some version of the *ad coelum* rule (see n. * supra) is followed in nearly all legal systems for purposes of defining the right to exclude others from land. See Andrea B. Carroll, Examining a Comparative Law Myth: Two Hundred Years of Riparian Misconception, 80 Tul. L. Rev. 901, 912–19 (2006). As Professor Carroll recounts, the rule was extracted from Roman law, and given its Latin name, by medieval monks known as Glossators working in Italy in the twelfth and thirteenth centuries. One of these Glossators, Franciscus, was brought to England by King Edward I in 1273, which led to the introduction of the concept to English law. Lord Coke invoked the concept by its Latin name in some cases in the seventeenth century, and also noted it in his *Institutes*. See 1 Edwardo Coke, The First Part of the Institutes of the Laws of England; Or, A Commentary upon Littleton, § 4a (Francis Hargrave & Charles Butler eds., 16th ed. 1809) (1628). All this, of course, was well before airplanes were invented.

2. The *ad coelum* rule is fundamental to property in land. Deeds to land nearly always are stated in terms of some measurement of the surface area. But under the *ad coelum* rule, the owner of the surface is also entitled to dig below the surface (for example, to construct a basement for a house) and to build above the surface (for example, to construct a two-story house). Without such an understanding, obviously, the bare right to the surface would be largely worthless. Rights to the column of space above the surface are often referred to as "air rights." Absent some zoning restriction or

covenant restricting the height of buildings, the *ad coelum* rule means that the owner of the surface can construct a building as tall as engineering prowess will allow. Thus, a farmer in an unzoned area of rural Illinois could replicate the Willis Tower (formerly the Sears Tower) on his land, provided he could obtain financing for the project. Height restrictions are common in zoning ordinances, however, and these have been held to be a legitimate exercise of the police power, not requiring any payment of compensation. See Welch v. Swasey, 214 U.S. 91, 106–07 (1909); see also Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978), reproduced in Chapter X. We take up some of the issues presented by the *ad coelum* rule's application to subsurface rights in Chapter II.

3. The question whether airplane overflights are trespasses under the *ad coelum* rule was always more theoretically interesting than practically important. No court (as far as we are aware) has ever concluded that operators of airplanes could be held liable in trespass for flying at cruise altitudes over land below. The injury to each surface owner is small or nonexistent, and the transaction costs of negotiating permissions with each owner would be so large that they would make it impossible to fly airplanes. Courts are far too pragmatic to take such an extreme assertion of rights seriously. The puzzle in *Hinman* (and similar cases involving airplane overflights) is how to carve out an exception for overflights from the *ad coelum* rule without otherwise damaging the rule's general utility. Four different doctrinal moves have been suggested at various times to accomplish this excision.

(1) The action for trespass is available only to persons who are in possession of land. See Restatement (Second) of Torts § 158(a). One argument, therefore, is that as long as the owner of the surface has not asserted dominion and control over the portion of the column of space in which airplanes fly, the owner cannot sue in trespass. The problem with this argument is that the owner of land is generally regarded as being in "constructive" possession of the land sufficient to maintain trespass, even if the owner is not in actual possession. 87 C.J.S. Trespass § 25 (2000). For example, although the Jacques do not appear to have been in active control of the portion of their farm where Steenberg Homes trespassed, this did not defeat their right to sue for trespass.

(2) One could argue that airplane overflights are actionable as trespasses only if they cause actual harm to the surface owner. The problem with this argument is, as we have seen, that actual injury or harm is not a traditional element of trespass to land. Again, even though the Jacques did not suffer any actual harm because of the trespass by Steenberg Homes, they were allowed to recover in an action for trespass.

(3) Richard Epstein has argued that airplane overflights are technically trespasses, but the surface owner is not entitled to any damages or other relief because she obtains "implicit in kind compensation" from being able to take advantage of the benefits that airplane travel has to offer—that is, from being able to commit similar trespasses over other people's property. See Richard A. Epstein, *Intel v. Hamidi*: The Role of Self-Help in Cyberspace?, 1 J.L. Econ. & Pol'y 147, 154–55 (2005). In effect, every

surface owner has implicitly granted a license to every other person to trespass over her property, since this makes everyone in society better off. In a related argument, Eric Claeys sees the *ad coelum* regime as evolving flexibly because it is ultimately grounded in productive use. Eric R. Claeys, On the Use and Abuse of Overflight Column Doctrine, 2 Brigham-Kanner Prop. Rts. Conf. J. 61 (2013). Do these arguments rest too heavily on hindsight? When airplane travel first developed and challenges were brought based on trespass, no one could be sure air travel would work out to the benefit of all. Today we can say this is undoubtedly true, but it may not have been obvious at the dawn of air travel.

(4) One could reclassify the airspace in which airplanes travel as a type of public property—public navigable airspace—in which no surface owner has any claim of private property rights. The analogy would be to navigable rivers or public highways, which are considered public property open to all. A problem with this theory is that the declaration of public ownership of the navigable airspace might be regarded as a taking of private property, given the previous understanding that the surface owner owns "to the heavens." But even if it were a taking, the compensation might be small or nothing, given the absence of harm and the "implicit compensation" emphasized by Epstein.

For more on the history of the law of airplane overflights, see Stuart Banner, Who Owns the Sky?: The Struggle to Control Airspace from the Wright Brothers On (2008).

4. Which of these legal arguments is embraced by the Court in *Hinman*? The U.S. Supreme Court eventually embraced the fourth theory in *United States v. Causby*, 328 U.S. 256 (1946). The Court concluded that Congress had effectively asserted federal government control over navigable airspace. The Court also concluded that the legislative declaration of federal ownership was not a taking of property, unless the flights come in so low over the property as to destroy the use and enjoyment of the surface area and improvements. For more on *Causby*, see Chapter III. Which solution to the problem of overflights do you find the most appealing?

5. Farmer Hinman and the Burbank airport were not on good terms. A subsequent opinion gives more background. Hinman had tried to get the airport to purchase or lease his entire 72.5-acre parcel, but the airport refused on the ground that Hinman's asking price was far above fair market value. In response to his loss in the litigation and the holding that he was entitled to only so much airspace as he was actually using, Hinman erected 20-foot poles and a large derrick in the flight path to the airport. The airport offered to pay the cost of removal or of installation of warning lights, and Hinman refused. When the airport sued, the court enjoined the structures as a private and public nuisance. United Airports Co. of California v. Hinman et al., 1940 U.S. Av. Rep. 1 (S.D. Cal. 1939). The Burbank airport was much favored by movie stars and other celebrities and was frequently used to shoot films. Was Hinman a spiteful opportunist? If so, is the law of nuisance (considered in *Hendricks v. Stahlnaker* infra) more suited to controlling his behavior than the law of trespass?

6. The problem of airplane overflights reemerged in debates about the assembly of digital databases. In particular, the Google Books project which makes and stores copies of the full text of millions of published books, and allows users to search for and view snippets of the works. Google prevailed on its argument that all this was fair use, Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015), but in the course of the controversy, commentators such as Larry Lessig defended the project on the grounds that the problem is essentially the same as that of airplane overflights: The injury to each author is small or nonexistent, and the transaction costs of negotiating consents with each copyright owner would be so large as to make the project of creating such a database infeasible. They argued that just as the courts carved out an exception to the law of trespass for overflights, so they should carve out an exception from copyright law for use of copyrighted books in large searchable databases. Claeys, supra, at 99–108. Does Lessig's argument suggest that there may be other circumstances in which exceptions to trespass law should be recognized based on small injury to the landowner and high transaction costs of negotiating permissions? Should the same reasoning apply to the use of fracking technology to exact for oil and gas from the ground? Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 11 (Tex. 2008) (invoking the airplane overflight analogy). See generally Chapter IV.B (considering various other exceptions to the landowner's right to exclude). If as James Grimmelmann argues, courts give close and exacting scrutiny to uses of copyrighted material by humans but fast-track use through robotic readers, James Grimmelmann, Copyright for Literate Robots, 101 Iowa L. Rev. 657, 667 (2016), where should this leave autonomous drones under the *ad coelum* rule?

2. CONCEPTIONS OF PROPERTY—PHILOSOPHICAL PERSPECTIVES

Scholars who seek to identify the meaning of property tend to fall into two camps. On the one hand, there are the essentialists, who attempt to uncover the single true definition of property as a legal concept. Essentialist efforts can be more or less complex. In an often-quoted passage, William Blackstone, with a bit of self-conscious drama, wrote: "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, Commentaries on the Laws of England *2 (1766). This reflects a relatively simple essentialist conception: Property confers a kind of exclusive sovereign control over some "external thing." Others have come up with more complex characterizations of property that are still essentialist, in that they are premised on the understanding that there is one correct meaning of property. For example, Tony Honoré, an English analytical philosopher, has developed a conception of what "full ownership" means in a mature

liberal legal system that features no less than eleven elements. See Tony Honoré, Ownership, in Making Law Bind 161 (1987).

On the other hand, there are the skeptics, who believe that it is fruitless to try to come up with a single canonical conception of what property means in a legal system. For the skeptics, "property" is just a word that means nothing until we spell out—using different words—exactly what we are talking about in any given context. The skeptical view is reflected in the common metaphor that property is a "bundle of rights" or "bundle of sticks." The metaphor was apparently first used in a nineteenth century treatise, see John Lewis, Treatise on the Law of Eminent Domain in the United States 43 (1888), and gained wider currency in the 1920s and 1930s. See, e.g., Benjamin N. Cardozo, The Paradoxes of Legal Science 129 (1928). The metaphor implies that one can add to or subtract from the bundle more or less without limit, and still talk about the bundle as property. Many of the Legal Realists who came to the fore in the 1930s shared this view of the plasticity of property. The skeptical perspective is also reflected in the First Edition of the American Law Institute's *Restatement of Property*. See Restatement of Property § 10 (1936) ("The word 'owner,' as it is used in this Restatement, means the person who has one or more interests.").

Although the skeptical tradition has the widest following among American law professors today, essentialism is making something of a comeback. We start with an excerpt from James Penner, an English legal philosopher who defends the essentialist view, and then an excerpt from Tom Grey, a law professor who reflects the skeptical tradition that dominates in America.

J.E. Penner, *The Idea of Property in Law*

23, 26–27, 68, 70–71, 75–76 (1997).

A right *in rem* is, roughly, a right in respect of a *res*, a thing. The classic example is a property right. Rights *in rem* are characterized as those rights which bind "all the world," that is, rights which must be respected by all, or virtually all, of the subjects of the legal system; everybody must refrain from trespassing on my land. In contrast, a right *in personam* is a right in the behaviour of some person, such as the right to the performance of a contract. Rights *in personam* bind only specific individuals; only the other party to the contract has any obligations which correlate to one's contractual rights. * * *

One may visualize the holder of a right *in rem* as standing at the hub of a spoked wheel, with the spokes representing relations to a multitude of duty-owers. Yet one may just as easily visualize the ower of a duty not to interfere with property, i.e. the ower of a duty *in rem*, in exactly the position, at the hub, so to speak, except that the spokes will represent relations to all those who hold property. These are lousy pictures, because a moment's notice will confirm that any trace of a *res*, like a bicycle or a

pound note, is missing, which is something of a deficiency if we are trying to explain the normative relation which comprises property. * * * But if we pay attention to the fact that rights and duties *in rem* do not refer to persons, not in the sense that the property is not owned by persons, but in the sense that nothing to do with *any particular individual's personality* is involved in the normative guidance they offer, we may get somewhere. * * *

[I]n general, it is completely unknown to us whether any given amount of property is owned by one person or by several or many. * * * We are under one duty to the plurality of property holders however their property is distributed amongst themselves. It is a simple, single duty, and very easy to comply with.* * * * As I walk through a car park, my actual, practical duty is only capable of being understood as a duty which applies to the cars there, not to a series of owners. For all I know, the cars are owned by the same person. The content of my duty not to interfere is not structured in any way by the actual ownership relation of the cars' owners to their specific cars. By the same token, if one of the cars has just been sold, so that there is a new owner, or if one of the cars has been lent to the owner's sister-in-law, again, my duty has not changed one whit. Thus transactions between an owner and a specific other do not change the duties of everyone else not to interfere with the property. * * *

The concepts of exclusion and use are more complex than they first appear, because, in general, they are intertwined. One can, of course, have a right to use something without having a right to exclude others, and vice versa. One can have the right to use a library, but no right to exclude others from it. Similarly a guard may have the right to exclude others from the library but no right to use it himself.

