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Learning Property Through
Multiple-Choice Questions and Analysis

James Charles Smith, *The University of Georgia School of Law*

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Smith

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Wolters Kluwer

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James Charles Smith
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University of Georgia

Wolters Kluwer

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I dedicate this book to my children, Nicole and Kristin,
in recognition of all that they have taught me.

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James Charles Smith

July 2018

The Glannon Guide to Property

1

A Very Short Introduction

"The White Rabbit put on his spectacles. 'Where shall I begin, please your Majesty?' he asked. 'Begin at the beginning,' the King said gravely, 'and go on till you come to the end: then stop.'"
Lewis Carroll, *Alice's Adventures in Wonderland* (1865)

This study guide contains sets of multiple-choice questions, with accompanying introductory text, for the major topics you are likely to encounter in your basic course on Property.

This guide is organized topically. Each chapter contains clear, concise statements of the elements of property law, organized in sections that have topic headings. This content is similar to what you would find in a student text. Right after my text, there are one or occasionally two multiple-choice questions that follow up on the rules and principles. Unlike the standard student text or outline, the questions enable you to engage in active learning. After each question, I provide immediate and detailed feedback that assesses each of the multiple-choice responses. If you got the question right, your quick review of my comments hopefully will confirm your understanding; or on occasion you probably will discover that you got the question right "for the wrong reason," in which case you are able to clear things up or correct a misunderstanding.

My multiple-choice questions are designed to have a range of complexity. At the end of each chapter I've included a "Closer," which is designed to be a challenging task requiring student understanding of the material from more than one of the preceding sections in the chapters.

You might use this book profitably in several different ways. During the semester, if you find a particular subject matter especially cloudy or difficult while you're preparing for class, it should help for you to read the text in the relevant chapter and possibly also the questions and analyses. This study guide

is designed principally for use in examination review. The text may help you backstop the outline that you prepare for Property. Prior to your exam, you can take the questions in this guide as a "practice test." Even if your course exam will not include multiple-choice questions, you should find the introductory text to be useful, and the questions present many issues you will likely have to analyze in essay and short-answer questions.

Property is the oddest of the first-year courses with respect to the bundling of subject matter. There is no consensus among Property professors as to what topics must be taught. This is in contrast to Torts, Contracts, Procedure, Criminal Law, and Constitutional Law, where there is a defined core for the introductory course, with curricular diversity taking place along the edges. Some Property professors teach only real property; others include substantial coverage of various personal property topics, including intellectual property. Some professors incorporate a significant amount of land use law (typically zoning and takings). Others focus on real estate transactions (typically the recording system, contracts of sale, and deeds). A large majority of Property faculty (but not everybody) has some coverage of estates, future interests, landlord-tenant law, servitudes, and adverse possession. Here is my point, which bears on your use of this book. Some of the topics I've selected for this book probably won't be covered in your course, and conversely your course is likely to include one or two topics I haven't included in this book due to considerations of length. Let me make the unremarkable suggestion that you compare the syllabus for your course with the table of contents for this study guide. If the chapter topic is one that you are responsible for in your course, than take a careful look at the Chapter Overview at the beginning of the chapter to see whether all of the subtopics relate to what you have studied.

When I first began teaching Property in 1983, I included multiple-choice questions as part of my exam. At first, my questions only dealt with estates and future interests, an area especially suitable for the multiple-choice format when one is testing student comprehension of the complex labeling scheme that forms the backbone of the estates system. Several years later, I began drafting multiple-choice questions for other Property topic areas, a practice I have since continued and expanded upon.

I believe there are several virtues for including multiple-choice questions on law school exams. First, a normal essay exam requires the student to analyze a discrete, relatively small number of issues in detail. With an all-essay exam, large batches of material will go untested if the exam is limited to the normal three- or four-hour period. With a multiple-choice exam, the professor is able to add questions from all the areas not covered by essay-type questions. Second, to pass a bar examination most law students will have to tackle the Multistate multiple-choice questions, which include real property. Taking a multiple-choice property exam in law school is excellent practice for that important chore. Third, for combinations of reasons, some students do better answering multiple-choice questions than they do responding to essay

questions under the constraints associated with the typical law school examination. Giving an exam with both types of questions helps to level the playing field for students and in my judgment produces a better overall assessment of learning performance.

One thing I am sure of is that this study guide, including the question sets, is not perfect. I find it difficult to write multiple-choice questions that are precise, challenging, and have one answer that is unassailably stronger than the other responses. If you spot a mistake or problem in the text or in any question or in my analysis of a question, I'd appreciate your letting me know by email so that I may consider fixing it for the third edition. You may contact me at jim@uga.edu

Best of luck in your study of property law, a topic I've found fascinating since my days in law school.

2

Finders of Personal Property

"Finders keepers, losers weepers."
Old Scottish saying

CHAPTER OVERVIEW

A. The General Rule
B. The Public/Private Place Distinction
C. Mislaid Property
D. Abandoned Property
E. Treasure Trove
F. The Closer: Other Factors
Smith's Picks

Most property courses spend the majority of their time on real property subjects, but most also spend some time on personal property subjects. Of the large number of personal property topics that can be studied in the property course, the law of lost and found property (finders) is the most popular. Due to tradition and intrinsic interest, professors usually assign at least several principal cases, and students find the subject interesting and, often to their surprise, complicated.

A. The General Rule

Most property casebooks lead off the subject of finders with the classic decision of *Armory v. Delamirie,* 93 Eng. Rep. 664, (1722), decided by the Court of King's Bench, sitting as a trial court in 1722. *Armory* is the font of Anglo-American finders' law. In a remarkable and remarkably short opinion, Chief Justice Pratt stated that "the finder of a jewel, though he does not by such

finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover."

The *writ of trover*, referred to in the *Armory* opinion, is one of the forms of action recognized at common law by the English royal courts. Trover allows an owner of a chattel to recover damages from a person who *converts* the chattel. Damages are usually measured as the full value of the chattel at the time of its conversion.

To recover in trover, the plaintiff must prove that the defendant committed an act of conversion. This means that the defendant has wrongfully exercised dominion or control over the chattel. The defendant's interference must be significant, but it is not necessary that the defendant knows the identity of the owner or knows that she is behaving wrongfully.

The *writ of replevin* developed as an exception to an English common-law rule that an owner of converted chattels could sue only for damages. If a landlord wrongfully seized a tenant's chattels, replevin permitted a tenant to recover those specific chattels. Modern property law has expanded the scope of replevin, typically by statute, to permit an owner of a chattel to recover its possession from any wrongful possessor. Under modern law, the action for conversion has largely replaced trover and replevin.

QUESTION 1. Watch in the park. Danny finds a valuable watch in the city park. He takes it home, places an announcement in the local newspaper disclosing his find, and after a few days he begins to wear the watch. Three months later Owen, the owner of the watch, contacts Danny and requests its return. When Owen requests his watch, Danny refuses to return it. If Owen sues Danny because of that refusal, the most probable result is

A. Owen wins if he sues in trover.
B. Owen wins if he sues in replevin.
C. Both of the above are correct.
D. Danny wins because Owen has lost title.
E. Danny wins because a finder has property rights.

ANALYSIS. A student might select Choice **E** based on a casual reading of *Armory v. Delamirie*. Danny did acquire a finder's property right by taking up the watch, but this is a limited property right. In the words of *Armory*, the finder has the right "to keep it against all but the rightful owner." Because Owen is the true owner, Danny does not have the right to keep the watch when Owen requests its return.

