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INTRODUCTION

I hereby present to you, with a gladsome mind, my most comprehensive notes on Property Law for your forthcoming NCA exams. The note is fully updated to the current NCA syllabus, and shall be continually updated from time to time, especially whenever NCA updates its syllabus. Most especially, I ensured that I followed the NCA syllabus to the letter in preparing these notes, in which case I was able to cover ALL (and I mean, ALL) the topics and sub-topics in the syllabus. I also ensured that ALL the cases listed in the syllabus are dealt with – summarised in a form that will make you understand the facts, issues and ratios.

In my usual manner, I have prepared this note, employing the basic language that would make the topics easy to read and understand. And as I have always recommended, students ought to read the NCA syllabus as part of their preparation for the exams, because it is meant to guide you and direct your attention to those specific areas where you will need to demonstrate the needed competence.

Therefore, to assist students while preparing for this course (and as it's customary with all my notes), I have reproduced verbatim, at the beginning of each Chapter, the contents of the NCA current syllabus on Property. (The contents of the syllabus are all indicated in red font colour and italicised). So, as you read the note, you will do so in the assurance that you are equally reading the syllabus. In addition, your mind will be at rest that you have covered all the required topics as contained in the syllabus.

In compiling this note, I have made a most comprehensive use of the required text, *Principles of Property Law, 7th Edition by Bruce Ziff*. I have made copious and extensive references to, and cited plenty of the contents of this text. I equally utilised the second required text, *A Property Law Reader: Cases, Questions, and Commentaries (4th edition) by B. Ziff, et al.* In addition, I also made good use of the textbook, *Anger and Honsberger Real Property*, one of the other reference materials cited in the syllabus. I discovered that this text was cited by the Supreme Court of Canada in some cases, which confirms its use as a good source of information. Lastly, I made use of over 130 other materials too numerous to list here, both local and foreign. All these works are recognized for their contributions to the development of property law, hence their usefulness in broadening your understanding of the topics.

In all, I wish you all the luck you would need in your NCA property exams.

Manuel Akinshola

Chapter 1

PROPERTY - HISTORY AND CATEGORIES

- ✓ *This topic deals with two fundamental matters -- the origins of the Canadian law of real property, and the main bases for categorizing property interests.*
- ✓ *With regard to the latter, pay closest attention to the divisions within the law of real property. But notice also the curious way in which leases are classified -- as chattels real, a hybrid category. As you will see, there are different ways in which one might establish a taxonomy of property rights.*
- ✓ *At the completion of this topic, you should be able to*
    - *a) understand and explain the historic development of Canadian property law, and*
    - *b) place property entitlements within the categories of property.*

General introduction

By definition, property is sometimes referred to as a bundle of rights, and this signifies that property does not refer to the thing, but rather to a right, or a collection of rights over a thing which right is enforceable against others; or as a legal positivist would put it, an entitlement recognised by law. It signifies a set of relationships among people concerning claims to tangible and intangible items.

Regarding property as a bundle of rights suggests that property is a collection of incidents. For example, Professor Honore, while treating ownership, identified eleven elements that provided the most ample conception of property within a mature legal system, thus:

> Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the duty to prevent harm, liability to execution, and the incident of residuarity,

In this Honore bundle, it will be seen that it contains a wide range of entitlements, duties and obligations. These include claims against others, powers of disposal, entitlements to privileges or liberties, entitlement to some immunities (including exemptions from certain acts of expropriation), duty to prevent harm, and liability of the property to seizure (or execution). But it has been said that

this list does not identify an irreducible core, because it describes property in its most robust sense, not its essential minimum element.

Some other scholars have expressed the opinion that the right of exclusion is at the centre of property, and they have described property as state-enforced right of exclusion over things, which is good generally against the world (*in rem*). For example, Felix Cohen concluded that the term private property describes a relationship among people and this relationship allows an owner to exclude or include others from certain activities, with the law backing up the decision either way. But here, the right of exclusion goes beyond the right of physical expulsion. It is the right of exclusivity, with the owner holding a monopoly over the rights of use, transfer, income, etc. The owner makes the decision which others must respect. Here, property law is viewed not as a wall, but a gate which the owner can open and shut at his preference. But this view has been criticised as being merely descriptive, not prescriptive, as private property may at times be shared between two or more individuals as joint tenants or as tenants in common.

