POSSESSION, TITLE AND PERSONAL PROPERTY

Note:
- goods on land are considered to be within the possession and control of the landowner, if affixed to or embedded in the land
- otherwise, goods found on land are only within the possession and control of the landowner if the landowner exercised such manifest control over the land as to indicate an intention to control the land and everything on the land.

POSSESSION

- physical concept referring to the occupation, control, or dominion over corporeal objects such as land, goods or resources. If the appropriate level of control can be established, the holder may acquire possession.
- Threshold for possession is complete and absolute dominion rather than a temporary or fleeting control
- Physical possession will arise where an individual has a high level of control over land or an object or resource because that control gives them the power of exclusion
- Nature of character of the control, occupation or dominion that must be proven before physical possession can be established depends upon the nature of the land, object of resource in issue.
- When dealing with land that includes a residential dwelling, physical possession will generally arise where it can be established that the dwelling is substantively occupied in a permanent rather than a temporary manner
- when dealing with vacant land, physical possession will generally exist where acts of physical control such as fencing or gate locking can be established
- Chattels or personal property are far easier to physically possess because of their inherently movable nature.
  o Person may take control and therefore possess a chattel by the simple act of holding it in a private capacity
  o E.g. a person will possess a motor vehicle where it is locked in his/her garage.

A CONCEPT LIMITED TO CORPOREAL PROPERTY (bodily present)

- land
- goods

PHYSICAL CONCEPT – occupation, control or dominion: “to have and to hold”

What constitutes possession will depend on the nature of the land and goods involved –

- A house – possession established by living in it on a permanent, as distinct from a temporary or merely transient basis
- Vacant land – possession established by fences and locked gates

DEGREE OF CONTROL

Goods:
Acts of holding them in a private capacity. E.g. books and pens – in your bag; car – locked and you hold the keys permanently and decide where it is located from time to time (even if you're not in temporary control of your car i.e. impounded, it does not lessen the ideal of your absolute possession)

POSSESSION: To possess is to have absolute power of dealing with the thing oneself and absolute power of excluding the action of everybody else…

- The power to exclude – i.e. to have the practical ability to exclude others, and to have the support of the law in excluding others
- Power to exclude is a practical question – practical ability to actually exclude possession (whether you have been deprived of the possession wrongly)

DIFFERENT WAY POSSESSION ARISES

The way in which possession arises affects the rights of:

- The person into whose possession the object comes
- The person who has a better right to possess the object (jus tertii) (confers that right upon you)
- Source of possession can vary – way in which or how your possession starts can effect your ability to maintain that possession
- E.g. you have bought a book from a bookshop, the bookshop lawfully possesses the book. The possession passed to you consensually when you paid for the book. It has to be conferred by the bookseller.

CONSENSUAL POSSESSION

- Will arise where physical possession is consented by the owner or previous owner of the goods.
- This possession is limited or temporal in nature because it is conferred for a specific purpose
- Examples
  o If you lend your book to your friend for a day
  o You leave your overcoat with the cloak room at a club for safekeeping
- Carries with it a legally enforceable right to reclaim possession.

NON CONSENSUAL POSSESSION

- Non consensual possession that is not the product of an illegal act may arise where physical possession has been acquired without the consent of the owner or previous owner of the goods
• This may occur when the owner cannot be found or there is no previous owner as the goods have been ‘discovered’ for the first time.
• Non consensual is more likely to confer enduring possessory title on the holder because of the limited availability of legal rights in 3P to reclaim the property

UNLAWFUL
• Conversion – treating someone else’s property as your own, by selling it away, using it to make money (e.g. hiring it out for a fee) or destroying it
• Trespass to goods – interfering with someone else’s possession
• Detinue – refusing to return someone else’s property in your possession (detaining the goods/wrongful detention of the goods)

LAWFUL
• Finders: finding goods misplaced by the true owner. E.g. a chimney sweep finds a jewel on a street crossing
• Discovery: discovering goods never previously possessed (the prosecutor). E.g. while bushwalking in central Victoria, you find a nugget of gold

PHYSICAL POSSESSION

Where a holder acquires physical possession, that possession will also have legal consequences. Physical possession confers a legal title upon the holder that gives that holder an enforceable legal title in the property
• The basic rule possessory title is enforceable title against the world except for the true owner
• The true owner will always have a superior claim to that of the professor because proprietary title is stronger than possessory title
• If the title that physical possession confers is the product of the consensual possession that title may be subject to contractual or tortious obligations
• OR where the physical possession of goods are consensually transferred by the owner, the tortious principles of bailment may arise, requiring the possessor to exercise a reasonable standard of care over the goods and obliging the possessor to return the goods to the owner when requested

FINDERS KEEPERS RULE

Armory v Delamirie [1722] 93 ER 664: The start of the line/base/foundation of cases establishing ‘finders keepers’
Facts:
- a chimney sweep apprentice found a jewel in the course of cleaning and took it to a goldsmith to have it valued
- the goldsmith removed the jewel from its setting, with the intention of keeping it and selling it himself, and returned the setting to the boy without the jewel
- The apprentice sued for damages
- NB: no-one ever claimed the jewel as owner, nor did the owner of the house whose chimney was being swept at the time assert any prior right to the jewel
Held:
- The apprentice’s claim was upheld, on the grounds that he had prior possession which gave him an entitlement to the goods against all the world but someone with a superior right
- Sir John Pratt CJ (KB) said: “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.”

