Conflicting Conceptions of Ownership
In Taxation

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The ideas of property and ownership are very old. Notwithstanding
their great age—or more likely because of it—they are far from being
clearly defined.

A sharp dispute exists as to what constitutes property. According to
one view, property consists of such things as land and buildings which are
commonly thought of as being owned.¹ A contrary view denies that such
things are property but insists instead that property consists of the various
rights and powers or interests involved in ownership.²

This dispute has an important bearing on a more serious controversy
involving the classification of limited interests, such as the right of a tenant
to use land for a limited period of time, or the right of a person to use
stories, plays or inventions for limited purposes, for limited periods or in
limited areas. It is commonly considered that such interests are in the na-
ture of privileges or licenses granted by the owner of the property and that
they neither constitute property nor give rise to ownership.³ This view as
to the nature of limited interests is supported by the following concepts:
(1) Ownership is either synonymous with legal title or the two go hand in
hand; (2) Property and ownership exist only in the case of interests in
perpetuity; and (3) Property is an indivisible entity and anyone having
an interest less than complete ownership should not be considered as an
owner of property.

In contrast it is strongly urged that property rather than being an in-
divisible entity is instead an aggregate or bundle of rights and powers and
that anyone having any of such rights and powers should properly be con-
sidered an owner of property.⁴

A third view, proposed here, recognizes that the creation of limited
interests does not result in a division of property but suggests that there
is a division of ownership. Accordingly a tenant of land should be regarded
as a co-owner with the landlord and hence a co-owner of the property, even
though there is no division of the land and hence no division of property.

These differences of opinion as to the meaning and nature of property

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¹ See 1 Tiffany, Real Property § 1 (3d ed. 1939).
² See 1 Powell, Real Property § 7 (1949).
³ See Ladas, The International Protection of Literary and Artistic Property § 1 (1938); contra, Ball, Copyright and Literary Property 42 (1944).
⁴ See note 2 supra.
and ownership are not simply a matter of abstract theory of interest only to juristic philosophers. They have an extremely important bearing on such mundane and practical matters as the interpretation and application of most tax laws.

For sales tax purposes the legal title or indivisible theory of property and ownership is generally followed. As a consequence, leases of property are not generally considered as constituting sales and the receipts therefrom are not generally subjected to this kind of tax. Consistent therewith, the lessor of property is considered as remaining the owner and as using the property for the purpose of producing rental income. He is considered the consumer of the property and the sale to him is the taxable sale. Similarly, when a person buys property in one state for the purpose of leasing it and transporting it to a person in another state where a use tax law is in effect, the lessor is considered as using the property in the second state for the production of income and hence is subject to such state’s use tax even though he personally makes no physical use of the property in such state.

Under the aggregate or divisible theory, leases, at least those for a substantial period of time, would be considered sales and the receipts therefrom would be taxable as in the case of receipts from the complete transfer of all interests. For use tax purposes the lessee, rather than the lessor, would be considered as using the property leased.

5 There appears to be no general definition of the term “sale” for the purposes of federal retail and manufacturers excise taxes. INT. REV. CODE OF 1954, § 4217, provides that for the purposes of manufacturers excise taxes the lease of an article shall be considered a taxable sale. Such specific provision implies that in the absence of it a lease would not be considered a sale and thus implies that for federal retail sales tax purposes leases are not sales.

CAL. REV. & TAX CODE § 6006(a) defines “sale” for the purposes of the California sales tax, administered by the State Board of Equalization, as meaning and including “any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. Transfer of possession, ‘lease,’ or ‘rental’ includes only transactions found by the Board to be in lieu of a transfer of title, exchange, or barter.” The Board has distinguished between sales and leases and has indicated that the latter are to be treated as taxable sales only in rare situations, for instance, where property leased is substantially consumed during the period of the lease. 18 CAL. ADMIN. CODE § 2042. It is believed that this practice of not generally treating leases as taxable sales is fairly typical of most sales tax laws.

6 The phrase “incident to the ownership of property” contained in CAL. REV. & TAX CODE § 6009, defining use, compels this result under the legal title or indivisible theories of ownership. (Emphasis added.) See Ops. CAL. ATT’Y GEN. N.S. 4665 (1942).

7 It is believed that this result should be obtained under the California Use Tax Law notwithstanding that for the purposes of the sales tax, which the use tax supplements, leases are not normally considered taxable sales. See note 1 supra. CAL. REV. & TAX CODE § 6009 defines the word “use” as including “the exercise of any right or power over tangible personal property incident to the ownership of that property.” Under the legal title or indivisible theory of property and ownership the lessor is considered as remaining the owner, and the collection of rent is an incident of ownership. Under the aggregate or divisible theory of property and ownership, however, the lessor is considered as selling a part of his property or ownership, and the claim for rent becomes a separate item of property analogous in all respects to the claim for the purchase price in the case of a transfer of all the property or the entire ownership. Under this
For property tax purposes the aggregate or divisible theory of property has frequently been followed. There are a large number of cases holding that privately held leasehold or other possessory interests in land or buildings, the title to which is publicly held, constitute property subject to taxation notwithstanding constitutional prohibitions against the taxation of publicly owned property. A fairly recent California case squarely holds that in the valuation of such interests by the capitalization of net income method the rent or other consideration paid for such interests should be treated as the purchase price of property and hence, contrary to the decisions in previous cases, should not be deducted as an expense in computing the net income employed in the valuation process. As a result of this decision, which extends to limited interests the same principles commonly employed in the valuation of unlimited or entire interests, the valuations assigned to limited interests in property, the title to which is publicly held, will be sharply increased.

