

Romualdo P. Eclavea, J.D.

Property

63C Am Jur 2d Property Summary

Property Summary

Scope:

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 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property §§ 1 et seq.
Abstracts of title, see Am. Jur. 2d, Abstracts of Title §§ 1 et seq.
Actions for recovery of chattels, see Am. Jur. 2d, Replevin §§ 1 et seq.
Adjoining landowners, rights, duties, and liabilities of, see Am. Jur. 2d, Adjoining Landowners §§ 1 et seq.
Adverse possession, see Am. Jur. 2d, Adverse Possession §§ 1 et seq.
Aliens, property rights of, see Am. Jur. 2d, Aliens and Citizens §§ 2074 et seq.
Animals, property rights in, see Am. Jur. 2d, Animals §§ 3 to 15
Assignments for benefit of creditors, see Am. Jur. 2d, Assignments for Benefit of Creditors §§ 1 et seq.
Assignment of property rights and choses in action, see Am. Jur. 2d, Assignments §§ 43 to 63
Associations and clubs, power to acquire or dispose of property, see Am. Jur. 2d, Associations and Clubs §§ 12, 13
Attachment and garnishment, see Am. Jur. 2d, Attachment and Garnishment §§ 1 et seq.
Auction, acquisition of property at, see Am. Jur. 2d, Auctions and Auctioneers §§ 1 et seq.
Automobiles, title to and ownership of, see Am. Jur. 2d, Automobiles and Highway Traffic §§ 29 to 56
Bailments, see Am. Jur. 2d, Bailments §§ 1 et seq.
Boundaries of privately owned real property, see Am. Jur. 2d, Boundaries §§ 1 et seq.
Buildings, see Am. Jur. 2d, Buildings §§ 1 et seq.
Carriers, carriage of property by, see Am. Jur. 2d, Carriers §§ 286 to 533
Charges on specific property as security for payment of debts or the performance of other acts, see Am. Jur. 2d, Liens §§ 1 et seq.
Community property, see Am. Jur. 2d, Community Property §§ 1 et seq.
Condominiums and cooperative apartments, see Am. Jur. 2d, Condominiums and Co-operative Apartments §§ 1 et seq.
Conflict of laws principles applicable to property actions, see Am. Jur. 2d, Conflict of Laws §§ 30 to 60
Constitutional rights relating to property, see Am. Jur. 2d, Constitutional Law §§ 581 to 602
Contracts for the purchase and sale of real property, see Am. Jur. 2d, Vendor and Purchaser §§ 1 et seq.
Conversion of personal property, see Am. Jur. 2d, Conversion §§ 1 et seq.
Copyright and literary property, see Am. Jur. 2d, Copyright and Literary Property §§ 1 et seq.
Corporations, power over property of, Am. Jur. 2d, Corporations §§ 1760 to 1810
Cotenancy and joint ownership of property, see Am. Jur. 2d, Cotenancy and Joint Ownership §§ 1 et seq.
Covenants, conditions, and restrictions expressed or implied in conveyances of land, see Am. Jur. 2d, Covenants, Conditions, and Restrictions §§ 1 et seq.
Damages for injuries to property rights, see Am. Jur. 2d, Damages §§ 252 to 290
Dedication of land to public use, see Am. Jur. 2d, Dedication §§ 1 et seq.
Deed, conveyance of title by, see Am. Jur. 2d, Deeds §§ 1 et seq.

Descent and distribution, transfer of real and personal property of one dying intestate by, see Am. Jur. 2d, Descent and Distribution §§ 1 et seq.

Division of property among co-owners by consent or judicial proceedings, see Am. Jur. 2d, Partition §§ 1 et seq.

Division of property upon dissolution of marriage, see Am. Jur. 2d, Divorce and Separation §§ 455 to 570

Due process of law, constitutional provisions guaranteeing, see Am. Jur. 2d, Constitutional Law §§ 890 to 972

Easements and licenses in real property, see Am. Jur. 2d, Easements and Licenses in Real Property §§ 1 et seq.

Ejectment, recovery of specific real property by action for, see Am. Jur. 2d, Ejectment §§ 1 et seq.

Eminent domain, see Am. Jur. 2d, Eminent Domain §§ 1 et seq.

Equity, protection of property rights in, see Am. Jur. 2d, Equity §§ 39 to 41

Escheat, reversion or forfeiture of property to government by, see Am. Jur. 2d, Escheat §§ 1 et seq.

Estates in real property and analogous interests in personal property, see Am. Jur. 2d, Estates §§ 1 et seq.

Execution, property subject to writ of, see Am. Jur. 2d, Executions and Enforcement of Judgments §§ 119 to 173

Fixtures, see Am. Jur. 2d, Fixtures §§ 1 et seq.

Forcible entry and detainer, see Am. Jur. 2d, Forcible Entry and Detainer §§ 1 et seq.

Franchises as property, see Am. Jur. 2d, Franchises from Public Entities § 5

Gifts representing whole or part of portion of donor's estate to which donee would be entitled on death of donor intestate, see Am. Jur. 2d, Advancements §§ 1 et seq.

Highways, streets, and bridges, title and rights of public and abutting owners as to, see Am. Jur. 2d, Highways, Streets, and Bridges §§ 190 to 226

Homestead rights of family members, see Am. Jur. 2d, Homestead §§ 1 et seq.

Improvements to real property, see Am. Jur. 2d, Improvements §§ 1 et seq.

Landlord and tenant, see Am. Jur. 2d, Landlord and Tenant §§ 1 et seq.

Liability of owners or occupiers of real property for negligently caused injuries, see Am. Jur. 2d, Premises Liability §§ 1 et seq.

Life tenants, remaindermen and reversioners, see Am. Jur. 2d, Life Tenants and Remaindermen §§ 1 et seq.

Nature of collateral as personal property, see Am. Jur. 2d, Secured Transactions §§ 91 to 96

Patents, property rights in, see Am. Jur. 2d, Patents § 8

Powers of guardian over property of ward, see Am. Jur. 2d, Guardian and Ward §§ 99 to 128

Property rights and interests of married persons, see Am. Jur. 2d, Husband and Wife §§ 11 to 44

Property which may be subject to a mortgage, see Am. Jur. 2d, Mortgages §§ 34 to 59

Quiet title suits and actions to remove clouds from title, see Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.

Real estate brokers, see Am. Jur. 2d, Brokers §§ 1 et seq.

Recording of instruments affecting title to real property, see Am. Jur. 2d, Records and Recording Laws §§ 1 et seq.

Registration of land titles, see Am. Jur. 2d, Registration of Land Titles §§ 1 et seq.

Rule against perpetuities and other rules barring restraints on alienation of property, see Am. Jur. 2d, Perpetuities and Restraints on Alienation §§ 1 et seq.

Special or local assessments as means of collecting cost of public improvements from owners of properties deriving special benefits from such improvements, see Am. Jur. 2d, Special or Local Assessments §§ 1 et seq.

Specific performance of contracts for sale of real and personal property, see Am. Jur. 2d, Specific Performance §§ 133 to 170

State and local taxation, property and interests subject to, see Am. Jur. 2d, State and Local Taxation §§ 130 to 157

Statute of frauds, agreements and transactions relating to estates and interests in land and sales of personal property as within, see Am. Jur. 2d, Statute of Frauds §§ 49 to 123

Statutes of limitations governing actions and proceedings involving property, see Am. Jur. 2d, Limitation of Actions §§ 131 to 133

Taxes imposed upon transfer of property, see Am. Jur. 2d, Inheritance, Estate, and Gift Taxes §§ 1 et seq.

Time sharing arrangements for use and occupation of real property, see Am. Jur. 2d, NTS Real Estate Time Sharing §§ 1 et seq.

Title insurance, see Am. Jur. 2d, Insurance §§ 528 to 530

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 Am. Jur. 2d, Accession and Confusion §§ 3 to 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 Am. Jur. 2d, Accession and Confusion §§ 1, 2, 10 to 17

Trade secret, misuse as constituting common law unfair trade practice, see Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1114 to 1126
Trademark or trade name as property, see Am. Jur. 2d, Trademarks and Tradenames § 4
Transactions connected with property while rights in the property are in litigation, see Am. Jur. 2d, Lis Pendens §§ 1 et seq.
Transfer of real property as security for payment of debt or performance of other obligation, see Am. Jur. 2d, Mortgages §§ 1 et seq.
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 Am. Jur. 2d, Equitable Conversion §§ 1 et seq.
Trespass to chattels and real property, see Am. Jur. 2d, Trespass §§ 1 et seq.
Trust, rights and liabilities relating to property held in, see Am. Jur. 2d, Trusts §§ 1 et seq.
Use of premises by one lawfully in possession thereof to the prejudice of the estate or interest therein of another, see Am. Jur. 2d, Waste §§ 1 et seq.
Venue in suits relating to realty or recovery of chattels, see Am. Jur. 2d, Venue §§ 15, 17, 21 to 23
Writ of assistance, enforcement of decree determining title to, or right of possession of, real estate by, see Am. Jur. 2d, Assistance, Writ of §§ 1 et seq.
Zoning power, government control of use of property through exercise of, see Am. Jur. 2d, Zoning §§ 1 et seq.

REFERENCE: Research References

American Law Reports (ALR)
West's A.L.R. Digest (ALRDIGEST)
American Jurisprudence 2d (AMJUR)
American Jurisprudence Legal Forms 2d (AMJUR-LF)
American Jurisprudence Proof of Facts (AMJUR-POF)
American Jurisprudence Pleading and Practice Forms Annotated (AMJUR-PP)
American Jurisprudence Trials (AMJUR-TRIALS)
Code of Federal Regulations (CFR)
Federal Procedure (FEDPROC)
Federal Procedural Forms (FEDPROF)
Uniform Laws Annotated (ULA)
United States Code Annotated (USCA)

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Property
I. In General

63C Am Jur 2d Property § 1

§ 1 Generally; definitions

The legal definition of property most often refers not to a particular physical object, but rather to the legal bundle of rights recognized in that object, which bundle of rights includes the rights to possess, use, and dispose of a particular article.ⁿ¹ The term "property" embodies more than just physical, corporeal assets; it can include intangible entities, such as rights and interests.ⁿ² As a matter of legal definition, "property" refers not to a particular material object, but to the right and interest in an object;ⁿ³ as to a thing, "property" does not consist merely in its ownership or possession, but also in the lawful, unrestricted right of its use, enjoyment, and disposal.ⁿ⁴ In its precise legal sense, property is nothing more than a collection of rights;ⁿ⁵ indeed, "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.ⁿ⁶ The right to exclude others, as well as their property, is one of the most essential sticks in the bundle of rights that are commonly characterized as property.ⁿ⁷ While ownership of real property does not always mean absolute dominion, the right to exclude persons is a fundamental aspect of private property ownership,ⁿ⁸ and inherent in one's ownership of real property is the right to exclude uninvited visitors.ⁿ⁹ Ownership of property implies the right of possession and control, and includes the right to exclude others; thus, the true owner of land exercises full dominion and control over it and possesses the right to expel trespassers.ⁿ¹⁰ Property has also been described 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.ⁿ¹¹ The term is generally used in this sense in the federal and state constitutional guarantees against deprivation of property without due process of law,ⁿ¹² and as so used, the word signifies the sum of all the rights and powers incident to ownership.ⁿ¹³

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.ⁿ¹⁴

Generally, the common law concept of "property" refers to the right and interest that a person has in an object, which extends beyond ownership and possession to include the lawful, unrestricted right of use, enjoyment, and disposal of the object.ⁿ¹⁵ 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 it, 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.ⁿ¹⁶

FOOTNOTES:

n1 *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 2005 FED App. 0065P (6th Cir. 2005).

n2 *Solomon v. Solomon*, 383 Md. 176, 857 A.2d 1109 (2004).

n3 *U.S. v. General Motors Corporation*, 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 156 A.L.R. 390 (1945); *Howlett v. Doglio*, 402 Ill. 311, 83 N.E.2d 708, 6 A.L.R.2d 790 (1949).

n4 *South Carolina Dept. of Highways and Public Transp. v. Balcome*, 289 S.C. 243, 345 S.E.2d 762 (Ct. App. 1986); *Sammons v. American Auto. Ass'n*, 912 P.2d 1103 (Wyo. 1996).

n5 Matter of Valuation Proceedings Under Sections 303(c) and 306 of Regional Rail Reorganization Act of 1973, 445 F. Supp. 994 (Regional Rail Reorg. Ct. 1977); U.S. v. General Motors Corporation, 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 156 A.L.R. 390 (1945) (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).

n6 Howlett v. Doglio, 402 Ill. 311, 83 N.E.2d 708, 6 A.L.R.2d 790 (1949); City of Akron v. Chapman, 160 Ohio St. 382, 52 Ohio Op. 242, 116 N.E.2d 697, 42 A.L.R.2d 1140 (1953).

n7 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); Novelty Crystal Corp. v. PSA Institutional Partners, L.P., 49 A.D.3d 113, 850 N.Y.S.2d 497 (2d Dep't 2008).

n8 People v. Tapia, 129 Cal. App. 4th 1153, 29 Cal. Rptr. 3d 158 (2d Dist. 2005).

n9 LT-WR, L.L.C. v. California Coastal Com'n, 152 Cal. App. 4th 770, 60 Cal. Rptr. 3d 417 (2d Dist. 2007), as modified, (June 21, 2007).

n10 Sammons v. American Auto. Ass'n, 912 P.2d 1103 (Wyo. 1996).

n11 Washington Medical Center, Inc. v. U. S., 211 Ct. Cl. 145, 545 F.2d 116 (1976).

n12 Am. Jur. 2d, Constitutional Law §§ 581 to 588; Am. Jur. 2d, Eminent Domain § 88.

n13 Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191 (1933); State St. Furniture Co. v. Armour & Co., 345 Ill. 160, 177 N.E. 702, 76 A.L.R. 1298 (1931).

n14 Delaware v. New York, 507 U.S. 490, 113 S. Ct. 1550, 123 L. Ed. 2d 211 (1993) (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 U.S. 155, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980); Rural Gas, Inc. v. North Cent. Kansas Production Credit Corp., 243 Kan. 109, 755 P.2d 529, 6 U.C.C. Rep. Serv. 2d 827 (1988).

n15 Reese v. Department of Health and Mental Hygiene, 177 Md. App. 102, 934 A.2d 1009 (2007).

n16 First Charter Land Corp. v. Fitzgerald, 643 F.2d 1011 (4th Cir. 1981).

REFERENCE: West's Key Number Digest, Property [westkey]1, 7
A.L.R. Index, Intangible Hereditaments or Property
A.L.R. Index, Interest in Property or Subject Matter
A.L.R. Index, Lots and Parcels
A.L.R. Index, Personal Property
A.L.R. Index, Property
A.L.R. Index, Sale and Transfer of Property
A.L.R. Index, Title and Ownership
West's A.L.R. Digest, Property [westkey]1, 7
West's Key Number Digest, Property [westkey]1, 7

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Property
I. In General

63C Am Jur 2d Property § 2

§ 2 Special and limited definitions

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,ⁿ¹ although these things which are the subjects of property when coupled with possession are but the indicia or visible manifestations of invisible rights.ⁿ² 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.ⁿ³

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.ⁿ⁴ While the words "all property," as used in a statute, contract, or like instrument, are usually given a very comprehensive construction,ⁿ⁵ 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,ⁿ⁶ or for which, if taken, compensation must be paid,ⁿ⁷ and statutes and constitutions relating to taxation may describe what constitutes taxable property.ⁿ⁸

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.ⁿ⁹

FOOTNOTES:

n1 *Texas Co. v. Hauptman*, 91 F.2d 449 (C.C.A. 9th Cir. 1937); *Callahan v. Martin*, 3 Cal. 2d 110, 43 P.2d 788, 101 A.L.R. 871 (1935).

n2 *Texas Co. v. Hauptman*, 91 F.2d 449 (C.C.A. 9th Cir. 1937); *Tatum Bros. Real Estate & Investment Co. v. Watson*, 92 Fla. 278, 109 So. 623 (1926).

n3 *Washington Medical Center, Inc. v. U. S.*, 211 Ct. Cl. 145, 545 F.2d 116 (1976); *Eliasberg Bros. Mercantile Co. v. Grimes*, 204 Ala. 492, 86 So. 56, 11 A.L.R. 300 (1920).

n4 *Northwestern Mut. Life Ins. Co. v. Lewis & Clarke County*, 28 Mont. 484, 72 P. 982 (1903); *In re Hellman's Estate*, 174 N.Y. 254, 66 N.E. 809 (1903).

n5 *Morgan Bros. v. Dayton Coal & Iron Co.*, 134 Tenn. 228, 183 S.W. 1019 (1916).

n6 Am. Jur. 2d, Eminent Domain §§ 87 to 102.

n7 Am. Jur. 2d, Eminent Domain §§ 150 to 166.

n8 Am. Jur. 2d, State and Local Taxation §§ 134 to 137.

n9 Fidelity & Deposit Co. of Maryland v. Arenz, 290 U.S. 66, 54 S. Ct. 16, 78 L. Ed. 176 (1933); Texas Co. v. Hauptman, 91 F.2d 449 (C.C.A. 9th Cir. 1937).

REFERENCE: West's Key Number Digest, Property [westkey]1, 7

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Lots and Parcels

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

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Property
I. In General

63C Am Jur 2d Property § 3

§ 3 Constituent elements

Property is composed of certain constituent elements, namely, the unrestricted rights of use, enjoyment, and disposal of the particular subject of property.ⁿ¹ It consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.ⁿ² Of these elements, the right of the user is the most essential and beneficial since without it, all other elements would be of little effect, in that if one is deprived of the use of his or her property, little but a barren title is left in his or her hands.ⁿ³ This right of a free and untrammelled user for legitimate purposes is fundamental and within the protection of the United States Constitution.ⁿ⁴ The right or element of the user necessarily includes the right and power of excluding others from using the subject of property;ⁿ⁵ indeed, an essential element of individual property is the legal right to exclude others from enjoying it.ⁿ⁶

FOOTNOTES:

n1 *Labberton v. General Cas. Co. of America*, 53 Wash. 2d 180, 332 P.2d 250 (1958); *Sammons v. American Auto. Ass'n*, 912 P.2d 1103 (Wyo. 1996).

n2 *Department of Financial Institutions v. General Finance Corp.*, 227 Ind. 373, 86 N.E.2d 444, 10 A.L.R.2d 436 (1949).

n3 *Appeal of Perrin*, 305 Pa. 42, 156 A. 305, 79 A.L.R. 912 (1931); *Spann v. City of Dallas*, 111 Tex. 350, 235 S.W. 513, 19 A.L.R. 1387 (1921).

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

n4 Am. Jur. 2d, *Constitutional Law* §§ 581 to 588.

n5 *Sammons v. American Auto. Ass'n*, 912 P.2d 1103 (Wyo. 1996).

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

n6 *U.S. v. Caymen*, 404 F.3d 1196 (9th Cir. 2005).

REFERENCE: West's Key Number Digest, Property [westkey]1, 7

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A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Lots and Parcels

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Property
II. Subjects of Property

63C Am Jur 2d Property § 4

§ 4 Generally

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.ⁿ¹ It may be reasonably construed to include obligations, rights, and other intangibles as well as physical things,ⁿ² and in its most general sense, property embraces everything that has an exchangeable value.ⁿ³

Property extends to every species of right and interest capable of being enjoyed as one upon which it is practicable to place a money value.ⁿ⁴ Thus, the right to carry on a lawful business without obstruction is a property right,ⁿ⁵ 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.ⁿ⁶ In other words, valid contracts are property,ⁿ⁷ and property, therefore, may include intangibles as well as tangibles,ⁿ⁸ and includes choses in action.ⁿ⁹ Thus, vesting is substantially a property right, and may be created by common law, by statute, or by contract.ⁿ¹⁰ As to intangibles, property may include even those rights which are insusceptible of voluntary transfer by the owner.ⁿ¹¹ Also, the right to use an item or to control its use is an interest in property,ⁿ¹² and although **less than a fee interest**, development rights are beyond question a valuable right in property.ⁿ¹³

While the term "property" is comprehensive, 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.ⁿ¹⁴ Lost opportunity to bring unliquidated tort claims is not property.ⁿ¹⁵

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.ⁿ¹⁶

FOOTNOTES:

n1 *Dodds v. Shamer*, 339 Md. 540, 663 A.2d 1318 (1995); *Reese v. Department of Health and Mental Hygiene*, 177 Md. App. 102, 934 A.2d 1009 (2007); *In re Marriage of Langham and Kolde*, 153 Wash. 2d 553, 106 P.3d 212 (2005).

n2 *Solomon v. Solomon*, 383 Md. 176, 857 A.2d 1109 (2004).

n3 *In re Albion Disposal, Inc.*, 152 B.R. 794 (Bankr. W.D. N.Y. 1993); *Iszler v. Jorda*, 80 N.W.2d 665, 64 A.L.R.2d 696 (N.D. 1957).

n4 *Straus v. North Hollywood Hospital, Inc.*, 150 Cal. App. 2d 306, 309 P.2d 541 (2d Dist. 1957); *Kansas City Life Ins. Co. v. Hammett*, 177 La. 930, 149 So. 525 (1933).

n5 *Tappan Motors, Inc. v. Waterbury*, 65 Misc. 2d 514, 318 N.Y.S.2d 125 (Sup 1971).

n6 *Claunch v. Claunch*, 525 S.W.2d 788 (Mo. Ct. App. 1975).

n7 *In re I.A. Durbin, Inc.*, 46 B.R. 595, 40 U.C.C. Rep. Serv. 727 (Bankr. S.D. Fla. 1985); *Baker v. Young*, 798 P.2d 889 (Colo. 1990).

n8 *Graves v. Elliott*, 307 U.S. 383, 59 S. Ct. 913, 83 L. Ed. 1356 (1939); *In re Rosenberg's Will*, 269 N.Y. 247, 199 N.E. 206, 105 A.L.R. 1238 (1935).

n9 *State v. Tauscher*, 227 Or. 1, 360 P.2d 764, 88 A.L.R.2d 674 (1961).

