

LAWS2012/5008
INTRODUCTION TO PROPERTY AND COMMERCIAL LAW

EXAM ONE: TOPIC 1– 2

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What is Property?

Property is a right, not a thing. It is a relationship – Yanner v Eaton (1999)

Property: Most commonly used to refer to things people own. When lawyers talk about property, they are generally referring to the rights people have to things rather than the actual thing itself.

Lawyers divide rights into two categories:

1. Personal Rights
2. Property Rights

A property right is a right to a thing which can be enforced generally against the entire world. Whereas a personal right is a right enforceable against a single person or defined set of people.

King v David Allen [1916]

Personal rights could only be enforced against parties to the contract. Real (proprietary) rights have a greater scope of enforceability and can be enforced against the world. Property rights are created when a person intends to create that right and takes all the steps necessary to give effect to that intention. The intention and the action combine to bring the property right into existence.

Assignable Rights

At its widest property means any right that can be transferred from one person to another.

- > For example, when someone dies, most of their rights form an estate which will be transferred to the executor and then distributed according to law.
- > The collection of these type of rights are often called 'the property of the deceased' including

things such as land, belongings, bank accounts, shares, debts due and even legal claims.

In these regards property is looked at through assignability of rights and is seen as including everything that could be regarded as wealth or which an accountant might list as an asset on a balance sheet.

Largely however, the law of property is based on the enforceability of rights and not their assignability.

Rights *In Rem*

Enforceable against the entire world.

If I borrow your book and promise to return it, you continue to own the book. In addition to my promise, you have a right *in rem* which is enforceable against me because I have your book. The property right follows the book, and if I give your book to a friend, you can assert your right *in rem* against my friend, because he or she has your book.

A right *in rem* depends upon the continued existence of the thing to which the right relates. For example, if your book is destroyed, your property right is gone. The destruction may give you a right *in personam* against the person who destroyed your book or against your insurance company, but it brings to an end your right *in rem* to the book.

Rights *In Personam*

Enforceable Against Particular Person/Class

If I borrow \$20 and promise to repay it, I owe you \$20. You do not expect the same \$20 note back. Instead, I have a personal obligation to pay which corresponds to your personal right to be paid. This

is a right *in personam* which can be enforced against me, regardless of what has become of the \$20 note.

If I give that note to a friend or spend it, you do not acquire any rights against my friend or the shop. You have no right to the note nor to any other \$20 note.

A right *in personam* does not depend on the existence of any particular thing. Instead, it corresponds to some person's obligation to fulfil that right. The value of the right *in personam* depends on the ability of the person to perform a corresponding obligation.

Essential Characteristics of Property Rights

A property right can be identified as a right to a thing, which corresponds to a general duty placed on other members of society not to interfere with that right.

1. A property right can be enforced not just against specific persons, but against a wide range of persons (**Enforceability**).
2. A property right always relates to, and depends on the existence of, some particular thing (**Existence**).

1. Enforceability

All legal rights, whether personal or property, have correlating obligations.

If I owe you \$20, you have a right to be paid \$20 and I have a corresponding obligation to pay that amount. Your personal right and my personal obligation are two sides of the same coin.

Contractual v Proprietary Rights

King v David Allen [1916]

A licence does not confer a sufficient plenitude of rights over the land to qualify as a proprietary right. Only proprietary rights are enforceable against third parties [a licence is a mere permission to do something which would otherwise be unlawful].

Contractual Rights

Sphere of enforceability

- > Parties to a contract can enforce the right (i.e. Between promisee and promisor).
- > Doctrine of privity limits who can enforce contractual rights.
- > Thus a right *in personam*.

Potential content of the right – what rights make up contractual rights?

- > Content governed by the terms of the agreement. An infinite possible array of contractual rights – parties determine what they're agreeing to.

Proprietary Rights

Sphere of enforceability

- > Owner can enforce the right against the whole world.
- > Thus a right *in rem*.

Potential Content of the right

- > The prima facie position is that the law only recognises a set number and type of property rights.
- > Since property rights are enforceable against all the world, would be impractical and unreasonable to force people to comply with novel property rights.

2. Existence

Property rights relate to things which are separate and apart from ourselves.

Things intrinsically connected to us, such bodies and reputations, cannot be subject to property rights. Although they are valuable to us and protected by laws such as the rules against assault and defamation, they are not protected by property law.

3. Other Characteristics

Alienability

They can be sold or given away to others.

While most rights are alienable, many are not. Most non-assignable rights are rights *in personam*, but there are also a few non-assignable rights *in rem*. In other words, **there is some property that cannot be sold or given away.**

For example, a non-assignable, residential lease is certainly a property right, even though the tenants are not free to transfer it to others.

