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

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.

The issue of airspace

*Bernstein v Skyways:*²

**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.³

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.⁴

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² *Baron Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479.
³ *ibid.* 488.
⁴ (1990) 793 P 2d 479.

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THE RIGHTS OF PROPERTY

J Blackburn in *Milirrpum v Nabalco*,⁵ 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
- All these rights are subject to qualification.

Difference between personal rights and real (proprietary) rights

*King v David Allen*:⁶

**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.⁷ If a person was entitled to a real remedy (could recover the object as of right) it was classified as real property.

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⁵ *Milirrpum v Nabalco Pty Ltd and Commonwealth* [1971] ALR 65.
⁶ *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54.

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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.\(^8\)

DOCTRINE OF FIXTURES

The distinction between personal and real property has its most practical significance in the doctrine of fixtures.\(^9\) A chattel (personal property) can be affixed to the land, and once affixed, will become part of the land (real property).\(^10\) This will bring about a change in ownership – the chattel is now the property of the landowner instead of the chattel owner.

Issues may arise between:

- Vendor and purchaser of land. Does the land purchase include aboveground pool? TV antenna? Can the vendor take these away?

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• 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).

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*[^11]:
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.

**Ease of removal**

*Australian Provincial Assurance Co Ltd v Coroneo:* One also needs to look at the effect of removing the chattel. If the realty would be damaged when the object is removed, this is strongly indicative that it is a fixture. BUT, as Jordan CJ emphasised, each case depends on its own facts.

[^11]: (1872) LR 7 CP 328.

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[108x709]PROPERTY LAW

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Purpose of annexation

Intention showing that the object was meant to remain in position permanently or for an indefinite or substantial period is a fixture: *Holland v Hodgson*. If it was fixed for a temporary purpose, then it is a chattel: *Australian Provincial Assurance Co Ltd v Coroneo*.12

For example, blocks of stone placed on top of each other without mortar to form a stone wall would become part of the land, but the same stones, if in a builder’s yard and stacked as a wall for convenience sake, would remain chattel: *Holland v Hodgson*.

The intention of the person affixing the object must be gathered from the purpose for which, and the time during which the user contemplates fixing the object: *Hobson v Gorringe*.13

**The chattel owner’s interest in the realty**

*Leigh v Taylor*:14

**FACTS:** The tenant for life15 of a large mansion owned large tapestries that he wished to hang. He used strips of wood nailed to the wall with canvas stretched on it. The tapestries were put on these frames with tacks.16

**ISSUE:** After the life tenant’s death, the executors and the remainderman17 both made claims on the tapestries. Were the tapestries fixtures or chattel?

**HELD:** The tapestries were easily removable without damaging the house structure, and the court presumed that it was very unlikely the life tenant wished to pass the tapestries on to the life tenant. The tapestries were held to be chattel. If the chattel owner’s right to the realty is temporary, more persuasive that the object is a chattel.

12 (1938) 38 SR (NSW) 700.
13 [1897] 1 Ch 182.
15 Life tenants do not need to pay rent, and they may live on the property until their death.
17 Person succeeding to the mansion upon the life tenant’s death.
**Intention – objective or subjective?**

*Permanent Trustee Australia Ltd v Esanda Corporation Ltd.*\(^{18}\)

The intention of the person attaching the object is to be viewed objectively. This intention is to be derived from all the facts including any evidence of ACTUAL intention, though this is not decisive. Thus, the court will look objectively at intention, but will take into account subjective intention as evidence.

**Contractual terms about fixtures**

*Hobson v Gorringe:*

FACTS: King bought an engine from Hobson under a hired purchase agreement. King was to pay regular instalments but the engine remains the property of Hobson until totally payed for. King also owed a mortgage over the sawmill to Gorringe. King later went bankrupt.

ISSUE: Hobson wants engine back, but Gorringe contents it is a fixture of the sawmill.

3\(^{RD}\) PARTY PROBLEM – Gorringe was not a party to the hired purchase agreement stating that the engine was Hobson’s until fully paid for.

HELD: the engine had become a fixture. The private agreement was irrelevant to third parties.

**Factors derived from the various cases**

In determining whether an object is a chattel or fixture the following factors need to be taken into account:

- Extent of physical attachment
- Nature of the chattel and its relationship to the realty
- Whether the attachment contemplated is relatively permanent or merely temporary
- Ease of removal
- Nature of the interest in the realty (if any) held by the chattel owner
- Purpose served by attaching the chattel to the realty
- Subjective intention
- Any relevant legal documents.

\(^{18}\) (1991) 6 BPR 13,420.

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In addition, you must have regard to all circumstances including the ‘taste and fashion of the day’ (*Leigh v Taylor*).

**Example case:**

*Belgrave Nominees Pty Ltd v Barlin-Scott Airconditioning (Aust) Pty Ltd*<sup>19</sup>

**FACTS:** The plaintiffs (who were building owners) entered a contract with X to renovate their buildings. X then subcontracted the installation of air conditioning systems to the defendant. X went into liquidation and did not finish paying the defendant for the air conditioning systems. The defendant removed the air conditioners, and the plaintiff sought a mandatory injunction to compel the defendants to return the air conditioning systems.<sup>20</sup>

**ISSUE:** The plaintiff’s claim for relief is based on the premise that each air conditioning plant was a fixture.

**HELD:** Kaye J discussed the principles of law in this area expressed in earlier cases. A system of pipes from the air conditioners ran through building, thus triggering the presumption that the air conditioners were fixtures. Kaye J then looked at the purpose of installing the air conditioners, he stated that they were not objects of interest in their own right. The plants were an essential part of an office building and were not meant to be removed. Thus the air conditioning plants were fixtures.

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<sup>19</sup> [1984] VR 947 (Supreme Court of Victoria).