

Table of Contents

WEEK 1: CONCEPTS OF PROPERTY LAW	4
PROPERTY RIGHTS	5
EQUITY	6
CLASSIFICATIONS OF PROPERTY	7
PROFIT-À-PRENDRE	7
WEEK 1 LECTURE / WORKSHOP	8
WEEK 2: POSSESSION, TITLE, AND PERSONAL PROPERTY	9
ENFORCEABILITY OF POSSESSORY TITLE	9
POSSESSORY TITLE [BODY]: <i>DOODEWARD V SPENCE</i> (1908) 6 CLR 406	10
FINDERS KEEPERS RULE	11
FINDERS V PROPRIETORS OF PROPERTY	12
BAILMENT	13
GRATUITOUS BAILMENT	13
Deposit	13
Mandate	13
Gratuitous Loan For Use	13
CUSTODY FOR REWARD (HIRE OF CUSTODY)	14
Hire of Work and Labour	14
Pledge	14
Hire of Chattels For Reward	15
Onus of Proof	15
Enforcement	15
POSSESSION OF GOODS: THE <i>JUS TERTII</i> DEFENCE	16
THE PERSONAL PROPERTY SECURITIES ACT 2009 (CTH)	17
ELEMENTS OF AN EFFECTIVE PPSA SECURITY INTEREST	17
PRIORITY OF SECURITY INTERESTS [ss 55–61]	17
PMSI	17
RULES WRT PRIORITY	17
REMEDIES	18
Commingle Goods & Component Parts	18
POSSESSION AND SEISIN	18
REMEDIES FOR REAL AND PERSONAL PROPERTY	18
History of Seisin	18
NON-CONSENSUAL POSSESSION	19
DEFINITIONS	19
WEEK 4: FIXTURES, ENCROACHMENT, AND BOUNDARIES	20
THE DOCTRINE OF FIXTURES	20
INTENTION OF PROPERTY CLASS	20
<i>Holland v Hodgson</i> (1872) LR 7 CP 328	20
TESTS FOR INTENTION & ANNEXATION	21
<i>Loiero (aka Lero) v Adel Sportswear Pty Ltd</i> [2010] NSWSC 1133	21
OBJECT OF ANNEXATION	22
Nature of the Annexation {Tapestries}	22
TENANT'S RIGHTS TO REMOVE	22
FIXTURES AND THIRD PARTIES	23

BOUNDARIES: LAND ABUTTING WATER	23
Tidal Water Boundaries	23
Non-Tidal Water Boundaries	23
AVULSION & ACCRETION	24
TITLE ERRORS	24
ENCROACHMENT	24
WEEK 4 LECTURE / WORKSHOP	25
Elitestone Ltd v Morris [1997] 1 WLR 687	25
WEEK 5: ADVERSE POSSESSION	26
TITLE HIERARCHY	26
ADVERSE POSSESSION: ELEMENTS	26
ADVERSE POSSESSION: DIFFERENT TESTS	27
NATURE OF ADVERSE POSSESSION	28
FACTUAL POSSESSION	28
Intention to Possess (Animus Possidendi)	28
WEEK 6: DOCTRINE OF TENURE & ESTATES	29
BATTLE OF HASTINGS 1066	29
DOCTRINE OF TENURE IN AUSTRALIA	31
RADICAL TITLE	31
SUMMARY OF TENURE	31
DOCTRINE OF ESTATES	32
TWO TYPES OF ESTATES (CLASSIFIED BY DURATION)	32
Freehold estate	32
Leasehold (non-freehold estate)	32
FORMALITIES FOR CREATING ESTATES	33
SUMMARY OF ESTATES	33
WEEK 7: NATIVE TITLE	34
THREE WAYS BRITAIN COULD POSSESS A COUNTRY	34
HISTORY	34
MABO 1988—1992	37
WEEK 9: CO-OWNERSHIP	39
TENANCY-IN-COMMON	39
INTENTION: TENANCY-IN-COMMON	39
POSSESSION: TENANCY-IN-COMMON	39
SEVERANCE: TENANCY-IN-COMMON	39
JOINT TENANCY	40
SURVIVORSHIP	40
RULES OF JOINT TENANCY	41
THE FOUR UNITIES	41
THE FORFEITURE RULE	42
CO-OWNERSHIP: PRESUMPTION	42
RIGHT TO POSSESSION	43
REPAIRS AND IMPROVEMENTS	43
COMMON LAW V EQUITY	45
OCCUPATION FEE / RENT	45
OUSTER	45

