

PROPERTY, EQUITY AND TRUSTS - EXAM NOTES
SEMESTER 1, 2019

Exam Format

Need to Know	Not Expressly Tested
Concept of property Express Trusts Complete Constitution of Express Trusts Resulting Trusts (automatic and presumed) Constructive Trusts (unconscionable retention of legal interest) Trustee duties	Possessory title Nemo dat + exceptions Co-ownership An introduction to equity The Trust compared to other legal relationships

Q1 (30%) – short answer question

Q2 (70%) – problem question

*CONCEPT OF PROPERTY

Yanner v Eaton

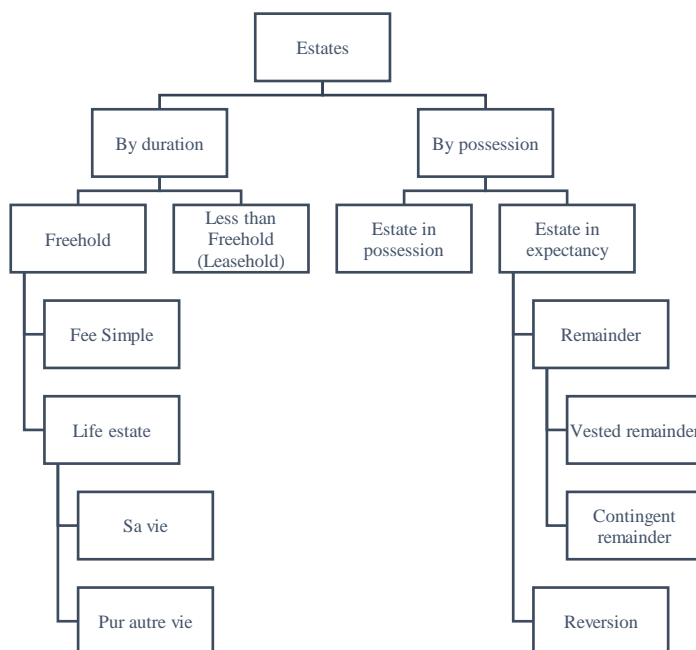
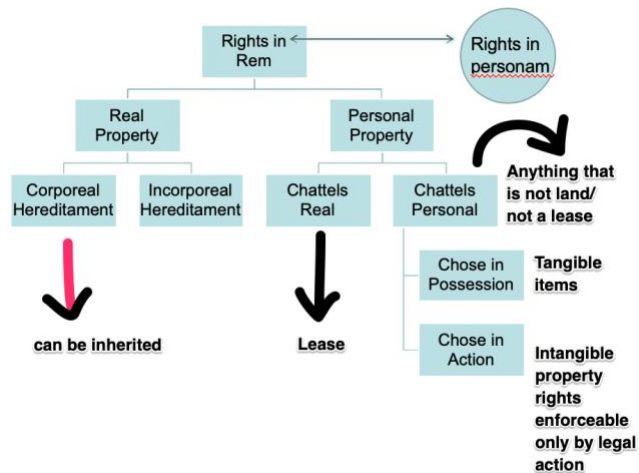
- “Property” does not refer to a thing; it is a description of a legal relationship
- It refers to a degree of power that is recognised in law as power permissibly exercised over a thing
- The concept of property may be elusive
- Usually treated as a ‘bundle of rights’

Bundle of Rights

- Possession;
- Use and modification, including destruction; and
- Alienability – sell, give away, exclude
- Exclude
 - ‘a resource can be “propertised” only if it is “excludable”. A resource is “excludable” only if it is feasible for a legal person to exercise regulatory control over the access of strangers...’ (Kevin Gray, ‘Property in Thin Air’ [1991])
 - ‘Physical non-excludability arises where it is not possible or reasonably practicable to exclude strangers from access to the benefits or a particular resource in its existing form....’

Types of Property

	Definition	Examples
Personal property	All forms of property other than real property (land). Two categories: chattel real and chattel personal	
Real property		Land and buildings; interest in land and buildings
Chattel real	Personal property that relates to/exhibits characteristics of real property	Lease of a dance studio;
Chattel personal	Tangible property / intangible right belonging to a person	
Chose in possession	Physical possession of tangible personal property; able to be transferred by delivery.	A share certificate issued by BHP
Chose in action	Rights of intangible personal property that is incapable of physical possession and can only be claimed by legal/equitable action.	An idea for a new reality TV show; a share in BHP; an ANZ bank account
Corporeal hereditament	A corporeal hereditament is a permanent tangible object that can be seen and handled and is confined to the land.	Materials, such as coal, timber, stone, or a house; \$500,000 beach shack; a heritage listed property in North Adl;
Incorporeal hereditament	Property that lacks physical presence constituted by a right enforceable by court. Intangible property in existence outside of land and goods.	
Rights in rem	Rights to a thing which are enforceable against the ‘entire world’ in contrast to in ‘personam’ – enforceable against the person who shares the agreement. A right in property against everyone; ‘multital right’	



Categories of Estate

- Freehold – no more mortgage, own it forever
- Fee simple – highest way to own a land
- Life estate – duration is determined by a person's life
- Sa vie – his/her own life
- Pur autre vie – somebody else's lifetime

Property as Power

- "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."
- External – external to body parts

Ainsworth Test

- "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"
 - Must be definable and identifiable by third parties and have a degree of permanence

Justifications for private property (Q1 of Exam)

- The **occupation** theory
 - Occupancy/possession as ownership
 - Res nullius
 - "possession is 9/10ths of the law"
- The **labour** theory
 - Every person owns him/herself;