Under certain circumstances, the true owner of lost goods can lose title, thereby vesting full title in the finder. The true owner could lose title by *abandonment*, which generally requires a manifestation of intent to relinquish

ownership.[1] Alternatively, a true owner can lose title by adverse possession if the finder keeps the chattel for a period longer than the statute of limitations and satisfies the other elements for adverse possession of chattels.[2] Choice **D** could point to either doctrine, but neither one would apply here. There's no evidence that Owen ever intended to relinquish ownership, and all statutes of limitation are at least several years; Owen has been out of possession for only three months.

Thus, Owen should prevail in his suit against Danny, and to pick among Choices **A**, **B**, and **C**, we need to consider remedies. Danny has converted the watch by refusing to return it to Owen, continuing that resistance after the filing of litigation. A court would grant trover if Owen requested that remedy, awarding Owen damages equal to the value of the watch. If Owen as an alternative requested replevin, the court would order Danny to return the watch. Thus **C** is the best answer.

B. The Public/Private Place Distinction

In *Armory v. Delamirie,* the court's opinion gives no indication of the place where the chimney sweep's boy found the jewel. English cases decided after *Armory* considered claims to chattels found on privately owned land, the two most prominent ones being *Bridges v. Hawkesworth,* 91 Rev. Rep. 850 (Q.B. 1851), and *South Staffordshire Water Co. v. Sharman,* [1896] Q.B. 44. In some of the cases, the finder prevailed over the claim of the owner of the *locus in quo,*[3] and in other cases the landowner won. The courts' opinions discussed a number of considerations, the most prominent one being a test that discriminates between an item found on premises open to the public (a "public place") and premises not open to the public. The finder is ordinarily entitled to chattels found in a public place. The landowner is ordinarily entitled to chattels found in a private place. American courts readily adopted the English public place/private place distinction, just as they had adopted *Armory.*

The public/private place test rests upon a theory of prior possession. A landowner has *constructive possession* of any lost chattels located on her real property if the landowner (1) has a general intent to exercise dominion and control over her property and (2) has engaged in substantial acts of control. Combining the two elements, the cases have sometimes said that such a landowner has a *manifested intention* to control her property. When a finder takes up a chattel on such a private place, the chattel was already in the possession of the landowner at the moment of the finding.

1. Abandonment is discussed in more detail in Section D of this chapter.
2. Adverse possession of chattels (personal property) is discussed in chapter 7.
3. This is a Latin phrase used in court opinions in finders' cases to refer to the real property where the chattel is found.

Conversely, a landowner who has opened her premises to the public, by, for example, operating a store, is not in possession of chattels on her property at the moment a finder picks up the item. Such a landowner is thought to have a different intent with respect to controlling her property and has exerted different, and supposedly less extensive, acts of control. Thus a finder who takes up lost property from such a public place is the prior possessor, as between the finder and landowner.

QUESTION 2. Various places of finding. Rank the following places where a person has found a chattel in order of the probability that the finder may not keep the property when confronted by the claim of the owner of the locus in quo (rank from most likely that the owner prevails to least likely).

1. In the hall bathroom of a single-family house, the finding taking place during a birthday party with 80 guests.
2. On the floor in the main lobby of a bus station, owned by a private intercity bus company, the finding taking place while the bus station is open to travelers.
3. In a fitting room of a clothing store, where customers may try on merchandise, during hours when the store is open to shoppers.
4. Next to the sofa in the living room of an apartment, while the only persons present in the apartment are the tenant and a guest of the tenant.
5. On the lawn in a small park owned and operated by the city, for which the city does not control access or charge an admission fee.

A. 3–4–1–5–2.
B. 4–3–1–2–5.
C. 4–1–3–5–2.
D. 1–4–3–2–5.
E. 4–1–3–2–5.

ANALYSIS. Let's examine each of the five scenarios in order. (1) Under the public/private place distinction, a finding inside a single-family house normally presents a very strong claim for the homeowner. Most homeowners exercise substantial control and dominion over who may enter for what purposes. Under these facts, cutting against that claim, at least slightly, is the fact that the finding takes place during a party with a very large invitation list. The homeowner, however, has not opened her house to the public.

(2) The bus station is privately owned, but the place of finding is as open as any establishment that is open to the public. This is a very strong case for the finder.

(3) The clothing store may be just as open to the public as the bus station, but the place of finding is different. In many stores, there is some restricted access

to fitting rooms, and the fitting room is to be used by customers for the limited purpose of trying on clothes. The clothing store may argue that it exercises more dominion and control over the fitting rooms than other areas of the store.

(4) The living room of the apartment, with only one guest present (who presumably is the finder) is the strongest case for the owner of the locus in quo. Some students will rank the apartment tenant's claim below that of the homeowner (number 1), but that case is weaker due to the size of the birthday party. It should make no difference that the chattel is found in an apartment rather than a single-family home (both are private residences). Likewise, it should not matter that here the "owner" of the locus in quo (the apartment) is a tenant, rather than a fee simple owner (presumably the case for the home in number 1).

(5) The city's possible claim to a chattel found in its park is the weakest because there is no evidence of the city's dominion and control. The bus station and the clothing store are closed for part of each day, and proprietors of such establishments usually monitor customers' conduct more closely than a city park department monitors the conduct of park patrons.

Putting this all together, the ranking is 4–1–3–2–5. So my answer is **E**. The closest call, in my opinion, is between (1) and (3). Some clothing stores have attendants, with customers only allowed to use a specific fitting room as directed by an attendant. That procedure certainly would reflect more control than a homeowner usually exercises when allowing a guest at a large party to use the hall bathroom. But I'm convinced that there's something special about a home as a place of finding that will steer most courts to prefer the homeowner over a guest finder.

C. Mislaid Property

The mislaid property doctrine is an American invention, not followed by the English courts. Property is said to be *mislaid* when the true owner intentionally places it in a certain location, intending to retrieve it at a later time. The owner then forgets to collect the item when leaving the premises. Such mislaid property is distinguished from *lost property,* which becomes separated from the true owner without her knowledge (e.g., a small book falls out of a student's book bag while she is running to catch a bus).

The mislaid property doctrine favors the landowner over the finder of the object. Mislaid property is not considered to be "lost property" that is open for acquisition by a finder. The landowner holds the mislaid property as bailee for the true owner, with the responsibilities that normally stem from a bailment relationship.[4] The finder has no right to take the property from the premises and no property rights in the event the true owner never returns to reclaim her property.

4. Bailment is discussed in chapter 3.

QUESTION 3. Purse on the booth seat. Candy goes to Garcia's Restaurant to have dinner. When the hostess seats Candy and her party at a booth, Candy sees a purse on the seat portion of the booth. The purse evidently had been placed there by a woman who had eaten at that table earlier in the evening. Candy picks up the purse and turns it in to Garcia, the owner of the restaurant. Garcia attempts to locate the true owner, but to no avail. Who has the better claim to the purse if the jurisdiction treats the purse as mislaid property?

A. Candy, because her possession is what the true owner would have intended.
B. Garcia, because his possession is what the true owner would have intended.
C. Candy, because Garcia opened his restaurant to members of the public.
D. Garcia, because he was already in possession of the purse when Candy picked it up.
E. The court would order a sale of the purse with the proceeds split between Candy and Garcia.

ANALYSIS. The most basic point to remember about the mislaid property doctrine is that it favors the landowner over the finder. In a state that applies the lost/mislaid distinction, if the court determines that the chattel is mislaid, it awards the property to the landowner. Due to the place where Candy found the purse, on the seat of the booth, it is a reasonable inference that the purse was mislaid. This means that the true owner intentionally set it there and forgot to retrieve it when she finished her dinner and left. This question, however, does not require that you make this judgment call. It stipulates that the purse is mislaid. Thus the purse will go to Garcia, so we can strike Choices **A**, **C**, and **E**. With respect to **E**, there are situations in which a court has determined that two or more persons have an equal claim as finders, but this has not been done with respect to mislaid property.