Yet rights purely to exclude or purely to use interact naturally, as it were, in the sense that use almost always involves some exclusion of others. As a rightful user of a library, I may not have the right to exclude others, but I would certainly have the right to occupy a desk, or take a book from a shelf. In this sense I have a right *not to be excluded* from the library, since use implies non-exclusion. * * *

How do the right to use and the right to exclude explain the right to property? The right to property is grounded by the interest we have in using things in the broader sense. No one has any interest in merely excluding others from things, for any reason and no reason at all. The interest that underpins the right to property is the interest we have in purposefully dealing with things. Because we have long-term interests in respect of things, and interests in using them in many different ways the broad definition of use is the appropriate one. But because we are concerned with the right to property, we must be concerned with the correlative duties imposed on others. Because of the social setting in which we live, we see that any meaningful right to use is the opposite side of the coin to a right to exclude. Secondly, the right to use reflects

our practical interest in exclusively using things, which correlates to duties *in rem* on everyone else not to interfere with our uses of things. Their not using the property is framed in terms of their duties to exclude themselves from it.

Thus at a theoretical level we understand the right to property equally as a right of exclusion or a right of use, since they are opposite sides of the same coin. Yet we can equally see that only one of these ways of looking at the right might drive the analysis in understanding the shape of the property norms in the legal system. It is my contention that the law of property is driven by an analysis which takes the perspective of exclusion, rather than one which elaborates a right to use. In other words, in order to understand property, we must look to the way that the law contours the duties it imposes on people to exclude themselves from the property of others, rather than regarding the law as instituting a series of positive liberties or power to use particular things. This can be expressed as follows, in what I will call the *exclusion thesis: the right to property is a right to exclude others from things which is grounded by the interest we have in the use of things.*

On this formulation use serves a justificatory role for the right, while exclusion is seen as the formal essence of the right. It is our interest in the use of property which grounds the right *in rem* to property and the correlative general duty *in rem*; yet exclusion is the practical means by which that interest is protected, and that makes all the difference to our understanding of property. * * *

NOTES AND QUESTIONS

1. The distinction between rights *in rem* and *in personam* is fundamental to the law of property, and we will encounter it periodically throughout these materials. The distinction concerns who bears the duty to respect the right. An in rem right creates duties in a large and indefinite class of others ("all the world" is the expression often used with some exaggeration) to respect the right. An in personam right creates a duty in only a small and definitely ascertained number of others (e.g., B owes a duty to A). Not all in rem rights (as defined) are property rights. Rights of bodily security, reputation, and privacy are also in rem in the sense that they create duties of noninterference in a large and indefinite class of others. These are basic duties created by tort law. What makes something an in rem right of property is the recognition of duties in a large and indefinite class of others not to interfere with some *thing* (as opposed to a duty not to interfere with a person). Clearly, one can also have in personam rights with respect to things, in the sense of rights that create duties on the part of only a small number of ascertained others. Contract rights are the clear example. Very roughly speaking—and we emphasize the "very"—the law of torts as it applies to persons and the core of the law of property establish in rem rights, whereas the law of contract establishes in personam rights. One interesting implication of this distinction is that in rem rights tend to be simple, easy-to-understand duties of noninterference (like "no hitting" or "no

trespassing"). This is because the duty that corresponds to the right has to be observed by such a large and indefinite mass of people. Complicated rights that impose affirmative duties to take particular actions are more likely to be in personam and hence will be more likely to be imposed by contract or government regulation. For further discussion see Thomas W. Merrill & Henry E. Smith, The Property/Contract Interface, 101 Colum. L. Rev. 773 (2001); Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 Yale L.J. 710 (1917).

2. Penner's emphasis on the right to exclude captures the attitude of the Wisconsin Supreme Court about the property rights of Harvey and Lois Jacque. The court justifies the punitive damages award as a way of vindicating the Jacques' right to exclude others from their land, which the court says is central to the understanding that the land is their property. But what about the dispute in *Hinman*? The *Hinman* court seems to view property more as a collection of rights, and the question whether this includes the right to exclude airplane overflights depends on a considerations of competing social interests, not any a priori conception of what ownership entails.

3. Penner's conception of property as the right to exclude others from things grounded in our interest in the use of the thing seems to fit ownership of land and tangible personal property like cars—for most purposes at least. It may even fit certain intellectual property rights like patents and copyrights, which are said to create a right to exclude others from using certain inventions or forms of expression. But how does Penner's conception apply to other interests we commonly call property, like stocks or bonds or money? Money started out as a tangible form of personal property—gold and silver coins that have an intrinsic value. Then it turned into pieces of paper which promised to pay the bearer on demand a certain amount of gold or silver. Today it is just "fiat" currency—a piece of paper (or a digital entry in a computer operated by a bank) of no intrinsic value but which society recognizes as a unit of value that can be exchanged for goods and services that have intrinsic value. See James Willard Hurst, A Legal History of Money in the United States, 1774–1970 (1973). We commonly think of money as property. But what exactly is the "thing" that the owner of money is empowered to exclude others from under Penner's exclusion model?

4. If property rights, being in rem, create duties on the part of all persons in a community to respect owned things, how do these generalized duties get started? Can it be said that everyone has agreed or consented to being bound to respect property? If so, when and where was this consent given? See, e.g., Geraint Parry, John Locke 51 (1978); Jeremy Waldron, The Right to Private Property 126–283 (1988).

5. For other analyses that emphasize the centrality of the right to exclude others to the understanding of the interests we call property, see J.W. Harris, Property and Justice 13 (1996); Waldron, supra, at 26–61; Shaymkrishna Balganesh, Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions, 31 Harv. J.L. & Pub. Pol'y 593 (2008); Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998).

6. In other parts of the book, Penner develops what he calls the Separation Thesis: Something can only be an object of property if it is contingently associated with an owner. Penner, supra, at 111. Penner builds on Frederick Pollock, who defined a legal "thing" as "some possible matter of rights and duties conceived as a whole and apart from all others, just as, in the world of common experience, whatever can be separately perceived is a thing." Frederick Pollock, What Is a Thing?, 10 L.Q. Rev. 318, 318 (1894). On this account, a "thing" is central to property:

> [O]n the whole perhaps we have good ground for saying that the 'thing' of legal contemplation, even when we have to do with a material object, is not precisely the object as we find it in common experience, but rather the entirety of its possible legal relations to persons. We say entirety, not sum, because the capacity of being conceived as a distinct whole is a necessary attribute of an individual thing. What the relations of a person to a thing can be must depend in fact on the nature of the thing as continuous or discontinuous, corporeal or incorporeal, and in law on the character and the extent of the powers of use and disposal which particular systems of law may recognize.

Id. at 320–21. Many legal systems denominate property as the "law of things." In the materials that follow, consider what role if any the "legal thing" plays. See Henry E. Smith, Property as the Law of Things, 125 Harv. L. Rev. 1691 (2012). Those who are skeptical about the right to exclude tend also to downplay the importance of things to property. Consider the following.

Tom Grey, *The Disintegration of Property*

in NOMOS XXII: PROPERTY 69–71 (J. Pennock & J. Chapman eds., 1980).

In the English-speaking countries today, the conception of property held by the specialist (the lawyer or economist) is quite different from that held by the ordinary person. Most people, including most specialists in their unprofessional moments, conceive of property as *things* that are *owned* by *persons*. To own property is to have exclusive control of something—to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it. Legal restraints on the free use of one's property are conceived as departures from an ideal conception of full ownership.

By contrast, the theory of property rights held by the modern specialist tends both to dissolve the notion of ownership and to eliminate any necessary connection between property rights and things. Consider ownership first. The specialist fragments the robust unitary conception of ownership into a more shadowy "bundle of rights." Thus, a thing can be owned by more than one person, in which case it becomes necessary to focus on the particular limited rights each of the co-owners has with respect to the thing. Further, the notion that full ownership includes rights to do as you wish with what you own suggest that you might sell off particular aspects of your control—rights to certain uses, to profits

from the thing, and so on. Finally, rights of use, profit, and the like can be parceled out along a temporal dimension as well—you might sell your control over your property for tomorrow to one person, for the next day to another, and so on. * * *

The same point can be made with respect to fragmentation of ownership generally. When a full owner of a thing begins to sell off various of his rights over it—the right to use it for this purpose tomorrow, for that purpose next year, and so on—at what point does he cease to be the owner, and who then owns the thing? You can say that each one of the many rights holders owns it to the extent of the right, or you can say that no one owns it. Or you can say, as we still tend to do, in the vestigial deference to the lay conception of property, that some conventionally designated rights constitute "ownership." The issue is seen as one of terminology: nothing significant turns on it.

What, then, of the idea that property rights must be rights in things? Perhaps we no longer need a notion of ownership, but surely property rights are a distinct category from other legal rights, in that they pertain to things. But this suggestion cannot withstand analysis either; most property in the modern capitalist economy is intangible. Consider the common forms of wealth: shares of stock in corporations, bonds, various kinds of commercial paper, bank accounts, insurance policies—not to mention more arcane intangibles such as trademarks, patents, copyrights, franchises, and business goodwill.

In our everyday language, we tend to speak of these rights as if they were attached to things. Thus we "deposit our money in the bank," as if we were putting a thing in a place; but really we are creating a complex set of abstract claims against an abstract legal institution. We are told that as insurance policy holders we "own a piece of the rock"; but we really have other abstract claims against another abstract institution. We think of our share of stock in Megabucks Corporation as part ownership in the Megabucks factory outside town; but really the Megabucks board of directors could sell the factory and go into another line of business and we would still have the same claims on the same abstract corporation.

Property rights can no longer be characterized as "rights of ownership" or as "rights in things" by specialists in property. What, then, *is* their special characteristic? How do property rights differ from rights generally—from human rights or personal rights or rights to life or liberty, say? Our specialists and theoreticians have no answer; or rather, they have a multiplicity of widely differing answers, related only in that they bear some association or analogy, more or less remote, to the common notion of property as ownership of things. * * *

The conclusion of all this is that discourse about property has fragmented into a set of discontinuous usages. The more fruitful and useful of these usages are those stipulated by theorists; but these depart drastically from each other and from common speech. Conversely,

meanings of "property" in law that cling to their origin in the thing-ownership conception are integrated least successfully into the general doctrinal framework of law, legal theory, and economics. It seems fair to conclude from a glance at the range of current usages that the specialists who design and manipulate the legal structures of the advanced capitalist economies could easily do without using the term "property" at all. * * *

The substitution of the bundle-of-rights for a thing-ownership conception of property has the ultimate consequence that property ceases to be an important category in legal and political theory. This in turn has political implications * * * The legal realists who developed the bundle-of-rights notion were on the whole supportive of the regulatory and welfare state, and in the writings that develop the bundle-of-rights conception, a purpose to remove the sanctity that had traditionally attached to the rights of property can often be discerned. * * *

I would want to deny, however, that the account and explanation of the breakdown of the concept of property offered here is in the last analysis ideological, in the pejorative sense of a mystifying or false apologetic. The development of a largely capitalist market economy toward industrialism objectively demands formulation of its emergent system of economic entitlements in something like the bundle-of-rights form, which in turn must lead to the decline of property as a central category of legal and political thought.

NOTES AND QUESTIONS

1. Grey's characterization of property as a contingent bundle of rights seems to describe the inquiry in *Hinman* fairly accurately. The dispute is over whether property in land does or does not include, as one of the sticks in the bundle, the right to block airplane overflights. Before the suit, there is uncertainty about whether this is one of the features of property in land. After the decision, we know it is not. According to the bundle of rights view, this is how we determine what "property" means, by building up or cutting down the number of sticks in the bundle over time. But how does the bundle of sticks metaphor account for the great importance that the Wisconsin Supreme Court in *Jacque* and other courts attribute to the right to exclude others from things as a central feature of property?

