THE PROFESSIONAL NURSE AND THE LAW

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To Our Children,
Edie and Danny

PREFACE

We have attempted to meet the need for a readily understandable text on the legal aspects of nursing. We have not attempted to provide a "do it yourself" book on legal problems or a substitute for professional legal services. Nor have we attempted to provide a definitive reference book on any of the fields of law. In a text of this size, such an effort would have been patently impossible. We have tried to provide a readable text tracing the broad outlines of those areas of law of particular concern to nurses. Of necessity, some of the fields of law discussed in this book are of general interest to any person concerned with his or her rights and obligations. Many chapters, such as those dealing with torts, nurse practice acts, consumerism and accountability, collective bargaining, national health care, death, and principles for nurses to remember, are of primary concern to nurses.

We hope our readers enjoy using this book as much as we enjoyed writing it. If they have only a small part of the patience that our two young children, Edie and Danny, displayed while their parents worked on this book, we are sure they will find its use rewarding and instructive.

The nursing profession will never achieve the status it deserves unless nurses are willing to assume the responsibility for guiding its growth through progressive legislation and role change. For this task it is essential that nurses know their legal rights and obligations.

Dresher, Pennsylvania

D.A.R.
N.L.R.

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1. PROPERTY RIGHTS

Human beings enter the world with certain deep-seated primal instincts. Among these are the desire for food, shelter, and love, and freedom from pain, injury, and death. These instincts are not necessarily compatible with living in an ordered society or in a densely populated area. Human beings attained their ascendancy on this planet not through their brute strength, but through their intellect and their capability for collective action. This ascendancy was only possible because of the ability of the human race to coordinate its activities and live in more or less ordered societies.

An ordered society is, by implication, a society with rules and standards of conduct for its members, defining their goals and setting guidelines and limitations for the fulfillment of their basic primitive drives. Broadly stated, the rules and standards of society that control the conduct of its individual members and set limitations and guidelines for the fulfillment of natural impulses are called laws. These laws may be imposed by a despot who rules through strength and fear without the consent of those governed, by an elected body governing with the consent of those governed, by long-standing custom and practice, or by a combination of these and other means.

The society in which the readers of this book will live their lives is extremely complex. Their day-to-day conduct is governed by a body of law that encompasses and controls every aspect of their lives. It has been said that the law is a "seamless web" and this is, in fact, an apt metaphor since the law envelops our activities, prospects, and aspirations from birth to death and, in some respects, thereafter as well.

Without laws and without a society under law, we would have anarchy, or what has otherwise been called the law of the jungle. The strongest would prevail in every situation. People would only survive to the extent that they could defend their own lives and bodies, and they would only own property to the extent that they could physically defend it against those who wished to take it from them. At an early stage in his development, man determined that this was not the way to live. What then are these laws that govern our lives and envelop us like a cocoon or the air we breathe? A law is a rule applicable to the members of society for the purpose of recognizing a particular interest of the government of that society or of its individual members.

To be more specific, a law that makes certain types of killing a crime recognizes the right of the individual members of society to be free from murderous assaults. Another law that provides for the imposition of taxes

recognizes the collective interest of the members of a society in having services that its government can provide and the interest of the government in having a method to pay for these services. A law that governs the disposition of the estates of decedents recognizes the interest and desire of most individuals to provide for the disposition of their assets on their death. Preeminent among the interests recognized and protected by laws is the *general interest* in an ordered society without which we would have anarchy and a situation in which only the strongest would survive.

Another way of approaching the law is in terms of rights. When an individual has an interest that society recognizes and protects it may be said that he has a right. For instance, individuals have an interest in owning real estate and being reasonably free from the interference of others in the enjoyment of that ownership. If this interest is recognized and protected by the state it may be said that they have a *right* to such ownership [1]. The ability to acquire, own, and dispose of property is the cornerstone of an ordered and civilized society.

PROPERTY DEFINED

What is property? In a sense it only exists by virtue of laws. While a lay person may think of property in terms of real estate, which is land or things permanently attached to land, or in terms of personal property, which consists of all the other movable things in the world capable of being owned, a lawyer thinks of property as a collection of rights. Therefore, a lawyer might say that a person owns something only to the extent that he has a legal interest in it that is recognized and protected by society in the form of a law.