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

n10 *Beggs v. City of Portales*, 142 N.M. 505, 2007-NMCA-125, 167 P.3d 953 (Ct. App. 2007), cert. granted, 142 N.M. 716, 2007-NMCERT-009, 169 P.3d 409 (2007).

n11 *In re Rosenberg's Will*, 269 N.Y. 247, 199 N.E. 206, 105 A.L.R. 1238 (1935); *U. S. Life Ins. Co. v. Hamilton*, 238 S.W.2d 289 (Tex. Civ. App. Waco 1951), writ refused n.r.e.

n12 *In re Marshall*, 550 F.3d 1251 (10th Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3619 (U.S. Apr. 24, 2009) (applying Kansas law).

n13 *Bentley Funding Group, L.L.C. v. SK & R Group, L.L.C.*, 269 Va. 315, 609 S.E.2d 49 (2005).

n14 *Gaskins v. People*, 84 Colo. 582, 272 P. 662, 63 A.L.R. 693 (1928).

n15 *Magnum v. Archdiocese of Philadelphia*, 253 Fed. Appx. 224 (3d Cir. 2007) (applying Pennsylvania law).

n16 *State v. Tauscher*, 227 Or. 1, 360 P.2d 764, 88 A.L.R.2d 674 (1961).

REFERENCE: West's Key Number Digest, Property [westkey]2

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Lots and Parcels

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]2

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Am. Jur. Legal Forms 2d, Name §§ 182:21, 182:22

Am. Jur. Pleading and Practice Forms, Privacy §§ 17, 19, 23

West's Key Number Digest, Property [westkey]2

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Property
II. Subjects of Property

63C Am Jur 2d Property § 5

§ 5 Creations and products of the mind; information

Although there may be no property rights cognizable by the law in a mere abstract idea or mental conception as such,ⁿ¹ 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.ⁿ² In other words, there may be a property right in a particular combination of ideas or in the form in which ideas are embodied.ⁿ³

Information possessed by one person which may be valuable to another is, at times, considered the property of the possessor.ⁿ⁴ Thus, confidential business information may be property;ⁿ⁵ for example, confidential client information regarding a corporate takeover is property in the hands of the law firm, in which a partner uses the information to purchase stock in the target corporation.ⁿ⁶

Among the principal types of such creations are literary productions of various kinds.ⁿ⁷ 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.ⁿ⁸ Collections and compilations of information and news,ⁿ⁹ trademarks and trade names,ⁿ¹⁰ and trade secretsⁿ¹¹ are all considered property.

FOOTNOTES:

n1 Am. Jur. 2d, Copyright and Literary Property § 21.

n2 Am. Jur. 2d, Copyright and Literary Property § 22.

n3 *Matarese v. Moore-McCormack Lines*, 158 F.2d 631, 170 A.L.R. 440 (C.C.A. 2d Cir. 1946); *Schonwald v. F. Burkart Mfg. Co.*, 356 Mo. 435, 202 S.W.2d 7 (1947).

n4 *Stewart v. Fourth Nat. Bank*, 141 Kan. 175, 39 P.2d 918 (1935).

n5 *Carpenter v. U.S.*, 484 U.S. 19, 108 S. Ct. 316, 98 L. Ed. 2d 275 (1987).

n6 *U.S. v. Elliott*, 711 F. Supp. 425 (N.D. Ill. 1989).

n7 Am. Jur. 2d, Copyright and Literary Property § 24.

n8 *O'Keeffe v. Snyder*, 83 N.J. 478, 416 A.2d 862 (1980).

Generally, as to such rights in literary and artistic works, see Am. Jur. 2d, Copyright and Literary Property §§ 69 to 75.

n9 Am. Jur. 2d, Copyright and Literary Property § 40.

n10 Am. Jur. 2d, Trademarks and Tradenames § 4.

n11 As to the law of trade secrets, see Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1071 to 1080.

REFERENCE: West's Key Number Digest, Property [westkey]2

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Lots and Parcels

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]2

Employee's Right to Compensation for Employer's Use of Employee's Inventive Idea, 23 Am. Jur. Proof of Facts 2d 203

Am. Jur. Legal Forms 2d, Name §§ 182:21, 182:22

Am. Jur. Pleading and Practice Forms, Privacy §§ 17, 19, 23

West's Key Number Digest, Property [westkey]2

Patent rights, copyrights, trademarks, secret processes, formulas, or the like, as "property" within provisions of law or charter forbidding issuance of corporate stock except for money paid or property received, 37 A.L.R.2d 913

Property right in idea. Employee's Right to Compensation for Employer's Use of Employee's Inventive Idea, 23 Am. Jur. Proof of Facts 2d 203 § 6

Romualdo P. Eclavea, J.D.

Property
II. Subjects of Property

63C Am Jur 2d Property § 6

§ 6 Right of publicity

For over a century, the 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.ⁿ¹ The right of publicity is a generally recognized property right of prominent persons,ⁿ² such as professional athletes and entertainers,ⁿ³ to control the commercial value and exploitation of their names or pictures or likenesses, or to prevent others from unfairly appropriating that value for commercial benefit.ⁿ⁴ The right is analogous to a commercial entity's right to profit from the good will it has built up in its name,ⁿ⁵ and is protected by the courts in order to preserve the entertainers' incentive to produce creative works or entertainment.ⁿ⁶ 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 the courts enforce a claim which has pecuniary worth.ⁿ⁷

The right of a person to be compensated for the use of his or her name for advertising purposes or purposes of trade, although evolving 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.ⁿ⁸ 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.ⁿ⁹ 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 the courts have protected a variety of interests under the right of publicity, including the plaintiff's name,ⁿ¹⁰ nickname,ⁿ¹¹ likeness,ⁿ¹² a character that the plaintiff has created,ⁿ¹³ and the plaintiff's distinctive style.ⁿ¹⁴

FOOTNOTES:

n1 *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, 67 A. 392 (Ch. 1907).

n2 *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D. N.Y. 1978).

n3 *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D. N.Y. 1978) (boxing champion); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (2d Dep't 1977) (bandleader).

n4 *Presley's Estate v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981).

n5 *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D. N.Y. 1978).

n6 *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977).

n7 Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

n8 Presley's Estate v. Russen, 513 F. Supp. 1339 (D.N.J. 1981); Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379, 280 N.W.2d 129 (1979).

n9 Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379, 280 N.W.2d 129 (1979).

n10 Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953); Wyatt Earp Enterprises, Inc. v. Sackman, Inc., 157 F. Supp. 621 (S.D. N.Y. 1958).

n11 Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379, 280 N.W.2d 129 (1979).

n12 Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D. N.Y. 1978).

n13 Price v. Worldvision Enterprises, Inc., 455 F. Supp. 252 (S.D. N.Y. 1978), aff'd, 603 F.2d 214 (2d Cir. 1979).

n14 Lahr v. Adell Chemical Co., 300 F.2d 256 (1st Cir. 1962) (sustaining an action against the imitation of an actor's voice in advertisements); Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 396 N.Y.S.2d 661 (2d Dep't 1977) (granting relief against an agency's commercial depicting the plaintiff conducting a band at a New Year's Eve party).

REFERENCE: West's Key Number Digest, Property [westkey]2

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Lots and Parcels

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]2

Employee's Right to Compensation for Employer's Use of Employee's Inventive Idea, 23 Am. Jur. Proof of Facts 2d 203

Am. Jur. Legal Forms 2d, Name §§ 182:21, 182:22

Am. Jur. Pleading and Practice Forms, Privacy §§ 17, 19, 23

West's Key Number Digest, Property [westkey]2

Am. Jur. Legal Forms 2d, Name § 182:21 (Grant of right to use name -- General form)

Am. Jur. Legal Forms 2d, Name § 182:22 (Grant of right to use name in advertising)

Am. Jur. Pleading and Practice Forms, Privacy § 17 (Complaint, petition, or declaration -- Unauthorized use of plaintiff's photograph for advertisement)

Am. Jur. Pleading and Practice Forms, Privacy § 19 (Complaint, petition, or declaration -- Unauthorized use of name and photograph to promote or endorse goods or services)

Am. Jur. Pleading and Practice Forms, Privacy § 23 (Complaint, petition, or declaration -- Unauthorized use by author and publisher of public figure's name and photograph)

Romualdo P. Eclavea, J.D.

Property
II. Subjects of Property

63C Am Jur 2d Property § 7

§ 7 Assignability and survivability of right

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.ⁿ¹ During his or her lifetime, an entertainer, therefore, may license or assign a property right in his or her name and likeness for commercial benefit.ⁿ² 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,ⁿ³ the right of publicity in some jurisdictions is considered a property right which does not terminate at the individual's death.ⁿ⁴

Observation: 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.ⁿ⁵

However, in other jurisdictions, the right to exploit commercially one's name and likeness is not a property right which descends at death.ⁿ⁶

FOOTNOTES:

n1 *Presley's Estate v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981).

n2 *Presley's Estate v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (2d Dep't 1977).

n3 Am. Jur. 2d, Privacy § 14.

n4 *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, 694 F.2d 674 (11th Cir. 1983); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D. N.Y. 1975).

n5 *Presley's Estate v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 160 Cal. Rptr. 323, 603 P.2d 425, 10 A.L.R.4th 1150 (1979).

n6 *Memphis Development Foundation v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980); *Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 768, 427 N.Y.S.2d 828 (1st Dep't 1980).

SUPPLEMENT:

Cases

Rugby clothing vendor could not assert claim against his competitor, for misappropriation of common law right to publicity, since it was not recognized as a cause of action under Massachusetts law. *Ruggers, Inc. v. U.S.*, 736 F.

Supp. 2d 336 (D. Mass. 2010).

REFERENCE: West's Key Number Digest, Property [westkey]2

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Lots and Parcels

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]2

Employee's Right to Compensation for Employer's Use of Employee's Inventive Idea, 23 Am. Jur. Proof of Facts 2d 203

Am. Jur. Legal Forms 2d, Name §§ 182:21, 182:22

Am. Jur. Pleading and Practice Forms, Privacy §§ 17, 19, 23

West's Key Number Digest, Property [westkey]2

Right to publicize or commercially exploit deceased person's name or likeness as inheritable, 10 A.L.R.4th 1193

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Property
III. Kinds and Classifications of Property
A. In General

63C Am Jur 2d Property § 8

§ 8 Generally

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.ⁿ¹ Corporeal property is classified as real and personal,ⁿ² or as movable and immovable.ⁿ³ The classification of property as real or personal property is a mixed question of law and fact.ⁿ⁴

Observation: In the civil law systems, "things" are divided into movables and immovables, as opposed to the common law system where they are divided into personal and real property.ⁿ⁵

Property may be further classified as public and private,ⁿ⁶ tangible or intangible.ⁿ⁷

FOOTNOTES:

n1 § 9.

n2 *Transcontinental Oil Co. v. Emmerson*, 298 Ill. 394, 131 N.E. 645, 16 A.L.R. 507 (1921); *Ralston Steel Car Co. v. Ralston*, 112 Ohio St. 306, 3 Ohio L. Abs. 200, 147 N.E. 513, 39 A.L.R. 334 (1925).

n3 *McNamara v. Oilfield Const. Co., Inc.*, 417 So. 2d 1311 (La. Ct. App. 3d Cir. 1982), writ denied, 422 So. 2d 157 (La. 1982); *Strobel v. Northwest G. F. Mut. Ins. Co.*, 152 N.W.2d 794 (N.D. 1967).

n4 *Union Elevator & Warehouse Co., Inc. v. State ex rel. Dept. of Transp.*, 144 Wash. App. 593, 183 P.3d 1097 (Div. 3 2008).

n5 *In re Ark-La-Tex Timber Co., Inc.*, 482 F.3d 319 (5th Cir. 2007).

n6 § 10.

n7 *Hommel v. George*, 802 P.2d 1156 (Colo. App. 1990).

REFERENCE: West's Key Number Digest, Property [westkey]3, 4
A.L.R. Index, Intangible Hereditaments or Property
A.L.R. Index, Interest in Property or Subject Matter
A.L.R. Index, Lots and Parcels
A.L.R. Index, Personal Property
A.L.R. Index, Property
A.L.R. Index, Sale and Transfer of Property
A.L.R. Index, Title and Ownership
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Property
III. Kinds and Classifications of Property
A. In General

63C Am Jur 2d Property § 9

§ 9 Corporeal or incorporeal; tangible or intangible

When the term "property" is used to refer to the subject of various rights of use and enjoyment, it is generally 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.ⁿ¹

Definitions: In its usual sense, "corporeal property" is that which is palpable or tangible and is material and physical in its nature, and it includes things which have a body, whether animate or inanimate, and can be felt or touched.ⁿ² "Incorporeal property" are rights which have no corporeal tangible substance, or which are intangible.ⁿ³

When the object of a personal right is a corporeal immovable, the personal right is an incorporeal immovable.ⁿ⁴

Tangible property is that which is capable of being handled, felt, or touched, and may be evaluated by the physical senses;ⁿ⁵ it is property having substance or body and which is capable of being possessed or realized.ⁿ⁶ 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.ⁿ⁷ Intangible property has no physical existence, but may be evidenced by a document with no intrinsic value, such as a stock certificate.ⁿ⁸

Observation: 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.ⁿ⁹

Personal property may be incorporeal, that is, without tangible substance, and it may be intangible in the sense that it is a right rather than a physical object.ⁿ¹⁰

FOOTNOTES:

n1 *Curry v. McCannless*, 307 U.S. 357, 59 S. Ct. 900, 83 L. Ed. 1339, 123 A.L.R. 162 (1939); *Transcontinental Oil Co. v. Emmerson*, 298 Ill. 394, 131 N.E. 645, 16 A.L.R. 507 (1921).

n2 *Webb v. State Through Dept. of Transp. & Development*, 470 So. 2d 994 (La. Ct. App. 1st Cir. 1985), writ denied, 476 So. 2d 357 (La. 1985); *Flowers v. Texas Mexican Ry. Co.*, 174 S.W.2d 70 (Tex. Civ. App. Austin 1943).

n3 *National Telegraph News Co. v. Western Union Telegraph Co.*, 119 F. 294 (C.C.A. 7th Cir. 1902); *Transcontinental Oil Co. v. Emmerson*, 298 Ill. 394, 131 N.E. 645, 16 A.L.R. 507 (1921).

n4 *Richard v. Hall*, 874 So. 2d 131 (La. 2004).

n5 *Adams v. Great American Lloyd's Ins. Co.*, 891 S.W.2d 769 (Tex. App. Austin 1995); *Birde v. Williams*, 859 S.W.2d 571 (Tex. App. Houston 1st Dist. 1993).

n6 Lucker Mfg., A Unit of Amclyde Engineered Products, Inc. v. Home Ins. Co., 23 F.3d 808 (3d Cir. 1994); Navistar Internat. Transportation Corp. v. State Bd. of Equalization, 8 Cal. 4th 868, 35 Cal. Rptr. 2d 651, 884 P.2d 108 (1994).

n7 Curry v. McCannless, 307 U.S. 357, 59 S. Ct. 900, 83 L. Ed. 1339, 123 A.L.R. 162 (1939).

n8 Lucker Mfg., A Unit of Amclyde Engineered Products, Inc. v. Home Ins. Co., 23 F.3d 808 (3d Cir. 1994); Navistar Internat. Transportation Corp. v. State Bd. of Equalization, 8 Cal. 4th 868, 35 Cal. Rptr. 2d 651, 884 P.2d 108 (1994); Adams v. Great American Lloyd's Ins. Co., 891 S.W.2d 769 (Tex. App. Austin 1995).

n9 Am. Jur. 2d, Goodwill § 4.

n10 In re Marriage of McTiernan and Dubrow, 133 Cal. App. 4th 1090, 35 Cal. Rptr. 3d 287 (2d Dist. 2005).

REFERENCE: West's Key Number Digest, Property [westkey]3, 4

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Lots and Parcels

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]3, 4

West's Key Number Digest, Property [westkey]3, 4

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Property
III. Kinds and Classifications of Property
A. In General

63C Am Jur 2d Property § 10

§ 10 Public and private property

Property may be classified as either public or private. Public property is that owned by the public as such in some governmental capacity,ⁿ¹ and 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.ⁿ² The fact that private property serves a quasi-public service, as in the case of property of a college or university, does not alter its character as private property within the constitutional protection afforded to such property.ⁿ³

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 domainⁿ⁴ and provisions for the exemption of public property from taxation.ⁿ⁵

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.ⁿ⁶ Thus, the public at large is capable of acquiring a nonpossessory interest in land.ⁿ⁷ 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 which he or she has thus created.ⁿ⁸

FOOTNOTES:

n1 Am. Jur. 2d, Public Lands § 1; Am. Jur. 2d, States, Territories, and Dependencies § 64; Am. Jur. 2d, United States § 30.

n2 Board of Trustees of Gate City Guard v. City of Atlanta, 113 Ga. 883, 39 S.E. 394 (1901).

n3 Am. Jur. 2d, Colleges and Universities § 35.

n4 Am. Jur. 2d, Eminent Domain § 14.

n5 Am. Jur. 2d, State and Local Taxation §§ 267 to 278.

n6 U.S. v. Ohio Oil Co., 234 U.S. 548, 34 S. Ct. 956, 58 L. Ed. 1459 (1914).

n7 Town of Manchester v. Augusta Country Club, 477 A.2d 1124 (Me. 1984).

n8 In re Traders Compress Co., 381 F. Supp. 789 (W.D. Okla. 1973).

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

REFERENCE: West's Key Number Digest, Property [westkey]3, 4
A.L.R. Index, Intangible Hereditaments or Property
A.L.R. Index, Interest in Property or Subject Matter
A.L.R. Index, Lots and Parcels
A.L.R. Index, Personal Property
A.L.R. Index, Property
A.L.R. Index, Sale and Transfer of Property
A.L.R. Index, Title and Ownership
West's A.L.R. Digest, Property [westkey]3, 4
West's Key Number Digest, Property [westkey]3, 4

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Property
III. Kinds and Classifications of Property
B. Real Property

63C Am Jur 2d Property § 11

§ 11 Generally; definitions and distinctions

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.ⁿ¹ It has been frequently defined by statute to be coextensive with the phrase "lands, tenements, and hereditaments,"ⁿ² and, in some jurisdictions, real property includes all legal and equitable rights and interests in such subjects.ⁿ³

The term "real property" includes land, possessory rights to land, and that which is appurtenant to land;ⁿ⁴ it has also been defined to include land and generally whatever is erected or growing upon or affixed to land,ⁿ⁵ and the land upon which improvements, such as buildings, are constructed.ⁿ⁶ The term covers all that goes to make up the earth in its natural condition, and, thus, generally includes gas and oil,ⁿ⁷ and it may also include crops, trees, and nursery stock, which have not been severed from the soil.ⁿ⁸ In some jurisdictions, real property is defined to include rents therefrom,ⁿ⁹ and a mortgagee that takes a security interest in rents from the mortgaged property is not regarded as having an interest in property other than the realty itself.ⁿ¹⁰

"Real estate," both at common law and in its generally accepted meaning, is synonymous with real property; however, in its strictly technical sense, the term "real estate" 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.ⁿ¹¹ "Real estate" includes not only the land itself, but also all buildings, fixtures, and improvements, and the rights and privileges appurtenant thereto.ⁿ¹²

An ownership interest in a condominium is treated as property,ⁿ¹³ and a real estate "time-sharing" arrangement may be an estate or interest or possessory interest in property itself,ⁿ¹⁴ although 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.ⁿ¹⁵ However, cooperative apartments are personal property, not real property.ⁿ¹⁶

FOOTNOTES:

n1 *Ralston Steel Car Co. v. Ralston*, 112 Ohio St. 306, 3 Ohio L. Abs. 200, 147 N.E. 513, 39 A.L.R. 334 (1925); *Woodworth v. Franklin*, 1921 OK 333, 85 Okla. 27, 204 P. 452, 27 A.L.R. 590 (1921).

n2 *Callahan v. Martin*, 3 Cal. 2d 110, 43 P.2d 788, 101 A.L.R. 871 (1935); *Woodworth v. Franklin*, 1921 OK 333, 85 Okla. 27, 204 P. 452, 27 A.L.R. 590 (1921).

n3 *National Bank of America of Salina v. Barritt*, 136 Kan. 870, 18 P.2d 552, 86 A.L.R. 225 (1933); *Wood v. Galpert*, 1 Ohio App. 2d 202, 30 Ohio Op. 2d 242, 204 N.E.2d 384 (8th Dist. Cuyahoga County 1965) (stating that the phrase "lands, tenements, and hereditaments" is usually used to designate an owner's whole bundle of rights in any given piece of land).