ACCOUNT FOR RENTS AND PROFITS	46
SEVERANCE OF JOINT TENANCY	47
SEVERANCE BY ALIENATION TO SELF	47
SEVERANCE BY GRANT OF MORTGAGE	47
SEVERANCE BY GRANT OF LEASE	48
SEVERANCE BY AGREEMENT	48
SEVERANCE BY CONDUCT	49
SEVERANCE BY OPERATION OF LAW	50
SEVERANCE BY MERGER	50
SEVERANCE BY HOMICIDE	50
Under the Forfeiture Rule (Supra)	50
Severance by Partition	51
EFFECTS OF SEVERANCE	51

WEEK 1: CONCEPTS OF PROPERTY LAW

Property is a legal relationship between persons and resources; it refers to power permissibly exercised over a thing. Such relationship confers rights to the owner and/or possessor. The fundamental right of property is the right to exclude others from using it. This right to exclude gives the property relationship an *in rem* status, which means ‘proprietary rights’ (opposed to *in personam*, which means ‘personal rights’), meaning that the rights conferred are enforceable against the world at large, rather than just against the parties privy to the relationship. This right is a *sine qua non* (necessary; a condition thereof). ‘Proprietary title’ means that one has a right to the property, or title thereto.

Property is a legally endorsed concentration of power over things and resources — Professor Gray (Textbook p 14). The difference between a property right and a contractual right is that a property right is enforceable *in rem*, whereas a contractual right is only enforceable *in personam*. Whilst enforcement of a contractual right is *in personam*, ownership of a contractual right is *in rem*. Due to the fact that enforcement of a contractual right is *in personam*, a range of personal remedies are available.

The right to property is the right to determine the use or disposition of an alienable thing in so far as that can be achieved or aided by others excluding themselves from it, and includes the right to abandon it, to share it, to licence it to others (either exclusively or not), and to give it to others in its entirety – ‘The “Bundle of Rights” Picture of Property’ (1996) by Penner

The right to occupy land [*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)]; and the right to pass land onto one’s heirs [*Hodel v. Irving*, 481 U.S. 704 (1987)], fall within the scope of property interests, compensable if taken. The right to modify a building that one owns and the right to prevent physical invasion are not compensable

Implied Licence and Contractual Interest

In *Heller v Niagara Racing Association*, Hodgins JA: “It appears to be settled law in England that a licence granted by the sale of a ticket includes a contract not to revoke the licence arbitrarily, which contract entitles the purchaser to stay and witness the whole performance, provided he behaves properly and complies with the rules of the management, and that this licence and agreement, if given for value, is an enforceable right” – cited from *Hurst v Picture Theatres Ltd* [1914-15] All ER Rep 836

Injunctions of Forbearance in Contract Law

In *Lumley v Wagner* (1852) 42 ER 687, Lord St Leonards: “With respect to the negative covenants, if the tenant, for example, has stipulated not to cut lop timber, or any other given act of forbearance, the court does not ask how many of the affirmative covenants on either side remain to be performed under the lease, but acts at once by giving effect to the negative covenant, specifically executing it by prohibiting the commission of acts which have been stipulated not to be done”.

Lease & Licence Dichotomy

The distinction between a lease and a licence represents the classic dichotomy between property and non-property; or, where the licence is coupled with a contract, between property and contract. A lease is an estate in land whereas a licence, “properly passeth no thing nor alters or transfers property in any *thing*, but only makes an action lawful, without which it would have been unlawful” — *Thomas v Sorrell* (1693) Vaugh 330 at 351 per Vaughan CJ

In *King v David Allen & Sons Billposting Ltd* (1916) 2 AC 54, the rules discussed regarding proprietary interests are that, a licence does not confer a proprietary right, as it is not merit sufficient control over land. Only proprietary rights are enforceable against third parties; contractual rights are only enforceable against parties privy to the contract.

In *Georgeski v Owners Corporation Strata Plan 49833* (2004) NSWLR 534, the rules discussed regarding who can be sued are, a licensee (as opposed to a lessee) does not have a right of possession. Where the licence also has a ‘grant of interest’, then the licensee may, because of the interest, sue ‘in trespass for direct interference with the subject matter of the grant’. However, the remedy is based on that interest, not the contractual right. I.e. a license only grants a right *in personam*, which means a licensee can only sue the person who gave him that right if his right is breached. He cannot sue the rest of the world for trespassing.

PROPERTY RIGHTS

The right to use or enjoy

A proprietor will generally have a “**fee simple**” or “**fee simple absolute**”, which is a permanent and absolute tenure in land with freedom to dispose of it at will. It is the highest possible ownership interest that can be held in real property.

