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# PROPERTY

by

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## TOPIC SCOPE

### Scope of Topic:

This article contains a discussion of the general rules and principles of the law of property, the nature and subjects of property, including real and personal property, corporeal and incorporeal property, tangible and intangible property, and choses in action, and generally discusses the use and alienation of property.

### Treated Elsewhere:

Abandoned, lost, and unclaimed property, **see** 1 Am Jur 2d, Abandoned, Lost, and Unclaimed Property

Abstracts of title, **see** 1 Am Jur 2d, Abstracts of Title

Actions for recovery of chattels, **see** 66 Am Jur 2d, Replevin

Adjoining landowners, rights, duties, and liabilities of, **see** 1 Am Jur 2d, Adjoining Landowners

Adverse possession, **see** 3 Am Jur 2d, Adverse Possession

Aliens, property rights of, **see** 3A Am Jur 2d, Aliens and Citizens §§ 2003-2021

Animals, property rights in, **see** 4 Am Jur 2d, Animals §§ 5-19

Assignments for benefit of creditors, **see** 6 Am Jur 2d, Assignments for Benefit of Creditors

Associations and clubs, power to acquire or dispose of property, **see** 6 Am Jur 2d, Associations and Clubs §§ 13 , 14

Assignment of property rights and choses in action, **see** 6 Am Jur 2d, Assignments §§ 23-45

Attachment and garnishment, **see** 6 Am Jur 2d, Attachment and Garnishment

Auction, acquisition of property at, **see** 7 Am Jur 2d, Auctions and Auctioneers

Automobiles, title to and ownership of, **see** 7A Am Jur 2d, Automobiles and Highway Traffic §§ 25-48

Bailments, **see** 8 Am Jur 2d, Bailments

Boundaries of privately owned real property, **see** 12 Am Jur 2d, Boundaries

Buildings, **see** 13 Am Jur 2d, Buildings

Carriers, carriage of property by, **see** 13 Am Jur 2d, Carriers §§ 225-732

Charges on specific property as security for payment of debts or the performance of other acts, **see** 51 Am Jur 2d, Liens

Community property, **see** 15A Am Jur 2d, Community Property

Condominiums and co-operative apartments, **see** 15A Am Jur 2d, Condominiums and Co-operative Apartments

Conflict of laws principles applicable to property actions, **see** 16 Am Jur 2d, Conflict of Laws §§ 24-51

Constitutional rights relating to property, **see** 16A Am Jur 2d, Constitutional Law §§ 580-600

Contracts for the purchase and sale of real property, **see** 77 Am Jur 2d, Vendor and

Purchaser

Conversion of personal property, **see** 18 Am Jur 2d, Conversion

Copyright and literary property, **see** 18 Am Jur 2d, Copyright and Literary Property

Corporations, power over property of, 18B Am Jur 2d, Corporations §§ 2045-2103

Cotenancy and joint ownership of property, **see** 20 Am Jur 2d, Cotenancy and Joint

Ownership

Covenants, conditions, and restrictions expressed or implied in conveyances of land, **see** 20 Am Jur 2d, Covenants, Conditions, and Restrictions

Damages for injuries to property rights, **see** 22 Am Jur 2d, Damages §§ 399-450

Dedication of land to public use, **see** 23 Am Jur 2d, Dedication

Deed, conveyance of title by, **see** 23 Am Jur 2d, Deeds

Descent and distribution, transfer of real and personal property of one dying intestate by, **see** 23 Am Jur 2d, Descent and Distribution

Division of property among co-owners by consent or judicial proceedings, **see** 59A Am Jur 2d, Partition

Division of property upon dissolution of marriage, **see** 24 Am Jur 2d, Divorce and Separation §§ 817-962

Due process of law, constitutional provisions guaranteeing, **see** 16A Am Jur 2d, Constitutional Law §§ 804 et seq.

Easements and licenses in real property, **see** 25 Am Jur 2d, Easements and Licenses in Real Property

Ejectment, recovery of specific real property by action for, **see** 25 Am Jur 2d, Ejectment

Eminent domain, **see** 26, 27 Am Jur 2d, Eminent Domain

Equity, protection of property rights in, **see** 27A Am Jur 2d, Equity §§ 52-58

Escheat, reversion or forfeiture of property to government by, **see** 27A Am Jur 2d,

Escheat

Estates in real property and analogous interests in personal property, **see** 28 Am Jur 2d, Estates

Execution, property subject to writ of, **see** 30 Am Jur 2d, Executions and Enforcement of Judgments §§ 113-204

Fixtures, **see** 35 Am Jur 2d, Fixtures

Forcible entry and detainer, **see** 35 Am Jur 2d, Forcible Entry and Detainer

Franchises, **see** 36 Am Jur 2d, Franchises § 5

Gifts representing whole or part of portion of donor's estate to which donee would be entitled on death of donor intestate, **see** 3 Am Jur 2d, Advancements

Highways, streets, and bridges, title and rights of public and abutting owners as to, **see** 39 Am Jur 2d, Highways, Streets, and Bridges §§ 157-190

Homestead rights of family members, **see** 40 Am Jur 2d, Homestead

Improvements to real property, **see** 41 Am Jur 2d, Improvements

Landlord and tenant, **see** 49 Am Jur 2d, Landlord and Tenant

Leases of personal property, **see** Am Jur 2d, New TopicService, Leases of Personal Property

Liability of owners or occupiers of real property for negligently caused injuries, **see** 62, 62A Am Jur 2d, Premises Liability

Life tenants, remaindermen and reversioners, **see** 51 Am Jur 2d, Life Tenants and Remaindermen

Nature of collateral as personal property, **see** 68A Am Jur 2d, Secured Transactions §§ 111-116

Patents, property rights in, **see** 60 Am Jur 2d, Patents § 7

Powers of guardian over property of ward, **see** 39 Am Jur 2d, Guardian and Ward §§ 108-148

Property rights and interests of married persons, **see** 41 AmJur 2d, Husband and Wife §§ 18-61

Property which may be subject to a mortgage, **see** 55 Am Jur2d, Mortgages §§ 106-131

Quiet title suits and actions to remove clouds from title, **see** 65 Am Jur 2d, Quieting Title and Determination of Adverse Claims

Real estate brokers, **see** 12 Am Jur 2d, Brokers

Recording of instruments affecting title to real property, **see** 66 Am Jur 2d, Records and Recording Laws

Registration of land titles, **see** 66 Am Jur 2d, Registration of Land Titles

Rule against perpetuities and other rules barring restraints on alienation of property, **see** 61 Am Jur 2d, Perpetuities and Restraints on Alienation

Special or local assessments as means of collecting cost of public improvements from owners of properties deriving special benefits from such improvements, **see** 70A Am Jur 2d, Special or Local Assessments

Specific performance of contracts for sale of real and personal property, **see** 71 Am Jur 2d, Specific Performance §§ 112-162

State and local taxation, property and interests subject to, **see** 71 Am Jur 2d, State and Local Taxation §§ 191-220

Statute of frauds, agreements and transactions relating to estates and interests in land and sales of personal property as within, **see** 72 Am Jur 2d, Statute of Frauds §§ 3-284

Statutes of limitations governing actions and proceedings involving property, **see** 51 Am Jur 2d, Limitation of Actions §§ 84-91

Taxes imposed upon transfer of property, **see** 42 Am Jur 2d, Inheritance, Estate, and Gift Taxes

Time sharing arrangements for use and occupation of real property, **see** Am Jur 2d, New Topic Service, Real Estate Time-Sharing

Title insurance, **see** 43 Am Jur 2d, Insurance §§ 525-527

Title to and rights of ownership in tangible personal property where one either innocently or wrongly takes another's property and by his or her own labor and expenditures alters its form or enhances its value, **see** 1 Am Jur 2d, Accession and Confusion §§ 3-9

Title to and rights of ownership in tangible personal property where property belonging to one person has been attached to, incorporated in or intermingled with property of another, **see** 1Am Jur 2d, Accession and Confusion §§ 1 , 2 , 10-17

Trade secret, misuse as constituting common-law unfair trade practice, **see** 54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1114 et seq.

Trademark or tradename as property, **see** 74 Am Jur 2d, Trademarks and Tradenames § 8

Transactions connected with property while rights in the property are in litigation, **see** 51 Am Jur 2d, Lis Pendens

Transfer of real property as security for payment of debt or performance of other obligation, **see** 55 Am Jur 2d, Mortgages

Transformation, in equity, of real property into personalty and of personal property into real property to carry into effect intention of testator, settlor, or contracting parties, **see** 27AAm Jur 2d, Equitable Conversion

Trespass to chattels and real property, **see** 75 Am Jur 2d, Trespass

Trust, rights and liabilities relating to property held in, **see** 76 Am Jur 2d, Trusts

Use of premises by one lawfully in possession thereof to the prejudice of the estate or interest therein of another, **see** 78Am Jur 2d, Waste

Venue in suits relating to realty or recovery of chattels, **see** 77 Am Jur 2d, Venue §§ 10-14 , 17-19 , 21 , 24

Writ of assistance, enforcement of decree determining title to, or right of possession of, real estate by, **see** 6 Am Jur 2d, Assistance, Writ of

Zoning power, government control of use of property through exercise of, **see** 83 Am Jur 2d, Zoning and Planning

## RESEARCH REFERENCES

### Annotation References:

ALR Digest: Descent and Distribution; Property and Property Rights  
ALR Index: Adverse Possession; Eminent Domain; Intangible Hereditaments or Property; Interest in Property or Subject Matter; Life Estates, Remainders, and Reversions; Lots and Parcels; Partition; Personal Property; Property; Public Figures; Sale and Transfer of Property; Title and Ownership

### Practice References:

7A Am Jur Pl & Pr Forms (Rev), Conversion ; 20 Am Jur Pl & Pr Forms (Rev), Privacy ; 20A Am Jur Pl & Pr Forms (Rev), Property ; 23A Am Jur Pl & Pr Forms (Rev), Trespass  
2 Am Jur Legal Forms 2d, Animals; 13A Am Jur Legal Forms 2d, Name  
23 Am Jur POF2d, Employee's Right to Compensation for Employer's Use of Employee's Inventive Idea; 28 Am Jur POF2d 703, Permissive Possession or Use of Land; 37 Am Jur POF2d 639, Damages for Loss of or Injury to Animal; 38 Am Jur POF2d 731, Justified Use of Force in Defense of Private Property

### Insta-Cite(R):

Cases and annotations referred to herein can be further researched through the **Insta-Cite(R)** citation verification service. Use Insta-Cite to check citations for Bluebook styling, parallel references, prior and later history, and annotation references.

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## I. IN GENERAL [1-3]

### Research References

ALR Digest: Property and Property Rights §§ 1 et seq.  
ALR Index: Adverse Possession; Eminent Domain; Intangible Hereditaments or Property; Interest in Property or Subject Matter; Life Estates, Remainders, and Reversions; Lots and Parcels; Partition; Personal Property; Property; Sale and Transfer of Property; Title and Ownership

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### § 1 Definitions, generally

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As a matter of legal definition, "property" refers not to a particular material object but to the right and interest in an object. 1 "Property" in a thing does not consist merely in its ownership or possession, but also in the lawful, unrestricted right of its use,

enjoyment, and disposal. 2 In its precise legal sense, property is nothing more than a collection of rights. 3 Property has been described by one court as the unrestricted and exclusive right to a thing, the right to dispose of it in every legal way, to possess it, use it, and to exclude everyone else from interfering with it. 4 The term is generally used in this sense in the federal and state constitutional guarantees against deprivation of property without due process of law, 5 and as so used, the word signifies the sum of all the rights and powers incident to ownership. 6

Property interests are not created by the Federal Constitution, but rather by existing rules or understandings that stem from an independent source such as state law. 7

In contemporary jurisprudence, "property" refers to the various incorporeal ownership rights in a res, such as the right to possess, to enjoy the income from, to alienate, or to recover ownership from one who has improperly obtained title to the res, as well as to the actual physical object of these rights. 8

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## Footnotes

Footnote 1. *United States v General Motors Corp.*, 323 US 373, 89 L Ed 311, 65 S Ct 357, 156 ALR 390; *Howlett v Doglio*, 402 Ill 311, 83 NE2d 708, 6 ALR2d 790 (disapproved on other grounds as stated in *Elliott v Willis*, 92 Ill 2d 530, 65 Ill Dec 852, 442 NE2d 163).

Footnote 2. *Texas Co. v Hauptman* (CA9 Cal) 91 F2d 449; *Eliasberg Bros. Mercantile Co. v Grimes*, 204 Ala 492, 86 So 56, 11 ALR 300; *Stevens & Woods v State*, 2 Ark 291; *Callahan v Martin*, 3 Cal 2d 110, 43 P2d 788, 101 ALR 871; *Tatum Bros. Real Estate & Inv. Co. v Watson*, 92 Fla 278, 109 So 623; *State Street Furniture Co. v Armour & Co.*, 345 Ill 160, 177 NE 702, 76 ALR 1298; *Transcontinental Oil Co. v Emmerson*, 298 Ill 394, 131 NE 645, 16 ALR 507; *Iszler v Jorda* (ND) 80 NW2d 665, 64 ALR2d 696; *South Carolina Dep't of Highways & Public Transp. v Balcome* (App) 289 SC 243, 345 SE2d 762; *Spann v Dallas*, 111 Tex 350, 235 SW 513, 19 ALR 1387; *Sammons v American Auto. Ass'n* (Wyo) 912 P2d 1103.

Footnote 3. *United States v General Motors Corp.*, 323 US 373, 89 L Ed 311, 65 S Ct 357, 156 ALR 390 (holding that, used accurately, "property" denotes the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use, and dispose of it); *In re Valuation Proceedings under Sections 303(c) & 306 etc. (Sp Ct RRRRA)* 445 F Supp 994, related proceeding (Sp Ct RRRRA) 862 F Supp 437, 39 Env't Rep Cas 1333, 26 ELR 20401.

The right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property. *Dolan v City of Tigard*, 512 US 374, 129 L Ed 2d 304, 114 S Ct 2309, 94 CDOS 4747, 94 Daily Journal DAR 8803, 38 Env't Rep Cas 1769, 24 ELR 21083, 8 FLW Fed S 331, on remand, remanded 319 Or 567, 877 P2d 1201 and (limited on other grounds *Clajon Prod. Corp. v Petera* (CA10 Wyo) 70 F3d 1566, 26 ELR 20213).

"Property" is the right and interest which a person has in lands and chattels to the exclusion of others. *Ralston Steel Car Co. v Ralston*, 112 Ohio St 306, 3 Ohio L Abs 200, 147 NE 513, 39 ALR 334.

"Property," in law, is not the material object itself, but is the right and interest or domination rightfully obtained over such object, with the unrestricted right to its use, enjoyment, and disposition. *Howlett v Doglio*, 402 Ill 311, 83 NE2d 708, 6 ALR2d 790 (disapproved on other grounds as stated in *Elliott v Willis*, 92 Ill 2d 530, 65 Ill Dec 852, 442 NE2d 163); *Akron v Chapman*, 160 Ohio St 382, 52 Ohio Ops 242, 116 NE2d 697, 42 ALR2d 1140.

Ownership of property implies the right of possession and control, and includes the right to exclude others; that is, the true owner of land exercises full dominion and control over it and possesses the right to expel trespassers. *Sammons v American Auto. Ass'n (Wyo)* 912 P2d 1103.

Footnote 4. *Washington Medical Center, Inc. v United States*, 211 Ct Cl 145, 545 F2d 116, cert den 434 US 902, 54 L Ed 2d 188, 98 S Ct 296, reh den 435 US 1018, 56 L Ed 2d 398, 98 S Ct 1891.

Footnote 5. 16A Am Jur 2d, Constitutional Law §§ 580 et seq.; 26 Am Jur 2d, Eminent Domain § 171.

Footnote 6. *Nashville, C. & S. L. Ry. v Wallace*, 288 US 249, 77 L Ed 730, 53 S Ct 345, 87 ALR 1191; *State Street Furniture Co. v Armour & Co.*, 345 Ill 160, 177 NE 702, 76 ALR 1298.

The term "property," as ordinarily employed, includes every interest which anyone may have in anything that is the subject of ownership, together with the right freely to possess, use, enjoy, and dispose of it. *Wood v Security Mut. Life Ins. Co.*, 112 Neb 66, 198 NW 573, 34 ALR 712.

Footnote 7. *Delaware v New York*, 507 US 490, 123 L Ed 2d 211, 113 S Ct 1550, 93 CDOS 2325, 93 Daily Journal DAR 3935, 7 FLW Fed S 133, motion den 510 US 805, 126 L Ed 2d 18, 114 S Ct 48, supp op 510 US 1022, 126 L Ed 2d 590, 114 S Ct 631, later proceeding 510 US 1106, 127 L Ed 2d 368, 114 S Ct 1044 and motion gr (US) 128 L Ed 2d 188, 114 S Ct 1534, complaint dismd, motion den (US) 129 L Ed 2d 806, 114 S Ct 2670 (noting that law that creates property necessarily defines the legal relationships under which certain parties, or debtors, must discharge obligations to other parties or creditors); *Webb's Fabulous Pharmacies, Inc. v Beckwith*, 449 US 155, 66 L Ed 2d 358, 101 S Ct 446, on remand (Fla) 394 So 2d 1009; *Paul v Davis*, 424 US 693, 47 L Ed 2d 405, 96 S Ct 1155, 1 BNA IER Cas 1827, reh den 425 US 985, 48 L Ed 2d 811, 96 S Ct 2194 (criticized on other grounds as stated in *Best v District of Columbia (DC Dist Col)* 1991 US Dist LEXIS 5435) and (criticized on other grounds as stated in *Scheetz v Morning Call, Inc. (ED Pa)* 747 F Supp 1515, 18 Media L R 2369); *Board of Regents v Roth*, 408 US 564, 33 L Ed 2d 548, 92 S Ct 2701, 1 BNA IER Cas 23 (not followed on other grounds as stated in *New Jersey State Parole Bd. v Byrne*, 93 NJ 192, 460 A2d 103) and (criticized on other grounds as stated in *Richardson v Chevrefils*, 131 NH 227, 552 A2d 89) and (criticized on other grounds in *Stacy & Witbeck, Inc. v City and County of San Francisco (1st Dist)* 36 Cal App 4th 1074, 42 Cal Rptr 2d 805, 95 CDOS 5564, 95 Daily Journal DAR 9400); *Ellentuck v Klein (CA2 NY)* 570 F2d 414; *Rural Gas, Inc. v North Cent. Kansas Production Credit Corp.*, 243 Kan 109, 755 P2d 529, 6 UCCRS2d 827.

Footnote 8. *First Charter Land Corp. v Fitzgerald (CA4 Va)* 643 F2d 1011.

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## § 2 --Special and limited definitions

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The word "property" is not always used in its strict legal sense. It is frequently used to signify or describe the subject of property, such as a chattel or tract of land, 9 although these things which are the subjects of property when coupled with possession are but the indicia or visible manifestations of invisible rights. 10 In its popular and more general sense, the term "property" means something to which a person has legal title or that which one owns, goods or lands owned, or ownership or right of possession, enjoyment, or disposal of anything, especially of something tangible. 11

Not every interest that one may have in a particular object is necessarily to be classed as property, although in a given instance that interest may constitute a valuable right. Thus one may have an insurable interest in property although such interest is not properly classifiable as property. 12

The term "property" as used in constitutions and statutes may be used in its strict legal sense or, as is quite frequently the case, may be defined by the constitution or statute in which it is used. 13 The words "all property," as used in a statute, contract, or like instrument, are usually given a very comprehensive construction. 14 However, frequently statutes or constitutions use the word "property" in a special sense or in conjunction with other words which qualify or limit its meaning. For example, condemnation statutes may specify what property shall be subject to appropriation, 15 or for which, if taken, compensation must be paid, 16 and statutes and constitutions relating to taxation may describe what constitutes taxable property. 17

In view of the different ways in which the word "property" may be used, it may be necessary to resort to the context of the instrument or statute in which it is used to determine the sense in which it is employed. 18

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### Footnotes

Footnote 9. *Texas Co. v Hauptman* (CA9 Cal) 91 F2d 449; *Eliasberg Bros. Mercantile Co. v Grimes*, 204 Ala 492, 86 So 56, 11 ALR 300; *Stevens & Woods v State*, 2 Ark 291; *Callahan v Martin*, 3 Cal 2d 110, 43 P2d 788, 101 ALR 871; *Tatum Bros. Real Estate & Inv. Co. v Watson*, 92 Fla 278, 109 So 623.

Footnote 10. *Texas Co. v Hauptman* (CA9 Cal) 91 F2d 449; *Tatum Bros. Real Estate & Inv. Co. v Watson*, 92 Fla 278, 109 So 623.

Footnote 11. *Washington Medical Center, Inc. v United States*, 211 Ct Cl 145, 545 F2d 116, cert den 434 US 902, 54 L Ed 2d 188, 98 S Ct 296, reh den 435 US 1018, 56 L Ed 2d 398, 98 S Ct 1891; *Eliasberg Bros. Mercantile Co. v Grimes*, 204 Ala 492, 86 So 56, 11 ALR 300.

Footnote 12. 43 Am Jur 2d, Insurance § 943.

Footnote 13. Northwestern Mut. Life Ins. Co. v Lewis & Clarke County, 28 Mont 484, 72 P 982; In re Hellman's Estate, 174 NY 254, 66 NE 809.

Footnote 14. Morgan Bros. v Dayton Coal & Iron Co., 134 Tenn 228, 183 SW 1019.

Footnote 15. 26 Am Jur 2d, Eminent Domain §§ 99 et seq.

Footnote 16. 26 Am Jur 2d, Eminent Domain §§ 171 et seq.

Footnote 17. 71 Am Jur 2d, State and Local Taxation §§ 195 et seq.

Special rules determine what is "property of the estate" which may be administered in bankruptcy. 9 Am Jur 2d, Bankruptcy §§ 927 et seq.

Footnote 18. Fidelity & Deposit Co. v Arenz, 290 US 66, 78 L Ed 176, 54 S Ct 16; Texas Co. v Hauptman (CA9 Cal) 91 F2d 449; McAlister v Pritchard, 287 Mo 494, 230 SW 66; Wood v Security Mut. Life Ins. Co., 112 Neb 66, 198 NW 573, 34 ALR 712.

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### § 3 Constituent elements

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Property is composed of certain constituent elements, namely, the unrestricted rights of use, enjoyment, and disposal of the particular subject of property. 19 Of these elements the right of user is the most essential and beneficial; without it all other elements would be of little effect, since if one is deprived of the use of his or her property, little but a barren title is left in his or her hands. 20 This right of free and untrammelled user for legitimate purposes is fundamental and within the protection of the United States Constitution. 21 It is frequently a matter of discussion in controversies relating to the taking of property, 22 and it is generally held that whatever physical interference annuls this right takes "property." 23 The right or element of user necessarily includes the right and power of excluding others from using the subject of property. 24

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### Footnotes

Footnote 19. Terrace v Thompson, 263 US 197, 68 L Ed 255, 44 S Ct 15 (criticized on other grounds as stated in Cabell v Chavez-Salido, 454 US 432, 70 L Ed 2d 677, 102 S Ct 735, 27 BNA FEP Cas 1129, 27 CCH EPD ¶ 32310); Texas Co. v Hauptman (CA9 Cal) 91 F2d 449; State Street Furniture Co. v Armour & Co., 345 Ill 160, 177 NE 702, 76 ALR 1298; Spann v Dallas, 111 Tex 350, 235 SW 513, 19 ALR 1387; Labberton v General Casualty Co., 53 Wash 2d 180, 332 P2d 250; American Motors Corp. v Kenosha, 274 Wis 315, 80 NW2d 363, affd 356 US 21, 2 L Ed 2d 578, 78 S Ct 559,



reh den 357 US 912, 2 L Ed 2d 1163, 78 S Ct 1147; Sammons v American Auto. Ass'n (Wyo) 912 P2d 1103.

Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. Department of Financial Institutions v General Finance Corp., 227 Ind 373, 86 NE2d 444, 10 ALR2d 436.

Footnote 20. Appeal of Perrin, 305 Pa 42, 156 A 305, 79 ALR 912; Spann v Dallas, 111 Tex 350, 235 SW 513, 19 ALR 1387.

For a definition of "title," see § 25.

Footnote 21. 16A Am Jur 2d, Constitutional Law §§ 580 et seq.

Footnote 22. 26 Am Jur 2d, Eminent Domain §§ 143 et seq.

Footnote 23. Crawford Co. v Hathaway, 67 Neb 325, 93 NW 781 (ovrld in part on other grounds by Wasserburger v Coffee, 180 Neb 149, 141 NW2d 738).

Footnote 24. Sammons v American Auto. Ass'n (Wyo) 912 P2d 1103.

As to the right of alienation as an incident of property, see § 35.

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## II. SUBJECTS OF PROPERTY [4-7]

### **Research References**

ALR Digest: Descent and Distribution § 39; Property and Property Rights §§ 1-6  
ALR Index: Adverse Possession; Eminent Domain; Intangible Hereditaments or Property; Interest in Property or Subject Matter; Life Estates, Remainders, and Reversions; Lots and Parcels; Partition; Personal Property; Property; Public Figures; Sale and Transfer of Property; Title and Ownership  
20 Am Jur Pl & Pr Forms (Rev), Privacy, Forms 21, 23, 25  
13A Am Jur Legal Forms 2d, Name § 182:33, 182:34  
23 Am Jur POF2d, Employee's Right to Compensation for Employer's Use of Employee's Inventive Idea

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### **§ 4 Generally**

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When used to refer to the subjects of property rights, the term "property" is broad and comprehensive, and embraces everything which has exchangeable value or goes to make up a person's wealth, and every interest or estate which the law regards as of sufficient value for judicial recognition. It may be reasonably construed to include obligations, rights, and other intangibles as well as physical things. 25 It

extends to every species of right and interest capable of being enjoyed as one upon which it is practicable to place a money value. 26 Thus, the right to carry on a lawful business without obstruction is a property right, 27 as are the rights of a husband and wife as purchasers of land under a contract "property" for purposes of a statute relating to the disposition of marital property on dissolution of a marriage. 28 In other words, valid contracts are property. 29 Property, therefore, may include intangibles as well as tangibles, 30 and includes choses in action. 31 As to intangibles, property may include even those rights which are unsusceptible of voluntary transfer by the owner. 32 With respect to lands, the term comprehends every species of title, inchoate or complete. 33

Comprehensive as the term is, however, it is subject to limitations which the courts will recognize. Thus, one has no property right in a nuisance or in property that is used in conducting the same. 34

Where the term "property" is used in a context indicating that only physical property is intended, the meaning of the term is accordingly so limited. 35 Moreover, beyond the traditional boundaries of the common law, only some imperative justification in policy will lead the courts to recognize in old values new property rights. 36

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## Footnotes

Footnote 25. *Hamilton v Rathbone*, 175 US 414, 44 L Ed 219, 20 S Ct 155; *Yuba River Power Co. v Nevada Irrigation Dist.*, 207 Cal 521, 279 P 128; *Connelly v Special Road & Bridge Dist.*, 99 Fla 456, 126 So 794, 71 ALR 923; *State Street Furniture Co. v Armour & Co.*, 345 Ill 160, 177 NE 702, 76 ALR 1298; *Kansas City Life Ins. Co. v Hammett*, 177 La 930, 149 So 525; *Dodds v Shamer*, 339 Md 540, 663 A2d 1318; *Park v State*, 42 Nev 386, 178 P 389, 3 ALR 75; *Iszler v Jorda (ND)* 80 NW2d 665, 64 ALR2d 696; *State v Tauscher*, 227 Or 1, 360 P2d 764, 88 ALR2d 674.

In its most general sense, property embraces everything that has an exchangeable value. *Slater v Smith (BC WD NY)* 152 BR 794; *Associated Press v International News Service (CA2 NY)* 245 F 244, 2 ALR 317, *affd* 248 US 215, 63 L Ed 211, 39 S Ct 68, 2 ALR 293.

Where under a statute the thing which may be owned constitutes property, a civil damage act, in giving a cause of action to anyone injured in "property," is not confined to tangible real or personal property. Accordingly, since parents have a statutory right to the earnings and services of an unmarried minor child, this constitutes property, and the destruction of that right is an injury to property within the meaning of the act, so that the parents of an unmarried 18-year-old boy who were deprived of his substantial services on their farm by his death in an automobile accident, and who had to bear substantial funeral expenses, suffered an injury to property and were entitled to recover. *Iszler v Jorda (ND)* 80 NW2d 665, 64 ALR2d 696.

As to particular types of property, see, for example, 1 Am Jur 2d, *Adjoining Landowners (air and light)*; 4 Am Jur 2d, *Animals*; 11-12 Am Jur 2d, *Bills and Notes*; 14 Am Jur 2d, *Cemeteries (burial lot)*; 18 Am Jur 2d, *Corporations (shares and certificates of stock)*; 21A Am Jur 2d, *Crops*; 22A Am Jur 2d, *Dead Bodies*; 35 Am Jur 2d, *Fish and Game*; 35 Am Jur 2d, *Fixtures*; 36 Am Jur 2d, *Franchises*; 38 Am Jur 2d, *Gas and Oil*; 38 Am

Jur 2d, Good Will; 49 Am Jur 2d, Landlord and Tenant (leaseholds); 52 Am Jur 2d, Logs and Timber; 53 Am Jur 2d, Mines and Minerals; 53A Am Jur 2d, Money; 57 Am Jur 2d, Name; 59A Am Jur 2d, Party Walls; 60 Am Jur 2d, Patents; 60A Am Jur 2d, Pensions and Retirement Funds; 74 Am Jur 2d, Trademarks and Tradenames; 78 Am Jur 2d, Waters.

Footnote 26. *Yuba River Power Co. v Nevada Irrigation Dist.*, 207 Cal 521, 279 P 128; *Kansas City Life Ins. Co. v Hammett*, 177 La 930, 149 So 525.

Any civil right not unlawful in itself or against public policy which has acquired a pecuniary value becomes a property right that is entitled to protection as such. *Fisher v Star Co.*, 231 NY 414, 132 NE 133, 19 ALR 937, cert den 257 US 654, 66 L Ed 419, 42 S Ct 94.

A contract which not only was the demise of a leasehold, but also granted to a physician the sole and exclusive privilege of doing all the laboratory and pathology work in and for a hospital for the term of an agreement, which still had three years to run, was a property right. *Straus v North Hollywood Hospital, Inc.* (2nd Dist) 150 Cal App 2d 306, 309 P2d 541.

Footnote 27. *Tappan Motors, Inc. v Waterbury*, 65 Misc 2d 514, 318 NYS2d 125 (holding that where the defendant, who had purchased an automobile from a dealer, parked the car in front of the dealer's showroom with a large sign stating that the car had been purchased from the dealer and that "over 30 repairs still not fixed," the dealer was entitled to an injunction preventing defendant from using the public street so as to interfere with the dealer's business).

Footnote 28. *Claunch v Claunch* (Mo App) 525 SW2d 788.

Footnote 29. *Superior Water, Light & Power Co. v Superior*, 263 US 125, 68 L Ed 204, 44 S Ct 82; *In re I.A. Durbin, Inc.* (BC SD Fla) 46 BR 595, 40 UCCRS 727; *Baker v Young* (Colo) 798 P2d 889; *Bethlehem Fabricators, Inc. v H. D. Watts Co.*, 286 Mass 556, 190 NE 828, 93 ALR 1124; *U. S. Life Ins. Co. v Hamilton* (Tex Civ App) 238 SW2d 289, writ ref n r e.

Footnote 30. *Graves v Elliott*, 307 US 383, 83 L Ed 1356, 59 S Ct 913, 31 AFTR 950; *Fidelity & Deposit Co. v Arenz*, 290 US 66, 78 L Ed 176, 54 S Ct 16; *In re Rosenberg's Will*, 269 NY 247, 199 NE 206, 16 AFTR 1417, 105 ALR 1238, cert den 298 US 669, 80 L Ed 1392, 56 S Ct 834.

Vesting is substantially a property right, and may be created by common law, by statute, or by contract. *Pierce v State*, 121 NM 212, 910 P2d 288.

As to the property rights created by covenants restricting the use of land, see 20 Am Jur 2d, Covenants, Conditions, and Restrictions § 151.

Footnote 31. *State v Tauscher*, 227 Or 1, 360 P2d 764, 88 ALR2d 674.

As to choses in action as personal property, see § 22.

Footnote 32. *In re Rosenberg's Will*, 269 NY 247, 199 NE 206, 16 AFTR 1417, 105 ALR 1238, cert den 298 US 669, 80 L Ed 1392, 56 S Ct 834.

The use of an individual's signature for business purposes unquestionably constitutes the exercise of a valuable right of property in the broadest sense of that term. *U. S. Life Ins. Co. v Hamilton* (Tex Civ App) 238 SW2d 289, writ ref n r e.

Footnote 33. *Chouteau's Heirs v United States*, 34 US 137, 9 Pet 137, 9 L Ed 78.

Footnote 34. *Gaskins v People*, 84 Colo 582, 272 P 662, 63 ALR 693.

Footnote 35. *State v Tauscher*, 227 Or 1, 360 P2d 764, 88 ALR2d 674.

Footnote 36. *Reichelderfer v Quinn*, 287 US 315, 77 L Ed 331, 53 S Ct 177, 83 ALR 1429.

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## § 5 Creations and products of the mind; information

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Although there may be no property rights cognizable by the law in a mere abstract idea or mental conception as such, 37 a creation or product of the mind which has been put into tangible form is the subject of property, independently of copyright or similar legislative protection. 38 In other words, there may be a property right in a particular combination of ideas or in the form in which ideas are embodied. 39

Information possessed by one person which may be valuable to another is, at times, considered the property of the possessor. 40 Thus, confidential business information may be property; 41 for example, confidential client information regarding a corporate takeover is property in the hands of the law firm, a partner in which uses the information to purchase stock in the target corporation. 42

Among the principal types of such creations are literary productions of various kinds. 43 Likewise, valuable rights exist in a work of art, apart from the right to title and possession, such as the right of reproduction, distribution, and display. 44 Collections and compilations of information and news, 45 stock market reports and quotations, 46 trademarks and tradenames, 47 and trade secrets 48 are all considered property.

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### Footnotes

Footnote 37. 18 Am Jur 2d, Copyright and Literary Property § 22.

Footnote 38. 18 Am Jur 2d, Copyright and Literary Property § 23.

Footnote 39. *Matarese v Moore-McCormack Lines, Inc.* (CA2 NY) 158 F2d 631, 71 USPQ 311, 170 ALR 440; *Schonwald v F. Burkart Mfg. Co.*, 356 Mo 435, 202 SW2d 7; *Fendler v Morosco*, 253 NY 281, 171 NE 56, reh den 254 NY 563, 173 NE 867.

**Practice References** Property right in idea. 23 Am Jur POF2d, Employee's Right to Compensation for Employer's Use of Employee's Inventive Idea § 6.

Footnote 40. *Stewart v Fourth Nat'l Bank*, 141 Kan 175, 39 P2d 918.

Footnote 41. *Carpenter v United States*, 484 US 19, 98 L Ed 2d 275, 108 S Ct 316, 14 Media L R 1853, 5 USPQ2d 1059, CCH Fed Secur L Rep ¶ 93423.

Footnote 42. *United States v Elliott* (ND Ill) 711 F Supp 425, CCH Fed Secur L Rep ¶ 94512, later proceeding (ND Ill) 714 F Supp 380, CCH Fed Secur L Rep ¶ 94513, later proceeding (ND Ill) 727 F Supp 1126, later proceeding (ND Ill) 727 F Supp 1131.

Footnote 43. 18 Am Jur 2d, Copyright and Literary Property §§ 18 et seq.

Footnote 44. *O'Keeffe v Snyder*, 83 NJ 478, 416 A2d 862.

Generally, as to such rights in literary and artistic works, see 18 Am Jur 2d, Copyright and Literary Property §§ 166 et seq.

Footnote 45. 18 Am Jur 2d, Copyright and Literary Property § 41.

Footnote 46. 73 Am Jur 2d, Stock and Commodity Exchanges § 18.

Footnote 47. 74 Am Jur 2d, Trademarks and Tradenames § 8.

Footnote 48. As to the law of trade secrets, see 54 Am Jur 2d, Monopolies §§ 1114 et seq.

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## § 6 Right of publicity

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For a over a century, courts have recognized publicity interests as a distinct kind of property right, and that a person's name is his or her property, with the same right to its use and enjoyment as any other type of property. 49 The right of publicity is a generally recognized property right of prominent persons, 50 such as professional athletes and entertainers, 51 to control the commercial value and exploitation of his or her name or picture or likeness, or to prevent others from unfairly appropriating that value for commercial benefit. 52 The right is analogous to a commercial entity's right to profit from the good will it has built up in its name, 53 and is protected by courts in order to preserve the entertainers' incentive to produce creative works or entertainment. 54 In one sense, labeling a person's right in the publicity value of his or her photograph by calling it "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth. 55

The right of a person to be compensated for the use of his or her name for advertising purposes or purposes of trade, although evolved from the common law of privacy and its

tort of appropriating the name or likeness of the plaintiff for the defendant's benefit, is distinct from privacy torts, which protect primarily the mental interest in being let alone. 56 While the injury involved in a violation of privacy rights is of the person's right to be let alone, in the case of property rights, the injury is the misappropriation of a person's property or his or her economic interest in his or her name, likeness, characteristics, or activities; this right, sometimes called the "appropriation tort," is different from other rights of property because it protects primarily the property interest in the publicity value of one's name, and such a right can exist even in a jurisdiction which has rejected the right of privacy. 57 Unlike the right of privacy, the right of publicity expressly protects an individual's right to reap financial rewards from his or her endeavors, and courts have protected a variety of interests under the right of publicity, including the plaintiff's name, 58 nickname, 59 likeness, 60 a character that the plaintiff has created, 61 and the plaintiff's distinctive style. 62

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## Footnotes

Footnote 49. *Brown Chemical Co. v Meyer*, 139 US 540, 35 L Ed 247, 11 S Ct 625; *Edison v Edison Polyform & Mfg. Co.*, 73 NJ Eq 136, 67 A 392.

Footnote 50. *Haelan Laboratories, Inc. v Topps Chewing Gum, Inc.* (CA2 NY) 202 F2d 866, cert den 346 US 816, 98 L Ed 343, 74 S Ct 26; *Factors Etc., Inc. v Creative Card Co.* (SD NY) 444 F Supp 279, 3 Media L R 1290, affd (CA2 NY) 579 F2d 215, 4 Media L R 1144, 205 USPQ 751, cert den 440 US 908, 59 L Ed 2d 455, 99 S Ct 1215 and on remand (SD NY) 496 F Supp 1090, 208 USPQ 529, revd on other grounds (CA2 NY) 652 F2d 278, 7 Media L R 1617, 211 USPQ 1, cert den 456 US 927, 72 L Ed 2d 442, 102 S Ct 1973 and on remand (SD NY) 541 F Supp 231, 8 Media L R 1839, vacated on other grounds (SD NY) 562 F Supp 304, 9 Media L R 1642 and reh den (CA2 NY) 701 F2d 11, 9 Media L R 1110 and (criticized on other grounds by *Rogers v Grimaldi* (CA2 NY) 875 F2d 994, 16 Media L R 1648, 10 USPQ2d 1825).

The distinctive aspect of the common-law right of publicity is that it recognizes the commercial value of a picture or representation of a prominent person and protects his or her proprietary interest in the profitability of his or her public reputation or "persona." *Ali v Playgirl, Inc.* (SD NY) 447 F Supp 723, 3 Media L R 2540, 206 USPQ 1021.

Footnote 51. *Ali v Playgirl, Inc.* (SD NY) 447 F Supp 723, 3 Media L R 2540, 206 USPQ 1021 (boxing champion); *Lombardo v Doyle, Dane & Bernbach, Inc.* (2d Dept) 58 App Div 2d 620, 396 NYS2d 661, 2 Media L R 2321 (bandleader).

The law recognizes a professional performer's property right in and to the product of his or her services, and the curtailment without consideration of the right of a professional performer to control his or her performance is a wrong to him or her, and the quality and artistry of the performance are not to be used as a criterion with respect thereto. *Ettore v Philco Television Broadcasting Corp.* (CA3 Pa) 229 F2d 481, 108 USPQ 187, 58 ALR2d 626, cert den 351 US 926, 100 L Ed 1456, 76 S Ct 783, 109 USPQ 517.

Where a professional baseball star had granted a sporting-goods manufacturer the exclusive right to manufacture baseballs bearing his name and to license others to do so, he could not recover damages from the ball manufacturer or from a meat processor who had entered an agreement with the manufacturer of the baseballs to increase the sales of

their meat products by tying in the sale of baseballs to meat products. *Cepeda v Swift & Co.* (CA8 Mo) 415 F2d 1205.

As to publicity rights as an asset of an estate, see 31 Am Jur 2d, *Executors and Administrators* § 504.

Footnote 52. *Estate of Presley v Russen* (DC NJ) 513 F Supp 1339, 211 USPQ 415.

**Law Reviews:** Ellis, *The right of publicity and the First Amendment: a comment on why celebrity parodies are fair game for fair use.* 64 U Cin LR 575 (Winter 1996).

**Forms:** Complaint, petition, or declaration—Unauthorized use of plaintiff's photograph for advertisement. 20 Am Jur Pl & Pr Forms (Rev), *Privacy*, Form 21.

Footnote 53. *Ali v Playgirl, Inc.* (SD NY) 447 F Supp 723, 3 Media L R 2540, 206 USPQ 1021.

As to the name of a famous person as the subject of a trademark, see 74 Am Jur 2d, *Trademarks and Tradenames* § 58.

Footnote 54. *Zacchini v Scripps-Howard Broadcasting Co.*, 433 US 562, 53 L Ed 2d 965, 97 S Ct 2849, 5 Ohio Ops 3d 215, 2 Media L R 2089, 205 USPQ 741, on remand 54 Ohio St 2d 286, 8 Ohio Ops 3d 265, 376 NE2d 582, 3 Media L R 2444 (pointing out that the broadcast of a film of the plaintiff's entire "human cannonball" act poses a substantial threat to the economic value of that performance which is the product of plaintiff's own talents and energy, the end result of much time, effort, and expense, much of its economic value lying in the right of exclusive control over the publicity given to his performance; hence a state may recognize what may be the strongest case for a "right of publicity," involving not the appropriation of an entertainer's reputation but the appropriation of the very activity by which the entertainer acquired his reputation in the first place).

Footnote 55. *Haelan Laboratories, Inc. v Topps Chewing Gum, Inc.* (CA2 NY) 202 F2d 866, cert den 346 US 816, 98 L Ed 343, 74 S Ct 26.

**Forms:** Complaint, petition, or declaration—Unauthorized use of name and photograph to promote or endorse goods or services. 20 Am Jur Pl & Pr Forms (Rev), *Privacy*, Form 23.

Complaint, petition, or declaration—Unauthorized use by author and publisher of public figure's name and photograph. 20 Am Jur Pl & Pr Forms (Rev), *Privacy*, Form 25.

Footnote 56. *Estate of Presley v Russen* (DC NJ) 513 F Supp 1339, 211 USPQ 415; *Hirsch v S. C. Johnson & Son, Inc.*, 90 Wis 2d 379, 280 NW2d 129, 205 USPQ 920.

As to violations of privacy, see 62 Am Jur 2d, *Privacy* §§ 1 et seq.

Footnote 57. *Hirsch v S. C. Johnson & Son, Inc.*, 90 Wis 2d 379, 280 NW2d 129, 205 USPQ 920.

**Law Reviews:** Spahn, *The right of publicity: a matter of privacy, property, or public*

domain? 19 Nova LR 1013 (Spring 1995).

Footnote 58. Haelan Laboratories, Inc. v Topps Chewing Gum, Inc. (CA2 NY) 202 F2d 866, cert den 346 US 816, 98 L Ed 343, 74 S Ct 26; Wyatt Earp Enterprises, Inc. v Sackman, Inc. (DC NY) 157 F Supp 621, 116 USPQ 122.

**Forms:** Grant of right to use name in advertising. 13A Am Jur Legal Forms 2d, Name § 182:34.

Footnote 59. Hirsch v S. C. Johnson & Son, Inc., 90 Wis 2d 379, 280 NW2d 129, 205 USPQ 920.

Footnote 60. Factors Etc., Inc. v Creative Card Co. (SD NY) 444 F Supp 279, 3 Media L R 1290, affd (CA2 NY) 579 F2d 215, 4 Media L R 1144, 205 USPQ 751, cert den 440 US 908, 59 L Ed 2d 455, 99 S Ct 1215 and on remand (SD NY) 496 F Supp 1090, 208 USPQ 529, revd on other grounds (CA2 NY) 652 F2d 278, 7 Media L R 1617, 211 USPQ 1, cert den 456 US 927, 72 L Ed 2d 442, 102 S Ct 1973 and on remand (SD NY) 541 F Supp 231, 8 Media L R 1839, vacated on other grounds (SD NY) 562 F Supp 304, 9 Media L R 1642 and reh den (CA2 NY) 701 F2d 11, 9 Media L R 1110 and (criticized on other grounds by Rogers v Grimaldi (CA2 NY) 875 F2d 994, 16 Media L R 1648, 10 USPQ2d 1825).

An injunction would be granted against the unauthorized printing, publication, and distribution of an obscene portrait clearly recognizable as that of a former heavyweight boxing champion. Ali v Playgirl, Inc. (SD NY) 447 F Supp 723, 3 Media L R 2540, 206 USPQ 1021.

Footnote 61. Price v Worldvision Enterprises, Inc. (SD NY) 455 F Supp 252, 4 Media L R 1301, affd without op (CA2 NY) 603 F2d 214 (granting injunctive relief against production of television series in which actors portrayed Laurel and Hardy characters).