- Nobody has the right to another's person/body;
- Labour belongs to the person;
- If you remove a thing from the 'commons' and mix your labour with it, it becomes part of yourself;
- Therefore, you own it ...provided
 - You leave as much as good for others;
 - You are not entitled to take so much that it goes to waste.
- The **personality/human flourishing** theory
 - 'The concepts of liberty and property cannot be separated, as existing theory has attempted to do, without stripping the individual of essential protection. Without a secure and supportive habitat for the individual – a protected personal space – there can be no liberty.'
 - Charles Reich
- The **economic** theory
 - Property is necessary for the greatest good for the greatest amount of people
 - Jeremy Bentham

POSSESSORY TITLE

Possession

Button v Cooper

- A relationship between a person and some material object
- A relation subsisting in fact

Four Ways to Acquire Possession

1. Take possession of something that has never been possessed before;
 2. Receive possession from someone with ownership or possession;
 3. Take possession of something that has been lost/hidden;
 4. Take something without consent; (an attempt alone is not enough (*Young v Hitchens*))
- Ownership and possession are not the same thing
 - Actual Possession v Right to Possession
 - Corresponds with duties in other people
 - Right to possess without interference
 - If there is interference, it could be a tort offence

Breach of Duty not to Interfere with property rights (3 torts)

- Tort of Trespass
 - Direct interference with actual possession in goods or land
- Tort of Conversion (trover)
 - Complete repudiation of the plaintiff's right to possession as the result of the defendant's use of, dealing with, or destruction of the goods
- Tort of Detinue
 - Failure to return the plaintiff's goods on demand

Competition for Priority

- True owner
- Finder
- Subsequent possessor
- Occupier/owners of land/chattels (containing the object in question)
- Finder's employer
- The State

Questions to Consider

1. What is it?
2. Who's got it?
3. Who wants it?
4. Who gets it, and why?

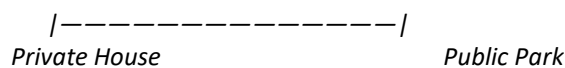
- Trespass, conversion and detinue are the legal causes of action that set the context for determining who gets it and why

Finder v True Owner

- Not a question about ownership but who has a better claim to possess
- Finder v subsequent possessor

Armory v Delamirie	<ul style="list-style-type: none"> • Mark a timeline with things that happened • Boy not true owner • Really about possession
Young v Hitchens	<ul style="list-style-type: none"> • Plaintiff set out fishing net in sea and partially enclosed it with partial gap • Defendant helped himself to the fish in net • Issue is whether plaintiff had property in the fish when they were taken by the defendant • What degree of control is required?
The Tubantia	<ul style="list-style-type: none"> • Alleged trespass on ship • Shipwreck - belongs to no one • First salvage party maintains effective control

Spectrum of Control



Bridges v Hawkesworth	<p>Facts: Travelling salesman (bridges) found parcel when leaving shop. Told Hawkesworth to keep it and return to original owner. Hawkesworth advertised for it. Hawkesworth ask for compensation for advertisement</p> <p>Held: Bridges held liable</p>	
Parker v British Airways Board	<p>Facts: A man finds a gold bracelet in an airport. Who has a better claim, him or the airport?</p> <p>Held: The occupier must attempt to exert control if they want to have the best claim. A person who dishonestly acquires a chattel will have little claim to it. The owner always has a better claim. A finder only has a right if it is lost or abandoned and s/he exerts control over it</p>	<p><u>Parker – Rights/Obligations of FINDER</u></p> <ol style="list-style-type: none"> 1. The finder acquires no rights unless chattel is: <ul style="list-style-type: none"> ○ Abandoned or lost ○ Finder takes it into care and control (i.e. <i>animus possidendi</i> – intention: <i>corpus possessionis</i> – physically picked up) 2. The finder acquires limited rights if the finding is in the context of trespass or dishonest 3. Finder acquires a right to keep the chattel (not absolute ownership) that is good against all except: <ul style="list-style-type: none"> ○ The true owner (or those who claim through true owner); or ○ A person who can assert a prior right to keep the chattel that was subsisting at the time the finder took it into care and control 4. An agent/employee finds for his/her principal/employer 5. A finder must take all reasonable measures to acquaint the true owner

		<p>of the finding, present chattel to him/her and care for it</p> <p><u>Parker – Rights/Obligations of OCCUPIER</u></p> <ol style="list-style-type: none"> 1. Occupier of land has rights superior to those of a finder of chattels <u>in or attached to land</u>, whether aware of the chattel or not <ul style="list-style-type: none"> ○ An occupier of a building has similar rights in respect of chattels <u>attached to the building</u> whether aware or not 2. Occupier of a building has rights superior to those of a finder re chattels <u>on or in</u> a building only if, before the chattel is found, the occupier has manifested an intention to exercise control over the building 3. An occupier who manifests an intention to exercise control must also take reasonable steps to acquaint the true owner of the finding etc 4. Manifestation of intent may be express or implied from the circumstances. 5. A ship, car, caravan etc = building for these purposes of being an 'occupier'
<p>National Crime Authority v Flack</p>	<p>Facts: Sole tenant of the housing trust. Son stayed with her sometimes. Search warrant obtained for son. Police found a load of money in a bag. Mom denied knowledge. Police seized the bag. Mom asked police to hand back her property/money</p> <p>Held:“...readily accept that the occupier of a private home will ordinarily manifest the necessary intention to control chattels therein...” (Heerey J)“...it is reasonable that Mrs F, who clearly manifested shock and horror when confronted with the presence in her home of these goods, and who quite clearly would not have countenanced their presence had she known of them, but nevertheless entitled or obliged, by the presumption relied upon, to assume possession of them? This would be to impose upon her possession of unwanted goods...” (Foster J, dissenting)</p>	