

STUDY UNIT 1

1. Distinguish between:

(a) law of property and law of things (4)

ANSWER:

In the broad sense the word “property” in the law of property refers to everything that forms part of a person’s estate. (1) In a narrow sense property law refers to the law of things, which is the system that regulates legal (½) relationships (½) between legal subjects (1) in regard to a **particular legal object**, that is, a thing. (1)

Patrimonial law is divided into the law of **property**, the law of **succession**, the law of **obligations** and **intellectual property law**. Patrimonial law therefore regulates all rights which have assets in a person’s estate as objects. (1) In this broad sense everything that forms part of a person’s estate can be described as “property”. Property therefore includes a **variety of assets**, such as things, personal rights and immaterial property rights.

The law of **things** can be defined as a branch of the private law which consists of a number of legal rules that determine the nature, content, vesting, protection, transfer and termination of various real relationships between a legal subject and a **thing**, as well as the rights and duties ensuing from these relationships.

(Maximum 4 marks)

Summary:

Property law in the <u>broad</u> sense	Property law in the <u>narrow</u> sense
In the <u>broad sense</u> the word “property” in the law of property refers to everything that forms part of a person’s estate .	In a <u>narrow sense</u> property law refers to the law of things , which is the system that regulates legal relationships between legal subjects in regard to a particular legal object , that is, a thing .

(b) real right and entitlement (5)

ANSWER:

A real right is a lawful (1) real (1) relationship between a legal subject and a thing (1) which confers direct control over the thing on the legal subject, as well as the relationship between the legal subject and all other legal subjects who must respect this relationship.

The term entitlement refers to the content (1) of a right. The entitlements of a real right determine which acts (1) a legal subject may perform in regard to a thing, eg, may sell or use the thing.

(c) legal object and thing (4)

ANSWER:

A legal object can be defined as **every object** (1) with which a legal subject has a legally recognised (1) relationship. Legal objects may be divided into things, performances, immaterial property and personality property.

A thing is a **specific** (1) legal **object** (1) characterised as follows: it is an independent part of the corporeal world that exists outside humans, is subject to human control and is of value to humans.

(d) real relationship and real right (4)

ANSWER:

A **real** (the word “real” comes from the Latin word “*res*” meaning a thing) relationship is the particular (½) legal relationship (½) between one or more legal subjects (½) and a **thing** (½). A real relationship is broader (1) than a real right since real relationships include real rights, (1) as well as certain **unlawful** (1) real relationships. A **lawful real relationship** is therefore known as a **real right**. Only lawful real relationships, namely ownership and lawful holdship, confer real rights. Unlawful real relationships, namely possession and unlawful holdship, cannot confer any real rights. A real right can therefore be defined as a lawful (1) real (1) relationship between a legal subject and a thing (1) which confers direct control over the thing on the legal subject, as well as the relationship between the legal subject and all other legal subjects who must respect this relationship.

(Maximum 4 marks)

2. Briefly distinguish between:

(a) fungible and non-fungible things and explain the relevance of this distinction (7)

ANSWER:

This distinction depends on whether things have **individual characteristics** (or value), or whether they belong to a certain kind or genus. The individual character of one kilogram of sugar or a litre of water is not such that it differs from another litre of water or kilogram of

sugar (1). They can therefore be replaced (1) with a kilogram of the same kind of sugar or by another litre of water. However, one original painting (eg by Picasso) cannot simply be replaced (1) by another original painting (by Susan Scott).

This distinction is significant in various fields of the law:

- (i) In the law of obligations: (½) the replaceability or otherwise of a specific thing is determined by agreement between the parties, and may affect the consequences of the agreement, for example, if X buys the painting by Picasso, and the seller delivers a painting by Susan Scott, the seller has not performed in terms of the agreement. However, if X buys "a painting", the seller can deliver any painting. ((½) for explanation)
- (ii) Pledge: (½) a fungible cannot, in principle, be given in pledge with the intention that it can be replaced by a similar thing since the pledgee may not use the pledged article. ((½) for explanation)
- (iii) Transfer of ownership: (½) in certain circumstances a fungible may change ownership by means of *commixtio* (mixing of solids) or *confusio* (mingling of liquids). ((½) for explanation)
- (iv) Replacement: (½) it would seem that the courts are more inclined to authorise the repair and even the replacement of a damaged or destroyed fungible thing in a spoliation order, in certain cases, than would be the case with non-fungibles. ((½) for explanation) For example, the court may order rebuilding of a wall with bricks similar to the ones used in the wall before spoliation. The court will not order restoration of a similar picture where a person was despoiled of his/her Picasso (see Study Unit 9 par 2.3 on spoliation).