Legal inchoate possessory title that arises upon establishing physical possession
• Where goods have been found or discovered, the true owner may be absent and the legal title that physical possession confers allows he holder to retain an interest in those goods that is almost powerful as full ownership
• This is because the holder can enforce that title against all the world apart from the true owner.
• Thus, someone who finds goods that have been lost or mislaid can retain them, and sue anybody else into whose possession they come for their return, except for the true owner or person who had prior possession

Hannah v Peel [1945] 1 KB 509: finder of an old, valuable brooch was held to be in possession of it simply because it was held in a private capacity and in the absence of the true owner, the finder acquired a good title which was enforceable against the rest of the world because the true owner could not be located

HOWEVER, taking control of the object and acquiring possessory title is difficult because of the context in which the object exists.

The Tubantia [1924]: it was held that the finders of a shipwreck were in possession of the wreck because they had done everything that a true owner could reasonably be expected to do in watching over and investigating the wreck
- The divers were in effective control of the wreck bc they were in a position to prevent any similar work being carried out by other divers and were therefore able to preclude anybody else from exercising a similar level of control

MISLAID PROPERTY

Finder of mislaid property will be entitled to the possession of that property against everyone but the true owner unless it is shown that the property is not lost but rather, that the owner cannot recall where it is placed
• Mislaid property occurs when owner of the goods intentionally places those goods in a place and then forgets where they are
• HOWEVER: Mislaid property is not ‘lost’
Property may be mislaid, in the sense that it is intentionally placed somewhere by its owner and the owner then forgets where it was put.

Mislaid property is not “lost”: the owner of private property on which mislaid goods are found has a duty of care to look after the goods belonging to those entitled to use the premises.

- Eg: You hold a dinner party. A guest takes off a valuable ring in the bathroom to wash his hands and places it beside the sink. You find it there the next morning.
- You have a duty to take care of the ring (the wearer was in your house as your guest) and return it when possible

**LOST GOODS**

- Lost property arises where the owner/other possessor has involuntarily parted with property through inadvertence, negligence or carelessness.
- If mislaid property is found in a place where the general public is not ordinarily admitted, the interests of the owner must be protected and the occupier of the premises comes under a duty to care for the goods mislaid by those who are entitled to use the private/semiprivate place.
- If lost property is found, however, the finder will acquire a title
- Where lost property is found, possession is title against the whole world except the real owner and the finder may acquire the value of the property

**ABANDONMENT**

- Abandoned property returns to a state of nature or the ‘common mass’ and belongs to the first finder, occupier or taker.
- You intended to abandon it
- A person who finds it will be like a “discoverer” – she will become the true owner with the best right against all the world, by taking possession of it
- Whether goods are abandoned or not depends on
  - the fact of having given up the control and power to exclude that constituted possession of the goods and
  - the intention to part with possession permanently, objectively assessed by inference from the acts of the putative abandoner

**COMPETING CLAIMS OF FINDERS AND LANDOWNERS**

- The rule becomes interesting where goods are found on land belonging to another
- The rule remains the same: the person in possession has the best claim all the world, except someone with the better claim
- The issue is: does the owner of the land on which the goods were found have such a better claim?
- The issue is determined by analysing whether owning or possessing land on which goods are found amounts to owning or possessing the goods found on the land

**GOODS FOUND IN LAND OR BUILDINGS**

- If property is discovered on land which belongs to 3P, the finder may only acquire possession and therefore title in circumstances where it is clear that the owner of the land did not manifest a clear intention to control all goods discovered upon the land
- Personal property that is found upon the land rather than attached to that land may (if land is open to public access) come into possession of the finder, unless the owner of land indicates clear intention to control all objects existing on that land.

Where goods are found on land or in a building owned by a third party, the rule is the same but its application can be expressed as follows:

- where goods are found
  - embedded in or under the land or
  - are fixed to the land, or
  - are embedded in or fixed to a building on the land,
- they form part of the land or building and the owner or person in possession of the land has possession of the goods, by virtue of having possession of the land
  - where goods are found
    - unattached on the surface of the land or within a building
- the owner of the building only has the better right if the owner exercised such manifest control over the land as to indicate an intention to control the land and anything that might be found on it

**GOODS ATTACHED TO OR EMBEDDED IN LAND**

- Where goods are attached to or embedded in land, the owner or possessor of the land is in law in possession of the land and everything forming part of it.
- It is not necessary to determine whether an item is a chattel or a fixture (a legal issue we will look at in later classes)
- It is only necessary to ascertain that the goods are “in or under” the land
- In any such case, the owner of the land has the better right by virtue of having possession at the time the goods are “found” by the finder

*Flack v Chairperson, National Crime Authority [1997]*: where chattels have been embedded in the land, so as to form part of the land, the owner of the land has the right superior to a finder and notwithstanding that the owner is unaware of the existence of the chattel embedded in the land
LIVERY OF SEISIN
- An ancient conveyancing ceremony in which Seisin was delivered by the transferor of a freehold estate to the transferee, and this the freehold estate passed
- It involved the parties (or their agents) going to the land and the transferor taking up some of the soil and giving it into the hands of the transferee
- (in middle ages – this was essential for transfer of a freehold estate. Only on the transferee becoming ‘seised’ of the land on its being delivered symbolically in this way, did the freehold estate pass)
- was still possible to transfer legal title in this way in the UK until 1925

