

COMMERCIAL LAW SUMMARY NOTES

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EXAM IS 2 HOURS WITH 10 MIN READING TIME

2 PARTS – ANSWER ALL Q'S IN BOTH PARTS

COMMERCIAL TRANSACTIONS

PROPERTY:

Definition and Nature of Property – *McCaughey v Commissioner of Stamp Duties*

The word 'property' is used in different senses. It may denote either objects of proprietary rights, such as pieces of land, domesticated animals, and machines; or the proprietary rights themselves... In common parlance it is usually employed in the former sense, but in the language of jurisprudence in the latter... Property, in the sense of proprietary rights, may exist in relation to physical objects, or to tangible things such as debts or patent rights. Each separate piece of property consists of a bundle of proprietary rights relating to a particular object, including rights administration and rights of enjoyment, the totality of which must be vested in a single person, or may be divided amongst a number of persons, as for example when they are shared by several who together own them all, jointly or in common' – Jordan CJ.

Characteristics of Property:

National Provincial Bank Ltd v Ainsworth:

'Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties and have some degree of permanence or stability.

- Capable of being assigned although there are exceptions e.g. statutory rights
- Must be able to be viewed as of some value to a third party
- These are the general elements

Elements of Assignability:

Assignability is not always essential, eg some statutory property rights are stated to be inalienable – *R v Toohy; ex parte Meneling Station Pty Ltd*.

Some forms of property which are not assignable:

- Personal rights
- A bare right to sue
- A contract or statute may specify that the right is not assignable.

Property Rights v Personal Rights:

- Property rights are enforceable against the world.
- Personal rights are enforceable against other parties in the contract or an individual only (such as a tort claim).
 - Personal rights are vulnerable to insolvency, death and missing persons.

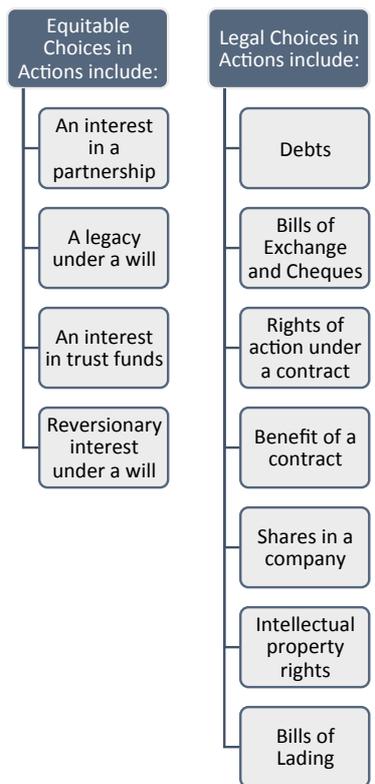
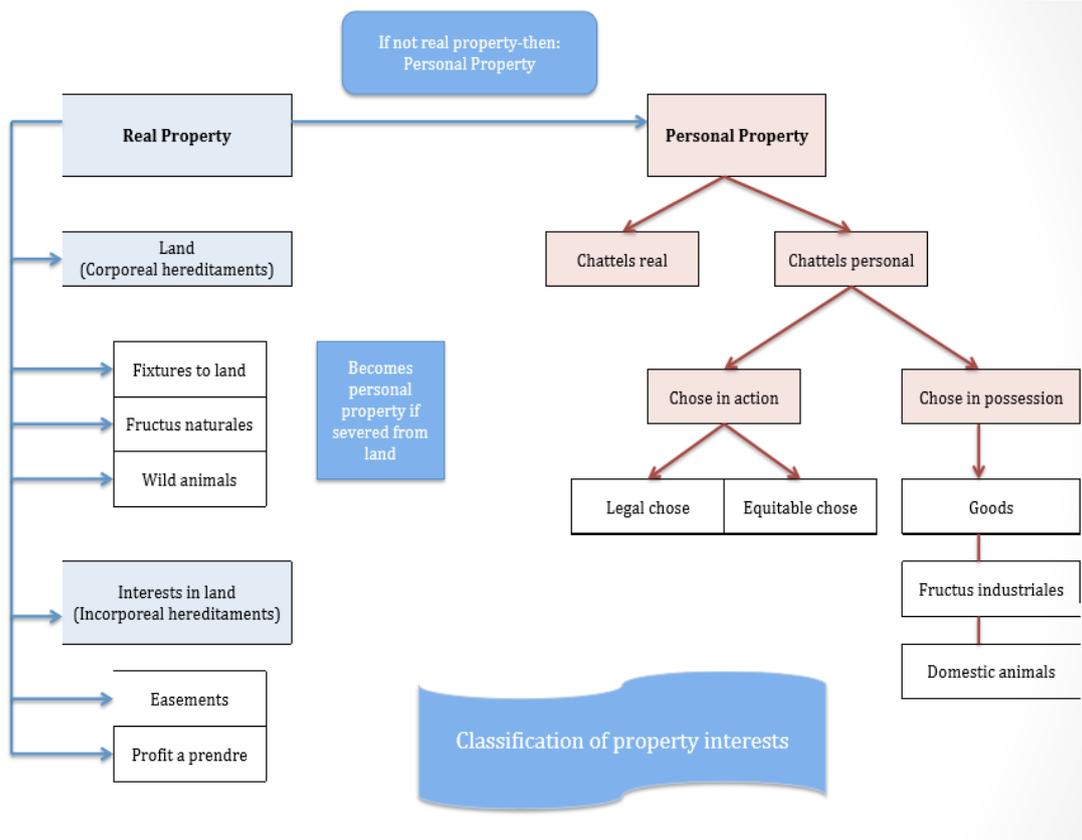
Distinction between real property and personal property:

Real property

- Land and all things embedded in land or attached to it (minerals, trees, buildings): cannot be removed – permanently fixed to the land with intention of never being removed
- Indestructible, immovable, appreciates in value
- Unique – contractual remedy specific performance rather than damages

Personal property

- Separated into two categories: chattel reals, and chattels personal
- Chattels real e.g. leases (not covered in this course)
- Impermanent, moveable, temporal, fragile, often depreciates in value
- Common/not unique (related remedies damages unless unique e.g. work of art)
- Includes choses in action, equitable and legal choses



OWNERSHIP AND POSSESSION:

What is Ownership?

Ownership may include a right to use, sell, give away, put into a trust, use as security for a loan, share with co-owners and leave in will.

- **Co-ownership:** where joint tenants or tenants own common rights.
 - Tenants in common; shares proportionate to the size of their contribution

What is meant by 'title' in law?

- 'Title' typically means ownership
- If you own property, then you have legal title
- But there are forms of title and characteristics of title which don't necessarily go together with being the owner e.g. where you have possession of something
- **Possession is a form of title**, it gives the person possessing the item, the legal power to do certain things and to enforce certain rights even though they are not the owner
- **Law presumes that a person who possesses an item is the legal owner of the item**
 - A defeasible form of title; defeasible to the true owner, to someone who has a superior title

What is Possession?

To possess property means to demonstrate an intention to exercise exclusive control (or dominion) over the item: *Parker v British Airways*.

- **Types of Possession:**
 - **Actual:** physical custody and intention to exercise exclusive control (possession in fact).
 - Compare mere physical custody with no knowledge or intention to control.
 - **De Facto:** exercise of dominion and control over item – not mere physical custody (eg. hiding an item).
 - Employer's rights in goods used by an employee.
 - **Legal:** possession in the eyes of law. This allows the person to sue in relation to the item. Holder of legal possession presumed to be the owner.
 - Will usually coincide with actual possession, but need not
 - Legal possession remains even if actual possession abandoned.
 - **Right to Possession:** enforceable right to obtain actual possession (ordinary incident of ownership). Treated as possession for certain purposes.
 - Bailee acting under terms of bailment has right to possession, not the bailor (owner).
 - Right to possess will ordinarily coincide with legal and actual possession (except for wrongful dispossession ie. theft).
 - **Constructive Possession:** a right to possession without having actual or legal possession.

Legal Significance of Possession:

Possession confers a legal right to retain control of an object against any other person except the person with ownership rights.

→ Except for bailee acting under terms of bailment.

Possession may allow the possessor to institute or defend legal proceedings in respect of the item.

Armory v Delamirie

“That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover (conversion)” – *Parker v British Airways* per Donaldson LJ. Thus, merely finding an item is not enough, the exercise of an intention to exercise exclusive control needed.

Finding an Item (Cases):

- Items found attached to land:
 - *Hannah v Peel, South Staffordshire Water, Parker* (presumption that goods on land are not lost).
- Items found on the land:
 - *Parker v British Airways, and Bridges v Hawkesworth*.
- Items found during employment belong to employer, unless merely incidental to work: *Byrne v Hoare*.

Possession and Finding:

- Possession involves a form of legal title:
 - Even if by finding or by theft (*Costello*).
- Personal property may typically be transferred by delivery.
- Mere possession does not transfer ownership (title), unless intention to abandon was made by the true owner.
- Possession may be defended against all except the true owner (*Armory*).

Transfer of Personal Property:

- Typically by delivery.
- Gift of personal property:
 - Intention to give by donor.
 - Acceptance by donee.
 - Delivery.
- *Knappy v Knapp* – gift of car to wife by husband, no transfer of registration.
- *Flinn v White* – gift of piano by father to daughter, remained in common custody but no delivery.

Other Ways to Transfer Title:

- Will
- Deed (*Conveyancing Act 1919 s 38*)
- Sale: *Sale of Goods Act 1923*.
- Statutory Assignment: *Conveyancing Act s 12*.
- In Equity