(b) singular and composite things (5)

ANSWER:

A singular thing consists of a **single piece** (1). A horse, a stone or a brick (½) are examples of singular things. A composite thing is made up of **constituent parts** (½), or even of independent things (½) that have been joined together to form a **new entity** (1), for example, a car or a bicycle (½). Here the constituent parts **lose their individuality** (½) and the composite thing is regarded as one thing (½) for the purpose of the law of things.

(c) consumable and non-consumable things (4)

ANSWER:

Consumable things (*res consumptibiles*) are **used up** (consumed) (1) or their value is **considerably diminished** by **ordinary use** (1), for example, pencils, foodstuffs and cigarettes (½). Non-consumable things (*res non consumptibiles*) are **preserved** in spite of **normal use** (1), for example, a motorcar or a stove (½). A thing can be non-consumable despite the fact that it is **subject to normal wear and tear**.

(d) movables and immovables (4)

ANSWER:

In principle, immovable things consist of **land** (1) and everything that is **permanently attached** (1) to land, including natural attachments (½) like plants and artificial fixtures (½) like buildings and structures that are permanently attached to land. All other things (1) are movable things.

(e) divisible and indivisible things (4)

ANSWER:

A thing is divisible if it can be **divided, without** losing its **essential characteristics** (1), into **smaller parts** (½) of which the nature and function are **essentially the same** (½) as those of the original thing. Examples are: a bag of sugar, a roll of fabric, or a piece of land (½). Indivisible things, such as a car or a painting (½), cannot be divided without destroying or changing (1) the nature of the thing.

(f) composite things and a collection of things (4)

ANSWER:

Two forms of collections are relevant: In the one we deal with a **collection of similar** (1) principal things (eg a flock of sheep) and in the other the collection consists of **different** (1) **types of objects (eg things and rights – a person's entire estate)**. In both cases the collection is treated as a singular unit (1). A composite thing mostly consists of various constituent parts (1).

3. Mention three reasons why it is important to distinguish between movable and immovable things. (6)

- (i) It affects the formalities and requirements for the **transfer of ownership**: transfer of ownership of movables is effected by delivery, and of immovables by registration in the Deeds Office.
- (ii) Several **statutes distinguish** between movable and immovable things: for example, the *Deeds Registries Act 47 of 1937* and the *Alienation of Land Act 68 of 1981*.
- (iii) **Private international law** distinguishes between movable and immovable things in that the law of the owner's domicile (*lex loci domicilii-the law of the place where the owner is domiciled – broadly his/her permanent address*) applies in the case of movables, whereas the law of the immovable thing's location governs immovables (*lex loci rei sitae- the law of the place where the (immovable) thing is situate*).
- (iv) The right to alienate or encumber the **estate of a minor**: permission of the Master of the High Court is required for the alienation or encumbrance of a minor's immovable assets worth more than R100 000-00.
- (v) In the **execution of a judgment** debt and in the case of insolvency, the debtor's movable assets are sold before the immovables, to secure payment of the judgment debt.
- (vi) In criminal law the crime of **theft** can be committed only in regard to **movables**, while **arson** can only be committed in relation to **immovables**.
- (vii) **Real security** is effected by means of a **pledge** in the case of **movables** and by means of a **mortgage** in the case of **immovable things**.

(1 mark for each reason)

STUDY UNIT 2

1. Briefly explain the different tests/theories which are applied to determine whether a specific right is a real or a personal (creditor's) right. (12)

ANSWER:

The **personalist theory** place emphasis is on the person against whom (1) the right may be enforced. In terms of this theory a *real right* operates absolutely (1), in the sense that it is

enforceable against "the world at large". Recognition of and compliance with such a right (for example, ownership) may be enforced against anyone (1). Whatever my relationship with someone might be, that person will have to recognise my ownership of a certain thing, and I can, in principle, claim my thing from anyone who is in control of it, for example, an owner can claim his motorcar from a person who bought it from a thief.