REMEDIES FOR REAL AND PERSONAL PROPERTY
- Personal property has been protected by common law torts giving rise to an entitlement to damages
  - Conversion, detinue, trespass to goods
  - Breach of bailment or breach of contract – for damages for interference with possession
- Where damages are an inadequate remedy to protect against interference with possession of personal property (eg where the thing itself is important), then equitable remedies need to be invoked:
  - Constructive trust
  - injunction
- Real property refers to property interests over land whereas personal property refers to property interests over goods and chattels
- Real interests have always been supported by real actions, including praecipe in capite (writs for recover of land), grand assize, the possessory assizes and the writs of entry entitling a dispossessed holder to recover
- Personal property is supported by personal remedies which are enforceable against the person interfering with the possession of the goods.
- Where a holder is dispossessed of chattel, the relief will generally stem from either a tortious or contractual action, depending upon the particular circumstances.
- E.g. damages may be available to support a tort of conversion, a tort of detinue or to support trespass to property
- Damages may be available where it can be established that the interference with possession constitutes a breach of bailment/contract
- Restitution of goods may be available under specific category provisions or where the equity jurisdiction is prepared to impose a resulting/constructive trust in order to prevent the interfering party from unconscionably retaining goods which do not belong to them.

FIXTURES, ENROACHMENT AND BOUNDARIES
Questions of who owns the land:
- Who is entitled to leave or take goods on one owner vacating the land (eg on sale, or lease)
- Who has the responsibility to leave or take goods on vacating the land

Question is important:
- A certain good may add value t the land if left for the purchaser, or have value to the vendor if removed from the land
- Alternatively, an object may devalue the land if left, and create expense if it has to be removed.

NOTE*:
- Goods affixed to land become part of the land at common law and ownership vests in the owner of the land on adfixture.
- Whether something is a fixture or not depends on the intention with which it was affixed
- There are in general terms two tests for this intention: the degree of annexation and the object of annexation
- The Courts will look at a wide variety of factors to determine whether goods have become fixtures. Each case must be considered on its own facts.
- Tenants may remove trade, domestic and decorative fixtures, making good any damage caused in the removal. This is a right to remove the fixture, and does not mean that the item to which the right attaches is any the less a fixture.
- Equity recognises a contract to sever a fixture, either in a contract to retain title to the fixture on sale of the land, or to sell the fixture while retaining the land. This equitable severance is effective, even though the object remains a fixture at law, and thus part of the land, until such time as it is severed in fact.

FIXTURES
- Whatever is affixed to the land becomes part of the land
- Law of fixtures determines how and when an object of personal property loses its character as chattel and becomes recognised as being part of the land
- Fixtures are goods that have been annexed to land such that they lose their independent identity as good and become a part of the land
- Stem from the broader concept of ‘whatever is affixed to the soil becomes part of the soil’
- Whether item is a chattel or a fixture depends on whether the item was placed on the land with the intention that it become part of the land or whether it was placed on the land with the intention that it remain separate from it. Reid v Smith (1906) 3 CLR 656.
- Conflicting claims to the item may arise in relation to an assessment of stamp duty in land transfers under state or territory legislation, as well as between the following parties:
  - A landlord or tenant
Where the parties to a dispute have entered into a contract, the conflicting claims may be resolved if there is an express term on the matter

In absence of express term – general law of fixtures applies

**TWO TESTS in determining whether the object has become a fixture:**

- The degree of annexation
- The purpose/object of annexation

**Holland v Hodgson (1872) LR 7 CP 328 per Blackburn J**

- What is annexed to the land becomes part of the land;
- Must depend on the circumstances and mainly on two circumstances: intention, viz, the degree of annexation (how fixed is the item to the land) and the object of annexation (for what purpose was it fixed in place on the land);
- When the article is no longer attached to the land then by its own weight it is generally considered a mere chattel;
- Although if the intention is apparent to make the articles part of the land, it becomes part of the land;
- Tests are related in that the degree and purpose of the annexation indicate the intention of the annexor.

Blackburn J posits the true rule:

- Articles not otherwise attached to the land than by their own weight are not to be considered as part of the land
- Unless the circumstances are such as to show that they were intended to be part of the land
- The onus of establishing that they were so intended lies with the person who asserts that they have ceased to be chattels
- Conversely, an article affixed to land even slightly is to be considered as part of the land
- Unless the circumstances are such as to show that it was intended all along to continue a chattel
- The onus of establishing that they were so intended lies with the person who contends that it is a chattel
- When an object is only attached to the land by its own weight, it is generally a mere chattel, although in a given case if the intention is apparent to make the object part of the land, it becomes part of the land.

**(a) DEGREE OF ANNEXATION**

*Australian Provincial Assurance Co Ltd v Coroneo* (1938) 38 SR (NSW) 700 at 712.