Choices **B** and **D** offer different reasons for awarding the purse to Garcia. **D** justifies the result based on a conclusion that Garcia was in prior possession of the purse. This theory of possession is the basis of the public/private place distinction but is not part of the thinking behind the mislaid property doctrine. Instead, the mislaid property rule rests upon the assumption that the true owner may remember where she left her property and may return to that location. The true owner's retrieval of her property is facilitated if the owner of the locus in quo has kept the property as a bailee for the true owner. Choice **B**, the correct answer, encapsulates this line of thought by stating that Garcia's possession fulfills the true owner's probable intent.

D. Abandoned Property

The mislaid property doctrine described in the previous section assumes that the true owner has retained title to the goods and that a legal rule making it more probable that the true owner will recover possession is good policy. An owner of goods, however, can lose title by abandonment. *Abandonment* is typically defined as the intentional and voluntary relinquishment of ownership. The test is aimed at ascertaining the owner's intent. In contested cases, of course, the owner (or her successor) who has been out of possession for a long time will never admit a subjective intent to surrender ownership. The issue becomes what evidence is sufficient to prove such an intent, despite the owner's protestations to the contrary? Courts commonly say that the mere fact of non-possession, even for a lengthy time period, is not sufficient by itself.

Although there are many situations when questions regarding the abandonment of goods come up, one interesting situation involves shipwrecks. When a shipwreck is discovered and the ship or its contents are salvaged (taken possession of and brought to the surface), the salvager naturally wants title to those objects. Courts, however, often apply a high bar with respect to abandonment in the shipwreck context. A good example is *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), holding that insurance companies who paid claims on gold lost in an 1857 shipwreck off the coast of South Carolina did not abandon their ownership claims between the time of the loss and the time of recovery by salvagers more than 120 years later, despite the companies' inaction during that time period and the loss of many of the original records documenting their payment of insurance claims. Under maritime law, salvagers are entitled to a liberal salvage award from the owner. This may influence courts to set a relatively high standard for abandonment.

QUESTION 4. "It's mine and I want it back." In which of the following situations do you think a court is most likely to find that an owner of goods has abandoned ownership?

A. Suzie, a university student, had her backpack stolen while she was in the main library. In the backpack was a pearl necklace valued at $200. She reports the theft to the university police but takes no other measures to recover the necklace. Six years have passed since the theft.

B. Tommy owns a condominium in a beach community, which he rents out to vacationers. The condominium is fully furnished. Three years ago one of the guests took a copper kettle from the kitchen. Although Tommy visits the condominium on occasion to check its condition and make repairs, he has not noticed that the kettle is missing.

C. In March Ron, a college freshman, lends his DVD of the movie *Inception* to a classmate, asking her to return it to him by the end of the semester. She hasn't returned the movie to Ron, and Ron hasn't asked for it back. It's now two years later, and they are still acquaintances at the same college.

D. Forty years ago, Isaiah, a newly wed husband, lost his wedding ring in the ocean surf while vacationing with his wife. Last week a person strolling along the beach found the ring and posted a description of the ring's engraving on Facebook.

ANALYSIS. In some cases when a party claims that goods were abandoned, the length of time the true owner has been out of possession may be an important consideration. Here Choice **D** is quite different from the other choices. Isaiah lost his wedding ring 40 years ago, and the other three "losers" lost possession no more than 6 years ago. If this was all you had to go on, **D** would be the best choice.

But there's more to consider. With Isaiah's wedding ring, all we have is a lengthy period of non-possession, with nothing more to indicate he no longer desires to own the ring. Thus **D** is a weak choice. **A** is also weak for the same reason. There's nothing to indicate that Suzie doesn't want her pearl necklace back. The fact that she hasn't taken any measures to recover the necklace, other than filing one police report, doesn't go far. What else, realistically, could she do? Inaction in this context does not manifest the intent to relinquish ownership.

Consider Tommy's situation in **B**. If the question were "In which situation is a finding of abandonment *least likely*?" we should pick **B**. Tommy does not yet know he no longer is in possession of his copper kettle. It may be true that he's highly unlikely to get the kettle back, but that is not the issue. It does not seem logical to say that a person intends to no longer own an object that he believes he still possesses.

This leaves **C** as a better choice than the others. In contrast to the other fact patterns, Ron has known where his property was (and who had it) all along. He voluntarily gave possession of his *Inception* DVD to a friend, who has never returned it. This is a *bailment,* and Ron continues to own the DVD for so long as the bailment continues. However, the bailment was intended to last no more than the remainder of the school year, and it's now two years later. Although it's quite possible that a court will not find abandonment here if Ron suddenly asks for "his" DVD back, it's also conceivable that a court would say that his protracted inaction evinced an intent to abandon ownership.

E. Treasure Trove

Under English common law, treasure coin consisted of coins, jewelry, and other items containing a substantial percentage of gold or silver. The treasure had to be embedded within the soil or a structure under circumstances that supported a finding that the property had been hidden or concealed for safekeeping. The treasure had to be sufficiently ancient to indicate that the owner was probably dead or incapable of identification.

In England, treasure trove belonged to the sovereign, not to the finder. Under modern British practice, treasure trove goes to a British museum, with the finder entitled to monetary compensation that is supposed to be equivalent to the market value of the treasure. In the United States, treasure trove belongs to the finder, not to the government or the landowner. There are several older cases that award treasure trove to the finder as against the owner of the land where the treasure was found, even when the finder had committed a trespass when finding and removing the treasure. There are few modern American cases, but several courts have rejected the doctrine of treasure trove, preferring the landowner rather than the finder.

QUESTION 5. Buried coins. For the past 20 years John has owned and lived in a wood-frame house, originally built in 1925. He hires Rachel, age 12, to dig up an area of his lawn by the side of his house where John wants to put in a vegetable garden. John agrees to pay Rachel $7 an hour. Rachel uses a shovel, hoe, and rake. After she has been working almost two hours, she strikes something several inches under the soil with the shovel. It turns out to be a glass jar with a metal lid. The glass is broken, possibly due to Rachel's striking it with the shovel. The jar contains 41 silver dollars, which were minted between 1931 and 1944. Rachel hands the jar to John, who thanks her and says that he has never seen the jar or coins before. In most states today that recognize the doctrine of treasure trove, who has the better right to possess the silver dollars?

A. Rachel.
B. John.
C. The state where John's house is located.
D. The United States.
E. Rachel and John each should have an equal share.

ANALYSIS. This question focuses on the elements of treasure trove. The coins satisfy all the normal elements of treasure trove. They are precious metal—silver. The mint dates, together with the age of the house, suggests that someone buried the jar of coins in the yard a long time ago, satisfying the requirement of antiquity. The jar is important because (along with the large

number of coins) it supports the inference that the coins were not accidentally dropped by their owner. Rather, the owner buried the coins to hide them, and for some reason failed to retrieve them subsequently.

Normally courts award chattels embedded in the soil to the owner of the locus in quo, but treasure trove is an exception. Under American common law, treasure trove goes to the lucky finder. English common law awarded treasure trove to the sovereign (probably such a rule would favor the state but conceivably the United States), but this rule was never accepted in the United States. Rachel should prevail—**A** is the best answer.

F. The Closer: Other Factors

Courts sometimes turn to a number of other factors when deciding disputes between finders and landowners. As indicated in the prior section on treasure trove, a chattel embedded in the soil or attached to a structure is sometimes placed in a special category, awarding that item to the landowner. There seems to be a feeling that the fact of attachment heightens the landowner's claim.