Footnote 62. Lahr v Adell Chemical Co. (CA1 Mass) 300 F2d 256, 132 USPQ 662 (sustaining an action against imitation of an actor's voice in advertisements); Lombardo v Doyle, Dane & Bernbach, Inc. (2d Dept) 58 App Div 2d 620, 396 NYS2d 661, 2 Media L R 2321 (granting relief against an agency's commercial depicting the plaintiff conducting a band at New Year's Eve party).

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## § 7 --Assignability and survivability of right

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The right of publicity is an intangible property right, and where it is recognized as such rather than as a personal right attached to the individual, it is capable of being disassociated from the individual and transferred for commercial purposes. 63 Therefore, an entertainer, during his or her lifetime, may license or assign a property right in his or her name and likeness for commercial benefit. 64 In contrast to the right of privacy, an action for the violation of which does not survive the death of an



individual because of its purely personal nature, 65 the right of publicity in some jurisdictions is considered a property right which does not terminate at the individual's death. 66

◆ Caution: Some courts which do recognize a surviving right of publicity only recognize an inheritable property interest in exploiting the commercial opportunities associated with a name or likeness, because the interest is fundamentally personal in nature to instances where the right was exercised by the artist or figure during his or her lifetime. 67

However, in other jurisdictions, the right to exploit commercially one's name and likeness is not a property right which descends at death. 68

◆ Illustration: The survivability of publicity rights was denied in a case in which the heirs of an actor who had played the title role in the 1930 film "Dracula" sought an injunction against and an accounting for profits from the motion picture corporation which had licensed the use of the image of the actor as Dracula on a variety of commercial products. 69 Similarly, the assignee of the publicity rights of Elvis Presley was not allowed to enjoin the sale of Presley statuettes by a nonprofit corporation for the purpose of raising funds to build a memorial to Presley. 70

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## Footnotes

Footnote 63. *Estate of Presley v Russen* (DC NJ) 513 F Supp 1339, 211 USPQ 415.

Footnote 64. *Factors Etc., Inc. v Creative Card Co.* (SD NY) 444 F Supp 279, 3 Media L R 1290, *affd* (CA2 NY) 579 F2d 215, 4 Media L R 1144, 205 USPQ 751, cert den 440 US 908, 59 L Ed 2d 455, 99 S Ct 1215 and on remand (SD NY) 496 F Supp 1090, 208 USPQ 529, *revd* on other grounds (CA2 NY) 652 F2d 278, 7 Media L R 1617, 211 USPQ 1, cert den 456 US 927, 72 L Ed 2d 442, 102 S Ct 1973 and on remand (SD NY) 541 F Supp 231, 8 Media L R 1839, *vacated* on other grounds (SD NY) 562 F Supp 304, 9 Media L R 1642 and *reh den* (CA2 NY) 701 F2d 11, 9 Media L R 1110 and (criticized on other grounds by *Rogers v Grimaldi* (CA2 NY) 875 F2d 994, 16 Media L R 1648, 10 USPQ2d 1825); *Price v Hal Roach Studios, Inc.* (SD NY) 400 F Supp 836; *Estate of Presley v Russen* (DC NJ) 513 F Supp 1339, 211 USPQ 415; *Lombardo v Doyle, Dane & Bernbach, Inc.* (2d Dept) 58 App Div 2d 620, 396 NYS2d 661, 2 Media L R 2321.

**Forms:** Grant of right to use name—General form. 13A Am Jur Legal Forms 2d, Name § 182:33.

Footnote 65. 62A Am Jur 2d, Privacy § 20.

Footnote 66. *Price v Hal Roach Studios, Inc.* (SD NY) 400 F Supp 836; *Martin Luther King, Jr., Ctr. for Social Change v American Heritage Prods.* (CA11 Ga) 694 F2d 674.

**Law Reviews:** Kranz, Sharing the spotlight: equitable distribution of the right of publicity. 13 Cardozo Arts & Ent LJ 917 (Fall 1995).

Footnote 67. *Estate of Presley v Russen* (DC NJ) 513 F Supp 1339, 211 USPQ 415; *Lugosi v Universal Pictures*, 25 Cal 3d 813, 160 Cal Rptr 323, 603 P2d 425, 5 Media L R

2185, 205 USPQ 1090, 10 ALR4th 1150.

The right of publicity survives the owner, provided he or she recognizes the extrinsic commercial value of his or her name or likeness in his or her lifetime and manifests that recognition in some overt manner. *Hicks v Casablanca Records* (SD NY) 464 F Supp 426, 4 Media L R 1497, 204 USPQ 126.

**Law Reviews:** Hogue & Garfinkel, The right of publicity: does it survive death and abandonment? 30 Tort & Ins LJ 663 (Spring 1995).

**Annotation:** Right to publicize or commercially exploit deceased person's name or likeness as inheritable, 10 ALR4th 1193.

Footnote 68. *Memphis Dev. Foundation v Factors Etc., Inc.* (CA6 Tenn) 616 F2d 956, 5 Media L R 2521, 205 USPQ 784, cert den 449 US 953, 66 L Ed 2d 217, 101 S Ct 358; *Frosch v Grosset & Dunlap, Inc.* (1st Dept) 75 App Div 2d 768, 427 NYS2d 828, 6 Media L R 1272.

Footnote 69. *Lugosi v Universal Pictures*, 25 Cal 3d 813, 160 Cal Rptr 323, 603 P2d 425, 5 Media L R 2185, 205 USPQ 1090, 10 ALR4th 1150.

Footnote 70. *Memphis Dev. Foundation v Factors Etc., Inc.* (CA6 Tenn) 616 F2d 956, 5 Media L R 2521, 205 USPQ 784, cert den 449 US 953, 66 L Ed 2d 217, 101 S Ct 358.

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### III. KINDS AND CLASSIFICATIONS OF PROPERTY [8-23]

#### A. In General [8-10]

#### Research References

ALR Digest: Property and Property Rights §§ 7-12

ALR Index: Adverse Possession; Eminent Domain; Intangible Hereditaments or Property; Interest in Property or Subject Matter; Life Estates, Remainders, and Reversions; Lots and Parcels; Partition; Personal Property; Property; Sale and Transfer of Property; Title and Ownership

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#### § 8 Generally

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Property is generally divided into several major and a number of minor classes which are well recognized by law. Initially, property is classified as corporeal and incorporeal. 71 Corporeal property is classified as real and personal, 72 or as movable and immovable. 73

Property may be further classified as public and private, 74 tangible or intangible. 75

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## Footnotes

Footnote 71. § 9.

Footnote 72. *Transcontinental Oil Co. v Emmerson*, 298 Ill 394, 131 NE 645, 16 ALR 507; *Ralston Steel Car Co. v Ralston*, 112 Ohio St 306, 3 Ohio L Abs 200, 147 NE 513, 39 ALR 334.

Footnote 73. *McNamara v Oilfield Constr. Co.* (La App 3d Cir) 417 So 2d 1311, cert den (La) 422 So 2d 157; *Strobel v Northwest G. F. Mut. Ins. Co.* (ND) 152 NW2d 794.

Footnote 74. § 10.

Footnote 75. *Hommel v George* (Colo App) 802 P2d 1156, cert den (Colo) 1990 Colo LEXIS 888.

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## § 9 Corporeal or incorporeal; tangible or intangible

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When the term "property" is used to refer to the subject of various rights of use and enjoyment, generally it is not confined to that which may be touched by the hand or seen by the eye, but includes a multitude of rights which may not have any direct concern with tangible or substantial things. 76

◆ Definition: In its usual sense, "corporeal property" is that which is palpable or tangible and is material and physical in its nature; it includes things which have a body, whether animate or inanimate, and can be felt or touched. 77 "Incorporeal property" are rights which have no corporeal tangible substance, or which are intangible. 78

Tangible property is that which is capable of being handled, felt, or touched, and may be evaluated by the physical senses; 79 it is property having substance or body and which is capable of being possessed or realized. 80 Intangibles consist of rights not related to physical things, but that are merely relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in the courts. 81 Intangible property has no physical existence, but may be evidenced by a document with no intrinsic value, such as a stock certificate. 82

◆ Caution: Goodwill is property of an intangible nature, but has been said to have no existence as property in and of itself, that is, as a separate and distinct entity, since it cannot be separated from the business in which it inheres, and cannot be disposed of independently from the business. 83

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## Footnotes

Footnote 76. *Curry v McCanless*, 307 US 357, 83 L Ed 1339, 59 S Ct 900, 31 AFTR 937, 123 ALR 162; *Transcontinental Oil Co. v Emmerson*, 298 Ill 394, 131 NE 645, 16 ALR 507.

Footnote 77. *Transcontinental Oil Co. v Emmerson*, 298 Ill 394, 131 NE 645, 16 ALR 507; *Webb v State* (La App 1st Cir) 470 So 2d 994, cert den (La) 476 So 2d 357; *Flowers v Texas M. R. Co.* (Tex Civ App) 174 SW2d 70.

Theoretically, perhaps, "intangible assets" may be regarded as a species of property separate and apart from tangible or physical property. *Flowers v Texas M. R. Co.* (Tex Civ App) 174 SW2d 70.

Footnote 78. *Patterson v Kentucky*, 97 US 501, 97 Otto 501, 24 L Ed 1115; *National Tel. News Co. v Western U. Tel. Co.* (CA7 Ill) 119 F 294; *Transcontinental Oil Co. v Emmerson*, 298 Ill 394, 131 NE 645, 16 ALR 507.

Footnote 79. *Registrar & Transfer Co. v Director of Div. of Taxation, Dep't of Treasury*, 157 NJ Super 532, 385 A2d 268, revd on other grounds 166 NJ Super 75, 398 A2d 1335, certif den 81 NJ 63, 404 A2d 1161 and certif den 81 NJ 63, 404 A2d 1161; *Adams v Great Am. Lloyd's Ins. Co.* (Tex App Austin) 891 SW2d 769; *Birdo v Williams* (Tex App Houston (1st Dist)) 859 SW2d 571.

Footnote 80. *Lucker Mfg. v Home Ins. Co.* (CA3 Pa) 23 F3d 808, digest op at (CA3 Pa) 17 PLW 331; *Navistar Internat. Transportation Corp. v State Bd. of Equalization*, 8 Cal 4th 868, 35 Cal Rptr 2d 651, 884 P2d 108, 94 CDOS 9013, 94 Daily Journal DAR 16722.

Footnote 81. *Curry v McCanless*, 307 US 357, 83 L Ed 1339, 59 S Ct 900, 31 AFTR 937, 123 ALR 162.

Footnote 82. *Lucker Mfg. v Home Ins. Co.* (CA3 Pa) 23 F3d 808, digest op at (CA3 Pa) 17 PLW 331; *Navistar Internat. Transportation Corp. v State Bd. of Equalization*, 8 Cal 4th 868, 35 Cal Rptr 2d 651, 884 P2d 108, 94 CDOS 9013, 94 Daily Journal DAR 16722; *Adams v Great Am. Lloyd's Ins. Co.* (Tex App Austin) 891 SW2d 769.

Footnote 83. 38 Am Jur 2d, Goodwill § 3.

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## § 10 Public and private property

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Property may be classified as either public or private. Public property is that owned by the public as such in some governmental capacity. 84 Private property is that which is owned by an individual or some other private owner, and ordinarily is devoted to the private uses of that private owner; however, the fact that private property is used

exclusively for public purposes does not change the nature of the property or the title in such property so as to convert it into public property. 85 Neither does the fact that private property serves a quasipublic service, as in the case of property of a college or university, alter its character as private property within the constitutional protection afforded to such property 86

The distinction between public and private property is important in connection with the application of constitutional and statutory provisions relating to the taking of private property under the power of eminent domain 87 and provisions for the exemption of public property from taxation. 88

When private property is affected with a public interest, it ceases to be only private property. Property becomes clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large. 89 That is to say, the public at large is capable of acquiring a nonpossessory interest in land. 90 When one devotes his or her property to a use in which the public has an interest, he or she, in effect, grants to the public an interest in that use and must submit to being controlled by the public for the common good to the extent of the interest he or she has thus created. 91

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## Footnotes

Footnote 84. 63A Am Jur 2d, Public Lands § 1; 72 Am Jur 2d, States, Territories, and Dependencies § 66; 77 Am Jur 2d, United States § 71.

Footnote 85. Board of Trustees v Atlanta, 113 Ga 883, 39 SE 394; State ex rel. Realty Co. v Cooley, 62 Minn 183, 64 NW 379.

Footnote 86. 15A Am Jur 2d, Colleges and Universities § 32.

Footnote 87. 26 Am Jur 2d, Eminent Domain §§ 99 et seq.

Footnote 88. 71 Am Jur 2d, State and Local Taxation §§ 336 et seq.

Footnote 89. Pipe Line Cases, 234 US 548, 58 L Ed 1459, 34 S Ct 956; Munn v Illinois, 94 US 113, 94 Otto 113, 24 L Ed 77.

Footnote 90. Manchester v Augusta Country Club (Me) 477 A2d 1124.

Footnote 91. In re Traders Compress Co. (WD Okla) 381 F Supp 789, 1974-2 CCH Trade Cases ¶ 75425.

As to governmental control and regulation of use of private property, see § 33.

## B. Real Property [11-17]

### Research References

ALR Digest: Property and Property Rights §§ 8, 9

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## § 11 Generally; definitions and distinctions

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Real property, except as modified or superseded by statute, consists of such things as are permanent, fixed, and immovable, including lands, tenements, and hereditaments of all kinds, which are not annexed to the person or cannot be moved from the place in which they exist. 92 It has been frequently defined by statute to be coextensive with the phrase "lands, tenements, and hereditaments" 93 and, in some jurisdictions, includes all legal and equitable rights and interests in such subjects. 94

The term "real property" includes land, possessory rights to land, and that which is appurtenant to land. 95 The phrase covers all that goes to make up the earth in its natural condition, and thus generally includes gas and oil, 96 and minerals that have not been severed from the soil. 97 It may also include crops, trees, and nursery stock, which have not been severed from the soil. 98

"Real estate," both at common law and in its generally accepted meaning, is synonymous with real property. The term "real estate" in its strictly technical sense, however, signifies such an interest as one has in land; it is the condition or circumstance in which the owner stands, with regard to his or her property. It implies a right, interest, or ownership existing in the soil and is limited to an estate in fee or for life. 99

An ownership interest in a condominium, for example, is treated as property. 1 Also, a real estate "time-sharing" arrangement may be an estate or interest or possessory interest in property itself, 2 but a time-sharing arrangement may also exist in the form of a "vacation license" or "vacation lease," which may be a mere contractual right rather than an interest in real property. 3 A claim for the unpaid price of land secured by the legal title is not property, although possession has been given and substantial payment toward the price has been made. 4

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### Footnotes

Footnote 92. *Ralston Steel Car Co. v Ralston*, 112 Ohio St 306, 3 Ohio L Abs 200, 147 NE 513, 39 ALR 334; *Woodworth v Franklin*, 85 Okla 27, 204 P 452, 27 ALR 590.

As to the treatment of a burial lot as real property, see 14 Am Jur 2d, *Cemeteries* §§ 25 et seq.

Footnote 93. *Hyatt v Vincennes Nat'l Bank*, 113 US 408, 28 L Ed 1009, 5 S Ct 573; *Callahan v Martin*, 3 Cal 2d 110, 43 P2d 788, 101 ALR 871; *Woodworth v Franklin*, 85

Okla 27, 204 P 452, 27 ALR 590.

Footnote 94. National Bank of America v Barritt, 136 Kan 870, 18 P2d 552, 86 ALR 225.

The phrase "lands, tenements, and hereditaments" is usually used to designate an owner's whole bundle of rights in any given piece of land. Wood v Galpert (Cuyahoga Co) 1 Ohio App 2d 202, 30 Ohio Ops 2d 242, 204 NE2d 384.

For a more detailed discussion of these terms see §§ 12 (lands), § 13 (tenements), and § 14 (hereditaments).

Footnote 95. Fulton v Duro (App) 107 Idaho 240, 687 P2d 1367, affd 108 Idaho 392, 700 P2d 14.

Footnote 96. 38 Am Jur 2d, Gas and Oil § 4.

Footnote 97. 54 Am Jur 2d, Mines and Minerals § 3.

Footnote 98. 21A Am Jur 2d, Crops § 3.

As to trees and nursery stock, see § 16.

Footnote 99. Dabney v Edwards, 5 Cal 2d 1, 53 P2d 962, 103 ALR 822; Callahan v Martin, 3 Cal 2d 110, 43 P2d 788, 101 ALR 871; Orchard v Wright-Dalton-Bell-Anchor Store Co., 225 Mo 414, 125 SW 486.

Property rights may be created by covenants restricting the use of real property. 20 Am Jur 2d, Covenants, Conditions, and Restrictions § 167.

As to the character of rent as personalty or realty, see 49 Am Jur 2d, Landlord and Tenant §§ 514, 515.

Footnote 1. 15A Am Jur 2d, Condominiums and Cooperative Apartments §§ 1 et seq.

Footnote 2. Cal-Am Corp. v Department of Real Estate (2nd Dist) 104 Cal App 3d 453, 163 Cal Rptr 729, 6 ALR4th 1281.

**Annotation:** Regulation of time-share or interval ownership interests in real estate, 6 ALR4th 1288.

Footnote 3. Am Jur 2d, New Topic Service, Real Estate Time-Sharing § 2.

Footnote 4. Blaisdell v Coe, 83 NH 167, 139 A 758, 65 ALR 626.

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## § 12 Lands

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The word "land" includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by human hands, as buildings, fixtures, and fences. 5 The common-law meaning of the term "land" is substantially synonymous with "real property." 6 While it generally refers to something corporeal, 7 it may mean a franchise connected with land. 8

Ordinarily, the term "land" is used as descriptive of the subject of ownership, and not of the ownership itself. Thus, in its legal and broadest sense, "land" embraces much more than the word literally indicates, 9 and includes many things besides the soil itself, such as waters, grass, stones, buildings, fences, trees, and the like, and in fact all things which have become a part of the soil. 10

◆ Caution: Sod, although in a sense land, has been considered personalty on the ground that it was a crop which owed its existence to yearly fertilizing and cultivation. 11

According to an ancient maxim "cujus est solum, ejus est usque ad coelum et ad infernos," the title to land extends downward from the surface to the center of the earth and upward indefinitely to the heavens, 12 so that whatever is in a direct line between the surface of any land and the center of the earth, whether it is rock, soil, or water, belongs to the owner of the surface, who may use it for his or her own purpose. 13 However, there is authority to the contrary, 14 and modern courts recognize that the common-law right must be balanced with other rights, such as the right of flight over land. 15 The right to receive light and air is also a property right which can be created in a deed. 16

Land underlying non-navigable streams is recognized by some courts to be the subject of private ownership and vested in the proprietors of the adjoining lands. 17 Yet other courts hold that even though a party owned the bed of a non-navigable stream, he did not have such property rights in the waters of the stream as to bar the public from boating, fishing, and wading, 18 at least where the stream is navigable by small recreational or pleasure boats. 19

For purposes of separate ownership, land may be divided horizontally as well as superficially and vertically. 20 Therefore, in addition to the land itself, the right to use the air above that land is a property interest that may be conveyed or taken in condemnation. 21

◆ Observation: The term "land" is commonly defined in constitutions and statutes. These definitions vary materially in their terms and scope, depending usually on the particular connection or circumstances with reference to which the word is defined. 22

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## Footnotes

Footnote 5. *Delaney v Lowery*, 25 Cal 2d 561, 154 P2d 674; *Shaw v August*, 266 Mich 634, 254 NW 231; *Crawford Co. v Hathaway*, 67 Neb 325, 93 NW 781 (ovrld in part on other grounds by *Wasserburger v Coffee*, 180 Neb 149, 141 NW2d 738); *Bruno v Long*



Branch, 21 NJ 68, 120 A2d 760, 60 ALR2d 216.

Footnote 6. Callahan v Martin, 3 Cal 2d 110, 43 P2d 788, 101 ALR 871; Southern Pacific Co. v County of Riverside, 35 Cal App 2d 380, 95 P2d 688.

Footnote 7. Southern Pacific Co. v County of Riverside, 35 Cal App 2d 380, 95 P2d 688.

Footnote 8. Southern Pacific Co. v County of Riverside, 35 Cal App 2d 380, 95 P2d 688.

However, the fact that a special franchise may be taxed as if it were an interest in real estate does not make it real property. New York Tel. Co. v North Hempstead, 41 NY2d 691, 395 NYS2d 143, 363 NE2d 694.

Footnote 9. Southern Pacific Co. v County of Riverside, 35 Cal App 2d 380, 95 P2d 688; New Jersey Power & Light Co. v Rockaway, 80 NJ Super 435, 194 A2d 16.

Footnote 10. Story v Christin, 14 Cal 2d 592, 95 P2d 925, 125 ALR 1402; New Jersey Power & Light Co. v Rockaway, 80 NJ Super 435, 194 A2d 16; King Bros. v Utah Dry Kiln Co., 21 Utah 2d 43, 440 P2d 17; Eggborn v Smith, 114 Va 745, 77 SE 593.

The expression "interest in land" includes ownership of a portion of a building placed thereon. United States v Certain Property Located in Manhattan (SD NY) 225 F Supp 498.

As to the status of property affixed to realty, see § 15.

Footnote 11. Barron v Edwards, 45 Mich App 210, 206 NW2d 508, 12 UCCRS 671.

As to the status of crops as real or personal property, see 21A Am Jur 2d, Crops § 3.

Footnote 12. Del Monte Mining & Milling Co. v Last Chance Mining & Milling Co., 171 US 55, 43 L Ed 72, 18 S Ct 895; People v Emmert, 198 Colo 137, 597 P2d 1025, 6 ALR4th 1016; Pyramid Coal Corp. v Pratt, 229 Ind 648, 99 NE2d 427, 25 ALR2d 1245; Edwards v Sims, 232 Ky 791, 24 SW2d 619, appeal after remand 250 Ky 166, 61 SW2d 1049, appeal after remand 265 Ky 418, 96 SW2d 1028; Gas Prods. Co. v Rankin, 63 Mont 372, 207 P 993, 24 ALR 294; Hynes v New York C. R. Co., 231 NY 229, 131 NE 898, 17 ALR 803; Gostina v Ryland, 116 Wash 228, 199 P 298, 18 ALR 650; Piper v Ekern, 180 Wis 586, 194 NW 159, 34 ALR 32.

As to specific applications of the maxim in particular circumstances, see 1 Am Jur 2d, Adjoining Landowners §§ 1 et seq.; 38 Am Jur 2d, Gas and Oil § 3; 54 Am Jur 2d, Mines and Minerals §§ 116-119.

Footnote 13. Selig v United States (WD Ark) 538 F Supp 1387; Gas Prods. Co. v Rankin, 63 Mont 372, 207 P 993, 24 ALR 294.

Footnote 14. Katz v Walkinshaw, 141 Cal 116, 74 P 766 (refusing to apply the maxim).

Footnote 15. State v Chippewa Cable Co., 48 Wis 2d 341, 180 NW2d 714.

As to the right to use airspace, and as to the relative rights of surface proprietors and those who fly over the land, see 8 Am Jur 2d, Aviation §§ 3 et seq.

Footnote 16. *Mock v Shulman* (2nd Dist) 226 Cal App 2d 263, 38 Cal Rptr 39.