Degree of physical attachment between the object and the land or to a building on the land is very important

**(i) if object is attached (e.g. by screws) to the land other than by its own weight, then it is prima facie a fixture**
- More object is attached to the land or building, the more likely it is to be classified as a fixture
- Onus of proving any attached object is not a fixture lies on the person who wants the object moved
- The following object attached to land are fixtures include:
  - Spinning looms bolted to the floor of a mill: *Holland v Hodgson (1872) LR 7 CP 328*
  - Verandah attached to a house: *Buckland v Butterfield* (1820) 2 Brod & B 54

**(ii) if object rests unattached on the ground, prima facie it is not a fixture even if it has become embedded in the ground**
- Onus of proof that it is a fixture lies on the person warning the object to remain on the land
- E.g., of the application of this presumption in where a printing press attached by its own weight to the ground was found not to be a fixture: *Hulme v Brigham* [1943] KB 152

*Australian Provincial Assurance Co Ltd v Coroneo* (1938) 38 SR (NSW) 708 at 712 per Jordan CJ

Jordan CJ considered some of the circumstances that may be relevant to considering whether an object is a fixture

- The test whether a good affixed to some extent to land has become a fixture is whether it has been fixed with the intention that it remain in position permanently or for an indefinite or substantial period, or whether it has been fixed with the intent that it remain in position only for some temporary purpose
  - Eg a marquee may be erected with poles and pegs driven into the ground, but only for the purpose of a one-off event such as a wedding
  - A garden shed bolted onto a concrete slab for long-term use (generally a garden shed will be a fixture)
- If fixed with intention to stay in position permanently or indefinitely, it is a fixture whether or not it has been fixed for the better enjoyment of the land, or fixed merely to steady the thing itself for the better enjoyment of the land
  - Eg a water tank is placed on the land for its better enjoyment, but may be fixed only for the purpose of steadying it
- The intention of the person fixing it must be gathered from the purpose for which and the time during which use in the fixed position is contemplated
  - Eg. The wedding marquee v the water tank
- If a thing is securely fixed, particularly if it has been so fixed that it cannot easily be removed without substantial injury to the thing itself, this supplies strong but not necessarily conclusive evidence that a permanent fixing was intended
  - Eg a bush tramway put on land for removing logs in the course of timber-getting and clearing, which was capable of being moved from place to place, was not a fixture despite being securely fixed
- On the other hand, slight fixing supports an inference that it was not intended to be permanent, but again each case depends on its own facts
Test of whether a chattel which has been to some extent fixed to land is a fixture is whether it has been fixed with the intention that it shall remain in position permanently or for an indefinite or substantial period: Holland v Hodgson (1872) LR 7 CP 328 or whether it has been fixed with the intent that it shall remain in position only for some temporary purpose: Vaudeville Electric Cinema Ltd v Muriset (1923) 2 Ch 74 [87].

If it is proved to have been fixed merely for a temporary purpose it is not a fixture: Holland v Hodgson (1872)

Intention of someone fixing it must be gathered from the purpose for which and the time during which use in the fixed position is contemplated: Hobson v Gorringe (1897) 1 Ch 182

If a thing has been secretly fixed, and in particular if it has been so fixed that it cannot be detached without substantial injury to the thing itself or to that to which it is attached, it supplies evidenc

e that a permanent fixing was intended: Holland v Hodgson

logs in the course of timbergetting and clearing and capable of being moved from place to place was held not to be a fixture; notwithstanding that a relatively secure degree of fixation was necessary: Pukuweka Sawmills Ltd v Winger (1917 NZLR 81

**HOWEVER** a wooden building, resting on land by its own weight but brought there for the purpose of being permanently used as a dwelling house is a fixture: Reid v Smith 3 CLR 656

Irrigation equipment resting on its own weight did not constitute a fixture: National Australia Bank Ltd v Blacker (2000) 179 ALR 97

- No single factor should be determinative. The equipment was not attached to the land and was not heavy enough to raise the inference that it was intended to be permanent
- The fact that an item is affixed to the land is not determinative. An item may be a fixture where it simply rests on land by virtue of its own weight: Loireo (aka Lero) v Adel Sportswear Pty Ltd [2010] NSWSC [11].
- Mining equipment should be treated as a fixture because of the extensive way in which they had been attached to the land as well as the cost of removing the equipment was high relative to their value and the removal would occasion significant damage to the land: Agripower Barraba Pty Ltd v Blomfield [2013] NSWSC 1598.
- However, if there has been an annexation of the goods to the land, the greater and stronger the annexation and the more difficult it is to remove the goods without destroying them, the more likely it will be that the goods will be regarded as fixtures.

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**Concept:** Where there has been an annexation,

- the greater and stronger the annexation and
- the more difficult it is to remove the goods without destroying them,
- the more likely it will be that the goods will be fixtures

**Issue:** whether they were fixtures or whether they retained their individual character as chattels

**Court of Appeal held:** that the buildings were chattels – common intention of the land owners and the occupants was that the occupants should retain possession of the bungalows whilst the land upon which they stood would remain vested in the owner of the freehold

**Held:**
- Where removal would result in substantial destruction to the goods in issue, the parties could not have intended the house to retain its separate identity as a chattel
- Similarly in May v Ceedive (2006) 13 BPR 24, 147: that a house had been attached to the land had become a fixture because the dwelling was a solid brick residence which could only have been removed by demolition
- A common sense approach to the assessment suggested that the parties could not have intended the house to have retained its identity as a chattel and that once it was constructed, it had become affixed to the land.