Public And Common Property

The main distinguishing features of a public property are that:

- the state possesses the power of exclusion
- rights of enjoyment may not be fully equivalent to those held by private owners
- some legal rules pertain only to public properties, e.g., the Canadian Charter of Human Rights and Freedoms which applies only to state action.
- while private property owners may act in self-seeking ways in exercising their rights, property owned by the state are constrained by unique public obligations which must be carried out in the public interest.

Common property refers to those interests for which there is a shared right of use conferred on all. Here, there is no element of exclusivity. Note though that not all common property has full open-access. Some properties may fall under communal or collective ownership or holdings and still deny open access.

A common mistake is to regard properties like public parks and roads as common property, since we all have access. However, title to these properties is typically placed in public authorities, which means they are technically under public ownership.

1. The Sources of Canadian Property Law

The foundation of Canadian property law contains the elements of an English feudal ancestry. Of course, while some of these structures still remain, most of the impacts of the feudal system have been eradicated by changes that have taken place in social organization. But under Canadian real property law, two main principles of feudal land law have survived, namely the doctrines of tenures and estates.

(a) Feudal Structures And The Doctrines Of Tenures And Estates

The English feudal system consists of several different forms of land tenure, with each of them being a contract that has differing rights and duties attached thereto. Here, the tenures could be either free-hold (which means that they were hereditable or perpetual), or non-free (where the tenancy terminated on the tenant's death or at an earlier specified period. Let's now examine some elements of the English feudal system below.

i) Origin and rationale – after William the Conqueror conquered England and declared himself as the sole allodial owner of all the realm, land tenure then changed drastically. Under William, the common exchange and sale of land became restricted and all landholders were made to provide a service to their lord (no land without a lord). This means that land was held of a lord, not owned outright by a subject, and the recipients do not obtain absolute ownership of land.

   The rationale behind this tenurial arrangement was to create an economic and social network in which land devolved from the Crown in return for allegiance, revenue or other benefits.

   Traditionally, the first grant of land was from the Crown to the tenants in chief who were able to exercise rights of ownership to a large extent. The form of this grant involved oaths of loyalty sworn by the tenant, and an undertaking of security of tenure given to him by the lord. If the tenant met certain requirements, he was able to pass the land to a purchaser or donee who would then assume the very position occupied by the original tenant. This is sometimes called a substitution, which reflects the conventional sale of residential property today.

   The original grant to the tenant holding property directly from the Crown is under a military tenure, under which he was obliged to provide military aid such as knight service to the Crown for a specified number of days in a year.

Another feature of the tenure is what is known as *subinfeudation*. This is the practice whereby tenants who held land under the king or other superior lord (tenant in *capite*), would carve out new and distinct tenures in their turn by subletting or alienating a part of their lands. The result here is to place the granting tenant in the role of lord to the grantee. The new tenant (a tenant in *demesne*) held the land of the immediate overlord who then assumes the role of being a lord (known as a mesne lord).

The tenant in demesne could also create a further tenurial relationship like this and there was no limit on the extent of which the original grant could be fragmented.

Out of these processes, a social and economic pyramid grew, with the Crown at the apex, then the tenants in *capite,* and then their various other subordinates below. So, each tenant held the property of an overlord and was compelled to provide tenurial services to the immediate lord.

ii) Forms, especially free and common socage – As noted above, the tenure originally granted could be free or non-free. There were many types of tenures, each designed to serve a particular purpose. These included religious-based tenures granted to ecclesiastical bodies in return for the provision of spirituality; grand serjeantry granted to tenants in *capite* in return for the provisions of personal services to the Crown, and petty serjeantry – granted to tenants in return for petty or ceremonial services to the monarch.

But the key type of tenure was the one known as "free and common socage". This is the grant in return for services of an honorable that are not of spiritual, military or servential nature. Especially, this grant was made to farmers in exchange for clearly-defined fixed payments made at specified intervals or other non-military service to their feudal lords. In return, the lord was obligated to provide certain services, such as protection to the farmer. Payments were usually in cash but occasionally could be made in kind or with goods.

