

### The Concept of Property

- A property right is a right to a thing which can be enforced general against other members of society not just against specific persons. (Chambers)
- Property = bundle of rights, multiple parties can have a proprietary interest in one thing
  - i.e. person who has 'title' to the land "owns" the land but they can be subject to the proprietary rights of a tenant who has possession
- Proprietary rights are a construct of rights, held by the rightholder with corresponding duties upon others not to interfere with that right.
  - **Enforceable**
  - **Excludable**
  - **Alienable**
  - **Assignable**
  - \* also normally have market **value**
- Australian real property law cannot be properly understood until it is recognized that its fundamental concepts are different from those of the English feudal system.
- The Crown is the ultimate owner of all land and the Crown grants estates in the land to natural and corporate persons.

**Torrens System** changed the nature of interests in land.

- **The TS is one where title to land is derived from registration *it is a system of title by registration and not one of registration of title*** (Barwick CJ in *Breskvar v Wall*)
- The system attempts to designate the one person/persons who together hold all interests in the land; it thus fundamentally departs from the concept of relativity of title where by courts determine which of the parties has the better title.
- The only recognized interest that can exist in relation to TS land are those recognized by the system.
- TS was introduced to simplify the land transfer process and make land titles more certain
- According to Sackville and Neave '*Sir Robert Torrens set out to establish a system of registration of title 'that would be reliable, simple, cheap, speedy and suited to the social needs to the community'*
- Land alienated or granted by the Crown after the date of commencement was automatically under the TS (*Real Property Act 1862 (Vic) (2 October 1862)*); which has continued in the TLA 1958 (Vic) s 8(1).

### Doctrine of Tenure

- The doctrine of tenure has its origins in the UK feudal system whereby, all land was 'held of the Crown'.
- From 1880 until Mabo thought that the Crown held all land beneficially
- The Crown acquired radical title as a concomitant as sovereignty (Brennan J *Mabo No 2*)
  - This confers particular powers on the Crown such as the powers to grant interests in land.
- Land in Australia is not capable of being owned absolutely by an individual (i.e. allodial title not possible)
- Origins in the UK feudal system whereby, all land was 'held of the Crown'.
- Until *Mabo No 2* Crown was the paramount Lord and all Australian citizens were tenants
  - Crown had absolute title
  - Rights existed as a grant of the Crown
- Land in Australia is not capable of being owned absolutely (allodial title not possible)

### Modes of Sovereignty:

- Settlement – uninhabited land
- Conquest – valid grant for acquisition of Sovereignty (absolute title)
- Cession – Agreement (like a treaty)

### Feudal System:

- Passed down to Tenants-In-Chief
- Subinfeudation – less formal arrangements of tenancy in exchange for services

## Possession

### Historical Development:

- In the early common law, the law protected possession (seisin) of land against the world.
  - If the rightful owner were dispossessed, you only had a short period of time (roughly four days) to assert possession before the person taking the land acquired seisin of the land, and you lost it.
  - The only remedies were slow and cumbersome.
- Eventually, however, there grew a distinction between mere possession and seisin.
  - To be 'seised' of land, a person needed to be (1) in possession (2) as the holder of a freehold estate in the land.
  - This title arising from possession is presumed to be lawful (the best right to possession) unless the contrary is proved.
- In the fifteenth century the common law developed ejectment; permitted leaseholder to recover possession.

### Modern Day:

- Form of a PR (although not as strong as ownership)
  - Weak: can be displaced by relativity of title
- \*\* Remember: PR follow the 'thing'
  - Therefore, someone with possession still has a PR against the world at large and is enforceable against anyone, except if they have a better title (i.e. the true owner)
  - Systems of possession maintains order and fairness

Test: objective test of a reasonable person (*Perry* for unknown rightful owner; *Armory*; *Asher* for prior possessor)

**1. Factual Possession; AND**

→ *physical control that is sufficient to exclude strangers/interferers/wrongdoers*

**2. Intention to Possess → to use land for own enjoyment at exclusion of world**

→ *factual, conduct, signs*

→ *temporary intention is sufficient*

A proprietary interest is good against the entire world, except someone with a better interest *Armory v Dlamirrie*