The House of Lords considered the question by applying the tests as stated by Blackburn J in Holland v Hodgson and overturned the Court of Appeal’s decision:

**Degree of annexation:**
- the importance of the degree of annexation varies from case to case
- where the object in question is a house, it is generally the case that annexation goes without saying
- the House of Lords cited Reid v Smith with approval, noting that the HCA had treated the matter as almost a question of common sense: whether or not it was annexed, a house formed part of the land and the absence of any attachment to the land in a given case does not prevent this outcome

**Purpose of annexation:**
- In the case of fixtures in a building, such as windows and tapestries, a useful test is whether the object has been so fixed for the better enjoyment of the object as a chattel, or whether it has been fixed with a view to permanently improving the freehold
- This kind of test is less useful when considering the building itself.
- The answer is as much a matter of common sense as precise analysis.
  - A temporary dwelling constructed so as to be removable as a whole or in sections, may remain a chattel.
  - But a house constructed as as to be incapable of removal without completely destroying it cannot have been intended to remain a chattel.
  - The case differed from that of a greenhouse, capable of being moved from site to site
EXAMPLE OF FIXTURE V CHATTEL

- Example given by Blackburn J in Holland v Hodgson, referred to by the House of Lords in Elitestone:
  - blocks of stone
    - if placed on top of each other to build a stone wall in a field, they become part of the land
    - if placed in a builder's yard and placed on top of each other in a wall as a matter of convenience, they remain chattels

ELISTSTONE FOLLOWED, AND DISTINGUISHED:

- The key point in Elitestone was the House of Lord's emphasis on the significance of the inability of the cottages to be removed without substantial damage to them
- In May v Ceedive (2006) 13 BPR 24,147, the NSW Court of Appeal considered a house that had been attached to land had become a fixture because it was a solid-brick residence which could only have been removed by demolition. A "common sense" approach was adopted – the parties could not have intended the house to retain its identity as a chattel
- Contrast PricewaterhouseCoopers Legal v Perpetual Trustees Victoria Ltd (2007) NSWCA 271: a portable dwelling, though affixed to land, had not become a fixture because it was clear that this type of dwelling did not have to be demolished in order to be removed and because applicable legislation prevented portable dwellings of that kind from being treated as fixtures
- Webb v Frank Bevis Ltd: it was annexed to the land and it was held to form part of the realty. But it could be severed from the land and removed by the tenant at the end of his tenancy because it was in the nature of a tenant's fixture, having been erected by the tenant for use in his trade.
- PricewaterhouseCooper Legal v Perpetual Trustees Victoria Ltd (2007) NSWCA 271: where a portable dwelling which had been attached to the land was found to have become a fixture because it was clear that this type of dwelling did not have to be demolished in order to be removed
  - Intention of the parties was that the dwelling was to retain its separate identity as a chattel despite affixation
- Darmanin v Cowan (2010) NSWSC 118: where it could be shown that the cottage was for the better use or enjoyment by the Cowans of the Cowans land in the sense of furthering the use to which the land is put, then the cottage would be likely to be seen as a fixture.
  - BUT if the intention was for the better use or enjoyment of the cottage itself (as distinct from the land) then the cottage would be likely to be held to be a chattel
- Eon Metals NL v Commissioner of State Taxation (WA) (1991) 91 ATC 4841: so long as the degree of annexation goes no further than what is required to achieve that object, there is no need for a court to give an annexation any particular or special regard in the overall assessment of whether a chattel has become a fixture

(b) THE PURPOSE (OBJECT) OF ANNEXATION

- In determining whether the parties intended the object in question to become part of the land, the Court has regard to a variety of different factors
- An important factor is the state of mind of the affixing party. However, this is objectively assessed and subjective intention is irrelevant
- Increasing the significance of the purpose or intention of annexation test

THE NATURE OF THE CHATTTEL

- Some goods can only be effectively used where they are attached to land and do not have an independent operation
  - E.g. a loading dock at the rear or a retail centre
  - A shed for storing wood
  - Others have an independent identity and are attached to maximize their operation or utility
  - Consider two English cases involving tapestries affixed to walls:
    - Leigh v Taylor (1902) AC 157: tapestry which was securely affixed by nails to the walls of a house so that it could be effectively viewed. It was held not to be a fixture. It remained a chattel as it was affixed for the benefit of the tapestry as an independent chattel. Annexation was for the purpose of enjoying the viewing of the tapestry and there was no intention to benefit the value of the real estate
    - Re Whaley (1908): A valuable tapestry was attached to a wall to enhance the historic character of the room as an Elizabethan room. It became a fixture as it was affixed primarily to decorate the room and enhance its Elizabethan character.
- Where object are not affixed but the circumstances show that the objects were intended to become part of the land, these will be regarded as fixtures by application of the purpose of annexation test
o Includes heavy marble statues and substantial garden ornaments which were an integral part of agricultural design: *D'Eyncourt v Gregory* (1866) LR 3 Eq 382

o *Reid v Smith* (1905) 3 CLR 656: obvious example is a house resting by its own weight on stumps/piers. The onus will lie on the person claiming the house as real property to show that the building was erected with the intention that it become part of the real property

o Onus was discharged by showing that the object was an ordinary dwelling house on a town allotment

o In considering the objective intention of the parties the court should take into account the prevailing community practice and the taste and fashion of the day (timber dwellings were not affixed except by their own weight)
  - Test is an objective one and intention of the person affixing the item is to be determined from all the circumstances of the case, including the nature of the chattel and the relationship of the parties
  - *National Australia Bank v Blacker* (2000) 104 FCR 288: the actual (subjective) intention of the fixer, may be relevant in indicating the time the object is intended to remain in position and the purpose of its annexation
  - Recourse to subjective intention, if allowed, should not be permitted to prejudice the rights of 3P who would be unaware of such intentions
  - Agreements made between the items owner and the landowner as to whether an item is a fixture or chattel will not affect 3P with an interest in the land:

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<tr>
<th><strong>May v Ceedive Pty Ltd</strong> (2006) 12 BPR 24: application of objective test of intention</th>
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<td>- P entered into a contract to purchase a house, but not the land on which it was situated</td>
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<td>- land owned by D and leased to the purported vendor of the house</td>
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<td>- NSWCA found the house to be a fixture and in reaching this finding attributed greater weight to evidence that removal of the house would involve significant, if not total destruction of the house, than to evidence of the subjective intention of the parties</td>
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<tr>
<td><strong>Belgrave Nominees Pty Ltd v Barlin Scott conditioning (Aust) Pty Ltd</strong> [1984] VR 947: D (subcontractor) had affixed air-conditioning plants to the roofs of P’s buildings</td>
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<tr>
<td>- Plants stood on their own weight on a platform and were connected to the water pipes and electric supply cables of the buildings</td>
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<td>- D later removed the air-conditioning plants and P sought to return of the equipment.</td>
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<td><strong>Held:</strong></td>
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<td>- There was an absence of any such relationship between the parties in the present action</td>
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<td>- Considered that even slight fixing to the land is sufficient to raise the presumption that a chattel is a fixture</td>
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<tr>
<td>- The onus of proving otherwise rests upon the party so contending to show objectively from the relevant circumstances, that it was intended that the article should remain a chattel</td>
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<table>
<thead>
<tr>
<th><strong>INTENDED TIME OF ANNEXATION</strong></th>
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<tbody>
<tr>
<td><strong>Australian Provincial Co Ltd v Coroneo</strong> (1938) 38 SR (NSW) 700</td>
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<tr>
<td>- Coroneo (P) built a theatre on land which was the subject of a mortgage</td>
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<tr>
<td>- Equipment and plants were installed in the theatre, including chairs which were fastened together in rows and fixed to the floor when in use. Chairs could be easily unfixed and moved around to accommodate the different uses</td>
</tr>
<tr>
<td>- P with consent of mortgagees, leased the theatre and the equipment in it to Smythe who subsequently transferred the lease to other parties</td>
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<tr>
<td>- Mortgagees exercised their power of sale and the building was sold</td>
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<tr>
<td>- P claimed for the return of the chairs and other objects on the grounds that they were chattels</td>
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<tr>
<th><strong>TEST OF PURPOSE OF ANNEXATION</strong></th>
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<tbody>
<tr>
<td>- Whether a chattel which has been to some extent fixed to land is a fixture is whether it had been fixed with the intention that it shall remain in position permanently or for an indefinite or substantial period (<em>Holland v Hodgson</em>) or whether it has been fixed with the intent that it shall remain in position only for some temporary purpose (<em>Vaudeville Electric Cinema Ltd v Munset</em>)</td>
</tr>
<tr>
<td>- <em>Holland v Hodgson</em> – chattel is a fixture, whether it has been fixed for the better enjoyment of the land or building or fixed merely to steady the thing itself, for the better use or enjoyment of the thing fixed if it is proved to have been fixed merely for a temporary purpose it is not a fixture</td>
</tr>
<tr>
<td>- Intention of the person fixing it must be gathered from the purpose for which and the time during which use in the fixed position is contemplated</td>
</tr>
</tbody>
</table>
  - They were securely fastened to the building by screws and bolts and had remained in position though the building had been variously used as a movie theatre, for concerts or been hired out for other events |
  - Objects were evidently intended to remain in position permanently and were clearly fixtures |
  - Having regard to the purposes for which they were used and the extent and reason for their fixation on the occasions when they were affixed, the court found that the chairs were chattels. |
  - However because the equipment had been leased to Smythe, P did not have a right to their possession until the expiry |
  - P’s claim failed notwithstanding the finding that the chairs were chattels |
BOUNDARIES: LAND ABUTTING WATER

- Where land does not abut water, the boundaries are fixed by measurements from fixed survey marks
  - determined by surveyors
  - managed by the Office of the Surveyor-General Victoria
  - longitudinal (east-west) and latitudinal (north-south)
    - co-ordinates on the earth’s surface calculated from a point in Greenwich, England
    - other points worked out by using the principles of trigonometry
    - certain points established officially as “survey marks”
    - trig points
- The boundaries are fixed by measurements on title
- Determining where the boundaries of land not abutting water is just a matter of expert surveying opinion
  - Boundaries of land and water may be determined according to natural artificial measures
  - Where land does not abut water, the boundaries are determined in accordance with specific measurements set out in cert of title
  - Where land does abut water, so that the boundary is natural, particular rules have been developed
  - Where one of the boundaries is water
  - Port Phillip Bay
  - Yarra River
    - Problem: the boundary between land and water notoriously shifts over time
    - Rules are needed to determine where the boundary line should be set when natural boundaries shift over time