From the different types of tenures that existed, only free and common socage came to Canada.

iii) Incidents of tenure – rendering services in return for tenures was not the only obligation/entitlement that attached to the grant of land. Other incidental elements of tenure existed which varied depending on the type of tenure involved. These other incidents of tenure included:

- homage and fealty – i.e., oaths of allegiance given by the tenant to the lord,

- aids – which is the right of the lord to demand financial contributions in certain circumstances
- fines - i.e., transfer taxes
- relief and primer seisin – i.e., death duties payable on the descent of land to an heir
- escheat and forfeiture – i.e., the power to recover the land when the tenurial term had expired or was forfeited
- wardship and marriage – which involved the control over lands held by a minor or by the marriage of the heir of the estate respectively
- customary dues – which are other local tax-like levies.

From all the above incidents of tenure, it is escheat that is important today as it enables the immediate lord to regain the land once the tenure is over and also allows the land to ascend back upwards as of right just the same way it devolved, subject to any enduring encumbrances. The implication of this is that if a landowner who is the immediate grantee dies without a will and leaving no next-of-kin recognised under the law, the land will escheat to the immediate lord, who, in Canada, is the Crown.

Please note that the doctrine of tenures only allocates land rights but it is the doctrine of estates that specifies the duration and time span of an interest in land and also defines the associated rights. But by the beginning of the 14th Century, the common law had recognized the following three types of freehold estates, viz.:

(1) **Fee simple** – this is the most common and largest land ownership and tenurial holding in Canada. It is the same as absolute ownership and most private land holdings in Canada are held in fee simple.

(2) **Fee tail** – this is a tenure that subsists as long as there were lineal descendants of the grantee. These will include children, their children, etc. who could inherit the land.

(3) **Life estate** – this is the tenure holding that continues only for the duration of a life or lives.

These freehold estates all share two common features: 1) the time period during which the given freehold estate will last is always uncertain. 2) Only the holder of a freehold estate can be seised of the land as seisin refers to the possession as a freeholder. This freeholder enjoyed

certain protections but is also the person of whom the lord may exact services and incidents of tenure.

Tenures and estates remain the basis of land law in the common law provinces and territories of Canada, though most of the accompanying feudal trappings have been dealt away with. But these developments notwithstanding, several of the incidents of tenure listed above remained and these gave rise to many conflicts as to the nature and extent of the entitlements. The Crown sought to impose feudal dues which the tenants sought to avoid. This became the subject of charged political debates and one of the grievances dealt with in the Magna Carta. But major reforms introduced during the reign of Henry VIII preserved the revenues generated by the incidents and these remain in Canadian law today.

iv) Truncation and decay of the feudal structure: *Quia Emptores, 1290* and the *Tenures Abolition Act, 1660* – However, as early as the mid-13th century, there was already discontent with the feudal system, particularly with subinfeudation. The proliferation of subinfeudation had seriously undermined the incidents of tenure and made it difficult to determine existing obligations, including the loss of escheats and right under marriage and wardship. As a result of this, the Statute *Quia Emptores Terratum of 1290* was promulgated which radicalized feudalism.

The *Quia Emptores* aimed at prohibiting further subinfeudation, though it did not abolish the existing ones. The expectation was that as escheats and forfeitures occurred, more and more land would revert to the Crown as the immediate lord to all tenants of freehold land. This purpose was hastened in England by the Black Death pandemic (a bubonic plague in Afro-Eurasia from 1346 – 1353 which killed between 75 – 200 million people) and which decimated the population. With this, almost all lands in the hands of tenants in England reverted to and have become held directly of the Crown.

The effect of the 1290 Statute was that a transfer of fee simple estate from A to B was no longer accompanied by the obligations of continuing tenurial services or incidents owed by B to A. Therefore, the transfer produced a substitution, instead of subinfeudation

In addition, the Statute also eradicated the practice whereby a tenant could not alienate land without the consent of the immediate lord. Transfers were now allowed without the need to seek consent. This measure reflects the first official policy of promoting free alienability (transferability), which today influences much of the law of property.

Note though that *Quia Emptores* is not binding on the Crown which still retained the power to grant new lands and re-convey properties that have been reclaimed through escheats. These powers have continued till date.

