

## Chapter 48

# INTRODUCTION TO PROPERTY, PROPERTY INSURANCE, BAILMENTS, AND DOCUMENTS OF TITLE

*Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.*

JEREMY BENTHAM, ENGLISH JURIST AND PHILOSOPHER, 1748–1832

### LEARNING OBJECTIVES

*After reading this chapter you should be able to:*

1. Define (a) tangible and intangible property, (b) real and personal property, and (c) a fixture.
2. Explain (a) the ways to transfer title to personal property; (b) the three elements of a valid gift; and (c) the difference in the law's treatment of abandoned property, lost property, and mislaid property.
3. With respect to property insurance, explain (a) the different types of fires, (b) co-insurance clauses, (c) other insurance clauses, (d) insurable interest, (e) valued and open policies, and (f) the defenses of misrepresentation, breach of warranty, concealment, waiver, and estoppel.
4. Define the essential elements of a bailment and describe the rights and duties of the bailor and bailee.
5. (a) Explain what a document of title is and (b) identify and describe the various types of documents of title.

**I**n our democratic and free enterprise society, the importance of the concept of property is second only to that of the idea of liberty. Although many of our rules of property stem directly from English law, in the United States property occupies a unique status because of the protection expressly granted it by the U.S. Constitution and by most state constitutions as well. The Fifth Amendment to the federal Constitution provides that "No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment contains a similar

requirement: "No State shall ... deprive any person of life, liberty, or property, without due process of law." Under the police power, however, this protection afforded to property owners is subject to regulation for the public good.

In the first part of this chapter, we will provide a general introduction to the law governing real and personal property. The second part of this chapter deals specifically with personal property; the third part covers property insurance. The fourth part of the chapter covers bailments and the last part of the chapter discusses documents of title.



## INTRODUCTION TO PROPERTY AND PERSONAL PROPERTY

Property is a legally protected interest or group of interests. It is valuable only because our law provides that certain consequences follow from the ownership of it. The right to use property, to sell it, and to control to whom it shall pass on the death of the owner are all included within the term *property*. Thus, a person who speaks of "owning property" may have one of two separate ideas in mind: (1) the *physical thing itself*, as when a homeowner says, "I just bought a piece of property in Oakland," meaning complete ownership of a physically identifiable parcel of land, or (2) a *right or interest* in a physical object (for example, with respect to land, a tenant under a lease has a property interest in the leased land, although he does not own the land).

### Kinds of Property

Property may be classified as (1) tangible or intangible and (2) real or personal, but these classifications are not mutually exclusive.

#### TANGIBLE AND INTANGIBLE

A forty-acre farm, a chair, and a household pet are tangible property. Each of these *physical* objects embodies the group of rights or interests known as "title" to or "ownership" of **tangible property**. **Intangible property**, in contrast, does not exist in a physical form. For example, the rights represented by a stock certificate, a promissory note, and a deed granting Jones a right-of-way over Smith's land are intangible property. Each represents certain rights that defy reduction to physical possession but have a legal reality in that the courts will protect them.

The same item may be the object of both tangible and intangible property rights. Suppose Ann purchases a book published by Brown & Sons. On the first page is the statement "Copyright 2009 by Brown & Sons." Ann owns the volume she has purchased. She has the right to exclusive physical possession and use of that particular copy. It is a tangible piece of property of which she is the owner. Brown & Sons, however, has the exclusive right to publish copies of the book, a right granted the publisher by the copyright laws. The courts will protect this intangible property of Brown & Sons, as well as Ann's right to her particular volume.

#### REAL AND PERSONAL

The most significant practical distinction between types of property is the classification into real and personal property. To define this distinction simply, land and all interests in it are **real property** (also called *realty*), and every other thing or interest identified as property is **personal property** (also called *chattel*). This easy description encompasses most property, with the exception of certain physical objects that are personal property under most circumstances but that may, because of their attachment to land or their use in connection with land, become a form of real property called fixtures.