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

- n4 *Fulton v. Duro*, 107 Idaho 240, 687 P.2d 1367 (Ct. App. 1984), decision aff'd, 108 Idaho 392, 700 P.2d 14 (1985).
- n5 *City Of San Antonio v. Parra*, 185 S.W.3d 61 (Tex. App. San Antonio 2005).
- n6 *Smith v. State*, 176 Md. App. 64, 932 A.2d 773, 224 Ed. Law Rep. 792 (2007).
- n7 *Kunkel v. Meridian Oil, Inc.*, 114 Wash. 2d 896, 792 P.2d 1254 (1990).
- As to gas and oil as real property, see Am. Jur. 2d, Gas and Oil § 5.
- n8 *Key v. Loder*, 182 A.2d 60 (Mun. Ct. App. D.C. 1962).
- As to trees and nursery stock, see § 16.
- As to crops as real property, see Am. Jur. 2d, Crops § 3.
- n9 *In re Scarborough*, 461 F.3d 406 (3d Cir. 2006) (applying Pennsylvania law); *In re Ferandos*, 402 F.3d 147 (3d Cir. 2005) (applying New Jersey law).
- n10 *In re Scarborough*, 461 F.3d 406 (3d Cir. 2006) (applying Pennsylvania law).
- n11 *Dabney v. Edwards*, 5 Cal. 2d 1, 53 P.2d 962, 103 A.L.R. 822 (1935); *Callahan v. Martin*, 3 Cal. 2d 110, 43 P.2d 788, 101 A.L.R. 871 (1935).
- n12 *In re Hodes*, 402 F.3d 1005 (10th Cir. 2005) (applying Kansas law).
- n13 *Board of Directors of 175 East Delaware Place Homeowners Ass'n v. Hinojosa*, 287 Ill. App. 3d 886, 223 Ill. Dec. 222, 679 N.E.2d 407 (1st Dist. 1997).
- n14 *Cal-Am Corp. v. Department of Real Estate*, 104 Cal. App. 3d 453, 163 Cal. Rptr. 729, 6 A.L.R.4th 1281 (2d Dist. 1980).
- n15 *State, Dept. of Commerce, Division of Real Estate v. Carriage House Associates*, 94 Nev. 707, 585 P.2d 1337 (1978).
- n16 *In re Pollack*, 18 A.D.3d 555, 795 N.Y.S.2d 296 (2d Dep't 2005).

REFERENCE: West's Key Number Digest, Property [westkey]1, 3 to 5, 8

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Lots and Parcels

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Time-Share Properties

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]1, 3 to 5, 8

Proof That Item of Personal Property Has Become Fixture of Real Property, 54 Am. Jur. Proof of Facts 3d 303

Am. Jur. Pleading and Practice Forms, Property § 10

West's Key Number Digest, Property [westkey]1, 3, 4, 8

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63C Am Jur 2d Property § 12

§ 12 Lands

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.ⁿ¹ The common law meaning of the term "land" is substantially synonymous with "real property,"ⁿ² and while it generally refers to something corporeal,ⁿ³ it may mean a franchise connected with land.ⁿ⁴ However, the fact that a special franchise may be taxed as if it were an interest in real estate does not make it a real property.ⁿ⁵

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,ⁿ⁶ 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.ⁿ⁷ The expression "interest in land" includes ownership of a portion of a building placed thereon.ⁿ⁸

Observation: Sod, although in a sense land, has been considered personalty on the ground that it is a crop which owes its existence to yearly fertilizing and cultivation.ⁿ⁹

A landowner owns at least as much of the space above the ground as he or she can occupy or use in connection with the land.ⁿ¹⁰ The owner of land in fee holds all of the complex elements of a single right, which include not only the right to use the surface, but so much of the superjacent airspace as he or she can use, as well as the subjacent reaches below.ⁿ¹¹ 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,ⁿ¹² 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.ⁿ¹³ However, there is authority to the contrary,ⁿ¹⁴ and the modern courts recognize that the common law right must be balanced with other rights, such as the right of flight over land.ⁿ¹⁵ The right to receive light and air is also a property right which can be created in a deed.ⁿ¹⁶

While land underlying nonnavigable streams is recognized by some courts to be the subject of private ownership and vested in the proprietors of the adjoining lands,ⁿ¹⁷ other courts hold that even though a party owns the bed of a nonnavigable stream, he or she does not have such property rights in the waters of the stream as to bar the public from boating, fishing, and wading,ⁿ¹⁸ at least where the stream is navigable by small recreational or pleasure boats.ⁿ¹⁹

For purposes of separate ownership, land may be divided horizontally as well as superficially and vertically;ⁿ²⁰ 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.ⁿ²¹

FOOTNOTES:

n1 *Delaney v. Lowery*, 25 Cal. 2d 561, 154 P.2d 674 (1944); *Bruno v. City of Long Branch*, 21 N.J. 68, 120 A.2d 760, 60 A.L.R.2d 216 (1956).

n2 *Callahan v. Martin*, 3 Cal. 2d 110, 43 P.2d 788, 101 A.L.R. 871 (1935); *Southern Pac. Co. v. Riverside County*, 35 Cal. App. 2d 380, 95 P.2d 688 (4th Dist. 1939).

n3 *Southern Pac. Co. v. Riverside County*, 35 Cal. App. 2d 380, 95 P.2d 688 (4th Dist. 1939).

n4 *Southern Pac. Co. v. Riverside County*, 35 Cal. App. 2d 380, 95 P.2d 688 (4th Dist. 1939).

n5 *New York Tel. Co. v. Town of North Hempstead*, 41 N.Y.2d 691, 395 N.Y.S.2d 143, 363 N.E.2d 694 (1977).

n6 *Southern Pac. Co. v. Riverside County*, 35 Cal. App. 2d 380, 95 P.2d 688 (4th Dist. 1939); *New Jersey Power & Light Co. v. Denville Tp., Morris County*, 80 N.J. Super. 435, 194 A.2d 16 (App. Div. 1963).

n7 *New Jersey Power & Light Co. v. Denville Tp., Morris County*, 80 N.J. Super. 435, 194 A.2d 16 (App. Div. 1963); *King Bros., Inc. v. Utah Dry Kiln Co.*, 21 Utah 2d 43, 440 P.2d 17 (1968).

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

n8 *U.S. v. Certain Property Located in Borough of Manhattan, City, County and State of New York*, 225 F. Supp. 498 (S.D. N.Y. 1963).

n9 *Barron v. Edwards*, 45 Mich. App. 210, 206 N.W.2d 508, 12 U.C.C. Rep. Serv. 671 (1973).

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

n10 *Palmer v. Com. Marine Resources Com'n*, 48 Va. App. 78, 628 S.E.2d 84 (2006).

n11 *Stansbury v. MDR Development, L.L.C.*, 161 Md. App. 594, 871 A.2d 612 (2005), judgment aff'd, 390 Md. 476, 889 A.2d 403 (2006).

n12 *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025, 6 A.L.R.4th 1016 (1979); *Pyramid Coal Corp. v. Pratt*, 229 Ind. 648, 99 N.E.2d 427, 25 A.L.R.2d 1245 (1951).

n13 *Selig v. U.S.*, 538 F. Supp. 1387 (W.D. Ark. 1982); *Gas Products Co. v. Rankin*, 63 Mont. 372, 207 P. 993, 24 A.L.R. 294 (1922).

n14 *Katz v. Walkinshaw*, 141 Cal. 116, 74 P. 766 (1903) (refusing to apply the maxim).

n15 *State v. Chippewa Cable Co.*, 48 Wis. 2d 341, 180 N.W.2d 714 (1970).

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

n16 *Mock v. Shulman*, 226 Cal. App. 2d 263, 38 Cal. Rptr. 39 (2d Dist. 1964).

n17 *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025, 6 A.L.R.4th 1016 (1979).

n18 *Elder v. Delcour*, 364 Mo. 835, 269 S.W.2d 17, 47 A.L.R.2d 370 (1954).

n19 *People v. Sweetser*, 72 Cal. App. 3d 278, 140 Cal. Rptr. 82 (5th Dist. 1977); *Curry v. Hill*, 1969 OK 134, 460 P.2d 933 (Okla. 1969).

As to the ownership of, and title to, navigable and nonnavigable waters, see Am. Jur. 2d, Waters § 3.

Generally, as to the status of "floatable" streams, see Am. Jur. 2d, Waters § 129.

n20 *Kidwell v. General Petroleum Corp. of California*, 212 Cal. 720, 300 P. 1, 76 A.L.R. 830 (1931); *Ramage v. South Penn Oil Co.*, 94 W. Va. 81, 118 S.E. 162, 31 A.L.R. 1509 (1923).

n21 *Grey v. Coastal States Holding Co.*, 22 Conn. App. 497, 578 A.2d 1080 (1990).

REFERENCE: West's Key Number Digest, Property [westkey]1, 3 to 5, 8
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63C Am Jur 2d Property § 13

§ 13 Tenements

The word "tenement," in its broadest sense, embraces more than the word "land," and includes everything which may be subject to an interest, provided it is of a permanent nature.ⁿ¹ As used in American jurisdictions, the word "tenement" is generally applied exclusively to land, or to what is usually denominated a real property.ⁿ²

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.ⁿ³ In a different and still more restricted sense, a tenement is a house or building.ⁿ⁴

Rents accruing to land have been classified as a tenement,ⁿ⁵ and sometimes also as an incorporeal hereditament,ⁿ⁶ as real property,ⁿ⁷ or as a chattel real,ⁿ⁸ but the rents due from a tenant after his or her tenancy has terminated are a mere debt, not connected with the lands.ⁿ⁹

FOOTNOTES:

n1 Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 S.W. 486 (1909); Wood v. Galpert, 27 Ohio Op. 2d 454, 93 Ohio L. Abs. 545, 199 N.E.2d 900 (C.P. 1964), judgment aff'd, 1 Ohio App. 2d 202, 30 Ohio Op. 2d 242, 204 N.E.2d 384 (8th Dist. Cuyahoga County 1965).

n2 Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 S.W. 486 (1909).

n3 Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 S.W. 486 (1909).

n4 Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 S.W. 486 (1909).

n5 Wood v. Galpert, 1 Ohio App. 2d 202, 30 Ohio Op. 2d 242, 204 N.E.2d 384 (8th Dist. Cuyahoga County 1965).

n6 § 9.

n7 § 11.

n8 § 20.

n9 Wood v. Galpert, 1 Ohio App. 2d 202, 30 Ohio Op. 2d 242, 204 N.E.2d 384 (8th Dist. Cuyahoga County 1965).

REFERENCE: West's Key Number Digest, Property [westkey]1, 3 to 5, 8
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63C Am Jur 2d Property § 14

§ 14 Hereditaments

"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.ⁿ¹ Hereditaments may be either corporeal, such as lands,ⁿ² or incorporeal.ⁿ³ An incorporeal hereditament is anything, the subject of property, which is inheritable and not tangible or visible; or a right issuing out of a thing corporate, whether real or personal, or concerning or annexed to or exercisable within the same; or a right growing out of, or concerning, or annexed to, a corporeal thing, but not the substance of the thing itself.ⁿ⁴ An incorporeal hereditament may include a franchise,ⁿ⁵ or the right of a riparian landowner to the use of riparian waters,ⁿ⁶ or a profit a prendre.ⁿ⁷

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.ⁿ⁸

FOOTNOTES:

n1 Mead v. Mead, 193 So. 2d 476 (Fla. Dist. Ct. App. 3d Dist. 1967); McLaughlin v. Neiger, 286 S.W.2d 380 (Mo. Ct. App. 1956).

n2 Gerhard v. Stephens, 68 Cal. 2d 864, 69 Cal. Rptr. 612, 442 P.2d 692 (1968).

n3 Callahan v. Martin, 3 Cal. 2d 110, 43 P.2d 788, 101 A.L.R. 871 (1935).

n4 Pottle v. Link, 187 N.C. App. 746, 654 S.E.2d 64 (2007), review allowed, 663 S.E.2d 316 (N.C. 2008) and appeal dismissed, 362 N.C. 509, 668 S.E.2d 31 (2008).

n5 Am. Jur. 2d, Franchises § 5.

n6 Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903) (overruled on other grounds by, Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966)).

n7 Am. Jur. 2d, Easements and Licenses § 3.

n8 Costa Mesa Union School Dist. of Orange County v. Security First Nat. Bank, 254 Cal. App. 2d 4, 62 Cal. Rptr. 113 (4th Dist. 1967).

REFERENCE: West's Key Number Digest, Property [westkey]1, 3 to 5, 8
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63C Am Jur 2d Property § 15

§ 15 Property affixed to realty; mobile homes

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.ⁿ¹ 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.ⁿ² Similarly, a mobile home that is affixed to a permanent foundation will generally be considered real rather than personal property.ⁿ³ In other words, except for mobile homes permanently attached to realty, mobile homes are personal property, not real property.ⁿ⁴ Moreover, a house becomes a personal property, and not part of the real estate, if the owner of the house does not own the land it is situated on.ⁿ⁵ Also, cooperative apartments are personal property, not real property.ⁿ⁶

Real property also includes fixtures, such as machinery that is permanently used in a particular location,ⁿ⁷ and so water and sewer mains are normally considered real property.ⁿ⁸

In judging whether a property is personal or real, the manner in which it is affixed to the land and the permanence with which it has been designed to remain in place must be considered.ⁿ⁹ Thus, chattels become real estate when annexed to real property under such circumstances where it appears clearly from an inspection of the property itself that a permanent annexation to the real property was intended, taking into consideration the character of the annexation, the nature and adaptation of the articles annexed, 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.ⁿ¹⁰ Bricks, for example, are personal property until such time as they are incorporated into a building, at which time they become real property.ⁿ¹¹ However, fuel storage tanks subject to an agreement of sale by which the seller had agreed to transfer to the buyer all personal property connected with their fuel oil delivery business have been held a part of the personal property to be transferred, where 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.ⁿ¹²

Whether a 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, depends on the: (1) annexation, either actual or constructive; (2) adaptation or application to the use or purpose to which it is connected or is appropriated; and (3) intent to make the **article** a permanent accession to the freehold.ⁿ¹³

Definition: "Actual annexation" includes every movement by which chattels are joined or united to a property, and "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.ⁿ¹⁴

Personal property may retain its character as such where it is so agreed by the parties interested even though it is annexed to the realty.ⁿ¹⁵ Thus, a ballast placed by the railroad on a right-of-way retains its character as personalty and, thus, the township's removal of the ballast from the right-of-way with the railroad's permission does not affect the due process property rights of the owners of reversionary estates.ⁿ¹⁶

FOOTNOTES:

n1 Guernsey v. Phinzy, 113 Ga. 898, 39 S.E. 402 (1901).

n2 Mueller v. Mercer County, 60 N.W.2d 678 (N.D. 1953); Employers' Liability Assur. Corp. v. Hartford Acc. & Indem. Co., 151 W. Va. 1062, 158 S.E.2d 212 (1967).

n3 C.I.T. Financial Services v. Premier Corp., 1987 OK 101, 747 P.2d 934 (Okla. 1987).

As to whether mobile homes are real property for the purposes of state and local taxation, see Am. Jur. 2d, State and Local Taxation § 148.

n4 Johnston v. Johnston, 281 Ga. 666, 641 S.E.2d 538 (2007).

n5 § 18.

n6 § 11.

n7 Union Elevator & Warehouse Co., Inc. v. State ex rel. Dept. of Transp., 144 Wash. App. 593, 183 P.3d 1097 (Div. 3 2008).

n8 McPeak v. Thorell, 148 Ill. App. 3d 430, 101 Ill. Dec. 730, 499 N.E.2d 97 (3d Dist. 1986).

n9 Hayden Island, Inc. v. U.S., 380 F. Supp. 96 (D. Or. 1974).

n10 National Blvd. Bank of Chicago v. Citizens Utilities Co. of Illinois, 107 Ill. App. 3d 992, 63 Ill. Dec. 540, 438 N.E.2d 471 (1st Dist. 1982) (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.

n11 Adcor Realty Corp. v. Mellon-Stuart Co., 450 F. Supp. 769 (N.D. Ohio 1978).

n12 Waterbury Petroleum Products, Inc. v. Canaan Oil and Fuel Co., Inc., 193 Conn. 208, 477 A.2d 988 (1984).

n13 Prospecting Unlimited, Inc. v. Norberg, 119 R.I. 116, 376 A.2d 702 (1977).

n14 In re Vic Bernacchi & Sons, Inc., 170 B.R. 647 (Bankr. N.D. Ind. 1994).

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, 122 Idaho 708, 838 P.2d 311 (Ct. App. 1992).

n15 Milner v. New Edinburg School Dist., 211 Ark. 337, 200 S.W.2d 319 (1947); Public Service Co. of New Hampshire v. Vou-doumas, 84 N.H. 387, 151 A. 81, 70 A.L.R. 480 (1930).

n16 Lucas v. Township of Bethel, 137 Fed. Appx. 450 (3d Cir. 2005).

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63C Am Jur 2d Property § 16

§ 16 Trees; nursery stock

Trees which have not been severed from the land, either actually or constructively, are real propertyⁿ¹ which cannot, except as provided by statute, be levied upon and sold on execution as chattels,ⁿ² and which cannot be the subject of larceny.ⁿ³ However, the owner of the land may treat them as personal property for a particular purpose, such as for the purpose of fixing the measure of damages for their wrongful destruction.ⁿ⁴ 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.ⁿ⁵

Observation: Christmas trees have been named personal property on the ground that they are growing crops.ⁿ⁶

The question of 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,ⁿ⁷ 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.ⁿ⁸ 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, and much now depends upon the character, relationship, and intention of the parties, and the particular purpose for which the question is to be determined.ⁿ⁹ 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.ⁿ¹⁰ However, the courts, recognizing the injustice of a strict application of the rule, regard them as personalty in certain particular circumstances and relationships.ⁿ¹¹

FOOTNOTES:

n1 Am. Jur. 2d, Logs and Timber § 7.

n2 Am. Jur. 2d, Executions § 140.

n3 Am. Jur. 2d, Larceny § 56.

n4 As to the measure of damages for the destruction of, or injury to, nursery trees and stock, see Am. Jur. 2d, Damages §§ 276, 277.

n5 *Morgan v. Bolsan Realty Corp.*, 48 A.D.2d 331, 369 N.Y.S.2d 544 (3d Dep't 1975).

n6 *Groth v. Stillson*, 20 Mich. App. 704, 174 N.W.2d 596, 7 U.C.C. Rep. Serv. 429 (1969).

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

n7 Kirkman Nurseries v. Sargent, 42 Cal. App. 290, 183 P. 591 (1st Dist. 1919).

n8 Story v. Christin, 14 Cal. 2d 592, 95 P.2d 925, 125 A.L.R. 1402 (1939).

n9 Kirkman Nurseries v. Sargent, 42 Cal. App. 290, 183 P. 591 (1st Dist. 1919).

n10 Story v. Christin, 14 Cal. 2d 592, 95 P.2d 925, 125 A.L.R. 1402 (1939); State, Through Dept. of Highways v. Henderson, 138 So. 2d 597 (La. Ct. App. 3d Cir. 1962).

N11 Cogliano v. Com., 334 Mass. 354, 135 N.E.2d 648 (1956); Julius Roehrs Co. v. Division of Tax Appeals, Dept. of Treasury, 16 N.J. 493, 109 A.2d 611 (1954).