Stated another way, a person who lives on a piece of land does not own it unless society, for one reason or another, recognizes his right to quiet enjoyment of that land. Ownership may be of varying degrees, starting with ownership *in fee simple*, or absolute ownership, which gives the owner the right to use a piece of land for any lawful use that does not unreasonably interfere with rights of his neighbors, to sell or lease his land, and to dispose of it by a will at his death. These rights are frequently divisible. For instance, a person owning a piece of land may sell one portion of it, occupy another portion, and lease a third portion. The laws applying to interests in land, sometimes called real property, vary in many respects from those dealing with personal or movable property [2].

Both real and personal property may be owned, but a piece of land is truly unique. While the law recognizes the fact that a person who is unlawfully deprived of an item of personal property may be compensated in money damages, laws involving real estate often provide for the restoration of a particular piece of land to its rightful owner. This distinction can be traced to the feudal system, in which the ownership of land was the basis of the entire social and economic order.

Personal property is divided into two broad categories: tangibles and intangibles. Tangible personal property encompasses things that can be seen, touched, and moved, such as automobiles, coins, watches, and books. Another class of personal property consists of transferable rights against other persons. Lawyers call these intangible items of personal property *choses in action*. A chose in action could be a check, which is a right to collect money from a bank; a stock certificate, which is evidence of ownership of a portion of a corporation; a bank deposit book, or even a lease. Rights in personal property also may be acquired, enjoyed, divided, lost, and transferred [3].

ACQUISITION OF PROPERTY

Most of us spend the greater portion of our lives in an attempt to acquire property, things which bring comfort, security, and a certain unique life style to ourselves and our families, things which we can obviously not take with us to whatever we believe to be the next world. In this intensive quest for property, spiritual and ethical goals and values are often neglected or ignored.

Since this book is not intended as a treatise on ethics and religion, we will not dwell at any great length on the relative merits of this acquisitive point of view. Suffice it to say that much of the present high standard of living to which citizens of the Western democracies have become accustomed is based on acquisition and possession of private property.

How may this property be acquired, or, stated another way, how may an individual acquire an interest in things or in land that would be recognized and protected by society? One way is by acquiring possession of a thing or piece of land that belongs to no one else. Except for an occasional uncharted atoll, very little land on this earth still fits that description, so we may reasonably omit unclaimed land from this discussion. However, items of personal property (as opposed to real property) with no owner are still plentiful. One obvious example is wild game. While the owner of the piece of land on which a hunter acquires possession of a wild animal has a greater claim to the animal than the hunter, the hunter has a greater claim than everyone else. Furthermore, a person hunting on a game preserve, or on his own land, has title to a captured or slain wild animal that is good against the whole world. Goods and things may be abandoned; that is, their prior owner may relinquish control of the goods or things with the intention of permanently divesting himself of ownership. One who acquires possession of such an item becomes its new owner [4].

Lost Property

The situation is different in the case of lost goods. If an item is lost, the one who finds it and obtains control over it has greater title to it than everyone except the original owner who may reclaim it [5]. The situation is also

different in the case of misplaced goods. An item that has been misplaced must be distinguished from an item that is lost. When one deliberately places an item in a particular place and forgets the location of the item, it has been misplaced; whereas, if an item is inadvertently dropped and not found, it is lost. The one who finds an item that has been misplaced has title to it that is superior to that of everyone but the owner of the premises on which the item was found and, of course, the original owner [6].

For example, someone who picked up a lamp or some other piece of household furnishing left on the curb by a householder for the garbage men would have better title to that item than anyone else. A nurse who found a wrist watch in a rest room in a hospital, which had been placed on the sink by another nurse who was washing her hands, would have found a misplaced item and would have a good title against everyone but the hospital and the original owner of the watch. However, if the same watch were found by the same nurse in the hall with the strap broken so that it was apparent that it had fallen from its original owner's wrist, the nurse who found it would have good title against everyone but the original owner since the watch would have been lost.