#### FIXTURES

As we noted above, a **fixture** is an article or piece of property that was formerly treated as personal property but has been attached in such a manner to land or a building that it is now designated as real property even though it retains its original identity. The intent of the parties to convert the property to real property from personal property is usually shown by the permanent manner of affixation or the adaptation of the affixed object to the property. For example, building materials are clearly personal property; however, when worked into a building as its construction progresses, such materials become real property, as buildings are a part of the land they occupy. Thus, clay in its natural state is, of course, real property; when made into bricks, it becomes personal property; and if the bricks are then built into the wall of a house, the "clay" once again becomes real property.

Although doing so may be difficult, determining whether various items are personal property or real property may be the only way to settle certain conflicting ownership claims. Unless otherwise provided by agreement, personal property remains the property of the person who placed it on the real estate. On the other hand, property that has been affixed so as to become a fixture (an actual part of the real estate) becomes the property of the real estate owner.

In determining whether personal property has become a fixture, the intention of the parties, as expressed in their agreement, will control the settlement of conflicting claims. In the absence of an agreement, the following factors are relevant in determining whether any particular item is a fixture:

1. the physical relationship of the item to the land or building;
2. the intention of the person who attached the item to the land or building;



3. the purpose the item serves in relation to the land or building and in relation to the person who brought it there; and
4. the interest of that person in the land or building at the time of the item's attachment.

Although physical attachment is significant, a more important test is whether the item can be removed without causing material injury to the land or building on the land. If it *cannot* be so removed, the item is generally held to have become part of the realty.

### Practical Advice

Specify in your contracts for the sale of real estate which fixtures stay with the property and which fixtures may be removed by the seller.

By comparison, the test of purpose or use applies only if the item (1) is affixed to the realty in some way but (2) can be removed without material injury to the realty.

In such a situation, if the use or purpose of the item is peculiar to a particular owner or occupant of the premises, the courts will tend to let him remove the item when he leaves. Accordingly, in the law of landlord and tenant, the tenant may remove *trade fixtures* (that is, items used in connection with a trade but not intended to become part of the realty), provided that she can accomplish this without material injury to the realty. On the *other* hand, doors may be removed without injury to the *structure*; yet, because they are necessary to the ordinary *use* of the building and are not peculiar to the use of the occupant, they are considered to be fixtures and thus part of the *real* property.

### Practical Advice

When placing on real property a permanently affixed structure, such as a billboard, provide in your agreement with the owner of the land terms specifying who owns the structure and whether you have the right to remove it upon termination of the lease.

## FREEMAN V. BARRS

MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT, DIVISION ONE, 2007  
237 S.W.3D 285

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=mo&vol=/appeals/112007/&invol=5411107>

**FACTS** Francis B. Freeman, Jr., brought this action to replevin (recover) from defendant, Mary Ann Barrs, a cattle scale. In 2005, Barrs purchased a tract of real estate consisting of approximately four thousand acres from plaintiff for a price of \$3,500,000. There were four residences on the property, two barns, and a covered pole barn with open sides. The pole barn housed the cattle scale that that plaintiff seeks to recover. The defendant claims that the cattle scale was a fixture that was part of the real estate and passed to the buyer in the sale.

Paragraph 2 of the form contract between the parties states:

### INCLUSIONS, EXCLUSIONS AND EXCEPTIONS.

The Property *includes* any and all rights, privileges and easements appurtenant thereto, together with all existing buildings and improvements and all affixed equipment now located thereon, *if any*, including all mechanical, HVAC, electrical and plumbing systems, fixtures and equipment, fencing and other attached fixtures, trees, bushes, shrubs and plants, feed bunks in the fence, installed fences and gates, propane tanks not under lease, water association rights and telephone rights where applicable, hog and cattle waterers in the fence or permanently installed, grain storage buildings and hog and cattle shades on permanent foundations,

auger and conveyor systems. All grain, crops, livestock, hay, silage, and non-affixed personal property on the real estate are reserved by Seller or Seller's tenant....