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Am. Jur. Pleading and Practice Forms, Property § 10 (Complaint -- To recover damages from tenant for committing negligent waste to leased premises -- To enjoin tenant from selling orchard products reserved to landlord)

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63C Am Jur 2d Property § 17

§ 17 Manure

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.ⁿ¹ The rule has been 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 receiving their nourishment from the soil.ⁿ² 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.ⁿ³ Thus, as between a 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.ⁿ⁴ 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, therefore, constitutes realty.ⁿ⁵

FOOTNOTES:

n1 Gomez v. Dykes, 89 Ariz. 171, 359 P.2d 760, 82 A.L.R.2d 1093 (1961).

n2 Gomez v. Dykes, 89 Ariz. 171, 359 P.2d 760, 82 A.L.R.2d 1093 (1961).

n3 Gomez v. Dykes, 89 Ariz. 171, 359 P.2d 760, 82 A.L.R.2d 1093 (1961).

n4 Gomez v. Dykes, 89 Ariz. 171, 359 P.2d 760, 82 A.L.R.2d 1093 (1961).

n5 Gomez v. Dykes, 89 Ariz. 171, 359 P.2d 760, 82 A.L.R.2d 1093 (1961).

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West's Key Number Digest, Property [westkey]1, 3, 4

Manure as real or personal property as between seller and buyer of real property, 82 A.L.R.2d 1099

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Property
III. Kinds and Classifications of Property
C. Personal Property

63C Am Jur 2d Property § 18

§ 18 Generally; definitions

Generally, 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,ⁿ¹ including money, goods, and movable chattels.ⁿ² Indeed, as a legal term of art, the phrase "personal property" includes money.ⁿ³

Personal property may also include: (1) accrued rents, because they are choses in action;ⁿ⁴ (2) a partnership interest;ⁿ⁵ (3) an oil or gas leasehold interest, unless declared to be something else by statute;ⁿ⁶ (4) steam;ⁿ⁷ and (5) billboards.ⁿ⁸ The term is frequently declared by statute to be coextensive with goods, chattels, choses in action, evidences of debt, and money.ⁿ⁹ Some statutes also use the words in the limited sense of chattel or tangible property as distinguished from incorporeal rights,ⁿ¹⁰ this being accomplished in some cases by the use of qualifying words, such as "tangible," or the like.ⁿ¹¹

The term "intangible personal property" is generally interpreted to include incorporeal rights, such as choses in action.ⁿ¹²

A house becomes a personal property, and not part of the real estate, if the owner of the house does not own the land it is situated on.ⁿ¹³ Also, cooperative apartments are personal property, not real property.ⁿ¹⁴

Observation: Gametic material, with its potential to produce life, is a unique type of property and thus is not governed by the general laws relating to gifts or personal property or transfer of personal property upon death.ⁿ¹⁵

FOOTNOTES:

n1 *State v. Robinson*, 3 Conn. Cir. Ct. 273, 212 A.2d 833 (App. Div. 1965); *City of Holland v. Fillmore Tp.*, 363 Mich. 38, 108 N.W.2d 840 (1961).

n2 *Clancy v. Oak Park Village Athletic Center*, 140 Mich. App. 304, 364 N.W.2d 312, 40 U.C.C. Rep. Serv. 832 (1985).

n3 *Hanson v. Estate of Bjerke*, 2004 MT 200, 322 Mont. 280, 95 P.3d 704 (2004).

n4 *In re Westchase I Associates, L.P.*, 126 B.R. 692 (W.D. N.C. 1991) (construing North Carolina law).

As to choses in action, see § 22.

n5 *Forward v. Beucler*, 702 F. Supp. 582 (E.D. Va. 1988) (construing Virginia law).

n6 *Utica Nat. Bank and Trust Co., Tulsa, Okl. v. Marney*, 233 Kan. 432, 661 P.2d 1246 (1983).

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

n7 Concord Steam Corp. v. City of Concord, 128 N.H. 724, 519 A.2d 266 (1986).

n8 Manderson & Associates, Inc. v. Gore, 193 Ga. App. 723, 389 S.E.2d 251 (1989).

n9 Button v. Drake, 302 Ky. 517, 195 S.W.2d 66, 167 A.L.R. 1046 (1946).

n10 Cincinnati Street Ry. Co. v. Whitehead, 39 Ohio App. 51, 9 Ohio L. Abs. 552, 176 N.E. 583 (1st Dist. Hamilton County 1930).

n11 Maxwell v. Kent-Coffey Mfg. Co., 204 N.C. 365, 168 S.E. 397, 90 A.L.R. 476 (1933), aff'd, 291 U.S. 642, 54 S. Ct. 437, 78 L. Ed. 1040 (1934).

n12 Parsowith v. Com., Dept. of Revenue, 555 Pa. 200, 723 A.2d 659 (1999).

As to choses in action, see § 22.

n13 Price v. Godby, 263 S.W.3d 598 (Ky. Ct. App. 2008).

N14 § 11.

n15 In re Estate of Kievernagel, 166 Cal. App. 4th 1024, 83 Cal. Rptr. 3d 311 (3d Dist. 2008).

REFERENCE: West's Key Number Digest, Property [westkey]3 to 5.5

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]3 to 5.5

Proof That Item of Personal Property Has Become Fixture of Real Property, 54 Am. Jur. Proof of Facts 3d 303

Am. Jur. Pleading and Practice Forms, Property § 20

West's Key Number Digest, Property [westkey]3, 4

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Property
III. Kinds and Classifications of Property
C. Personal Property

63C Am Jur 2d Property § 19

§ 19 Chattels and movables

"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.ⁿ¹ A "chattel" is moveable or transferable property, and a "chattel personal" is a tangible good or an intangible right, such as a patent.ⁿ² The term "chattel" extends only to tangible articles of personal property that may be possessed and delivered, and does not include securities.ⁿ³

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.ⁿ⁴ However, it is now generally understood to include 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.ⁿ⁵ The nature of a movable is generally such that its identity is not lost if it is moved from one location to another.ⁿ⁶ Sinks and fans placed on a premises by a former lessee are movables,ⁿ⁷ as are portable window unit air conditioners and racks attached to window sills by screws, an electrical extension cord with a socket and bulb at its end, copper tubing connected to a refrigerator, and small doghouses.ⁿ⁸

"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 used here may in certain circumstances constitute personal property. Thus, unharvested crops may be personal property for some purposes, but they are not movable property,ⁿ⁹ and standing timber may acquire the status of personalty in some circumstances, although it is not movable.ⁿ¹⁰

Neither "chattels" nor "movables" include choses in action, in their original signification,ⁿ¹¹ although the latter are personal property.ⁿ¹²

FOOTNOTES:

n1 *Clancy v. Oak Park Village Athletic Center*, 140 Mich. App. 304, 364 N.W.2d 312, 40 U.C.C. Rep. Serv. 832 (1985).

As to "chattels real," see § 20.

n2 *In re Marriage of Langham and Kolde*, 153 Wash. 2d 553, 106 P.3d 212 (2005).

n3 *In re Estate of Light*, 385 Ill. App. 3d 196, 324 Ill. Dec. 43, 895 N.E.2d 43 (3d Dist. 2008).

n4 *McNamara v. Oilfield Const. Co., Inc.*, 417 So. 2d 1311 (La. Ct. App. 3d Cir. 1982), writ denied, 422 So. 2d 157 (La. 1982); *Strobel v. Northwest G. F. Mut. Ins. Co.*, 152 N.W.2d 794 (N.D. 1967).

n5 *Succession of Young*, 205 So. 2d 791 (La. Ct. App. 1st Cir. 1967).

n6 *Bailey v. Kruithoff*, 280 So. 2d 262 (La. Ct. App. 2d Cir. 1973).

n7 *Automatique New Orleans, Inc. v. Capitano*, 211 So. 2d 757 (La. Ct. App. 4th Cir. 1968).

n8 *Lafleur v. Foret*, 213 So. 2d 141 (La. Ct. App. 3d Cir. 1968).

n9 Am. Jur. 2d, Crops §§ 3 to 7.

n10 Am. Jur. 2d, Logs and Timber § 7.

n11 *First Nat. Bank v. Holland*, 99 Va. 495, 39 S.E. 126 (1901).

n12 §§ 22, 23.

REFERENCE: West's Key Number Digest, Property [westkey]3 to 5.5

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]3 to 5.5

Proof That Item of Personal Property Has Become Fixture of Real Property, 54 Am. Jur. Proof of Facts 3d 303

Am. Jur. Pleading and Practice Forms, Property § 20

West's Key Number Digest, Property [westkey]3, 4

Proof That Item of Personal Property Has Become Fixture of Real Property, 54 Am. Jur. Proof of Facts 3d 303

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63C Am Jur 2d Property § 20

§ 20 Chattels real

A "chattel real" is an interest in real estate having the character of immobility, which is less than a freehold and is personal property.ⁿ¹ 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.ⁿ² Where a person erects buildings on leased premises under an agreement in the lease that he or she 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.ⁿ³ A term for years, while denominated as a chattel real, is not technically considered real estate;ⁿ⁴ rather, it is personal property, regardless of its duration in years,ⁿ⁵ and passes a present interest in real property.ⁿ⁶

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.ⁿ⁷

FOOTNOTES:

n1 *Citicorp v. Bank of Lansing*, 604 F. Supp. 585 (N.D. Ind. 1985); *Dempsey v. Diederich*, 313 Ky. 865, 233 S.W.2d 976 (1950).

n2 *Lincoln Nat. Bank & Trust Co. of Fort Wayne v. Nathan*, 215 Ind. 178, 19 N.E.2d 243 (1939).

n3 *Lincoln Nat. Bank & Trust Co. of Fort Wayne v. Nathan*, 215 Ind. 178, 19 N.E.2d 243 (1939).

n4 *Callahan v. Martin*, 3 Cal. 2d 110, 43 P.2d 788, 101 A.L.R. 871 (1935); *Abraham v. Fioramonte*, 158 Ohio St. 213, 48 Ohio Op. 159, 107 N.E.2d 321, 33 A.L.R.2d 1267 (1952).

n5 *State v. Platte Valley Public Power & Irr. Dist.*, 147 Neb. 289, 23 N.W.2d 300, 166 A.L.R. 1196 (1946); *Application for Awarding of Process of Subpoena Pursuant to R.S. 54:4-16*, 21 N.J. Misc. 387, 34 A.2d 239 (Cir. Ct. 1943).

n6 *Abraham v. Fioramonte*, 158 Ohio St. 213, 48 Ohio Op. 159, 107 N.E.2d 321, 33 A.L.R.2d 1267 (1952).

n7 *Application for Awarding of Process of Subpoena Pursuant to R.S. 54:4-16*, 21 N.J. Misc. 387, 34 A.2d 239 (Cir. Ct. 1943); *Janura v. Fencel*, 261 Wis. 179, 52 N.W.2d 144 (1952).

REFERENCE: West's Key Number Digest, Property [westkey]3 to 5.5

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]3 to 5.5

Proof That Item of Personal Property Has Become Fixture of Real Property, 54 Am. Jur. Proof of Facts 3d 303

Am. Jur. Pleading and Practice Forms, Property § 20

West's Key Number Digest, Property [westkey]3, 4

Am. Jur. Pleading and Practice Forms, Property § 20 (Complaint, petition, or declaration -- Allegation -- Status of chattels real fixed by agreement as personal property)

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Property
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63C Am Jur 2d Property § 21

§ 21 Things severed from real property

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.ⁿ¹ 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.ⁿ² Thus, 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.ⁿ³

FOOTNOTES:

n1 *Willamette Quarries, Inc. v. Wodtli*, 308 Or. 406, 781 P.2d 1196 (1989).

n2 *Derbofen v. T. L. James & Co.*, 148 So. 2d 795, 1 A.L.R.3d 793 (La. Ct. App. 4th Cir. 1962); *Barron v. Edwards*, 45 Mich. App. 210, 206 N.W.2d 508, 12 U.C.C. Rep. Serv. 671 (1973) (commercially grown sod).

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

As to severance of manure, see § 17.

n3 *Townsend v. State ex rel. State Highway Dept.*, 117 N.M. 302, 871 P.2d 958 (1994); *Bonner v. Oklahoma Rock Corp.*, 1993 OK 131, 863 P.2d 1176 (Okla. 1993) (when lifted or reduced to possession, oil and gas become personal property).

REFERENCE: West's Key Number Digest, Property [westkey]3 to 5.5

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]3 to 5.5

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West's Key Number Digest, Property [westkey]3 to 5

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Property
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63C Am Jur 2d Property § 22

§ 22 Choses in action

A chose in action is a personal right not reduced into possession, but recoverable by a suit at law.ⁿ¹ It has been defined also as a thing of which one has only a right of possession rather than actual possession.ⁿ² For example, a parking ticket represents a cause of action and is a property, although intangible.ⁿ³

Choses in action are personal property and, although intangible, are property subject to encumbrances.ⁿ⁴

Observation: A 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.ⁿ⁵

FOOTNOTES:

n1 Capital Nat. Bank of New York v. McDonald's Corp., 625 F. Supp. 874, 42 U.C.C. Rep. Serv. 1040 (S.D. N.Y. 1986) (construing New York law); Peavy Lumber Co. v. Murchison, 272 Ala. 251, 130 So. 2d 338 (1961).

n2 In re Antley, 18 B.R. 207 (Bankr. M.D. Ga. 1982); Peavy Lumber Co. v. Murchison, 272 Ala. 251, 130 So. 2d 338 (1961) (stating that there can in the nature of things be no present possession of a thing which lies merely in an action).

n3 LeFevour v. U.S., 748 F. Supp. 579 (N.D. Ill. 1990).

n4 Moore v. Nassau County Dept. of Public Transp., 78 Misc. 2d 1066, 357 N.Y.S.2d 652 (Sup 1974); Mueller v. Rupp, 52 Wash. App. 445, 761 P.2d 62 (Div. 1 1988).

n5 Am. Jur. 2d, Conflict of Laws § 31.

REFERENCE: West's Key Number Digest, Property [westkey]3 to 5.5

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]3 to 5.5

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West's Key Number Digest, Property [westkey]5.5

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63C Am Jur 2d Property § 23

§ 23 Rights of action constituting choses in action

The term "chose in action" is comprehensive, and 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 an action.ⁿ¹

The term "chose in action" may be used in two senses. Thus, 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.ⁿ² However, it is frequently used in a more limited sense, confining it to assignable rights of action arising from a contractⁿ³ and, perhaps, arising from a breach of duty for injuries to property,ⁿ⁴ or for torts connected with a contract,ⁿ⁵ to the exclusion of a right of action ex delicto for personal injuries.ⁿ⁶

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.ⁿ⁷ As an illustration of the comprehensiveness of the term, a chose in action may include open or unliquidated accounts,ⁿ⁸ bills and accounts receivable,ⁿ⁹ the right to receive contract payments under a contract for the sale of real property,ⁿ¹⁰ and a policy of insurance.ⁿ¹¹ Shares of corporate stock are regarded as personal property in the nature of choses in action.ⁿ¹²

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 may be deemed a property.ⁿ¹³

FOOTNOTES:

n1 Peavy Lumber Co. v. Murchison, 272 Ala. 251, 130 So. 2d 338 (1961); State v. Tauscher, 227 Or. 1, 360 P.2d 764, 88 A.L.R.2d 674 (1961).

n2 Porter v. Household Finance Corp. of Columbus, 385 F. Supp. 336, 46 Ohio Misc. 53, 75 Ohio Op. 2d 426 (S.D. Ohio 1974).

n3 Bronzo Estate, 69 Pa. D. & C. 390, 1949 WL 10820 (C.P. 1949).

As to the assignability of choses in action, see Am. Jur. 2d, Assignments §§ 44 to 50.

n4 Coty v. Cogswell, 100 Mont. 496, 50 P.2d 249 (1935).

n5 Coty v. Cogswell, 100 Mont. 496, 50 P.2d 249 (1935); Bronzo Estate, 69 Pa. D. & C. 390, 1949 WL 10820 (C.P. 1949).

n6 Coty v. Cogswell, 100 Mont. 496, 50 P.2d 249 (1935).

n7 First Nat. Bank v. Holland, 99 Va. 495, 39 S.E. 126 (1901).

n8 Miami Coal Co. v. Fox, 203 Ind. 99, 176 N.E. 11, 79 A.L.R. 333 (1931).

n9 Miami Coal Co. v. Fox, 203 Ind. 99, 176 N.E. 11, 79 A.L.R. 333 (1931).

n10 In re Freeborn, 94 Wash. 2d 336, 617 P.2d 424, 29 U.C.C. Rep. Serv. 1625 (1980).

n11 Densby v. Acacia Mut. Life Ass'n, 78 F.2d 203, 101 A.L.R. 863 (App. D.C. 1935); Miller v. Miller, 200 Iowa 1070, 205 N.W. 870, 43 A.L.R. 567 (1925).

n12 Registrar & Transfer Co. v. Director, Division of Taxation, Dept. of Treasury, 166 N.J. Super. 75, 398 A.2d 1335 (App. Div. 1979).

n13 Maryland Cas. Co. v. Brown, 321 F. Supp. 309 (N.D. Ga. 1971) (applying Georgia law).

REFERENCE: West's Key Number Digest, Property [westkey]3 to 5.5

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

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Property
IV. Title; Ownership; Possession; Use

63C Am Jur 2d Property § 24

§ 24 Generally; acquisition

One of the essential characteristics of property is the ability to acquire it by any lawful and legitimate means,ⁿ¹ such as by descent and by purchase,ⁿ² by a transfer or conveyance, as by a devise from a decedent's estate, or a common sale.ⁿ³ In some jurisdictions, a person does not acquire interest in property solely because the property in question was purchased with funds belonging wholly or in part to such person.ⁿ⁴ Property may also be acquired by the operation of natural causes, as by accretion in the case of real property,ⁿ⁵ and in the case of personal property, by the increase of animals.ⁿ⁶ Property in personalty may be acquired by its incorporation into, or union with, other property.ⁿ⁷ However, trespass cannot form the basis for the acquisition of title.ⁿ⁸

Common law requires the acceptance of ownership of property before ownership can vest.ⁿ⁹ On the other hand, the doctrine of renunciation applies where an individual has made an express, clear, and unequivocal renunciation of his or her rights to property, which must be made with the full knowledge of the effects, legal and practical, of the act or the statement made, and must be intelligently done, with full awareness of all the surrounding circumstances.ⁿ¹⁰

Observation: In determining priority, a party is deemed on constructive notice of another's interest in real property, where the party could have learned by inquiry of the person in possession and of others who, the party had reason to believe, knew of facts which might affect title, and also by what appeared in the appropriate indices in the office of the recorder of deeds.ⁿ¹¹

FOOTNOTES:

n1 *Woolf v. Fuller*, 87 N.H. 64, 174 A. 193, 94 A.L.R. 1067 (1934).

n2 *Warner v. Flack*, 278 Ill. 303, 116 N.E. 197, 2 A.L.R. 423 (1917); *Lynn v. Rainey*, 1964 OK 212, 400 P.2d 805 (Okla. 1964).

n3 *Luloff v. Blackburn*, 274 Mont. 64, 906 P.2d 189 (1995); *Lynn v. Rainey*, 1964 OK 212, 400 P.2d 805 (Okla. 1964).

n4 *Spotts v. U.S.*, 429 F.3d 248, 2005 FED App. 0441P (6th Cir. 2005) (applying Kentucky law).

n5 Am. Jur. 2d, *Waters* §§ 315 to 318.

n6 Am. Jur. 2d, *Animals* § 8.

n7 *IDS Leasing Corp. v. Leasing Associates, Inc.*, 590 S.W.2d 607, 27 U.C.C. Rep. Serv. 1441 (Tex. Civ. App. Houston 1st Dist. 1979), writ refused n.r.e., (Mar. 5, 1980).

n8 *Hinojos v. Lohmann*, 182 P.3d 692 (Colo. App. 2008).

n9 *Jackson County v. State, Dept. of Natural Resources*, 2006 WI 96, 293 Wis. 2d 497, 717 N.W.2d 713 (2006).

n10 In re Estate of McIntosh, 146 N.H. 474, 773 A.2d 649 (2001).

n11 Mid-State Bank and Trust Co. v. Globalnet Intern., Inc., 557 Pa. 555, 735 A.2d 79 (1999).