A *personal right* (creditor's right or claim), on the other hand, has relative (1) operation. It can be enforced only against the particular person (1) who has a duty to perform in terms of an obligation. For example, a contract can be enforced against the other contracting party (the debtor) only, or, in a delict, damages can be claimed only from the person who caused the damage (apart from certain exceptions).

Criticism: The fundamental criticism levelled against this theory is that it overemphasises the absolute operation of real rights (1), which do not, in reality, always and necessarily operate absolutely. There are cases, for example, where the owner of a thing is prevented by the operation of estoppel from enforcing his/her right of ownership against another person. Estoppel operates if the owner has culpably created the impression that a third person was the owner or had authorisation (acted as the representative of the owner) to alienate the thing.

It should be remembered that personal rights do not always (1) have only relative operation either. In exceptional circumstances they operate absolutely and have to be respected by outsiders, such as in the case of a service contract. It has been held that an outsider may not **intentionally** interfere in the relationship between an employer and an employee.

Another objection to the absoluteness of real rights in the personalist theory is that other rights (1), such as personality rights (for example, rights to integrity or reputation) and immaterial property rights (for example, patent rights and copyright), also operate absolutely. This argument also has little substance, since the theory is used to distinguish between real and personal rights for a particular reason. It is valuable to demarcate the boundary between the law of things and the law of obligations, but, in particular, to determine which rights may be registered against land in terms of section 63(1) of the *Deeds Registries Act 47 of 1937*.

The **classical theory** corresponds to the original Roman-law (1) distinction. It distinguishes between real and personal rights with reference to the nature of the object (1) to which each right pertains. *Real rights*, according to this theory, concern the relationship between a person and a thing (1). A *real right* confers direct control (1) and the right of disposal (1) over a thing. *Personal rights*, on the other hand, concern the relationship between persons (1). A *personal right* entitles the creditor only to claim performance from a particular (1) person. The object of the right is therefore performance (1).

Criticism: Although some criticism can also be levelled at this distinction, in most instances this criterion will help to determine whether one is dealing with a real right, or not. However, it is sometimes difficult to determine exactly what is meant by a direct relationship (1) with a thing. Certain personal rights ultimately also have a thing as their object, but they are not real rights, for example, personal rights to acquire a thing (*iura in personam ad rem acquirendam*). We are dealing with such rights when, for example, X buys a car from Y. In terms of the contract X has a right to the car, but this is only a personal right. Before delivery X has a personal right to claim delivery of the car (*ius in personam ad rem acquirendam*). X acquires a real right (ownership) only after delivery of the car to him/her.

(Maximum 12 marks)

2. Summarise *Ex parte Geldenhuys* (1926 OPD 155) briefly (in not more than 250 words). (10)

ANSWER:

Facts:

Q and R drafted a mutual will with the following provisions:

- (a) As soon as the first child reaches his or her majority, the survivor of the testators shall be bound to subdivide the said land in equal portions and distribute it among the children.
- (b) Such distributions to be made by the survivor should be made by drawing lots.
- (c) The child who by such lot obtains the portion comprising the homestead of the farm Jakhalskop shall pay the sum of £200 to the other children. (1)

The applicant, the survivor, applied for an order instructing the Registrar of Deeds to register transfer of certain farms in favour of the children of the late Gesina Elizabeth Geldenhuys (the testatrix) and applicant, her surviving spouse, subject to the above conditions of the will.

Legal Question:

Are these conditions registrable against the title in the Deeds Office? (1)

Judgement:

Judge De Villiers said that:

“One has to look not so much to the **right**, (1) but to the **correlative** (1) **obligation**. If that obligation is a **burden upon the land**, (1) a **subtraction from the dominium**, (1) the **corresponding right** is **real** and registrable; (1) if it is not such an obligation, but merely

an **obligation binding on some person** (1) or other, the **corresponding right** is a **personal right**, (1) or right *in personam*, and it cannot as a rule (1) be registered.”