The plaintiff purchased the cattle scale in June 2001 for \$11,000. The scale was sold as a portable model. Plaintiff placed the scale in a pole-type barn on a concrete pad poured for the scale, then poured concrete ramps that would allow cattle to enter and exit the scale. Plaintiff further welded an iron fence into place to help funnel the cattle through the scale area. The scale was designed to be portable, and 70 percent of the scales sold were installed the same way as the plaintiff. The scale could be moved by cutting away a welded metal fence and lifting the scale with heavy machinery. The removal of the fence would take approximately one hour with use of a cutting torch, after which the scale could be moved within fifteen minutes. The trial court entered judgment in favor of the defendant.

**DECISION** Judgment of the trial court is affirmed.

**OPINION** Parrish, P.J. Paragraph 2 of the real estate contract between the parties unambiguously provides that the sale included all affixed equipment located on the



property. Courts do not rewrite unambiguous contracts but construe them as written. [Citation.] Thus, as defendant suggests, if the scale constitutes a fixture, the judgment will be affirmed.

A fixture is an article in the nature of personal property which has been so annexed to the realty that it is regarded as part of the land and partakes of the legal incidents of the freehold and belongs to the person owning the land. [Citation.] The test for determining whether property has become a fixture is three-fold, consisting of: (1) the annexation to the realty; (2) the adaptation to the use to which the realty is devoted; and (3) the intent that the object become a permanent accession to the land. [Citation.] These elements or tests all present questions of fact and are not ordinarily resolvable by law. [Citation.] Whether or not an article is a fixture depends upon the facts and circumstances of a particular case. [Citation.]

\*\*\*

\*\*\* The latter two elements, adaptation and intent, are more important in determining whether a chattel became a fixture than the method by which the chattel is affixed to a freehold. [Citation.] Annexation that may be slight and easily displaced does not prevent an article from becoming a fixture when the other elements are found. [Citation.]

**Annexation.** Plaintiff purchased the scale and printer in 2001. The scale was purchased by plaintiff to "start selling cattle from the ranch and not sending them to the sale barn to keep the price up a little." It was placed in a roofed structure that housed cattle-working pens and a small veterinary office. The scale weighs approximately 6,500 pounds. A fence and gates within the structure had to be cut off in order to install the scale. A concrete slab was poured in the structure for placement of the scale. The size and shape of the slab were designed to accommodate the scale. Metal cleats were welded to the bottom of the scale before it was placed on the slab. The scale was placed on pipes on the ground and pushed with a tractor across the pipes onto the slab. Concrete ramps were installed on two sides of the scale and fencing was constructed to direct cattle onto the scale. The concrete construction (other than the slab) and the metal pipe fencing were completed after the scale was placed on the slab in the pole barn. The metal posts for the fence were set in the concrete. The scale has remained in place since its installation.

**Adaptation.** Ray Stone had been ranch manager for plaintiff. At the time of trial he had an agreement with defendant that permitted him to run cattle on the property. He was running 200 head of cows and 90 calves on the property. He "just kind of [saw] after the place" for her. He told the court that the scale was integral to a cattle-working facility. The scale was used to weigh cattle for sale and to determine required dosages of medicine administered to cattle.

**Intent.** The scale was described as portable by its manufacturer. The manufacturer sold peripheral items that permitted the scale to be moved. This included a trailer and an inverter. Plaintiff did not buy that equipment. Ray Stone told the court that the scale was purchased "to be stationary whether it was portable or not."

This court concludes that the scale was a fixture; that, therefore, the sale of the real estate on which it was situate included the sale of the scale. A 6,500-pound scale placed on a specially sized concrete pad and surrounded by metal pole fencing set in the concrete is annexed to the real estate on which the concrete pad is poured. The permanency of the installation is emphasized by the fact the facility is covered \*\*\*. The scale was put in place to facilitate the cattle operation on the premises. It had been used for that purpose since its purchase. Its adaptation for that purpose enhanced the operation of the cattle ranch.