**Annotation:** Validity, construction, and effect of restrictive covenants as to trees and shrubbery, 13 ALR4th 1346.

Footnote 17. *People v Emmert*, 198 Colo 137, 597 P2d 1025, 6 ALR4th 1016.

**Annotation:** Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned, 6 ALR4th 1030.

Footnote 18. *Elder v Delcour*, 364 Mo 835, 269 SW2d 17, 47 ALR2d 370.

Footnote 19. *People v Sweetser* (5th Dist) 72 Cal App 3d 278, 140 Cal Rptr 82, 7 ELR 20653; *Curry v Hill* (Okla) 460 P2d 933.

Generally as to the status of "floatable" streams, see 78 Am Jur 2d, Waters § 66.

As to the ownership of, and title to, navigable and non-navigable waters, see 78 Am Jur 2d, Water § 230.

**Annotation:** Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned, 6 ALR4th 1030.

Footnote 20. *Kidwell v General Petroleum Corp.*, 212 Cal 720, 300 P 1, 76 ALR 830; *Ramage v South Penn Oil Co.*, 94 W Va 81, 118 SE 162, 31 ALR 1509.

As to the codification of this common-law rule in modern condominium statutes, see 15A Am Jur 2d, Condominiums and Cooperative Apartments §§ 8 et seq.

Footnote 21. *Grey v Coastal States Holding Co.*, 22 Conn App 497, 578 A2d 1080, app den 216 Conn 817, 580 A2d 57.

Footnote 22. *Hyatt v Vincennes Nat'l Bank*, 113 US 408, 28 L Ed 1009, 5 S Ct 573; *Krouser v County of San Bernardino*, 29 Cal 2d 766, 178 P2d 441; *Southern Pacific Co. v County of Riverside*, 35 Cal App 2d 380, 95 P2d 688; *Bruno v Long Branch*, 21 NJ 68, 120 A2d 760, 60 ALR2d 216.

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## § 13 Tenements

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The word "tenement," at its broadest, embraces more than the word "land," including everything which may be subject to an interest, provided it is of a permanent nature. 23 As used in American jurisdictions, the word "tenement" is generally applied exclusively to land, or to what is usually denominated real property. 24

An estate or interest to amount to a tenement should be a freehold at least, and hence a term for years does not come within the meaning of the word. 25

The word "tenement" may be used in a statute in a restrictive sense so as to include only those tenements upon which entry can be made and of which there can be tangible possession. When so used, the term excludes a franchise. 26 In a different and still more restricted sense, a tenement is a house or building. 27

Rents accruing to land have been classified as a tenement, 28 and sometimes also as an incorporeal hereditament, 29 or as a chattel real, 30 but the rents due from a tenant after his tenancy has terminated are a mere debt, unconnected with the lands. 31

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## Footnotes

Footnote 23. *Lenfers v Henke*, 73 Ill 405; *Oskaloosa Water Co. v Board of Equalization*, 84 Iowa 407, 51 NW 18; *Orchard v Wright-Dalton-Bell-Anchor Store Co.*, 225 Mo 414, 125 SW 486; *Orchard v Wright-Dalton-Bell-Anchor Store Co.*, 225 Mo 414, 125 SW 486; *Wood v Galpert (CP Ct)* 27 Ohio Ops 2d 454, 93 Ohio L Abs 545, 199 NE2d 900, affd (Cuyahoga Co) 1 Ohio App 2d 202, 30 Ohio Ops 2d 242, 204 NE2d 384.

Footnote 24. *Orchard v Wright-Dalton-Bell-Anchor Store Co.*, 225 Mo 414, 125 SW 486; *Gibson v Brockway*, 8 NH 465.

Footnote 25. *Orchard v Wright-Dalton-Bell-Anchor Store Co.*, 225 Mo 414, 125 SW 486; *Mayor, etc., of New York v Mabie*, 13 NY 151.

Footnote 26. *Gibbs v Drew*, 16 Fla 147.

As to the nature of a franchise as property, see 36 Am Jur 2d, Franchises § 5.

Footnote 27. *Oskaloosa Water Co. v Board of Equalization*, 84 Iowa 407, 51 NW 18; *Orchard v Wright-Dalton-Bell-Anchor Store Co.*, 225 Mo 414, 125 SW 486.

Footnote 28. *Wood v Galpert (Cuyahoga Co)* 1 Ohio App 2d 202, 30 Ohio Ops 2d 242, 204 NE2d 384.

Footnote 29. § 9.

Footnote 30. § 20.

Footnote 31. *Wood v Galpert (Cuyahoga Co)* 1 Ohio App 2d 202, 30 Ohio Ops 2d 242, 204 NE2d 384.

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## § 14 Hereditaments

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"Hereditaments" is the largest and most comprehensive word of the phrase "land, tenements, and hereditaments," and is almost as comprehensive as "property" because it embraces anything capable of being inherited, whether corporeal, incorporeal, real, personal, or mixed. 32 Hereditaments may be either corporeal, such as lands, 33 or incorporeal, 34 such as a franchise, 35 or the right of a riparian landowner to the use of riparian waters, 36 or a profit a prendre. 37

◆ Definition: A "profit a prendre" is a right exercised by one person in the soil of another, such as the right to mine metals, and carries with it the right of entry, and includes the right to use as much of the surface as necessary to exercise the profit. 38

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### Footnotes

Footnote 32. Callahan v Martin, 3 Cal 2d 110, 43 P2d 788, 101 ALR 871; Mead v Mead (Fla App D3) 193 So 2d 476, cert den (Fla) 201 So 2d 552; Mead v Mead (Fla App D3) 193 So 2d 476, cert den (Fla) 201 So 2d 552; Orchard v Wright-Dalton-Bell-Anchor Store Co., 225 Mo 414, 125 SW 486; Ralston Steel Car Co. v Ralston, 112 Ohio St 306, 3 Ohio L Abs 200, 147 NE 513, 39 ALR 334.

However, while recognizing that "hereditaments" may mean anything inheritable, one court has noted that the words "lands, messages, tenements, and hereditaments," as used in a deed under consideration, are susceptible to more than one interpretation, being ancient and archaic words which do not have a clear, unambiguous, commonly known meaning to lay persons (or even, perhaps, to all lawyers). Mead v Mead (Fla App D3) 193 So 2d 476, cert den (Fla) 201 So 2d 552.

An easement appurtenant to plaintiff's property constitutes a hereditament within the meaning of a statute which bars actions for the recovery of "lands, tenements, and hereditaments" unless instituted within the prescribed period. McLaughlin v Neiger (Mo App) 286 SW2d 380.

As to the status of various leaseholds as hereditaments, see 49 Am Jur 2d, Landlord and Tenant §§ 1 et seq.

Footnote 33. Gerhard v Stephens, 68 Cal 2d 864, 69 Cal Rptr 612, 442 P2d 692, 31 OGR 28; Callahan v Martin, 3 Cal 2d 110, 43 P2d 788, 101 ALR 871; Gibbs v Drew, 16 Fla 147.

Footnote 34. Callahan v Martin, 3 Cal 2d 110, 43 P2d 788, 101 ALR 871; Orchard v Wright-Dalton-Bell-Anchor Store Co., 225 Mo 414, 125 SW 486; Mayor, etc., of New York v Mabie, 13 NY 151.

Footnote 35. 36 Am Jur 2d, Franchises § 5.

Footnote 36. Crawford Co. v Hathaway, 67 Neb 325, 93 NW 781 (ovrld in part on other grounds by Wasserburger v Coffee, 180 Neb 149, 141 NW2d 738).

As to the nature of riparian rights, generally, see 78 Am Jur 2d, Waters §§ 260 et seq.

Footnote 37. 25 Am Jur 2d, Easements and Licenses § 4.

Footnote 38. Costa Mesa Union School Dist. v Security First Nat'l Bank (4th Dist) 254 Cal App 2d 4, 62 Cal Rptr 113, 27 OGR 253.

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## § 15 Property affixed to realty; mobile homes

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Property which is otherwise personal in nature, when physically attached to the soil or constructively attached by its use or intended use with the soil, ordinarily becomes a part of the realty. 39 Thus, a building permanently fixed to the freehold becomes a part of it, and prima facie a house is real estate, belonging to the owner of the land on which it stands. 40 Likewise, a mobile home that is affixed to a permanent foundation will generally be considered real rather than personal property. 41 Similarly, water and sewer mains are normally considered real property. 42

In judging whether property is personal or real, the manner in which it is affixed to the land and the permanence with which it was designed to remain in place must be considered. 43 Therefore, chattels become real estate when annexed to real property under such circumstances that it appears clearly from an inspection of the property itself, taking into consideration the character of the annexation, the nature and adaptation of the articles annexed to, the uses and purposes of the real estate at the time of the annexation, and the relation of the annexing person to the real estate in question, that a permanent annexation to the real property was intended. 44 Bricks, for example, are personal property until such time as they are incorporated into a building, at which time they become real property. 45 However, fuel storage tanks subject to an agreement of sale by which the seller agreed to transfer to the buyer all personal property connected with their fuel oil delivery business were part of the personal property to be transferred, because the tanks rested only by the force of gravity, were unattached to the realty, and were easily removed from one site to another with minimal time and modest expense. 46

Whether property is realty or personalty depends not simply on whether it can be removed without damaging it or the realty, but, in the case of chattels which have already been annexed, on (1) annexation, either actual or constructive; (2) adaptation or application to the use or purpose to which it is connected is appropriated; (3) intent to make the article a permanent accession to the freehold. 47

◆ Definition: "Actual annexation" includes every movement by which chattels are joined or united to property. "Constructive annexation" is the union of such things as have been considered part of the realty but which are not actually annexed; it exists where an object, although not itself attached to realty, comprises a necessary, integral, or working part of some other object which is attached. 48

Personal property may retain its character as such where it is so agreed by the parties

interested even though annexed to the realty. 49

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## Footnotes

Footnote 39. *Guernsey v Phinizy*, 113 Ga 898, 39 SE 402.

As to whether buildings and other structures affixed to the soil constitute real property, see 35 Am Jur 2d, Fences § 3; 35 Am Jur 2d, Fixtures §§ 78 et seq.; 41 Am Jur 2d, Improvements §§ 3, 4; 53 Am Jur 2d, Mechanics' Liens §§ 29 et seq.; 55 Am Jur 2d, Mortgages §§ 106 et seq.

Footnote 40. *Insurance Co. v Haven*, 95 US 242, 95 Otto 242, 24 L Ed 473; *Williams v Kirby School Dist.*, 207 Ark 458, 181 SW2d 488; *Union Cent. Life Co. v Tillery*, 152 Mo 421, 54 SW 220; *Mueller v Mercer County (ND)* 60 NW2d 678; *Employers' Liability Assurance Corp. v Hartford Accident & Indem. Co.*, 151 W Va 1062, 158 SE2d 212.

Footnote 41. *C.I.T. Financial Services v Premier Corp. (Okla)* 747 P2d 934.

As to whether mobile homes are real property for the purposes of state and local taxation, see 71 Am Jur 2d, State and Local Taxation § 211.

Footnote 42. *McPeak v Thorell (3d Dist)* 148 Ill App 3d 430, 101 Ill Dec 730, 499 NE2d 97, app den 106 Ill Dec 49, 505 NE2d 355.

Footnote 43. *Hayden Island, Inc. v United States (DC Or)* 380 F Supp 96, 74-2 USTC ¶ 9604, 34 AFTR 2d 74-5580 (holding that a sewage treatment plant which was transported by truck and installed at ground level on a cement slab to assure level footing but was purchased with the intent that it would be moved from site to site was "tangible personal property" for investment tax credit purposes).

Footnote 44. *National Boulevard Bank v Citizens Utilities Co. (1st Dist)* 107 Ill App 3d 992, 63 Ill Dec 540, 438 NE2d 471, later proceeding (1st Dist) 157 Ill App 3d 201, 109 Ill Dec 431, 510 NE2d 52, app den 113 Ill Dec 294, 515 NE2d 103 (holding that sewer mains, which were buried in the property and were installed for the use of the freehold, were real property rather than personal property).

As to chattels as personal property, see § 19.

Footnote 45. *Adcor Realty Corp. v Mellon-Stuart Co. (ND Ohio)* 450 F Supp 769 (holding that an action against a manufacturer in a products liability action seeking a recovery of damages from the discoloration, cracking, and disintegration of bricks made by the defendant manufacturer and used as face bricks around the exterior walls of a department store building was a products liability action for injury to real property and not an action for injury to personal property, which was governed by a shorter period of limitations).

Footnote 46. *Waterbury Petroleum Products, Inc. v Canaan Oil & Fuel Co.*, 193 Conn 208, 477 A2d 988.

Footnote 47. *Prospecting Unlimited v Norberg*, 119 RI 116, 376 A2d 702.

Footnote 48. *Vic Bernacchi & Sons v Loxas* (In re *Vic Bernacchi & Sons*) (BC ND Ind) 170 BR 647.

Illustrative instances of constructive annexation are keys, which must be movable to answer their end, and which are a necessary part of the fixed locks to which they are adapted; also, sashes and window frames. *Central B. R. Co. v Fritz*, 20 Kan 430; *Fay v Muzzey*, 79 Mass 53, 13 Gray 53; *Hoyle v Plattsburgh & M. R. Co.*, 54 NY 314.

However, a court found that a wood stove not bolted to a residential room nor for which any special foundation had been laid was not constructively annexed to the building simply because it was the decorative focal point of the room. *Everitt v Higgins* (App) 122 Idaho 708, 838 P2d 311, reh den (Idaho App) 1992 Ida App LEXIS 218 and reh den (Idaho App) 1992 Ida App LEXIS 239.

Footnote 49. *Milner v New Edinburg School Dist.*, 211 Ark 337, 200 SW2d 319; *Public Serv. Co. v Voudoumas*, 84 NH 387, 151 A 81, 70 ALR 480.

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## § 16 Trees; nursery stock

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Trees which have not been severed from the land, either actually or constructively, are real property<sup>50</sup> which cannot, except as provided by statute, be levied upon and sold on execution as chattels,<sup>51</sup> and which cannot be the subject of larceny.<sup>52</sup> However, the owner of the land may treat them as personal property for a particular purpose,<sup>53</sup> such as for the purpose of fixing the measure of damages for their wrongful destruction.<sup>54</sup> Where the owner of the dominant estate under a grant of easement is given the specific right to plant, maintain, and replace such trees as he or she may desire, the language of the easement manifests an implicit understanding between the grantor and grantee that the trees be treated as personal property, notwithstanding their annexation to the real property.<sup>55</sup>

◆ Caution: Christmas trees have been named personal property on the ground that they are growing crops.<sup>56</sup>

The question whether nursery stock attached to the soil is real or personal property illustrates the conflicting conceptions of ancient rules of real property and more recent developments in the law of trade fixtures,<sup>57</sup> as applied to a species of property partaking of the general characteristics of both. The question usually arises in the determination of the extent to which interests less than the freehold estate may use the estate to grow and deal commercially in transplantable products of the soil, and the conclusions reached are sometimes somewhat artificial and based upon legal fictions.<sup>58</sup> There is an obvious analogy between nursery stock and growing crops.<sup>59</sup> The common-law rule that whatever is affixed to the soil belongs to the soil has evolved over the course of time to develop exceptions in the interests of justice; much now depends upon the character, relationship, and intention of the parties, and the particular purpose

for which the question is to be determined. 60 Generally, nursery trees and perennials are within the strict letter of the ancient rule that whatever is growing in the soil is a part of it and is therefore real property. 61 Yet courts, recognizing the injustice of a strict application of the rule, regard them as personalty in certain particular circumstances and relationships. 62

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## Footnotes

Footnote 50. 52 Am Jur 2d, Logs and Timber § 9.

Footnote 51. 30 Am Jur 2d, Executions § 151.

Footnote 52. 50 Am Jur 2d, Larceny § 72.

Footnote 53. *Bailey v Chicago, M. & St. P. Ry.*, 3 SD 531, 54 NW 596.

Footnote 54. 52 Am Jur 2d, Logs and Timber §§ 126 et seq.

As to the measure of damages for the destruction of or injury to nursery trees and stock, see 22 Am Jur 2d, Damages §§ 424, 425.

Footnote 55. *Morgan v Bolsan Realty Corp.* (3d Dept) 48 App Div 2d 331, 369 NYS2d 544, app dismd 37 NY2d 712 and app dismd 37 NY2d 921, 378 NYS2d 389, 340 NE2d 749.

Footnote 56. *Groth v Stillson*, 20 Mich App 704, 174 NW2d 596, 7 UCCRS 429.

As to trees as crops, generally, see 21A Am Jur 2d, Crops §§ 3-6.

Footnote 57. *Kirkman Nurseries v Sargent*, 42 Cal App 290, 183 P 591.

As to trade fixtures, see 35 Am Jur 2d, Fixtures §§ 3, 39, 40.

Footnote 58. *Story v Christin*, 14 Cal 2d 592, 95 P2d 925, 125 ALR 1402.

Footnote 59. 21A Am Jur 2d, Crops §§ 1 et seq.

Footnote 60. *Kirkman Nurseries v Sargent*, 42 Cal App 290, 183 P 591.

As to a tenant's nursery stock as trade fixtures, see 35 Am Jur 2d, Fixtures §§ 3, 39, 40.

Footnote 61. *Story v Christin*, 14 Cal 2d 592, 95 P2d 925, 125 ALR 1402; *State ex rel. Department of Highways v Henderson* (La App 3d Cir) 138 So 2d 597 (criticized on other grounds in *Liberty Mut. Ins. Co. v Louisiana Dep't of Ins.* (CA5 La) 62 F3d 115).

Footnote 62. *Story v Christin*, 14 Cal 2d 592, 95 P2d 925, 125 ALR 1402; *Cogliano v Commonwealth*, 334 Mass 354, 135 NE2d 648; *Julius Roehrs Co. v Division of Tax Appeals*, 16 NJ 493, 109 A2d 611.

As to the rights between vendors and purchasers to appurtenances or fixtures in a



real-estate contract, see 77 Am Jur 2d, Vendor and Purchaser § 87.

As to property interests which may be subject to a mortgage, see 55 Am Jur 2d, Mortgages §§ 106-131.

**Forms:** Complaint—To recover damages from tenant for committing negligent waste to freehold—To enjoin tenant from selling orchard products reserved to landlord. 20A Am Jur Pl & Pr Forms (Rev), Property, Form 5.

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## § 17 Manure

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Manure made in the usual course of husbandry on a farm is so attached to and connected with the realty that, in the absence of an express stipulation to the contrary, it is treated as part of the realty. 63 The rule was established for the benefit of agriculture and for the conservation of the soil, that prudent farming requires that as the fertility of the soil is depleted, it should be replaced by the waste products of the animals who have received their nourishment from the soil. 64 The general rule does not apply to manure made in a livery stable, or in any manner not connected with agriculture or made in the ordinary course of husbandry. 65 Therefore, for example, as between landlord and tenant, manure which was not produced directly or indirectly from the demised premises constitutes no part of the realty and may be removed by the tenant at the close of his or her term. 66 In determining whether, as between a vendor and purchaser of realty, manure dropped on the land by the vendor's animals constitutes personalty belonging to the vendor or a part of the realty passing to the purchaser, the test is whether the animals were fed from the products of the land or from products grown elsewhere; in the former case, the manure is regarded as a replenishment of that taken from the land and constitutes realty. 67

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### Footnotes

Footnote 63. Gomez v Dykes, 89 Ariz 171, 359 P2d 760, 82 ALR2d 1093; Whitesell v Collison (Ch Ct) 94 NJ Eq 44, 9 B Stockton 44, 118 A 277.

**Annotation:** Manure as real or personal property as between seller and buyer of real property, 82 ALR2d 1099.

Footnote 64. Gomez v Dykes, 89 Ariz 171, 359 P2d 760, 82 ALR2d 1093; Haslem v Lockwood, 37 Conn 500; Fay v Muzzey, 79 Mass 53, 13 Gray 53.

Footnote 65. Gomez v Dykes, 89 Ariz 171, 359 P2d 760, 82 ALR2d 1093.

Footnote 66. Gomez v Dykes, 89 Ariz 171, 359 P2d 760, 82 ALR2d 1093.

Footnote 67. Gomez v Dykes, 89 Ariz 171, 359 P2d 760, 82 ALR2d 1093.

## C. Personal Property [18-23]

### Research References

ALR Digest: Property and Property Rights §§ 4, 10-12

ALR Index: Adverse Possession; Eminent Domain; Intangible Hereditaments or Property; Interest in Property or Subject Matter; Life Estates, Remainders, and Reversions; Lots and Parcels; Partition; Personal Property; Property; Sale and Transfer of Property; Title and Ownership

20A Am Jur Pl & Pr Forms (Rev), Property, Form 7

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### § 18 Generally; definitions

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In its general meaning, the term "personal property" embraces all objects and rights which are capable of ownership except freehold estates in land and incorporeal hereditaments issuing from such estates, 68 including money, goods, and movable chattels. 69 Personal property may include—

—accrued rents, because they are choses in action. 70

—a partnership interest. 71

—an oil or gas leasehold interest, unless declared something else by statute. 72

—steam. 73

—billboards. 74 The term is frequently declared by statute to be coextensive with goods, chattels, choses in action, evidences of debt, 75 and money. 76 Some statutes, too, use the words in the limited sense of chattel or tangible property as distinguished from incorporeal rights, 77 this being accomplished in some cases by the use of qualifying words, such as "tangible," or the like. 78

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### Footnotes

Footnote 68. *State v Robinson*, 3 Conn Cir 273, 212 A2d 833, cert den 383 US 960, 16 L Ed 2d 302, 86 S Ct 1225; *Button v Drake*, 302 Ky 517, 195 SW2d 66, 167 ALR 1046; *Elkton Electric Co. v Perkins*, 145 Md 224, 125 A 851, cert den 266 US 602, 69 L Ed 462, 45 S Ct 90 and error dismd 266 US 585, 69 L Ed 454, 45 S Ct 124; *Holland v Fillmore*, 363 Mich 38, 108 NW2d 840; *Cincinnati S. R. Co. v Whitehead (Hamilton Co)* 39 Ohio App 51, 9 Ohio L Abs 552, 176 NE 583, motion overr.

Footnote 69. *Clancy v Oak Park Village Athletic Center*, 140 Mich App 304, 364 NW2d 312, CCH Prod Liab Rep ¶ 10456, 40 UCCRS 832; *Ralston Steel Car Co. v Ralston*, 112

Ohio St 306, 3 Ohio L Abs 200, 147 NE 513, 39 ALR 334.

Footnote 70. In re Westchase I Assoc., L.P. (WD NC) 126 BR 692 (construing North Carolina law).

As to choses in action, see § 22.

Footnote 71. Forward v Beucler (ED Va) 702 F Supp 582 (construing Virginia law).

Footnote 72. Utica Nat'l Bank & Trust Co. v Marney, 233 Kan 432, 661 P2d 1246, 77 OGR 61.

As to the common-law classification of leaseholds, see § 20.

Footnote 73. Concord Steam Corp. v Concord, 128 NH 724, 519 A2d 266.