2. Do Penner and Grey fundamentally disagree about the nature of the concept of property, or do they simply emphasize different aspects of a single but complex phenomenon? Penner, in seeking to explicate the meaning of property, takes as his core case individual ownership of land or tangible personal property. When he moves beyond the core case later in his book and takes up questions such as whether stocks, bonds, and money are "property," the analysis becomes more convoluted. Grey, for his part, does not deny that most people, "including most specialists in their unprofessional moments," have an intuitive conception of property as the right to control things. His case for the "disintegration" of property rests on emphasizing specialized discourses that deal with issues at some remove from the core

case of individual ownership of things. If this characterization of the two readings is correct, then the question becomes: Which part of the story should we emphasize—the messiness at the perimeter, or the clarity at the core? Can the decisions in *Jacque* and *Hinman* be reconciled the same way—one dealing with the "normal" rule, the other with an "exception"? For another analysis that contrasts the thing-like view of property held by "ordinary observers" with the bundle-of-sticks view employed by "scientific policymakers," see Bruce A. Ackerman, Private Property and the Constitution (1977); see generally Thomas W. Merrill & Henry E. Smith, What Happened to Property in Law and Economics?, 111 Yale L.J. 357 (2001); *Symposium*: Property: A Bundle of Rights?, 8 Econ. J. Watch 193 (2011) (econjwatch.org).

B. THE TRESPASS/NUISANCE DIVIDE

Jacque v. Steenberg Homes and *Hinman v. Pacific Air Transport* represent two different responses to intentional trespasses to land by strangers. Another contrast, which exposes additional questions about the nature of property rights, concerns the distinction between invasions of land by large objects (like house trailers or airplanes) and interferences with the use and enjoyment of land caused by some activity on neighboring land, like generating pollution or making excessive noise. The latter sorts of interferences are governed by a different common-law doctrine—the law of nuisance—which has traits very different from the law of trespass (at least the version applied in *Jacque*).

1. NUISANCE

Hendricks v. Stalnaker

Supreme Court of Appeals of West Virginia, 1989.
380 S.E.2d 198.

■ NEELY, JUSTICE: Walter S. Stalnaker, defendant below, appeals from a decision by the Circuit Court of Lewis County declaring a water well drilled on his property to be a private nuisance to Harry L. Hendricks and Mary Hendricks, plaintiffs below. The Hendrickses, owners of the property adjacent to that of Mr. Stalnaker, were refused a Health Department permit for a septic system located within 100 feet of Mr. Stalnaker's water well. The Circuit Court of Lewis County, based on a jury verdict, found the water well to be a private nuisance and ordered its abatement. On appeal, Mr. Stalnaker argues that because his water well was not an unreasonable use of his land, he is not liable for the effects on the Hendrickses' property. We agree and, therefore, reverse the decision of the circuit court.

Mr. Stalnaker owns approximately 10 acres of land situated on Glady Fork Road, Lewis County. In 1985, Mr. Stalnaker constructed his home on a 2.493 acre portion of the tract, and had two water wells dowsed. One well was located behind his house and the other, near the

Hendrickses' property. The rear well was near land disturbed by a former strip mine and, therefore, the well produced poor quality water. Except for a small section of land near the Hendrickses' property—the location of the second "dowsed" well—most of Mr. Stalnaker's home tract had been disturbed by a strip mine. In August 1985, Mr. Stalnaker spent approximately $3,000 in an unsuccessful attempt to treat the water from the rear well.

In 1984, the Hendrickses purchased approximately 2.95 acres adjacent to Mr. Stalnaker's property for a home site or a trailer development. On 31 December 1985, Mr. Hendricks met with the Lewis County sanitarian to determine locations for a water well and a septic system. The Health Department requires a distance of 100 feet between water wells and septic systems before it will issue permits.[2] Because the Hendrickses' land was too hilly or had been disturbed in order to build a pond, the only location for a septic system on the tract was near Mr. Stalnaker's property. On 13 January 1986, the Hendrickses contacted the county sanitarian to visit their property to complete the septic system permit application. The county sanitarian said because of snowy weather he would come out later in the week.

On 13 January 1986, Mr. Stalnaker called the sanitarian and was told about the Hendrickses' proposed septic system. Mr. Stalnaker was also told that the county sanitarian would be unavailable on 14 January 1986 but could meet with him on 15 January 1986. On 14 January 1986, Mr. Stalnaker contacted a well driller, who applied for and received a well drilling permit for the second well from the assistant sanitarian. The well was completed on 25 January 1986 but was not connected to Mr. Stalnaker's home until January 1987.

On 15 January 1986, the county sanitarian informed Mr. Hendricks that no permit for his proposed septic system could be issued because the absorption field for his septic system was within one hundred feet of Mr. Stalnaker's water well. Mr. Hendricks did install a septic system without a permit in January 1987; however, the system was left inoperative pending the outcome of this suit.

The Hendrickses filed suit in the Circuit Court of Lewis County on 29 January 1987 requesting (1) the water well be declared a private nuisance, (2) the nuisance be abated, and (3) damages. In a bifurcated trial, the jury found that the water well was a private nuisance and the trial judge ordered it to be abated. On the issue of damages the jury found for the defendant and awarded no damages.

I

In the past we have broadly described what constitutes a nuisance:

[2] The county sanitarian testified that the purpose of the distance requirement was to protect not just an individual well but to prevent contamination of the ground streams of the aquifer.

> A nuisance is anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable. . . . A nuisance is anything which interferes with the rights of a citizen, either in person, property, the enjoyment of his property, or his comfort. . . . A condition is a nuisance when it clearly appears that enjoyment of property is materially lessened, and physical comfort of persons in their homes is materially interfered with thereby. (Citations omitted).

Martin v. Williams, 93 S.E.2d 835, 844 (W. Va. 1956). * * * This definition of nuisance includes acts or conditions that affect either the general public or a limited number of persons. In *Hark v. Mountain Fork Lumber Co.,* 34 S.E.2d 348, 354 (W. Va. 1945) we defined a public nuisance as that which "affects the general public as public, and [a private nuisance as that which] injures one person or a limited number of persons only."

In order clearly to delineate between a public nuisance and a private nuisance, we define a private nuisance as a substantial and unreasonable interference with the private use and enjoyment of another's land. The definition of private nuisance includes conduct that is intentional and unreasonable, negligent or reckless, or that results in an abnormally dangerous conditions or activities in an inappropriate place. See W. Prosser, Handbook of the Law of Torts § 87 at 580, § 89 at 593 (4th ed. 1971); Restatement (Second) of Torts §§ 821D, 821F, 822 (1979); W. Keeton, Prosser and Keeton on the Law of Torts § 87 (5th ed. 1984). Recovery for a private nuisance is limited to plaintiffs who have suffered a significant harm to their property rights or privileges caused by the interference. Restatement (Second) of Torts §§ 821E, 821F (1979).

Early West Virginia cases indicate that the existence of a private nuisance was determined primarily by the harm caused. Medford v. Levy, 8 S.E. 302 (W. Va. 1888) (cooking odors); Flanagan v. Gregory and Poole, Inc., 67 S.E.2d 865 (W. Va. 1951) (inadequate culvert). Gradually the focus included an examination of the reasonableness of the property's use. See McGregor v. Camden, 34 S.E. 936 (W. Va. 1899) (required an examination of the location, capacity and management of oil and gas well); Pope v. Edward M. Rude Carrier Corp., 75 S.E.2d 584 (W. Va. 1953) (transportation of explosives); Martin, supra (used automobile lot); State ex rel. Ammerman v. City of Philippi, 65 S.E.2d 713 (W. Va. 1951) (tire recapping business); Ritz v. Woman's Club of Charleston, 173 S.E. 564 (W. Va. 1934) (noise); Harless v. Workman, 114 S.E.2d 548 (W. Va. 1960) (coal dust).

In the area of public nuisance, we have made explicit that an examination of the "reasonableness or unreasonableness of the use of property in relation to the particular locality" is a fair test to determine the existence of a public nuisance. Similarly, any determination of liability for a private nuisance must include an examination of the

private use and enjoyment of the land seeking protection and the nature of the interference.[5]

Because the present case concerns conduct that is not a negligent, reckless, or abnormally dangerous activity, our discussion of private nuisance is limited to conduct that is intentional and unreasonable. An interference is intentional when the actor knows or should know that the conduct is causing a substantial and unreasonable interference. Restatement (Second) of Torts § 825 (1979). The unreasonableness of an intentional interference must be determined by a balancing of the landowners' interests. An interference is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm. See W. Prosser, supra § 87, at 581, § 89 at 596; Restatement (Second) of Torts § 826 (1979); W. Keeton, supra § 88, at 629. Restatement (Second) of Torts §§ 827 and 828 (1979) list some of the factors to be considered in determining the gravity of the harm and the social value of the activity alleged to cause the harm.[6] However, this balancing to determine unreasonableness is not absolute. Additional consideration might include the malicious or indecent conduct of the actor. Restatement (Second) of Torts § 829. * * *

In the case before us, the Hendrickses' inability to operate a septic system on their property is clearly a substantial interference with the use and enjoyment of their land. The record indicates that the installation of the water well was intentional, but there was no evidence that the installation was done so as maliciously to deprive the Hendrickses of a septic system. Mr. Stalnaker wanted to insure himself of an adequate water supply and found no alternative to the well he dug.

The critical question is whether the interference, the installation of a water well, was unreasonable. Unreasonableness is determined by balancing the competing landholders' interests. We note that either use,

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[5] The *Restatement (Second) of Torts* § 822 (1979) requires a consideration of unreasonableness as part of the determination of liability.

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

(a) intentional and unreasonable, or

(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

[6] The *Restatement (Second) of Torts* § 827 (1979) lists the following "gravity of harm" factors:

(a) The extent of the harm involved;

(b) the character of the harm involved;

(c) the social value that the law attaches to the type of use or enjoyment invaded;

(d) the suitability of the particular use or enjoyment invaded to the character of the locality; and

(e) the burden on the person harmed of avoiding the harm.

The *Restatement (Second) of Torts* § 828 lists the following "utility of conduct" factors:

(a) the social value that the law attaches to the primary purpose of the conduct;

(b) the suitability of the conduct to the character of the locality; and

(c) the impracticability of preventing or avoiding the invasion.

well or septic system, burdens the adjacent property. Under Health Department regulations, a water well merely requires non-interference within 100 feet of its location. In the case of a septic system, however, the 100 foot safety zone, extending from the edge of the absorption field, may intrude on adjacent property. Thus, the septic system, with its potential for drainage, places a more invasive burden on adjacent property.[7] Clearly both uses present similar considerations of gravity of harm and social value of the activity alleged to cause the harm. Both a water well and a septic system are necessary to use this land for housing; together they constitute the in and out of many water systems. Neither party has an inexpensive and practical alternative. The site of the water well means quality water for Mr. Stalnaker, and the Hendrickses have only one location available for their septic system.

In the case before us, we are asked to determine if the water well is a private nuisance. But if the septic system were operational, the same question could be asked about the septic system.[8] Because of the similar competing interests, the balancing of these landowners' interests is at least equal or, perhaps, slightly in favor of the water well. Thus, the Hendrickses have not shown that the balancing of interests favors their septic system. We find that the evidence presented clearly does not demonstrate that the water well is an unreasonable use of land and, therefore, does not constitute a private nuisance. * * *

We find that because the evidence is not disputed and only one [inference] is reasonable, the trial court should have held as a matter of law that the water well was not a private nuisance. * * *

Reversed.

NOTES AND QUESTIONS

1. The law of nuisance, in contrast to the conventional (*Jacque*-style) law of trespass, is neither simple nor rigorous. In fact, commentators have described nuisance doctrine as so complex and uncertain that it amounts to an "impenetrable jungle." William L. Prosser, Handbook of the Law of Torts 571 (4th ed. 1971). The *Restatement of Torts* valiantly seeks to bring some order to this complexity by providing that a nuisance is an interference with the use and enjoyment of land that causes "significant harm" and is "unreasonable." Restatement (Second) of Torts §§ 821F, 822. The primary definition of "unreasonable," according to the *Restatement*, is that "the gravity of the harms outweighs the utility of the actor's conduct." Id. § 826. The *Hendricks* court, which generally follows the *Restatement*, reads this to

[7] Rules and Regulations of the Health Department § 64–9–5.7 [1983] require a recorded easement or authorization for use of or crossing of adjacent property for off lot disposal of sewage or effluent.