TIDAL WATER BOUNDARIES

- Boundary line for land for land abutting the seashore – to be the mean high water mark
  - if an express boundary is set out within the certificate of title, then the boundary will be as expressed
  - otherwise, the rule is that the boundary is the mean high water mark (A-G (UK) v Chambers (1854) 43 ER 486)
  - mean high water mark = the average over a year of the highest tide in each lunar month (spring tides) and the lowest tide in a lunar month (neaps)
- the foreshore = the land between the mean high water mark and the actual water: this belongs to the Crown
- This common law method of determining the boundary between private land and sea can be modified by legislation
  - Mean high water mark is assessed by averaging out the annual tidal level reached by the spring and the neaps
  - Inter-tidal waters are subject to public and international rights to fish and navigate
  - Not possible for native title right to abrogate a public/international right of fishing or navigation
  - Where Native title right is inconsistent with such rights, it becomes a non-recognition right and cannot be legally enforced despite the fact that it may remain a customary right which is exercised by indigenous communities
  - Native Title Act now defines foreshore ‘land’ as being ‘waters’ not land

NON-TIDAL WATER BOUNDARIES

- Where a body of water is non-tidal in nature, determined according to assessment of the ebb and flow motion of the water, different boundary principles apply
- Ad medium flum acquae rule sets out that a non-tidal river running through the centre of adjoining land, is presumed to be divided down the centre by adjoining landowners: Micklethwaite v Newlay Bridge Co (1896) 33 Ch D 133 (CA)
- In VIC, rule has been abrogated so that the riverbed (albeus) bounding adjacent land is deemed to remain with the Crown although an owner entitled to take water may exercise a right of access to that water over the Crown land: Water Act 1989 (VIC) s 7(1).
- Land Act 1958 s 385 – bed and bank of river forming the boundary of any land remains vested in the Crown

WATER RIGHTS

- Right of adjoining landowners to access water from a lake or river is regulated by statute/Crown (because the bed and banks are vested in the Crown)
- This abrogated the common law riparian rights: the right of an adjoining landowner to take water from the river or lake adjoining its land ICM Agriculture v Commonwealth (2009) 240 CLR 140
- Statutory regulation of water rights was effected to vest ownership and control of all private water entitlements in the Crown with the aim of fostering greater public accessibility
- By vesting all rights to take and use water in the Crown, the greater public good is promoted
- Water Act 1989 (Vic) s 15: sets out that the unauthorised taking of water constitutes a civil liability (need specific licences) (p 142-3)
- Water is a national issue

DOCTRINE OF ACCRETION AND AVULSION

- Possible for landowner to acquire land through a gradual imperceptible and natural process of alluvion or dereliction by the sea
- Under the doctrine of accretion, land which is acquired by either the natural deposit of ‘ooze, soil, sand and matter’ cast up by the tides and the ebb and flow of waves against the shore over a long period of time will pass to the landowner rather than the Crown and the legal boundary held by the landowner will be altered: Gifford v Lord Yarborough (1828) 5 Bing 163 [171]
- A purchaser must therefore inspect a property carefully before buying it to determine whether there is any discrepancy between title and occupation, and if so, whether it has continued for a period of 15 years

### ERROR IN TITLE

- If the certificate of title incorrectly describes the boundaries of the land, the registered proprietor of the land cannot claim it.
- However, a purchaser for value will be protected from claims by the person who loses as a result of the wrong description.
- Where the cause of error is a surveying error (rather than a wrong description), the registered proprietor of the land included in the certificate of title (whether as a result of the error or not) will acquire an indefeasible title to it (but only in the absence of fraud).
- Equity will come to notice if you are a bonafide purchaser for value without notice – someone who has brought something that there was a problem there, equity protection.
- Where land is incorrectly described in the title and is subsequently conveyed to a 3P the effect of the conveyance will depend upon the character of the land and the stage of the conveyance that has been reached.
- An error in old title of land of which neither the vendor nor the purchaser is aware will result in the purchaser acquiring a defective title.
- If vendor is aware of the error and fails to disclose it to the purchaser, the purchaser may be entitled to set aside the contract: Sale of Land Act 1962 (Vic) ss 30-32.
- Where the land is Torrens title land, the registered proprietor will not acquire an indefeasible title if there has been a wrong description of the land.
- If there is an error that has arisen as a result of an incorrect survey rather than a wrong description, the registered proprietor will in the absence of fraud acquire an indefeasible title.

### CONTRACTUAL ERRORS

- Where a boundary has been expressly or impliedly misdescribed in a contract of sale, the effect will depend upon whether or not the term was fundamental.
- If contract sets out that the vendor agrees to hand over all land as described, a failure to do so will usually amount to a fundamental breach entitling the purchaser to rescind.
- Where the vendor does not hold title over the transferred land, s/he may fail to make a good title to the whole of the land described in the contract: Svanosio v McNamara (1956) 96 CLR 186.
- If a contract of sale states that the vendor agrees to sell all the land as described in the contract, then a failure to do so will usually amount to a fundamental breach of the contract – so purchaser can rescind.
- What is included in the sale depends on how the property being sold is described in the contract. In Svanosio v McNamara (1956) 96 CLR 186, the High Court considered the sale of land in Bendigo described by measurements in the contract “together with the Bull’s Head Hotel erected thereon”. The Court noted at 205-207 that a purchaser who purchases land which is represented to have a building erected thereon expects to obtain a complete building and not a building partly erected on land to which the vendor cannot make title.

