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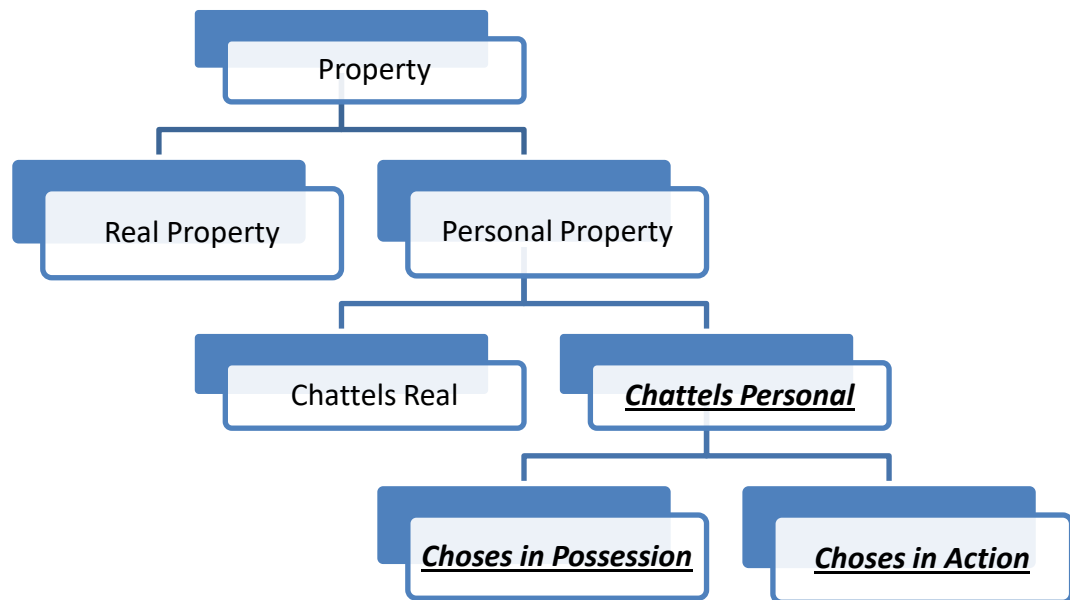
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TOPIC 2 – PERSONAL PROPERTY – CHOSSES IN POSSESSION – TAXONOMY OF PERSONAL PROPERTY

Choses in Possession: the ‘thing itself’ – has a physical manifestation

Choses in Action: no physical manifestation – ownership has to be shown through going to court

→ *Colonial Bank v Whinney* (1885) 30 Ch D 261 at 285-90 (per Fry LJ, dissenting) upheld in HL (1886) 11 App Cas 426: established the general law taxonomy



Personal Property Securities Act 2009 (Cth) s 10 – definitions:

"**personal property**" means property (including a licence) other than:

- (a) land; or
- (b) a right, entitlement or authority that is:
 - (i) granted by or under a law of the Commonwealth, a State or a Territory; and
 - (ii) declared by that law not to be personal property for the purposes of this Act.

"**land**" includes all estates and interests in land, whether freehold, leasehold or chattel, but does not include fixtures.

"**goods**" means personal property that is tangible property, including the following:

- (a) crops;
- (b) livestock;
- (c) wool;
- (d) minerals that have been extracted (including hydrocarbons) in any form, whether solid, liquid or gaseous and whether organic or inorganic;
- (e) satellites and other space objects;

but does not include financial property or an intermediated security.

"**financial property**" means any of the following personal property:

- (a) chattel paper;
- (b) currency;
- (c) a document of title;
- (d) an investment instrument;
- (e) a negotiable instrument.

"**intermediated security**" has the meaning given by section 15.

"intangible property" means personal property (including a licence) that is not any of the following:

- (a) financial property;
- (b) goods;
- (c) an intermediated security.