The cases involve a number of different types of limited interests which may be classified as follows:

(a) Ordinary leases pursuant to which the tenant has the right to the use or possession of the property to which title is publicly held for a period of time. Trimble v. Seattle, 231 U.S. 683 (1914); El Toro Development Co. v. County of Orange, 45 Cal.2d 586, 290 P.2d 569 (1955); Victor Valley Housing Corp. v. County of San Bernardino, 45 Cal.2d 580, 290 P.2d 565 (1955); Fairfield Gardens, Inc. v. County of Solano, 45 Cal. 2d 575, 290 P.2d 562 (1955); De Luz Homes, Inc. v. County of San Diego, 45 Cal.2d 546, 290 P.2d 544 (1955); Blinn Lumber Co. v. County of Los Angeles, 216 Cal. 468, 14 P.2d 512 (1932); San Pedro R.R. v. Los Angeles, 180 Cal. 18, 179 Pac. 393 (1919); reversing 167 Cal. 425, 139 Pac. 1071 (1914); Hammond Lumber Co. v. County of Los Angeles, 104 Cal. App. 235, 285 Pac. 896 (1930); Maricopa Co. v. Fox Riverside Theatre Corp., 57 Ariz. 407, 114 P.2d 245 (1941); Greene Line Terminal Co. v. Martin, 122 W. Va. 483, 10 S.E.2d 901 (1940); Ottertail Power Co. v. Degnan, 64 N.D. 413, 252 N.W. 619 (1934); Moeller v. Gormley, 44 Wash. 465, 87 Pac. 507 (1906).

(b) So called oil or mineral leases pursuant to which the holder may enter upon the property to explore for and remove oil and other minerals. Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140, 99 Pac. 483 (1909); California v. Moore, 12 Cal. 56 (1859).

(c) The rights of contractors to enter upon and use property the title to which is publicly held in the course of the performance of a government contract. United States v. County of Allegheny, 322 U.S. 174 (1944); Kaiser Co. v. Rciid, 30 Cal.2d 610, 184 P.2d 879 (1947); Douglas Aircraft Co. v. Byram, 57 Cal. App. 2d 311, 134 P.2d 15 (1943).

(d) The interest of a squatter who has settled upon government owned land, made improvements and has the right to possession of the land as against everyone except the owner. People v. Shearer, 30 Cal. 645 (1866).

8 De Luz Homes, Inc. v. County of San Diego, 45 Cal. 2d 546, 290 P.2d 544 (1955).


11 Under the rule formerly prevailing in California, permitting a deduction of rent in the computation of income in the application of the capitalization of net income method of valuing leases, a lease would have no value in any instance where the rental was a fair rental on
If the legal title or indivisible theory were followed, publicly owned property would be considered as remaining completely publicly owned, notwithstanding the execution of a lease to private parties; the entire property, and not simply the remainder interest, would be exempt from taxation.

Where privately owned property is leased to a public body, the aggregate or divisible theory of property and ownership would lead to the conclusion that the public body acquires an interest in the property and that such interest is exempt from taxation as publicly owned property. In practice, it is believed that assessors continue to assess the entire property to the owner of the remainder interest and thus inconsistently ignore the existence of the publicly owned lease as property. So far as is known, the correctness of this procedure has never been challenged.

In the application of estate, inheritance and gift taxes, life estates and other limited interests are commonly considered as taxable transfers and are valued by the use of mortality and annuity tables. This treatment of such interests is at least consistent with the view that they constitute property or an interest in property.

For income tax purposes the legal title or indivisible theory of property and ownership has for the most part been followed. Thus, in the case of a lease the landlord is regarded as remaining the owner with the result that rent is treated as ordinary income derived from the property rather than as the sales price of property or an interest in property. Under the aggregate or divisible theory a lease for a substantial period would be considered a sale. Hence, a portion of the tax basis of the entire property would be attributed to the "property rights" transferred by the lease and be deducted from the rest or sales price in computing net income. Furthermore, in many instances any net income remaining would be taxable as capital gain rather than as ordinary income.

Where a person transfers the title to real estate and simultaneously agrees to lease it back from the transferee for a number of years upon the payment of an agreed consideration, it is generally regarded that he has the valuation date. Such leases were considered as having a value only in instances where between the date of the lease and the valuation date, the value of the property had increased sufficiently so that presumably someone would be willing to become an assignee of the lease, assume the rental obligations and, in addition, pay a bonus to the assignor for the assignment. Under the theory of De Luz Homes, Inc. v. County of San Diego, note 9 supra, the amount of the rent, whether fair or not, and the existence or non-existence of a bonus value are immaterial. Unpaid rent is treated in the same manner as unpaid purchase price. Just as the complete owner of property is not permitted a deduction for the unpaid purchase price in valuing the property, so the lessor is not permitted a deduction in valuing the lease for the rental payments to be made over the remaining period of the lease.

See, e.g., U.S. Treas. Reg. 108, § 86.19 (1940), relating to the valuation of annuities, life estates, and interests for a term of years for federal gift tax purposes.