[8] In a factually similar case, the Supreme Court of Oklahoma held that a sewage lagoon created within 100 feet of a neighbor's water well was a "willful" injury to the adjacent property and awarded attorneys' fees. The court reasoned that under an Oklahoma statute the sewage lagoon actively burdened adjacent property whereas the water well was a non-invasive burden. Schaeffer v. Shaeffer, 743 P.2d 1038 (Okla. 1987).

mean that nuisance liability turns on "balancing the competing landowners' interests."

2. How does the court here arrive at the conclusion of reasonableness? The court says that the value of the competing interests is "similar," or "perhaps" is "slightly in favor of the water well." Does the opinion give any reasons that might support this conclusion? Should the court, following the guidance of the *Restatement*, have conducted a more rigorous (and perhaps quantified) analysis of the costs and benefits of septic tanks and water wells before deciding the reasonableness issue? Why do you suppose the court did not do this? If a rigorous cost-benefit analysis is not required, should the question of reasonableness be regarded as one of fact? If so, why shouldn't the court accept as controlling the jury's determination that the well was a nuisance?

3. Although the *Restatement* is widely followed—or at least cited—in modern nuisance cases, it is by no means the only possible approach that courts could take to resolving nuisance disputes. We take up nuisance in greater detail in Chapter IX, but for now, consider these possibilities and ask yourself whether any of them may have carried weight with the court in *Hendricks*:

(1) Instead of balancing the interests of the parties, perhaps courts should simply ask whether the defendant has committed some kind of "invasion" of plaintiff's land that causes harm above a certain threshold level ("significant harm"). Richard Epstein has argued that under the English common law, a nuisance would be found only if the defendant's conduct had caused or threatened to cause some kind of invasion, such as by air pollution particles, sewage added to a stream, or sound waves—a kind of mini-trespass if you will. Richard A. Epstein, Nuisance Law: Corrective Justice and Its Utilitarian Constraints, 8 J. Legal Stud. 49 (1979). Is the outcome in the instant case consistent with this principle? Would Stalnaker's well, which would draw water from an aquifer common to both parcels of land, have caused any "invasion" of the Hendrickses' subsurface land rights? Conversely, would the Hendrickses' septic tank, which would diffuse waste water into the surrounding soil, have caused any "invasion" of Stalnaker's subsurface rights?

(2) Another possibility would be to decide these disputes by enforcing the general understanding in the relevant community of what constitutes "normal use" of land. See Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. Chi. L. Rev. 681 (1973). Although it is unclear from the facts as stated, it is likely that both water wells and septic tanks are common uses of land in rural West Virginia. Can it be said that either a water well or a septic tank is more "normal" or "natural" than the other? Water wells have been around since the dawn of civilization, whereas septic fields are a more recent contrivance of human ingenuity. Should this matter?

(3) Some cases and commentators have given weight to temporal priority, in the sense that the first use to be established is given a presumption of validity relative to a later, incompatible use. See Donald

Wittman, First Come, First Served: An Economic Analysis of "Coming to the Nuisance," 9 J. Legal Stud. 557 (1980). Note that Stalnaker rushes to complete his well before the Hendrickses can obtain a permit for their septic system. Is this a legitimate reason to prefer Stalnaker's use to the Hendrickses' use in determining whether the well is a nuisance? Or is this undesirable behavior? Might it be a legitimate consideration in other circumstances?

(4) A final approach that may explain some of the cases is to ask whether the defendant (or the plaintiff) has been acting in a way consonant with general norms of "neighborliness." See Stewart E. Sterk, Neighbors in American Land Law, 87 Colum. L. Rev. 55, 88–103 (1987). For example, many jurisdictions recognize that the erection of a "spite fence," meaning a fence that is built for the sole purpose of irritating a neighbor, is an actionable nuisance. Id. at 62–63. As between Stalnaker and the Hendrickses, who is behaving in the more "neighborly" fashion? Is this judgment too subjective to serve as the basis for a rule of property law?

Given all these theories or themes in nuisance law competing with the *Restatement*'s balancing test and with each other, can you see why Prosser threw up his hands and said it was an "impenetrable jungle?"

4. Consider again the decision in *Hinman v. Pacific Air Transport* in light of *Hendricks* and the brief summary of nuisance law provided here. Does *Hinman* ultimately subject airplane overflights to a mode of analysis more commonly associated with nuisance than trespass? See also Restatement (Second) of Torts § 159(2) (1965) ("Flight by aircraft in the air space above the land of another is a trespass if, but only if, (a) it enters into the immediate reaches of the air space next to the land, and (b) it interferes substantially with the other's use and enjoyment of his land."). If there is a subset of trespass cases that should be resolved using nuisance principles, how could that subset be defined? Conversely, is there a subset of nuisance cases that should be handled using a strict liability doctrine like trespass? If so, how could this subset of nuisance cases be defined?

5. Given that trespass is typically clear and strict, and nuisance is typically neither clear nor strict, the boundary between interferences governed by trespass and those governed by nuisance would seem to be a matter of some importance. In principle, the boundary between trespass and nuisance is fixed by the nature of the interests these actions are said to protect: Trespass is said to protect the interest in *possession* of land, while nuisance is said to protect the *use and enjoyment* of land. See Restatement (Second) of Torts § 821D, cmt. d. From this, it has generally been assumed that trespass applies when the defendant intrudes upon the land with some object large and solid enough to physically displace the plaintiff from a portion of her land, such as an intrusion by another person, a vehicle, standing water—or a mobile home. Conversely, if the invasion is committed by small objects like particles of gas or sound or light waves, this will be governed by the law of nuisance. Similarly, noninvasive interferences with use and enjoyment of land, like the construction of a spite fence, will be governed by the law of nuisance rather than trespass. (We take up the distinction between trespass and nuisance further in Chapter IX.)

2. EXCLUSION AND GOVERNANCE

Another way to consider the distinction between trespass and nuisance is to think of them as exemplifying two different strategies for resolving disputes about how scarce resources are used: exclusion and governance. See Henry E. Smith, Exclusion versus Governance: Two Strategies for Delineating Property Rights, 31 J. Legal Stud. S453 (2002); Henry E. Smith, Exclusion and Property Rules in the Law of Nuisance, 90 Va. L. Rev. 965 (2004). Under an exclusion strategy, decisions about resource use are delegated to an owner who acts as the manager or gatekeeper of the resource. For example, the owner decides who gets to come onto the property, what it will be used for, and so forth. To implement this delegation of gatekeeper authority, the law allows the owner of the resource to repel any and all intrusions that do not have the owner's consent. A crude signal—whether an object is intruding on the land or not—is a simple basis for finding a violation. Exclusion is likely to be favored where particular resources like land have multiple potential uses, and when we think it desirable to give owners discretion to choose which use is most valuable. The only task of judges and other officials, under this approach, is to backstop the authority of the owner as manager of the resource. In particular, these officials have no need to monitor—or even to identify—the various permissible uses of the resource. The law of trespass, at least as applied in *Jacque v. Steenberg Homes*, appears to reflect this kind of strategy.

A second and different strategy for solving resource use disputes is governance. This strategy focuses on particular uses of resources, and prescribes particular rules about permitted and prohibited uses without regard to the other attributes of the resource. Governance rules can derive from many sources, including social norms, contracts, government regulations, and common-law judgments. Governance tends to be used in situations where the particular uses of property are of heightened significance, either because they are strongly favored or disfavored. Thus, in *Hendricks v. Stalnaker*, the parties perceive that their land can either be used for groundwater extraction or sewage disposal—but quite likely cannot be used for both. The answer to the question of which use has priority will have very substantial implications for the use and enjoyment of their respective parcels. Under a governance strategy, courts or other officials may determine directly how the property will be used along one or more dimensions singled out as critical. The law of nuisance, at least as applied in *Hendricks v. Stalnaker*, appears to reflect this kind of strategy.

At various points in these materials we will see property law shifting from an exclusion strategy to a governance strategy (or somewhere in between), particularly as disputes over conflicting uses of property become more intense, or more persons are affected by decisions as to how property is used, or both. The distinction between trespass and nuisance

is one of the clearest examples of this, and serves to some extent as a model for similar shifts that occur elsewhere in property law.

3. THE COASE THEOREM

Nuisance law has given rise to a rich literature about the role of private agreements—contracts—that reassign property rights in ways different from how they are originally assigned as a matter of law. Ronald Coase was an economist who was awarded the Nobel Memorial Prize in Economics in 1991 for his identification of the importance of transaction costs in assessing the economic effects of alternative institutional arrangements. His most famous article, part of which is excerpted below, contains an elaborate discussion of English nuisance cases and the role of private agreements in reassigning the rights established by nuisance law. This is also the article that lays out what has subsequently come to be known as the "Coase theorem," which plays an important role in the economic analysis of property rights and in law and economics more generally. Although Coase did not have a law degree, this article has become the most frequently cited work in all of legal scholarship.

Ronald H. Coase, *The Problem of Social Cost*

3 J.L. & ECON. 1–3, 6–8, 13–19 (1960).

This paper is concerned with those actions of business firms which have harmful effects on others. * * *

The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: How should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: Should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm. I instanced in my previous article[1] the case of a confectioner the noise and vibrations from whose machinery disturbed a doctor in his work. To avoid harming the doctor would inflict harm on the confectioner. The problem posed by this case was essentially whether it was worth while, as a result of restricting the methods of production which could be used by the confectioner, to secure more doctoring at the cost of a reduced supply of confectionery products. Another example is afforded by the problem of straying cattle which destroy crops on neighboring land. If it is inevitable that some cattle will stray, an increase in the supply of meat can only be obtained at the expense of a decrease in the supply of crops. The nature of the choice is clear: meat or crops. What answer should be given is, of course, not clear unless we know the value of what is obtained as well as the value of what is sacrificed to obtain it. * * * It goes almost without saying that this problem has to be looked at in total *and* at the margin.

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[1] Coase, The Federal Communications Commission, 2 J.L. & Econ. 26–27 (1959).

I propose to start my analysis by examining a case in which most economists would presumably agree that the problem would be solved in a completely satisfactory manner: when the damaging business has to pay for all damage caused and the pricing system works smoothly (strictly this means that the operation of a pricing system is without cost).

A good example of the problem under discussion is afforded by the case of straying cattle which destroy crops growing on neighboring land. Let us suppose that a farmer and a cattle-raiser are operating on neighboring properties. Let us further suppose that, without any fencing between the properties, an increase in the size of the cattle-raiser's herd increases the total damage to the farmer's crops. What happens to the marginal damage as the size of the herd increases is another matter. This depends on whether the cattle tend to follow one another or to roam side by side, on whether they tend to be more or less restless as the size of the herd increases and on other similar factors. For my immediate purpose, it is immaterial what assumption is made about marginal damage as the size of the herd increases.