The nature of the relationship between the finder and the landowner also has mattered in a number of cases. Courts sometimes, but not always, disqualify a trespassing finder from keeping the chattel. When the landowner has employed the finder, or has hired the finder to perform a service at the locus in quo, the court may conclude that the finder has found the chattel on behalf of the employer/hirer. In essence, this means that there is an implied term of the contract that the person will deliver any found property to the owner.

QUESTION 6. Riding the hospital elevator. Rocky enters Big City Hospital, where he is in a hurry to visit his aunt, who is hospitalized after having undergone emergency surgery. His aunt is in a room on the fifth floor. Rocky is on the ground floor, and the regular elevator for visitors to use is far away at the end of a long hall, but he is right next to a service elevator, posted "Hospital Staff Only." Rocky asks a nurse's aide, who is standing nearby, if he may use the service elevator. She gives him permission, and they enter the elevator together. Rocky looks down and spots two $20 bills on the floor of the elevator. He picks them up and shows them to the aide, who asks him to turn the bills in to the hospital's lost and found after he visits his aunt. Rocky, an honest lad, does so. The true owner never appears to reclaim the cash. Who has the better claim to the $40?

A. Rocky, because the $20 bills are treasure trove.
B. Rocky, because the nurse's aide gave Rocky permission to ride the service elevator.
C. The hospital, because the $20 bills are mislaid property.
D. The hospital, because the service elevator is not normally used by visitors.
E. The hospital, because it employed the nurse's aide.
F. The federal government (United States Treasury).

ANALYSIS. This is a tough question when we get down to the two "better" answers. Let's eliminate the weaker choices first. Choice **A** is improbable. There are a few American cases that expand treasure trove to include currency when its nature and location satisfies the other elements of the treasure trove doctrine. Here there is no evidence that the bills are old; they clearly have not been on the elevator floor very long; and no one would intentionally place the bills there for safekeeping.

Likewise, Choice **C** is weak. The bills are not likely to be classified as mislaid property. Almost certainly someone who had been taking the service elevator accidentally dropped the two bills, perhaps from a pocket or an open bag or purse. Who would have intentionally laid them on the elevator floor, even for a short time period?

The nurse aide's employment status, referred to in Choice **E**, will not help the hospital. If the aide were the finder, the hospital could argue that she found the bills on the hospital's behalf, but Rocky found them.

Choice **F** also is improbable. When they were first printed, the bills were United States Treasury property but obviously they were placed in circulation. Nor does the government have a claim to lost money by escheat.

Our two final contenders are **B** and **D**, which both revolve around the public/private place distinction. Rocky will claim that the hospital is generally open to the public and that he found the bills in a public place. The hospital may concede that many areas of the hospital are open to the public, but it will argue that the service elevators are generally not open for use by a visitor such as Rocky. Rocky will respond that the nurse's aide gave him permission to use the elevator, and that he reasonably believed that she had the authority to extend permission. The issue is close, but the hospital has the better argument, so **D** is preferable. Even if the aide had actual or apparent authority to let Rocky ride the elevator once, she did not (and presumably could not) make the service elevator generally available for use by all hospital visitors.

Smith's Picks

1. Watch in the park	**C**
2. Various places of finding	**E**
3. Purse on the booth seat	**B**
4. "It's mine and I want it back"	**C**
5. Buried coins	**A**
6. Riding the hospital elevator	**D**

3

Bailments

"A borrowed mule soon gets a bad back."
Syrian proverb

CHAPTER OVERVIEW

A. The Nature of Bailments
B. Whom Does the Bailment Benefit?
C. The Bailee's Standard of Care
D. The Closer: Divisible Bailments — The Problem of Contents
Smith's Picks

Bailment is a common, everyday occurrence. A *voluntary bailment* is created whenever a person rents a car, checks luggage on an airline, takes clothes to the cleaners, borrows a book from a classmate, or leaves a pet with a friend during a trip. For many commercial transactions, the terms of the bailment are expressed in a writing, often in a standardized contract or in very small print on a receipt. Commercial bailments are typically characterized as bailments for the mutual benefit of the bailor and bailee, and are often called a *bailment for hire*. A bailee, like a finder, has a limited property right. In the following cases, notice the role played by the concept of possession.

A. The Nature of Bailments

Like most legal terms, courts and commentators have defined bailment in a number of different ways. The core idea relates to possession of goods (chattels). A person other than the true owner is in possession of the goods. Most courts and many commentators define bailment by using one or more

contract-law elements. Here's a typical example: A "bailment is the delivery of property for some purpose upon a contract, express or implied, that after the purpose has been fulfilled, the property shall be redelivered to the bailor, or otherwise dealt with according to his directions, or kept until he reclaims it." *Toll Processing Servs., LLC v. Kastalon, Inc.*, 880 F.3d 820, 827 (7th Cir. 2018).

Long ago contracts scholar Samuel Williston provided a much broader definition: "A bailment may be defined as the rightful possession of goods by one who is not the owner." Samuel Williston, 2 The Law of Contracts §1032 (1920). Though contained in a contracts treatise, this definition includes none of the basic elements of contract, such as mutual intent, offer, or acceptance. Instead, it views bailment through the lens of property. His property law definition simply says bailment is all rightful possession of goods by a person other than the owner.

Does it matter whether a court follows a contract definition or a property definition of bailment? Consider the following question.

QUESTION 1. Becky finds a dog. Becky takes a walk in a neighborhood, and a collie follows her home. The dog has no collar or identifying tag, but the dog is well behaved and appears to be in good health. For the next seven days Becky cares for the dog at her home, feeding the dog each day, and occasionally letting the dog inside her house. The dog sleeps on the screened porch at the back of her house each night. The best argument that Becky is *not* a bailee with respect to the dog is:

A. Becky has not intended to take possession of the dog.
B. Becky has not taken dominion and control of the dog.
C. Becky's possession of the dog is not rightful.
D. The owner of the dog has not delivered possession to Becky.

ANALYSIS. Choices **A** and **B** both revolve around the core question whether Becky is in possession of the dog. Neither choice is a plausible conclusion to draw from the facts. Although Becky may not have intended that the dog follow her home, she chose to feed the dog and allow it into her house. She is treating the dog exactly like a normal pet owner treats a dog. Likewise, these are sufficient acts of control and dominion so that it can be said that she has actual possession.

Choice **C**, like Choices **A** and **B**, focus on the property-based definition of bailment as "the rightful possession of goods by one who is not the owner." Assuming that the dog has a true owner, Becky's possession is either rightful or wrongful. Under these facts, "rightful" seems highly probable. Although one might criticize Becky for not attempting to locate the true owner, under these facts it's not clear what steps she might have taken, and she is not concealing the dog.

So this leaves Choice **D** as the best answer. Unlike the other choices, Choice **D** uses typical language for a contractual definition of bailment. The

true owner of the dog, though probably aware that the dog is missing, does not know whether anyone has found the dog. Plainly the owner did not deliver the dog to Becky "for some purpose." Thus, a court that adopts a contract definition of bailment may decide no bailment exists.

B. Whom Does the Bailment Benefit?

Many bailments benefit both parties, the bailor and the bailee. A bailment for the mutual benefit of both parties fits squarely within the contract model of bailment, with consideration going in both directions.