See Int. Rev. Code of 1954, § 61(a) (5). So far as is known, there are no cases or rulings so holding. The point seems to be more or less taken for granted.
sold the entire property and that the lease is in the nature of a privilege or license obtained from the new owner.\(^4\) As a result the consideration payable for the lease is deductible as an expense in the year of payment or accrual. Such transactions, commonly referred to as “sales and leasebacks,” are being used extensively for tax avoidance purposes. Although there are a number of varying applications of the device, it is frequently used to reduce taxes by reporting the gain from the sale of the entire property as a long-term capital gain taxable at a maximum rate of twenty-five per cent\(^15\) and later claiming deductions for the rental payments, thereby reducing ordinary income which would otherwise be taxable at much higher rates. Under the aggregate or divisible theory of property and ownership, it would be held that such a transaction results in a sale only of the remainder or future interest and that the property or interest in property represented by the lease was never transferred but was retained or reserved. It would further be held that the rental payments are such in form only and hence not deductible.\(^16\)

Where interests in land and buildings, stocks, bonds, and other such things commonly called “property” are divided between a present interest such as a life estate on the one hand, and a future or remainder interest on the other, either through the use of a trust or otherwise, it is commonly considered that the tax basis of the property follows the legal title or the remainder interest, or both, and that no part of such basis is attributable to the present or limited interest, presumably for the reason that such an interest is not property.\(^17\) As a result where a person acquires by gift or inheritance the right for life to the income from a trust, for example, he is taxable on the entire income without diminution by way of amortization or otherwise for any portion of the tax basis of the trust property.\(^18\) In contrast if

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\(^{14}\) For discussion of sales and lease-backs see Comment, Sale-Leasebacks and Sec. 112 (b)(1) of the Int. Rev. Code, 46 ILL. L. Rxv. 130 (1951); Note, Taxation of Sale and Lease-Back Transactions, 60 YALE L.J. 879 (1951).


\(^{16}\) In effect such payments would be nothing more than the periodic return of the part of the purchase price representing the retained interest.

\(^{17}\) Although divided interests of this character are common, and although the federal income tax has been in effect for over forty years, problems involving the apportionment of the basis of property between divided interests appear virtually to have escaped both judicial and administrative attention. However, in Commissioner v. Moore, 207 F.2d 265 (9th Cir. 1953), the concept of divisible interests was apparently recognized. The taxpayer inherited land and a building subject to a lease. The property was valued for estate tax purposes. The taxpayer successfully contended that a portion of the value of the entire property was attributable to the lease and since the lease would expire in time, the value so attributable to it should be amortized and deducted for income tax purposes over its remaining life.

\(^{18}\) According to the Treasury, the holder of a life estate has a basis for his interest in the event of a sale thereof. This ruling is inconsistent with the legal title or indivisible theories of ownership but is consistent with the aggregate or divisible theories. I.T. 3911, 1948–1 CUM. BULL. 66.
the trustee should sell the trust property, under prevailing practice he would be permitted as title owner to exclude the entire tax basis of the property in the computation of taxable income. It is believed that a similar result would be obtained under present practice in the event the owner of the remainder interest should sell his interest.19

Under the aggregate or divisible theory the income tax treatment of such divided interests would be radically different. One extremely significant change would consist in the recognition that income beneficiaries of trusts are the owners either of separate property or of interests in property. As a result a portion of the tax basis of the entire property out of which such interests are carved would be attributed to such interests. The portion so attributed would be deductible over the estimated life of the interests in much the same manner as a deduction is allowed for the cost or other tax basis of depreciable property.

For many years it appeared firmly established that authors and inventors who granted limited rights to use their stories or inventions, such as motion picture rights or the right to manufacture a patented article in a limited area for a limited period of time, were granting privileges or licenses to use their property and that the receipts were royalties taxable as ordinary income.20 This conclusion was reached solely on the grounds that property is an indivisible entity and that the granting of such limited interests could not, accordingly, result in a transfer or sale of property. In recent years, however, a number of cases have been decided the other way.21 These reject the indivisible theory of the nature of property and ownership and hold instead that a grant for consideration of any substantial right to use stories, plays and inventions constitutes a sale and should be so regarded for income tax purposes. The Treasury Department, which has stubbornly clung to the indivisible theory,22 has finally changed its position to a limited extent so far as literary properties are concerned.23 It now recognizes that with respect to such properties a complete transfer of all interests is not necessary to constitute a sale. It still somewhat arbitrarily insists, however, that to be a sale there must at least be a transfer of the world-wide rights

19 See ibid.

20 Rohmer v. Commissioner, 153 F.2d 61 (2d Cir. 1946), cert. denied, 328 U.S. 862 (1946); Sabatini v. Commissioner, 98 F.2d 753 (2d Cir. 1938). See also Wodehouse v. Commissioner, 8 T.C. 637 (1947), rev'd, 166 F.2d 986 (4th Cir. 1948), aff'd, 337 U.S. 369 (1949).

21 Wodehouse v. Commissioner, 166 F.2d 986 (4th Cir. 1948), aff'd, 337 U.S. 369 (1949); Goldsmith v. Commissioner, 143 F.2d 466 (2d Cir. 1944), cert. denied, 323 U.S. 774 (1944); Herwig v. United States, 105 F. Supp. 384 (Cl. Ct. 1952). See also Justice Frankfurter's dissenting opinion when the Wodehouse case was before the United States Supreme Court. 337 U.S. 369, 401 (1949). The majority opinion went off on other grounds and hence there is no implication that the case supports the indivisible theory of property and ownership.


for all time to one medium of communication.\textsuperscript{24} It is believed that the basic theories involved do not admit of any such limitation.\textsuperscript{25}

One important consequence of this change in juristic philosophy is that in many instances receipts from limited interests in stories, plays and inventions will be taxable as capital gains subject to a maximum rate of twenty-five per cent rather than as ordinary income subject to rates ranging up to as high as ninety-one per cent. In view of the great disparity in rates the matter assumes substantial financial importance, particularly when it is considered that transactions in such limited interests not uncommonly involve hundreds of thousands and sometimes even millions of dollars. In view of the amounts at stake it is reasonably certain that the treatment of such limited interests will receive considerable judicial attention in the ensuing years. For similar reasons it is probable that the classification of limited interests in other situations such as those mentioned previously will also undergo careful re-examination. Although such re-examination should result in many substantial changes in prevailing practices, the problems involved are too intricate to permit detailed discussion here. The remainder of the present discussion will be limited to a consideration of the differences in the views as to the meaning and nature of property and ownership.

