

Table of Contents

1	Identify the Property Interest	4
1.1	Real Property	4
	Legal Interests	4
	Equitable Interests	4
1.2	Choses in Action	4
	Legal Interests	4
	Equitable Interests	4
	Interest under a trust	5
	Has a trust been created?	5
	Livingston Rights	6
	Assignment of Livingston Right	6
	Location of Livingston Rights	6
2	Assignment	7
2.1	Property Incapable of Assignment	7
	Public Pay	7
	Bare Rights to Litigate	7
	Contractual Prohibitions	8
	Statutory Limitations	8
	Personal Service Contracts	8
	Contracts Generally	8
	Future Property	9
2.2	Assignment of Legal Interests	10
	Legal Assignment of Legal Interests	10
	Real Property	10
	Old System Land	10
	Torrens Title Land	11
	Choses in Action	12
	Assignment of Shares	12
	Choses in Possession	13
	Abandonment and Appropriation	13
	Delivery	13
	Gift	14
	Donatio Mortis Causa	14
	Losing and Finding	15
	Sale of Goods	16
	Assignment of Possession (Bailment)	18
	Equitable Assignment of Legal Interests	20
	Assignment of Property Not Assignable at Law	20
	Partial Assignment of Choses in Action	20
	Future Property (see above)	20
	Assignment of Property Assignable at Law	20
	Gifts	20
	Assignment for Valuable Consideration	21
2.3	Assignment of Equitable Interests	22

Equitable Assignment	22
'Disposition'?	23
Exceptions	24
Constructive trust: s 23C(2)	24
Part Performance: s 23E(d)	24
Fraud on the Statute	24
Equitable choses in Action and CA s 12.....	24
3 Priorities	25
3.1 Priorities under the Sale of Goods Act (NSW).....	25
Identify the interests	25
Does the SoGA apply?	25
General Rule	25
Are there any relevant exceptions?	25
Estoppel.....	25
Mercantile agent.....	26
Voidable title	26
Seller in possession	27
Buyer in possession	27
3.2 General Law Priorities	28
Legal v Legal	28
Equitable v Legal.....	28
What if an innocent purchaser sells-on?	28
Legal v Equitable	29
Equitable v Equitable	30
Mere Equities	31
4 Additional Material	32
4.1 Fixtures	32
4.2 Native Title	33
4.3 Cases Regarding Disposition of an Equitable Interest	34

1. Identify the parties and their interest.
2. What are they trying to do with their interests?
3. Is this a gift or for value?
4. Is there an inconsistency? What rule applies?

1 Identify the Property Interest

The common law only allows the creation of **recognised proprietary interests**. Otherwise, there is no property right, but merely a contractual licence (*King v David Allen*).

1.1 Real Property

Legal Interests

Fee Simple	The most extensive form of private land ownership, granting exclusive possession for an unlimited duration, subject only to government powers.
Life Estate	A property interest lasting for the duration of a person's life, after which ownership reverts to another party (the remainderman). <ul style="list-style-type: none"> Holder has no power to grant an interest beyond their life.
Lease	A temporary right to use the land for a fixed period under agreed terms (such as exclusive possession), with ownership reverting to the landlord after the term. <ul style="list-style-type: none"> Owner has (and can only transfer) fee simple in reversion.
Easement	A right to use another's land for a specific purpose (e.g., right of way, drainage).
Profit à prendre	A right to enter land to remove naturally occurring produce.
Mortgage	A legal interest in land granted to a lender as security for a loan.
Charge	Security where a creditor has a claim over property but does not take ownership.

Equitable Interests

Equity of redemption	Right of a mortgagor to reclaim title to property over payments discharged.
Vendor's lien	A right to retain title as security until payment is made.
Other	<ul style="list-style-type: none"> Equitable interest in the land by virtue of oral agreement

1.2 Choses in Action

Legal Interests

- Contractual rights (e.g. gift voucher) – unsecured creditors
- Debt (*Olsson v Dyson*)
- Rights to sue in a court of common law
- Shares in a company (statutory chose in action)

Equitable Interests

- Shares or interests in partnerships
- Interests of beneficiaries under trusts (see below)
- Interests of a legatee (Livingston right, see below)
- Mere equities?

Interest under a trust

A trust relationship is where a trustee holds legal title to property for the benefit of beneficiaries. They have:

- A negative right to stop assets from going to someone who is not a beneficiary.
- A potential positive right to the trust assets, depending on the trust arrangement.
- A personal right to compel due administration of the trust: *Byrnes v Kendle*
- Where a beneficiary has a present entitlement to specific property, the beneficial right may be classified as an interest in the property itself: *Baker v Archer-Shee*.
 - Compare to the interests of a beneficiary under a discretionary trust: *Dial a Dump*
 - Look to the terms of the trust: *CPT Custodian*

Has a trust been created?

Whether a trust has been created depends on whether the “three certainties” have been satisfied.