But mutual benefit is not required. Many bailments benefit only one party, either bailor or bailee. A *gratuitous bailment* is defined as a "bailment for which the bailee receives no compensation," benefitting only the bailor. Black's Law Dictionary (10th ed. 2014). Likewise, a bailment may benefit only the bailee; for example, you borrow something without payment or other compensation to the owner. This is a *bailment for the sole benefit of the bailee*. Most authorities distinguish this from a gratuitous bailment (benefitting only bailor), reserving the term "gratuitous bailment" only for the transactions that solely benefit the bailor. But a few authorities define "gratuitous bailment" to cover both types of bailments that benefit only one party. E.g., *Mezo v. Warren County Public Library*, 2010 WL 323302 (Ky. Ct. App. 2010) ("When a bailment benefits only one party and no consideration is given, the bailment is gratuitous"; holding that library patron who checks out books is gratuitous bailee).

QUESTION 2. Becky finds a dog revisited. Under the facts of Question 1 above, if Becky is a bailee in possession of the dog, what type of bailment is most likely?

A. A gratuitous bailment.
B. A mutual-benefit bailment.
C. A bailment for the bailee's sole benefit.

ANALYSIS. This question is not as easy as it may first appear. Let's look at Choice **C** first. Choice **C** means that only Becky is benefitted by her decision to take possession of the dog. But if a bailment exists, it's necessarily the case that someone else still owns the dog. That person (the bailor) is obviously benefitted by the care given by Becky. Absent Becky's action, the dog might still be lost, wandering about, and unfed. So we can strike Choice C.

Choice **A** is right if this is a "bailment for which the bailee receives no compensation." The dog owner has not paid Becky to take care of the dog. In the event the owner locates the dog and takes it back, the owner may reimburse

Becky or pay a reward, but in most states this is optional. So Choice **A** is the better answer. Becky is a volunteer, and is gaining nothing from her act of kindness in caring for a lost dog.

But can we find a mutual benefit, justifying Choice **B**? Possibly, if we try hard enough. The facts don't tell us anything about Becky's motivations. Maybe she is a "dog person" who truly enjoys canine companionship. If so, and it's making her happy to take care of this dog, is this enough of a benefit to make this a mutual-benefit bailment? This is a stretch argument, which I don't think a court is likely to endorse—but it has some plausibility. If these facts came up in an essay question, a good student answer would spot the issue and argue both sides.

C. The Bailee's Standard of Care

What happens when goods subject to a bailment are damaged or lost? Generally the bailee's liability to the bailor depends upon fault, measured under a negligence standard. For a bailment for the mutual benefit of both parties, a bailee has a duty to exercise reasonable care to protect the property. For bailments that benefit only one party, the traditional rule alters the negligence standard based on whom the bailment benefits. For a gratuitous bailment, benefitting only the bailor, the bailee a duty to exercise slight care, and thus is liable only for gross negligence. For a bailment benefitting only the bailee, the bailee has a duty to exercise great care, and thus is liable for slight negligence. Some courts reject the traditional three-tiered standard for a single standard of reasonable care under the circumstances.

The parties may modify the bailee's standard of care by agreement. The bailee may undertake complete liability for loss or damage, regardless of fault. For example, rental car agreements usually obligate the renter to pay the company for damage or loss of the vehicle, regardless of the cause. Or a bailment contract may exculpate the bailee from liability. When the property subject to the bailment is covered by insurance, the parties to the bailment should consider the relationship between insurance coverage and the parties' rights and liabilities with respect to damage or loss.

QUESTION 3. Borrowing the neighbor's car. Kareles and Haley are next-door neighbors and good friends. Last week Kareles's car incurred severe damage from a hailstorm. His car is presently at an auto body shop, undergoing repairs. Haley owns and drives a recent model year Honda Accord sedan. At 3 PM in the afternoon, Kareles borrows Haley's Accord to make a short trip. Consider the following three versions of the story:

1. Haley is sick with the flu, and Haley asks Kareles to drive the Accord to her pharmacy, located within a nearby supermarket, to buy several over-the-counter cold and flu pharmacy products for Haley.
2. Kareles is hungry and out of groceries, and he asks Haley to borrow the Accord so he can shop at the nearby supermarket.
3. Kareles is hungry and out of groceries, he asks Haley to borrow the Accord so he can shop at the nearby supermarket, Haley agrees but tells Kareless she also needs a few things, which Kareless agrees to purchase for her.

All three stories have the same sad ending. Kareles is in a hurry when he arrives at the supermarket. He parks in a regular parking space, dashes into the store, while leaving the Accord unlocked with the keys on the front passenger seat. He quickly shops, but when he returns to the parking lot, the Accord is gone. Maybe the car thief will be identified, or the car recovered, but this has not happened yet. What standard of care will apply to determine if Kareles is liable to Haley for the loss of the Accord?

A. Slight care for 1, extraordinary care for 2, and reasonable care for 3.
B. Slight care for 1, reasonable care for 2, and extraordinary care for 3.
C. Reasonable care for 1, extraordinary care for 2, and slight care for 3.
D. Reasonable care for 1, slight care for 2, and extraordinary care for 3.
E. Extraordinary care for 1, slight care for 2, and reasonable care for 3.
F. Extraordinary care for 1, reasonable care for 2, and slight care for 3.

ANALYSIS. This one is straightforward. It tests whether you understand the traditional three-tiered standard of care developed by courts to determine when the bailee is liable to the bailor for loss or damage to the bailment property. To get the answer, you do not have to reach a conclusion on how bad (negligence) or blameless Kareles's conduct was in leaving the car keys in an unlocked car. It's only necessary to determine which of the three standards applies to each of the three transactions. This is a matching question.

Transaction (1) is plainly a gratuitous bailment, benefitting only Haley. Kareles is going to the supermarket solely as a favor to Haley, to shop for her. He must be slightly careful (i.e., he is liable only for gross negligence). In transaction (2), the favor goes in the other direction. Haley is gaining nothing by letting Kareles use her car to shop for himself. He must be extraordinarily careful (i.e., he is liable for slight negligence). In transaction (3), there is mutual benefit. Kareles is shopping for himself, but buying a few things for Haley, saving her from making a trip to the supermarket. He must be reasonably careful (i.e., he is liable for ordinary negligence). So the right answer is **A**.

D. The Closer: Divisible Bailments — The Problem of Contents

Bailments frequently involve an object that has contents. A traveler checks luggage with a common carrier. A hotel patron turns over his Lexus sedan to the hotel valet parking attendant. A woman mislays her purse in a restaurant,[1] which is found by a restaurant employee. It's quite possible that all three items (luggage, sedan, purse) contain valuable contents. In most transactions, thankfully, the nature and value of the contents never becomes important. When the bailment ends, the bailee redelivers possession to the bailor, with the container and all contents in the same condition as they were before.

But sometimes there is a problem with the contents. All or some of the contents are missing or damaged. Is the bailee liable for the loss or damage? Courts usually try solve the problem by resorting to contract rules (what did the parties agree to?), tort rules (did the bailee exercise proper care, or was there negligence?), or a combination of both. Under the contract approach, the issue is: What were the parties' reasonable expectations with respect to the contents? A contract-based definition of bailment may excuse the bailee for liability if the presence of value of the contents were not known by the bailee, or reasonable foreseeable to the bailee. This gives rise to the doctrine of *divisible bailment*. For example, a bailment might cover the purse, but not its contents, thus relieving the bailee for liability for loss or damage to the contents.