### Defence? Jus Tertii

- 3<sup>rd</sup> Party Rights → Argument made by a 3<sup>rd</sup> P (as opposed to the legal title holder) which attempts to justify entitlement to possessory rights based on the showing of legal title in another person.
  - *A alleges that B should not have rights to the land, because C has superior rights (an argument made by a third party to justify entitlement to possessory rights based on the showing of legal title in another person).*
  - By showing legitimate title in another person, jus tertii arguments imply that the present possessor's interest is illegitimate or that the present possessor is a thief.
- At CL not generally available (*Jeffries*)
- **When you cannot raise a jus tertii argument (*Perry v Clissold*):**
  - *B (current possessor) cannot claim that A (prior possessor) has no claim to title, simply because C is a prior possessor to A or rightful owner (that is, has a superior property right).*
- **When you can raise a just tertii argument (*Oxford Meat Co*)**
  - *When B (current possessor) can show that A was never in possession of the land and therefore not a prior possessor (has no right to possession), because C was the land's possessor and A was, e.g., merely a licensee.*

### *Asher v Whitlock (1865) LR 1 QB 1*

Facts: Thomas 'enclosing' land belonging to Lord of Manor. Died and left land to wife Lucy as long as she remained a widow or, when she died/remarried, to his daughter Mary-Anne. Lucy marries Whitlock. Subsequently, both Lucy and Mary-Anne die; leaving Whitlock (the new husband) in possession. Asher, Mary-Anne's heir, then seeks to eject Whitlock.

Issue: W has actual possession. A is claiming a better right of prior possession devised from T > MA > A.

Held: A's right (devised possessory interest) is superior to W's current possession

Cockburn CJ with Mellor J agreeing and Lush J concurring.

## Extinguishing Title

2 ways to lose proprietary title

### (1) **Abandonment**

- a. Rare (*plaintiffs who abandon goods are unlikely to commence litigation*)
- b. **Intentionally left AND no expectation to reclaim (clear and unequivocal intention to renounce ownership *Sackville & Neaves*)**

(2) **Prescription** (when no longer able to enforce PR against world OR unable to bring action for interference)

- a. CL
- b. Statutory:
  - i. *Limitations of Actions Act 1958 (Vic)* ss 5(1) – 6(1)
    1. Conversion/Detinue → 6 years to bring action
    2. Title extinguishes after 6 yrs s6(2)

## Fixtures

Real:

- Land + everything on the land that cannot be removed without being destroyed
- Remedy: specific recovery + damages

Personal:

- Goods → everything that can be moved without being destroyed
- Remedy: recovery of *value* of the thing

Fixtures = part of land    Chattels = moveable

→ once a chattel is attached to the land, it becomes a fixture → becomes real property

*PLA sale of land includes all fixture unless excluded by contract ss 62(1), (3).*

### Degree of Annexation Test:

- Looks to the manner in which the chattel is attached to the land
- 2 Presumptions → ONUS
  - If a chattel is attached to the land other than by its own weight (i.e. screws/bolts) prima facie it is a fixture (*May v Ceedive*)
    - Even if degree of attachment is slight (*Holland v Hodgson*)
    - The greater the attachment, the stronger the presumption
  - If a chattel is only attached by its own weight, prima facie the chattel is not a fixture EVEN if it has become embedded in soil

Test:

#### 1. Degree of attachment?

- a. Attached?
  - i. Yes → Fixture
  - ii. No → Chattel

#### 2. Purpose for which it was attached?

- a. Objectively established at time of attachment (*May v Ceedive*)
  - i. If proven to be fixed for a temporary purpose then not a fixture (*Belgrave*)

Onus:

- If attached → onus on person arguing it is a chattel
- If not attached → onus on person arguing that it is a fixture, it is attached

*Belgrave Nominees Pty Ltd v Barlin-Scott Air-conditioning (Aust) Pty Ltd (1984) VR 947*

Kaye J

❖ Found for plaintiffs → airconditioners were fixtures