Certainty of Intention

- This is a question of objective intention (*Byrnes v Kendle*).
- Look to the language of the parties.
 - There must be an imperative requirement that the trustee hold the assets for someone else, not merely a permissive intention (*Re Adams*). The trustee must be *required* to hold the assets for the benefit of someone else (“must, will, shall”).
 - Not words of expectation, hope or confidence.
 - The word “trust” is not required (*Paul v Constance*: “the money is as much yours as mine” ... this is likely a generous case, but the point stands).
 - Conversely, the use of the word “trust” is not definitive (*Associated Alloys*).
- Instead of a trust, there may be an intention to create:
 - **Debt?**
 - Ask: does the creditor have the freedom to use funds however they like?
 - Is it a *Quince* (trust) or *Daly* (debt) situation?
 - Payments into a separate bank account are a useful indication of an intention to create a trust: *Re Kayford*. In *Associated Alloys*, it was said to be the hallmark duty of a trustee. However, it is not a conclusive factor.
 - Collecting money for customer accounts, but pooling it and accessible at free disposal = not a trust relationship: *Farepak*
 - **Agency?**
 - Does the “agent” have the power to bind the principal? If so, they may just have an obligation to pay the principal, and not be a trustee.
 - Lack of requirement to keep funds separate from personal account = agency (most important factor *Walker v Corby*)
 - **Contract for benefit of third party?**
 - While two parties may contract for the benefit of a third party, privity prevents that party from enforcing the contract. Creating a trust where the third party is a beneficiary can escape this issue (*Trident*).
 - A trust can be established over the benefit of a contract and therefore assigned, even if there is a contractual prohibition on assignment: *Don King*.
 - However, where there is a prohibition on both assignments and the creation of trusts, neither can be achieved (*Secure Parking v Wilson*)
 - **Charge?** (*Associated Alloys*)
 - **Bailment?** (*Associated Alloys*)

Identify the Property Interest - Choses in Action

Certainty of subject matter (Palmer v Simmonds)

- Have to know what property is being held in trust (and what assets are not): *Associated Alloys*
- "A plaintiff who seeks to prove too wide a trust need not fail altogether": *Kauter v Hilton*
- Would ideally mention interest accrued

Certainty of objects

- For whom is the trust property held? ("friends" or "relatives" is too vague)

Additional Requirement

An additional requirement is for **trust property to reach the trustee** before the trust is constituted (*Oughtred v IRC*). Note that this can be easily achieved e.g. with \$10.

Livingston Rights

When a testator dies, the legal and equitable title of their estate vests with the executor: *Probate Administration Act* s 44. Until probate passes, a residuary legatee does not have any interest in the property constituting the estate, but they do have a chose in action to require the estate to be duly administered (*Livingston*). This carries a right to the "fruits" of the proper administration of the estate.

Assignment of Livingston Right

Livingston rights are assignable (*Re Leigh*). Are the words of an agreement/statute wide enough to capture the assignment of a Livingston right?

- In *Re Leigh*, the testatrix used the phrase "any other interest or assets which she may have". This was sufficiently wide.
- In *Re Maye* and *Schultz*, the statutory definition of property included things in action, and therefore Livingston rights, and therefore the fruits of proper administration.
 - Maye: "intangible or incorporeal"

Note that the assignment must comply with the rules of assignment for equitable interests:

- First, although Livingston rights are equitable interests and CA s 12 applies to 'legal choses in action', passing remark by the HCA in *Everett* suggests that CA s 12 refers to "lawfully assignable" choses in action. This could include equitable choses in action. Section 12 imposes a requirement to give notice to the debtor. Here, notice should be given to [executor].
 - Note: *Everett* concerned a partnership interest which may be sui generis. Also, s 12 could be seen as merely providing a method for the assignment of equitable choses in action, not a mandatory method.
- Second, s 23C(1)(c) may apply if the assignment is considered a disposition of an equitable interest. However, a Livingston right is a right against executors, not an interest in property, so it is unclear whether the assignment of a Livingston right is captured by this provision.
 - Potentially, as the administration of the estate moves closer toward completion, the interest becomes more like an interest in property and s 23C(1)(c) may apply
 - Or also s 23C(1)(a) if land

Location of Livingston Rights

- Livingston rights are located in the place where there is a right for the estate to be duly administered (where the executor is located): *Livingston*

2 Assignment

2.1 Property Incapable of Assignment

Public Pay

The holder of a public office cannot assign their right to be paid for work done in public office (*Mulvenna v Admiralty*). The right may be capable of assignment if such an assignment would not impinge on the public duty (*Arbuthnot v Norton*).

Bare Rights to Litigate

A bare right to litigate is a right to sue for tort, breaches of equitable obligations or unliquidated damages for breach of contract. These assignments are contrary to public policy in that, unless justified, they encourage litigation by persons not interested in the litigation.

1. Is it a bare right to litigate?
 - Assigning the proceeds (or "fruits") of the litigation is not assigning a bare right to litigate (*Glegg v Blomley*). Note, however, that since this is future property, it can only be assigned in equity and there must be valuable consideration (*Holroyd v Marshall*).
 - This exception is also the basis of the rule that an assignment of a bare right to litigate will be enforceable if it is incidental to a right of property that is also assigned (*Ellis v Torrington*).
 - In *Mid-City Skin Cancer Centre v Zahedi*, a contractual covenant to maintain confidentiality was not unassignable on account of the *Ellis v Torrington* exception.
2. Assignee has "genuine commercial interest" in the litigation (*Trendtex*; applied by HCA in *Esquucorp*).
 - In *Trendtex*, the creditor had a financial interest in maintaining the solvency of the plaintiff.
 - The interests of the assignee do not need to predate the assignment, but the interest cannot be the assignment itself (*Billabong Gold*).
3. Does the prohibition still apply?
 - X could argue that a bare right to litigate can nevertheless be assignable following the HCA decision in *Fostif*. While this position has not been followed in WA (*Billabong Gold*) and NZ (*Pricewaterhouse*), a strong equity bench in the NSWCA in *Bakewell v Anchorage* has said "the public policy case for the continued existence of the prohibition may be open to argument".