Footnote 74. Manderson & Assoc., Inc. v Gore, 193 Ga App 723, 389 SE2d 251.

Footnote 75. Hyatt v Vincennes Nat'l Bank, 113 US 408, 28 L Ed 1009, 5 S Ct 573; Button v Drake, 302 Ky 517, 195 SW2d 66, 167 ALR 1046; Cincinnati S. R. Co. v Whitehead (Hamilton Co) 39 Ohio App 51, 9 Ohio L Abs 552, 176 NE 583, motion overr.; In re Gunderson's Will, 191 Wis 557, 211 NW 791.

Footnote 76. Bromberg v McArdle, 172 Ala 270, 55 So 805; Button v Drake, 302 Ky 517, 195 SW2d 66, 167 ALR 1046; Cincinnati S. R. Co. v Whitehead (Hamilton Co) 39 Ohio App 51, 9 Ohio L Abs 552, 176 NE 583, motion overr.

Footnote 77. Cincinnati S. R. Co. v Whitehead (Hamilton Co) 39 Ohio App 51, 9 Ohio L Abs 552, 176 NE 583, motion overr.

Footnote 78. Maxwell v Kent-Coffey Mfg. Co., 204 NC 365, 168 SE 397, 90 ALR 476, affd 291 US 642, 78 L Ed 1040, 54 S Ct 437.

As to questions of personal property which arise out of the law of bailments, see 8 Am Jur 2d, Bailments §§ 1 et seq.

As to special types of bailments 4 Am Jur 2d, Animals; 12 Am Jur 2d, Brokers; 13, 14 Am Jur 2d, Carriers; 38 Am Jur 2d, Garages and Filling and Parking Stations; 40 Am Jur 2d, Hotels, Motels, and Restaurants; 78 Am Jur 2d, Warehouses; 79 Am Jur 2d, Wharves.

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## § 19 Chattels and movables

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"Chattels," or "chattels personal" as they are sometimes called, are items of personal property, not amounting to a freehold or leasehold, which are visible, tangible, and

movable. 79 The word "movables" is derived from the civil law, and in its older usage seems to have been limited in meaning to utensils, furniture, ornaments, and the like, used for the furnishing and ornamentation of a house. 80 Yet it is now generally understood to comprehend that tangible movable property which attends a person wherever he or she goes, as distinguished from things immovable, 81 and includes things which may be carried from one place to another, whether they move by themselves or whether they are inanimate objects capable of being moved by extraneous power. 82 The nature of a movable is generally such that its identity is not lost if it is moved from one location to another. 83 Sinks and fans placed on a premises by a former lessee are movables, 84 as are portable window unit air conditioners and racks attached to window sills by two screws, a 12-foot electrical extension cord with socket and bulb at its end, copper tubing connected to a refrigerator, and small doghouses. 85

The term "movables," or "goods movable" as it is used in the civil law does not extend to all movable objects which are the subject of movability, since the word if used without adjunct or explanation in that broad sense would include movables which are not personal property, such as removable, component parts of the earth placed there in the course of nature. 86 "Movables" and personal property are not synonymous in their legal signification, since objects which are not movable in the sense in which that term is here used may in certain circumstances constitute personal property. Thus, unharvested crops may be personal property for some purposes, but they are not movable property. 87 Similarly, standing timber may acquire the status of personalty in some circumstances, although it is not movable. 88

Neither "chattels" nor "movables" included, in their original signification, choses in action, 89 although the latter are personal property. 90

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## Footnotes

Footnote 79. *Miller v Hirschmann*, 170 Md 145, 183 A 259; *Clancy v Oak Park Village Athletic Center*, 140 Mich App 304, 364 NW2d 312, CCH Prod Liab Rep ¶ 10456, 40 UCCRS 832; *First Nat'l Bank v Holland*, 99 Va 495, 39 SE 126.

As to "chattels real," see § 20.

Footnote 80. *McNamara v Oilfield Constr. Co.* (La App 3d Cir) 417 So 2d 1311, cert den (La) 422 So 2d 157; *Strobel v Northwest G. F. Mut. Ins. Co.* (ND) 152 NW2d 794.

Footnote 81. *McLean v Hardin*, 56 NC 294; *Hardeman v State*, 16 Tex App 1.

Footnote 82. *Succession of Young* (La App 1st Cir) 205 So 2d 791.

Footnote 83. *Bailey v Kruithoff* (La App 2d Cir) 280 So 2d 262.

Footnote 84. *Automatique New Orleans, Inc. v Capitano* (1968) 211 So2d 757.

Footnote 85. *Lafleur v Foret* (La App 3d Cir) 213 So 2d 141 (superseded by statute on other grounds as stated in *P. H. A. C. Services, Inc. v Seaways International, Inc.* (La) 403 So 2d 1199, 69 OGR 454).

Footnote 86. *Goddard v Winchell*, 86 Iowa 71, 52 NW 1124.

Footnote 87. 21A Am Jur 2d, Crops §§ 3-5.

Footnote 88. 52 Am Jur 2d, Logs and Timber §§ 9, 10.

Footnote 89. *Penniman v French*, 34 Mass 404, 17 Pick 404; *First Nat'l Bank v Holland*, 99 Va 495, 39 SE 126.

Footnote 90. §§ 22, 23.

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## § 20 Chattels real

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A "chattel real" is an interest in real estate having the character of immobility, which is less than a freehold and is personal property. 91 Chattels real are to be distinguished, on the one hand, from things which have no concern with the land, such as mere movables and rights connected with them, which are chattels personal, and on the other hand, from a freehold, which is realty. 92 Where a person erects buildings on leased premises under an agreement in the lease that he may remove them, or places machinery in buildings under a similar agreement, the buildings and the machinery follow the term and partake of its character as a chattel real. 93 A term for years, while denominated a chattel real, is not technically considered real estate; 94 rather it is personal property, regardless of its duration in years, 95 and passes a present interest in real property. 96

A chattel real does not ordinarily descend to the heir, but is an asset in the hands of the executor or administrator to be administered and distributed by him or her like other personal property. 97

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### Footnotes

Footnote 91. *Hyatt v Vincennes Nat'l Bank*, 113 US 408, 28 L Ed 1009, 5 S Ct 573; *Citicorp v Bank of Lansing (ND Ind)* 604 F Supp 585; *Dabney v Edwards*, 5 Cal 2d 1, 53 P2d 962, 103 ALR 822; *Intermountain Realty Co. v Allen*, 60 Idaho 228, 90 P2d 704, 122 ALR 647; *Lincoln Nat'l Bank & Trust Co. v Nathan*, 215 Ind 178, 19 NE2d 243; *Dempsey v Diederich*, 313 Ky 865, 233 SW2d 976; *Van Camp v Evans*, 306 Ky 59, 206 SW2d 38, 173 ALR 1256 (describing an oil and gas lease as a chattel real).

Rent to accrue may be treated as a chattel real. 49 Am Jur 2d, Landlord and Tenant § 677.

**Forms:** Status of chattels real fixed by agreement as personal property. 20 Am Jur Pl & Pr Forms (Rev), Property, Form 7.

Footnote 92. *Lincoln Nat'l Bank & Trust Co. v Nathan*, 215 Ind 178, 19 NE2d 243; *Dyer v Owens*, 204 Ky 59, 263 SW 663.

Footnote 93. *Hyatt v Vincennes Nat'l Bank*, 113 US 408, 28 L Ed 1009, 5 S Ct 573; *Lincoln Nat'l Bank & Trust Co. v Nathan*, 215 Ind 178, 19 NE2d 243; *Calnon v Fidelity-Phenix Fire Ins. Co.*, 114 Neb 194, 206 NW 765.

As to whether such buildings constitute "fixtures," see 35 Am Jur 2d, *Fixtures* §§ 78 et seq.

Footnote 94. *Callahan v Martin*, 3 Cal 2d 110, 43 P2d 788, 101 ALR 871; *Orchard v Wright-Dalton-Bell-Anchor Store Co.*, 225 Mo 414, 125 SW 486; *Calnon v Fidelity-Phenix Fire Ins. Co.*, 114 Neb 194, 206 NW 765; *Mayor, etc., of New York v Mabie*, 13 NY 151; *Abraham v Fioramonte*, 158 Ohio St 213, 48 Ohio Ops 159, 107 NE2d 321, 33 ALR2d 1267.

Footnote 95. *Insurance Co. v Haven*, 95 US 242, 95 Otto 242, 24 L Ed 473; *Dabney v Edwards*, 5 Cal 2d 1, 53 P2d 962, 103 ALR 822; *State v Platte Valley Public Power & Irrigation Dist.*, 147 Neb 289, 23 NW2d 300, 166 ALR 1196; *Calnon v Fidelity-Phenix Fire Ins. Co.*, 114 Neb 194, 206 NW 765; *Application for Awarding of Process of Subpoena*, 21 NJ Misc 387, 34 A2d 239.

Footnote 96. *Abraham v Fioramonte*, 158 Ohio St 213, 48 Ohio Ops 159, 107 NE2d 321, 33 ALR2d 1267.

As to whether a tenant-stockholder's interest in a cooperative apartment is considered personal property, see 15A Am Jur 2d, *Condominiums and Cooperative Apartments* § 78.

Footnote 97. *Insurance Co. v Haven*, 95 US 242, 95 Otto 242, 24 L Ed 473; *Intermountain Realty Co. v Allen*, 60 Idaho 228, 90 P2d 704, 122 ALR 647; *Application for Awarding of Process of Subpoena*, 21 NJ Misc 387, 34 A2d 239; *Janura v Fencel*, 261 Wis 179, 52 NW2d 144.

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## § 21 Things severed from real property

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As a general rule, property which is essentially real may become personal property by severance from the real property with the intent to change it to personal property. 98 Examples of things that are severable from land are shells, sand, gravel, coal and other minerals, mud, humus, topsoil, leaf mold, and other forms of dirt and soil sold and used to improve lawns and gardens. 99 Therefore, real property in the form of mineral rights or a profit a prendre is transformed into personal property when the physical substance is severed from the land. 1

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## Footnotes

Footnote 98. *Richbourg v Rose*, 53 Fla 173, 44 So 69; *Willamette Quarries, Inc. v Wodtli*, 308 Or 406, 781 P2d 1196, 107 OGR 71.

This general rule applies even where the severance has been wrongful. *Williamson v Jones*, 43 W Va 562, 27 SE 411.

Footnote 99. *Derbofen v T. L. James & Co.* (La App 4th Cir) 148 So 2d 795, 1 ALR3d 793; *Barron v Edwards*, 45 Mich App 210, 206 NW2d 508, 12 UCCRS 671 (commercially grown sod).

As to severance of trees and nursery stock, see § 16.

As to severance of manure, see § 17.

As to other examples of things which change nature after severance from real property, see 21A Am Jur 2d, Crops § 3; 38 Am Jur 2d, Gas and Oil § 3; 52 Am Jur 2d, Logs and Timber §§ 9-12; 54 Am Jur 2d, Mines and Minerals § 3; 78 Am Jur 2d, Waters § 1.

Footnote 1. *Townsend v State ex rel. State Highway Dep't*, 117 NM 302, 871 P2d 958, 128 OGR 319.

When lifted or reduced to possession, oil and gas become personal property. *Bonner v Oklahoma Rock Corp.* (Okla) 863 P2d 1176, 127 OGR 350.

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## § 22 Choses in action

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A chose in action is a personal right not reduced into possession, but recoverable by a suit at law. 2 It has been defined also as a thing of which one has only a right of possession rather than actual possession. 3 For example, a parking ticket represents a cause of action and is property, although intangible. 4

Choses in action are personal property and, although intangible, are property subject to encumbrances. 5

Consideration of the nature of a chose in action as personal property frequently involves the question of its situs for the purpose of determining the law applicable thereto in the particular case. 6

◆ Practice guide: Consideration of the nature of a chose in action as personal property frequently involves the question of its situs for the purpose of determining the law applicable in the particular case. 7 The terms "choses in actions" and "debts" are used by courts to represent the same thing when viewed from opposite sides. The chose in

action is the right of the creditor to be paid, while the debt is the obligation of the debtor to pay. 8

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## Footnotes

Footnote 2. Capital Nat'l Bank v McDonald's Corp. (SD NY) 625 F Supp 874, 42 UCCRS 1040 (construing New York law); Peavy Lumber Co. v Murchison, 272 Ala 251, 130 So 2d 338; Denver v Jones, 85 Colo 212, 274 P 924; Button v Drake, 302 Ky 517, 195 SW2d 66, 167 ALR 1046.

Footnote 3. In re Antley (BC MD Ga) 18 BR 207, 8 BCD 1229; Peavy Lumber Co. v Murchison, 272 Ala 251, 130 So 2d 338; Connelly v Special Road & Bridge Dist., 99 Fla 456, 126 So 794, 71 ALR 923; Young v Garred, 90 W Va 767, 112 SE 181, 23 ALR 1317.

There can in the nature of things be no present possession of a thing which lies merely in action. Peavy Lumber Co. v Murchison, 272 Ala 251, 130 So 2d 338.

Footnote 4. LeFevour v United States (ND Ill) 748 F Supp 579.

Footnote 5. Connelly v Special Road & Bridge Dist., 99 Fla 456, 126 So 794, 71 ALR 923; State ex rel. Coffey v District Court, 74 Mont 355, 240 P 667; Koplik v C. P. Trucking Corp., 27 NJ 1, 141 A2d 34 (ovrld in part on other grounds by Immer v Risko, 56 NJ 482, 267 A2d 481); Moore v Nassau County Dep't of Public Transp., 78 Misc 2d 1066, 357 NYS2d 652; Moore v Nassau County Dep't of Public Transp., 78 Misc 2d 1066, 357 NYS2d 652; Mueller v Rupp, 52 Wash App 445, 761 P2d 62.

However, National Labor Relations Board awards are not the "property" of the recipients until the recipients receive them. Lenz v Lenz (ND Iowa) 723 F Supp 1329, 132 BNA LRRM 2637, 114 CCH LC ¶ 11839, affd (CA8 Iowa) 915 F2d 388, 142 BNA LRRM 2785, 116 CCH LC ¶ 10326.

Footnote 6. 16 Am Jur 2d, Conflict of Laws § 43.

Footnote 7. 16 Am Jur 2d, Conflict of Laws §§ 43 et seq.

Footnote 8. Smead & Powell v D. W. Chandler & Co., 71 Ark 505, 76 SW 1066.

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## § 23 --Rights of action constituting choses in action

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The term "choses in action" is comprehensive; it includes the infinite variety of contracts, covenants, and promises which confer on one party the right to recover a personal chattel or a sum of money from another by action. 9



The term "choses in action" may be used in two senses. It is sometimes used in the broad sense of all rights of action, whether arising from a breach of contract or founded upon a wrong or tort, 10 but it is frequently used in a more limited sense, which confines it to assignable rights of action arising from a contract, 11 and perhaps arising from a breach of duty for injuries to property, 12 or for torts connected with a contract, 13 to the exclusion of a right of action *ex delicto* for personal injuries. 14

The general class of choses in action includes money due on a bond, note, or other contract, damages due for breach of contract, for the detention of chattels, or for torts, and the rights of action for recovery arising from these offenses. 15 To illustrate the comprehensiveness of the term, a chose in action may include open or unliquidated accounts, 16 bills and accounts receivable, 17 the right to receive contract payments under a contract for the sale of real property, 18 and a policy of insurance. 19 Shares of corporate stock are regarded as personal property in the nature of choses in action, 20 and the term "choses in action" may include a mortgage on real property. 21

While a right to bring an action is property regardless of whether actual or compensatory damages are involved, neither a right to punitive damages nor a right to unliquidated damages is property. 22

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## Footnotes

Footnote 9. *Mexican Nat'l R. Co. v Davidson*, 157 US 201, 39 L Ed 672, 15 S Ct 563; *Peavy Lumber Co. v Murchison*, 272 Ala 251, 130 So 2d 338.

The interest of a depositor in a checking account is an intangible chose in action, as contrasted with tangible choses in action, a term used to describe certain commercial documents, such as bonds, bills of exchange, bank checks, and promissory notes. *State v Tauscher*, 227 Or 1, 360 P2d 764, 88 ALR2d 674.

Footnote 10. *Porter v Household Fin. Corp.* (SD Ohio) 385 F Supp 336, 46 Ohio Misc 53, 75 Ohio Ops 2d 426; *Coty v Cogswell*, 100 Mont 496, 50 P2d 249.

Footnote 11. *Coty v Cogswell*, 100 Mont 496, 50 P2d 249; *Bronzo Estate*, 69 Pa D & C 390; *Gibson v Gibson*, 43 Wis 23.

As to the assignability of choses in action, see 6 Am Jur 2d, Assignments §§ 27 et seq.

Footnote 12. *Sullivan v Curling*, 149 Ga 96, 99 SE 533, 5 ALR 124, ans conformed to 24 Ga App 112, 100 SE 26; *Coty v Cogswell*, 100 Mont 496, 50 P2d 249.

Footnote 13. *Bushnell v Kennedy*, 76 US 387, 9 Wall 387, 19 L Ed 736; *Coty v Cogswell*, 100 Mont 496, 50 P2d 249; *Bronzo Estate*, 69 Pa D & C 390.

Footnote 14. *Coty v Cogswell*, 100 Mont 496, 50 P2d 249.

Footnote 15. *Mexican Nat'l R. Co. v Davidson*, 157 US 201, 39 L Ed 672, 15 S Ct 563; *First Nat'l Bank v Holland*, 99 Va 495, 39 SE 126.

Footnote 16. *Miami Coal Co. v Fox*, 203 Ind 99, 176 NE 11, 79 ALR 333.

Footnote 17. Miami Coal Co. v Fox, 203 Ind 99, 176 NE 11, 79 ALR 333.

Footnote 18. In re Freeborn, 94 Wash 2d 336, 617 P2d 424, 29 UCCRS 1625.

Footnote 19. Densby v Acacia Mut. Life Ass'n, 64 App DC 319, 78 F2d 203, 101 ALR 863; Steele v Gatlin, 115 Ga 929, 42 SE 253; Prudential Ins. Co. v Hunn, 21 Ind App 525, 52 NE 772; Spencer v Myers, 150 NY 269, 44 NE 942.

An insurance policy payable to the personal representatives or to the estate of the insured is a valid, subsisting contract which ripens immediately upon the death of the insured into a chose in action, and unless controlled by statute, the proceeds will pass, under the general statute of descent, to his or her executors or administrators for distribution. Miller v Miller, 200 Iowa 1070, 205 NW 870, 43 ALR 567 (ovrld in part on other grounds by In re Estate of Brown (Iowa) 205 NW2d 925).

As to the nature of an insurance policy, generally, see 43 Am Jur 2d, Insurance §§ 159 et seq.

Footnote 20. 18A Am Jur 2d, Corporations § 432.

Footnote 21. 55 Am Jur 2d, Mortgages § 1.

Footnote 22. Maryland Casualty Co. v Brown (ND Ga) 321 F Supp 309 (applying Georgia law).

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## **IV. TITLE; OWNERSHIP; POSSESSION; USE [24-33]**

### **Research References**

ALR Digest: Property and Property Rights §§ 13-16

ALR Index: Adverse Possession; Eminent Domain; Intangible Hereditaments or Property; Interest in Property or Subject Matter; Life Estates, Remainders, and Reversions; Lots and Parcels; Partition; Personal Property; Property; Sale and Transfer of Property; Title and Ownership

20A Am Jur Pl & Pr Forms (Rev), Property, Forms 6-8, 10, 11, 14, 15; 23A Am Jur Pl & Pr Forms (Rev), Trespass § 7

28 Am Jur POF2d 703, Permissive Possession or Use of Land; 38 Am Jur POF2d 731, Justified Use of Force in Defense of Private Property

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### **§ 24 Generally; acquisition**

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One of the essential characteristics of property is the ability to acquire it by any lawful and legitimate means. 23 Property may be acquired by descent and by purchase, 24 by

transfer or conveyance, such as devise from decedent's estate, or common sale. 25 Property may also be acquired by the operation of natural causes, as by accretion in the case of real property, 26 and in the case of personal property, by the increase of animals. 27 Property in personalty may be acquired, too, by its incorporation into or union with other property. 28

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## Footnotes

Footnote 23. *Woolf v Fuller*, 87 NH 64, 174 A 193, 94 ALR 1067.

Footnote 24. *Warner v Flack*, 278 Ill 303, 116 NE 197, 2 ALR 423; *Lynn v Rainey* (Okla) 400 P2d 805.

Footnote 25. *Luloff v Blackburn*, 274 Mont 64, 906 P2d 189; *Lynn v Rainey* (Okla) 400 P2d 805.

Footnote 26. 78 Am Jur 2d, *Waters* §§ 406 et seq.

Footnote 27. 4 Am Jur 2d, *Animals* § 10.

Footnote 28. 1 Am Jur 2d, *Accession and Confusion* § 1; 35 Am Jur 2d, *Fixtures* §§ 34 et seq.; 41 Am Jur 2d, *Improvements* § 1.

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## § 25 Title

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"Title" is the evidence of a person's right or of the extent of his interest; the means whereby the owner is enabled to maintain or assert his possession and enjoyment; the right of the owner considered with reference either to the manner in which it has been acquired, or to its capacity of being effectually transferred. 29 Title to property does not necessarily involve ownership of the property, but refers only to a legal relationship to the land, while ownership is comparable to control and denotes an interest in the real estate other than that of holding title thereto. 30

An absolute title to land is necessarily exclusive, or at least exclusive of all others not compatible with it. 31 While the right to dispose is one of the essential incidents of property, 32 it is not title, but a mere power which may be exercised. 33

◆ Definition: "Color of title" is that which gives a semblance or appearance of title, but is not the title in fact. 34

Title to real estate cannot remain in abeyance; it must be vested in someone, 35 since public policy favors certainty in title to real property, both to protect bona fide purchasers and to avoid conflicts of ownership which may engender needless litigation. 36 Legal

title to real property can be held only by a natural person or some legal entity sanctioned by law to hold such title. 37 Authentic real-estate titles which are valid on their face, properly recorded, and accompanied by delivery and continuous control by the party as owner afford potent presumptions of ownership. 38

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## Footnotes

Footnote 29. *United States v Denlinger* (CA7 Ind) 982 F2d 233, 93-1 USTC ¶ 50040, 71 AFTR 2d 93-509, reh, en banc, den (CA7) 1993 US App LEXIS 2135 and cert den 510 US 859, 126 L Ed 2d 131, 114 S Ct 171, related proceeding (ND Ind) 75 AFTR 2d 95-611, 95 TNT 15-13, app dismd (CA7 Ind) 96-2 USTC ¶ 50380, 78 AFTR 2d 96-5199 (holding that, in Indiana, record title is the highest evidence of ownership of real property); *North v Graham*, 235 Ill 178, 85 NE 267.

As to evidence admissible to prove title, see 29 Am Jur 2d, Evidence §§ 446, 648.

