

PROPERTY LAW
SUMMARY
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HOW DOES THE LAW DEFINE PROPERTY?

The law conceptualises property as rights to things, as legal relationships between people with respect to objects.¹

“Property is that sole and despotic dominion which one [person] claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe”.²

Section 22(1)(c) of the Acts Interpretation Act 1901 (Cth) defines ‘land’ to include *‘messuages tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein’*.

WHAT CAN BE CONSIDERED PROPERTY?

The objects of property do not include:

- Slavery
- Airspace – contentious area due to the issues of aviation and satellites
- “Things owned by common”. Things not governed by property rules such as public software.

Property has been defined to mean “objects of ownership”. The law classifies objects of ownership into real property or realty (such as land and those things affixed to land and tenements) and personal property (such as goods and chattels).³

The maxim *cuius est solum est usque ad coelum et ad inferos* means they who own the land own everything reaching up to the very heavens and down to the depths of the earth.⁴ However, this concept has been dismissed by the courts.⁵

¹ Felix Cohen ‘Dialogue on Private Property’ (1954) *Rutgers LR* 357.

² Blackstone, *Commentaries on the Law of England*, Dawsons, London, 1966, vol II.

³ See: Vermeesch and Lindgren, *Business Law of Australia*, 10th ed, Butterworths, Australia, 2001.

⁴ See: Tan, Webb, Wright, *Land Law Butterworths Tutorial Series*, 2nd ed, LexisNexis Butterworths, Australia, 2002.

⁵ *Lord Bernstein v Skyview & General Ltd* [1978] 1 QB 479.

The issue of airspace

Bernstein v Skyways:⁶

ISSUE: Whether the owner of an estate has an action against a company flying over the land without permission in order to take photographs of the estate to offer for sale.

GRIFFITHS J: The right of the owner is restricted to the airspace above his land to such height as is needed for the ordinary use and enjoyment of his land and the structures on it.⁷

In summary, subject to zoning laws, the owner of land may use their airspace to build to any height and for any purpose.⁸

Recent inclusions within the definition of property

- Company shares
- Intellectual property – copyright, trademarks, patents etc.
- Medical science – contentious area. Note the position of the common law is that the human body and its parts are not property. For example, *Moore v Regents of the University of California*: there are no property rights in human tissue.⁹

THE RIGHTS OF PROPERTY

J Blackburn in *Milirrpum v Nabalco*,¹⁰ held that the rights include:

- Right to use and enjoy
- Right to exclude others from use and enjoyment
- Right to alienate (transfer ownership etc).

Note:

- It is not necessary that all these rights co-exist before there is a proprietary interest (and all these rights are subject to qualification).

Difference between personal rights and real (proprietary) rights

King v David Allen:¹¹

⁶ *Baron Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479.

⁷ *Ibid.* 488.

⁸ *Victoria Park Racing Co v Taylor* (1937) 58 CLR 479.

⁹ (1990) 793 P 2d 479.

¹⁰ *Milirrpum v Nabalco Pty Ltd and Commonwealth* [1971] ALR 65.

FACTS: David Allen had a contract with King giving them permission to affix posters to the wall of King's theatre. Theatre's ownership was then transferred to a company. Can David Allen enforce the contract against the company?

ISSUE: The difference between personal and real rights. Personal rights can only be enforced against parties to the contract. In contrast, real (proprietary) rights have a greater scope of enforceability and can be enforced against the world.

HELD: David Allen only had a personal right, which could not be enforced against the company.

THE DISTINCTION BETWEEN PERSONAL AND REAL PROPERTY

The difference between personal and real property stems from the different remedies available at common law.¹² If a person was entitled to a real remedy (could recover the object as of right) it was classified as real property.

Personal versus real remedy

- Personal remedies: money, financial compensation.
- Real remedy: enables plaintiff to protect the thing. Available against the world. Includes: possession, injunction, specific performance, and eviction.

Real property

Historically limited to land. Encompasses two categories:

- Corporeal hereditaments: tangible real property (land)
- Incorporeal hereditaments: intangible real property such as easements.

Personal property

Two categories:

- Chattels real: covers leasehold interests
- Pure personalty (chattels personal): includes movable objects such as furniture, and intangibles such as trademarks, copyrights, and shares in companies.¹³

¹¹ *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54.

¹² MA Neave, CJ Rossiter, MA Stone. *Sackville and Neave Property Law* (1999) 6th Ed Butterworths Sydney.

¹³ As at note 12.

DOCTRINE OF FIXTURES

Land includes things which are fixed to the land.

The distinction between personal and real property has its most practical significance in the doctrine of fixtures.¹⁴ A chattel (personal property) can be affixed to the land, and once affixed, will become part of the land (real property).¹⁵ This will bring about a change in ownership – the chattel is now the property of the landowner instead of the chattel owner.

In general, the principle governing fixture is- *quicquid plantatur solo, solo cedit* (whatever is attached to the soil becomes part of the soil).¹⁶

The leading case of *Holland v Hodgson*¹⁷ provides that two tests are necessary to determine whether a chattel had been annexed to the land:

- The degree of annexation of the chattel; and
- The object, or purpose, of annexation.¹⁸

Issues may arise between:

- Vendor and purchaser of land. Does the land purchase include aboveground pool? TV antenna? Can the vendor take these away?
- Mortgagors and mortgagees. If the mortgagor defaults on mortgage, mortgagee can sell mortgagor's land and anything affixed to the land.
- Landlords and tenants. Special rules exist about tenants putting up fixtures.
- Tax and stamp duty law – these are linked to the value of the property.

The question whether a chattel has become a fixture is a question of law: ***Reynolds v Ashby & Son* [1904] AC 461 (HL)**.

¹⁴ As at note 12.

¹⁵ As at note 12.

¹⁶ Gray and Edgeworth, *Property Law in New South Wales*, LexisNexis Butterworths, Australia, 2003.

¹⁷ (1872) LR 7 CP 328.

¹⁸ Gray and Edgeworth, *Property Law in New South Wales*, LexisNexis Butterworths, Australia, 2003.

Determining whether an object is a fixture involves two steps:

1. Determining the degree of annexation. This step involves considering how the object is connected to the land.
2. Determining the purpose of annexation. The court considers whether the object was fixed with the intention that it remain there permanently (fixture), or temporarily (chattel).

The degree of annexation

Establishing the degree of annexation involves starting with two rebuttable presumptions derived from *Holland v Hodgson*¹⁹:

1. If the object is in any way affixed to the land, then it is presumed to be a fixture. Even slight fixing to the land is enough to raise the presumption that a chattel is a fixture. The burden of proof lies on the party arguing that the object is a chattel.
2. An object resting on its own weight is presumed to be a chattel. The burden of proof is on the party claiming it is a fixture.

These presumptions can be rebutted through evidence of intention of the annexation. This is done in step 2 – purpose of annexation.



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¹⁹ (1872) LR 7 CP 328.