All property rights can be described as “alienable” if that term is understood to mean “disposable” rather than “transferable”.

Since property rights must relate to some thing which is only contingently connected to the right holder, it must be possible for that person to alienate the thing in the sense of severing her or his connection to it. However, that connection can be severed without transferring the right to another. For example, the tenant with a non-assignable lease can surrender it and vacate the dwelling.

Excludability

Meaning that the holder of a property right is able **to exclude others** from making use of the thing subject to that right. Most property rights do include this trait.

For example, if you own or rent a home, you have the right to exclude others from it. If you borrow a book from the library, you have the right to exclude others from using the book.

However, there are property rights which do not allow the right holder to exclude others from the thing subject to that right. For example, a right of way is a property right to cross another person's land. It meets the definition of a property right in that it relates to some thing (land) and is enforceable against other members of society (including the land owner), who are not permitted to interfere with its proper use. However, the holder of a right of way is not permitted to exclude others from the land subject to it.

Value

Most, but not all, property rights share the trait of value. Many things which are subject to property rights have only sentimental value.

There are other things which are completely valueless. For example, your property right to dirty motor oil drained from your car may create a liability for the cost of discarding it safely.

Some personal rights are commonly regarded as property rights because of their value. The most familiar example is the bank account. Money in the bank may be a person's most valuable asset, but that does not make it property. If you deposit a \$100 note in the bank, your property right to that note passes

to the bank and the balance in your account increases by \$100. The bank does not keep that \$100 note safe for you. It belongs to the bank and is used as the bank sees fit. The deposit does not give you any property rights to any other notes or assets in the bank. Your “money in the bank” does not correspond to anything but the bank’s promise to pay you \$100 (plus interest, less fees and taxes) on request. In other words, you have exchanged your property right to the \$100 note for a personal right of similar value. You are the bank’s creditor and the bank is your debtor.

Creation/Transfer of Proprietary Right

Property rights are created when a person intends to create that right and takes all the necessary steps to give effect to that intention. The intention and the action combine to bring the property right into existence.

There are both essential/substantive and formal requirements to be met creating proprietary rights.

Milirrpum v Nabalco (1971)

Plaintiffs claimed that the defendant’s activities were wrongly interfering with their property rights to use certain land to perform ritual ceremonies.

Plaintiffs claim for Native Title was dismissed as Blackburn J set a high bar for essential characteristics that needed to be met – *“plaintiffs were not entitled to exclude others from the land and could not sell or give their rights to others”*.

The result likely would have been different today in light of *Mabo (No 2)* where a wider understanding of essential characteristics was embraced.

Although they could not have given away or sold their rights, they had the power to sever the connection by moving away.

Further, the right to perform rituals can be a property right so long as it corresponds to a general duty placed on other members of society not to interfere with the exercise of the right.

Taxonomy

Land and Goods

Arguably the most important division in the law of property. However, there are many things that are not land or goods – such as shares or copyright.

Goods are those things other than land that are tangible – such as a car, dog or loaf of bread.

Land is both permanent and stationary – remaining relatively constant while the people who use it come and go.

A parcel of land will always be subject to the laws that apply in that location. Whereas a car made in one State may become subject to the laws of other states if it is driven from place to place.

Real and Personal

In contract, the distinction between real and personal property is based on the nature of the right. Real property rights are generally related to land, whilst personal property rights are related to chattels.

The distinction between real and personal property should not be confused with the distinction between *right in rem* and *rights in personam*.

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FINAL EXAM NOTES: TOPICS 2 – 5

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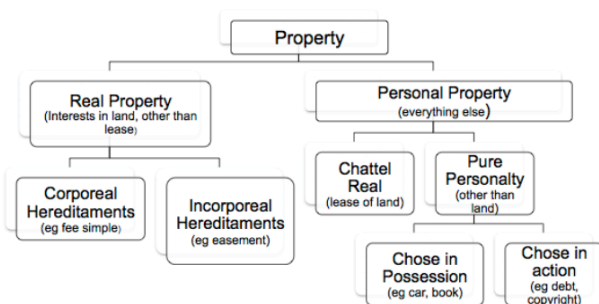
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Choses in Possession

Taxonomy

Chose in possession: An item of tangible personal property that is capable of physical possession by the owner and of transfer by delivery (e.g a book or chair). Choses in possession are distinguished from choses in action, which are intangible forms of personal property.



Chattel Real & Chattel Personal

Distinction between real and personal property is based on the nature of the right. All real property rights are rights to land, while most personal property rights are not.

- There are property rights to land, which strictly speaking, are not real property.
- The law allows the holders of property rights to goods which are difficult or impossible to replace to recover those goods from others wrongly in possession of them.
- The categories of realty and personality no longer indicate with accuracy whether a property right entitles the holder to recover the thing itself or merely receive compensation for its loss.