\section*{The Meaning and Nature of Ownership and Property}

\subsection*{Ownership}

Ownership is a special status or relationship enjoyed by particular individuals with reference to particular things. It exists in the case of most people with reference to at least a few things. There is, however, no ownership on the part of anyone with reference to things which cannot be used or possessed, such as, for instance, distant stars. There is likewise no ownership with reference to things which may be used more or less freely by everyone, such as the ocean, the air above the ocean, and the air above the land—at least beyond a certain height which is not as yet clearly delineated.\textsuperscript{26} Thus there is involved in ownership not only the use or possession of things, but also the exclusive use or possession.

Under generally prevailing rules, owners are differentiated from non-owners in many respects, the most important of which is that an owner may use or possess the things to which his status relates without acting contrary to law.\textsuperscript{27} By prohibiting non-owners from using or possessing things

\begin{itemize}
  \item \textsuperscript{25} See text at note 42 \textit{infra}.
  \item \textsuperscript{26} See Prosser, \textit{Torts} 59 (2d ed. 1955).
  \item \textsuperscript{27} Other major differences exist, but are of substantially less importance:
    \begin{enumerate}
      \item The owner, unlike non-owners, may (subject to various qualifications and restrictions not here pertinent) use force to prevent other people from using or possessing the things to which the status relates.
    \end{enumerate}
\end{itemize}
to which the ownership of another relates, the law frees the owner from interference and hence he may use or possess such things himself more freely than would otherwise be the case. The owner is not required to exercise the freedom which the law accords him. Whether he does so or not is a matter of indifference so far as the law is concerned. Hence, the status of ownership may accurately be described as a privilege, fostered and protected by law, to use and possess particular things more or less exclusively.

**Property**

The various objects and things involved in ownership are often thought of as constituting property. The word “property” is commonly used interchangeably with the more specific terms employed to identify such objects and things. Thus, it is common for a person to say, “I own this property,” or “this land,” or “this farm.”

The propriety of this usage of the term “property” has frequently been questioned. In *Commissioner v. Moore* the court, discussing the meaning of the term “property” in relation to certain real estate, states emphatically that the property “is not the steel frame, brick and terra cotta loft and store building on the corner of Figueroa, Seventh and Flower Streets in the City of Los Angeles.” This challenging assertion is followed by the observation that the property “is the taxpayer’s interest in that property.”

(2) The owner may invoke the processes of the law to protect or preserve his special status by enjoining or evicting trespassers and by the use of other protective measures.

(3) The owner may, by sale or gift during his lifetime, or by will on his death, select or designate a successor to his status as owner. In the absence of any such designation, the law will designate a successor who usually will be a person closely related to the owner by marriage or blood.

The right to use or possess the things to which the status relates without acting contrary to law reflects the essential meaning and nature of ownership. The other differences, although important, are strictly incidental. Those relating to the use of force by the owner and the application of legal sanctions are procedural rather than substantive. Their function is to further or protect the first mentioned difference in status. It may be urged with considerable truth that without force or threat of force ownership would be greatly diminished and would become both fugitive and tenuous. The point is simply a commentary on the present level of development of human beings and should not lead to an identification of an objective with the methods of attaining it, of an end with the means. The differences relating to the transferability of, and succession to, ownership, although greatly enhancing its value, commercially and otherwise, are nevertheless not necessary elements of ownership. Ownership could still exist, and during its existence remain substantially the same, even though the rules of transferability and succession were changed so as to eliminate any differences between owners and non-owners in connection therewith.

28 A similar observation might be made with respect to all so called “rights” which upon analysis turn out to be nothing more than privileges. See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913), reprinted in Hohfeld, *Fundamental Legal Conceptions* (1923).

29 207 F.2d 265 (9th Cir. 1953).

30 Id. at 268.

31 Ibid.
After pointing out that the term "property" is often employed loosely and ambiguously, Hohfeld states:

Sometimes it [property] is employed to indicate the physical object to which various legal rights, privileges, etc., relate;—with far greater discrimination and accuracy—the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object.

In his concurring opinion in White-Smith Music Co. v. Apollo Co., Justice Holmes went a step further and suggested that in the case of copyrights there is no object or thing analogous to land or buildings which can serve as the object of ownership or possession and implied that the property must be the power which the copyright confers to restrain others from doing certain things:

The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is in vacuo, so to speak. It restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong.

The above quotation was referred to with approval by Justice Frankfurter in his dissenting opinion in Commissioner v. Wodehouse, in which he argued against the indivisible theory of property and ownership and urged that the grant by an author for a consideration of only the publishing rights to certain stories in a limited area should be regarded as constituting a sale for income tax purposes.

The simple ideas of property and ownership which originated in physical possession of objects and things have been greatly extended and have become exceedingly conceptualistic and complex. Not all the developments are consistent either with the original ideas or with one another. Nevertheless, there is no necessity of discarding the time-honored and widespread

82 Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 21 (1913), reprinted in Hohfeld, Fundamental Legal Conceptions (1923). (Emphasis added.) See also Eaton v. Boston C. & M.R.R., 51 N.H. 504, 511 (1872): "In a strict legal sense, land is not property, but the subject of property. The term property, although in common parlance frequently applied to a tract of land or a chattel, in its legal signification means, only the rights of the owner in relation to it. It denotes a right . . . over a determinate thing. Property is the right of any person to possess, use, and enjoy and dispose of a thing."

