英美法案例精选系列丛书　英文版

美国财产法

American Property Law

薛　源　编著

对外经济贸易大学出版社

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总　序

自1984年设立国际法专业以来，对外经济贸易大学法学院（原国际经济法系）已经走过了20个年头。在20年的时间里，经过几代人的努力，在培养懂法律、懂经贸和熟练运用外语（英语）的综合型人才、满足国内市场和国际市场的人才需求的道路上，对外经济贸易大学法学院已成为国内外经贸法律教育中一个具有自己特色和风格的人才培养基地和输送站。

对外经济贸易大学法学院的教学特色体系是从“国际商法”开始的。为了适应国际经贸全球化的发展潮流，我们希望，从对外经济贸易大学法学院走出的人才能够从国际化的视角理解和把握我国的法律，并且客观地认识不同国家的法律、国际法律之间的相互作用和影响。为此目的，我院几代教师编辑的教材，包括案例教材，都在强调具有国际化视角的教学和比较研究的重要性。

对外经济贸易大学法学院以独特的教学方法——案例教学和双语教学为代表，旨在通过引导学生对“原汁原味”的英文案例的阅读和研讨，既学习不同国家在国际商贸领域的法律原理和规则，也通过对经典案例事实和纠纷场景的分析，帮助学生认识现实生活中经贸活动的规律和特点。

我们多年的教学实践已经证明：案例教学对于培养学生发现和归纳问题、分析和处理问题的综合能力，对于培养学生在错综复杂的事实和现象中分清真伪和主次、结合事实和法律推理的能力有直接的促进作用。

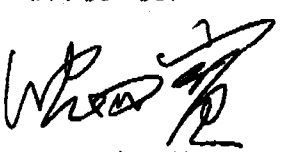
除了国际商法以外，对外经济贸易大学法学院国际法专业的

另一个教学和研究方向是以 WTO 法律为主的国际经济法（公法）。本套英文案例选编丛书包含了这样两个方面的内容。

我院鼓励教师在教学、科研和法律实践中全面拓展才能和发掘潜力，同时，我们强调：教师的工作应以教学为中心，科研和法律实践应为提升教师的专业素质、提高教学水平而服务。参与本套丛书编写的同志都是我院具有多年教学经验的中青年教师，本套丛书是他们在对自己的教学心得的积累和总结的基础上精心编辑而成的，是他们对多年摸索的教学方法的总结；本套丛书也是我院几代人的教学成果的延续，更是我院“211 工程”建设成果的组成部分。

20 年来，我们欣慰地看到：对外经济贸易大学法学院的教学风格和特色也得到国家和社会的认可：早在 20 世纪七八十年代，我院就经批准设有可招收国际经济法专业方向的硕士点和博士点；我院的“国际商法”教材和案例教材也广为流传；2002 年我院的国际法专业被评为国家重点建设学科，现又增设了博士后流动站；学生和教师的规模日益扩大。我衷心希望，我院有更多的教师和学生加入案例教学和双语教学的尝试和探索中来，保持和发展特色，早日走上国际人才培养和学科全面发展的道路。

对外经济贸易大学
法学院　院长



2004 年 7 月

前　言

财产法在美国是与合同法、侵权法等并列的法学院一年级开设的基础课程。财产法大致等同于大陆法中物权法的概念。对于美国合同法和侵权法，国内的研究较多，但对美国财产法的关注相对较少。了解财产法对深入研究信托法、公司法和证券法都有一定的帮助。

本书选编了反映美国财产法的基本概念和原理的四十多个典型案例，分为财产的取得、不动产利益、不动产租赁、不动产转让、私人对土地使用的控制和国家对土地使用的管理六个部分。研究了财产主要是不动产利益的种类、不动产利益的变动，不动产权利人行使权利受到的私人权利和国家权力约束的基本原则。

美国财产法的内容十分丰富，限于篇幅，本书选编的案例旨在初步揭示美国财产法的基本原则和理念，引发对美国财产法的研究兴趣。在收集相关案例中，本书在注意案例典型性的同时，选取了较新的案例，以反映美国财产法的最新发展。