REFERENCE: West's Key Number Digest, Property [westkey]1, 7, 9, 10

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Lots and Parcels

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]1, 7, 9, 10

Permissive Possession or Use of Land, As Defeating Claim of Adverse Possession or Prescriptive Easement, 68 Am. Jur. Proof of Facts 3d 239

Justified Use of Force in Defense of Private Property, 38 Am. Jur. Proof of Facts 2d 731

Am. Jur. Pleading and Practice Forms, Property §§ 13, 16, 19, 21, 24, 26 to 31, 34, 35

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Property

IV. Title; Ownership; Possession; Use

63C Am Jur 2d Property § 25

§ 25 Title

A "title" is the evidence of a person's right or of the extent of his or her interest, the means whereby the owner is enabled to maintain or assert his or her 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.ⁿ¹ "Legal title" to real property is defined as title evidencing apparent ownership, but does not necessarily signify full and complete title or beneficial interest.ⁿ² "Title" and "ownership" are not synonymous; "ownership" is but one element of "title."ⁿ³ 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.ⁿ⁴

Definitions: "Color of title" is that which gives a semblance or appearance of title, but is not the title in fact,ⁿ⁵ and a holder by "color of title" has a claim to title that while having the appearance of validity is, in reality, defective.ⁿ⁶ "Equitable title" is the right in the party to whom such title belongs to have the legal title transferred to him or her upon the performance of a specified condition.ⁿ⁷

A party's possession of real property is merely prima facie evidence of title.ⁿ⁸ Also, while the right to dispose is one of the essential incidents of property,ⁿ⁹ it is not title, but a mere power which may be exercised.ⁿ¹⁰

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.ⁿ¹¹

Observation: According to the "form of title presumption," the description in a deed as to how title is held is presumed to reflect the actual ownership interests in the property.ⁿ¹² This "form of title" presumption affects the burden of proof, that is, the party asserting that title is other than as stated in the deed has the burden of proving that fact by clear and convincing evidence.ⁿ¹³ The presumption cannot be overcome solely by tracing the funds used to purchase the property, nor by testimony of an intention not disclosed to the grantee at the time of the execution of the conveyance, nor by evidence that title was taken in a particular manner merely to obtain a loan.ⁿ¹⁴ The presumption can be overcome only by evidence of an agreement or understanding between the parties that the title reflected in the deed is not what the parties intended.ⁿ¹⁵ The presumption is based on promoting the public policy in favor of the stability of titles to property.ⁿ¹⁶

Title to real estate cannot remain in abeyance; it must be vested in someone,ⁿ¹⁷ 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.ⁿ¹⁸ Legal title to real property may be held only by a natural person or some legal entity sanctioned by law to hold such title.ⁿ¹⁹

Observation: Some jurisdictions have enacted statutes which are designed to simplify conveyances of real property, stabilize titles, and give certainty to land ownership.ⁿ²⁰ Thus, a state statute known as the Marketable Record Title Act (MRTA) contains a scheme to accomplish the objective of stabilizing property law by clearing old defects from land titles, limiting the period of record search, and clearly defining marketability by extinguishing old interests of record not specifically claimed or reserved.ⁿ²¹

FOOTNOTES:

- n1 U.S. v. Denlinger, 982 F.2d 233 (7th Cir. 1992); North v. Graham, 235 Ill. 178, 85 N.E. 267 (1908).
- n2 Woodland Grove Baptist Church v. Woodland Grove Community Cemetery Ass'n, Inc., 947 So. 2d 1031 (Ala. 2006).
- n3 Montgomery County v. Wildwood Medical Center, L.L.C., 176 Md. App. 731, 934 A.2d 484 (2007), cert. granted, 403 Md. 304, 941 A.2d 1104 (2008) and rev'd on other grounds, 405 Md. 489, 954 A.2d 457 (2008).
- n4 Azar v. Old Willow Falls Condominium Ass'n, 228 Ill. App. 3d 753, 170 Ill. Dec. 694, 593 N.E.2d 583 (1st Dist. 1992).
- n5 Stevenson v. Owen, 212 Mont. 287, 687 P.2d 1010 (1984).
- n6 Allen v. Hall, 2006 UT 70, 148 P.3d 939 (Utah 2006).
- n7 Carolan v. Nelson, 226 S.W.3d 923 (Mo. Ct. App. W.D. 2007).
- n8 Hinojos v. Lohmann, 182 P.3d 692 (Colo. App. 2008).
- n9 § 35.
- n10 Barbin v. Moore, 85 N.H. 362, 159 A. 409, 83 A.L.R. 62 (1932).
- n11 Favaloro v. Favaloro, 561 So. 2d 783 (La. Ct. App. 4th Cir. 1990), writ denied, 567 So. 2d 1125 (La. 1990).
- n12 In re Marriage of Brooks, 169 Cal. App. 4th 176, 86 Cal. Rptr. 3d 624 (4th Dist. 2008), review denied, (Mar. 25, 2009).
- n13 In re Marriage of Brooks, 169 Cal. App. 4th 176, 86 Cal. Rptr. 3d 624 (4th Dist. 2008), review denied, (Mar. 25, 2009).
- n14 In re Marriage of Brooks, 169 Cal. App. 4th 176, 86 Cal. Rptr. 3d 624 (4th Dist. 2008), review denied, (Mar. 25, 2009).
- n15 In re Marriage of Brooks, 169 Cal. App. 4th 176, 86 Cal. Rptr. 3d 624 (4th Dist. 2008), review denied, (Mar. 25, 2009).
- n16 In re Marriage of Brooks, 169 Cal. App. 4th 176, 86 Cal. Rptr. 3d 624 (4th Dist. 2008), review denied, (Mar. 25, 2009).
- n17 Carter v. Wroten, 187 S.C. 432, 198 S.E. 13, 119 A.L.R. 379 (1938).
- n18 Matter of Estate of Violi, 65 N.Y.2d 392, 492 N.Y.S.2d 550, 482 N.E.2d 29 (1985).
- n19 Krumbine v. Lebanon County Tax Claim Bureau, 541 Pa. 384, 663 A.2d 158 (1995).
- n20 H & F Land, Inc. v. Panama City-Bay County Airport and Industrial District, 736 So. 2d 1167 (Fla. 1999).
- n21 H & F Land, Inc. v. Panama City-Bay County Airport and Industrial District, 736 So. 2d 1167 (Fla. 1999).

SUPPLEMENT:

Cases

The property interest created by an instrument poses a mixed question of law and fact; the parties' intent is a question of fact, and the legal effect of their intent is a question of law. (Per Fairhurst, J., with one Justice concurring and four Justices concurring in the result.) *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 243 P.3d 521 (Wash. 2010).

REFERENCE: West's Key Number Digest, Property [westkey]1, 7, 9, 10

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Lots and Parcels

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]1, 7, 9, 10

Permissive Possession or Use of Land, As Defeating Claim of Adverse Possession or Prescriptive Easement, 68 Am. Jur. Proof of Facts 3d 239

Justified Use of Force in Defense of Private Property, 38 Am. Jur. Proof of Facts 2d 731

Am. Jur. Pleading and Practice Forms, Property §§ 13, 16, 19, 21, 24, 26 to 31, 34, 35

West's Key Number Digest, Property [westkey]1, 7, 9

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Property
IV. Title; Ownership; Possession; Use

63C Am Jur 2d Property § 26

§ 26 Owner and ownership

"Ownership" is a collection of rights to possess, to use, and to enjoy property, including the right to sell and transmit it.ⁿ¹ Ownership of real estate is a broad concept and can apply to one other than the record titleholder.ⁿ² While there may be times in which "ownership" of land is equated with the possession of legal title, the word has also been utilized to describe a person who has dominion or control over property even though title resides elsewhere.ⁿ³

The plain meaning of "owner" contemplates someone with legal or rightful title to the real estate in question.ⁿ⁴ The term "owner" is one of general application and includes one having an interest other than the full legal and beneficial title;ⁿ⁵ it is one of flexible meaning, and it varies from an absolute proprietary interest to a mere possessory right.ⁿ⁶ Moreover, the word "owner" is not a technical term and, as such, is not confined to a person who has the absolute right in a chattel, but also applies to a person who has possession and control thereof.ⁿ⁷

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.ⁿ⁸ 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,ⁿ⁹ and when used alone, the term 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.ⁿ¹⁰ In some cases, de facto ownership may exist without physical possession, where there is a sufficient degree of possession, control, dominion, or supervision.ⁿ¹¹ However, the term owner is often used to characterize the possessor of an interest less than that of absolute ownership,ⁿ¹² such as a tenant for years, a tenant for life, and a remainderman in fee.ⁿ¹³

The owner of property is the one who, in case of its destruction, must sustain the loss of it.ⁿ¹⁴ Thus, a person is an "owner" of property although he or she holds only the equitable title.ⁿ¹⁵

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.ⁿ¹⁶

The state's power to regulate does not constitute ownership, nor does the fact that a state has regulated an object in and of itself constitute ownership.ⁿ¹⁷

FOOTNOTES:

n1 *Energy Oils, Inc. v. Montana Power Co.*, 626 F.2d 731, 6 Fed. R. Evid. Serv. 1256 (9th Cir. 1980); *State ex rel. Elvis Presley Intern. Memorial Foundation v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987).

As to incidents of ownership, generally, see § 27.

n2 *Board of Educ. of Glen Ellyn Community Consol. School Dist. No. 89 v. Department of Revenue*, 356 Ill. App. 3d 165, 292 Ill. Dec. 158, 825 N.E.2d 746, 197 Ed. Law Rep. 340 (2d Dist. 2005).

n3 Jock v. Zoning Bd. of Adjustment of Tp. of Wall, 371 N.J. Super. 547, 854 A.2d 928 (App. Div. 2004), judgment rev'd on other grounds, 184 N.J. 562, 878 A.2d 785 (2005).

n4 Travis Cent. Appraisal Dist. v. Signature Flight Support Corp., 140 S.W.3d 833 (Tex. App. Austin 2004).

n5 Payne v. TK Auto Wholesalers, 98 Conn. App. 533, 911 A.2d 747 (2006).

n6 Payne v. TK Auto Wholesalers, 98 Conn. App. 533, 911 A.2d 747 (2006).

N7 Payne v. TK Auto Wholesalers, 98 Conn. App. 533, 911 A.2d 747 (2006).

n8 People v. Chicago Title and Trust Co., 75 Ill. 2d 479, 27 Ill. Dec. 476, 389 N.E.2d 540 (1979).

n9 Graf v. State, 118 Neb. 485, 225 N.W. 466 (1929).

n10 U.S. v. MPM Contractors, Inc., 763 F. Supp. 488 (D. Kan. 1991).

n11 U.S. v. MPM Contractors, Inc., 763 F. Supp. 488 (D. Kan. 1991).

n12 U.S. Nat. Bank v. Lake Superior Terminal & Transfer Ry. Co., 170 Wis. 539, 174 N.W. 923 (1919).

n13 T.W. Spinks Co. v. Pachoud Bros., 263 Ky. 119, 92 S.W.2d 50 (1936); Ramsey v. Leeper, 1933 OK 661, 168 Okla. 43, 31 P.2d 852 (1933).

n14 Automobile Underwriters v. Tite, 119 Ind. App. 251, 85 N.E.2d 365 (1949); American Motor Corp. v. City of Kenosha, 274 Wis. 315, 80 N.W.2d 363 (1957), judgment aff'd, 356 U.S. 21, 78 S. Ct. 559, 2 L. Ed. 2d 578 (1958).

n15 Godwin v. Gerling, 362 Mo. 19, 239 S.W.2d 352, 40 A.L.R.2d 1250 (1951).

n16 Schram v. Manary, 123 Or. 354, 260 P. 214 (1927), modified on reh'g, 123 Or. 354, 262 P. 263 (1927).

n17 U.S. v. McClain, 545 F.2d 988 (5th Cir. 1977).

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

REFERENCE: West's Key Number Digest, Property [westkey]1, 7, 9, 10

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Lots and Parcels

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]1, 7, 9, 10

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Justified Use of Force in Defense of Private Property, 38 Am. Jur. Proof of Facts 2d 731

Am. Jur. Pleading and Practice Forms, Property §§ 13, 16, 19, 21, 24, 26 to 31, 34, 35

West's Key Number Digest, Property [westkey]1, 7

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Property

IV. Title; Ownership; Possession; Use

63C Am Jur 2d Property § 27

§ 27 Incidents of ownership

The primary incidents of ownership include the right to possession, the use and enjoyment of the property, the right to change or improve the property, and the right to alienate the property at will.ⁿ¹ Stated somewhat differently, there are certain minimum elements that must be present for a person to be considered an owner of property; an owner can include one who has control or occupation of the land although he or she is not the record titleholder, but that person must possess the rights to control and enjoy the property.ⁿ² Simply stated, the owner of real property generally has the right to possess, use, enjoy, and dispose of the property and the corresponding right to exclude others from its use.ⁿ³ Real property implicates a broad range of potential rights, including all rights inherent in ownership, including the right to possess, use, and enjoy the property, as well as security in and title to the property.ⁿ⁴

Ownership of property implies the right of possession and control,ⁿ⁵ 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.ⁿ⁶ Ownership includes the right to protect and defend such possession against the intrusion or trespass of others,ⁿ⁷ and also gives the owner the right and ability to limit any obstructions from being placed on the land.ⁿ⁸

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.ⁿ⁹ 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 a trespasser.ⁿ¹⁰

As one of its incidents, the ownership of property carries with it, at law and in equity, the right to its products or increase.ⁿ¹¹ The interest of the landowner in exclusive possession extends above and below the surface of the property.ⁿ¹² Thus, the landowner may recover for trespass committed by explosions or blasting operations,ⁿ¹³ or by other operations designed to undermine his or her property.ⁿ¹⁴

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.ⁿ¹⁵

FOOTNOTES:

n1 Department of Transp. v. Anderson, 384 Ill. App. 3d 309, 322 Ill. Dec. 869, 892 N.E.2d 116 (3d Dist. 2008).

n2 Department of Transp. v. Anderson, 384 Ill. App. 3d 309, 322 Ill. Dec. 869, 892 N.E.2d 116 (3d Dist. 2008).

n3 Navajo Const., Inc. v. Brigham, 271 Ga. App. 128, 608 S.E.2d 732 (2004).

n4 Hamm v. Arrowcreek Homeowners' Ass'n, 124 Nev. 28, 183 P.3d 895 (2008).

n5 Rick v. Boegel, 205 N.W.2d 713 (Iowa 1973); Ablah v. Eyman, 188 Kan. 665, 365 P.2d 181, 90 A.L.R.2d 766 (1961).

n6 U.S. v. McClain, 545 F.2d 988 (5th Cir. 1977) (possession is a frequent incident, not the sine qua non of ownership); John Wanamaker, Philadelphia v. School Dist. of Philadelphia, 441 Pa. 567, 274 A.2d 524 (1971).

n7 Zabowski v. Loerch, 255 Mich. 125, 237 N.W. 386 (1931);

Cross v. State, 370 P.2d 371, 93 A.L.R.2d 1357 (Wyo. 1962) (stating that the right to protect property is a constitutional right under the state constitution, notwithstanding the absence of an express provision therein to that effect).

n8 8,960 Square Feet, More or Less v. State, Dept. of Transp. and Public Facilities, 806 P.2d 843, 7 A.L.R.5th 1004 (Alaska 1991).

n9 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982); Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (1974) (a possessory interest in real property must include the general right to exclude others).

n10 Com. v. Haddock, 46 Mass. App. Ct. 246, 704 N.E.2d 537 (1999).

n11 Zuniga v. County of San Mateo Dept. of Health Services, 218 Cal. App. 3d 1521, 267 Cal. Rptr. 755 (1st Dist. 1990).

n12 Steiger v. Nowakowski, 67 Wis. 2d 355, 227 N.W.2d 104 (1975).

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.

n13 Laughon & Johnson, Inc. v. Burch, 222 Va. 200, 278 S.E.2d 856 (1981).

As to damages from the consequences of blasting, see Am. Jur. 2d, Explosions and Explosives § 81.

n14 Steiger v. Nowakowski, 67 Wis. 2d 355, 227 N.W.2d 104 (1975).

n15 Polytechnic Data Corp. v. Xerox Corp., 362 F. Supp. 1 (N.D. Ill. 1973) (attachment of device for controlling and measuring work on copying machines to such machines owned and leased by manufacturer); Illinois Bell Telephone Co. v. Miner, 11 Ill. App. 2d 44, 136 N.E.2d 1 (2d Dist. 1956) (use of plastic covers on telephone directories owned by telephone company).

SUPPLEMENT:

Cases

One with a possessory interest has the right and intention to exclude other members of society in general from any present occupation of the land. Restatement (First) of Property § 7. Osguthorpe v. Wolf Mountain Resorts, L.C., 2010 UT 29, 232 P.3d 999 (Utah 2010).

REFERENCE: West's Key Number Digest, Property [westkey]1, 7, 9, 10

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A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]1, 7, 9, 10

Permissive Possession or Use of Land, As Defeating Claim of Adverse Possession or Prescriptive Easement, 68 Am. Jur. Proof of Facts 3d 239

Justified Use of Force in Defense of Private Property, 38 Am. Jur. Proof of Facts 2d 731

Am. Jur. Pleading and Practice Forms, Property §§ 13, 16, 19, 21, 24, 26 to 31, 34, 35

West's Key Number Digest, Property [westkey]1, 7

Right to kill game in defense of person or property, 93 A.L.R.2d 1366

Justified Use of Force in Defense of Private Property, 38 Am. Jur. Proof of Facts 2d 731

Am. Jur. Pleading and Practice Forms, Property § 13 (Complaint, petition, or declaration -- To enjoin trespassing and cutting of timber on land -- By property owner -- Against defendants who claim ownership to land)

Am. Jur. Pleading and Practice Forms, Property § 24 (Instruction to jury -- Defining and distinguishing "trespasser" and "licensee")

Am. Jur. Pleading and Practice Forms, Property § 26 (Instruction to jury -- Intent to harm not necessary for trespass)

Am. Jur. Pleading and Practice Forms, Property § 27 (Instruction to jury -- Damages recoverable for trespass)

Am. Jur. Pleading and Practice Forms, Property § 28 (Instruction to jury -- Damages recoverable for trespass by cutting and removing timber)

Am. Jur. Pleading and Practice Forms, Property § 35 (Judgment or decree -- Directing removal of encroaching wall and awarding costs)

Romualdo P. Eclavea, J.D.

Property
IV. Title; Ownership; Possession; Use

63C Am Jur 2d Property § 28

§ 28 Possession

The general rule is that possession of land constitutes notice to the world of whatever rights the possessor may have in the property,ⁿ¹ and what constitutes possession of land or property is a question of fact, and each case depends upon its own facts.ⁿ²

Possession has been defined as the detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name.ⁿ³ Possession of real property can also mean control;ⁿ⁴ it may, but need not, imply title.ⁿ⁵ One who holds a deed translative of title is presumed to possess to the full extent of his or her title by any act of possession on his or her land.ⁿ⁶

Possession may be actual or constructive.ⁿ⁷ Actual possession is defined as actual, open, visible possession or occupancy in fact, exactly that and nothing less, as distinguished from constructive possession.ⁿ⁸ 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.ⁿ⁹ Actual possession of real property generally refers to physical occupation of land.ⁿ¹⁰ In general, actual possession of land means dominion over the property; it is not the equivalent of occupancy.ⁿ¹¹ Actual possession is the same as "pedis possessio" or "pedis positio"; and these mean a foothold on the land, and actual entry, a possession in fact, a standing upon it, as a real demonstrative act done.ⁿ¹² However, with respect to land, a 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.ⁿ¹³ To have legal possession of real property, a person must have sufficient control to enjoy the exclusive right to the use of the property.ⁿ¹⁴ Accordingly, seasonal hunting by the public on a disputed tract has been held inadequate to establish corporeal possession by the state or to usurp possession.ⁿ¹⁵

Observation: "Disseisin" occurs when the true owner of real property is deprived of possession or displaced by someone exercising the powers and privileges of ownership.ⁿ¹⁶

A person who knowingly has direct physical control over a thing which may be the subject of property, at a given time, is in actual possession of it.ⁿ¹⁷ A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing which may be the subject of property, either directly or through another person or persons, is then in constructive possession of it.ⁿ¹⁸

Possession of personal property involves the power to control and the intent to control.ⁿ¹⁹ 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.ⁿ²⁰ One who has the requisite power to control and the intent to control access to and use of a vehicle or a house also has the possession of the known contents thereof.ⁿ²¹

Possession of personal property is prima facie evidence of ownership, it is only prima facie evidence of title and must yield to actual title.ⁿ²² The law regards the person in possession of goods as the owner, except in a contest with one who has the true title.ⁿ²³

Constructive possession is that which exists without actual personal occupation of the land or without actual personal present dominion over a chattel, but with an intent and capability to maintain control and dominion.ⁿ²⁴ Constructive possession occurs when a defendant has both: (1) the intent to maintain dominion and control over the device; and (2) the capability to maintain dominion and control over the item in question.ⁿ²⁵ Constructive possession of an item is the ownership, or dominion or control over the item itself, or dominion over the premises where the item is located.ⁿ²⁶ One has "constructive possession" of property when one has legal estate in fee.ⁿ²⁷ Constructive possession is that possession which the law annexes to the title;ⁿ²⁸ it also means being in a position to exercise dominion or control over a thing,ⁿ²⁹ and such dominion and control need not be exclusive, but may be shared with others.ⁿ³⁰ The law infers that the party in possession of the premises is capable of exercising dominion and control over all items on the premises, and this applies regardless of whether the possession of the premises is exclusive.ⁿ³¹ 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.ⁿ³² 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.ⁿ³³

When a property owner intentionally gives direct physical control of the property to another party for the purpose of having him or her do some act for the owner, the owner retains constructive possession of the property.ⁿ³⁴ The party to whom a bare physical control of property has been entrusted for the owner's purpose does not have possession but only custody.ⁿ³⁵

FOOTNOTES:

n1 National City Mortg. Co. v. Ross, 34 Kan. App. 2d 282, 117 P.3d 880 (2005).

n2 Skillman v. Harvey, 898 So. 2d 431 (La. Ct. App. 1st Cir. 2004), writ denied, 897 So. 2d 610 (La. 2005).

n3 Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc., 208 S.W.3d 922 (Mo. Ct. App. S.D. 2006).

n4 In re Estate of Clark, 219 S.W.3d 509 (Tex. App. Tyler 2007).

n5 Mehan v. WAMCO XXVIII, Ltd., 138 S.W.3d 415 (Tex. App. Fort Worth 2004).

n6 Ryder v. Belgard, 915 So. 2d 408 (La. Ct. App. 3d Cir. 2005), writ denied, 926 So. 2d 549 (La. 2006).

n7 Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc., 208 S.W.3d 922 (Mo. Ct. App. S.D. 2006); Curtis v. Giff, 17 Neb. App. 149, 757 N.W.2d 139 (2008).

n8 Curtis v. Giff, 17 Neb. App. 149, 757 N.W.2d 139 (2008).

n9 Baehr v. Penn-O-Tex Oil Corp., 258 Minn. 533, 104 N.W.2d 661 (1960); Shellenberger v. Hicks, 1961 OK 274, 370 P.2d 292 (Okla. 1961).

n10 Woodland Grove Baptist Church v. Woodland Grove Community Cemetery Ass'n, Inc., 947 So. 2d 1031 (Ala. 2006).

n11 Com. v. Boone, 2004 PA Super 436, 862 A.2d 639 (2004).

n12 Regions Bank v. Dean, 2009 WL 281252 (Ala. Civ. App. 2009).

n13 Estate of Mark v. H.H. Smith Co., 547 N.E.2d 796 (Ind. 1989).