Footnote 30. *People v Chicago Title & Trust Co.*, 75 Ill 2d 479, 27 Ill Dec 476, 389 NE2d 540; *Azar v Old Willow Falls Condominium Ass'n* (1st Dist) 228 Ill App 3d 753, 170 Ill Dec 694, 593 NE2d 583, companion case (1st Dist) 228 Ill App 3d 750, 170 Ill Dec 692, 593 NE2d 581, app den 146 Ill 2d 626, 176 Ill Dec 796, 602 NE2d 450 and app den 146 Ill 2d 621, 176 Ill Dec 792, 602 NE2d 446; *IMM Acceptance Corp. v First Nat'l Bank & Trust Co.* (2d Dist) 148 Ill App 3d 949, 102 Ill Dec 232, 499 NE2d 1012, app den 106 Ill Dec 47, 505 NE2d 353.

Footnote 31. *Johnson v M'Intosh*, 21 US 543, 8 Wheat 543, 5 L Ed 681.

Footnote 32. § 35.

Footnote 33. *Barbin v Moore*, 85 NH 362, 159 A 409, 83 ALR 62; *Burns v Nolette*, 83 NH 489, 144 A 848, 67 ALR 1051 (superseded on other grounds by statute as stated in *Brennan v Timmins*, 104 NH 384, 187 A2d 793).

Footnote 34. *Stevenson v Owen*, 212 Mont 287, 687 P2d 1010.

Footnote 35. *Carter v Wroten*, 187 SC 432, 198 SE 13, 119 ALR 379.

Footnote 36. *In re Estate of Violi*, 65 NY2d 392, 492 NYS2d 550, 482 NE2d 29.

Footnote 37. *Krumbine v Lebanon County Tax Claim Bureau* (Pa) 663 A2d 158; *Carter v Wroten*, 187 SC 432, 198 SE 13, 119 ALR 379.

The obligation on the part of a seller of land to furnish good or marketable title is discussed in 77 Am Jur 2d, Vendor and Purchaser §§ 115 et seq.

Footnote 38. *Favaloro v Favaloro* (La App 4th Cir) 561 So 2d 783, cert den (La) 567 So 2d 1125.

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## § 26 Owner and ownership

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"Ownership" is a collection of rights to possess, to use and to enjoy property, including the right to sell and transmit it. 39 Yet the state's power to regulate is not ownership; nor does the fact that a state has regulated an object in and of itself constitute ownership. 40 The meaning of the term "owner" is varied and depends in a great measure on the manner of its use. 41 In common speech it is most often used to designate the person in whom the legal or equitable title rests, as distinguished from a mere occupant or tenant. 42 When used alone it imports an absolute owner or one who has complete dominion or plenary control of the property owned as the owner in fee of real property. 43 In some cases, de facto ownership may exist without physical possession, where there is a sufficient degree of possession, control, dominion, or supervision. 44 However, the term owner is often used to characterize the possessor of an interest less than that of absolute ownership, 45 such as a tenant for years, a tenant for life, and a remainderman in fee. 46

The owner of property is the one who, in case of its destruction, must sustain the loss of it. 47 Therefore, a person is an "owner" of property although he or she holds only the equitable title. 48

The word "owner," as used in statutes relating to real property, is one of general meaning, and may be applied to any defined interest in real property; when used in a remedial statute, it is to be construed liberally, but it is to be more strictly construed where the statute is of a penal character. 49

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## Footnotes

Footnote 39. *Energy Oils, Inc. v Montana Power Co.* (CA9 Mont) 626 F2d 731, 6 Fed Rules Evid Serv 1256, 68 OGR 255; *State ex rel. Elvis Presley International Memorial Foundation v Crowell* (Tenn App) 733 SW2d 89, 14 Media L R 1043, 2 USPQ2d 1663.

As to incidents of ownership, generally, see § 28.

Footnote 40. *United States v McClain* (CA5 Tex) 545 F2d 988, reh den (CA5 Tex) 551 F2d 52 (holding that the National Stolen Property Act could properly apply to illegal exportation of artifacts declared by Mexican law to be the property of the state).

As to the state's power to regulate ownership, see § 34.

Footnote 41. *Blumenfield v United States* (CA8 Minn) 306 F2d 892; *In re Bigham's Estate*, 227 Iowa 1023, 290 NW 11; *Beck v Council of St. Paul*, 235 Minn 56, 50 NW2d 81; *Bowers v Viereck* (CP Ct) 66 Ohio L Abs 467, 117 NE2d 717.

As applied to land, the term "owner" has no fixed meaning applicable under all circumstances, although it usually denotes a fee simple estate, but it may also include one who has the usufruct, control, or occupation of land with a claim of ownership, whether his or her interest be an absolute fee or a lesser estate. *People v Chicago Title & Trust Co.*, 75 Ill 2d 479, 27 Ill Dec 476, 389 NE2d 540.

Footnote 42. Graf v State, 118 Neb 485, 225 NW 466.

Incidents of ownership of a chose in action are the rights or privileges to deal with it as one may deal with his own property. In re Weninger (BC DC Colo) 119 BR 238, 7 Colo Bankr Ct Rep 260, 71A AFTR 2d 93-4760, 93 TNT 254-20.

Footnote 43. United States v MPM Contractors, Inc. (DC Kan) 763 F Supp 488, 33 Env't Rep Cas 1157; In re Bigham's Estate, 227 Iowa 1023, 290 NW 11; T. W. Spinks Co. v Pachoud Bros., 263 Ky 119, 92 SW2d 50; Ramsey v Leeper, 168 Okla 43, 31 P2d 852.

Footnote 44. United States v MPM Contractors, Inc. (DC Kan) 763 F Supp 488, 33 Env't Rep Cas 1157.

Footnote 45. United States Nat'l Bank v Lake Superior T. & T. R. Co., 170 Wis 539, 174 NW 923.

Footnote 46. T. W. Spinks Co. v Pachoud Bros., 263 Ky 119, 92 SW2d 50; Ramsey v Leeper, 168 Okla 43, 31 P2d 852.

Footnote 47. Automobile Underwriters, Inc. v Tite, 119 Ind App 251, 85 NE2d 365; T. W. Spinks Co. v Pachoud Bros., 263 Ky 119, 92 SW2d 50; Ramsey v Leeper, 168 Okla 43, 31 P2d 852; American Motors Corp. v Kenosha, 274 Wis 315, 80 NW2d 363, aff'd 356 US 21, 2 L Ed 2d 578, 78 S Ct 559, reh den 357 US 912, 2 L Ed 2d 1163, 78 S Ct 1147.

Footnote 48. Godwin v Gerling, 362 Mo 19, 239 SW2d 352, 40 ALR2d 1250; Imperial Fire Ins. Co. v Dunham, 117 Pa 460, 12 A 668.

As to what constitutes sufficient ownership to amount to an "insurable interest," see 43 Am Jur 2d, Insurance § 943.

Footnote 49. Schram v Manary, 123 Or 354, 260 P 214, mod on reh on another point 123 Or 368, 262 P 263.

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## § 27 --Incidents of ownership

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Ownership of property implies the right of possession and control, 50 although the use and ownership of property are distinct and separate; the right to use property is just one of the several rights incident to ownership. 51 Ownership includes the right to protect and defend such possession against the intrusion or trespass of others, 52 and gives the owner the right and ability to limit any obstructions from being placed on the land. 53

Implicit in the concept of ownership of property is the right to exclude others; that is, a true owner of land exercises full dominion and control over it and possesses the right to

expel intruders. 54 An owner's right to the exclusive possession of his or her property is such that, subject to certain conditions, he or she may be absolved from criminal liability for acts done in repelling or ousting an intruder or trespasser. 55

As one of its incidents, the ownership of property carries with it, at law and in equity, the right to its products or increase. 56 The interest of the landowner in exclusive possession extends above and below the surface of the property. 57 Thus, the landowner may recover for trespass committed by explosions or blasting operations 58 or by other operations designed to undermine his or her property. 59

Ownership rights in tangible personal property include a right to prohibit the attachment of devices thereto, or to retain authority to decide whether such attachment may be made. 60

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## Footnotes

Footnote 50. *Green v Biddle*, 21 US 1, 8 Wheat 1, 5 L Ed 547; *Ablah v Eyman*, 188 Kan 665, 365 P2d 181, 90 ALR2d 766; *Anderson v Courtney*, 203 Okla 71, 218 P2d 361.

When two parties claim ownership of property in dispute, the right of possession depends on ownership, and it is presumed that the owner is entitled to possession. *Rick v Boegel* (Iowa) 205 NW2d 713.

Footnote 51. *John Wanamaker, Philadelphia v School Dist.*, 441 Pa 567, 274 A2d 524.

Possession is a frequent incident, not the sine qua non of ownership. *United States v McClain* (CA5 Tex) 545 F2d 988, reh den (CA5 Tex) 551 F2d 52.

Footnote 52. *Green v Biddle*, 21 US 1, 8 Wheat 1, 5 L Ed 547; *Edwards v Sims*, 232 Ky 791, 24 SW2d 619, appeal after remand 250 Ky 166, 61 SW2d 1049, appeal after remand 265 Ky 418, 96 SW2d 1028; *Zabowski v Loerch*, 255 Mich 125, 237 NW 386; *Bunten v Davis*, 82 NH 304, 133 A 16, 45 ALR 1409.

A person is entitled to shoot a protected game animal when the shooting is reasonably necessary to protect his or her property from deprivation at the time of the killing, and where he or she has used every remedy available to him or her before killing the animal. The right to protect property is a constitutional right under the Constitution of Wyoming, notwithstanding the absence of an express provision therein to that effect. *Cross v State* (Wyo) 370 P2d 371, 93 ALR2d 1357.

**Annotation:** Right to kill game in defense of person or property, 93 ALR2d 1366.

**Practice References** 38 Am Jur POF2d 731, Justified Use of Force in Defense of Private Property.

**Forms:** Instruction to jury—Defining and distinguishing "trespasser" and "licensee." 20A Am Jur Pl & Pr Forms (Rev), Property, Form 8.

Judgment or decree—Directing removal of encroaching wall and awarding costs. 20A Am Jur Pl & Pr Forms (Rev), Property, Form 15.

Footnote 53. 8,960 Square Feet v Department of Transp. & Pub. Facilities (Alaska) 806 P2d 843, 7 ALR5th 1004.

Footnote 54. *Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419, 73 L Ed 2d 868, 102 S Ct 3164, 8 Media L R 1849, on remand 58 NY2d 143, 459 NYS2d 743, 446 NE2d 428, reh den 59 NY2d 761 and later proceeding (1st Dept) 135 App Div 2d 444, 522 NYS2d 543, app den 71 NY2d 802, 527 NYS2d 768, 522 NE2d 1066 and cert den 488 US 827, 102 L Ed 2d 55, 109 S Ct 78 and (criticized on other grounds as stated in *Seawall Associates v New York*, 74 NY2d 92, 544 NYS2d 542, 542 NE2d 1059); *United States v Pueblo of San Ildefonso*, 206 Ct Cl 649, 513 F2d 1383, 41 ALR Fed 405, later proceeding 227 Ct Cl 265, 647 F2d 1087, cert den 456 US 1006, 73 L Ed 2d 1300, 102 S Ct 2296, later proceeding 16 Cl Ct 139.

A possessory interest in real property must include the general right to exclude others. *Opinion of Justices*, 365 Mass 681, 313 NE2d 561.

**Forms:** Complaint, petition, or declaration—Trespass to real property—General form. 23A Am Jur Pl & Pr Forms (Rev), Trespass § 7.

Footnote 55. 6 Am Jur 2d, Assault and Battery §§ 81, 167; 40 Am Jur 2d, Homicide §§ 180 et seq.

Footnote 56. *Nunez v Wainoco Oil & Gas Co.* (La App 1st Cir) 477 So 2d 1149, 88 OGR 54, set aside, summary judgment gr (La) 488 So 2d 955, 91 OGR 246, cert den and app dismd 479 US 925, 93 L Ed 2d 345, 107 S Ct 391, companion case (La App 3d Cir) 606 So 2d 1320, cert den (La) 608 So 2d 1010; *Rush v Vought*, 55 Pa 437.

As to an increase in animals, see 4 Am Jur 2d, Animals § 10.

As to an increase in crops, see 21A Am Jur 2d, Crops §§ 7 et seq.

Footnote 57. *Steiger v Nowakowski*, 67 Wis 2d 355, 227 NW2d 104.

For a discussion of the rule that "land" extends from the surface downward to the center of the earth and upward indefinitely to the skies, see § 12.

Footnote 58. 31 Am Jur 2d, Explosions and Explosives §§ 35 et seq.

Footnote 59. *Steiger v Nowakowski*, 67 Wis 2d 355, 227 NW2d 104 (pointing out that where plaintiff's neighbors, who apparently developed antipathy to a two-foot retaining wall built by plaintiffs on their land, dug a ditch alongside the wall, plugged the ends of the ditch with stones, and diverted rainwater into the ditch, resulting in the erosion of the soil beneath the wall and its partial collapse, the fact that it was water instead of TNT which caused the damage to the soil underneath the wall did not change the fact that an intended act of physical trespass had occurred).

Footnote 60. *Polytechnic Data Corp. v Xerox Corp.* (ND Ill) 362 F Supp 1, 1973-2 CCH Trade Cases ¶ 74660 (attachment of device for controlling and measuring work on copying machines to such machines owned and leased by manufacturer); *Illinois Bell Tel. Co. v Miner* (2d Dist) 11 Ill App 2d 44, 136 NE2d 1 (use of plastic covers on



telephone directories owned by telephone company).

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## § 28 Possession

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Possession can be actual or constructive. 61

Actual possession, as distinguished from constructive possession, means an actual and continuous occupancy or exercise of full dominion which may be an occupancy in fact of the whole that is in possession and may be called substantial possession. 62 However, with respect to land, record title is the highest evidence of ownership, and while such title may be defeated by adverse possession, mere possession is the lowest evidence of ownership. 63 To have legal possession of real property, a person must have sufficient control to enjoy the exclusive right to the use of the property. 64

Possession of personal property involves the power to control and the intent to control. 65 In the case of personal property, possession is the visible possibility of exercising physical control over such property and has three attributes: (1) actual or potential physical control; (2) intention to exercise dominion; and (3) external manifestations of intent and control. 66 Possession of personal property is prima facie evidence of ownership, it is only prima facie evidence of title and must yield to actual title. 67

Properly speaking, constructive possession is that possession which the law annexes to the title. 68 Constructive possession means being in a position to exercise dominion or control over a thing; 69 such dominion and control need not be exclusive, but may be shared with others. 70 Constructive possession has been said to be a legal conclusion derived from factual evidence that someone who does not have physical possession of a thing in fact has legal possession of that thing. 71 Hence, constructive possession is sometimes called legal possession, or possession in law, to distinguish it from possession in deed or in fact, which actual occupancy gives. 72

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### Footnotes

Footnote 61. *United States v Thomas* (CA6 Mich) 497 F2d 1149.

Footnote 62. *Baehr v Penn-O-Tex Oil Corp.*, 258 Minn 533, 104 NW2d 661; *Jackson v Rothschild* (Mo App) 99 SW2d 859; *Shellenberger v Hicks* (Okla) 370 P2d 292, 17 OGR 554; *Lieberman, Loveman & O'Brien v Clark*, 114 Tenn 117, 85 SW 258; *Gibson v St. Paul Fire & Marine Ins. Co.*, 117 W Va 156, 184 SE 562.

One cultivating and raising crops upon land is in actual possession of it, even though he does not live upon it. *Gross v Robinson*, 36 Wyo 392, 256 P 80, 57 ALR 578.

Footnote 63. *Estate of Mark v H.H. Smith Co.* (Ind) 547 NE2d 796.

Footnote 64. *United States v Jackson County* (WD Mo) 696 F Supp 479, 34 CCF ¶ 75520.

Therefore, seasonal hunting by the public on a disputed tract was inadequate to establish corporeal possession by the state or to usurp possession. *Todd v State* (La App 1st Cir) 422 So 2d 1353, *revid* on other grounds (La) 456 So 2d 1340, *adhered to* (La) 465 So 2d 712 and *on reh* (La) 474 So 2d 430.

Footnote 65. *United States v Angelini* (CA9 Cal) 607 F2d 1305.

Footnote 66. *Radke v State* (Crim App) 52 Ala App 397, 293 So 2d 312, *affd* 292 Ala 290, 293 So 2d 314.

When one joint owner is in possession of the whole, the presumption is that he or she is keeping possession not only for herself or himself, but for his or her cotenant, according to their several rights. 3 Am Jur 2d, *Adverse Possession* §§ 173 et seq.

One having the mere custody, as distinguished from the legal possession, of another's personalty may commit larceny of it. 50 Am Jur 2d, *Larceny* §§ 89 et seq.

Footnote 67. *Hinkle v Perry*, 296 Ark 114, 752 SW2d 267.

Footnote 68. *National Safe Deposit Co. v Stead*, 232 US 58, 58 L Ed 504, 34 S Ct 209, 3 AFTR 2892; *Baehr v Penn-O-Tex Oil Corp.*, 258 Minn 533, 104 NW2d 661; *Harris v Paul* (Cuyahoga Co) 37 Ohio App 206, 9 Ohio L Abs 201, 174 NE 615, *motion overr.*

Footnote 69. *United States v Di Novo* (CA7 Ind) 523 F2d 197, *cert den* 423 US 1016, 46 L Ed 2d 387, 96 S Ct 449; *United States v Holland*, 144 US App DC 225, 445 F2d 701.

Footnote 70. *United States v Davis* (CA3 Pa) 461 F2d 1026; *United States v Di Novo* (CA7 Ind) 523 F2d 197, *cert den* 423 US 1016, 46 L Ed 2d 387, 96 S Ct 449.

**Practice References** General principles—Permissive possession of land. 28 Am Jur POF2d 703, *Permissive Possession or Use of Land* § 2.

Footnote 71. *Rosado v Martinez* (DC Puerto Rico) 369 F Supp 477 (criminal prosecution for possession of narcotics).

Footnote 72. *Baehr v Penn-O-Tex Oil Corp.*, 258 Minn 533, 104 NW2d 661; *Jackson v Rothschild* (Mo App) 99 SW2d 859.

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## § 29 --Constructive possession of real property

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The holder of a valid deed to real estate, whether it is a tax deed or a deed from the owner

himself, impliedly and constructively has the possession of the property described in the deed, 73 even if the land is vacant. 74 In other words, actual occupancy or residence upon the property is not a necessary element of possession. 75 Yet one who possesses corporeally only part of a tract to which he or she has title is considered constructively to possess the rest, although one may possess corporeally without title. 76 This rule applies to wild land 77 and to unimproved and unoccupied land. 78 However, the acts of possession required to establish possessory title to a woodland tract under one state's law are less than if the land were developed. 79

With respect to real estate, one may lose constructive possession by the usurpation of possession by one who possesses corporeally. 80

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## Footnotes

Footnote 73. *Borden v Westport*, 112 Conn 152, 151 A 512; *Baehr v Penn-O-Tex Oil Corp.*, 258 Minn 533, 104 NW2d 661; *State v Rosenquist*, 78 ND 671, 51 NW2d 767; *Harris v Paul (Cuyahoga Co)* 37 Ohio App 206, 9 Ohio L Abs 201, 174 NE 615, motion overr; *Glenrock v Abadie*, 71 Wyo 414, 259 P2d 766, 2 OGR 1441, reh den 72 Wyo 111, 262 P2d 393, 3 OGR 227.

Footnote 74. *Kizzire v Sarkeys (Okla)* 361 P2d 1082.

Footnote 75. *Boatmen's Nat'l Bank v Dandy (Mo App)* 804 SW2d 783.

Footnote 76. *Dufrene v Chouest (La App 1st Cir)* 499 So 2d 318, cert den (La) 503 So 2d 19.

Footnote 77. *Gilb v Alabama Mineral Land Co.*, 292 Ala 54, 288 So 2d 771.

Footnote 78. *Gilb v Alabama Mineral Land Co.*, 292 Ala 54, 288 So 2d 771.

Unoccupied land is presumed to be in the constructive possession of the true owner or the party with the better title. *Shilts v Young (Alaska)* 567 P2d 769, revd on other grounds (Alaska) 643 P2d 686.

Footnote 79. *United States v 125.07 Acres of Land (DC Mass)* 753 F Supp 1034.

Footnote 80. *Dufrene v Chouest (La App 1st Cir)* 499 So 2d 318, cert den (La) 503 So 2d 19.

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## § 30 --Constructive possession of personal property

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One may have possession of a chattel, even in the absence of actual personal custody, if the chattel is under his or her control and in a place where it must have been put by his

act or in his or her behalf, or where the chattel is within his or her power in such a sense that he or she can and does command its use. 81 The property right in chattels draws after it the right of possession. 82 If the owner of land sells personal property situated on his land, the vendee thereby obtains an implied license to enter the premises and take possession of and remove the property; in such case, the license is coupled with and supported by a valid interest or title in the property sold, and this cannot be revoked. 83

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## Footnotes

Footnote 81. *State v Woodman*, 119 Kan 679, 240 P 566; *State v Russo*, 127 Me 313, 143 A 99; *New England Box Co. v C & R. Const. Co.*, 313 Mass 696, 49 NE2d 121, 150 ALR 152; *State v Meyers*, 190 NC 239, 129 SE 600.

Footnote 82. *Howell v J. Mandelbaum & Sons*, 160 Iowa 119, 140 NW 397; *Jackson v Rothschild* (Mo App) 99 SW2d 859; *Security Ins. Co. v Sellers-Sammons-Signor Motor Co.* (Tex Civ App) 235 SW 617, writ ref.

Footnote 83. *Vallejo v Burrill*, 64 Cal App 399, 221 P 676; *Giles v Simonds*, 81 Mass 441, 15 Gray 441.

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## § 31 Limitations on use

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Every landowner has the right to use and enjoy his or her property as he sees fit, but such use must be reasonable and must not cause unnecessary harm to or invade the rights of others. 84 Property in land or in anything else must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations necessary for the highest enjoyment of property by the entire community of proprietors. 85 In other words, property is held under the implied obligation that the owner will use it in such a way as not to be injurious to the community. 86 Thus, an owner of land will not be permitted to use it in such a way that it serves no purpose other than to damage his or her neighbor. 87

◆ Illustration: Landowners who dug a ditch on their property, alongside a retaining wall on plaintiff's property, plugged the ends of the ditch with stones and diverted rainwater into the ditch, for no other reason but to erode the soil under the wall, causing its collapse, because they objected to the presence of the wall, were guilty of trespass. 88 Any claim of restrictions and limitations in the use of property must be clearly established. 89

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## Footnotes

Footnote 84. *Des Moines v Manhattan Oil Co.*, 193 Iowa 1096, 184 NW 823, 23 ALR 1322, supp op, reh overr 193 Iowa 1117, 188 NW 921, 23 ALR 1337; *Martin v Weckerly* (ND) 364 NW2d 93; *Appeal of Perrin*, 305 Pa 42, 156 A 305, 79 ALR 912; *Heckert v Patrick* (1984 Ohio) 472 NE2d 1204.

An uphill landowner is subject to liability for harm caused to a downhill landowner from natural conditions on the uphill landowner's property. *Sprecher v Adamson Companies*, 30 Cal 3d 358, 178 Cal Rptr 783, 636 P2d 1121.