QUESTION 4. "Don't whine over lost wine." Peter owns an expensive yacht, the Silver Slipper, which he kept at a marina. Peter made plans to spend the next six months in Europe. He gave his set of keys to the yacht to his friend Karl, who lived near the marina. Peter told Karl that he could use the Silver Slipper; he also asked Karl to take good care of it. For the next three months, Karl used the yacht several times a week, always returning it to the marina at the end of his day on the bay and the ocean. Near the end of the third month, Karl forgot to lock the cabin door one evening, and thieves broke in and stole two cases of exceptionally fine French wine that Peter had stocked in the yacht bar area. The wine has a market value of $12,000. Karl, not a drinker, had never went near the bar area, and was not aware of the wine's presence before the theft. Peter demands that Karl compensate him for the loss of the wine. If Karl prevails, the most likely reason will be:

A. No bailment was created because Karl was not paid for taking care of the yacht.

1. For a refresher on the mislaid property doctrine, see chapter 2.

B. A bailment was created, but Karl did not owe Peter a duty to take care of the bailed property.
C. A bailment was created, but it covered the yacht but not the wine.
D. A bailment was created, but it continued only for the time periods when Karl was present on the yacht.

ANALYSIS. Let's look at the choices in order. Choice **A** is flatly wrong. This is clearly a voluntary bailment, which all courts would recognize, even those who embrace a contract-law definition of bailment. Peter intended to transfer possession of the yacht to Karl, Karl intended to accept possession, and that's what happened. The lack of payment to Karl might justify a conclusion that this is not a mutual-benefit bailment (although it seems Karl enjoyed sailing the yacht); but if so, it's still a bailment — a gratuitous bailment.

Choice **B** is flawed. The first premise — a bailment was created — is right. But the second premise flunks. Karl owed Peter a duty of care, either a duty of reasonable care or a duty of slight care (the latter if this is a gratuitous bailment, and the jurisdiction follows the traditional three-tier calibration for the bailee's duty of care).

Choice **C** correctly finds a bailment, but excludes the wine from the scope of the bailment. This reflects the concept of divisible bailment. It's not certain that this is a winning defense for Karl. Despite his lack of knowledge that the yacht contained wine, and it was expensive wine, a court may conclude that the loss was a reasonably foreseeable consequence of his failure to lock the yacht. But nevertheless this is a plausible defense for Karl.

Choice **D** is a clever argument for Karl. This issue is whether the bailment is continuous, lasting until Peter returns home from Europe; or whether it persists only for the days and hours Karl takes physical possession of the yacht. Under some facts, it's possible that a bailment can start, stop, restart, stop again, etc. So our only two decent choices are **C** and **D**. I believe **C** is the best defense from the choices given. Because Karl retained the keys at all times, and Peter never returned to the marina until after the theft, a court almost certainly would rule that Karl's possession is continuous. If need be, the court could say he was in constructive possession when he wasn't on the yacht or at the marina.

Smith's Picks

1. Becky finds a dog	**D**
2. Becky finds a dog revisited	**A**
3. Borrowing the neighbor's car	**A**
4. "Don't whine over lost wine"	**C**

4

Gifts of Personal Property

"It is more blessed to give than to receive."
Acts of the Apostles 20:35

CHAPTER OVERVIEW
A. The Basic Elements
B. Physical Delivery
C. Constructive and Symbolic Deliveries
D. Acceptance
E. Gift Causa Mortis
F. The Closer: Gifts of Future Interests
Smith's Picks

Many property courses include some coverage of the law of gifts as part of the introduction to personal property. Part of the appeal of the subject is that all students have prior experiences as givers and recipients of gifts, although few students have considered the legal implications of attempted gift giving prior to law school. This chapter covers the basics of gifts of personal property, with most of the attention devoted to chattels. Additional, more complicated issues sometimes arise with respect to gifts of intangible personal property, such as stocks, bank accounts, and intellectual property.

A. The Basic Elements

The three requirements for a valid gift are

- **Donative intent.** The donor must intend to give the property to the donee.

- **Delivery.** The donor must deliver the subject matter of the gift to the donee. Delivery may be physical, constructive, or symbolic, as discussed in the next two sections of this chapter.
- **Acceptance.** The donee must accept the gift.

When an alleged gift is disputed, the donee has the burden of proof for all three elements.

Every gift is an inter vivos gift or a gift causa mortis.[1] An inter vivos gift is complete when the three elements are satisfied, and at that time the gift is generally irrevocable.[2] This means that the donee has title, and a donor has no right to change her mind and retrieve the chattel.

QUESTION 1. Last-minute birthday present. Today is Johnnie's birthday. It is 6 PM and his friend Sarah has forgotten to shop for a present. Sarah is about to leave town on a business trip. She telephones Johnnie, wishes him "Happy Birthday" and tells him that his present is a porcelain vase, which Johnnie previously saw at her house and admired. She tells Johnnie that he can pick it up next weekend. Before Sarah returns home from her trip, she changes her mind about the birthday present. Who presently owns the vase?

A. Johnnie, because Sarah expressed a definite intent to make a gift.
B. Johnnie, because he relied upon Sarah's expression that the vase was his.
C. Johnnie, because he allowed Sarah to retain possession of the vase temporarily.
D. Sarah, because she expressed an intent to make a gift in the future.
E. Sarah, because the requirements for making a gift were not satisfied.

ANALYSIS. This is a relatively simple question that tests understanding of the three basis elements for a gift of a chattel: intent, delivery, and acceptance. From the description of the telephone conversation, it appears that Sarah expressed a present intent to give the vase to Johnnie as his birthday present. For this reason Choice **D** is wrong.

Choice **B** asserts that Johnnie relied upon Sarah's gift (or Sarah's promise to make the gift). Under certain circumstances, the donee of a failed gift may prevail with reliance by using the contract law doctrine of promissory estoppel, but there are no facts supporting the assertion of reliance by Johnnie.

Sarah should prevail because there was no delivery of the vase. Choice **A** is incorrect because a definite expression of present donative intent is not sufficient. It must be coupled with a delivery. Choice **C** would be correct had Sarah

1. The gift causa mortis is discussed in Section E of this chapter.
2. In many states, there is an exception for engagement rings and other engagement gifts. Engagement gifts are often revocable if the wedding does not take place.

completed the gift with a delivery and then Johnnie had agreed to let Sarah keep possession temporarily, but this did not happen. **E** is the correct answer; the delivery requirement was not satisfied.

B. Physical Delivery

Donative intent is usually established through the donor's written or spoken words. Often the words alone are not conclusive as to what the alleged donor really intended to accomplish. They may be ambiguous or incomplete, and this is one reason why the law requires delivery in addition to manifested intent.

Normally delivery means the actual physical transfer of possession of the chattel to the donee. This is sometimes called *manual transfer* of the chattel. This transfer of possession is seen as strong evidence that the donor intended to make an irrevocable gift.

QUESTION 2. Mom may read the book first. Suzuki came home from college over the holidays to visit her parents. The three of them unwrapped presents together next to the Christmas tree. Suzuki gave her parents a framed photograph of their favorite daughter (Suzuki). Her parents gave Suzuki a just published bestseller, for which she thanked them. Suzuki was going to be too busy to read the book during the first part of the semester back at college, and she knew that her mom also wanted to read the book, so she left the book with her mom when she returned to college. Has there been a completed gift?

A. Yes, because the parents delivered the book to Suzuki.
B. Yes, because the photograph, given in exchange for the book, furnishes consideration.
C. No, because Suzuki's transfer of the book to her mother revoked the delivery.
D. No, because the parents did not intend to make a present transfer of ownership to Suzuki.
E. No, because Suzuki made a valid gift of the book to her mom.

ANALYSIS. First let's tackle the three responses that do not expressly address the delivery requirement for gifts. Choice **B** invokes contract law, arguing that Suzuki has a property right to the book because she gave the photograph to her parents. This does not fly. Suzuki did not bargain for her parents to give her the book by offering to give them the photograph. Exchanges of gifts are exchanges of gifts; they are not contracts in which parties bargain for promises or performances.

Choice **D** is wrong based on the facts. Normally holiday exchanges of gifts are complete when the recipients open their presents, and there is no indication here that the parents expressed any unusual idea or condition that the book was not to be Suzuki's immediately.