Gifts

Another highly esteemed and universally applauded way of acquiring property is by gift. A gift, by its nature, involves the transfer of property to the recipient without payment or a quid pro quo of any kind. Generally, it denotes esteem or affection on the part of the giver for the recipient, but this is of no legal consequence. How does one make a gift? What is necessary in order to accomplish this transfer of legally protected rights to an item so as to vest them in the recipient of the gift? First, there must be the intention to make a gift or *donative intent*. The donative intent must be a present intent. Intent to make a gift in the future will not suffice. In order for the gift-giving to be consummated there must be a present intent to make a transfer of the rights of the donor in a particular item to the recipient. In addition, there must be delivery, which represents a transfer of possession of the item to be given from the donor to the recipient. In the case of a small item, such as a watch or a coin, the act of transferring possession is easy to understand. With some larger items, such as automobiles, the transfer of possession may be constructive or symbolic, for example, the delivery of keys. In any event, the transfer of possession or delivery may be accomplished by a formal, written instrument or deed signed by the donor. Another requirement for a valid gift, which is perhaps too obvious to require much attention, is acceptance by the recipient. Obviously, a gift may be refused for any reason and, in most cases, in the face of such refusal, delivery is impossible.

Testamentary Gifts. Testamentary gifts are another very important category of gift. They involve gifts which take effect on the death of the

donor. In the United States, and in most other countries, testamentary gifts must be in writing and signed by the donor [7]. This document is referred to generally as a will or testament, and lawyers refer to the giver in such cases as the testator in the case of a man and the testatrix in the case of a woman. Wills and the disposition of decedents' estates are a matter for serious consideration by the professional nurse, not only because she is mortal and may wish to provide for the disposition of her worldly goods at the time of her own death, but also because she frequently deals with people who, reminded of their own mortality by illness and infirmity, may wish her to witness a will or obtain for them the services of a lawyer [8]. Frequently the mental condition of such individuals as it bears on their capacity to make a will may be an issue before a court of law, and the nurse's testimony may be required.

GIFTS A CAUSA MORTIS. Gifts made in anticipation of imminent death from an existing infirmity are given special treatment by the law. They are known as gifts *a causa mortis*. Like testamentary gifts, the subject of gifts a causa mortis may be of particular interest to nurses. A nurse could conceivably be the recipient of such a gift and, like anyone else, she might at some time in her life wish to make such a gift. Of course, she could be called into court to testify regarding such gift-giving she observed in the course of performing her professional duties.

In order for a gift to be treated as a gift a causa mortis, the giver, while not necessarily about to die, must believe that his or her death is imminent from an existing infirmity. An example would be a man who was about to have a serious operation that he was not sure he would survive. If, under such circumstances, he gives a piece of jewelry or some other object to a friend and actually delivers it to him or transfers it to him by means of a signed, written document, such a gift would be treated as a gift in contemplation of death or a gift a causa mortis and could be revoked under certain circumstances.

In general, it may said that the survival of the contemplated peril, of itself, revokes a gift a causa mortis. Therefore, in the case we are discussing, if the man survived the operation he could reclaim the jewelry at any time during his lifetime or, after his later death, it could be claimed by his executor as part of his estate.

The death of the recipient of the gift a causa mortis prior to the death of the person making the gift operates as a revocation of the gift, and the original donor may then reclaim the gift.

It is obvious that such gifts may be the subject of fraud. A great deal of litigation has taken place regarding the circumstances of gifts in contemplation of death. It is very possible that a nurse at some time in her career might be called into court to testify in regard to the circumstances of a gift a causa mortis, in order to help the court determine the actual intention of the donor [9].

Acquisition of Property by Contract

The most common method of transferring property between individuals in our society is by a binding agreement between the seller and the buyer of the object sold. The field of contracts is extremely complex and is the subject of a great body of judicial opinions and legal texts; it is also one of the most important courses in a law school. It will suffice for the purpose of this book to say that for a promise to be binding it must be supported by consideration; that is, in general, the promisor must receive something of value for the promise.

A promise given in return for another promise is sufficient to constitute a contract enforceable in a court of law. This is frequently the type of contract involved in a sale.