85 337 U.S. 369, 401 (1949) (dissent).
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usage of the term "property" which identifies it with objects and things which can be used or possessed more or less exclusively. Although it is sometimes convenient to refer to rights, powers and interests as property, and although this usage facilitates the obtaining of answers which it is believed are correct, there are compelling reasons which can be urged in support of the first usage and against the second.

If it were common to consider that property exists in situations where there is nothing present which can be used or possessed, then it would be necessary to revise our views as to the meaning and nature of property. Such instances are, however, certainly rare, and probably non-existent. In the great mass of cases where property is considered to exist, there is something involved which can be used more or less exclusively.

In the numerous instances where tangible objects and things are involved in ownership, there is obviously something which can be used or possessed and which may appropriately be considered as being owned and as constituting property. The difficulty in finding something which can be used or possessed arises in connection with so-called intangibles, such as copyrights, patents, notes, bonds and stocks.

In the case of copyrights there is no object which can be possessed or owned. A similar situation exists in the case of patents. Both copyrights and patents, however, do refer to something with which we associate such terms as "stories," "plays," "musical compositions," or "inventions." Although these things cannot be used in the same manner that land or other physical objects can be used, they can be used by being spoken, written, played, or reproduced in various forms. Furthermore, such use can be restricted and made exclusive in much the same manner as in the case of physical objects. Thus, the "right to exclude," although not directed to an object in possession, is directed to something which can be used and hence, does not exist "in vacuo, so to speak."

Ownership of "property" is considered to exist in connection with claims for money commonly evidenced by notes, bonds, or book entries. In an immediate sense there is nothing, not even an idea for a device, or an arrangement of words or notes, which the claimant can use or possess or prevent other individuals from using or possessing. But neither use nor possession are entirely absent, and neither exist wholly in a vacuum. They relate to something, the something being a sum of money which if the claim is satisfied, will some day be paid over to the claimant or to his account. Thus, although the claimant's ownership is anticipatory in nature, to speak of him as an owner of the money involves no greater extension in meaning than to include within the concept of ownership of "property" the present claim to future use or possession.

86 See text at note 34 supra.
It is common to attribute ownership of property to the corporate entity and to deny that stockholders own the things which corporations are considered to own. Nevertheless, we commonly say that the shareholders own something. Under the usage which identifies property with things which can be used or possessed, there is nothing which the shareholders can own except their stock certificates, which are not the property we have in mind; they are simply evidence of something else. The commonly accepted solution to this dilemma is to consider that the property which the stockholders own consists of various rights or interests with reference to or in the corporation, such as the right to vote, the right to receive dividends, and the right to participate in the corporation's assets on dissolution.37

The necessity of resorting to this highly abstract and, it is believed, inaccurate conception of property arises solely from the practice of attributing ownership to corporations. Although this practice is convenient for many purposes, it is nevertheless fictitious. It may be proper to consider that a corporation exists in a conceptualistic sense, but it is not an entity in the same sense that an individual is an entity. It has neither mind nor body. It cannot use or possess anything. A corporation may reflect the existence of special legal relationships among the stockholders and between them and other people, but it can have no relationships itself such as those involved in ownership.

It is not suggested that we abandon the practice of attributing ownership to corporations, but it is suggested that we clearly keep in mind what we are doing and the reasons why we are doing it and do not permit ourselves to become confused to the extent of believing it is necessary because of such attribution to revise the basic conceptions as to the nature of property and ownership.

The usage which identifies “property” with the things which can be used or possessed is conceptualistically simpler, more complete, and in many instances more convenient than the usage which identifies property with abstract rights, powers and interests.38 Under the first usage we can freely attribute the perceptual qualities of things to the property which we could not do strictly under the second usage. Rights, powers and interests, whatever they are, certainly do not have any perceptual qualities such as spatial re-

38 Where property is used to identify things which can be used or possessed, the entire meaning of ownership can be expressed by using the simple semantic structure consisting of subject, predicate, and object. The owner is the subject, the verb “to own,” or various synonyms, is the predicate, and the various things involved in ownership are the object. Under the other usage, the things which can be used, although obviously essential to ownership, lose their position in the sentence as the object of ownership and are left in an indeterminate and ambiguous position. This view recognizes that such things have something to do with ownership, but just what is not made clear.
relationships, size or shape, or any other identifiable appearance perceptible to our senses. The first usage is also more exact. It is claimed by Hohfeld\textsuperscript{39} that the first usage is loose and ambiguous and that the second usage is more discriminating and accurate. Actually, the reverse is true.

The meaning of "interests" is somewhat synonymous with the meaning of "rights" and "powers" and accordingly, the propriety of designating interests as property depends upon the propriety of so designating rights and powers. The use of the term "powers" in connection with ownership seems appropriate. As noted previously\textsuperscript{40} the owner may use force to defend his ownership. There is also force implied or actually present in the application or threatened application of legal sanctions. Force suggests power. There is also a suggestion of power in the ability of the owner to select or designate a transferee or successor. Such ability, coupled with the fact that ownership is commonly a highly coveted status, permits the owner to exercise considerable control over other individuals. He may, for example, demand and receive payment of substantial sums as a condition of agreeing to a transfer of his ownership.