To simplify the argument, I propose to use an arithmetical example. I shall assume that the annual cost of fencing the farmer's property is $9 and that the price of the crop is $1 per ton. Also, I assume that the relation between the number of cattle in the herd and the annual crop loss is as follows:

Number in Herd (Steers)	Annual Crop Loss (Tons)	Crop Loss per Additional Steer (Tons)
1	1	1
2	3	2
3	6	3
4	10	4

Given that the cattle-raiser is liable for the damage caused, this additional annual cost imposed on the cattle-raiser if he increased his herd from, say, 2 to 3 steers is $3 and in deciding on the size of the herd, he will take this into account along with his other costs. That is, he will not increase the size of the herd unless the value of the additional meat produced (assuming that the cattle-raiser slaughters the cattle), is greater than the additional costs that this will entail, including the value of the additional crops destroyed. Of course, if, by the employment of dogs, herdsmen, aeroplanes, mobile radio and other means, the amount of damage can be reduced, these means will be adopted when their cost is less the value of the crop which they prevent being lost. Given that the annual cost of fencing is $9, the cattle-raiser who wished to have a herd with 4 steers or more would pay for fencing to be erected and maintained, assuming that other means of attaining the same end would not do so more cheaply. When the fence is erected, the marginal cost due to the liability for damage becomes zero, except to the extent that an increase

in the size of the herd necessitates a stronger and therefore more expensive fence because more steers are liable to lean against it at the same time. But, of course, it may be cheaper for the cattle-raiser not to fence and to pay for the damaged crops, as in my arithmetical example, with 3 or fewer steers. * * *

I now turn to the case in which, although the pricing system is assumed to work smoothly (that is, costlessly), the damaging business is not liable for any of the damage which it causes. This business does not have to make a payment to those damaged by its actions. I propose to show that the allocation of resources will be the same in this case as it was when the damaging business was liable for damage caused. * * *

I return to the case of the farmer and the cattle-raiser. The farmer would suffer increased damage to his crop as the size of the herd increased. Suppose that the size of the cattle-raiser's herd is 3 steers (and that this is the size of the herd that would be maintained if crop damage was not taken into account). Then the farmer would be willing to pay up to $3 if the cattle-raiser would reduce his herd to 2 steers, up to $5 if the herd were reduced to 1 steer and would pay up to $6 if cattle-raising was abandoned. The cattle-raiser would therefore receive $3 from the farmer if he kept 2 steers instead of 3. This $3 foregone is therefore part of the cost incurred in keeping the third steer. Whether the $3 is a payment which the cattle-raiser has to make if he adds the third steer to his herd (which it would be if the cattle-raiser was liable to the farmer for damage caused to the crop) or whether it is a sum of money which he would have received if he did not keep a third steer (which it would be if the cattle-raiser was not liable to the farmer for damage caused to the crop) does not affect the final result. In both cases $3 is part of the cost of adding a third steer, to be included along with the other costs. If the increase in the value of production in cattle-raising through increasing the size of the herd from 2 to 3 is greater than the additional costs that have to be incurred (including the $3 damage to crops), the size of the herd will be increased. Otherwise, it will not. The size of the herd will be the same whether the cattle-raiser is liable for the damage caused to the crop or not. * * *

It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximizes the value of production) is independent of the legal position if the pricing system is assumed to work without cost.

Judges have to decide on legal liability but this should not confuse economists about the nature of the economic problem involved. In the case of the cattle and the crops, it is true that there would be no crop damage without the cattle. It is equally true that there would be no crop damage without the crops. The doctor's work would not have been disturbed if the confectioner had not worked his machinery; but the

machinery would have disturbed no one if the doctor had not set up his consulting room in that particular place. * * * If we are to discuss the problem in terms of causation, both parties cause the damage. If we are to attain an optimum allocation of resources, it is therefore desirable that both parties should take the harmful effect (the nuisance) into account in deciding on their course of action. It is one of the beauties of a smoothly operating pricing system that, as has already been explained, the fall in the value of production due to the harmful effect would be a cost for both parties. * * *

[I]t has to be remembered that the immediate question faced by the courts is *not* what shall be done by whom *but* who has the legal right to do what. It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production.

The argument has proceeded up to this point on the assumption * * * that there were no costs involved in carrying out market transactions. This is, of course, a very unrealistic assumption. In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.

In earlier sections, when dealing with the problem of the rearrangement of legal rights through the market, it was argued that such a rearrangement would be made through the market whenever this would lead to an increase in the value of production. But this assumed costless market transactions. Once the costs of carrying out market transactions are taken into account it is clear that such a rearrangement of rights will only be undertaken when the increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about. When it is less, the granting of an injunction (or the knowledge that it would be granted) or the liability to pay damages may result in an activity being discontinued (or may prevent its being started) which would be undertaken if market transactions were costless. In these conditions the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates. One arrangement of rights may bring about a greater value of production than any other. But unless this is the arrangement of rights established by the legal system, the costs of reaching the same result by altering and combining rights through the market may be so great that this optimal arrangement of rights, and the greater value of production which it would bring, may never be achieved. * * *

The discussion of the problem of harmful effects in this section (when the costs of market transactions are taken into account) is extremely inadequate. But at least it has made clear that the problem is one of choosing the appropriate social arrangement for dealing with the harmful effects. All solutions have costs and there is no reason to suppose that government regulation is called for simply because the problem is not well handled by the market or the firm. Satisfactory views on policy can only come from a study of how, in practice, the market, firms and governments handle the problem of harmful effects. Economists need to study the work of the broker in bringing parties together, the effect of restrictive covenants, the problems of the large-scale real-estate development company, the operation of Government zoning and other regulating activities. It is my belief that economists, and policy-makers generally, have tended to over-estimate the advantages which come from governmental regulation. But this belief, even if justified, does not do more than suggest that government regulation should be curtailed. It does not tell us where the boundary line should be drawn. This, it seems to me, has to come from a detailed investigation of the actual results of handling the problem in different ways. * * *

NOTES AND QUESTIONS

1. The problem of cattle trampling crops, which Coase takes as his central example in the excerpt reproduced here, is usually thought to be governed by a branch of the law of trespass rather than nuisance law. Interestingly, however, the rules regarding cattle trespass have varied in different parts of the country with respect to who has the duty to put up a fence to prevent livestock from damaging crops. See Robert C. Ellickson Order without Law: How Neighbors Settle Disputes 42–43 (1991). In most parts of the United States, a "fencing in" rule prevails, whereby the owner of the cattle or other livestock has the duty to put up a fence in order to keep the cattle in. If they escape and trample unfenced crops, the owner of the cattle is liable for damages for trespass. In certain parts of the western United States, however, where grazing livestock on the open range was the historical practice, a rule of "fencing out" sometimes prevails, whereby the burden is on the owner of the crops to put up a fence to keep the cattle out. If the crop owner has failed to put up a fence or to keep it maintained, the cattle owner is not liable when cattle wander into the field and trample the crops. Does the Coase theorem provide a basis for explaining why most states would adopt a fencing in rule, but others a rule of fencing out? See Kenneth R. Vogel, The Coase Theorem and California's Animal Trespass Law, 16 J. Legal Stud. 149 (1987). Interestingly, the fencing in/fencing out distinction only applies to cattle that wander of their own volition without human guidance. If an owner of livestock deliberately induces his animals to graze on land belonging to another, this is regarded as a trespass, whether the land is open range or not. See Light v. United States, 220 U.S. 523 (1911); Musselshell Cattle Co. v. Woolfolk, 85 P. 874 (Mont. 1906). Also, as Ellickson discovered in his empirical study of modern-day Shasta County, California, landowners there follow a norm requiring that cattle be fenced in, without

regard to whether the formal rule on the books requires fencing in or fencing out. Ellickson, supra, at 52–64. Can the Coase theorem explain these features of cattle trespass law and norms that appear to carry forward the traditional exclusion model? See generally Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J. L. & Econ. S77 (2011).

2. Work your way carefully through Coase's example about the rancher and the farmer, and make sure you understand the logic behind his argument that if it is costless to enter into contracts (that is, if "transaction costs" are zero), then the same number of cattle will be raised by the rancher, whether or not the rancher is liable to the farmer for cattle trespass. The basic idea is that if contracting is costless, the parties will keep contracting to modify the initial assignment of property rights until they have exhausted all possible deals that would be to their mutual advantage. The final stopping point will always be the use of resources that creates the greatest joint wealth for the parties, because once this point is reached, neither party can offer the other one a deal that would make both of them better off. Of course, this does not mean that the rancher and the farmer will be indifferent to the initial assignment of property rights. If the rancher starts out with the right to let cattle trespass, then the farmer will have to "bribe" the rancher to cut back to the joint-maximizing number. The rancher will be richer because of the initial assignment of rights. Conversely, if the farmer starts out with the right to be free of cattle trespasses, then the rancher will have to "bribe" the farmer to let him increase the number of cattle. The farmer will be richer because of the initial assignment of rights. So you can be sure that the rancher and the farmer (and others similarly situated) will care about the assignment of rights, because it affects the distribution of wealth. Coase's point is that if we ignore the distributional impact, and focus only on the question of how resources in society are used, the result would be the same regardless of the initial allocation of rights, provided transaction costs are zero. A good text providing further introduction to the Coase theorem and some basic economics concepts is Richard A. Ippolito, Economics for Lawyers 228–46 (2005).

3. What other assumptions are necessary for the invariance outcome of the Coase theorem to apply? Two assumptions that Coase does not make explicit are that individuals are rational maximizers and that all values are capable of being expressed in monetary terms. The assumption that persons are rational maximizers means that they prefer more rather than less (of whatever it is they happen to prefer), and that, subject to information constraints, when presented with a choice, they will choose the option that yields more rather than less. Nearly all economists would agree, however, that the assumption that people are rational maximizers is at most a generalization about human behavior, not a postulate that all people act rationally in pursuit of their interests all the time. (Before you have finished this book, you will have encountered some people who probably cannot be regarded as rational maximizers.) How much should the possibility of irrational behavior concern someone interested in the design of legal institutions? Most economists would also agree that there are certain values that people hold dear that cannot be readily translated into dollar terms.

How much of a concern should this be to someone designing legal institutions? Are there still other assumptions about human behavior lurking behind the Coase theorem? Robert Cooter has suggested that for the Coase theorem to hold, one must also assume that people are natural cooperators rather than ruthless exploiters. See Robert Cooter, The Cost of Coase, 11 J. Legal Stud. 1 (1982) (comparing the Coase Theorem and the "Hobbes Theorem"). For other issues, such as whether the parties' wealth would affect the allocation of resources in the hypothetical world of zero transaction costs, see, e.g., R.H. Coase, The Firm, the Market, and the Law 170–74 (1988); Harold Demsetz, When Does the Rule of Liability Matter?, 1 J. Legal Stud. 13 (1972); Stewart Schwab, Coase Defends Coase: Why Lawyers Listen and Economists Do Not, 87 Mich. L. Rev. 1171, 1178–84 (1989).

4. Coase himself wrote that the assumption that it is costless to engage in contracts is very unrealistic—"as strange as the physical world without friction." R.H. Coase, The Firm, the Market, and the Law 14 (1988). So the Coase theorem should not be taken to be a guide to understanding the real world. Instead, the theorem should be seen as a kind of thought experiment, which is intended to reveal the importance of transaction costs in the design of legal institutions. Coase in later writing expressed frustration that people mistook his thought experiment to mean that markets achieve efficient results when transaction costs are low. "The world of zero transaction costs has often been described as a Coasian world. Nothing could be further from the truth. It is the world of modern economic theory, one which I was hoping to persuade economists to leave." Id. at 174. His point was more nearly the opposite: that transaction costs are always positive, and hence we cannot assume that *any* institutional arrangement will necessarily generate efficient results. Coase thought that it is always important to compare alternative institutional arrangements, and to try to determine which one will deviate the least from the unattainable ideal of the (mythical) world of zero transaction costs. For more about the Coase theorem and its place in legal scholarship, see Daniel A. Farber, Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem, 83 Va. L. Rev. 397 (1997).

5. One of Coase's controversial claims is that any conflict over resource use (like the rancher and farmer, or a nuisance dispute) is a "reciprocal" one, meaning that each party to the dispute is imposing costs on the other party. This is plausible if we consider a dispute like *Hendricks v. Stalnaker*, involving adjacent landowners who make incompatible demands on the use of the land. But is it equally plausible to say that there is a "reciprocal" relationship between a property owner who has an in rem right to exclude others from her land, and the rest of the world which is subject to a duty to desist from interfering with her land? If the rule were that anyone—not just neighbors—would be entitled to trespass on land, with whom would the present owner of the land have to bargain in order to be free of such trespasses? Everyone on the block? In the United States? The world? What about unborn future would-be trespassers? Or do all these cases just point once again to the importance of transaction costs in the real world? See

Clifford G. Holderness, The Assignment of Rights, Entry Effects, and the Allocation of Resources, 18 J. Legal Stud. 181 (1989). Further, the default package of rights the law provides is not as symmetrical with respect to invasions as one would expect if causation of harm were fully reciprocal; people have the right to prevent invasions but robust rights to commit invasions must usually be specially added to this package. See Henry E. Smith, Self-Help and the Nature of Property, 1 J.L. Econ. & Pol'y 69, 70–80 (2005), and Chapter IX.

6. There is also an enormous literature describing various attempts to test the Coase theorem empirically. See generally Steven G. Medema & Richard O. Zerbe, The Coase Theorem, in The Encyclopedia of Law and Economics 836, 858–73 (2000). Although generalizations are hazardous, much of this literature suggests that bargaining over entitlements is influenced not only by joint wealth maximization, but also by a variety of factors, including the initial distributions of rights, the history of interaction between the parties, and perceptions of what outcomes are regarded as fair.