For instance, the buyer promises to pay an agreed sum of money for a specific object in return for which the seller agrees to transfer ownership of the object to the buyer. This type of agreement is frequently not pronounced in formal legal language by the parties to it, but rather is implied by their actions. For example, a woman might go into a dress shop and select a dress on which the price is clearly marked. She says to the salesperson, "I'll take it." In so doing, she has accepted the offer of the store to sell the dress for the price indicated and has promised to pay that price in return for the transfer of ownership of the dress.

Lawyers sometimes refer to such transactions as offer and acceptance, the offer being the promise to sell for a given price, and the acceptance being the promise to pay the price. Such an agreement is a binding contract based on a promise for a promise. Obviously, the promises must be in identically corresponding terms. For example, if the woman who was looking at the dresses selected a dress marked $50 and offered to pay $25 for it, there would be no contract since the two promises were in different terms. Until the proprietor of the store agreed to accept $25 for the dress, there would be no sale.

The second essential ingredient of a transfer of property by sale is ownership of the property by the seller. With few exceptions, a person who does not own an object himself cannot give ownership or title to that object to another. There is then an obvious conflict of interest between buyers who buy goods in good faith from sellers who do not have title to them and the true owners of the goods, who may wish to reclaim them. It is one of those conflicts that cannot be resolved in a completely satisfactory manner with full justice done to all the parties involved.

In the British Commonwealth the doctrine of *market overt* is followed, which means that in the case of goods sold in fairs, marketplaces, and stores, the good faith purchaser has better title to stolen goods than their true owner.

In the United States, the doctrine of market overt has never been popular, and the true owner of stolen goods prevails over the good faith

purchaser [10]. However, even in the United States there are certain important exceptions to the rule that the true owner of stolen goods prevails over the good faith purchaser:

1. The first and most important of these is in the case of currency. Obviously, it would be impossible for the economy and commerce of our country to survive if everyone who received money in payment of a debt had to determine that the source of the money was indeed the person making the payment. The basic characteristic of currency is that it is freely circulated and accepted without question as payment for all legal debts. Therefore, currency, whether in the form of coins or bank notes, cannot be recovered by its rightful owner once it has passed in payment of a lawful debt or for a valuable consideration as part of a contract. Before it has thus passed, the true owner can recover it in a legal action for the money itself.

2. The same rule that applies to currency has been extended to a class of documents representing choses in action. As the reader will recall, choses in action are legal rights against an individual or institution, such as the right of ownership a shareholder has in a corporation, which is represented by his stock certificate, or the right to payment from a bank, represented by a check or draft. Certain of these choses in action are represented by documents designed to be passed freely in commerce without a written endorsement. An example would be a check or a bank note payable to bearer or endorsed in blank, each of which is designed to pass freely in commercial intercourse. Lawyers refer to such documents as negotiable instruments. A purchaser in good faith of such a negotiable instrument, who has no notice of a defect in a seller's title, will prevail against a claim of the true owner if the instrument has in fact been stolen or obtained by fraud by the seller [11].

When Does Title Pass? Frequently a buyer and a seller enter into an agreement of sale, and before the object sold is actually delivered, it is destroyed or damaged. Who bears the burden of the loss? Did the ownership of the object sold remain in the seller until the time of delivery, or did the buyer become the owner at the time of the original agreement? This question has been the subject of a great deal of litigation in the courts, and the rules for determining the exact moment that ownership or title passes are complex and subject to many exceptions and variations.

For the purposes of this book, it is sufficient to point out the general rule that title passes at the time the parties intend it to pass, and their intent may be determined from all the circumstances of the sale, including the contract itself. For instance, if the contract for the sale of a particular item or particular goods already in existence calls for delivery by the seller to the buyer at a particular place, the title to the goods and the risk of loss does not pass to the buyer until the time of actual delivery, regardless of whether the goods have been actually paid for or not.

For example, a woman ordering a particular dress from a department

store that agrees to deliver it to her house would not be responsible for payment for the dress if it were destroyed by fire before the time of actual delivery. However, a man who purchased a chair at a furniture store and who agreed to stop by with a truck the next day and pick it up would have ownership of the chair immediately on the agreement of the sale, and if the chair were destroyed by fire before he actually picked it up he would still be responsible for payment of the purchase price.