Choice **E** might be plausible. Someone who receives a gift may decide to give the object, right away, to another person.[3] But the facts state that Suzuki "left the book with her mom," implying a loan (bailment) of the book. **E** is weak.

The two responses dealing with delivery are **A** and **C**. The latter choice states that Suzuki's bailment of the book to her mom, one of the donors, revoked delivery. A gift, once completed with all three elements satisfied, is irrevocable. Neither the donee nor the donor may revoke. Thus, a delivery may not be revoked once donative intent and acceptance have taken place to complete the gift.

A is the right answer. The parents made an actual physical delivery of the book to Suzuki, and her subsequent delivery to her mom as a bailment does not invalidate the gift.

C. Constructive and Symbolic Deliveries

Instead of a physical, manual delivery of the chattel, a donor may deliver to the donee a writing or another object that represents or refers to the chattel. Delivery of that thing may suffice to validate the gift if the court recognizes a constructive or symbolic delivery. This type of delivery is not always allowed. Courts often say that the donor must make the "best delivery possible" under the circumstances. A constructive or symbolic delivery is allowed as a substitute only if there is some reason why it was not practical for the donor to make a physical delivery of the chattel.

Some courts use the terms *constructive delivery* and *symbolic delivery* as synonyms, but there is a recognized distinction between the two terms. A constructive delivery provides the donee with the *means of access,* allowing the donee to acquire physical possession. Under the law of some states, a constructive delivery is preferred to a symbolic delivery (just as a manual delivery is preferred to a constructive or symbolic delivery). Some courts are more willing to allow a constructive delivery, compared to a symbolic one, because with a constructive delivery the donor has done all that is necessary to allow the donee to acquire possession of the chattel. Without anything further from the donor, the donee is able to obtain dominion and control over the chattel.

3. This phenomenon, called "regifting," sometimes takes place when the recipient doesn't want the item. The practice has its defenders (efficiency grounds) but is seen by some as a serious breach of etiquette.

QUESTION 3. A gift of an automobile. Homer wants to make a gift of an automobile to his niece. He has a certificate of title for the automobile, as required by the certificate of title act for the state where Homer resides. Which of the following statements is true?

A. Delivery of the certificate of title is a constructive delivery.
B. Delivery of the certificate of title is an actual delivery.
C. Delivery of the automobile itself is a symbolic delivery.
D. Delivery of the keys to the automobile is a constructive delivery.
E. Both A and D are correct.

ANALYSIS. This question tests the ability to distinguish the three types of delivery (actual, constructive, and symbolic), including the rule that a constructive delivery provides the donee with an object that furnishes the means of access. Actual delivery of the automobile is what you would think it is. Homer allows his niece to take possession of, and drive, the auto. Thus **B** and **C** are wrong.

For Choice **A**, the question to ask is whether the niece, if she receives only the certificate of title, has the means to take possession of the car and drive it. She does not have the means, even if the certificate is properly endorsed by Homer. Without the keys, she cannot unlock the car or drive it. Delivery of the certificate of title is a symbolic delivery, but not a constructive delivery.

Delivery of the keys, on the other hand, is a constructive delivery. She can go to wherever the automobile is located (probably Homer's home) and take it. **D** is the right answer.

D. Acceptance

Acceptance by the donee is required, but this element seldom poses a problem. Courts have often said that acceptance is presumed or implied if the gift has value. In the absence of affirmative evidence that the donee rejected the gift, an attempted gift is not likely to fail for lack of acceptance.

QUESTION 4. A gift of a pit bull. Babe, the owner of a pit bull dog named Roscoe, is planning to move to another state far away. Roscoe, a purebred, has a market value of $300. Babe decides not to take Roscoe with her. She thinks her friend, Marcus, may want Roscoe. After loading up her U-Haul trailer, she drives to Marcus's house on the way out of town, but Marcus is away at the moment. She ties Roscoe to a post on the front porch of Marcus's house, leaving a note that reads: "I'm giving Roscoe to you. I know you'll take good care of him. Love, Babe." Marcus returns home and

does not want Roscoe. He takes Roscoe to a local dog rescue shelter, which accepts possession of Roscoe. The shelter has a policy of charging $30 to the owner of any dog that the shelter is unable to place for adoption within 30 days. The shelter, not having placed Roscoe within 30 days, bills Marcus. Is he liable for the charge?

A. Yes, because Marcus accepted the gift by taking Roscoe to the shelter.
B. Yes, because the law presumes acceptance by Marcus.
C. Yes, because Marcus acted as Babe's agent in taking Roscoe to the shelter.
D. No, because Marcus never accepted the gift.
E. No, because Babe's delivery of Roscoe was not sufficient.

ANALYSIS. This question concentrates on the requirement of acceptance by the donee. First let's knock off the two choices that do not discuss acceptance. **C** is wrong, even if we assume that the dog rescue shelter would be justified in billing an agent who delivered a dog on behalf of the owner, because there are no facts to support a finding of agency. Babe did not know that Marcus took Roscoe to the shelter.

Delivery, referred to in **E**, is not open to question. Babe left Roscoe at Marcus's house. This would accomplish actual, physical delivery, making a completed gift provided there was donative intent and acceptance.

Acceptance in the law of gifts, just as in the law of contracts, depends upon a person's intent. As in contracts, in gifts a court may focus on *manifested intent.* A presumption of acceptance typically applies to solve a timing problem, when an alleged donee who wants the property first learns of the purported gift after the donor has died. Here the presumption will not apply because the facts indicate that Marcus does not want to own Roscoe. Choice **A** is a better pick than **B** but is also weak. Marcus might accept the gift by conduct, acting as if he were Roscoe's owner. The facts are sparse here, but there's no indication that he pretended to be Roscoe's owner or misled the shelter. Choice **D** is the best answer. Marcus decided not to accept Babe's offer of gift.

E. Gift Causa Mortis

A gift causa mortis is a special type of gift made by a donor who is in apprehension of imminent death. Just as for inter vivos gifts, a gift causa mortis requires donative intent, delivery, and acceptance. The delivery (manual, constructive, or symbolic) must take place before the donor dies.

With respect to donative intent, the donor does not always expressly refer to the possibility of pending death. This can raise a question as to whether an alleged donor intended to make a gift inter vivos or a gift causa mortis.

Courts will infer an attempted gift causa mortis when the surrounding circumstances indicate that the donor acted while in apprehension of possible imminent death.

A gift causa mortis takes effect immediately when all three required elements are present. The gift, however, is revocable. The donor has the right to revoke prior to death, assuming the donor has remained mentally competent. Moreover, revocation occurs automatically if instead of dying the donor recovers from the perceived peril. This timing distinguishes the gift causa mortis from a testamentary transfer, which takes place at the moment of the donor's death. Sometimes an attempted gift causa mortis fails because the court determines that the donor attempted a testamentary transfer, which could only be accomplished by the donor making a valid will.

QUESTION 5. The diamond ring. In January, Mary made a will, which bequeathed her diamond ring to her daughter, Alice; her Mustang convertible to her daughter, Brenda; and all the rest of her property to her husband, David. In April, Mary learned that she had a serious heart defect. The evening before she went into the hospital for surgery, she handed her diamond ring to Brenda, telling her, "This is yours, darling, you've always been so good to me." No one else was present when Mary handed Brenda the ring. Mary died during the surgery. Who has the better claim to the diamond ring?

A. Alice, because a gift causa mortis cannot revoke a will.
B. Alice, because there were no witnesses to the alleged gift causa mortis other than Brenda.
C. Alice, because delivery was not the best possible under the circumstances.
D. Brenda, because Mary adequately expressed her intent.
E. Brenda, because Mary made an effective symbolic delivery of the ring.