- n14 U.S. v. Jackson County, Mo., 696 F. Supp. 479 (W.D. Mo. 1988).
- n15 Todd v. State Through Dept. of Natural Resources, 422 So. 2d 1353 (La. Ct. App. 1st Cir. 1982), writ granted, 427 So. 2d 1199 (La. 1983) and judgment rev'd on other grounds, 456 So. 2d 1340 (La. 1983), amended on other grounds on reargument, 474 So. 2d 430 (La. 1985).
- n16 Adams v. Adams, 276 Mich. App. 704, 742 N.W.2d 399 (2007), appeal denied, 480 Mich. 1111, 745 N.W.2d 761 (2008).
- n17 Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc., 208 S.W.3d 922 (Mo. Ct. App. S.D. 2006).
- n18 Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc., 208 S.W.3d 922 (Mo. Ct. App. S.D. 2006).
- n19 U.S. v. Angelini, 607 F.2d 1305 (9th Cir. 1979).
- n20 Radke v. State, 52 Ala. App. 397, 293 So. 2d 312 (Crim. App. 1973), judgment aff'd, 292 Ala. 290, 293 So. 2d 314 (1974).
- n21 State v. Southards, 189 N.C. App. 152, 657 S.E.2d 419 (2008).
- n22 Hinkle v. Perry, 296 Ark. 114, 752 S.W.2d 267 (1988).
- n23 Payne v. TK Auto Wholesalers, 98 Conn. App. 533, 911 A.2d 747 (2006).
- n24 Mehan v. WAMCO XXVIII, Ltd., 138 S.W.3d 415 (Tex. App. Fort Worth 2004).
- n25 Abney v. State, 822 N.E.2d 260 (Ind. Ct. App. 2005) (disapproved of on other grounds by, Ryle v. State, 842 N.E.2d 320 (Ind. 2005)).
- n26 U.S. v. Richardson, 510 F.3d 622 (6th Cir. 2007), cert. denied, 128 S. Ct. 2072, 170 L. Ed. 2d 809 (2008).
- n27 Woodland Grove Baptist Church v. Woodland Grove Community Cemetery Ass'n, Inc., 947 So. 2d 1031 (Ala. 2006).
- n28 Baehr v. Penn-O-Tex Oil Corp., 258 Minn. 533, 104 N.W.2d 661 (1960); Harris v. Paul, 37 Ohio App. 206, 9 Ohio L. Abs. 201, 174 N.E. 615 (8th Dist. Cuyahoga County 1930).
- n29 U.S. v. DiNovo, 523 F.2d 197 (7th Cir. 1975); U.S. v. Holland, 445 F.2d 701 (D.C. Cir. 1971).
- n30 U.S. v. Davis, 461 F.2d 1026 (3d Cir. 1972); U.S. v. DiNovo, 523 F.2d 197 (7th Cir. 1975).
- n31 Abney v. State, 822 N.E.2d 260 (Ind. Ct. App. 2005) (disapproved of on other grounds by, Ryle v. State, 842 N.E.2d 320 (Ind. 2005)).
- n32 Rosado v. Martinez, 369 F. Supp. 477 (D.P.R. 1974) (criminal prosecution for possession of narcotics).
- n33 Baehr v. Penn-O-Tex Oil Corp., 258 Minn. 533, 104 N.W.2d 661 (1960).
- n34 Fin Ag, Inc. v. Hufnagle, Inc., 700 N.W.2d 510 (Minn. Ct. App. 2005), aff'd, 720 N.W.2d 579, 60 U.C.C. Rep. Serv. 2d 629 (Minn. 2006).
- n35 Fin Ag, Inc. v. Hufnagle, Inc., 700 N.W.2d 510 (Minn. Ct. App. 2005), aff'd, 720 N.W.2d 579, 60 U.C.C. Rep. Serv. 2d 629 (Minn. 2006).

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Am. Jur. Pleading and Practice Forms, Property §§ 13, 16, 19, 21, 24, 26 to 31, 34, 35
West's Key Number Digest, Property [westkey]1, 10
General principles -- Permissive possession of land. Permissive Possession or Use of Land, As Defeating Claim of Adverse Possession or Prescriptive Easement, 68 Am. Jur. Proof of Facts 3d 239

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Property
IV. Title; Ownership; Possession; Use

63C Am Jur 2d Property § 29

§ 29 Constructive possession of real property

The holder of a valid deed to real estate, whether it is a tax deed or a deed from the owner himself or herself, impliedly and constructively has the possession of the property described in the deed,ⁿ¹ even if the land is vacant.ⁿ² In other words, actual occupancy or residence upon the property is not a necessary element of possession.ⁿ³ However, one who possesses corporeally only a 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.ⁿ⁴ This rule applies to wild land and to unimproved and unoccupied land.ⁿ⁵ 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.ⁿ⁶

With respect to real estate, one may lose constructive possession by the usurpation of possession by one who possesses corporeally.ⁿ⁷

FOOTNOTES:

n1 *Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 104 N.W.2d 661 (1960); *Town of Glenrock v. Abadie*, 71 Wyo. 414, 259 P.2d 766 (1953).

n2 *Kizzire v. Sarkeys*, 1961 OK 111, 361 P.2d 1082 (Okla. 1961).

n3 *Boatmen's Nat. Bank of St. Louis v. Dandy*, 804 S.W.2d 783 (Mo. Ct. App. E.D. 1990).

n4 *Dufrene v. Chouest*, 499 So. 2d 318 (La. Ct. App. 1st Cir. 1986), writ denied, 503 So. 2d 19 (La. 1987).

n5 *Gilb v. Alabama Mineral Land Co.*, 292 Ala. 54, 288 So. 2d 771 (1974); *Shilts v. Young*, 567 P.2d 769 (Alaska 1977) (unoccupied land is presumed to be in the constructive possession of the true owner or the party with the better title).

n6 *U.S. v. 125.07 Acres of Land, More or Less Situated In Towns of Truro and Wellfleet, County of Barnstable, Com. of Mass.*, 753 F. Supp. 1034 (D. Mass. 1991).

n7 *Dufrene v. Chouest*, 499 So. 2d 318 (La. Ct. App. 1st Cir. 1986), writ denied, 503 So. 2d 19 (La. 1987).

REFERENCE: West's Key Number Digest, Property [westkey]1, 7, 9, 10

A.L.R. Index, Intangible Hereditaments or Property
A.L.R. Index, Interest in Property or Subject Matter
A.L.R. Index, Lots and Parcels
A.L.R. Index, Personal Property
A.L.R. Index, Property
A.L.R. Index, Sale and Transfer of Property
A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]1, 7, 9, 10

Permissive Possession or Use of Land, As Defeating Claim of Adverse Possession or Prescriptive Easement, 68 Am. Jur. Proof of Facts 3d 239

Justified Use of Force in Defense of Private Property, 38 Am. Jur. Proof of Facts 2d 731

Am. Jur. Pleading and Practice Forms, Property §§ 13, 16, 19, 21, 24, 26 to 31, 34, 35

West's Key Number Digest, Property [westkey]1, 10

Romualdo P. Eclavea, J.D.

Property
IV. Title; Ownership; Possession; Use

63C Am Jur 2d Property § 30

§ 30 Constructive possession of personal property

"Constructive possession" of personal property by its owner exists where the owner has intentionally given the actual possession, namely, the direct physical control, of the property to another for the purpose of having him or her do some act for the owner to or with the property.ⁿ¹ 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 or her 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.ⁿ² The property right in chattels draws after it the right of possession.ⁿ³ If the owner of land sells personal property situated on his or her 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.ⁿ⁴

FOOTNOTES:

n1 *In re Western Iowa Limestone, Inc.*, 538 F.3d 858, 66 U.C.C. Rep. Serv. 2d 542 (8th Cir. 2008) (applying Iowa law).

n2 *New England Box Co. v. C & R Const. Co.*, 313 Mass. 696, 49 N.E.2d 121, 150 A.L.R. 152 (1943); *State v. Meyers*, 190 N.C. 239, 129 S.E. 600 (1925).

n3 *Jackson v. Rothschild*, 99 S.W.2d 859 (Mo. Ct. App. 1936); *Security Ins. Co. v. Sellers-Sammons-Signor Motor Co.*, 235 S.W. 617 (Tex. Civ. App. Fort Worth 1921), writ refused, (Feb. 15, 1922).

n4 *City of Vallejo v. Burrill*, 64 Cal. App. 399, 221 P. 676 (3d Dist. 1923).

REFERENCE: West's Key Number Digest, Property [westkey]1, 7, 9, 10

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Lots and Parcels

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]1, 7, 9, 10

Permissive Possession or Use of Land, As Defeating Claim of Adverse Possession or Prescriptive Easement, 68 Am. Jur. Proof of Facts 3d 239

Justified Use of Force in Defense of Private Property, 38 Am. Jur. Proof of Facts 2d 731

Am. Jur. Pleading and Practice Forms, Property §§ 13, 16, 19, 21, 24, 26 to 31, 34, 35

West's Key Number Digest, Property [westkey]1, 10

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Property
IV. Title; Ownership; Possession; Use

63C Am Jur 2d Property § 31

§ 31 Limitations on use

The right to a full and free use and enjoyment of one's property in a manner and for such purposes as the owner may choose, as long as it is not for the maintenance of a nuisance or injurious to others, is a privilege protected by law.ⁿ¹ The free use of property is favored, and when there are doubts about the use to which property may be put, those doubts should be resolved in favor of such free use.ⁿ² Substantial doubt or ambiguity is to be resolved against the restrictions on property and in favor of the free use of property.ⁿ³ Indeed, public policy favors the free and unencumbered use of property.ⁿ⁴ Every person owning property has the right to make any lawful use of it as he or she sees fit, and restrictions sought to be imposed on that right must be carefully examined to prevent arbitrary, capricious, or oppressive action under the guise of law.ⁿ⁵ Restrictions on the free use of land, although widely used, are not favored and must be strictly construed, and the burden is on the party seeking to enforce them to demonstrate that they are applicable to the acts of which he or she complains.ⁿ⁶ However, while every landowner has the right to use and enjoy his or her property as he or she sees fit, such use must be reasonable and must not cause unnecessary harm to, or invade the rights of, others.ⁿ⁷ A landowner may use the premises that the landlord controls in whatever fashion he or she desires, as long as the law is obeyed.ⁿ⁸

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 the property by the entire community of proprietors.ⁿ⁹ 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.ⁿ¹⁰ 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.ⁿ¹¹ Accordingly, landowners who dug a ditch on their property, alongside a retaining wall on the 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, have been held guilty of trespass.ⁿ¹² Any claim of restrictions and limitations in the use of property must be clearly established.ⁿ¹³

Observation: While the court must safeguard property rights even at the risk of sanctioning unneighborly and economically unproductive behavior,ⁿ¹⁴ there is also authority holding that a property owner does not have a right to utilize his or her land for his or her highest and best financial gain.ⁿ¹⁵

FOOTNOTES:

n1 *Scofield v. State, Dept. of Natural Resources*, 276 Neb. 215, 753 N.W.2d 345 (2008).

n2 *Barton v. White*, 173 N.C. App. 717, 620 S.E.2d 278 (2005).

n3 *Lovlace v. Orange County Bd. of Zoning Appeals*, 276 Va. 155, 661 S.E.2d 831 (2008).

n4 *AKG Real Estate, LLC v. Kosterman*, 277 Wis. 2d 509, 2004 WI App 232, 691 N.W.2d 711 (Ct. App. 2004), decision rev'd on other grounds, 2006 WI 106, 296 Wis. 2d 1, 717 N.W.2d 835 (2006).

n5 Davidson County Broadcasting, Inc. v. Rowan County Bd. of Com'rs, 186 N.C. App. 81, 649 S.E.2d 904 (2007), review denied, 362 N.C. 470, 666 S.E.2d 119 (2008).

n6 Lovelace v. Orange County Bd. of Zoning Appeals, 276 Va. 155, 661 S.E.2d 831 (2008).

n7 Sprecher v. Adamson Companies, 30 Cal. 3d 358, 178 Cal. Rptr. 783, 636 P.2d 1121 (1981); Martin v. Weckerly, 364 N.W.2d 93 (N.D. 1985); Heckert v. Patrick, 15 Ohio St. 3d 402, 473 N.E.2d 1204 (1984).

n8 Biglane v. Under The Hill Corp., 949 So. 2d 9 (Miss. 2007).

n9 Menger v. Pass, 367 Pa. 432, 80 A.2d 702, 24 A.L.R.2d 562 (1951); State v. Dexter, 32 Wash. 2d 551, 202 P.2d 906, 13 A.L.R.2d 1081 (1949), judgment aff'd, 338 U.S. 863, 70 S. Ct. 147, 94 L. Ed. 529 (1949).

n10 Balent v. City of Wilkes-Barre, 542 Pa. 555, 669 A.2d 309 (1995).

n11 Hornsby v. Smith, 191 Ga. 491, 13 S.E.2d 20, 133 A.L.R. 684 (1941).

n12 Steiger v. Nowakowski, 67 Wis. 2d 355, 227 N.W.2d 104 (1975).

n13 Wiggins v. Young, 206 Ga. 440, 57 S.E.2d 486, 13 A.L.R.2d 1237 (1950).

n14 AKG Real Estate, LLC v. Kosterman, 2006 WI 106, 296 Wis. 2d 1, 717 N.W.2d 835 (2006).

n15 Township of East Caln v. Zoning Hearing Bd. of East Caln Tp., 915 A.2d 1249 (Pa. Commw. Ct. 2007).

SUPPLEMENT:

Cases

The general rule is that the owner of land has the right to use it for any lawful purpose; restrictions upon an owner's use of land must be clearly established and must be strictly construed. Charter Club on River Home Owners Ass'n v. Walker, 301 Ga. App. 898, 689 S.E.2d 344 (2009).

REFERENCE: West's Key Number Digest, Property [westkey]1, 7, 9, 10

A.L.R. Index, Intangible Hereditaments or Property

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A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]1, 7, 9, 10

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Justified Use of Force in Defense of Private Property, 38 Am. Jur. Proof of Facts 2d 731

Am. Jur. Pleading and Practice Forms, Property §§ 13, 16, 19, 21, 24, 26 to 31, 34, 35

West's Key Number Digest, Property [westkey]1, 7, 10

Am. Jur. Pleading and Practice Forms, Property § 19 (Complaint, petition, or declaration -- Liability of landowner for excavations on owned premises causing flooding of adjoining land)

Am. Jur. Pleading and Practice Forms, Property § 21 (Answer -- In action for damages for flooding of adjoining property -- General form)

Am. Jur. Pleading and Practice Forms, Property § 30 (Instructions to jury -- Owner's liability for injuries from

dangerous instrumentalities on owner's property)

Am. Jur. Pleading and Practice Forms, Property § 31 (Instructions to jury -- Owner's duty to prevent injury to passersby -- From defective structure located on owner's property)

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Property
IV. Title; Ownership; Possession; Use

63C Am Jur 2d Property § 32

§ 32 Liability for drilling, vibrations, and the like

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, some courts permitting recovery,ⁿ¹ while others do not.ⁿ² Similarly, the courts disagree as to whether recovery may be allowed for damage caused by vibrations produced by various kinds of heavy machinery on an owner's property, with some courts permitting recovery,ⁿ³ and other courts disallowing it.ⁿ⁴ There is also disagreement as to whether recovery may be permitted for vibrations produced by other machines or in another manner.ⁿ⁵ Where damages to property were sought because of the effect of vibrations produced by pile drivers, or the like, recovery has generally been upheld,ⁿ⁶ although the circumstances may dictate a different result.ⁿ⁷

FOOTNOTES:

n1 Savannah Asphalt Co. v. Blackburn, 96 Ga. App. 113, 99 S.E.2d 511 (1957); Acton Mfg. Co. v. George M. Myers, Inc., 182 Kan. 364, 320 P.2d 840 (1958); Piontek v. Joseph Perry, Inc., 342 Mass. 342, 173 N.E.2d 292 (1961) (holding that the use of a derrick to drop boulders onto a patio across the street from the plaintiff's house in order to demolish it, causing vibration damage to the plaintiff's house, constituted actionable negligence).

n2 Tadin v. New Orleans Public Service, 226 La. 629, 76 So. 2d 910 (1954); Harsey v. City of New Orleans, 192 So. 148 (La. Ct. App., Orleans 1939) (disapproved of on other grounds by, Legendre v. Boh Bros. Const. Co., Inc., 268 So. 2d 514 (La. Ct. App. 4th Cir. 1972)).

n3 Meyer v. Kemper Ice Co., 180 La. 1037, 158 So. 378 (1934); Piontek v. Joseph Perry, Inc., 342 Mass. 342, 173 N.E.2d 292 (1961).

n4 Grzelka v. Chevrolet Motor Car Co., 286 Mich. 141, 281 N.W. 568 (1938); Daly v. Earl W. Baker & Co., 1954 OK 187, 271 P.2d 1114 (Okla. 1954).

n5 D'Amico v. New Orleans Public Service, Inc., 348 So. 2d 116 (La. Ct. App. 4th Cir. 1977), writ refused, 350 So. 2d 1214 (La. 1977) and writ denied, 350 So. 2d 1214 (La. 1977) (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); Trent v. City of New York, 286 A.D. 479, 144 N.Y.S.2d 625 (1st Dep't 1955) (recovery not allowed); Ellison v. Walker, 1955 OK 86, 281 P.2d 931 (Okla. 1955) (recovery allowed); Frady v. Portland General Elec. Co., 55 Or. App. 344, 637 P.2d 1345 (1981) (a cause of action for damages was stated where it was alleged that the plaintiffs' property, including their home and dairy herd located near the defendant's combustion turbine facility, was damaged by low frequency sound waves).

n6 Caporale v. C. W. Blakeslee & Sons, Inc., 149 Conn. 79, 175 A.2d 561 (1961); Richmond County v. Williams, 109 Ga. App. 670, 137 S.E.2d 343 (1964); Jeanfreau v. Sanderson, 239 La. 51, 117 So. 2d 907 (1960); Sachs v. Chiat, 281 Minn. 540, 162 N.W.2d 243 (1968); Dussell v. Kaufman Const. Co., 398 Pa. 369, 157 A.2d 740, 79 A.L.R.2d 957 (1960) (a pile driver 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 pile driver 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).

n7 Ted's Master Service, Inc. v. Farina Bros. Co., 343 Mass. 307, 178 N.E.2d 268 (1961) (holding that the plaintiff failed to sustain the burden, on negligence counts, of proving that the cracks in their buildings resulting from the defendant's pile-driving operations were caused by a breach of legal duty, where there was no evidence that the defendant had reason to anticipate that vibrations would reach the plaintiffs' buildings, the court stating that the fact that the defendant did not include the plaintiffs' buildings in its preliminary survey does not warrant a finding of negligence without a showing of a custom to make such surveys).