**Forms:** Instructions to jury—Owner's liability for injuries from dangerous instrumentalities on property. 20A Am Jur Pl & Pr Forms (Rev), Property, Form 10.

Instructions to jury—Landowner's duty to prevent injury to passersby—From defective structure located on owner's property. 20A Am Jur Pl & Pr Forms (Rev), Property, Form 11.

Footnote 85. *Hibbard v Halliday*, 58 Okla 244, 158 P 1158; *Menger v Pass*, 367 Pa 432, 80 A2d 702, 24 ALR2d 562; *Wilcox v Hines*, 100 Tenn 538, 46 SW 297; *State v Dexter*, 32 Wash 2d 551, 202 P2d 906, 13 ALR2d 1081, affd 338 US 863, 94 L Ed 529, 70 S Ct 147.

Footnote 86. *Balent v City of Wilkes-Barre* (Pa) 669 A2d 309.

Footnote 87. *Hornsby v Smith*, 191 Ga 491, 13 SE2d 20, 133 ALR 684.

Footnote 88. *Steiger v Nowakowski*, 67 Wis 2d 355, 227 NW2d 104.

**Forms:** Complaint—Liability of landowner for excavations on his premises causing flooding of adjoining land. 20A Am Jur Pl & Pr Forms (Rev), Property, Form 6.

Footnote 89. *Wiggins v Young*, 206 Ga 440, 57 SE2d 486, 13 ALR2d 1237; *Thompson v Glenwood Community Club*, 191 Ga 196, 12 SE2d 623.

As to restrictive covenants generally, see 20 Am Jur 2d, Covenants, Conditions, and Restrictions.

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## § 32 --Liability for drilling, vibrations, and the like

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Generally, the owner of real property may be liable for injuries caused to the persons or property of others who are not injured on the defendant's premises, but are injured while outside such premises by some defect, instrumentality, or substance on defendant's property. 90 However, the courts are not in agreement with respect to the right to recover for damage to property attributable to vibrations from pneumatic drills or other machinery used to break up street or other pavements; while some courts permit recovery, 91 others do not. 92 Similarly, courts disagree as to whether recovery is

allowed for damage caused by vibrations produced by various kinds of heavy machinery on an owner's property, with some permitting recovery, 93 and other courts disallowing it; 94 and there is disagreement as to whether recovery may be permitted for vibrations produced by other machines or in another manner. 95 Where damages to property were sought because of the effect of vibrations produced by piledrivers, or the like, recovery has generally been upheld, 96 but circumstances may dictate a different result. 97

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## Footnotes

Footnote 90. 62A Am Jur 2d, Premises Liability §§ 737 et seq.

As to liability for injury to another on one's property, generally, see 62 Am Jur 2d, Premises Liability §§ 6 et seq.

As to other uses of one's property which may give rise to liability to third persons, see 1 Am Jur 2d, Adjoining Landowners §§ 9 et seq.; 4 Am Jur 2d, Animals; 7A, 8 Am Jur 2d, Automobiles and Highway Traffic; 8 Am Jur 2d, Aviation; 13 Am Jur 2d, Buildings; 13, 14 Am Jur 2d, Carriers; 31 Am Jur 2d, Explosions and Explosives; 35 Am Jur 2d, Fences; 35 Am Jur 2d, Fires; 38 Am Jur 2d, Gas and Oil; 39 Am Jur 2d, Highways, Streets, and Bridges; 52 Am Jur 2d, Logs and Timber; 54 Am Jur 2d, Mines and Minerals; 57 Am Jur 2d Negligence; 58 Am Jur 2d, Nuisances; 61A Am Jur 2d, Pollution Control; 78 Am Jur 2d, Waters.

Footnote 91. Savannah Asphalt Co. v Blackburn, 96 Ga App 113, 99 SE2d 511 (recovery allowed); Macer v O'Brien, 356 Ill 486, 190 NE 904 (recovery allowed); Acton Mfg. Co. v George M. Myers, Inc., 182 Kan 364, 320 P2d 840 (recovery allowed); Piontek v Joseph Perry, Inc., 342 Mass 342, 173 NE2d 292 (recovery allowed).

Use of a derrick to drop boulders onto a patio across the street from plaintiff's house in order to demolish it, causing vibration damage to plaintiff's house, constituted actionable negligence. Piontek v Joseph Perry, Inc., 342 Mass 342, 173 NE2d 292.

**Forms:** Instruction to jury—Owner's liability for damage caused by escape of dangerous substance from property. 20A Am Jur Pl & Pr Forms (Rev), Property, Form 7.

Footnote 92. Tadin v New Orleans Public Service, Inc., 226 La 629, 76 So 2d 910 (recovery not allowed); Hearsey v New Orleans (La App) 192 So 148 (disapproved on other grounds by Legendre v Boh Bros. Constr. Co. (La App 4th Cir) 268 So 2d 514) (recovery not allowed).

**Annotation:** Liability for property damage caused by vibrations, or the like, without blasting or explosion, 79 ALR2d 966.

Footnote 93. Fendley v Anaheim, 110 Cal App 731, 294 P 769 (recovery allowed); Cunningham v Wilmington Ice Mfg. Co., 32 Del 229, 121 A 654 (recovery allowed); Meyer v Kemper Ice Co., 180 La 1037, 158 So 378 (recovery allowed); Piontek v Joseph Perry, Inc., 342 Mass 342, 173 NE2d 292 (recovery allowed).

Footnote 94. Grzelka v Chevrolet Motor Car Co., 286 Mich 141, 281 NW 568 (recovery

not allowed); *Daly v Earl W. Baker & Co.* (Okla) 271 P2d 1114 (recovery not allowed).

Footnote 95. *Pueblo v Mace*, 132 Colo 89, 285 P2d 596 (recovery allowed); *Indiana Limestone Co. v Murphy*, 93 Ind App 76, 177 NE 350 (recovery allowed); *Ockman v T. L. James & Co.* (La App 4th Cir) 124 So 2d 778 (recovery allowed); *Krodinger v Citizens' Bank of Maplewood* (Mo App) 300 SW 311 (recovery allowed); *Trent v New York*, 286 App Div 479, 144 NYS2d 625 (recovery not allowed); *Ellison v Walker* (Okla) 281 P2d 931, 4 OGR 871 (recovery allowed).

The owner of a reasonably constructed building could recover for vibration damage to the building following the rerouting of heavy buses onto a street not designed for such weight. *D'Amico v New Orleans Public Service, Inc.* (La App 4th Cir) 348 So 2d 116, cert den (La) 350 So 2d 1214 and cert den (La) 350 So 2d 1214.

A cause of action for damages was stated where it was alleged that plaintiffs' property, including their home and dairy herd located near defendant's combustion turbine facility, was damaged by low frequency sound waves. *Frady v Portland General Electric Co.*, 55 Or App 344, 637 P2d 1345.

**Forms:** Judgment or decree—Enjoining blasting operations injuring property of adjoining landowner—Awarding damages for past injuries. 20A Am Jur Pl & Pr Forms (Rev), Property, Form 14.

Footnote 96. *Caporale v C. W. Blakeslee & Sons, Inc.*, 149 Conn 79, 175 A2d 561; *Richmond County v Williams*, 109 Ga App 670, 137 SE2d 343; *Divicent v Sanderson*, 239 La 51, 117 So 2d 907; *Sachs v Chiat*, 281 Minn 540, 162 NW2d 243; *Petillo v Kennedy & Smith, Inc.*, 263 App Div 821, 31 NYS2d 481.

A piledriver operating in the vicinity of frail and unsubstantial structures should restrain or mask the thunderous blows to the extent necessary to avoid inflicting avoidable damage, and the fact that a piledriver itself does not come into physical contact with nearby houses does not exonerate an operator who ignores the presence of dwellings within the periphery of its vibrations. *Dussell v Kaufman Constr. Co.*, 398 Pa 369, 157 A2d 740, 79 ALR2d 957.

Footnote 97. *Ted's Master Service, Inc. v Farina Bros. Co.*, 343 Mass 307, 178 NE2d 268 (holding that plaintiff failed to sustain burden, on negligence counts, of proving that cracks in their buildings resulting from defendant's pile-driving operations were caused by a breach of legal duty, where there was no evidence that defendant had reason to anticipate that vibrations would reach plaintiffs' buildings; fact that defendant did not include plaintiffs' buildings in its preliminary survey does not warrant finding of negligence without a showing of a custom to make such surveys).

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### § 33 Governmental control and regulation of use

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Although the concept of a citizen's right, absent unusual circumstances, to the unobstructed control of his own land, free from arbitrary governmental interference, has long been a fundamental principle in American jurisprudence, 98 the courts recognize that in order to assure that no man may use his property so as to injure another, 99 the power rests in the state to so regulate and control the use of property as to secure the general safety, the public welfare, and the peace, good order, and morals of the community. 1 In the proper exercise of this power, property rights are subject to such regulation as the legislature may in its wisdom see fit to impose, consistent with the United States Constitution. 2

This rule does not confer power to control rights which are purely and exclusively private, but it does authorize the establishment of laws requiring each citizen to conduct himself and use his own property so as not unnecessarily to injure another. 3 This power of government—commonly called the police power—is essential, and is comprehensive in its extent. 4

The state may provide regulations as to the acquisition, enjoyment, and disposition of property. 5 The power extends to intangible, as well as to tangible, property. 6 In fact, all property is presumably within a state's police power; thus, a state may prohibit the sale of firearms to convicted felons, it may regulate the price charged for electric power, it may prohibit the use of a privately owned manufacturing plant in a racially discriminatory manner, or the like. 7 However, since the right of property is a fundamental right, its protection, as well as its use, is one of the most important objects of government. 8 A limitation imposed under this power without reason or necessity cannot be enforced; 9 and in the exercise of it, the state cannot prohibit altogether any person whatever from legally acquiring and possessing property generally, or any particular species or description of property. 10

The state, within constitutional limitations, cannot only regulate the acquisition, enjoyment, and disposition of property, but it may also take private property for a public purpose, subject to the right of the individuals to receive just compensation. 11 However, the rights of a property owner to the lawful use of his or her property may not be indefinitely deferred upon the ground that the property might, at some future time, be required for public use. 12

Since, theoretically, ownership of land extends indefinitely downward to the center of the earth and upward from the surface to the sky, 13 the courts cannot limit the extent, up or down, to which a person may enjoy his or her property; and if an owner goes higher than a neighbor, so long as he or she does not interfere with the rights of others or injure the neighbor, the owner is subject to no liability. 14 An owner's property rights in this respect can be modified or restricted only by the lawmaking power, in the exercise of the police power or the power of eminent domain. 15

Property is subject to certain burdens which it must bear in common with other property of a like kind. Thus, the owner's rights as to abutting property are subject to the paramount right of the public. 16 An owner of riparian lands has, as incident to his or her ownership, certain rights and privileges in the riparian waters, but these must be enjoyed subject to the paramount rights of the public and the rights of other owners of riparian lands. 17 The rights of ownership are also subject to limitation in the case of health legislation and regulation. 18 Thus, ownership of real property does not include the right to bar access to governmental services available to migrant workers. 19



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## Footnotes

Footnote 98. *Reece v Scoggins* (CA5 Ga) 506 F2d 967, 75-1 USTC ¶ 9202, 35 AFTR 2d 75-620, 26 ALR Fed 374.

Footnote 99. § 31.

Footnote 1. *State v Picciochi*, 16 Ohio Misc 196, 45 Ohio Ops 2d 147, 241 NE2d 407; *State v Dexter*, 32 Wash 2d 551, 202 P2d 906, 13 ALR2d 1081, affd 338 US 863, 94 L Ed 529, 70 S Ct 147.

The law may condition the use and enjoyment of property rights so that the interests of the public in general are not unduly prejudiced. *Goulding v Cook*, 422 Mass 276, 661 NE2d 1322.

Footnote 2. *Nebbia v New York*, 291 US 502, 78 L Ed 940, 54 S Ct 505, 89 ALR 1469; *Munn v Illinois*, 94 US 113, 94 Otto 113, 24 L Ed 77; *Schiller Piano Co. v Illinois Northern Utilities Co.*, 288 Ill 580, 123 NE 631, 11 ALR 454; *Ackerman v Port of Seattle*, 55 Wash 2d 400, 348 P2d 664, 77 ALR2d 1344 (ovrld on other grounds as stated in *Highline School Dist. v Port of Seattle*, 87 Wash 2d 6, 548 P2d 1085) (holding that the ownership of private property and the right to the free use and enjoyment thereof are protected by fundamental principles of law, subject to the authority of the government and controlled by constitutional safeguards, to regulate the use and utilization of private property for the promotion of the public welfare); *State v Dexter*, 32 Wash 2d 551, 202 P2d 906, 13 ALR2d 1081, affd 338 US 863, 94 L Ed 529, 70 S Ct 147; *Christensen v Mann*, 187 Wis 567, 204 NW 499, 41 ALR 1192.

Footnote 3. *Walls v Midland Carbon Co.*, 254 US 300, 65 L Ed 276, 41 S Ct 118; *Des Moines v Manhattan Oil Co.*, 193 Iowa 1096, 184 NW 823, 23 ALR 1322, supp op, reh overr 193 Iowa 1117, 188 NW 921, 23 ALR 1337.

The state is not required by the Constitution of the United States to stand idly by while its natural resources are depleted. *State v Dexter*, 32 Wash 2d 551, 202 P2d 906, 13 ALR2d 1081, affd 338 US 863, 94 L Ed 529, 70 S Ct 147.

Footnote 4. 16A Am Jur 2d, Constitutional Law § 364.

Footnote 5. *McDaniel v McElvy*, 91 Fla 770, 108 So 820, 51 ALR 731; *Schiller Piano Co. v Illinois Northern Utilities Co.*, 288 Ill 580, 123 NE 631, 11 ALR 454; *Park v State*, 42 Nev 386, 178 P 389, 3 ALR 75.

Footnote 6. *Security Sav. Bank v California*, 263 US 282, 68 L Ed 301, 44 S Ct 108, 31 ALR 391.

Footnote 7. *United States v McClain* (CA5 Tex) 545 F2d 988, reh den (CA5 Tex) 551 F2d 52.

Footnote 8. *Pennsylvania Coal Co. v Mahon*, 260 US 393, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321 (among conflicting authorities on other grounds noted in *Orion Corp. v State*, 109 Wash 2d 621, 747 P2d 1062, 18 ELR 20697) and (criticized on other grounds

as stated in *Southeast Cass Water Resource Dist. v Burlington N. R.R.* (ND) 527 NW2d 884); *Schiller Piano Co. v Illinois Northern Utilities Co.*, 288 Ill 580, 123 NE 631, 11 ALR 454; *Ackerman v Port of Seattle*, 55 Wash 2d 400, 348 P2d 664, 77 ALR2d 1344 (ovrld on other grounds as stated in *Highline School Dist. v Port of Seattle*, 87 Wash 2d 6, 548 P2d 1085).

Footnote 9. *Washington ex rel. Seattle Title Trust Co. v Roberge*, 278 US 116, 73 L Ed 210, 49 S Ct 50, 86 ALR 654; *Curran Bill Posting & Distributing Co. v Denver*, 47 Colo 221, 107 P 261; *Spann v Dallas*, 111 Tex 350, 235 SW 513, 19 ALR 1387.

Where an individual, either for profit or otherwise, uses his or her private property for a humane and lawful purpose, and where a state regulating authority makes no initial and conclusive showing that such use adversely affects the public welfare, no grounds of enforcement by such regulatory authority exists. *State v Picciochi*, 16 Ohio Misc 196, 45 Ohio Ops 2d 147, 241 NE2d 407.

Footnote 10. 16A Am Jur 2d, Constitutional Law § 397.

Footnote 11. 26 Am Jur 2d, Eminent Domain § 2.

Footnote 12. *St. Morris Associates v McMorran* (2d Dept) 35 App Div 2d 997, 318 NYS2d 121.

Footnote 13. § 12.

Footnote 14. *Ackerman v Port of Seattle*, 55 Wash 2d 400, 348 P2d 664, 77 ALR2d 1344 (ovrld on other grounds as stated in *Highline School Dist. v Port of Seattle*, 87 Wash 2d 6, 548 P2d 1085).

Footnote 15. *Hopkins v United States* (DC Tex) 173 F Supp 245; *United States v 15909 Acres* (DC Cal) 176 F Supp 447; *Wright v United States*, 150 Ct Cl 386, 279 F2d 517; *Anderson v Port of Seattle*, 49 Wash 2d 528, 304 P2d 705; *Christensen v Mann*, 187 Wis 567, 204 NW 499, 41 ALR 1192.

Military flight training at an altitude of 600 feet above plaintiff's land, causing regular and severe noise on plaintiff's land, constitutes the taking of an easement for which plaintiff was entitled to compensation, despite the Federal Government's plenary power to regulate airspace. *Branning v United States*, 228 Ct Cl 240, 654 F2d 88, transf to 6 Cl Ct 618, later proceeding 7 Cl Ct 777, affd (CA FC) 784 F2d 361.

Footnote 16. 39 Am Jur 2d, Highways, Streets, and Bridges § 365.

Footnote 17. 78 Am Jur 2d, Waters § 262.

Footnote 18. 39 Am Jur 2d, Health § 20.

Footnote 19. *State v Shack*, 58 NJ 297, 277 A2d 369, 77 BNA LRRM 2408 (medical and legal services).

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## **V. EXTINGUISHMENT OR LOSS; ALIENATION AND TRANSFER**

**Research References**

ALR Digest: Property and Property Rights §§ 1, 13 et seq.

ALR Index: Adverse Possession; Eminent Domain; Intangible Hereditaments or Property; Interest in Property or Subject Matter; Life Estates, Remainders, and Reversions; Lots and Parcels; Partition; Personal Property; Property; Sale and Transfer of Property; Title and Ownership

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**§ 34 Theft of personal property as affecting owner's title and rights**

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The theft of goods or chattels does not divest one who owns, or has title to, such property from his or her ownership of the property, 20 since one cannot make good title to that which he or she does not own. 21 The owner may follow and reclaim the stolen goods wherever he or she may find them, 22 even if such goods have been changed or improved. 23 If possession of the stolen goods by an innocent subsequent purchaser may be deemed lawful, it is rendered unlawful by his or her refusal to honor a demand by the true owner for their possession. 24 Even though such a purchaser may be treated as having title and the right to possession as against everyone but the rightful owner, a sale by the thief or by any person claiming under the thief does not vest any title in the purchaser as against the owner, though the sale was made in the ordinary course of trade and the purchaser acted in good faith. 25 However, one without knowledge that money transferred to him has been obtained through a felony, who receives it honestly and in good faith, although from the thief, acquires good title to it even as against the true owner. 26

The owner may, through an appropriate action or proceeding, recover the stolen goods, 27 their proceeds, 28 or their value, 29 either from the thief, 30 or from any other person who has not acquired such title and into whose possession they have come, whether innocently or otherwise. 31 Thus, an auctioneer who sells stolen goods is liable to the true owner for conversion, even though the auctioneer had no knowledge that the goods were stolen and acted in utmost good faith. 32

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**Footnotes**

Footnote 20. *Supulver v Gilchrist & Dawson, Inc.*, 28 NM 339, 211 P 595.

As to the law of larceny and receiving stolen goods, generally, see 50 Am Jur 2d, Larceny.

As to what constitutes property for the purposes of statutes prohibiting the receiving and transporting of stolen property, see 66 Am Jur 2d, Receiving and Transporting Stolen Property.

As to receiving property stolen from the mails, see 62 Am Jur 2d, Post Office § 111.

Footnote 21. *Smith v Hooker/Barnes, Inc.*, 253 Ga 514, 322 SE2d 268.

Footnote 22. *United States Fidelity & Guaranty Co. v Moore* (ND Miss) 306 F Supp 1088; *Bozeman Mortuary Ass'n v Fairchild*, 253 Ky 74, 68 SW2d 756, 92 ALR 419.

Public welfare and public policy will not allow one to assert any rights to stolen property, or to anything he or she spends or puts on it, as against the owner. *Bozeman Mortuary Ass'n v Fairchild*, 253 Ky 74, 68 SW2d 756, 92 ALR 419.

In an action brought by one from whom property was stolen against a person previously convicted of larceny thereof, to recover the value of such property, the record of the defendant's conviction in the criminal proceeding is generally not competent evidence to prove his or her liability to the plaintiff in the civil case. 46 Am Jur 2d, Judgments § 615.

As to whether the use of force by the loser in an illegal gambling game to recover his or her lost stake constitutes robbery, see 67 Am Jur 2d, Robbery § 20.

Footnote 23. 1 Am Jur 2d, Accession and Confusion § 10.

Footnote 24. *Employers' Fire Ins. Co. v Cotten*, 245 NY 102, 156 NE 629, 51 ALR 1462.

Footnote 25. *Eureka Springs Sales Co. v Ward*, 226 Ark 424, 290 SW2d 434.

Footnote 26. *United States Fidelity & Guaranty Co. v Moore* (ND Miss) 306 F Supp 1088; *Sinclair Houston Federal Credit Union v Hendricks* (Tex Civ App) 268 SW2d 290, 44 ALR2d 1234, writ ref n r e.

As to the rights of a bona fide purchaser of a negotiable bill, bond, or note who buys from a thief, see 11 Am Jur 2d, Bills and Notes §§ 722 et seq.

Footnote 27. *Sinclair Houston Federal Credit Union v Hendricks* (Tex Civ App) 268 SW2d 290, 44 ALR2d 1234, writ ref n r e.

Footnote 28. 25 Am Jur 2d, Election of Remedies §§ 1-2.

Footnote 29. *Sinclair Houston Federal Credit Union v Hendricks* (Tex Civ App) 268 SW2d 290, 44 ALR2d 1234, writ ref n r e.

Footnote 30. *Bozeman Mortuary Ass'n v Fairchild*, 253 Ky 74, 68 SW2d 756, 92 ALR 419.

Since the cause of action survives, the value of stolen property may be recovered from the estate of the thief. *Lightfoot v Davis*, 198 NY 261, 91 NE 582; *Aylsworth v Curtis*, 19 RI 517, 34 A 1109 (superseded by statute on other grounds as stated in *Da Costa v Rose*, 70 RI 163, 37 A2d 794).

Footnote 31. *Swim v Wilson*, 90 Cal 126, 27 P 33; *Fort v Wells*, 14 Ind App 531, 43 NE

155; *Bozeman Mortuary Ass'n v Fairchild*, 253 Ky 74, 68 SW2d 756, 92 ALR 419; *Johnson v Martin*, 87 Minn 370, 92 NW 221.

The doctrine of *lis pendens* may operate to deprive a purchaser from the thief of stolen money, or of a chattel purchased with such money, of the status of a *bona fide* purchaser for value without notice; thus, where an automobile which was allegedly purchased with cash stolen in the course of a bank robbery, and which was seized by federal officers upon the arrest of the suspected robbers, was purportedly assigned by the suspects, before their conviction, to attorneys acting on their behalf in the prosecution, such attorneys could not claim to have the status of *bona fide* purchasers for value, since they could not have been oblivious to the "large black cloud" hovering over the interest of the suspects in the chattel, and in that event, the attorneys could stand in no better position than the robbery suspects. *United States Fidelity & Guaranty Co. v Moore* (ND Miss) 306 F Supp 1088.

