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*Property*  
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# Property

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CHAPTER 1  
INTRODUCTION

## I. “PROPERTY” GENERALLY

**A. General definition:** A person may be said to hold a property interest, in the broadest sense, if he has any *right* which the *law will protect* against *infringement by others*. In addition to *tangible* property (land and chattels), courts have increasingly recognized broad categories of *intangible* property interests. For instance, a teacher with tenure in a public school system may be found to have a constitutionally-protected property interest in continued employment.

**1. Real and personal property:** In this book, we are concerned almost exclusively with rights in tangible property, i.e., all *real* property and tangible *personal* property. “Real” property includes land and any structures built upon it. “Personal” property includes all other kinds of property; while our discussion of personal property concentrates on tangible property (e.g., an automobile), a few types of intangible property (e.g., bank accounts) are considered. The bulk of the treatment of personal property is in the following chapter, so that the remainder of the book concentrates heavily on real property.

**B. Possession vs. title:** Perhaps the most important distinction which will appear throughout the course of this outline is the distinction between *possession* and *title*.

**1. Possession:** There is no precise definition of the term “possession”, and its use varies according to the context. However, a person may generally be said to have possession of land or personal property if he has *dominion and control* over it.

**2. Title:** Title, on the other hand, is roughly synonymous with what the layman thinks of as “ownership.” Thus a tenant in a residential apartment building has possession of the apartment, but the landlord has title to it.

**a. Divided title:** A unique feature of Anglo-American property law is that title to a parcel of real estate can be spread among numerous owners and in several different ways. The chapters on future interests,

marital estates and concurrent interests are all illustrations of this fact.

**C. Law and equity:** Another frequently-drawn distinction is between *law* and *equity*. The difference between courts of law and courts of equity is discussed more fully *infra*, p. 77. The basic idea is that a law court awards *money damages*, and an equity court awards other sorts of relief, usually *injunctions*.

**D. Bundle of rights:** The non-lawyer thinks of property as a single right: one either “owns” personal or real property, or one does not. But in fact, ownership consists of a number of different rights, often called a “*bundle*”: the right to *possess* the object; the right to *use* it; the right to *exclude* others from possessing or using it, and the right to *transfer* it. Even the right of transfer has two distinct aspects, the right to make a *gift*, and the right to *sell*. See D&K, p. 86.

**1. Splitting up:** Frequently, an “owner” of real or personal property will be found to have some but not all of these rights. For instance, one who “owns” a vacant downtown acre in “fee simple” (the broadest form of ownership known to American law — see *infra*, p. 43) does not have the right to erect a 150 story building on the site, if buildings of that height are forbidden by the local zoning code. Similarly, a person “owns” his kidneys in the sense that government cannot remove a kidney without his consent, yet one may not make a forprofit sale of one's kidney to be transplanted into another. (See *infra*, p. 5.)

**2. The right to exclude others:** Even the right to *exclude* others, which goes to the core of what it means to “own” property, is subject to limits imposed by society. Most obviously, a property owner must allow fire and police officials on his property in certain circumstances. Some courts have cut back even further on the owner's right to exclude. For instance, one court has held that the owner of a farm may not use trespass statutes to keep out private citizens who are trying to furnish medical or legal services to migrant workers living on the farm. See *State v. Shack*, 277 A.2d 369 (N.J. 1971). As the court said in *Shack*, “title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises.”

## II. SOURCES OF PROPERTY LAW

**A. Cases:** The principal source of property law is *case law*, i.e., opinions by judges. Property case law is largely the product of decisions by the appellate courts of the individual *states*. In contrast to many other areas of the law (e.g., constitutional law), the state courts are more or less free to develop their own property case law without interference by the U.S. Supreme Court. (However, in a few situations, e.g., zoning, constitutional issues will arise, and as to these the U.S. Supreme Court has the final word.)

**B. Statutes:** Another large body of law is *state statutes*. The law of property has been heavily subjected to statutory modification of the old common-law principles and there are few property questions that can be answered wholly without reference to any statute.

**C. Restatements and model acts:** A third source of authority consists of secondary materials prepared by law professors and other experts. Foremost among these are the various Restatements: (1) the *First Restatement of Property* (published beginning in 1936); (2) the *Second Restatement of Property* (published in 1976, and dealing only with landlord-tenant law and selected topics under the general title of “Donative Transfers”); and (3) the *Third Restatement of Property* (published in the late 1990s and early 2000s, and dealing only with “servitudes” and mortgages).

**1. Model acts:** Also, a number of *model statutes* have been drafted (e.g., the Uniform Residential Landlord-Tenant Act.) These have been enacted in some states, and are sometimes looked to (on a non-binding basis) by the courts of other states.