Mindful that "[i]n determining the intention of the person making the annexation the court ... is not bound by [that person's] testimony on this point, nor by his secret or undisclosed purpose but may decide this issue from his acts and conduct and the surrounding facts and circumstances," [Citation], this court holds that the evidence in this case demonstrates that it was plaintiff's intent for the scale to be a permanent installation; that the scale is a fixture and, therefore, part of the real estate.

**INTERPRETATION** A fixture is personal property so firmly attached to real property that an interest in it arises under real property.

**ETHICAL QUESTION** Did the court fairly decide this case? Explain.

**CRITICAL THINKING QUESTION** When should personal property become a fixture? What criteria should be used in the determination? Explain.

## Transfer of Title to Personal Property

The transfer of title to real property typically is a formal affair. In contrast, title to personal property may be acquired and transferred with relative ease and little

formality. Such facility with regard to the transfer of personal property is essential within a society whose trade and industry are based principally on transactions in personal property. In a free economy, stocks, bonds, merchandise, and intellectual property must be sold with minimal delay. It is only natural that the law will reflect these needs.



## CONCEPT REVIEW 48-1

## Kinds of Property

	Personal	Real
Tangible	Goods	Buildings Mortgages
Intangible	Negotiable instruments Stock certificates Contract rights Copyrights Patents	Leases Easements Mortgages

Accordingly, the law concerning personal property has been largely codified. The Uniform Commercial Code (UCC) includes the law of sales of goods (Article 2), as well as the law governing the transfer and negotiation of negotiable instruments (Article 3) and of investment securities (Article 8). Nonetheless, the Code does not cover a number of issues (addressed in the remainder of this chapter) involving the ownership and transfer of title to personal property. In addition, personal property may be, and often is, acquired by producing the item, rather than by selling or transferring it.

## BY SALE

By definition, a sale of *tangible* personal property (goods) is a transfer of title to specified existing goods for a consideration known as the price. Title passes when the parties intend it to pass, and transfer of possession is not required for a transfer of title. For a discussion of transfer of title, see Chapter 21.

Sales of *intangible* personal property also involve the transfer of title. Many of these sales also are governed by UCC provisions, while some, such as sales of copyrights and patents, are governed by specialized federal legislation.

## BY GIFT

A gift is a transfer of title to property from one person to another without consideration. This lack of consideration is the basic distinction between a gift and a sale. Because a gift involves no consideration or compensation, it must be completed by delivery of the gift to be effective. A gratuitous promise to make a gift is not binding. In addition, there must be intent on the part of the maker (the donor)

of the gift to make a present transfer, and there must be acceptance by the recipient (the donee) of the gift.

**Delivery** Delivery is essential to a valid gift. The term *delivery* has a very special meaning that includes, but is not limited to, the manual transfer of the item to the donee. A donor may effect an irrevocable delivery by, for example, turning an item over to a third person with instructions to give it to the donee. Frequently, an item, because of its size, location, or intangibility, is incapable of immediate manual delivery. In such cases, an irrevocable gift may be effected through the delivery of something that symbolizes dominion over the item. This is referred to as **constructive delivery**. For example, if Joanne declares that she gives an antique desk and all its contents to Barry and hands Barry the key to the desk, in many states a valid gift has been made.

## Practical Advice

As a donee of a gift, attempt to receive actual or constructive delivery of the item as quickly as possible.

**Intent** The law also provides clearly that the donor must intend to make a gift of the property. Thus, if Jack leaves a packet of stocks and bonds with Joan, her acquiring good title to them depends on whether Jack intended to make a gift of them or simply intended to place them in Joan's hands for safekeeping. A voluntary, uncompensated delivery made with the intent to give the recipient title constitutes a gift when the donee accepts the delivery. If these conditions are met, the donor has no further claim to the property.

Gifts, therefore, cannot be conditional. There is, however, one major exception to this rule: an engagement gift



given in anticipation of marriage. If the marriage does not take place, the donor usually can recover the gift unless the donor broke the engagement without justification. But the courts will not apply the exception when a marriage is called off due to the death of one of the engaged parties.

