

Topic 1: Is it Property?

What is a property right?

A **property right** is a right to a thing, which corresponds to a general duty placed on other members of the society not to interfere with that right

Property right \neq **the thing itself**; it denotes the legal relationship to the thing

- Is not law governing the things themselves (e.g. land/cars/etc.), rather is law governing *relationship* with these things.

Rights in personam/Personal Right -> Enforceable against specific person – limited! E.g. contractual right

Rights in Rem/Property Right -> Enforceable against the world at large

Rights in Rem

Usually thought of as a “bundle of rights”

Key concept - More than one person can have property rights in the same thing - [different types of property right (e.g. possession versus ownership)]

Two essential characteristics:

- **Enforceable** against the world at large (essential!) – [but also true of personal injury torts]
 - o Where there are property rights, there are corresponding obligations owed by the world at large in relation to that thing
 - o Note – different from personal injury b/c our bodies \neq things
- **Existence of some “thing”**
 - o Property rights follow the **thing** – dependant on existence of some *thing*
 - o If thing (e.g. book) is destroyed, right is GONE – while in K – might still have right etc.

Characteristics the majority (not all) share:

- **Alienability/transferrable** (not always – not essential)
- **Right to exclude** the world at large? (Not always – not with some native title rights)
 - o Exclude others from making use of thing that is subject to property right
- **Value**
 - o Most property rights have some market value
 - o Not *necessary* though
 - o Many personal rights have high value – e.g. bank account, contractual rights

What things can be subject of property rights?

Property = relationship between person and thing

- Must relate to a “thing” + be enforceable against all the world (essential characteristic)
- Characteristics commonly (not always) in “bundle”

Remember: look at the substance not whether it is called property;

- In the instruments – *Radaich*
- In the statute – *Yanner*

What things can be owned?

- **Not things beyond control** – that cannot be subject to many characteristics – like flora + fauna (*Yanner*)
 - o Hard to identify property – it goes in and out of state (migrating birds etc), not like domestic animals
 - o Need a degree of control, control of wild animals NOT sufficient (*Yanner*)
- **Not a spectacle** (*Victoria Park Racing and Cowell*)
 - o This would be right to exclude the world – would impact on others – court considered this *Victoria*
 - o **Cowell**
 - Only contractual relationship, no proprietary interest in land. Mere license – revocable

- Right to see spectacle cannot be seen to create proprietary interest (when 50,000 go to footy)
 - **Victoria Park v Taylor**
 - Property in land that found action in nuisance could not be stretched to activity on that land that occurred
 - No property in spectacle
- **Not a license to put posters on wall; King v Allen**

Universal Rules / CL Rules

Possession = good against the world, except those that have a better right (e.g. title holder, or prior possession)

Possession requires:

- 1 factual possession – (physical control)
- 2 Intention to possess – *animus possidendi* (objective test)

Jus Tertii

- **D cannot avoid liability by pleading third party has better right** – court cares about who has best interest out of parties before them, not who in the world has best interest.

RULE: A wrongdoer cannot defend her actions against the person in possession (or with a right to possession) by claiming that a third party has a superior right or is the true owner – *Jeffries*

- Could only refer to another parties better right if your right is derived from theirs -> improves your right

Jeffries v Great Western Railway Co

- P (Jeffries) bought trucks off Owen, D (GWR) also bought trucks off Owen.
- D seized trucks from Owen – Owen had gone bankrupt (before P bought),
- So D argued goods belonged to creditors.
- But this is *jus tertii* – doesn't help D – no reduction!

The Winkfield

- post destroyed in collision of ships, tried to refuse postmaster's claim for damaged mail b/c he wasn't liable to people who posted mail.
- Issue – he didn't have possession in literal sense, but he was effectively bailee at the time, constructive possession.
- Couldn't bar claim by saying he didn't have best right (only bailee)
- Rule: bailee may recover full value of chattel – even if not liable to bailor for loss!

Nemo Dat

Two conflicting principles that are valued in property law;

- **Nemo dat** – no one can transfer what they don't have
- A person should also get what they pay for – security of transactions

Generally *nemo dat* wins out in CL

But Torrens – a way for bona fide purchaser's to have security