The distinction between real and personal property should not be confused with the distinction between rights *in rem* and rights *in personam*.

Personal property rights are not personal rights - they are property rights because they relate to external things and are enforceable against other members of society. However, they are normally enforced by means of personal rights.

E.g. Personal Property Rights Not Personal Rights

A thief who steals A's car commits an actionable wrong and is liable to compensate A for A's loss. A's right to his car is a property right, while A's right to be compensated is a personal right against the specific person who wrongly interfered with A's property.

What Are Choses in Possession

Colonial Bank v Whinney (1885)

"All personal things are either in possession or in action. The law knows no tertium quid (third category) between the two".

On the issue of whether a share was a chose in action or chose in possession:

- Such a share is, in my opinion, the right to receive certain benefits from a corporation, and to do certain acts as a member of that corporation; and if those benefits be withheld or those acts be obstructed, the only remedy of the owner of the share is by action. Of the share itself, in my view, there can be no occupation or enjoyment; though of the fruits arising from it there may be

occupation, enjoyment, and manual possession.

Tangible & Intangible

All property rights are intangible in the sense that they are rights enforceable against other persons, regardless of the nature of the thing to which those rights relate.

The distinction depends on whether the property right entitles the holder to possession of the thing involved

- Tangible (corporeal) property rights include the right to possession of something.
- Intangible (incorporeal) property rights do not entail a right of possession, and cannot actually be physically possessed.

A thing cannot be possessed unless it is something which can be controlled physically - therefore, property rights to things which cannot be possessed are necessarily intangible.

However: It is possible to have property rights to physical things which do not entitle the holder to possession of that thing.

- E.g. A person can have a right of way to cross another's land and not be entitled to possession of that land - an easement.

Personal property is often classified as tangible or intangible.

- A right to possession of goods is called a chose in possession.
- A personal property right to an intangible thing is called a chose in action.

Identifying Legal Interests: *Choses in Possession*

Ownership

In identifying ownership, first thing one must look to do is distinguish between ownership and possession.

Ownership: Residual legal rights in an asset remaining in a person, after specific rights over asset have been granted to others - residuary - almost 'reversionary'.

The difference between a sale or gift (which transfers ownership) and a lease or bailment (which transfers possession, but not ownership) is that the former disposes of all the owner's rights to the thing, while the latter leaves the owner with some residual right.

This 'incident of residuary' (residue of rights) (Tony Honore) is a necessary element of ownership - in order to distinguish ownership from possession, it is necessary to look at the rights a person has to use a thing in the future.

One feature of ownership which distinguishes it from possession, is its **potential for permanence**.

While ownership normally includes the right to possess a thing indefinitely, possession without ownership is a temporary right.

Owners are generally free to bring their ownership to an end by selling, giving, or destroying the thing owned. However, when someone is said to have possession, but not ownership, it means that there is an owner with a greater right to possession which

will revive when the possessor's right comes to an end.

- It is this '**reversionary right**, (residue) which characterizes ownership - what's left after other rights have been granted.

Honore: Ownership Definition

Six rights linked to possession: rights to possess the thing, to use the thing, to manage how the thing will be used, to income from the thing, to security from interference with the right to the thing, and to transmit rights to the thing to successors of choice.

- Plus the *duty and liability* to prevent harm to thing thing and the liability to execution.

Three exclusive rights of ownership, not possession: The right to capital entitles the owner to destroy or alienate the thing itself; The absence of term (the potential to last indefinitely); and the incident of residuary (reversionary right to possession).

Alienability

The owner has the rights to sell the thing (the capital) and to let it for the value (the income) (Honore)

Ownership according to James Penner also includes the rights to give the thing away and to share it with others, but not necessarily to do so for value.

Responsibilities of Ownership

Duty to prevent two different types of harm:

1. Duty not to harm others with the thing owned.

Not clear whether duty attaches to ownership or the right to possession - The person with possession or the right to immediate possession of a thing has the power to control its use and, therefore, bears some responsibility for its misuse.

The owner with a reversionary right to future possession is at least one step removed from the harm occasioned by its user.

2. Duty not to harm the thing itself.

Ambiguous - The sole owner of a thing, to which no-one else has a property right, usually is free to destroy or damage it, provided this causes no harm to others.

Abandonment

Re Jigrose [1994]

The common law does not require that a person retain property in goods after he has shown his intention to abandon them. Title remains with the owner of property until there is shown an intention to abandon it (distinguishing: losing property vs. throwing away property). It will then pass to the next occupier when there is an act such as appropriation.

1. Intention to abandonment

2. Actual act of abandonment