本书可以作为大专院校法律学科教师和学生讲授和学习“比较物权法”的案例辅助教材，为法律工作者和其他专业人士了解美国财产法的基本概念和原则提供参考，也可以为对法律英语感兴趣的人士提供了解财产法方面专业词汇和提高专业英语水平的机会。

书中错误和疏漏在所难免，请读者多提宝贵意见。

薛　源

2006 年 5 月于对外经济贸易大学

目　录

第一章　财产的取得

第二章　不动产权益

第三章 不动产租赁

第四章　不动产转让

第五章　私人对土地使用的控制

第六章 国家对土地使用的管理

第一章　财产的取得

在美国财产法中，财产大致对应的大陆法概念是物权。财产是法律保护而不容他人侵犯的就物的利益，反映的是人与人之间就物的关系。财产的取得方面的基本概念和原理学习是研究美国财产法首先会接触到的。财产的取得分为原始取得是继受取得。

第一节　财产的原始取得

财产的原始取得是指取得没有为他人所有的物的财产权，财产的原始取得方式包括发现、捕获和创造。由于通过发现未被他人所有的物，从而取得该物的所有权的情况，现在很少出现，所以我们关注的重点在通过捕获和创造取得物的所有权的方式。

通过捕获取得物的财产权通常涉及野生动物，普通法的原则是私人通过对野生动物的实际占有可以获得对野生动物的所有权。现在在美国，州代表的全体人民拥有对野生动物的所有权，私人在不违反法律的情况下，可以通过对特定野生动物的实际占有获得对该野生动物的所有权。Graves v. Dunlap 一案中就探讨了构成对野生动物实际占有的要素，以及就野生动物所有权，私人利益与公共利益的平衡问题。

通过创造取得物的财产权，通常涉及最多的是知识产权，以及人体器官和组织。Martin Luther King, Jr. , Center for Social Change, Inc. v. American 一案对名人的公众形象权进行了深入探讨。Hecht v. Superior Court 一案则关注个人是否对其在精子库存放的精子拥有财产利益的问题。

一、通过捕获取得财产

Graves v. Dunlap

87 Wash. 648, 152 P. 532

Wash. 1915

MAIN, J.

The purpose of this action was to establish the plaintiff's ownership and right to possession of certain game animals and birds, and to restrain the defendants, the game warden and the prosecuting attorney of Spokane county, from interfering with or disturbing the plaintiff's ownership and right to the possession of the animals, and birds in question. After the issues were framed, the cause was tried to the court sitting without a jury, and resulted in a judgment, sustaining the plaintiff's right to ownership and possession, and restraining the defendants from beginning or prosecuting any criminal action against the plaintiff on account of his possession of the wild animals and birds referred to. From this judgment the defendants appeal.

The facts are not in dispute, and are in substance as follows: The plaintiff, during the year 1901, and prior thereto, and at the present time, owns a farm, consisting of several hundred acres of land, a few miles north of the city of Spokane. Upon this farm there

has been kept a herd of dairy cattle. During the winter of 1901 a doe with a broken leg came into the herd of cattle upon the farm. This doe, by the respondent, or by the employees upon his farm, was placed in a box stall in the barn and taken care of until she recovered, when she was put into an inclosure. The following season a buck was given to the respondent by one of the men employed by him. To these deer and their increase the respondent occasionally added from outside herds. Because inbreeding causes a herd to deteriorate, on several occasions bucks were exchanged from the herd for bucks in city parks of Spokane and Tacoma. During the early years of the herd, and on two occasions, does from without the state were given to the respondent by friends. The doe and buck first acquired are still living. These, with the increase, and such bucks as have been procured by exchange, and their increase, made up a herd of about 20 deer in the fall of the year 1913. This herd is kept on the respondent's farm in an inclosure containing 15 or 20 acres, which is surrounded by a high woven wire fence, to which entry can only be gained by gates. During the summer there is sufficient feed in the inclosure to sustain the deer, but in the winter it is necessary to feed them. Workmen on the farm look after them all the year round, and gave them the attention that is given to cattle and other animals. The deer are not permitted to be without the inclosure.