4. RESOLVING PROPERTY DISPUTES BY CONTRACT

What, you may be asking yourself, is the payoff to the law student from studying the Coase theorem? One very important lesson is that, as a lawyer assisting a client in a dispute over the use of property, you should always try to imagine various ways in which contracts might be used to resolve the problem. Litigation to clarify or enforce property rights may ultimately be unavoidable. But contractual modifications of property rights—"Coasean bargains" as they are sometimes called—should be explored as an alternative to litigation. A contractual rearrangement of rights may be cheaper and more satisfactory to all concerned.

Consider again in this light the dispute in *Hendricks v. Stalnaker*. Nothing in the law would have prevented the parties from bargaining, at any stage of the dispute, over the placement of the well and the septic field. For example, the parties could have agreed to build a well on one parcel and a septic field on the other parcel, and could have granted reciprocal rights to each other (easements) so that each would have had access to both facilities. Alternatively, one party could have bought out the other, and then built a single well and septic field for both parcels; they could then have rented half of the land to a tenant (perhaps the other party) with water and septic services included in the rent.

Another dimension of *Hendricks* concerns the role that land-use regulation plays in creating the dispute. The reason both Stalnaker and the Hendrickses cannot do what they want to do is because of the County Health Department regulation requiring that there be at least 100 feet of separation between the edge of a septic field and any water well. Perhaps the Health Department would consider a waiver or modification of this rule if other adjustments were agreed upon by the parties. For example, if the Hendrickses agreed to pretreat their waste water before

it enters the septic field, or if Stalnaker agreed to extra monitoring of his well water, perhaps the Health Department could be persuaded to relax its 100-foot buffer zone requirement. This type of solution would entail a more complicated set of negotiations among three parties—Stalnaker, the Hendrickses, and the Health Department. And of course, the Health Department may take the position that it has no authority to grant a variance from the rules, and even if it has authority, there may be no (lawful) method of making a side payment to the Department to induce it to be flexible. But a conscientious lawyer looking for a solution to the problem would want to explore the regulatory side of the dispute as well.

Why didn't any of these "Coasean" solutions happen? One possibility is that the parties (or their lawyers) did not think about these kinds of solutions. Another possibility is that they thought about them, but concluded they were too costly or were technically infeasible. A third possibility is that they did not think about them until transaction costs became too high for any kind of Coasean bargain to take place. The last possibility highlights another point taught by the Coase theorem: It is important to be sensitive to the causes of high transaction costs in order to guide clients toward potential Coasean bargains before those options are foreclosed and litigation is the only recourse.

Many factors, some physical, some psychological, enter into creating high transaction costs. We will not make any attempt to catalogue them all here. You will gradually come to have a greater appreciation of the many impediments to contractual solutions to resource disputes as you go through these materials. We will highlight two factors that loom large throughout property law: assembly problems and bilateral monopoly.

Assembly problems arise when someone wants to assemble property rights from a large number of owners in order to undertake some project. This is an instance in a property setting of high transaction costs stemming from large numbers of contracting parties. *Hinman* is an example of an assembly problem. Suppose each surface owner had the power to block airplanes from entering into the airspace above the surface of his or her land, and suppose that some kind of technology (like advanced radar) is available so that both surface owners and airplanes can detect when airplanes enter the column of space above someone's land. Under these circumstances, persons who want to fly would have to assemble permissions from a huge number of surface owners. This would entail major difficulties in identifying all the affected surface owners, and getting them to communicate and agree on a solution. Even if all the affected surface owners could be identified and engaged in negotiations, some owners might hold out for a very generous payment (unless they could be easily avoided by choosing a different route). More mundane assembly problems arise when highways or utility lines are built or when developers want to acquire multiple contiguous parcels for some large-scale project (see Figure 1–3). Each of these projects typically entails the need to assemble a large number of property rights, and each presents high transaction costs as a consequence.

Another cause of high transaction costs is bilateral monopoly. By this, we do not refer to large industrial monopolies, but rather to localized monopolies—situations in which an owner of property needs something that can be provided by only one other person or entity. In *Hendricks*, it would appear that the physical lay of the land caused each party to have only the other as a possible negotiating partner, as long as each wished to use the land for wells and/or septic systems. Similarly, in *Jacque*, Steenberg Homes had only one route to deliver the mobile home that it regarded as reasonable, but access to that route was controlled by the Jacques. Economists call these localized monopoly problems "bilateral monopolies," because there is a monopoly on each side: only one seller and one buyer for the contested resource. See Richard A. Posner, Economic Analysis of Law § 3.8, at 77–78 (8th ed. 2011); Stewart E. Sterk, Neighbors in American Law, 87 Colum. L. Rev. 55, 57–58, 68–88 (1987).

Figure 1–3
A Holdout

By MrTinDC, www.flickr.com, licensed under CC BY-ND 2.0. This row house on Massachusetts Avenue in Washington, D.C., was owned by an architect who refused all entreaties to sell to the developer for many times its assessed value. The developer eventually decided to build around the house, at substantial additional expense. The holdout was reported to be planning to use the house to open a pizza parlor, which never opened, and the house was later sold for a small fraction of the developer's offer.

These bilateral monopoly situations are also a source of high transaction costs, because each of the parties has nowhere else to turn in order to engage in an equivalent transaction. Thus, if the parties disagree about the price or terms for an exchange of resources, prolonged haggling can result. Perhaps one or both parties, perceiving that the other party has no good options, will bargain strategically to try to get an especially

favorable deal. See Robert Cooter, The Cost of Coase, 11 J. Legal Stud. 1, 17–24 (1982). Or perhaps one party, the Jacques for example, may for whatever reasons be uninterested in entering into any kind of exchange. A further complication, which seems all too common, is that the parties may have gotten off on the wrong foot with each other, which has led to resentments or "bad blood" that make it very difficult to turn the relationship into a cooperative one. For whatever reasons, bilateral monopoly problems are extremely prevalent in property law.

The lesson for the lawyer advising clients is all too clear (but all too often ignored): It is important to look down the road in order to identify potential assembly problems and bilateral monopoly problems *before* the client gets trapped in a situation that precludes any kind of Coasean bargaining. If the client wants to acquire six contiguous parcels of property for a development, and the first five owners agree to sell but the sixth holds out, what will happen then? If the client wants to acquire a home site, but the only means of access for utility lines is across someone else's property, what will happen then? Ideally, someone should have advised Steenberg Homes about the difficult turn in the private road before it agreed to free delivery of the mobile home in the dead of winter. Ideally, someone should have advised the Hendrickses about the Health Department regulation requiring a 100-foot buffer zone around a septic field before they bought their property. Lawyers of course cannot foresee all problems, but they should be alert to the kinds of problems that can arise, and advise their clients to take all appropriate precautions to be able to acquire the resources they need before they fall into a high-transaction-cost trap.

C. BUILDING ENCROACHMENTS

Bilateral monopoly situations also arise as a result of minor building encroachments. If an owner knowingly and deliberately builds over the boundary of the parcel on the land of another, a court will have no hesitation in enjoining the structure—ordering it to be torn down. Building such a structure and leaving it there is a trespass, and as we will see in Chapter IV, a repeated or continuing trespass will normally be enjoined. More vexing for courts is the question whether they should enjoin trespasses involving inadvertent and innocent building encroachments. In the typical case, A builds a structure thinking it is on his own land, but it turns out that some portion of the building is actually on B's land. The portion of the building on B's land is a continuing trespass. Does this mean that B is entitled to an injunction that would require—in the extreme case—that the entire building be torn down? Consider the following decisions.

Pile v. Pedrick

Supreme Court of Pennsylvania, 1895.
31 A. 646.

Bill in equity to compel the removal of a wall.

The bill averred that the parties owned adjoining properties, that the defendants had erected a large factory and had in its erection exercised their right to use a portion of the plaintiffs' ground for their party wall; that the defendants were building an additional story to their factory and had inserted some windows in the said wall, and were about to insert others. The bill prayed for an order on defendants to remove the windows already inserted, and an injunction as to the others.

The answer denied that the defendants exercised the right to use a portion of plaintiffs' ground for their party wall, and alleged that the wall erected by them is entirely upon their own ground, as they are advised and verily believe; that they have had the premises surveyed by competent surveyors, and knowing they would want to put windows in their wall they employed competent builders and architects, and instructed them to build the premises wholly upon the land of defendants, and not in any part of said wall to use plaintiffs' premises.

The case was referred to Charles H. Mathews, Esq., as master, who found as a fact that the brick wall of defendants, which is eighteen inches thick, is clear of the property line, from Buttonwood street to Hamilton street, and that it stands its entire length on the defendants' land. That the brick wall rests upon a foundation wall which is two feet thick, and that this foundation wall was clear of the plaintiffs' property from Hamilton street, north, to a point about fifty feet south of Buttonwood street; but, that for the said fifty feet, the said foundation wall encroached on the plaintiffs' property on an average of one and a half inches to one and five eighths inches. * * *

On February 6th, the court entered the following decree: * * *

> Order and decree that the defendants by their workmen and pursuant to a permit of the building inspectors have leave to remove so much of their wall mentioned in the master's report, as is upon the ground of the plaintiffs, replacing it by a wall of the existing width to be wholly upon the defendants' ground. But in so doing the said workmen shall not enter upon or dig into the ground of the plaintiffs.
>
> And that the costs of the case shall be paid the respective parties, one half by each.
>
> And it is further ordered that if the permission herein be not exercised within a reasonable time, the plaintiffs have leave to apply to the court for further direction or order.

Errors assigned by plaintiffs were among others, * * * in not directing defendants to remove the windows placed in the wall; * * * [in decreeing] as above, quoting last three paragraphs of decree.

Errors assigned by defendants were among others, * * * in failing to order and decree that the plaintiffs permit the defendants to enter upon the premises of the plaintiffs and remove so much of the wall of the defendants as is upon the ground of the plaintiffs; in decreeing that the costs of the case should be paid by the respective parties, one half by each.

■ WILLIAMS, J. The learned judge of the court below was right in holding that the wall in controversy was not a party wall. It was not intended to be. The defendants were building a factory, and, under the advice of their architect, decided to build within their own lines, in order to avoid the danger of injury to others from vibration which might result from the use of their machinery. They called upon the district surveyor to locate their line, and built within it, as so ascertained. Subsequent surveys by city surveyors have determined that the line was not accurately located at first, but was about 1 1/2 inches over on the plaintiffs'. This leaves the ends of the stones used in the foundation wall projecting into the plaintiffs' lands, below the surface, 1 3/8 inches. This unintentional intrusion into the plaintiffs' close is the narrow foundation on which this bill in equity rests. The wall resting on the stone foundation is conceded to be within the defendants' line. The defendants offered, nevertheless, to make it a party wall, by agreement, and give to plaintiffs the free use of it, as such, on condition that the windows on the third and fourth floors should remain open until the plaintiffs should desire to use the wall. This offer was declined. The trespass was then to be remedied in one of two ways: It could be treated, with the plaintiffs' consent, as a permanent trespass, and compensated for in damages, or the defendants could be compelled to remove the offending ends of the stones to the other side of the line. The plaintiffs insisted upon the latter course, and the court below has, by its decree, ordered that this should be done. The defendants then sought permission to go on the plaintiffs' side of the line and chip off the projecting ends, offering to pay for all inconvenience or injury the plaintiffs or their tenants might suffer by their so doing. This they refused. Nothing remained but to take down and rebuild the entire wall from the defendants' side, and with their building resting on it. This the decree requires, but in view of the course of the litigation the learned judge divided the costs. This is the chief ground of complaint on this appeal. Costs are not of course, in equity. They may be given or withheld as equity and good conscience require. It often happens that a chancellor is constrained to enforce a legal right under circumstances that involve hardship to the defendant, and in such cases it is, as it should be, common to dispose of the costs upon a consideration of all the circumstances, and the position and conduct of the parties. The costs in this case were within the power of the chancellor. They were disposed of in the exercise of his official discretion, and we see no reason to doubt that they were disposed

of properly. The decree is affirmed; the costs of this appeal to be paid by the appellants.

Pile v. Pedrick

Supreme Court of Pennsylvania, 1895.
31 A. 647.