**Acceptance** The final requirement of a valid gift is acceptance by the donee. In most instances, of course, the

donee will accept the gift gratefully. Accordingly, the law usually presumes that the donee has accepted. But certain circumstances may render acceptance objectionable, such as when a gift would impose a burden upon the donee. In such cases, the law will not require the recipient to accept an unwanted gift. For example, a donee may prudently reject a gift of an elephant or a wrecked car in need of extensive repairs.

## O'FALLON V. O'FALLON

SUPREME COURT OF ARKANSAS, 2000

341 ARK. 138, 14 S.W.3D 506

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=ar&vol=supreme/2000a/20000420/99-806&invol=2>

**FACTS** Barney Laron O'Fallon died intestate (without a will) on May 3, 1997, and was survived by three children. His oldest son, William Martin O'Fallon, was appointed administrator of the estate and, pursuant to the probate court's order, proceeded to collect the assets of the estate. One of those assets was a 1996 Chevrolet Camaro automobile that had been purchased by the decedent two weeks prior to his death and delivered to his seventeen-year-old son, Ronnie O'Fallon. After the administrator of the estate took possession of the vehicle, Ronnie O'Fallon filed a motion in the probate court for return of the property. He alleged that the "vehicle was intended to be a gift to [him] and from and after the purchase of the vehicle the Decedent never had possession of same." The administrator denied that the decedent had made a gift of the 1996 Chevrolet Camaro to Ronnie O'Fallon. After a hearing, the probate court found "by clear and convincing evidence" that the vehicle was a gift from the decedent to Ronnie. Subsequently, the Arkansas Supreme Court reversed and remanded because the probate court was without jurisdiction to adjudicate Ronnie O'Fallon's claim to the car as an alleged donee of a gift made prior to the decedent's death and held that the appropriate jurisdiction for the matter was chancery court. Ronnie O'Fallon then asked the chancery court to enter judgment based upon the record of the probate court, where the matter had been fully tried before the same judge. The chancellor granted the motion, finding that the 1996 Chevrolet Camaro purchased by the decedent prior to his death was a gift to Ronnie O'Fallon. From that order, the administrator again appealed.

**DECISION** Judgment affirmed.

**OPINION** Imber, J. For his first point on appeal, the administrator challenges the chancellor's finding that the decedent made an *inter vivos* gift of the vehicle to

Ronnie O'Fallon. Our law determining a valid *inter vivos* gift is clear and well established. We have stated that a valid *inter vivos* gift is effective when the following requirements are proven by clear and convincing evidence: (1) the donor was of sound mind; (2) an actual delivery of the property took place; (3) the donor clearly intended to make an immediate, present, and final gift; (4) the donor unconditionally released all future dominion and control over the property; and (5) the donee accepted the gift. [Citation.]

In the case at hand, it is undisputed on appeal that the donor, Barney O'Fallon, was of sound mind, that there was actual delivery, and that the donee, Ronnie O'Fallon, accepted the car. The administrator's argument focuses instead on the evidence that pertains to the other two requirements for a valid *inter vivos* gift; that is, whether Barney O'Fallon intended to make the automobile a gift and whether he relinquished dominion and control over the automobile.

The administrator first points out that Barney O'Fallon retained title to the automobile. We have held, however, that the intent of the donor can negate the fact that actual title was not transferred. [Citation.] Here, Ronnie O'Fallon's mother, Linda Ngar, testified that Barney O'Fallon told her he "was going to buy" the car for Ronnie O'Fallon. Later, he told her that he "had bought" the car for Ronnie. Similar testimony was elicited from Mike Gorman, a loan officer with the Potlatch Credit Union where Barney O'Fallon applied for a loan to purchase the automobile. According to Mr. Gorman, Mr. O'Fallon told him that he was buying the car for his son who was getting ready to go to college. It should be noted that Ronnie O'Fallon was a minor at the time of the alleged gift and, therefore, could not acquire title to the automobile. [Citation.] With regard to the fact that Barney O'Fallon insured the vehicle in his name and listed himself as the only driver, Mr. O'Fallon's insurance agent, Sammy Mullis, testified that the children of a named



insured may be covered as occasional drivers. Mr. Mullis further confirmed that parents do not always list their children as drivers on the family's car insurance policy because the premium would be significantly higher.