The proprietor can grant to another, an “**easement**”, which is an intangible interest in land that confers upon the holder a right that is enforceable over one piece of land (the ‘burdened land’ or ‘*servient tenement*’) for the benefit of another piece of land (the ‘benefitted land’ or ‘*dominant tenement*’). Despite its incorporeal nature, the easement is a form of real property and is enforceable *in rem*. “An easement may be defined to be a privilege without profit, which the owner of one neighbouring tenement has on another, existing in respect of their several tenements, by which the servient owner is obliged to suffer or not to do something on his own land, for the advantage of the dominant owner” – *Gale on Easements* 1986 at [3]

A proprietor may make a “negative covenant” with another proprietor, which is a contract between two bits of land (as opposed to people). The owner of Block A will contract with owner of Block B not to do something with his or her land; even if the land is sold later on, the new owners are still bound by the covenant and cannot build on B until the covenant expires.

The right to exclude others

This is the right to prohibit others from using something, and is protected by the property torts (trespass to land, trespass to goods, detinue, and conversion). However, this right can be restricted by agreements such as negative covenants or easements.

The right to alienate

This is the right to pass rights onto another. In a fee simple, which is absolute interest in land, the rights can be sold completely. In a lease, the lessee can only alienate the rights that he has, meaning that he can still sublet (unless expressly prohibited by the lessor). The CC s 51(xxxi), the Cth can take property on just terms, provided that due compensation is paid.

EQUITY

Equity was created to correct deficiencies caused by the rigidity of the common law. By the power of the royal prerogative, it recognised things the common law didn't and allowed remedies, which were not offered by the common law. Based on conscience, beginning in the Court of Chancery in England, equity evolved into a comprehensive system of law, making use of precedents.

Eventually, the existence of two parallel and diverse systems (common law and equity) caused problems. Today the courts of common law and equity have 'fused', in that they are tried by the same courts and the same judges, in the same room; although, the 'bodies of law' have not fused. Common law issues remain common law issues, and equity remains equity.

There are 3 equitable jurisdictions:

- Exclusive (exclusive to equity): Trusts and fiduciary obligations
- Concurrent (both equity and common law): Estoppel, misrepresentation, overborne will (duress at common law; undue influence in equity).
- Auxiliary (equity aids operation of common law): Jurisdiction in aid of common law where common law remedies are inadequate.

Maxims of Equity

- Equity will not suffer a wrong without a remedy.
- Equity follows the law.
- He who seeks equity must do equity.
- He who comes to equity must do so with clean hands.
- Equity assists the diligent and not the tardy.
- Equity looks at intention rather than form.
- Equity regards as done that which ought to be done: e.g. gifts.
- Equity will not assist a volunteer (i.e. a person who has not paid something).

CLASSIFICATIONS OF PROPERTY

Real Property is divided into two categories–

'corporeal hereditaments' and *'incorporeal hereditaments'*. The former is the permanent, tangible real property; the latter is an intangible right that is derived therefrom.

Personal property is divided into two categories–

Chattels real: A hybrid between personal and real property. E.g., leaseholds (right in property, but not complete ownership).

Chattels personal: All other chattels

These can also be divided into–

Choses in Possession, which are tangible physical objects.

Choses in Action, which are intangible things, such as patents, copyrights, deeds etc. Choses in action are really a 'right to sue' (on the basis of copyright etc.)

Remedies

Remedies for real and personal property differ; for real property, a person can bring a claim for specific performance; however, a claim for damages can be made for an action in personal property. For a personal property claim, there need not be a written contract, whereas for real property, there must be a written contract.

Escheat: A common law doctrine that transfers the property of a person who dies without heirs to the crown or state. It serves to ensure that property is not left in 'limbo' without recognised ownership.

PROFIT-À-PRENDRE

This gives the holder the right to take natural resources such as petroleum, minerals, timber, and wild game from the land of another. Because of the necessity of allowing access to the land to gather resources, every profit contains an implied easement for the owner of the profit to enter the other party's land for the purpose of collecting the resources permitted by the profit. A profit may be made exclusively so that only the owner of the profit is permitted and no one else.

There are two types of profits, **"appurtenant"** and **"in gross"**. The former may *only* be used by the owner of the *adjacent* property. A properly recorded profit will remain even if the ownership of the land, upon which the profit exists changes hands. The latter can be assigned or otherwise transferred by its owner. Courts will construe a profit as being in gross unless the profit is expressly designated as being appurtenant.

A profit can be terminated in four ways: **'merger'** if the owner of the profit acquires the land, to which it applies; **'release'** if the owner of the profit executes a contract to surrender the profit to the servient landowner; **'abandonment'** if the owner thereof does not exercise the right for a sufficient length of time; or **'misuse'** by placing a burden on the servient estate.