### FENCE BOUNDARIES

- Usually a fence is constructed on the boundary between two properties.
- Where it is not and one owner requires the fence to be put back onto the correct title line and the other requires it to stay where it is, the dispute is determined by reference to principles of adverse possession:
  - the fence stays in its present location if it (or an earlier version of it) has been on that location for more than 15 years.
  - otherwise, the fence must be moved back onto the title boundary.
- Note the Fences Act 1968 (as amended in 2014)
  - If there is a dispute about whether a fence should be built, what quality the fence should be and/or where it should be located, the dispute is dealt with by the Magistrates Court.
  - The Court has express power to determine an adverse possession claim, if it arises in the course of a fencing dispute.
- Important when purchasing land to make sure that the physical boundaries correspond with the legal boundaries set out on the title documents.
- Where a fence does sit on the boundary, it is usual for each adjoining landowner to keep the fence in reasonable condition.
- At common law there is no duty upon owners to build or maintain boundary fencing for adjoining properties: Churchill v Evans (1809) 1 Taunt 523.
- Adjoining landowners are liable to construct or jointly contribute to the construction of a fence which is sufficient for the purposes of both occupiers: Fences Act 1984 (Vic) s 4.
- In the absence of an agreement between adjoining landowners, a court may determine liability.
- Where contribution is sought for the construction or repair of a boundary fence, a notice in writing must be served on the neighbour setting out the relevant area and type of fencing.

### ENROACEMENTS ON TO LAND

- In circumstances where a building encroaches upon land belonging to another, that building will vest in the land belonging to the other in accordance with the doctrine of fixtures with no compensation being available.
- Buildings on one parcel of land may encroach onto adjoining land.
- The building will vest in the landowner on whose land the encroaching part is located (by virtue of the doctrine of fixtures).
- Moreover, the adjoining owner may apply for various forms of relief if aggrieved by the encroachment:
  - an order for removal
  - compensation
  - a land transfer
  - a lease

(Burton v Winters [1993] 3 All ER 847)

- Further, where the adjoining landowner is dissatisfied with the situation, they may apply for a range of different forms of relief including: removal, compensation, a land transfer or a lease: Burton v Winters [1993] 2 All ER 847

- HOWEVER, if the adjoining landowner encouraged the construction, proprietary estoppel or acquiescence may be raised to prevent the adjoining landowner from asserting full ownership in the building: Dillwyn v Llewellyn (1862) 4 De GF & J 517

- An action for trespass may be brought if it can be established that a structure or object existing upon one piece of land encroaches upon the adjoining piece of land to the extent that it impedes or obstructs the proprietary rights of the adjoining landowner: Kelsen v Imperial Tobacco Co (Great Britain and Ireland) [1957] 2 QB 334

- An action of nuisance may also be established where encroachment amounts to continuous unlawful interference with the use or enjoyment of adjoining land: Munro v Southern Dairies Ltd [1955] VLR 332

- Possible for an encroachment to occur where the airspace of landowner has been interfered with: encroachment may occur via any spatial interference

- When structural encroachment interferes with the airspace of an adjoining property, the encroachment will usually constitute a trespass entitling the owner to seek compensation.

- Items such as cranes, advertising signs or even an encroaching treehouse may constitute a trespass.

- S Grattan, 'Judicial Reasoning and the Adjudication of Airspace Trespass’ – Bendal Pty Ltd v Mirvac Projects Pty Ltd (1991) 23 NSWLR 464 and Meriton Apartments Pty Ltd v Baulderstone Pty Ltd (unreported) → the offending structures appear to have encroached on airspace above the buildings on P’s land
  - Because the trespass was a continuing one, P was entitled to an injunction prohibiting D from further infringing upon P’s airspace and requiring the removal of any encroaching structure still in place
  - Courts in these cases have not labeled P’s conduct as selfish or unreasonable
  - Shows that the law protects what seems to be the selfish interest of the landowner whose airspace is violated at the expense of the interests of the encroaching landowner, and possibly also at the expense of the public interest.

**PROPRIETARY ESTOPPEL**

Note: however that where an adjoining landowner encouraged its neighbour to build the improvement partly on adjoining land, proprietary estoppel or acquiescence may prevent the adjoining landowner from asserting full ownership in the encroaching part of the building: Dillwyn v Llewellyn (1862) 45 ER 1285

**ACTION IN TRESPASS**

- The adjoining owner may bring an action in trespass if the extent of the encroachment is such that it impedes or obstructs the proprietary rights of the adjoining landowner: Kelson v Imperial Tobacco Co[1957] 2 QB 334
- This includes invasion of airspace above the land
- Alternatively an action in nuisance is available if the encroachment amounts to continuous unlawful interference with the use or enjoyment of adjoining land (Munro v Southern Dairies Ltd [1955] VLR 332)

**ADVERSE POSSESSION**

Note*: To establish adverse possession it is necessary to discuss the following questions:

| (i) | Was the adverse possessor (AP) in possession? |
| (ii) | Was the AP in possession of the land for the requisite limitation period? |

WAS AP IN POSSESSION?: First, did the AP have factual possession? If so, Did the AP have an intention to possess?

Factual possession – it is necessary to discuss four points

| (i) | Was the AP’s possession exclusive? |
| (ii) | Was the AP’s possession adverse? |
| (iii) | Was the AP’s possession open? |
| (iv) | Did the AP exercise physical control? |

Intention to possess – it is necessary to discuss two points:

| (i) | Was there a clear and affirmative intention to possess? |
| (ii) | Is it necessary to exclude just the title holder or all of the world? |

WAS AP IN POSSESSION OF THE LAND FOR THE REQUISITE LIMITATION PERIOD?

State the relevant statutory provisions

- When does the relevant statutory limitation period commence?
- What is the period of time stipulated?
- What is the availability for an extension?

On your facts