Similarly, although subinfeudalism may have been abolished, some grants which come close to it may still be allowed. For example, a private landowner may grant a long lease for 999 years and still retain the reversionary interest which allows him to regain possession once the lease expires. In the same vein, the owner of a fee simple estate (the largest conceivable estate interest), is allowed to carve a lesser interest from his portion, such as a life interest, at the end of which possession reverts to the fee simple owner.

The second statute, the Statute of Tenures of 1660 significantly reduced the enforcement and collection of incidents. The Statute provided that military tenures were abolished, converted all existing tenures held by knight service and serjeantry into socage, and removed some of the least popular incidents of tenure, mandating that all future grants must be in free and common socage. With this law, the forces of feudalism became effectively overtaken by that of capitalism.

(b) Reception of English Law

The incorporation of the principles of English property law as explained above, into Canadian law took place by means of the general laws of reception. Generally, the reception of colonial laws takes several methods and each is dictated by how the colony was acquired, as follows:

- **Conquest or cession** – where a colony is acquired by conquest or by cession from another colonial power, such a colony will retain its pre-existing laws until those laws are altered. This is exemplified by the Province of Quebec where the system of property law was cloned from the civil law of France, and radically different in substance and form from those of other Canadian provinces.
- **Settlement** – where the colony is regarded as settlement for reception purposes, the incoming European settlers were regarded as having brought with them the applicable English law into the settled colonies.

It has been said, though, that whether a land is characterised as by conquest/cession or by settlement overlook the fact that these lands were already occupied by Aboriginals before the arrival of the colonialists, and that these lands were appropriated from them. For this purpose, some jurisdictions have specified reception dates by statutes, such that only rules applicable as of the specified dates are regarded as received.

The uncertainties surrounding the application of received laws were typified by the case of **A.G. Alberta v. Huggard Assets Ltd (the Haggard Assets case) {1950}.** Here, Huggard Asset had derived interests in some oil fields vide a federal grant in 1913 which empowered the federal government to collect royalties from time to time. The Province of Alberta later acquired the federal government's interest in that grant and attempted to impose royalties on the company. The question raised at the Supreme Court of Canada (SCC) was whether the levying of royalties was in substance a kind of tenurial service, (which is uncertain) and therefore invalid. The second issue was whether or not the free and common socage formed part of the received laws of Alberta. The SCC held that the Statute of Tenures which abolished forms of tenure applied, that the grant of 1913 was in socage, and that the royalty was uncertain and therefore an invalid service.

At the Privy Council, it was held that the Charter of 1670, a subsequent legislation applied, and even though the royalties were uncertain under the principles governing socage, they were validly imposed.

Arising from the above, therefore, one can summarise as follows:

- That Canadian landholding in the common law jurisdictions is not allodial (i.e., independent of any superior landlord) but tenurial, since all land in private hands are held of the Crown in form of an estate.
- That within the common law, the tenure under which land is held is free and common socage. Unlike most other feudal land tenures then used in Britain (which though were perpetual and inheritable but not alienable), free and common socage was alienable and could be freely bought or sold as long as the new landholder continued to honor his obligations to the donor (Crown).
- That the services and incidents of socage are no longer of practical importance except for the incident of escheat which today exists in modified statutory forms.

- That the fee simple estate is the interest enjoyed in most privately held lands. This is an estate that is capable, indefinitely, of transfer inter vivos, or transfer by devolution on death; it is an estate whose duration is uncertain and indefinite, and could in theory last forever.
- That the modern law of property is, therefore, comprised of doctrines that were received and are still in force, together with some institutional reforms that have been introduced in each jurisdiction.

Doctrine of Marital Unity

At common law, the husband and wife, upon marriage were assumed to have the same personality. The effect of this in relation to property law is to deprive married women of many rights of property ownership. The doctrine thus gave the husband and his wife asymmetrical rights and obligations. The spouses shared control over the wife's right to transfer her real estate. here, all of the wife's property came under the husband's control absolutely, subject only to the wife's right to her personal paraphernalia.

To counter the effect of this doctrine, some rules were made, e.g., which placed the wife's properties in the hands of trustees who hold such for her benefit and could transfer it without the control or influence of the husband. But if the terms of the trust allow the wife to acquire legal title to any property from the trustees, then the property will become subject to the doctrine of marital unity. And to prevent such a trust arrangement from exploitation by a coercive husband, mechanisms were designed to limit the wife's right to acquire legal title from the trustees. These mechanisms, called *restraints on anticipation*, were inserted into trust documents for the protection of women and admitted by the courts as acceptable.