Footnote 32. 7 Am Jur 2d, Auctions and Auctioneers § 69.

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## § 35 Alienation

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One of the principal and most important rights incident to ownership is alienability, or the right to disposition. 33

◆ Definition: "Alienation" is the complete, voluntary transfer of title and is used generally to imply sale from one person to another, 34 although the term encompasses the power of disposition by will. 35 In other words, a right in property implies the legal power to convey that right as the holder desires, 36 so long as the conveyance neither interferes with the existing rights of others, 37 nor violates public policy. 38 Absent fraud, accident, or mistake, no one can question another's disposition of his or her own property. 39

The law generally favors the free alienation of property. 40 Therefore, any condition is invalid which attempts unduly to restrain the power to alienate legal title to a fee in land, and a condition which necessarily inhibits the sale of property without expressly doing so is no less objectionable than an outright prohibition. 41 However, reasonable restraints justified by the legitimate interest of the parties are not necessarily void, 42 which is to say, a limited and reasonable restraint on the power of alienation may be valid. 43

Similarly, any ambiguity or uncertainty in the meaning of a term with respect to alienation of property must be resolved most favorably to free alienation. 44 Also, the intention to deprive oneself of the right to dispose freely of his or her property must be clear; there must not only be a clear present intent to dispose of property but also be a present intent that the property disposition be forever binding. 45

Since the *jus disponendi*, or right of alienation, is one of the essential elements of property, it follows that this right attaches to any owner of property or of a right in

property, although certain persons are subject to legal disabilities in respect of their rights to contract or to dispose of their property, so that, in certain circumstances at least, those rights are commonly exercised for them by other persons acting for them in a representative capacity. 46 The law will not permit the rights of ownership to be fettered by the imposition of restraints by grantors or testators who seek to convey or dispose of their property and at the same time maintain control over its alienation or use. 47

The right of alienation is also one of the essential incidents of a right of general property in movables. 48

It is the natural corollary of the right of alienation that the owner cannot be deprived of his or her property in a given subject, except with his or her consent or as a result of his or her own negligence, 49 or in some manner provided by law. 50

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### Footnotes

Footnote 33. *Osage Oil & Refining Co. v Chandler* (CA2 NY) 287 F 848, 29 ALR 720; *Federal Deposit Ins. Corp. v British-American Corp.* (ED NC) 755 F Supp 1314; *Peterman v Coleman* (CA11 Fla) 764 F2d 1416; *Tracey v Franklin*, 31 Del Ch 477, 67 A2d 56, 11 ALR2d 990; *Stewart v Hook*, 118 Ga 445, 45 SE 369; *State Street Furniture Co. v Armour & Co.*, 345 Ill 160, 177 NE 702, 76 ALR 1298; *Wood v Hatcher*, 199 Kan 238, 428 P2d 799; *Att. Gen. v Pere Marquette R. Co.*, 263 Mich 431, 248 NW 860, 94 ALR 520; *State v Gleason*, 128 Mont 485, 277 P2d 530; *Miller v Greenville*, 134 SC 314, 132 SE 591, 46 ALR 155; *White v White*, 108 W Va 128, 150 SE 531, 66 ALR 518.

Ordinarily, a property owner has the power to dispose of his property as he wishes, as long as he does not violate public policy. *Erickson v Bank of California, N. A.*, 97 Wash 2d 246, 643 P2d 670.

Footnote 34. *Properties Inv. Enters. v Foundation for Airborne Relief* (App) 115 Ariz 52, 563 P2d 307; *Carma Developers (Cal.), Inc. v Marathon Development California, Inc.*, 2 Cal 4th 342, 6 Cal Rptr 2d 467, 826 P2d 710, 92 CDOS 2777, 92 Daily Journal DAR 4311; *In re Estate of Skuro* (Fla) 487 So 2d 1065, 11 FLW 199.

Footnote 35. *Prichard v Department of Revenue* (Iowa) 164 NW2d 113.

Footnote 36. *Peterman v Coleman* (CA11 Fla) 764 F2d 1416; *Mullins v Ratcliff* (Miss) 515 So 2d 1183; *Miller v Greenville*, 134 SC 314, 132 SE 591, 46 ALR 155.

Footnote 37. *Bean v Patterson*, 122 US 496, 30 L Ed 1126, 7 S Ct 1298; *M'Cutchen v Marshall*, 33 US 220, 8 Pet 220, 8 L Ed 923; *Sexton v Wheaton*, 21 US 229, 8 Wheat 229, 5 L Ed 603; *Millwee v Wilburn*, 6 Ark App 280, 640 SW2d 813; *Wood v Hatcher*, 199 Kan 238, 428 P2d 799; *Miller v Greenville*, 134 SC 314, 132 SE 591, 46 ALR 155.

Every interest in land is the subject of sale and transfer. *Smelting Co. v Kemp*, 104 US 636, 104 Otto 636, 26 L Ed 875; *Smith v Orton*, 62 US 241, 21 How 241, 16 L Ed 104; *Krone v Lacy*, 168 Neb 792, 97 NW2d 528, 11 OGR 492.

Footnote 38. Erickson v Bank of California, N. A., 97 Wash 2d 246, 643 P2d 670.

Footnote 39. Millwee v Wilburn, 6 Ark App 280, 640 SW2d 813.

Footnote 40. In re F.A.M.I. Service Systems, Inc. (BC SD Fla) 19 BR 30.

Footnote 41. Hortman v Childress, 162 Ga App 536, 292 SE2d 200.

Footnote 42. Terry v Born, 24 Wash App 652, 604 P2d 504.

Footnote 43. 61 Am Jur 2d, Perpetuities and Restraints on Alienation § 102.

Footnote 44. Laguna Royale Owners Asso. v Darger (4th Dist) 119 Cal App 3d 670, 174 Cal Rptr 136.

Footnote 45. Moore v Harvey (Ind App) 406 NE2d 354.

Footnote 46. 31 Am Jur 2d, Executors and Administrators §§ 67 et seq.; 39 Am Jur 2d, Guardian and Ward §§ 4 et seq., 18 et seq.; 41 Am Jur 2d, Husband and Wife §§ 7-16, 147-159; 42 Am Jur 2d, Infants § 58; 53 Am Jur 2d, Mentally Impaired Persons § 173-178; 76 Am Jur 2d, Trusts §§ 57-58, 121 et seq.

Footnote 47. 61 Am Jur 2d, Perpetuities and Restraints on Alienation § 100.

Footnote 48. John D. Park & Sons Co. v Hartman (CA6 Ky) 153 F 24, 5 OhioLr 5, cert dismd 212 US 588, 53 L Ed 662, 29 S Ct 689.

Footnote 49. Lynn v Rainey (Okla) 400 P2d 805.

Footnote 50. § 36.

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## § 36 Form and mode of transfer

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The word "transfer" used in its most comprehensive sense includes every means and manner by which property can pass from the ownership and possession of one person to the ownership and possession of another. 51 Under some circumstances, the transfer of certain incidents of property is regarded as equivalent to the transfer of the property itself; thus, a testamentary gift of the use, income, rents, or profits of land is equivalent to a devise of the land itself. 52 Property may be transferred by operation of law, such as by the devolution of intestate property, 53 and the passing of the property of a bankrupt to his trustees. 54 What method is sufficient to transfer property is a matter of positive regulation by law; it is not in the power of parties to waive or alter, by their private agreement, any regulations which have been adopted not only with regard to the interests of the parties immediately concerned, but also with regard to the interest of others in ascertaining the ownership of property. 55

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## Footnotes

Footnote 51. *Pirie v Chicago Title & Trust Co.*, 182 US 438, 45 L Ed 1171, 21 S Ct 906.

Footnote 52. 28 Am Jur 2d, Estates § 11.

Footnote 53. 23 Am Jur 2d, Descent and Distribution §§ 48 et seq.

Footnote 54. 9A Am Jur 2d, Bankruptcy §§ 2785 et seq.

Footnote 55. *Beeler v C. C. Mercantile Co.*, 8 Idaho 644, 70 P 943; *Hoyle v Plattsburgh & M. R. Co.*, 54 NY 314.

As to the rules governing the transferability of growing crops, see 21A Am Jur 2d, Crops §§ 47 et seq., and of growing trees, see 52 Am Jur 2d, Logs and Timber §§ 13 et seq.

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## VI. PRACTICE AND PROCEDURE [37-40]

### Research References

ALR Digest: Property and Property Rights § 1

ALR Index: Adverse Possession; Eminent Domain; Intangible Hereditaments or Property; Interest in Property or Subject Matter; Life Estates, Remainders, and Reversions; Lots and Parcels; Partition; Personal Property; Property; Sale and Transfer of Property; Title and Ownership

7A Am Jur Pl & Pr Forms (Rev), Conversion §§ 121 et seq.

2 Am Jur Legal Forms 2d, Animals § 20:67

37 Am Jur POF2d 639, Damages for Loss of or Injury to Animal

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### § 37 Actions generally; parties

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The rules and principles relating to actions, generally, 56 apply to actions relating to real property with the same force as to other actions. As a general rule only the owner of the fee has a right of action for damages to the fee, 57 although the owner of any particular right, interest, or estate in real property, 58 including one rightfully in the occupancy or possession of the realty, 59 has, generally at least, a right of action for damages for injury to his or her particular right, interest, or estate. It is essential, however, to enable one to maintain an action for damages for injury to realty, that he or she has some right, title, interest, or estate therein. 60

An owner, whether he or she is in possession or not, may recover for injury to his or her



property by the negligence of another. 61

As a general rule, the law of the state in which real property is located covers the questions of property rights, 62 and for personal property, including intangible personal property, its situs is at the domicile of its owner. 63

A default judgment determining title to real property is just as conclusive upon the issue of title to the property involved as is a judgment of this kind rendered in a contested case. 64

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## Footnotes

Footnote 56. 1 Am Jur 2d, Actions.

Footnote 57. *Brink v Moeschl Edwards Corrugating Co.*, 142 Ky 88, 133 SW 1147.

Footnote 58. *Choctaw, O. & G. R. Co. v Drew*, 37 Okla 396, 130 P 1149; *Nashville, C. & S. L. Ry. v Heikens*, 112 Tenn 378, 79 SW 1038.

Footnote 59. *Garrett v Beers*, 97 Kan 255, 155 P 2; *Delano v Smith*, 206 Mass 365, 92 NE 500; *Watkins v Kaolin Mfg. Co.*, 131 NC 536, 42 SE 983; *Knoll v New York, C. & St. L. R. Co.*, 121 Pa 467, 15 A 571; *Carland v Aurin*, 103 Tenn 555, 53 SW 940; *Louisville & N. R. Co. v Moore*, 31 Ky LR 141, 101 SW 934.

Footnote 60. *Lomax v Phillips*, 113 La 850, 37 So 777; *Missouri P. R. Co. v Cullers*, 81 Tex 382, 17 SW 19.

Footnote 61. *Nashville, C. & S. L. Ry. v Heikens*, 112 Tenn 378, 79 SW 1038.

Footnote 62. *In re Universal Clearing House Co. (DC Utah)* 62 BR 118; *Denney v Teel (Okla)* 688 P2d 803, 82 OGR 307, 56 ALR4th 527.

Footnote 63. *Delaware v New York*, 507 US 490, 123 L Ed 2d 211, 113 S Ct 1550, 93 CDOS 2325, 93 Daily Journal DAR 3935, 7 FLW Fed S 133, motion den 510 US 805, 126 L Ed 2d 18, 114 S Ct 48, supp op 510 US 1022, 126 L Ed 2d 590, 114 S Ct 631, later proceeding 510 US 1106, 127 L Ed 2d 368, 114 S Ct 1044 and motion gr (US) 128 L Ed 2d 188, 114 S Ct 1534, complaint dismd, motion den (US) 129 L Ed 2d 806, 114 S Ct 2670; *Granite Equipment Leasing Corp. v Hutton*, 84 Wash 2d 320, 525 P2d 223, 72 ALR3d 1172.

As to specific applications of these principles in particular actions relating to real estate, see, for example 3 Am Jur 2d, Adverse Possession; 6 Am Jur 2d, Assistance, Writ of; 20 Am Jur 2d, Cotenancy and Joint Ownership; 25 Am Jur 2d, Ejectment; 27 Am Jur 2d, Eminent Domain; 35 Am Jur 2d, Forcible Entry and Detainer; 37 Am Jur 2d, Fraudulent Conveyances; 53 Am Jur 2d, Mechanics' Liens; 59A Am Jur 2d, Partition; 65 Am Jur 2d, Quieting Title and Determination of Adverse Claims.

Footnote 64. *Ursey v Niehuss*, 214 Ark 753, 217 SW2d 848; *Freeze v Salot*, 122 Cal App 2d 561, 266 P2d 140; *Olds v Hitzemann*, 220 Ind 300, 42 NE2d 35; *Oliver v Montgomery*, 39 Iowa 601; *Gardner v Jones (Okla)* 309 P2d 731.

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## § 38 Pleading

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One's ownership of real property is sufficiently alleged by an averment that he or she "was seised and possessed" of the land, 65

A declaration or complaint should describe real property in a suit with sufficient particularity to prevent the defendant from being misled or uncertain as to the location of the property. 66

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### Footnotes

Footnote 65. *Gilb v O'Neill*, 225 Ala 92, 142 So 397, 85 ALR 1526.

As to the rules of pleading in general, see 61 Am Jur 2d, Pleading.

As to the rules governing pleading in specific actions relating to real property, see 3 Am Jur 2d, Adverse Possession; 25 Am Jur 2d, Ejectment; 65 Am Jur, Quieting Title and Determination of Adverse Claims.

◆ Definition: "Seisin" of real property means to possess under claim of a freehold estate. *Williams v Swango*, 365 Ill 549, 7 NE2d 306.

Footnote 66. *Malony v Adsit*, 175 US 281, 44 L Ed 163, 20 S Ct 115 (allegations of ownership of the lands in suit by right of prior occupancy and actual possession satisfy a statute which requires a plaintiff to allege the nature of his estate with specified particularity, where an estate by actual possession is the only kind by which the lands in controversy can be legally held).

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## § 39 Proof of ownership, generally; evidence

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Ownership and possession of land must be proved by evidence, 67 and cannot be proved by general notoriety or by reputation. 68 Unhindered possession of an item, particularly when accompanied by use of the item as one's own, is strong evidence of ownership; 69 mere possession, however, unaccompanied by other circumstances giving it a specific character, is not such evidence of ownership as to prevail against the true owner. 70

Possession of a chattel is deemed to be prima facie evidence of ownership, but while a certificate of title is an indicium of ownership and may establish the person entitled to possession, such certificate is not conclusive evidence of ownership. 71

The name on tools, vehicles, or animals, and articles generally is commonly accepted as prima facie proof of ownership, and though not of much probative weight, it is enough, in the absence of evidence to the contrary, to carry the issue to the jury. 72 This rule is recognized and applied to various species of property. It has been applied in actions for damages sustained through an instrumentality bearing the defendant's name. 73 Likewise, the brand or mark on cattle is prima facie proof of ownership in states where the legislature has permitted such branding by statute. 74 Admissions and declarations may be admitted to prove ownership. 75

Ordinarily, ownership of property is a simple fact, to which a witness having the requisite knowledge can testify directly. 76

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## Footnotes

Footnote 67. *M. C. Dixon Lumber Co. v Mathison*, 289 Ala 229, 266 So 2d 841; *Hill v State* (Ala Crim App) 394 So 2d 106, affd (Ala Crim App) 415 So 2d 1255.

Footnote 68. *M. C. Dixon Lumber Co. v Mathison*, 289 Ala 229, 266 So 2d 841.

Footnote 69. *Damon v Secretary of Health, Education & Welfare* (CA2 Vt) 557 F2d 31.

Footnote 70. *In re Williams' Estate*, 241 Iowa 1290, 45 NW2d 146; *Mielke v Leeberson*, 150 Ohio St 528, 38 Ohio Ops 352, 83 NE2d 209, 7 ALR2d 1342; *Wheeler Lumber, Bridge & Supply Co. v Shelton*, 146 Or 550, 29 P2d 1013, adhered to 146 Or 566, 31 P2d 163.

A recital in a deed that a party "occupied" a building is evidence of possession, but is not necessarily evidence of ownership. *Enterprise Lodge of Knights of Pythias, Inc. v First Baptist Church (Colored)*, 292 Ala 579, 298 So 2d 17.

**Annotation:** Proof of title to motor vehicle requisite to recovery for injury thereof, 7 ALR2d 1347.

Footnote 71. *Justice v Fabey* (ED Pa) 541 F Supp 1019, 34 FR Serv 2d 1117, 34 UCCRS 515.

Footnote 72. *Stokes v Gollmar Bros.*, 163 Iowa 530, 145 NW 59; *Perlstein v American Exp. Co.*, 177 Mass 530, 59 NE 194; *Cannon v Motors Ins. Corp.*, 224 SC 368, 79 SE2d 369; *Walker v Johnston* (Tex Civ App) 236 SW2d 534, writ disp w o j; *Cappello v Aero Mayflower Transit Co.*, 116 Vt 64, 68 A2d 913.

Footnote 73. *Perlstein v American Exp. Co.*, 177 Mass 530, 59 NE 194; *Kellogg v Church Charity Foundation*, 203 NY 191, 96 NE 406; *Walker v Johnston* (Tex Civ App) 236 SW2d 534, writ disp w o j; *Cappello v Aero Mayflower Transit Co.*, 116 Vt 64, 68 A2d 913.

Footnote 74. Warren v De Long, 57 Nev 131, 59 P2d 1165, reh den 57 Nev 131, 60 P2d 608.

As to branding or marking animals to evidence ownership, see 4 Am Jur 2d, Animals §§ 8, 9.

**Practice References** 37 Am Jur POF2d 639, Damages for Loss of or Injury to Animal.

**Forms:** Complaint, petition, or declaration—For conversion of livestock. 7A Am Jur Pl & Pr Forms (Rev), Conversion §§ 121 et seq.

Right to use brand. 2 Am Jur Legal Forms 2d, Animals § 20:67.

Footnote 75. 29 Am Jur 2d, Evidence §§ 320, 760 et seq.

Footnote 76. 31 Am Jur 2d, Expert and Opinion Evidence §§ 70, 136 et seq.

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## § 40 --Burden of proof; presumptions

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The burden of proving title or ownership of real property is upon the party alleging it. 77 Likewise, the burden of rebutting a prima facie showing of title rests upon the party attacking the title shown. 78

There is a rebuttable presumption of ownership of property from possession thereof, which is applied to real property and personal property alike. 79 Thus, in the case of land, if there is no evidence to the contrary, proof of possession, at least under a color of right, is sufficient proof of title. 80 For example, a plaintiff's possession of the land, as evidenced by her having erected and maintained a residence on the property, and by her cultivation of the very land through which defendant ran his road, raised a disputable presumption of ownership. 81 Possession of personal property may be sufficient evidence of ownership in a given case to protect one dealing with the property as that of the possessor. 82 However, the presumption of ownership arising from possession of a chattel may be rebutted by the introduction of evidence tending to establish that the possessor of property is not in fact its owner, and once the presumption is overcome, the burden of proof reverts to the party obliged to establish ownership. 83 In other words, a person claiming ownership of property which is in the possession of another bears the burden of proving facts essential to the claim of ownership. 84 If evidence is introduced which rebuts or meets the presumption of ownership of the party in possession, the presumption has no effect, and the factfinder may determine from the evidence whether ownership has been established. 85

Property is presumed to descend to the heir, 86 and in the absence of any proof to the contrary, the presumption is that a deceased person died intestate and that his or her heirs become the owners of all his property. 87 Exercising acts of ownership over property is

the basis for a statutory presumption of ownership in some jurisdictions. 88

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## Footnotes

Footnote 77. *North v Graham*, 235 Ill 178, 85 NE 267; *Tonopah & G. R.R. v Fellanbaum*, 32 Nev 278, 107 P 882, adhered to, on reh, remanded 35 Nev 249, 129 P 308.

Footnote 78. *Van Gundy v Shewey*, 90 Kan 253, 133 P 720; *Hardman v Cabot*, 60 W Va 664, 55 SE 756.

Footnote 79. 29 Am Jur 2d, Evidence §§ 234, 235.

Footnote 80. *Bradshaw v Ashley*, 180 US 59, 45 L Ed 423, 21 S Ct 297; *State ex rel. Tillman v District Court*, 101 Mont 176, 53 P2d 107, 103 ALR 376; *Permian Oil Co. v Smith*, 129 Tex 413, 73 SW2d 490, 111 ALR 1152, reh overr 129 Tex 446, 107 SW2d 564, 111 ALR 1175; *Wilson v Phoenix Powder Mfg. Co.*, 40 W Va 413, 21 SE 1035.

Footnote 81. *Hanns v Friedly*, 181 Or 631, 184 P2d 855.

As to the necessity and sufficiency of possession to sustain an action of ejectment, see 25 Am Jur 2d, Ejectment §§ 6 et seq.

Footnote 82. *Sarasota County v Weeks*, 100 Fla 1064, 130 So 599; *Morrison v Jones*, 192 Miss 567, 6 So 2d 577; *Mielke v Leeberson*, 150 Ohio St 528, 38 Ohio Ops 352, 83 NE2d 209, 7 ALR2d 1342; *Wheeler Lumber, Bridge & Supply Co. v Shelton*, 146 Or 550, 29 P2d 1013, adhered to 146 Or 566, 31 P2d 163.

**Annotation:** Proof of title to motor vehicle requisite to recovery for injury thereof, 7 ALR2d 1347.

Footnote 83. *In re Atlantic Marble, Inc.* (BC ED Pa) 126 BR 463, 16 UCCRS2d 528; *Hattaway v Keefe*, 191 Ga App 315, 381 SE2d 569, 10 UCCRS2d 143.

Footnote 84. *Justice v Fabey* (ED Pa) 541 F Supp 1019, 34 FR Serv 2d 1117, 34 UCCRS 515.

Footnote 85. *Austin v Ligonier*, 122 Pa Cmwlt 161, 551 A2d 403.

Footnote 86. *Warner v Flack*, 278 Ill 303, 116 NE 197, 2 ALR 423.

Footnote 87. 23 Am Jur 2d, Descent and Distribution §§ 59-61.

Footnote 88. *State ex rel. Tillman v District Court*, 101 Mont 176, 53 P2d 107, 103 ALR 376; *Judson v Bee Hive Auto Service Co.*, 136 Or 1, 294 P 588, 74 ALR 944, different results reached on reh on other grounds 136 Or 5, 297 P 1050, 74 ALR 944.

As to other specific presumptions which are recognized by the law regarding the law of real property, see, for example, 12 Am Jur 2d, Boundaries §§ 38, 56; 23 Am Jur 2d, Dedication §§ 22, 34; 25 Am Jur 2d, Easements and Licenses; 35 Am Jur 2d, Fixtures § 55; 39 Am Jur 2d, Highways, Streets, and Bridges § 61; 40 Am Jur 2d, Highways,

Streets, and Bridges § 592; 53A Am Jur 2d, Mines and Minerals § 241.