The record reflects additional evidence regarding Mr. O'Fallon's intent to make a gift and to relinquish all dominion and control over the automobile. Ms. Ngar testified that she drove Barney O'Fallon to Warren, where he picked up the 1996 Chevrolet Camaro from the dealership. He then drove it to Gillett, where Ronnie lived with his mother. After Ronnie got home from school, Mr. O'Fallon delivered the car and one set of car keys to Ronnie and gave the other set of keys to Ms. Ngar. According to Ms. Ngar, Mr. O'Fallon did not retain a set of keys to the car. Ronnie then drove

his father back to his home in Arkansas City and returned to Gillett that same day in the 1996 Chevrolet Camaro. Ronnie testified that the keys and paperwork on the car were given to him by his father and that the car stayed with him in Gillett. Furthermore, Ronnie stated that his father may have driven the car one other time prior to his death "because of his truck [being] in a bad position, like blocking the driveway or something, to go to the store."

**INTERPRETATION** Intent and relinquishment of control are necessary for an effective gift.

**CRITICAL THINKING QUESTION** When should the making of a gift be considered complete? Explain.

**Classification** Gifts may be either *inter vivos* or *causa mortis*. An *inter vivos* gift is a gift made by a donor during her lifetime. A gift *causa mortis* is a gift made by a donor in contemplation of her imminent death. A gift *causa mortis* is a conditional gift, contingent upon (1) the donor's death as she anticipated, (2) the donor's not revoking the gift prior to her death, and (3) the donee's surviving the donor.

## BY WILL OR DESCENT

Title to personal property frequently is acquired by inheritance from a person who dies, either with or without a will. We will discuss this method of acquiring title in Chapter 51.

## BY ACCESSION

Many of the practical problems surrounding the right to title to personal property stem from its principal characteristic—movability. The phrase "title by accession" denotes one general solution to the movability problem. Accession, in its strict sense, means the right of the owner of property to any increase in it, whether natural or human-made. For example, the owner of a cow acquires title by accession to any calves born to that cow.

## BY CONFUSION

The basic problem of confusion is somewhat similar to problems involving title by accession. Confusion arises when identical goods belonging to different people become so commingled (mixed) that the owners cannot identify their own property. For example, Hereford cattle belonging to Benton become mixed with Hereford cattle belonging

to Armstrong, and neither can specifically identify his herd as a result; or grain owned by Courts is combined inseparably with similar grain owned by Reichel. Confusion may result from accident, mistake, willful act, or agreement of the parties. If the goods can be apportioned, each owner who can prove his proportion of the whole is entitled to receive his share. If, however, the confusion results from the willful and wrongful act of one of the parties, he will lose his entire interest if unable to prove his share. Frequently, problems arise not because the owners cannot prove their original interests but because there is not enough left to distribute a full share to each. In such cases, if the confusion was due to mistake, accident, or agreement, each owner will bear the loss in proportion to his share. If the confusion resulted from an intentional and unauthorized act, the wrongdoer will first bear any loss.

## BY POSSESSION

Sometimes a person may acquire title to movable personal property by taking possession of it. If the property has been intentionally abandoned (intentionally disposed of), a finder is entitled to the property. Moreover, under the general rule, a finder is entitled to lost (unintentionally left) property against everyone except the true owner. Suppose Zenner, the owner of an apartment complex, leases a kitchenette apartment to Terrell. One night, Waters, Terrell's mother-in-law, is invited to sleep in the convertible bed in the living room. In the course of preparing the bed, Waters finds an emerald ring caught on the springs under the mattress. She turns the ring over to the police, but diligent inquiry fails to ascertain the true owner. As the finder, Waters will be entitled to the ring.

A different rule applies when the lost property is in the ground. Here, the owner of the land has a claim superior to that of the finder. For example, Terrell's mother-in-law