■ WILLIAMS, J. This is an appeal from the same decree just considered in *Pile v. Pedrick*, 31 Atl. 646. It is not denied that the foundation wall on which the appellant has built was located under a mistake made by the district surveyor, and does in fact project slightly into the plaintiffs' land. For one inch and three-eighths, the ends of the stones in the wall are said to project beyond the division line. The defendants have no right, at law or in equity, to occupy land that does not belong to them, and we do not see how the court below could have done otherwise than recognize and act upon this principle. They must remove their wall, so that it shall be upon their land. This the court directed should be done within a reasonable time. To avoid further controversy over this subject, we will so far modify the decree as to permit such removal to be made within one year from the date of filing hereof. In all other respects the decree is affirmed; the appellants to pay all costs made by them upon this appeal.

Golden Press, Inc. v. Rylands

Supreme Court of Colorado, 1951.
235 P.2d 592.

■ STONE, JUSTICE. Plaintiffs Rylands and Reid owned a parcel of land fronting on West Colfax Avenue, Jefferson County, upon which were located their residence and garage and some rental cottages. Defendant Golden Press, Inc., constructed a one-story brick and cinder block business building on its property which adjoined plaintiffs' property on the east. According to plaintiffs' survey here unchallenged, the west wall of defendant's building is two inches clear of the lot line at the front or south end, is exactly on the line at the north end, and is approximately 160 feet in length.

In the action here involved, plaintiffs allege that in [constructing] the building defendant caused its foundation and footings to extend from two to three and a half inches upon plaintiffs' land. * * * Plaintiffs prayed for injunction requiring that defendant remove all footings and foundations upon their property * * * Upon issue raised by general denial the case was tried to a jury as to the issue of damages alleged by trespass, the court reserving the determination of the issue of injunction. On the issue of damages the jury returned a verdict in favor of the defendant. The court then found encroachment as alleged and granted mandatory injunction requiring that defendant's projecting footings be removed from plaintiffs' property * * *

Ordinarily, mandatory injunction will issue to compel removal of encroaching structures, but it is not to be issued as a matter of course. On appeal to the court for an equitable remedy, the court must consider the peculiar equities of the case. A study of many decisions discloses no specific and universally-accepted rule as to encroachments. Even in jurisdictions like Massachusetts, in which it has been declared that mandatory injunction for removal of encroachment can only be denied where estoppel or laches is shown, Beaudoin v. Sinodinos, 48 N.E.2d 19 (Mass. 1943), there are numerous cases where injunction has been refused in the absence of those defenses. See cases cited as exceptional in Geragosian v. Un. Realty Co., 193 N.E. 726 (Mass. 1935). Generally in other jurisdictions such harsh rule is not followed. Sometimes a slight and harmless encroachment is held to be within the rule "de minimis," as in Tramonte v. Colarusso, 152 N.E. 90 (Mass. 1926), and McKean v. Alliance Land Co., 253 P. 134 (Cal. 1927), and generally the courts require that he who seeks equity should do equity and come with clean hands. Tramonte v. Colarusso, supra; McKee v. Fields, 210 P.2d 115 (Or. 1949)

Where the encroachment is deliberate and constitutes a willful and intentional taking of another's land, equity may well require its restoration regardless of the expense of removal as compared with damage suffered therefrom; but where the encroachment was in good faith, we think the court should weigh the circumstances so that it shall not act oppressively. 5 Pomeroy' Equity Jurisprudence, page 852, § 508. While the mere balance of convenience is not the proper test, yet relative hardship may properly be considered and the court should not become a party to extortion. Restatement of the Law, Torts, § 941. Where defendant's encroachment is unintentional and slight, plaintiff's use not affected and his damage small and fairly compensable, while the cost of removal is so great as to cause grave hardship or otherwise make its removal unconscionable, mandatory injunction may properly be denied and plaintiff relegated to compensation in damages. Owenson v. Bradley, 197 N.W. 885 (N.D. 1924); Nebel v. Guyer, 221 P.2d 337 (Cal. Dist. Ct. App. 1950); Mary Jane Stevens Co. v. First Nat'l Bldg. Co., 57 P.2d 1099 (Utah 1936).

In the case before us issue was raised in the argument as to whether or not the encroachment was intentional. There was no finding on this issue by the trial court and the decree is not necessarily predicated upon intent. In the absence of proof to the contrary there is a presumption that men act in good faith and that they intend to do what they have the right to do. Prior to the building of the wall, plaintiffs and defendant each employed a surveyor, but neither was called as a witness and the results of their surveys are not disclosed * * *

There is disclosed continued argument by plaintiffs with representatives of defendant during construction of the wall as to trespassing on their lands, but we find no evidence from the record

challenging the good faith of defendant's representative in locating the footings.

Again we note that while plaintiffs were continually complaining as to trespass of the workmen on their property, they took no steps for injunction or other legal determination of the disputed line until after both the foundation and upper wall were completed.

Further, we note that the encroachment here complained of is very slight. It is conceded that the wall above the foundation does not project over the property line and that the only encroachment consists of a projection of the footings a distance of two inches at the middle, increasing to three and a half inches at the north end. The top of these footings is about seven feet below the surface of the ground and they go down to nine feet below the surface. They constitute no interference whatever with plaintiffs' present use of the property as a driveway and iris bed, and the only testimony as to future damage was to the effect that if plaintiffs wished to build to their line with a basement, they would have to detour around this slight projection of defendant's footings.

The testimony indicates that the value of plaintiffs' lands is approximately $200 per front foot, so that if defendant had taken the entire strip of three and a half inches both at and below the surface, its value would have been only about $55, and the value of the portions extending from seven to nine feet below the surface and only along the rear eighty feet of wall would appear to be very small. Plaintiffs, at the trial, refused defendant permission to enter upon their property for the purpose of chipping off the encroaching footings with a jack hammer, and demanded that they be removed from defendant's side of the land, if necessary by tearing down the wall. The expense and hardship of such removal would be so great in comparison with any advantage of plaintiffs to be gained thereby that we think it would be unconscionable to require it, and that under all the circumstances disclosed mandatory injunction should have been denied by the trial court, with permission for plaintiffs to proceed, if desired, in damages.

Accordingly, the injunctive decree is reversed and the case remanded for further proceedings, if desired, consistent herewith.

NOTES AND QUESTIONS

1. The encroachments in *Pile* and *Golden Press* were extremely minimal—just a matter of a few inches underneath the soil in both cases. Yet the courts in both cases accept that these intrusions are trespasses, and that some type of rectification is needed to vindicate the property rights of the encroached-upon landowner. This in itself is a testament to the hold of the *ad coelum* rule (discussed in connection with *Hinman*) on the judicial mind. But does rigid enforcement of property boundaries make sense in this context? Another approach, as noted in *Golden Press*, would declare that very small intrusions are "de minimis" and hence would entitle the plaintiff to only nominal damages. Would you favor this approach over the approaches

of *Pile* and *Golden Press*? If so, what would be the point where "de minimis" is passed, and the intrusion becomes subject to liability?

2. As the discussion in *Golden Press* suggests, courts in a number of jurisdictions have rejected the absolutist approach of *Pile*. Indeed counsel for the defendant in *Pile* unsuccessfully argued undue hardship as a reason to withhold the injunction. Exactly how many jurisdictions would award injunctive relief against minor building encroachments is unclear, since some jurisdictions that purport to follow the automatic injunction rule nevertheless have recognized a number of exceptions to the rule (Massachusetts fits this description, see Peters v. Archambault, 278 N.E.2d 729 (Mass. 1972)). A safe generalization would be that, if faced with the facts of *Pile* or *Golden Press*—an unintentional encroachment, only slight damage to the plaintiff's interest, and grave hardship to the defendant if removal of the encroachment were required—most American courts today would probably deny injunctive relief and award only damages.

3. The doctrinal justification for awarding an injunction is relatively straightforward, although it is interesting that *Pile* sees no need to spell it out. The building encroachment is a trespass (the only intent required is to do the act, even if it as a mistake). And failing to remove the building is a continuing trespass. Restatement (Second) of Torts § 158 ("One is subject to liability to another for trespass . . . if he intentionally . . . (c) fails to remove from the land a thing which he is under a duty to remove"); id. § 161(1) ("A trespass may be committed by the continued presence on the land of a structure . . . which the actor tortiously placed there whether or not the actor has the ability to remove it"). Trespass, as we learned from *Jacque v. Steenberg Homes*, is forbidden without regard to any inquiry into the reasonableness of the intrusion or whether it causes any actual harm.

4. The doctrinal justification for the outcome in *Golden Press* comes about from viewing the problem from a different angle within the traditions of equity. One of the maxims of equity is that an injunction will issue only if a weighing of interests between the parties—generally called the "balance of the equities"—favors giving the victorious plaintiff the "extraordinary" relief of an injunction rather than damages. What the court looks for is not a deviation from equality of hardship, but rather a court will ask whether a plaintiff who is otherwise eligible to get an injunction should not get it in light of the gross hardship to the defendant in comparison with the benefit to the plaintiff. If the court balances the equities and finds a disproportionate hardship on the defendant, it will deny the injunction. Otherwise, the court will look with favor on the issuance of an injunction. If the injunction is denied, the plaintiff will be limited to the relief it would be entitled to "at law," i.e., damages. This is the doctrinal path followed by *Golden Press* in deciding that the victorious plaintiff (the encroached-upon party) will get only damages, rather than an injunction requiring removal of the encroaching footings.

5. Note that the court in *Pile* does not seem to disagree with the court in *Golden Press* about the balance of the equities. One contested issue in *Pile* is whether the trial court had authority to divide court costs between the parties rather than making the losing defendant pay all the costs. In

exercising this limited discretion in this fashion, the court seems to signal its displeasure with the plaintiffs' extreme and unreasonable behavior in refusing a license to the defendant to enter onto the plaintiff's land to remove the footings. Why, then, didn't the court use its equitable discretion in light of the relative hardships? It is worth noting that Pennsylvania case law at the time veered between absolutist statements about trespass and more lenient approaches. Henry L. McClintock, Discretion to Deny Injunction against Trespass and Nuisance, 12 Minn. L. Rev. 565, 575–76 (1928); Comment, Injunction—Nuisance—Balance of Convenience, 37 Yale L.J. 96, 97 n.4 (1927). It is also worth asking what the nature of the hardship was. If the encroachers could have avoided the problem by bricking up the windows in the wall they had built, what exactly was the hardship they faced?

6. It bears emphasis that courts have employed the balancing-of-the-equities approach to deny injunctions against building encroachments only when the original encroachment is innocent—that is, when the encroaching party does not know that the building is encroaching on someone else's property at the time the building is constructed. Courts frequently refer to a person who violates another's property rights without knowing that he or she is doing so as a "good faith" violator. In contrast, someone who knowingly violates another's property rights is called a "bad faith" violator. (Be aware that "good faith" and "bad faith" may have slightly different meanings in other legal contexts, but in property law this is nearly always the meaning of these terms.) When an encroacher acts in bad faith at the time the building is constructed, then the courts universally agree that injunctive relief against the encroachment is appropriate. See, e.g., Warsaw v. Chicago Metallic Ceilings, Chapter IX (upholding injunction requiring destruction of a warehouse built with knowledge of a neighbor's claim that it would block an easement); Mark L. Share, Principles of Equity Will Not Protect Encroachers Who Have Knowingly Invaded Their Neighbors' Property, L.A. Law., Jan. 27, 2005, at 40. Does this exception to *Golden Press* (or perhaps limitation on the *Golden Press* exception to *Pile*) follow from the balancing-of-the-equities maxim, or does it reflect another maxim like the clean hands requirement? If the former, why not treat bad faith at the time the building was constructed as just another factor to weigh in the balance of interests?

7. Should courts that follow the approach of *Golden Press* focus only on the encroacher's actual knowledge at the time the encroaching structure was built, or should they also ask whether the encroacher acted negligently in failing to avoid the encroachment? California has adopted a Good Faith Improver Act that requires consideration not only of the good faith of the encroacher, but also whether the encroacher was negligent, i.e., failed to procure a survey or ignored obvious warning signs. See Raab v. Casper, 124 Cal.Rptr. 590 (Cal. Ct. App. 1975) (discussing California Good Faith Improver Act as applied to encroaching cabin on adjacent foothill lot). Does this create better incentives for parties to take cost-justified precautions to avoid creating a building encroachment problem? If liability for encroachments is great enough it can call forth individually worthwhile but socially wasteful efforts at avoiding encroachments through elaborate

surveys. See Stewart W. Sterk, Property Rules, Liability Rules, and Uncertainty about Property Rights, 106 Mich. L. Rev. 1285 (2008).

