

2017 LAW EXAM NOTES

TRIMESTER 3

- PROPERTY -



BASIC CONCEPTS

Property is NOT the thing (i.e. land/object) but rather the person(s) relationship to the thing (*Yanner v Eaton*).

Essential characteristics of property rights:

1. A thing to which the property right can relate; and
2. The right must be enforceable against the world generally.

Basic definition of property: Property means any right that can be transferred from one person to another.

Property relationship: the specific relationship that an individual has over an object or a resource:

- (i.e. ownership of a book, leaser of house etc.)

Property rights: legal rights that entitle people to make use of things:

- (i.e. the right to build to a certain height, to invite person(s) onto premises)

'Bundle of rights':

- Different property relationships with the same property
- Different rights can be shared amongst members of society in different ways.

IN REM & IN PERSONAM

In rem: Rights that are assignable and enforceable against the whole world.

- Based in property law
 - E.g. Leasehold: Has right which enforceable against anyone in the world who trespasses.
 - A borrows book. B expects same book back.
- Right(s) enforceable to the item.

In personam: rights against the specific person(s) (concerned with parties).

- Based in contract law
 - E.g. Ticket: As it is only enforceable between specific parties (*Cowell v Rosehill Racecourse*)
 - A lends B money. B is not expected to return the same note.
- Right(s) enforceable against the person.

BUNDLE:

Essential Characteristics:

1. A thing to which the property right can relate.

- Clearly a property right cannot exist if there is no thing.
- If the item is **destroyed**, then that property right has been extinguished.

2. The right must be enforceable against the world generally.

Enforceability

Property is an exclusive and private relationship which an individual or corporation has with an object or resource which is *enforceable against the rest of the world*.

Non-essential Characteristics:

1. The right to exclude others:

Capacity to **exclude**

Def: The holder of a property right can prohibit person(s) from making use of the thing subject to that right.

- Typically associated with most property rights
- This right is facilitated by property torts (i.e. trespass/conversion/detinue)
 - E.g. renting a home: right to exclude everyone in the world from entering.

Exceptions:

The following property rights are incapable of having the capacity to exclude others.

Baron Bernstein of Leigh v Skyviews and General: If the trespass occurs in a plane at a high enough height.

Non-possessory property rights:

- *Easements*: the right to use and/or enter another's land for a particular purpose without actually possessing it (i.e. driveway to get to house)
- *Profits a prendre*: the right to take natural resources such as petroleum, minerals, timber, and wild game from the land of another.

2. The right to use or enjoy:

Right to use and enjoy the property

While a very fundamental right it can be subject to restrictions.

- i.e. building regulations/easements/negative covenants

3. The right to possess:

Right to possess

4. The right to alienate:

Alienability

Def: Right to alienate (assign, transfer or give up your right perhaps through selling, giving, mortgaging, leasing or surrendering).

- Related to selling the right. NOT selling the thing itself.

Exceptions:

The extent of one's right to alienate depends on the nature of one's interest:

- **Fee simple**: Biggest interest in land, can sell the rights COMPLETELY.
- *Leasehold*: A leaseholder can only sell the rights that he has (i.e. sublet)
- *Life tenant*: Owner of a life estate – estate that a person owns till their death which then reverts back to original owner or may pass to another person.

S 51 (xxx) of the Constitution: The Commonwealth can take property on just terms, as long as compensation has been adequate.

Person(s) can sever their connection with their property right without transferring it to another.

- i.e. Tenant with a non-assignable lease can surrender it and vacate the building.
- Subject to restrictions: Limitations in law i.e. dumping of dangerous waste.

5. The right to assign right(s):

Assignability

Def: Rights holder can assign rights: e.g. sell or give away.

- NOTE: assignability \neq alienability.

Exceptions:

In personam rights tend NOT to be assignable, i.e. Native title is incapable of being assigned to a person outside of the person or persons that possess the native title.

6. The right has value:

Value

Def: Most, but NOT all, property rights have monetary value.

- However, value is NOT an essential characteristic of property rights.

Exceptions:

- Sentimental value: A child's painting.
- Valueless items: Property right to dirty motor oil may create a liability for the cost of discarding it safely.

Just because an item has monetary value, does NOT mean that property rights exist.

- E.g. Bank account has great value, but the right that exists is a personal right NOT property.

JURISPRUDENTIAL ASPECTS OF PROPERTY

What things can be subject to property rights?

Human Tissue

- **Jones v Dodd [1999]:** *There is no property in a dead body under common law.*
 - Corpse or any part of the human body cannot be owned as property. There are sometimes some limited rights given to executor after death. These include the rights to burial of the corpse.
- **Doodeward v Spence (1908)** – a two headed foetus
 - “work and skill” could transform the human body into property.
 - A person cannot claim property rights over a corpse (ie foetus). However, the corpse can become property if it is turned into a chattel through the application of skill and labour.
- **R v Kelly [1999]** - theft of body parts from the Royal College of Surgeons
 - Body parts were considered property as they had been subject to a process of skill so as to acquire use and therefore became chattels.

Living Human Tissue

Our body parts and reputations are intrinsic parts of us and so are not protected by property rights.

- **Moore v Regents (1990)** – creation of a cell line from a removed spleen
 - A person has no property rights over cells they discard.
 - Cells are not unique.
 - If the person consents to giving samples away they are unable to claim property rights over the sample.

A Spectacle

Victoria Park Racing v Taylor

Facts: P owns and operates race track. D broadcasts race coverage by radio from vantage point of structure outside of racetrack without permission. Some people do not go to the races because they can listen to the broadcast. D uses written materials produced by P to help in broadcast.

Issue(s): Does a person have a property right in spectacles that take place on their land against people off their land disseminating and/or describing them?

Ratio: There is no property right in spectacle. People are entitled to do what they want on their own land subject to certain limits (e.g. nuisance) and that includes watching you.

Cowell v Rosehill Racecourse – license

Facts: Mr Cowell was ejected from the racecourse after behaving in a disorderly manner. He was found to have breached the implied terms of his licence to enter the racecourse....

Ratio: the licensor and his/her/its agents are entitled to *revoke* the licence and expel the offending person immediately.

- Even if there is no legitimate reason for the license to be revoked it may be revoked and lead to an action for breach of contract.
- Grantor must be willing to accept consequences.