ANALYSIS. Students may be drawn to Choice **A** because the question clearly involves an attempted gift causa mortis and Choice **A** is the only response that uses the term. But **A** is wrong. A will is revocable and operates only at the moment the testatrix dies. If the will includes a specific bequest and the testatrix no longer owns that property when she dies, the legatee has no claim to that property.

Choice **B** makes a good point. With no independent witnesses, there is a risk that Brenda has not described the transaction accurately. She may have even committed fraud. But this is an inherent problem with the gift causa mortis doctrine, and there is no requirement that a donee provide additional corroborating evidence.

Choices **C** and **E** both discuss delivery, with flaws. Delivery is not a problem here because Mary handed the diamond ring to Brenda. This is an actual delivery, not a symbolic delivery (which is a delivery of a symbol in lieu of the chattel), and an actual delivery, when it is made, is always the best delivery possible.

We're left with Choice **D**, the right answer. **D** is only a partial explanation for why Mary should win: we can also say that this is a valid gift causa mortis, with a proper delivery, which was accepted by Brenda. **D** is the best answer because it is the only choice without a flaw.

F. The Closer: Gifts of Future Interests

A promise to make a gift is generally unenforceable. Under property law, the explanation is that the promisor still has title and ownership. Contract law analysis leads to the same conclusion. The lack of consideration given to the promisor makes the promise unenforceable.

Although a promise to make a future gift is unenforceable, a gift of a future interest in property is valid. At first consideration, this may seen anomalous if not contradictory. But there is a distinction of substance. A promise to make a gift in the future does not transfer any property right to the promisee at the time the promise is made. In contrast, a gift of a future interest vests the donee with title to the future interest at the moment the gift is made. Like other inter vivos gifts, a gift of a future interest is irrevocable when made. The donee's right to possession is deferred until the point in time when the present estate expires. This deferral of possession and enjoyment is not the result of a special condition that the donor has sought to impose on the gift. Instead, such deferral follows from the nature of future interests. By definition, every future interest represents deferred enjoyment of property.

QUESTION 6. Future interest in a computer. Travis, 94 years old, just bought a new computer system. He wrote a letter to Junior, his great-grandson, which stated in pertinent part: "I love my new Multi Gig Byte Deluxe computer. When I die you may have it along with all the add-ons." Junior received the note through the mail and sent a thank-you card to Travis. Three months later Travis died of natural causes. Travis died intestate, and his sole heir is his wife, Woodsy. Who has the better claim to the computer system?

A. Junior, because Travis made a gift causa mortis of the computer system.
B. Junior, because Travis made a gift of a future interest in the computer system.
C. Woodsy, because Travis made no delivery of any kind.
D. Woodsy, because there is not adequate evidence that Travis intended to make a present gift.
E. Junior and Woodsy should share the computer system because they are both heirs of Travis.

ANALYSIS. Some students may be tempted by Choice **A**, given that many people as old as Travis do have an appreciation of pending mortality. But old age by itself does not qualify a person to make a gift causa mortis, and the facts state that Travis died of natural causes.

Choice **C** is incorrect because the letter from Travis can qualify as a symbolic delivery. If Travis has made a proper expression of donative intent, delivery is probably sufficient. Acceptance is no problem; not only is it presumed, but Junior sent a thank-you card.

Choice **E** is wrong because it is contradicted by the facts, which state that Woodsy is Travis's sole heir. In many states, Woodsy and Junior would both be heirs, but here the facts stipulate otherwise.

We're left with **B** and **D**, which forces you to decide whether Travis has made a present gift of a future interest in the computer system to Junior. Travis is able to make such a gift, and a letter written to Junior would be an appropriate mechanism to accomplish such a gift. A famous case contained in many property casebooks, *Gruen v. Gruen,* 496 N.E.2d 869 (N.Y. 1986), validated a gift of a remainder interest in a painting, made by a letter sent by a father to his son. But here there's a problem with Travis's expression of intent. By saying "When I die you may have [the computer]" Travis has indicated that Junior is to acquire an ownership interest at the time of Travis's death. This is too late. A property owner can transfer property at his death only by making a valid will, and the letter cannot qualify as a will. **D** is the best answer.

Smith's Picks

1. Last-minute birthday present	**E**
2. Mom may read the book first	**A**
3. A gift of an automobile	**D**
4. A gift of a pit bull	**D**
5. The diamond ring	**D**
6. Future interest in a computer	**D**

5

Intellectual Property

"The ancients stole our best ideas."
Mark Twain

CHAPTER OVERVIEW

A. Patents
B. Copyrights
C. Trademarks
D. Trade Secrets
E. Misappropriation
F. Right of Publicity
G. The Closer: Distinguishing among the IP Categories
Smith's Picks

Only recently have property teachers begun to include intellectual property ("IP") in the basic property course. The core topics of intellectual property law consist of patents, copyrights, and trademarks. The term "intellectual property" is not a term of art, and so its boundaries are not well defined. Nearly all lawyers and academics would also classify trade secrets and misappropriation as part of the law of intellectual property, and many would also add the emerging law governing the right of publicity.

In property courses with a traditional curriculum, students will receive little or no introduction into the subject matters that comprise intellectual property. In other property courses, students will encounter a substantial amount of materials dealing with intellectual property topics, although due to time constraints thorough coverage is not feasible. Detailed study is left to the upper-level curriculum; most law schools offer a variety of upper-level intellectual property course offerings. This chapter attempts to provide a rudimentary sketch of the best known intellectual property topics.

A. Patents

The federal Constitution empowers Congress to "promote the Progress of Science and useful Arts" by granting to "Inventors the exclusive Right to their . . . Discoveries" for a limited time. U.S. Const. art. I, §8. Since passing the first patent statute in 1790, Congress has exercised this power, which the Supreme Court has interpreted as preempting any conflicting state laws, foreclosing the states from issuing patents or adjudicating patent rights.

The federal patent statute requires that an inventor apply for a patent from the United States Patent Office. Today a patent lasts for 20 years from the date of the application for the patent, an increase made by Congress in 1994 from the previous term of 17 years.

The constitutional terms "useful arts," "inventor," and "discoveries" are the foundation of the scope of what is protectable under patent law. Patents are limited to the classes of subject matter set forth in the patent statute. The earliest statute defined the appropriate subject matter as "any useful art, machine, manufacture or composition of matter, or any new and useful improvement [thereon]." Today's subject matter has changed remarkably little. The patent statute now authorizes patents for

1. A process.
2. A machine.
3. An article of manufacture.
4. A composition of matter.
5. An improvement of any of the previous items.

35 U.S.C. §101.

Most patents are *utility patents.* In addition to coming within one of the listed subject matters, the applicant for a patent must establish that the invention has the following three characteristics:

- **Novelty.** The invention must be a new process or thing. If the "invention" already exists, an applicant may not obtain a patent. The test sounds easy, but its application sometimes requires a careful examination of the "prior art" (information previously available to the public). Novelty is defeated if the process or thing was known or used by other persons in the United States or patented or described in a printed publication anywhere in the world. 35 U.S.C. §102. Use by others includes all commercial uses, even uses that are nonpublic and secret. If the public has already had the benefit of the claimed invention, then a patent is no longer available.
- **Utility.** This is a relatively easy standard to meet. The invention must have the prospect of producing a direct benefit for people. The utility requirement does not mean that the claimed invention must be superior to comparable products or processes. One could successfully patent a mousetrap that was inferior in every way to those in the prior art. If the invention is frivolous or harmful, it lacks utility. In the patent application, the inventor must be able to explain the use of the invention.