In another situation, if an individual visited a lumber yard and ordered a certain amount of lumber that was not then and there specifically identified and allocated to his purchase, and said he would pick it up the next day or at some subsequent time, he would not bear the risk of loss if the lumber yard burned down before the specific lumber had been allocated to his purchase.

The variations in the possible factual situations are infinite and this text is not the place to discuss all the possible variations and exceptions, it being sufficient for the reader to know that they exist.

Transfer of Ownership by Judicial Decree

Under certain circumstances courts have the power to transfer ownership rights in specific goods by judicial decree. In a sense, the courts are merely determining pre-existing rights rather than creating new ones. To the extent that the judgment of a court having jurisdiction over the parties and the subject matter is final, even though it might be erroneous, its determination of the ownership of particular goods or land creates property rights.

In general, when two parties dispute the ownership of a particular object, the judgment of the court is binding only as to those parties. Lawyers call such a judgment a judgment *in personam*, or one that is binding only on the individuals actually party to the litigation that resulted in the decree. Take for example the case of a woman who claims to have purchased a valuable antique for a modest price and an antique dealer who denies that he had ever made such a contract. If they decide to dispute the matter in court, the resulting judicial decree determining who owns the particular antique will be binding as to the two of them, but not as to other persons not party to the litigation. For instance, a third individual may claim to be the true owner of the antique, and allege that the antique dealer obtained its possession by fraud.

In certain other cases, courts enter decrees determining ownership of things or land as to the whole world. The resulting judgments are known as judgments *in rem*. A common example of this is an action to *quiet title*. When ownership of a particular piece of land is in doubt, one who claims good title may bring an action to quiet title in a court of proper jurisdiction. Thereafter, notice of the action is served on all parties known to claim an interest in the land and also on the rest of the world by advertisement in accord with the rules of court. Subsequently, when the court enters

a final adjudication to determine the ownership of the land, such an adjudication is binding on everyone and the individual whose title is adjudicated by the court has good title against the whole world. Another common example of a judgment in rem is the final decree of a court determining the disposition of a decedent's estate.

Acquiring Title by Adverse Possession

Another less common method of acquiring title, but one that deserves attention, is the method of acquiring title, or ownership, by adverse possession. Society has an interest in putting stale claims at rest. The unfortunate consequences of allowing people to present claims many years after their alleged rights came into being is obvious. Witnesses may be nonexistent or else their memories of the events crucial to the claim may be hazy. Honoring such old claims would be an obvious avenue for fraud. Therefore, the legislatures in all of the fifty United States have enacted what are generally called statutes of limitation and are more accurately referred to in law schools as statutes of repose, since they place stale claims at rest permanently.

These statutes of limitation provide that after a certain number of years have elapsed since a right or cause of action arose, one can no longer institute a claim. The periods of time vary in different states and also within a given state, according to the type of action involved. Generally, the time for bringing an action for breach of contract follows the English law and is six years. In the case of torts, such as libel and slander, the period may be much shorter, even as short as one year.

In any event, in the case of a person who has wrongfully taken the property of another and whose use of it has been open, notorious, continuous, and hostile to the rights of the original owner for the period prescribed by the statute of limitations, in the absence of an institution of legal proceedings by the original owner during the prescribed period, the wrongful taker acquires good title and absolute ownership of the property wrongfully taken. The original owner can no longer resort to self-help or avail himself of help from the courts.

However, the requirements as to the nature of the ownership exercised by the wrongful taker during the period in which the statute of limitations is running are strict. He must not have hidden the wrongfully taken property nor used it in a manner consistent with the ownership of the original owner. The use of the property must be continuous for the period prescribed by the statute of limitations. If all the requirements are met, his title is as good as if he purchased the property through a valid agreement of sale. The most common example of adverse possession that the average layman runs into is that involving the use of land.

A home owner, not wishing to create ill will, may allow a neighbor to erect a fence that encroaches several feet on his property. If the