All of these powers are, however, strictly incidental to ownership. It is at least theoretically possible to have a system of law, including property law, which is not dependent upon the use or threatened use of force. Even today not all people must be coerced into observing all laws. Not all people regard all laws as unreasonable restrictions on their conduct which they may reasonably disregard provided they can do so without dire consequences to themselves. It is also possible to change property laws so that the owner has no control over the transferability of and succession to ownership. If both such changes should some day come about, there would still be ownership, but there would be no powers in connection therewith. Hence, if powers are property, we would be in the anomalous condition of having ownership without property.

The word "right" is a word of many meanings. It is quite commonly used to express notions of propriety in human conduct and is used more or less indiscriminately as a synonym for words such as "reasonable," "just," "fitting" and "appropriate." Laws are rules for the regulation or guidance of human conduct. They are made by human beings and hence must reflect the lawmakers’ conceptions as to the propriety of conduct in given situations. They also reflect to a high degree the notions of propriety prevailing in the community at the time of their adoption. It is understandable, therefore, that we should to some considerable extent think of laws, both generally and in particular, as being reasonable or right. In the course of usage "is right" easily becomes "a right." This usage of "right" as a noun is not

\textsuperscript{39} See text at note 32 \textit{supra}.
\textsuperscript{40} See note 27 \textit{supra}.
confined to law. There is, however, nothing in the universe with which the word "right" can be associated as a noun. As a noun it has no meaning. Any meaning which is intended by the term can be more accurately expressed by using it as a word of qualification. If "right" is not a noun, it obviously cannot be the object of the verb "to own" and hence cannot be property.

As a final argument against the propriety of considering that rights and powers are property, it should be noted that they are not confined to the law of property and ownership. Expressions such as the right to the custody of a child, the right to vote, the right to a trial by jury, and the right to picket peacefully all describe legally recognized relationships between people which under our present system of law based upon force or the threat of force imply power to maintain such relationships by compelling other individuals to engage or to refrain from engaging in certain conduct. These rights and powers, although essentially similar to the rights and powers relating to ownership, are not thought of as being owned or as being property. In order for ownership and hence property to exist, rights and powers must refer to something which can be used or possessed. The two must coincide. It is the presence in a given legal relationship of things which can be used or possessed, not right or powers, which makes the difference between the existence and non-existence of property. It is therefore both appropriate and accurate to consider that such things, and not the rights and powers associated therewith, are the property.

It is not suggested that we abandon the practice of referring to rights, powers and interests as constituting property. Such a suggestion would doubtlessly be futile. Besides, it must be recognized that this usage is frequently convenient and often avoids awkward and cumbersome phraseology, particularly in situations where the ownership of property is divided. Although we should not permit our thinking as to the nature and meaning of property to be obscured, the sensible procedure is to adopt whichever usage of the term "property" is most convenient in the particular circumstances. Occasionally, both usages might occur simultaneously, resulting in a redundancy to the effect that the property is the interest in the property. Such redundancy, however, is not serious and scarcely outweighs the element of convenience except perhaps to a semantic purist.

CONCEPTUAL BASES OF PROPERTY AND OWNERSHIP

Identification with Legal Title

The word "title" has several meanings, one of which is synonymous with "name." Thus, the name of a book, for example, is commonly referred to as its title. Similarly, the word "title" is used to refer to the legal document that evidences ownership of property. The two meanings of "title" are related in that both involve the concept of identification. The identification of a book by its title is a way of referring to the book in a general sense, while the identification of property by its title is a way of referring to the property in a specific sense.

References are occasionally made to natural rights, fundamental rights and inalienable rights. Reference is sometimes made to the difference between "right" and "wrong" almost as if they existed in the universe somewhat like goal posts at opposite ends of a football field.

See text at note 29 supra.
to as the title of the book. Possibly this meaning was intended when the word was first employed in connection with ownership and property. A person who was named in a deed or other such document as the owner of property came to be referred as to the title owner.

In the course of the development and application of the law of property and ownership, individuals who were named as owners in documents probably found it easier to obtain legal recognition of their ownership than individuals who could not produce such documents. In this manner, possibly, "legal" became associated with "title" to give us the phrase "legal title."

Over the centuries the practice has developed of considering that legal title and ownership are virtually synonymous. It is common to consider that when a transfer of ownership occurs by sale or otherwise, there is a transfer of title. A tenant or other person having the right to the use or possession of something for a limited time or for limited purposes is not generally considered as being an owner. If a person who is renting property should be asked, "Do you own this place?", he is apt to deny ownership and say that he is simply renting or leasing it. If, on the other hand, he has a deed to the property in which he is named as the owner, or is purchasing the property pursuant to a contract which, if fulfilled, will entitle him to a deed, he is apt to answer such a question in the affirmative even though the property is heavily encumbered and even though it is leased to someone else who is actually in possession of it.

The identification of title with ownership may be attributable, in whole or in part, to erroneous reasoning based on the premise that if the person named as the holder of legal title is an owner, then, accordingly, an owner has legal title. If this is the explanation of the identification of ownership with legal title, the fact that a lessee or other holder of limited interests in property is not named as an owner and does not therefore have legal title, should not stand in the way of reaching the conclusion that such parties are owners. In the case of the great majority of things which are commonly acquired and owned such as clothing, household furniture, garden implements, and the like, the owners are not named as such in deeds, bills of sale, or other such documents. Thus, being named as an owner in such a document is not essential to ownership. Furthermore, it is pertinent to note that the terms of leases and other such interests are commonly covered by written contracts in which the transferee is mentioned by name in connection with the interests transferred. Hence, if legal title is a matter of being named as the owner in a document which is acceptable as evidence of ownership, then it follows that in such cases the transferee acquires legal title to the interests transferred.