Please note that the doctrine of marital unity in relation to property began a gradual death in mid-19th century. Ultimately, legislation followed which conferred on married women the same rights to property and liabilities enjoyed by unmarried women. For instance, despite the initial resistance, the family law legislation in Ontario in 1978 expressly declared that the doctrine of marital unity was dead for all matters within the competence of the province

(c) Overlay of English Law on Pre-Existing Aboriginal Property Rights

Despite the radical reforms introduced by William I by investing all radical title in land in the king, it did not mean that the Crown obtained absolute beneficial ownership to the exclusion of the indigenous inhabitants who had existing interests before his conquest.

The same applies in Canada. In spite of European settlement and the reception of English law, the pre-existing property rights of Aboriginal communities are still recognised. The Aboriginals retain their property until same is legitimately taken by state action. As a matter of fact, current Canadian laws recognize that these land rights were in existence before colonial acquisition.

In the same light, Canadian courts have continued to define and refine these laws in recognition of ancient Aboriginal title. As the SCC indicated in the case of ***Delgamuukw v. BC (1997),*** these ancient rights are *sui generis*; they are in a class of their own kind. They enjoy a unique status which is different from the other categories, as we shall see in the next topic.

2. Basic Divisions in the Law of Property

(a) Real and Personal Property

The main categorization of property is that between real property (which essentially relates to land) and personal property (relating to other properties aside land).

The difference between the two, under common law, includes that a successful action in realty gave to the plaintiff an order for the return of the property (*res*) while in personalty or chattels, the plaintiff would only be entitled to compensation through an award of damages. (In modern day, the plaintiff may also be entitled to order of specific restitution). Lease of land fits in between the two types, with lease described as *chattel real* even to this day.

Another difference is in the method of devolution on the death of the property owner. Under common law, if she dies intestate, the land devolved directly to her lawful heir. But in relation to personalty, under early common law rules, a third of the personalty went to the widow, a third to the child(ren), and a third (known as the 'dead man's part') to religious offices or for distribution to the poor. A reform of the distribution formula in 1670 abolished the dead man's part and gave a third to the widow and two-third to the children. (Today, however, all properties, whether real or

personal, now devolve on the personal representative(s) of the deceased and are distributed in line with modern statutory formula).

(b) Other Categorizations

Real property may be further divided into two groups, namely:

i. Corporeal hereditaments – these refer to interest that can be possessed or physical matters over which ownership can be claimed. They refer to lands, buildings, minerals, trees and all other things which are part of or affixed to land.

ii. Incorporeal hereditaments – these are interests which are non-possessory in nature. They are intangible things which are not visible but are derived from real or personal property and are inheritable. Examples of these include rents, easements, *profits a prendre*.

When it comes to chattels personal, these may also be divided into two groups, as follows:

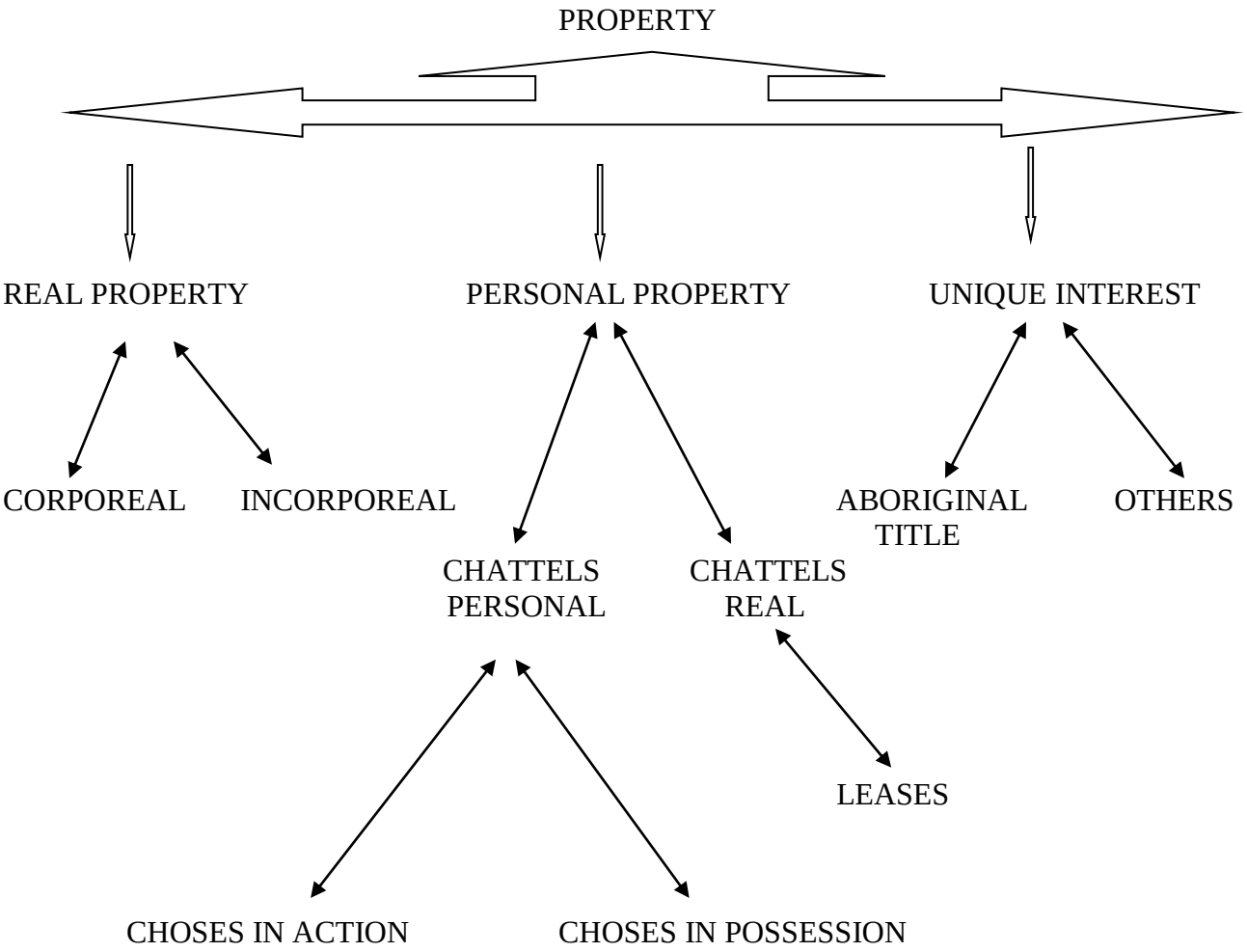
i. Choses in possession – these include anything tangible or physical that can be possessed. They include furniture, car, etc.

ii. Choses in action – these are abstract entities that cannot be possessed or handled physically. These are entities that are enforceable solely by a court action, hence the name *chose in action*. Initially, they applied only to debts but have now been expanded to include copyrights, trademarks, patents, bonds, corporate shares, and some other causes in action.

As a simple illustration of the above, you may regard the money in your hand as a chose in possession, while your money in the bank or a debt owed you may be regarded as a chose in action which you need an action to possess.

Note, though, that some choses in action may be represented by tangible or physical symbol, for example, money in bank covered by a cheque, or a share certificate, or I.O.U., or even a plastic card. Such physical attributes of these choses in action may lead to confusion as to whether they are choses in possession or choses in action. However, you must remember that it is the intangible holding which is the paramount entitlement here, not the document itself. But the destruction of their physical form (e.g., a share certificate) may give rise to an action in conversion; only that the measure of damages is determined by the value of the choses in action. These hybrid choses are sometimes called documentary intangibles.

See the diagram below on the classification of property interest.



According to A. P. Bell in *The Modern Law of Property in England and Ireland*, interest in property may be described in one of the following four ways, namely:

i. Beneficial rights – these confer the holder with the rights associated with ownership.

ii. Security rights – which ensures that some principal obligations are performed, e.g., a money lender's power over the mortgaged property.

iii. Managerial rights – e.g., like a trusteeship where the holder has control similar to that of a beneficial owner but without the general entitlement to exploit the property.

iv. Remedial rights – these are bare rights with a power to apply to the court for some form of relief. An example is the right to seek rescission of a contract or rectification of a flawed deed.

Finally, property rights may be legal or equitable (or even both).