REFERENCE: West's Key Number Digest, Property [westkey]1, 7, 9, 10

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Lots and Parcels

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A.L.R. Index, Title and Ownership

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Justified Use of Force in Defense of Private Property, 38 Am. Jur. Proof of Facts 2d 731

Am. Jur. Pleading and Practice Forms, Property §§ 13, 16, 19, 21, 24, 26 to 31, 34, 35

West's Key Number Digest, Property [westkey]1, 7, 10

Vibrations Not Accompanied by Blasting or Explosion as Constituting Nuisance, 103 A.L.R.5th 157

Am. Jur. Pleading and Practice Forms, Property § 16 (Complaint, petition, or declaration -- By adjoining landowner -- Property damage caused by blasting on adjacent parcel)

Am. Jur. Pleading and Practice Forms, Property § 29 (Instruction to jury -- Owner's liability for damage caused by escape of dangerous substance from owner's property)

Am. Jur. Pleading and Practice Forms, Property § 34 (Judgment or decree -- Enjoining blasting operations injuring property of adjoining landowner -- Awarding damages for past injuries)

Romualdo P. Eclavea, J.D.

Property
IV. Title; Ownership; Possession; Use

63C Am Jur 2d Property § 33

§ 33 Governmental control and regulation of use

Although the concept of a citizen's right, absent unusual circumstances, to the unobstructed control of his or her own land, free from arbitrary governmental interference, has long been a fundamental principle in American jurisprudence,ⁿ¹ the courts recognize that in order to assure that no person may use his or her property so as to injure another,ⁿ² 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.ⁿ³ 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.ⁿ⁴

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 or herself and use his or her own property so as not unnecessarily to injure another.ⁿ⁵ This power of government -- commonly called the police power -- is essential, and is comprehensive in its extent.ⁿ⁶ **Persons within a state hold their property and are entitled to enjoy and use it subject to a reasonable exercise of the police power, even though it affects adversely the property rights of some individuals.**ⁿ⁷

The state may provide regulations as to the acquisition, enjoyment, and disposition of property,ⁿ⁸ and this power extends to intangible, as well as to tangible, property.ⁿ⁹ 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, and it may prohibit the use of a privately owned manufacturing plant in a racially discriminatory manner, or the like.ⁿ¹⁰ 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.ⁿ¹¹ A limitation imposed under this power without reason or necessity cannot be enforced.ⁿ¹²

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.ⁿ¹³ **Where regulation completely deprives the owner of all economically beneficial use of his or her property, the government must pay just compensation, except to the extent that the background principles of nuisance and property law independently restrict the owner's intended use of the property.**ⁿ¹⁴ **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.**ⁿ¹⁵

Since, theoretically, the ownership of land extends indefinitely downward to the center of the earth and upward from the surface to the sky,ⁿ¹⁶ the courts cannot limit the extent, whether up or down, to which a person may enjoy his or her property; thus, if an owner goes higher than a neighbor, as long as he or she does not interfere with the rights of others or injure the neighbor, the owner is subject to no liability.ⁿ¹⁷ 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.ⁿ¹⁸

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.ⁿ¹⁹ 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.ⁿ²⁰

The ownership of real property does not include the right to bar access to governmental services available to migrant workers.ⁿ²¹

FOOTNOTES:

n1 *Reece v. Scoggins*, 506 F.2d 967, 26 A.L.R. Fed. 374 (5th Cir. 1975).

n2 § 31.

n3 *Goulding v. Cook*, 422 Mass. 276, 661 N.E.2d 1322 (1996) (the law may condition the use and enjoyment of property rights so that the interests of the public in general are not unduly prejudiced); *State v. Picciochi*, 16 Ohio Misc. 196, 45 Ohio Op. 2d 147, 241 N.E.2d 407 (C.P. 1968).

n4 *Nebbia v. People of New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934); *State v. Dexter*, 32 Wash. 2d 551, 202 P.2d 906, 13 A.L.R.2d 1081 (1949), judgment aff'd, 338 U.S. 863, 70 S. Ct. 147, 94 L. Ed. 529 (1949).

n5 *Walls v. Midland Carbon Co.*, 254 U.S. 300, 41 S. Ct. 118, 65 L. Ed. 276 (1920); *City of Des Moines v. Manhattan Oil Co.*, 193 Iowa 1096, 184 N.W. 823, 23 A.L.R. 1322 (1921).

n6 *Am. Jur. 2d, Constitutional Law* § 346.

n7 *American Legion Post #149 v. Washington State Dept. of Health*, 164 Wash. 2d 570, 192 P.3d 306 (2008).

n8 *McDaniel v. McElvy*, 91 Fla. 770, 108 So. 820, 51 A.L.R. 731 (1926); *Schiller Piano Co. v. Illinois Northern Utilities Co.*, 288 Ill. 580, 123 N.E. 631, 11 A.L.R. 454 (1919).

n9 *Security Sav. Bank v. State of California*, 263 U.S. 282, 44 S. Ct. 108, 68 L. Ed. 301, 31 A.L.R. 391 (1923).

n10 *U.S. v. McClain*, 545 F.2d 988 (5th Cir. 1977).

n11 *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 348 P.2d 664, 77 A.L.R.2d 1344 (1960) (abrogated on other grounds by, *Highline School Dist. No. 401, King County v. Port of Seattle*, 87 Wash. 2d 6, 548 P.2d 1085 (1976)).

n12 *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210, 86 A.L.R. 654 (1928); *State v. Picciochi*, 16 Ohio Misc. 196, 45 Ohio Op. 2d 147, 241 N.E.2d 407 (C.P. 1968) (holding that 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).

n13 *Am. Jur. 2d, Eminent Domain* § 6.

n14 *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

n15 *St. Morris Associates v. McMorran*, 35 A.D.2d 997, 318 N.Y.S.2d 121 (2d Dep't 1970).

n16 § 12.

n17 *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 348 P.2d 664, 77 A.L.R.2d 1344 (1960) (abrogated on other grounds by, *Highline School Dist. No. 401, King County v. Port of Seattle*, 87 Wash. 2d 6, 548 P.2d 1085 (1976)).

n18 Hopkins v. U.S., 173 F. Supp. 245 (N.D. Tex. 1959); Branning v. U. S., 228 Ct. Cl. 240, 654 F.2d 88 (1981); Wright v. U. S., 150 Ct. Cl. 386, 279 F.2d 517 (1960).

n19 Am. Jur. 2d, Highways, Streets, and Bridges § 196.

n20 Am. Jur. 2d, Waters § 32.

n21 State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971) (medical and legal services).

REFERENCE: West's Key Number Digest, Property [westkey]1, 7, 9, 10

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Jur. Proof of Facts 3d 239

Justified Use of Force in Defense of Private Property, 38 Am. Jur. Proof of Facts 2d 731

Am. Jur. Pleading and Practice Forms, Property §§ 13, 16, 19, 21, 24, 26 to 31, 34, 35

West's Key Number Digest, Property [westkey]1, 7, 10

Romualdo P. Eclavea, J.D.

Property
V. Extinguishment or Loss; Alienation and Transfer

63C Am Jur 2d Property § 34

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

A property owner's rights are superior to any rights of a subsequent possessor who has stolen the property or purchased stolen property.ⁿ¹ Indeed, 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,ⁿ² since one cannot make good title to that which he or she does not own.ⁿ³ The owner may follow and reclaim the stolen goods wherever he or she may find them.ⁿ⁴ 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.ⁿ⁵ 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, although the sale was made in the ordinary course of trade and the purchaser acted in good faith.ⁿ⁶ However, one without knowledge that money transferred to him or her 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.ⁿ⁷

The owner may, through an appropriate action or proceeding, recover the stolen goodsⁿ⁸ or their value,ⁿ⁹ either from the thiefⁿ¹⁰ or from the estate of the thief,ⁿ¹¹ or from any other person who has not acquired such title and into whose possession they have come, whether innocently or otherwise.ⁿ¹² 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, has been purportedly assigned by the suspects, before their conviction, to attorneys acting on their behalf in the prosecution, such attorneys cannot 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 stand in no better position than the robbery suspects.ⁿ¹³

FOOTNOTES:

n1 *Sharpe v. Turley*, 191 S.W.3d 362 (Tex. App. Dallas 2006).

n2 *Supulver v. Gilchrist & Dawson*, 28 N.M. 339, 211 P. 595 (1922).

n3 *Smith v. Hooker/Barnes, Inc.*, 253 Ga. 514, 322 S.E.2d 268 (1984).

n4 *U. S. Fidelity & Guaranty Co. v. Moore*, 306 F. Supp. 1088 (N.D. Miss. 1969); *Bozeman Mortuary Ass'n v. Fairchild*, 253 Ky. 74, 68 S.W.2d 756, 92 A.L.R. 419 (1934) (stating that 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).

n5 *Employers' Fire Ins. Co. v. Cotten*, 245 N.Y. 102, 156 N.E. 629, 51 A.L.R. 1462 (1927).

n6 *Eureka Springs Sales Co. v. Ward*, 226 Ark. 424, 290 S.W.2d 434 (1956).

n7 U. S. Fidelity & Guaranty Co. v. Moore, 306 F. Supp. 1088 (N.D. Miss. 1969); Sinclair Houston Federal Credit Union v. Hendricks, 268 S.W.2d 290, 44 A.L.R.2d 1234 (Tex. Civ. App. Galveston 1954), writ refused n.r.e.

n8 Sinclair Houston Federal Credit Union v. Hendricks, 268 S.W.2d 290, 44 A.L.R.2d 1234 (Tex. Civ. App. Galveston 1954), writ refused n.r.e.

n9 Sinclair Houston Federal Credit Union v. Hendricks, 268 S.W.2d 290, 44 A.L.R.2d 1234 (Tex. Civ. App. Galveston 1954), writ refused n.r.e.

n10 Bozeman Mortuary Ass'n v. Fairchild, 253 Ky. 74, 68 S.W.2d 756, 92 A.L.R. 419 (1934).

n11 Lightfoot v. Davis, 198 N.Y. 261, 91 N.E. 582 (1910).

n12 Bozeman Mortuary Ass'n v. Fairchild, 253 Ky. 74, 68 S.W.2d 756, 92 A.L.R. 419 (1934).

n13 U. S. Fidelity & Guaranty Co. v. Moore, 306 F. Supp. 1088 (N.D. Miss. 1969).

REFERENCE: West's Key Number Digest, Property [westkey]1, 7, 11, 12
A.L.R. Index, Intangible Hereditaments or Property
A.L.R. Index, Interest in Property or Subject Matter
A.L.R. Index, Lots and Parcels
A.L.R. Index, Personal Property
A.L.R. Index, Property
A.L.R. Index, Sale and Transfer of Property
A.L.R. Index, Title and Ownership
West's A.L.R. Digest, Property [westkey]1, 7, 11, 12
West's Key Number Digest, Property [westkey]1, 7, 12

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Property
V. Extinguishment or Loss; Alienation and Transfer

63C Am Jur 2d Property § 35

§ 35 Alienation

One of the principal and most important rights incident to ownership is alienability, or the right to disposition.ⁿ¹ Whether it is incorporeal or intangible, property must be capable of being transferred;ⁿ² it is a fundamental principle of law that one of the chief incidents of ownership in property is the right to transfer it.ⁿ³ A property right consists not merely in its ownership and possession, but in the unrestricted right of disposal.ⁿ⁴ Ownership of land includes the right to convey and the right to exclude others.ⁿ⁵ The ability to convey one's land is a recognized property interest.ⁿ⁶ A property owner has the right to carve out of his or her property as many estates or interests, perpendicular or horizontal, perpetual or limited, as it may be able to sustain.ⁿ⁷

As a matter of general property law, one who does not hold title to property or is not acting within his or her scope as an agent for the owner cannot pass or transfer title to that property.ⁿ⁸ A property can be encumbered or conveyed only by the owner.ⁿ⁹ A person or entity generally should have primary control over the disposition of property which he, she, or it owns.ⁿ¹⁰ An absolute owner of real property may dispose of his or her property during his or her lifetime in any manner he or she sees fit.ⁿ¹¹

"Alienation" is the complete, voluntary transfer of title and is used generally to imply a sale from one person to another,ⁿ¹² although the term encompasses the power of disposition by will.ⁿ¹³ In other words, a right in property implies the legal power to convey that right as the holder desires,ⁿ¹⁴ as long as the conveyance neither interferes with the existing rights of others,ⁿ¹⁵ nor violates public policy.ⁿ¹⁶ Absent fraud, accident, or mistake, no one can question another's disposition of his or her own property.ⁿ¹⁷

Generally, the law favors the free alienability of property interests,ⁿ¹⁸ and there is also a strong public policy favoring the free right of transfer of interests in real property.ⁿ¹⁹ In a market economy, the right to freely alienate property interests is one of the most basic rights guaranteed by law; without buyers and sellers being able to compete in an open market, the value of these protected rights would be destroyed or diminished.ⁿ²⁰ The law favors the free alienation of property and, thus, an act cannot be denounced which the law authorizes to be done.ⁿ²¹ Moreover, 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.ⁿ²² However, reasonable restraints justified by the legitimate interest of the parties are not necessarily void.ⁿ²³

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.ⁿ²⁴ Also, the intention to deprive one's self of the right to dispose freely of his or her property must be clear, that is, there must not only be a clear present intent to dispose of the property, but there must also be a present intent that the property disposition be forever binding.ⁿ²⁵

The right of alienation is also one of the essential incidents of a right of general property in movables.ⁿ²⁶

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,ⁿ²⁷ or in some manner provided by law.ⁿ²⁸

Observation: An inchoate title in real estate can be voluntarily conveyed and can be the subject of a fraudulent conveyance.ⁿ²⁹ Moreover, most litigious rights can be assigned, transferred, or inherited and are, therefore, not strictly personal.ⁿ³⁰

FOOTNOTES:

n1 Peterman v. Coleman, 764 F.2d 1416 (11th Cir. 1985); Federal Deposit Ins. Corp. v. British-American Corp., 755 F. Supp. 1314 (E.D. N.C. 1991); Erickson v. Bank of California, N. A., 97 Wash. 2d 246, 643 P.2d 670 (1982) (ordinarily, a property owner has the power to dispose of his property as he wishes, as long as he does not violate public policy).

n2 In re Marriage of McTiernan and Dubrow, 133 Cal. App. 4th 1090, 35 Cal. Rptr. 3d 287 (2d Dist. 2005).

As to incorporeal or intangible property, see § 9.

n3 Essex Ins. Co. v. Five Star Dye House, Inc., 38 Cal. 4th 1252, 45 Cal. Rptr. 3d 362, 137 P.3d 192 (2006).

n4 Rush v. State, Dept. of Natural Resources, 98 P.3d 551 (Alaska 2004).

n5 Santa Fe County Bd. of County Com'rs v. Town of Edgewood, 136 N.M. 301, 2004-NMCA-111, 97 P.3d 633 (Ct. App. 2004).

n6 Amberwood Development Corp. v. Board of Appeals of Boxford, 65 Mass. App. Ct. 205, 837 N.E.2d 1161 (2005).

n7 Libby Placer Min. Co. v. Noranda Minerals Corp., 2008 MT 367, 346 Mont. 436, 197 P.3d 924 (2008).

n8 Estate of Herbert v. Herbert, 152 S.W.3d 340 (Mo. Ct. App. W.D. 2004).

n9 In re Estate of Reed, 201 P.3d 1264 (Colo. App. 2008).

n10 David A. Bramble, Inc. v. Thomas, 396 Md. 443, 914 A.2d 136 (2007).

n11 Estate of Gabbett v. Ray, 352 Ill. App. 3d 900, 288 Ill. Dec. 274, 817 N.E.2d 924 (4th Dist. 2004).

n12 Carma Developers (Cal.), Inc. v. Marathon Development California, Inc., 2 Cal. 4th 342, 6 Cal. Rptr. 2d 467, 826 P.2d 710 (1992); In re Estate of Skuro, 487 So. 2d 1065 (Fla. 1986).

n13 Prichard v. Department of Revenue, 164 N.W.2d 113 (Iowa 1969).

n14 Peterman v. Coleman, 764 F.2d 1416 (11th Cir. 1985); Mullins v. Ratcliff, 515 So. 2d 1183 (Miss. 1987).

n15 Millwee v. Wilburn, 6 Ark. App. 280, 640 S.W.2d 813 (1982); Wood v. Hatcher, 199 Kan. 238, 428 P.2d 799 (1967).

n16 Erickson v. Bank of California, N. A., 97 Wash. 2d 246, 643 P.2d 670 (1982).

n17 Millwee v. Wilburn, 6 Ark. App. 280, 640 S.W.2d 813 (1982).

n18 Christensen v. Christensen, 2008 WY 10, 176 P.3d 626 (Wyo. 2008).

n19 VOSR Industries, Inc. v. Martin Properties, Inc., 919 So. 2d 554 (Fla. Dist. Ct. App. 4th Dist. 2005).

- n20 Cherokee Equities, L.L.C. v. Garaventa, 382 N.J. Super. 201, 887 A.2d 1203 (Ch. Div. 2005).
- n21 Karsenty v. Schoukroun, 406 Md. 469, 959 A.2d 1147 (2008).
- n22 Hortman v. Childress, 162 Ga. App. 536, 292 S.E.2d 200 (1982).
- n23 Terry v. Born, 24 Wash. App. 652, 604 P.2d 504 (Div. 1 1979).
- n24 Laguna Royale Owners Assn. v. Darger, 119 Cal. App. 3d 670, 174 Cal. Rptr. 136 (4th Dist. 1981).
- n25 Moore v. Harvey, 406 N.E.2d 354 (Ind. Ct. App. 1980).
- n26 John D. Park & Sons Co. v. Hartman, 153 F. 24 (C.C.A. 6th Cir. 1907).
- n27 Lynn v. Rainey, 1964 OK 212, 400 P.2d 805 (Okla. 1964).
- n28 § 36.
- n29 Hollberg v. Spalding County, 281 Ga. App. 768, 637 S.E.2d 163 (2006).
- n30 Caro Properties (A), LLC v. City of Gretna, 3 So. 3d 29 (La. Ct. App. 5th Cir. 2008).

REFERENCE: West's Key Number Digest, Property [westkey]1, 7, 11, 12
A.L.R. Index, Intangible Hereditaments or Property
A.L.R. Index, Interest in Property or Subject Matter
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A.L.R. Index, Property
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A.L.R. Index, Title and Ownership
West's A.L.R. Digest, Property [westkey]1, 7, 11, 12
West's Key Number Digest, Property [westkey]7, 11

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Property
V. Extinguishment or Loss; Alienation and Transfer

63C Am Jur 2d Property § 36

§ 36 Form and mode of transfer

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.ⁿ¹ A "transfer" contemplates a conveyance from one person to another or the passage of something from one person to another.ⁿ² While disposing of property is an inalienable natural right throughout a person's lifetime, the right to control the disposition of property after death and the right of inheritance are statutory.ⁿ³ What method is sufficient to transfer property is a matter of positive regulation by law; it is not in the power of the 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 the property.ⁿ⁴

Although it has been held that to transfer an ownership interest in real property, there must be a deed or other conveyance in writing,ⁿ⁵ there is also authority holding that a conveyance of land may occur in a document that is not formally drafted as a deed.ⁿ⁶

Conveyance of an interest in property is a concept distinct from a "renunciation" of such interest, and what one conveys or has conveyed, one plainly cannot "renounce."ⁿ⁷

Outside of an agreement or law establishing a relationship to the contrary, the prior owners of a property are divested of all rights and obligations to the said property on the date that the title to the property is transferred to the new owners.ⁿ⁸

FOOTNOTES:

n1 *Pirie v. Chicago Title & Trust Co.*, 182 U.S. 438, 21 S. Ct. 906, 45 L. Ed. 1171 (1901).

n2 *Box L Corp. v. Teton County ex rel. Board of County Commissioners of Teton County*, 2004 WY 75, 92 P.3d 811 (Wyo. 2004).

n3 *In re Estate of Jackson*, 2008 OK 83, 194 P.3d 1269 (Okla. 2008).

n4 *Beeler v. C.C. Mercantile Co.*, 8 Idaho 644, 70 P. 943 (1902).

n5 *Goodell v. Rosetti*, 52 A.D.3d 911, 859 N.Y.S.2d 770 (3d Dep't 2008).

n6 *Chebatoris v. Moyer*, 276 Neb. 733, 757 N.W.2d 212 (2008).

n7 *Kamens v. Utica Mut. Ins. Co.*, 6 A.D.3d 1237, 776 N.Y.S.2d 671 (4th Dep't 2004), order aff'd, 4 N.Y.3d 460, 796 N.Y.S.2d 328, 829 N.E.2d 292 (2005).

n8 *Fifth Third Bank v. Cope*, 162 Ohio App. 3d 838, 2005-Ohio-4626, 835 N.E.2d 779 (12th Dist. Warren County 2005).