43 For example, for California sales tax purposes, a sale is defined as constituting essentially a transfer of title. See note 5 supra.
There is another possible explanation of the identification of legal title with ownership. The process of legal recognition, selection, or designation of a person as an owner is suggestive of naming him as an owner. In view of the interchangeability of the words "name" and "title," it is possible that individuals who were legally recognized or "named" as owners came to be thought of as having legal title. If this is the explanation of the identification of legal title with ownership, such identification presents no obstacle to the recognition of tenants and other holders of limited interests as owners. All that needs to be done is to convince legislators and judges that limited interests partake of ownership. If the holders of limited interests were recognized by legislatures and courts as owners, they automatically would acquire legal title in the process of recognition.

**Identification with an Interest in Perpetuity**

Among the more conceptual and incongruous developments in the law of property is the notion that ownership is perpetual and that only the person who has an interest in perpetuity may properly be considered an owner.

The notion is a fantasy. The future of the world and its inhabitants, which are obviously essential to ownership, although uncertain is doubtlessly limited. Individual death is itself a serious limitation. The identity of individual objects of ownership is constantly being lost or altered through the processes of disintegration. Even portions of the earth's surface which are thought of as individual parcels, lots or tracts of land, may vanish as the result of natural phenomena. Ownership may also be lost involuntarily through legal processes. Property may be taken for public use through the power of eminent domain. It may be sold or appropriated to satisfy the claims of creditors. The tax collector must be reckoned with or one's ownership may be jeopardized.

Where one individual has the immediate or present exclusive right to the use or possession of something, and another individual has a similar right to such use or possession to commence at some time in the future upon the termination of the first person's right, we have a choice of three alternatives with respect to the conception of ownership: (1) neither is an owner; (2) one rather than the other is the owner; (3) both are owners. The first possibility we can reject somewhat summarily. Certainly between the two individuals there is ownership of something by any definition of ownership one might devise. Consequently, we are limited in our choice to say that either one but not the other is the owner, or that the ownership is divided between them. With respect to the right to use or possess, which is the essential element in ownership, both individuals are equal except for the difference in time when the respective rights commence. It would seem proper,
therefore, to consider that both are owners and that ownership is divided between them on a time basis.

In a temporal division, as in the case of other forms of joint ownership, each person may be said to have an interest in the property, the use of such term implying that the ownership of each is not as complete as it would be if he were the sole owner. As between the two interests the interest which consists of the immediate right to use and possess suggests ownership in a more apparent, obvious, and definite sense than the future interest which suggests ownership only in an anticipatory sense, consisting, as it does, simply of the presently recognized right to use or possess at some definite or indefinite date in the future, a right which, due to death or other exigencies, may never be exercised.

In many instances, of course, the present interest may consist of the right to use or possess for relatively short periods of time. The future interest may consist of the right to use or possess for vastly longer periods of time, so much longer that in comparison the present interest may seem relatively insignificant. The commonly accepted notion that the holder of the future interest is the owner of the property and that the holder of the present interest is simply a licensee may be attributable to the recognition of this insignificance.

Present interests are not, however, always limited to short periods of time. They not uncommonly continue for the lifetime of the holder. Leases for periods of ten, twenty, thirty or even a larger number of years, up to as many as ninety-nine years, are not uncommon. Such periods of time, whatever they may be in relation to the life of the earth, or particular identifiable portions of it, are not insignificant in the affairs of men.

Divisibility or Indivisibility

One of the more common arguments against the classification of limited interests as property or as interests in property is that property is an indivisible entity. Accordingly, property and ownership must either exist completely or not at all. Any interests less than complete ownership in the entire property, whether regarded as licenses, privileges, or otherwise cannot be considered property and their creation does not give rise to ownership.

Where physical objects or things are involved in ownership, they obviously can be divided. A parcel of land may be divided into any number of smaller parcels. This type of division, however, is amoeba-like in character. In the process of division the former entity disappears and two or more new entities emerge. To emphasize this type of division misses the point and simply serves to accentuate the difficulty in this highly abstract field of finding words which will accurately express the meaning intended.

In the case of a lease of land or other physical object, the object remains
intact and undivided. Hence, if the object is the property, there is no division of the property. Similarly, where an author grants the right to use a story or play for limited purposes, such as motion picture purposes, there is no division of the story or play as a literary or artistic entity. If the story or play is the property, there is again no division of property.

According to the usage which identifies property with rights, powers and interests, there would, of course, be a division of property in these and other similar cases. Such usage, although convenient, is, as previously noted, loose and inexact. Property consists of things which may be used or possessed. Hence, we must conclude that the creation of limited interests does not result in a division of property.

It does not follow, however, that there is no division of ownership. Ownership is a status protected by law, the distinguishing characteristic of which is the privilege of using things more or less freely to the exclusion of other people. It would seem, therefore, that wherever this status exists in whole or in part there is either whole or partial ownership of such things.

During the period of a lease the lessee may use the property leased more or less as he sees fit to the exclusion of other individuals. This privilege is recognized and protected by law. Accordingly, the status of ownership exists with respect to the lessee. Since his use is limited to the period of the lease, he is not the entire owner of the entire property for all time. His relationship to the property can be accurately described by considering him a partial owner or as a co-owner, the other co-owner being the party who may use the property when the lease terminates.