8. A dispute analogous to the issue in *Pile* and *Golden Press* recently reached the U.S. Supreme Court in the context of intellectual property rights (specifically patents). The question was whether the owner of a patent is automatically entitled to a permanent injunction against a defendant who has infringed the patent, or whether courts may sometimes deny an injunction and award only damages. In *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), the Court embraced the *Golden Press* position on this issue. Injunctive relief may be granted, the Court said, only if the patent holder can show that such relief is required by "traditional equitable principles." Apparently drawing on the standard for preliminary relief, the Court set forth a four-part test the patent holder must satisfy: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." Id. at 391. The Court did not apply this test, but remanded to the lower courts to determine whether an injunction was appropriate under the circumstances. A concurring opinion by Chief Justice Roberts, joined by two other Justices, emphasized that application of the traditional equitable test will usually result in issuing an injunction, "given the difficulty of protecting a right to *exclude* through monetary remedies that allow an infringer to *use* an invention against the patentee's wishes." Id. at 395. Another concurring opinion by Justice Kennedy, joined by three other Justices, warned that courts should be wary of issuing injunctions in favor of firms that buy up patents to be "employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent." Id. at 396. The four-factor test is spreading to other areas of law, see Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010), and to some state courts. For documentation and an argument that this is undesirable as a matter of history and policy, see Mark Gergen, John M. Golden, & Henry E. Smith, The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions, 112 Colum. L. Rev. 203 (2012). As we have already seen, the traditional approach to injunctions puts great weight on the good or bad faith of the rights violator, unlike the four-factor test in *eBay*.

THE EX ANTE/EX POST PROBLEM

Another important consideration in deciding on a remedy is whether we analyze the situation as it exists *before* the particular conflict over resources arises, or *after* that conflict arises. Economists often speak of "ex ante" analysis and "ex post" analysis (this locution has been picked up by courts in recent years). Ex ante analysis simply refers to an analysis of the situation before some critical event like an accident, or a contract, or a commitment to a particular use of resources, takes place. Ex post analysis refers to an analysis of the situation after such a critical event occurs. In the context of building encroachments, an ex ante

analysis would consider the circumstances of two adjacent landowners, one contemplating a building to be placed near the boundary line between their properties, before the building is constructed. Ex post analysis would consider the circumstances of the two landowners after the building is constructed. The analysis of both efficiency and justice may differ dramatically, depending on whether we consider a particular situation from an ex ante or an ex post perspective.

Assume that A and B are neighboring landowners. A is planning to build a warehouse on her land. B has already built and is occupying a single-family residence on his land. From A's perspective, each additional foot that the warehouse extends in the direction of B's house will increase the value of her warehouse (because it will be bigger). From B's perspective, each additional foot that the warehouse comes closer to B's house will decrease the use and enjoyment of his house (because it will cut off the flow of air and sunlight to the house). The following table indicates the relative values to A and B at different degrees of separation between the warehouse and the home. The values to A are positive and grow larger as the warehouse gets closer to the house; the values to B are negative (and are shown in parentheses to indicate they are negative) and grow larger (in a negative direction) as the warehouse gets closer to the house.

Figure 1–4
Warehouse Encroachment—Ex Ante Analysis

Feet of Separation	Gain to A	Loss to B
0	$20,000	($30,000)
1	$18,000	($23,000)
2	$16,000	($18,000)
3	$14,000	($14,000)
4	$12,000	($11,000)
5	$10,000	($8,000)
6	$8,000	($5,000)
7	$6,000	($2,000)
8	$4,000	($1,000)
9	$2,000	($500)

Suppose A commissions a survey, and learns that the boundary is four feet from B's house. A informs B that she intends to build the warehouse to the edge of the property line. What happens next? The Table tells us that four feet of separation is not the efficient distance to place the warehouse. To be sure, at this distance A's gain—$12,000—is

larger than B's loss—($11,000). But there is room to modify the initial assignment of property rights so as to make both parties better off. If A agrees to move the warehouse back to five feet of separation, A loses $2,000 (because A moves from a gain of $12,000 to a gain of only $10,000), but B gains $3,000 (because B's loss shrinks from $11,000 to $8,000). So B should be willing to offer A something more than $2,000, and something less than $3,000, and both parties would be better off. The same reasoning applies to a further dropback of the warehouse from five feet to six feet. A loses another $2,000, but B gains another $3,000, so there is again room for a mutually advantageous adjustment of rights. How far will the bargaining continue? A quick way to determine the joint-welfare maximizing result is to subtract the values in the Loss to B column from the values in the Gain to A column at each number of feet of separation, and determine which degree of separation produces the largest net positive gain for the two parties. We can see that a distance of seven feet between the warehouse and the house would produce an overall gain of $4,000 (a $6,000 gain to A offset by a $2,000 loss to B), which is the maximum joint benefit at any distance. Once the parties settle on this distance, there are no further trades to be made that would make them better off.

Of course, none of this may happen. A and B are in a bilateral monopoly situation before the warehouse is built. From B's perspective, A is the only source he can deal with in order to obtain more light and air for his house than would be provided if a warehouse is built four feet away. From A's perspective, B is the only source of cash side payments that may be worth more to her than expanding her warehouse up to the very edge of the property line. Given the bilateral monopoly, the parties may haggle endlessly, or bargain strategically, or may get off on the wrong foot with each other, and no deal may ever be reached. But note that in terms of remedies (at least ones that are not systematically under- or over-compensatory), it does not seem to make much difference which mode of protection we select ex ante, before the warehouse goes up. A knows that if she builds the warehouse three feet from B's house, she may face an injunction requiring that the building be torn down. Alternatively, if she builds at three feet, she may have to pay damages equal to $3,000 (the difference between the harm to B at four feet, where the warehouse is legal, and three feet, where it is not), which is more than she stands to gain by building at three feet (another $2,000)—and this should also be enough to induce A to respect B's property rights.

Let us modify the problem by considering how the situation might be viewed *after* the warehouse is built. Let us assume now that A goes ahead with the construction and, based on a faulty assumption about where the boundary lies, constructs the warehouse three feet from B's house. Once the warehouse is built it will cost $50,000 to tear it down. Suppose that B sues A, and the court determines that the actual

boundary is four feet from B's house. The ex post analysis of the situation is reflected in the following modified table.

Assume that *Pile v. Pedrick* describes the law in the relevant jurisdiction. The construction of the building, and the judicial determination that the building is encroaching on B's lot by one foot, mean that B is now entitled to an injunction ordering that the building be demolished (and if rebuilt, be one foot further from B's house). If B stands on his rights, A stands to lose $52,000: $50,000 in costs to demolish the warehouse, and $2,000 in lost warehouse space if she builds a new warehouse. (For convenience, we will ignore the costs of the new warehouse.) For his part, the gain to B, again assuming A rebuilds the warehouse, is only $3,000: the difference between the (negative) value to B of having the warehouse four feet away ($11,000) as opposed to three feet away ($14,000). Given the large difference between the loss to A and the gain to B, what is likely to happen?

Figure 1–5
Warehouse Encroachment—Ex Post Analysis

Feet of Separation	Gain to A	Demolition Cost to A	Loss to B	
0	$20,000	($50,000)	($30,000)	
1	$18,000	($50,000)	($23,000)	
2	$16,000	($50,000)	($18,000)	
3	$14,000	($50,000)	($14,000)	Building Location
4	$12,000	($0)	($11,000)	Actual Boundary
5	$10,000	$0	($8,000)	
6	$8,000	$0	($5,000)	
7	$6,000	$0	($2,000)	
8	$4,000	$0	($1,000)	
9	$2,000	$0	($500)	

On the one hand, it might seem that transaction costs are still pretty low in this situation. There are only two parties to the dispute, who are clearly identified. There is no uncertainty about where the boundary line is. And if *Pile v. Pedrick* is the law, there is no uncertainty about whether B is entitled to an injunction. On the other hand, we have a bilateral monopoly situation, as we did before the warehouse went up. But now the potential difficulty created by the bilateral monopoly has been greatly aggravated by the construction of the warehouse. In contrast to the ex ante analysis, the stakes on the table are now very large. B will be better off accepting anything more than $3,000. A will be better off offering anything less than $52,000. This is a $49,000 difference, which is much

larger than the bargaining range that exists in the ex ante version of the problem ($1,000). Given the high stakes, it is much more likely now that A and B will haggle endlessly, or B will try to strategically bargain to "extort" a huge payment from A, or B may regard A with suspicion or contempt because of the encroachment that has occurred. This could result in an inefficient outcome if no agreement is reached to modify B's entitlement. It could also result in an outcome that many would regard as unjust, if A is required to pay an enormous sum like $45,000 in order to secure B's agreement to the modification of rights.

Suppose the dispute goes to litigation, and B obtains an injunction requiring that A tear down the warehouse. Is bargaining more or less likely to occur now that the court has intervened? One question you might reasonably ask here is whether A and B can enter into a contract to sell B's injunction right. Coase and his many followers have assumed that such contracts are possible. It is not entirely clear this is correct. There are few recorded instances of individuals literally selling judicial judgments as if they were a type of property right; indeed, most jurisdictions place limits on the assignment of legal claims. See Michael Abramowicz, On the Alienability of Legal Claims, 114 Yale L.J. 697, 700–01 (2005). But there are ways to accomplish the same thing (lawyers get paid to figure these things out). The parties could settle the case, either before judgment is entered or even in a post-judgment settlement, and the settlement agreement could provide for a different outcome than the one specified in the court's injunction. The settlement could call for a money payment from A to B, as well as an agreement by A to a different injunction, which might then be entered by the court as a consent decree. Alternatively, B could agree to sell an additional one foot of land to A, in return for a payment of money by A, which would eliminate the encroachment. But even assuming we can devise a way to engage in post-injunction bargaining, how likely is it that bargaining will take place once a dispute gets that far? One study of 20 litigated nuisance cases resulting in an injunction or no liability found that not one set of parties bargained around the final judgment. Ward Farnsworth, Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral, 66 U. Chi. L. Rev. 373 (1999). The lawyers interviewed attributed the lack of trades to mutual enmity. Although the sample of cases was small, it suggests that if the parties cannot agree on a negotiated solution before they go to court, they are unlikely to sit down and negotiate afterwards.

Given the bilateral monopoly problem that exists in the ex post situation, and the very real possibility that there will be no post-injunction modification of rights, can you see how courts might be drawn to a solution that limits the encroached-upon party to damages (at least in cases of mistake)? If the court shifts from *Pile v. Pedrick* to *Golden Press v. Rylands* what will be the measure of damages to which B, from our hypothetical, will be entitled? Will the joint wealth of the parties be

greater under this solution than it would be under an injunction, assuming no post-injunction modification of rights? Will the outcome be more just than the one that will likely result if the court sticks with *Pile*?

Courts are naturally drawn to ex post analysis because this is how controversies are presented to them. People typically go to court after an accident has happened, a contract has been breached, or a building encroachment has occurred. The court takes the situation as it is presented, and looks for the solution that makes the most sense (is both efficient and fair) given what has transpired and the circumstances in which the parties find themselves. But this does not necessarily mean that the ex post perspective is the correct perspective for thinking about such problems. Ex post analysis tends to focus on fairness and distributional concerns, whereas ex ante analysis is more likely to consider incentives for future conduct. Injunctions might be inefficient from an ex post perspective, and yet still be the more efficient rule in the long run—that is, from an ex ante perspective that stresses incentives for future behavior. Can you think of an argument for adhering to *Pile v. Pedrick* in building encroachment cases, even in cases where the encroachment has already occurred and we are certain the parties will not negotiate for a modification of the injunction? (Hint: Can the $50,000 cost of demolishing and rebuilding the warehouse be regarded as analogous to the award of $100,000 in punitive damages in *Jacque v. Steenberg Homes*?)