The respondent also has certain fowls, including swans, wood ducks, pheasants, etc. Eight of the swans are birds obtained in the year 1902, with their increase. Four of the swans were purchased in the state of Massachusetts for breeding purposes in the year 1913. These swans have their nesting places around the lakes on the farm, and are fed and taken care of as purely domestic fowls. The

remainder of the fowls are kept in inclosed or covered runways in the respondent's poultry yards. These were purchased in various parts of the United States and Canada. For one pair of Reeves pheasants $85 was paid. For one pair of Amherst pheasants about $100 was paid. The fowls are not used for food, nor killed, and none have been sold, though the respondent has given away one or two pairs of pheasants for breeding purposes.

The appellants claim that the respondent has no right to keep the deer and the fowls in the inclosure, and that both the deer and the fowls are subject to the same regulation by the Legislature as is the wild game of the state. The respondent claims that he has a property right in the deer and the fowls, and that therefore it cannot be taken away by act of the Legislature without due compensation being first made. The question, therefore, is whether the respondent had acquired a property right in the deer and birds which he was entitled to have protected.

Animals ferae naturae are known by the denomination of "game" 1 Cooley, Blackstone (4th Ed.) p. 758. The respondent's deer and fowls come within the term "game", unless by the fact of their reclamation and confinement there has been acquired a property right therein which is not recognized in wild game. Without reviewing the early common law upon the subject of game, it may be said that the recognized doctrine is that the title to game belongs to the state in its sovereign capacity, and that the state holds this title in trust for the use and benefit of the people of the state. The state, through its Legislature, has the right to control for the common good the killing, taking, and use of game, so long as the rights guaranteed either by the state or federal Constitution are not

encroached upon. In Cawsey v. Brickey, 82 Wash. 653, 114 Pac. 938, it was said:

"Under the common law of England all property right in animals ferae naturae was in the sovereign, for the use and benefit of the people. The killing, taking, and use of game was subject to absolute governmental control for the common good. This absolute power to control and regulate was vested in the colonial governments as a part of the common law. It was passed with the title to game to the several states as an incident of their sovereignty, and was retained by the states for the use and benefit of the people of the states, subject only to any applicable provisions of the federal Constitution."

See, also, Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793. Many other decisions to the same effect might be cited, but the multiplication of authorities upon this question is hardly necessary.

While animals ferae naturae belong to the state, as indicated, yet, when they are reclaimed by the art and power of man, they are the subject of property, and a property right thereto may be acquired. In 2 Cooley, Torts (3d Ed.) p. 838, the author says:

"There is no property in wild animals until they have been subjected to the control of man. If one secures and tames them, they are his property; if he does not tame them, they are still his, so long as they are kept confined and under his control."

In 2 Kent, Commentaries (14th Ed.) p., upon the same question, the author observes:

"Animals ferae naturae, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but

when they are abandoned, or escape, and return to their natural liberty and ferocity, without the animus revertendi, the property in them ceases. While this qualified property continues, it is as much under protection of law as any other property, and every invasion of it is redressed in the same manner."

See, also, to the same effect, 1 Cooley, Blackstone (4th Ed.) p. 743.

It will be noticed from the excerpt quoted from Kent that the author uses the term "qualified property" Many of the decisions which discuss the question use the same term. The appellants contend that, since the property right is a qualified one, the state, in the exercise of its police power, can take it away with impunity. But the qualified property referred to is a property right which is defeasible upon a condition subsequent, which may or may not happen. This condition is that, if the animals return to their wild state, the property right ceases. That the property right is a defeasible one is recognized by Blackstone. In 1 Cooley, Blackstone (4th Ed.) p. 744, referring to this subject, it is said:

"In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible; a property that may be destroyed if they resume their ancient wildness and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become ferae naturae again, and are free and open to the first occupant that has ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law as if they were absolutely and indefeasibly mine; and an action will lie against any man that detains them from