REFERENCE: West's Key Number Digest, Property [westkey]1, 7, 11, 12
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A.L.R. Index, Property
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Property
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63C Am Jur 2d Property § 37

§ 37 Generally; parties

The rules and principles relating to actions, generally,ⁿ¹ 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;ⁿ² although the owner of any particular right, interest, or estate in real property,ⁿ³ including one rightfully in the occupancy or possession of the realty,ⁿ⁴ has, generally at least, a right of action for damages for injury to his or her particular right, interest, or estate. However, it is essential 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.ⁿ⁵

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.ⁿ⁶

Generally, questions involving ownership of land are determined under state law, even when the federal government is a party.ⁿ⁷ Moreover, in determining the ownership of property, the courts apply the law of the jurisdiction in which the land is located.ⁿ⁸ More specifically, the law of the state in which the real property is located covers the questions of property rights,ⁿ⁹ and for personal property, including intangible personal property, its situs is at the domicile of its owner.ⁿ¹⁰ Stated somewhat differently, generally, the law of the situs shall exclusively govern in regard to all rights, interests, and titles in and to immovable property.ⁿ¹¹

A default judgment determining the 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.ⁿ¹²

FOOTNOTES:

n1 Am. Jur. 2d, Actions §§ 1 et seq.

n2 Brink v. Moeschl Edwards Corrugating Co., 142 Ky. 88, 133 S.W. 1147 (1911).

n3 Choctaw, O. & G.R. Co. v. Drew, 1913 OK 95, 37 Okla. 396, 130 P. 1149 (1913).

n4 Garrett v. Beers, 97 Kan. 255, 155 P. 2 (1916).

n5 Lomax v. Phillips, 113 La. 850, 37 So. 777 (1905).

n6 Nashville, C. & St. L. Ry. v. Heikens, 112 Tenn. 378, 79 S.W. 1038 (1904).

n7 Dykes v. Arnold, 204 Or. App. 154, 129 P.3d 257 (2006).

n8 Turner v. Mullins, 162 S.W.3d 356 (Tex. App. Fort Worth 2005).

n9 In re Universal Clearing House Co., 62 B.R. 118 (D. Utah 1986); Denney v. Teel, 1984 OK 63, 688 P.2d 803, 56 A.L.R.4th 527 (Okla. 1984).

n10 Delaware v. New York, 507 U.S. 490, 113 S. Ct. 1550, 123 L. Ed. 2d 211 (1993); Granite Equipment Leasing Corp. v. Hutton, 84 Wash. 2d 320, 525 P.2d 223, 72 A.L.R.3d 1172 (1974).

n11 Quinn v. Quinn, 13 Neb. App. 155, 689 N.W.2d 605 (2004).

n12 Freeze v. Salot, 122 Cal. App. 2d 561, 266 P.2d 140 (2d Dist. 1954); Gardner v. Jones, 1956 OK 23, 309 P.2d 731 (Okla. 1956).

REFERENCE: West's Key Number Digest, Property [westkey]1, 6, 7, 9

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Lots and Parcels

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A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]1, 6, 7, 9

Am. Jur. Legal Forms 2d, Animals § 20:36

Am. Jur. Pleading and Practice Forms, Conversion §§ 112 to 115

Am. Jur. Pleading and Practice Forms, Property §§ 12, 14

West's Key Number Digest, Property [westkey]1, 6

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Property
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63C Am Jur 2d Property § 38

§ 38 Pleading

One's ownership of real property may be sufficiently alleged by an averment that he or she "was seised and possessed" of the land.ⁿ¹

A declaration or complaint should describe the real property in a suit with sufficient particularity to prevent the defendant from being misled or uncertain as to the location of the property.ⁿ²

Liberally read, a complaint of a dog owner against a city, alleging that a city police officer shot and killed the dog, encompasses a claim for damages for property loss.ⁿ³

FOOTNOTES:

n1 Gilb v. O'Neill, 225 Ala. 92, 142 So. 397, 85 A.L.R. 1526 (1932).

n2 Malony v. Adsit, 175 U.S. 281, 20 S. Ct. 115, 44 L. Ed. 163, 1 Alaska Fed. 574 (1899).

n3 Rabideau v. City of Racine, 2001 WI 57, 243 Wis. 2d 486, 627 N.W.2d 795 (2001).

REFERENCE: West's Key Number Digest, Property [westkey]1, 6, 7, 9
A.L.R. Index, Intangible Hereditaments or Property
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A.L.R. Index, Title and Ownership
West's A.L.R. Digest, Property [westkey]1, 6, 7, 9
Am. Jur. Legal Forms 2d, Animals § 20:36
Am. Jur. Pleading and Practice Forms, Conversion §§ 112 to 115
Am. Jur. Pleading and Practice Forms, Property §§ 12, 14
West's Key Number Digest, Property [westkey]1
Am. Jur. Pleading and Practice Forms, Conversion §§ 112 to 115 (Complaint, petition, or declaration -- For conversion of livestock)
Am. Jur. Pleading and Practice Forms, Property § 12 (Complaint, petition, or declaration -- For damages and injunctive relief -- Trespass -- General form)
Am. Jur. Pleading and Practice Forms, Property § 14 (Complaint, petition, or declaration -- Damage to crops and poultry of adjoining landowner by trespassing pigs)

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Property
VI. Practice and Procedure

63C Am Jur 2d Property § 39

§ 39 Proof of ownership

The ownership and possession of land must be proved by evidence,ⁿ¹ and cannot be proved by general notoriety or by reputation.ⁿ² While the legal title to real property can be shown by a valid deed,ⁿ³ the record title is the highest evidence of ownership of real property and is not easily defeated.ⁿ⁴ When the issue of title or ownership is directly involved, the proper way to prove title to the property is by the production of the original documents or certified copies from the record.ⁿ⁵ The payment of taxes for real property is not evidence of title and ownership.ⁿ⁶

The unhindered possession of an item, particularly when accompanied by the use of the item as one's own, is strong evidence of ownership.ⁿ⁷ However, mere possession, unaccompanied by other circumstances giving it a specific character, is not such evidence of ownership as to prevail against the true owner.ⁿ⁸

The 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.ⁿ⁹

The name on tools, vehicles, or animals, and articles generally is commonly accepted as prima facie proof of ownership, and although not of much probative weight, it is enough, in the absence of evidence to the contrary, to carry the issue to the jury.ⁿ¹⁰ This rule is recognized and applied to various species of property, and it has been applied in actions for damages sustained through an instrumentality bearing the defendant's name.ⁿ¹¹ Likewise, the brand or mark on cattle is prima facie proof of ownership in states where the legislature has permitted such branding by statute.ⁿ¹²

FOOTNOTES:

n1 *M. C. Dixon Lumber Co., Inc. v. Mathison*, 289 Ala. 229, 266 So. 2d 841 (1972); *Hill v. State*, 394 So. 2d 106 (Ala. Crim. App. 1981).

n2 *M. C. Dixon Lumber Co., Inc. v. Mathison*, 289 Ala. 229, 266 So. 2d 841 (1972).

n3 *Woodland Grove Baptist Church v. Woodland Grove Community Cemetery Ass'n, Inc.*, 947 So. 2d 1031 (Ala. 2006).

n4 *U.S. v. Denlinger*, 982 F.2d 233 (7th Cir. 1992); *Downing v. Owens*, 809 N.E.2d 444 (Ind. Ct. App. 2004).

n5 *Socha v. Bordeau*, 50 Conn. Supp. 631, 961 A.2d 495 (Super. Ct. 2007), judgment aff'd, 289 Conn. 358, 956 A.2d 1174 (2008).

n6 *Blair v. Bishop*, 290 Ga. App. 721, 660 S.E.2d 35 (2008), cert. denied, (July 8, 2008).

n7 *Damon v. Secretary of Health, Ed. and Welfare*, 557 F.2d 31 (2d Cir. 1977).

n8 Enterprise Lodge No. 352 of Knights of Pythias, Inc. v. First Baptist Church (Colored) of Evergreen, 292 Ala. 579, 298 So. 2d 17 (1974) (a recital in a deed that a party "occupied" a building is evidence of possession, but is not necessarily evidence of ownership); In re Williams' Estate, 241 Iowa 1290, 45 N.W.2d 146 (1950).

n9 Justice v. Fabey, 541 F. Supp. 1019, 34 Fed. R. Serv. 2d 1117, 34 U.C.C. Rep. Serv. 515 (E.D. Pa. 1982).

n10 Cannon v. Motors Ins. Corp., 224 S.C. 368, 79 S.E.2d 369 (1953); Walker v. Johnston, 236 S.W.2d 534 (Tex. Civ. App. San Antonio 1951), writ dismissed.

n11 Walker v. Johnston, 236 S.W.2d 534 (Tex. Civ. App. San Antonio 1951), writ dismissed; Cappello v. Aero Mayflower Transit Co., 116 Vt. 64, 68 A.2d 913 (1949).

n12 Warren v. De Long, 57 Nev. 131, 59 P.2d 1165 (1936).

As to branding or marking animals to evidence ownership, see Am. Jur. 2d, Animals §§ 6, 7.

SUPPLEMENT:

Cases

When determining ownership for personal property with no formal title, oral evidence from a witness with knowledge concerning ownership of such chattels is competent evidence of the fact of ownership. Renaissance Leasing, LLC v. Vermeer Mfg. Co., 322 S.W.3d 112 (Mo. 2010).

REFERENCE: West's Key Number Digest, Property [westkey]1, 6, 7, 9

A.L.R. Index, Intangible Hereditaments or Property

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A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]1, 6, 7, 9

Am. Jur. Legal Forms 2d, Animals § 20:36

Am. Jur. Pleading and Practice Forms, Conversion §§ 112 to 115

Am. Jur. Pleading and Practice Forms, Property §§ 12, 14

West's Key Number Digest, Property [westkey]7, 9

Proof of title to motor vehicle requisite to recovery for injury thereof, 7 A.L.R.2d 1347

Am. Jur. Legal Forms 2d, Animals § 20:36 (Right to use brand)

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Property
VI. Practice and Procedure

63C Am Jur 2d Property § 40

§ 40 Burden of proof; presumptions

The burden of proving title or ownership of real property is upon the party alleging it,ⁿ¹ and the burden of rebutting a prima facie showing of title rests upon the party attacking the title shown.ⁿ²

A record title or legal title is an indicium sufficient to raise a presumption of true ownership.ⁿ³ The holder of title to property is the presumed legal owner of that property, and if someone else claims ownership of such property, he or she must establish his or her claim by clear, satisfactory, and convincing evidence.ⁿ⁴

The possession of property is indicia of ownership, and a rebuttable presumption exists that those in possession of property are rightly in possession.ⁿ⁵ The law ever presumes ownership in favor of possession, for possession alone is prima facie evidence of good title.ⁿ⁶ However, the presumption of ownership from possession gives way to evidence of a superior title.ⁿ⁷ The burden is on the party not in possession to prove title superior to that of the possessor.ⁿ⁸ Simply stated, the possession of a thing creates a rebuttable presumption of ownership, and the burden of rebutting the presumption is upon the party claiming adversely to one in possession.ⁿ⁹

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 a sufficient proof of title.ⁿ¹⁰ A plaintiff's possession of the land, as evidenced by his or her having erected and maintained a residence on the property, and by his or her cultivation of the very land through which the defendant ran a road, raises a disputable presumption of ownership.ⁿ¹¹

The 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.ⁿ¹² However, the presumption of ownership arising from the possession of a chattel may be rebutted by the introduction of evidence tending to establish that the possessor of the 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.ⁿ¹³ 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.ⁿ¹⁴ Where evidence is introduced which rebuts or meets the presumption of ownership of the party in possession, the presumption has no effect, and the fact finder may determine from the evidence whether ownership has been established.ⁿ¹⁵

The statutory presumption that the owner of legal title to property is the owner of the beneficial title does not apply when the title itself is challenged as not genuine; otherwise, the statute would encourage fraud by permitting a dishonest person, simply by creating false documents of title, to shift to the innocent owner the burden of proving ownership by clear and convincing evidence.ⁿ¹⁶

Property is presumed to descend to the heir,ⁿ¹⁷ 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 or her property.ⁿ¹⁸ Exercising acts of ownership over property is the basis for a statutory presumption of ownership in some jurisdictions.ⁿ¹⁹

FOOTNOTES:

n1 North v. Graham, 235 Ill. 178, 85 N.E. 267 (1908); Tonopah & G. R. Co. v. Fellanbaum, 32 Nev. 278, 107 P. 882 (1910), aff'd, 35 Nev. 249, 129 P. 308 (1913).

n2 Van Gundy v. Shewey, 90 Kan. 253, 133 P. 720 (1913); Hardman v. Cabot, 60 W. Va. 664, 55 S.E. 756 (1906).

n3 Spotts v. U.S., 429 F.3d 248, 2005 FED App. 0441P (6th Cir. 2005) (applying Kentucky law); U.S. v. Nava, 404 F.3d 1119 (9th Cir. 2005) (applying Montana law and holding that a person possessed of the record title is presumed to be the lawful owner of property).

n4 Teton Peaks Inv. Co., LLC v. Ohme, 146 Idaho 394, 195 P.3d 1207 (2008).

n5 Willcox v. Stroup, 467 F.3d 409 (4th Cir. 2006), cert. denied, 550 U.S. 904, 127 S. Ct. 2105, 167 L. Ed. 2d 814 (2007) (applying South Carolina law).

n6 Willcox v. Stroup, 467 F.3d 409 (4th Cir. 2006), cert. denied, 550 U.S. 904, 127 S. Ct. 2105, 167 L. Ed. 2d 814 (2007) (applying South Carolina law).

n7 Willcox v. Stroup, 467 F.3d 409 (4th Cir. 2006), cert. denied, 550 U.S. 904, 127 S. Ct. 2105, 167 L. Ed. 2d 814 (2007) (applying South Carolina law).

n8 Willcox v. Stroup, 467 F.3d 409 (4th Cir. 2006), cert. denied, 550 U.S. 904, 127 S. Ct. 2105, 167 L. Ed. 2d 814 (2007) (applying South Carolina law).

n9 Condrey v. SunTrust Bank of Georgia, 429 F.3d 556 (5th Cir. 2005) (applying the law of both Georgia and Louisiana).

n10 State ex rel. Tillman v. District Court of Tenth Judicial Dist. in and for Fergus County, 101 Mont. 176, 53 P.2d 107, 103 A.L.R. 376 (1936); Permian Oil Co. v. Smith, 129 Tex. 413, 73 S.W.2d 490, 111 A.L.R. 1152 (1934).

n11 Hanns v. Friedly, 181 Or. 631, 184 P.2d 855 (1947).

n12 Morrison v. Jones, 192 Miss. 567, 6 So. 2d 577 (1942); Mielke v. Leeberson, 150 Ohio St. 528, 38 Ohio Op. 352, 83 N.E.2d 209, 7 A.L.R.2d 1342 (1948).

n13 In re Atlantic Marble, Inc., 126 B.R. 463, 16 U.C.C. Rep. Serv. 2d 528 (Bankr. E.D. Pa. 1991); Hattaway v. Keefe, 191 Ga. App. 315, 381 S.E.2d 569, 10 U.C.C. Rep. Serv. 2d 143 (1989).

n14 Justice v. Fabey, 541 F. Supp. 1019, 34 Fed. R. Serv. 2d 1117, 34 U.C.C. Rep. Serv. 515 (E.D. Pa. 1982).

n15 Austin v. Borough of Ligonier, 122 Pa. Commw. 161, 551 A.2d 403 (1988).

n16 People v. Semaan, 42 Cal. 4th 79, 64 Cal. Rptr. 3d 1, 163 P.3d 949 (2007).

n17 Warner v. Flack, 278 Ill. 303, 116 N.E. 197, 2 A.L.R. 423 (1917).

n18 Am. Jur. 2d, Descent and Distribution §§ 74 to 76.

n19 State ex rel. Tillman v. District Court of Tenth Judicial Dist. in and for Fergus County, 101 Mont. 176, 53 P.2d 107, 103 A.L.R. 376 (1936); Judson v. Bee Hive Auto Service Co., 136 Or. 1, 294 P. 588 (1930), rev'd on other grounds, 136 Or. 1, 297 P. 1050, 74 A.L.R. 944 (1931).

SUPPLEMENT:

Cases

When it applies, the form of title presumption established by a deed may not be rebutted by evidence that title was taken in a particular manner merely to obtain a loan. West's Ann.Cal.Evid.Code § 662. *In re Marriage of Fossum*, 192 Cal. App. 4th 336, 2011 WL 263203 (2d Dist. 2011), opinion modified, 2011 WL 484309 (Cal. App. 2d Dist. 2011) and opinion modified, 2011 WL 653392 (Cal. App. 2d Dist. 2011).

REFERENCE: West's Key Number Digest, Property [westkey]1, 6, 7, 9

A.L.R. Index, Intangible Hereditaments or Property

A.L.R. Index, Interest in Property or Subject Matter

A.L.R. Index, Lots and Parcels

A.L.R. Index, Personal Property

A.L.R. Index, Property

A.L.R. Index, Sale and Transfer of Property

A.L.R. Index, Title and Ownership

West's A.L.R. Digest, Property [westkey]1, 6, 7, 9

Am. Jur. Legal Forms 2d, Animals § 20:36

Am. Jur. Pleading and Practice Forms, Conversion §§ 112 to 115

Am. Jur. Pleading and Practice Forms, Property §§ 12, 14

West's Key Number Digest, Property [westkey]7, 9, 10

Romualdo P. Eclavea, J.D.

Property
VI. Practice and Procedure

63C Am Jur 2d Property § 41

§ 41 Motor vehicle

The owner of an automobile is the party who has legal title to it.ⁿ¹ A certificate of title to an automobile serves not only as a substitute recording system, but also as evidence of ownership.ⁿ² However, a certificate of title to a motor vehicle is not conclusive proof of the ownership of such vehicle but is only prima facie evidence of ownership, capable of being rebutted by other evidence.ⁿ³ Standing alone, a certificate of title to an automobile raises an inference of legal title in the holder subject to contradiction by other evidence.ⁿ⁴ In other words, the name on a motor vehicle's certificate of title is not conclusive of its ownership; evidence of the name in which an automobile is registered raises only a presumption of ownership,ⁿ⁵ and the presumption that the person named on the certificate of title is the owner of the motor vehicle is subject to rebuttal.ⁿ⁶ Simply stated, the presumption of ownership created by the certificate of title to a vehicle is not conclusive, and may be rebutted by evidence demonstrating that another individual owns the vehicle in question.ⁿ⁷

FOOTNOTES:

n1 McDuffie v. Com., 49 Va. App. 170, 638 S.E.2d 139 (2006).

n2 McDuffie v. Com., 49 Va. App. 170, 638 S.E.2d 139 (2006).

n3 Carolina Cas. Ins. Co. v. Williams, 945 So. 2d 1030 (Ala. 2006); Reinke v. Alliance Towing, 207 Ariz. 542, 88 P.3d 1154 (Ct. App. Div. 1 2004); Blue Ridge Bank and Trust Co. v. Hart, 152 S.W.3d 420, 55 U.C.C. Rep. Serv. 2d 693 (Mo. Ct. App. W.D. 2005).

n4 Brackin v. Brackin, 894 N.E.2d 206 (Ind. Ct. App. 2008).

n5 Humber v. Bjornson, 2008 WL 4823001 (Ala. Civ. App. 2008) (a certificate of title to a motor vehicle establishes prima facie title in favor of the individual whose name appears on the certificate); Vibbert v. PAR, Inc., 224 S.W.3d 317 (Tex. App. El Paso 2006).

n6 People v. Whitehead, 48 A.D.3d 237, 850 N.Y.S.2d 444 (1st Dep't 2008), leave to appeal denied, 10 N.Y.3d 872, 860 N.Y.S.2d 498, 890 N.E.2d 261 (2008).

n7 New Windsor Volunteer Ambulance Corps, Inc. v. Meyers, 442 F.3d 101 (2d Cir. 2006) (applying New York law).

REFERENCE: West's Key Number Digest, Property [westkey]1, 6, 7, 9

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West's A.L.R. Digest, Property [westkey]1, 6, 7, 9
Am. Jur. Legal Forms 2d, Animals § 20:36
Am. Jur. Pleading and Practice Forms, Conversion §§ 112 to 115
Am. Jur. Pleading and Practice Forms, Property §§ 12, 14
West's Key Number Digest, Property [westkey]7, 9, 10