Provisions (a) and (b) were regarded as real rights since they limited the co-owners’ rights to free division of the farm whenever they wanted and in any way they wanted (those are the normal rights of co-owners). They are therefore a burden on the *dominium* (co-ownership in this case – for the rules regarding co-ownership, see Study Unit 7). (1)

Provision (c) is a burden on a specific person (the child who by the drawing of lots obtained the portion comprising the homestead of the farm Jakhalskop) and therefore a personal right and not registerable against title. (1) However, since it was so closely related to the real rights registration was allowed in this case as an exception. (1)

(Maximum 10 marks)

3. M has a personal servitude of habitation (limited real right) over a homestead on X and Y’s farm. Is it possible to register this right in the Deeds Registry? Briefly substantiate your answer. (5)

ANSWER:

In principle only **real rights** (1) may be registered in the deeds registry. A **personal servitude** is a **limited real right** (1) over the property of another person. (Note that **all** servitudes are real rights – see Study Unit 10.) A limited real right has as its object the **thing** (1) itself (the land on which the house stands). The right and the accompanying obligation to allow the servitude holder to live in the house remain connected (1) with the thing concerned, regardless of who the **owner** of the thing is. The obligation is a burden upon the land and could, according to the subtraction of the *dominium* test, be registered (1) against the title in the Deeds Office. [A mere servitude agreement is a personal right, while a limited real right of servitude is required only on registration of the servitude – see Study Unit 10.]

4. Briefly distinguish between a real right and a personal right (creditor’s right/claim) and explain this distinction with reference to an example of each right. (10)

ANSWER:

(a) Examples

- A. Real right: M, X’s mother, has a personal servitude (1) of habitation (limited real right) over the homestead of Waterford.
- B. Personal right: S has a contract (1) that entitles him to use Waterford for grazing purposes with X and Y (personal right).

(b) Distinction between a real right and a personal right

(i) Object: The object of a limited real right is a **corporeal thing**, (½) in our example M's right to live in the **house on the farm**. (½) The object of a personal right is **performance** (½) (to give something, to do something or not to do something), in our example it is X and Y's duty to allow S to use the farm house (performance on their part). (½) S has no right to the farm.

(ii) Content: The holder of a limited real right, M, has a **direct claim** to the thing, (½) in our example the homestead on the farm. (½) The holder of a personal right, S, is entitled to claim performance (½) from a specific person/s, X and Y in our example. (½)

(iii) Remedies: The holder of a limited real right, M, can enforce her limited real right by means of a **real action** (½) based on her servitude even against the owner and all third persons who interfere with her right. The holder of a personal right, S, enforces his right by means of a **personal action** (½) based on contract against the other contracting parties (X and Y in this case). Therefore, if X and Y sell the farm to Z, M can enforce her servitude against Z as new owner, (½) but S cannot enforce his personal right against X and Y against the new owner, Z. (½)

(iv) Origin: limited real rights have their origin in **legal facts other than obligations**, (½) for example, registration of the servitude in M's name. Personal rights come into existence through **obligations**, (½) for example, in terms of a contract such as the one between X and Y and S. (½)

(v) Absoluteness: limited real rights are **absolute** in principle: (½) the servitude holder, M, can enforce her limited real right against **all third parties**, (½) even against a new owner. Personal rights are **relative** (½) in principle: the holder, S, can enforce his right only against **the person who is obliged to perform** in terms of an obligation (contract), thus X and Y. (½)

(vi) Preference: In case of insolvency real rights **enjoys preference** (½) over other rights and the maxim first in right stronger in law is applied in case of two or more competing real rights. Apart from certain exception the principle does not apply to personal rights. (½)

(vii) Publicity: The **establishment** of limited real rights requires some form of publicity. (½) This takes place by way of **registration of the servitude** against the title deed of the farm. (½) The reason for this lies in the nature of limited real rights. Since these rights have to be respected by **all third parties**, it is imperative that there should be some form of publicity **informing outsiders of the existence**, transfer or extinction of the real right. Personal rights do not require publicity, (½) since they are binding only on the contracting parties, that is on X and Y.

(Maximum 10 marks)

Summary:

		Real rights	Personal rights
I	Object	corporeal thing	performance
ii	Content	direct claim to the thing	claim performance
iii	Remedies	real action	personal action
iv	Origin	legal facts other than obligations	through obligations
V	Absoluteness	absolute in principle	relative in principle
Vi	Publicity	requires some form of publicity	do not require publicity