Where an author grants rights to use a story or play for limited purposes, his privilege of using the property after the grant obviously is not as complete as it was before. The conclusion seems inescapable that he has transferred a portion of his ownership and that the status of ownership has become shared or divided between himself and the grantee. Whether the grant consists of the world-wide rights to use the property for all time for one medium of communication or whether it is more limited in content is immaterial. Either grant is a limited interest. If the first results in a division of ownership, as the cases recognize, the second likewise results in such a division.

Singularity in ownership is often achieved through the attribution of ownership to an entity such as a corporation, partnership, estate, trust, or state or political subdivision thereof. If such attribution of ownership is recognized as being fictitious, which it is, then in all such cases there is a form of divided or joint ownership.

In several situations, such as tenancies-in-common and joint tenancies,
it is common to consider that ownership is shared or divided. Even here it is possible to obtain fictitious singularity in ownership by spinning a theory to the effect that the tenancy is an entity separate and apart from the tenants and that any property involved is owned by the tenancy. Such a theory, however, is fanciful to the point of being mystical and esoteric. If joint or divided ownership can exist in these cases, there should be no objection to the recognition of divided ownership in other instances where the interests, rights, powers or privileges are divided in other ways.

In opposition to the divisibility of ownership theory which is expressed here, it may be urged that logically carried out such a theory would lead to the conclusion that a person who rents a car or a hotel room for a day, or even engages a taxicab for a few minutes, should be considered a co-owner of the property involved in such transactions. A similar *reductio ad absurdum* argument can equally well be directed against the legal title or indivisible theory of property and ownership. An author, for instance, grants the publishing rights to one party, the motion picture rights to another, and so on, until he has disposed of all conceivable rights to use his story or play in any manner whatsoever, retaining only the legal title. Under either the legal title or indivisible theory of property and ownership it would logically follow that he has not parted with any of his property or ownership and hence remains the complete and absolute owner of all the property involved for all time, notwithstanding that he can no longer make any use of his story or play for any purposes whatsoever.

No coherent or comprehensive theory of property and ownership can be applied with inexorable logic and produce sensible answers in all cases. Other considerations must be taken into account. In the assessment of property, assessors commonly ignore items of relatively small value such as ordinary wearing apparel, garden implements, and the like. Although the stockholders of a corporation are the owners of any property involved in a transaction, the inconvenience of recognizing them as owners has led to the practice of disregarding their ownership and attributing the ownership of the property to the corporation.

A similar procedure is required here. It would doubtless be inconvenient, as well as incongruous, to consider the guests of a hotel as part owners. This circumstance, however, affords no reason for rejecting the view which leads to the conclusion that a tenant under a 99-year lease has an interest in the property identical to ownership. A practical solution to the problem is to recognize that ownership may be divided, but to limit such recognition to instances in which the divided interests are substantial in nature. Thus, the privilege of using property for short periods of time or for extremely limited purposes should be disregarded.\(^46\)

\(^{46}\) In this connection it is pertinent to note that presence within or absence from a jurisdiction for other than temporary or transitory purposes is commonly the standard employed
CONCLUSION

Notwithstanding the intricate conceptualism which has developed, ownership is essentially a fairly simple affair. It reflects the basic idea that it is right or reasonable for particular individuals to use various portions of the earth’s surface and other things more or less as they see fit without interference from other individuals. The development of law has provided general rules for determining, in the social continuum of constantly changing individuals and things, which individuals shall be privileged to use which things. It has also developed additional and more effective methods of protecting the privilege than the individual use of tooth and claw. Individuals who are thus differentiated from other individuals with respect to the use of particular things enjoy a special status or relationship which we call ownership. Such individuals are the owners, and the things which they may use are owned and are hence property. It frequently happens that the privilege of using a particular item of property more or less freely is shared or divided in various ways between two or more individuals. In such cases, ownership of the property is likewise shared or divided. Each of the individuals may be said to be a partial owner, or a co-owner with the other individuals, of the property.

Where a person who is the sole owner of property arranges for the substitution of another individual in his stead as the sole owner, we commonly speak of the transaction as a transfer of property or, more accurately, as a transfer of ownership. Where the transfer is made for a consideration, the transaction is called a sale or a purchase, and the consideration is called the sales price or the purchase price. Similar terminology may appropriately be used to describe transactions involving the transfer of partial ownership, commonly called interests or limited interests. Consistency requires that whatever tax treatment is accorded to cases or transactions involving complete ownership should likewise be accorded to cases or transactions involving partial ownership or limited interests. Such consistent treatment is being accorded to limited interests in the application of property, estate, gift and inheritance taxes. It is beginning to be extended to limited interests in the application of income taxes, particularly in connection with transactions involving transfers of limited interests in literary properties and inventions which are protected by copyright and patent laws, respectively.

For most income tax purposes as well as for sales and use tax purposes, however, the conceptions which identify property and ownership with legal

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for differentiating between residence and non-residence for income tax purposes. See Altman & Keelsing, ALLOCATION OF INCOME IN STATE TAXATION c.3 (1950); Keelsing, The Problem of Residence in State Taxation of Income, 29 Calif. L. Rev. 706 (1941). In the application of this standard, short periods of time such as a few weeks, a few months, and occasionally even longer periods of time are commonly ignored. This practice seems particularly relevant in the determination of the substantiality of interests where they are divided temporally.
title and interests in perpetuity, and which lead to the conclusion that property and ownership are essentially indivisible, are still being applied. Future developments in the tax field should lead to the complete rejection of these conceptions which do not reflect the essential meaning of ownership and should substitute in their place the views which recognize that ownership may be shared or divided between two or more people in various ways.
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