CHAPTER 9 – IDENTIFYING LEGAL INTERESTS IN CHOSSES IN POSSESSION: OWNERSHIP AND POSSESSION

Possession = control + intention to possess

- **Actual possession** = physical control + intention
- **Constructive possession** = symbolic delivery + intention

Ownership = 'bundle of rights' – the relationship between a legal person and a legal object

- Use and enjoyment
- Exclusion of others
- Alienation; ability to transfer

Identifying Legal Interests in Choses in Possession

Re Jigrose Pty Ltd [1994] 1 Qd R 382 at 385-386 (Kiefel J): Contract for the sale of a farm has three clauses: (1) the vendor was to remove property not sold; (2) the property not removed is deemed to be abandoned; (3) the purchaser was able to appropriate, remove or otherwise dispose of the property after the completion of the sale. \$20,000 of hay was left in a paddock – the purchaser put a padlock on the gate. The vendor was looking for a determination of the ownership. Held: purchaser successful – the hay was **intentionally abandoned** and ownership was obtained by **appropriation**.

- **Abandonment of property is valid** – 'It seems to me that if I do not wish to retain the possession or property in goods (perhaps most clearly shown by throwing them away), there is no reason in principle why the common law would require me to remain owner... If a person no longer holds that interest it is difficult to see what the common law's concern could be. **For my part I do not consider that there is a difficulty at law with the notion of abandonment divesting ownership.**'
- At 386: The contract clause was equivalent to the vendor representing that it had no further interest in the chattels, neither in possession or ownership.

- At 387: ‘...**title is not automatically transferred to the purchasers on abandonment** It will pass where there is an **act such as appropriation**...Appropriation in this sense simply means **taking to oneself as one’s property**. That would require in the context of an occupier, a **manifest intention to exercise control** over it (*Parker v British Airways Board*)...**An intention to exclude others is in my view an exercise of control over the chattels..’**
 - Placing the padlock = an act of appropriation.
- To be **distinguished from the ‘finder’ cases** (e.g. *Parker v British Airways Board*) which involve ‘possession [being] held without consent of the owner. It certainly could not be said that the owner necessarily intended to abandon the goods.’
- **SUMMARY:** abandonment (intentional) + appropriation (control + intention) = ownership

Elements of Legal Possession

1. **Physical control of a thing** – corpus possessionis: sufficient occupation to stop others from interfering
2. **Intention to control that thing** – animus possidendi
 - You may intend to control a wild animal, but are unable to catch it.
 - You may sit on a \$100 note, but not intend to control it.
 - Possession itself is a root of title A thief in possession has a better title than a third party (unless that third party is acting on behalf of the true owner).

1. Physical Control of That Thing

The Tubantia [1924] P 78: The Tubantia was sunk in the North Sea. P had a salvage company in 1922-23; in 1923 a rival company sent down divers and tried to claim possession; P sought a declaration that the P had possession, an injunction against the D, and damages. This case is about **possession**, no one claimed ownership. P marked out the area, worked on and within the ship – thus, they had some physical control. However, they only had intermittent working days. Use the *Pollock and Wright* criteria – you have to find (1) the extent of the physical control and (2) intention.

- Lists some **questions to help determine whether the P had possession:**

- **What are the kinds of physical control and use of which the things in question were practically capable?** Here, a submerged vessel difficult to control and use – the extent practically capable was what P did do.
- **Could physical control be applied to the res as a whole?** Yes.
- **Was there a complete taking?** Held that just because the P was only capable of sending divers down in short spells that this did not back the P incapable of possession.
- **Was the plaintiff's occupation sufficient for practical purposes to exclude strangers from interfering with the property?** Yes.
- **Was there the animus possidendi?** Yes.
- The significance of finding possession goes **beyond a legal interest** – first, it is often evidence of title/ownership; and, second, it confers **possessory title i.e. title that is good against all but the true owner.**

2. Intention to Control That Thing

→ **Question of Fact:** Sometimes the way you control a thing evinces an intentional to control it, satisfying both elements of possession – e.g. wearing clothes

Difference between Custody and Possession

Federal Commissioner of Taxation v ANZ (1979) 143 CLR 499 (Gibbs ACJ): Concerned the question of whether there was 'custody' under statute. The taxpayer deposited in a safety deposit box at ANZ – one key with the bank; one with the customer. As a matter of contract, a second key was cut and kept with the bank for safe-keeping. The FCT wanted to open the box and serve an order on documents in ANZ's custody or control. The bank said the box was not in their custody or control – the Court disagreed. The statutory duty to produce documents **overrode** the contract. The bank had the physical power to open the box since it had both keys. For the purposes of this statute, there was the requisite custody and control. The Court did not consider possession.

- [5]: **'control' in s 264(1) of the relevant act was not limited to physical control.** The real question is: **has the person to whom notice is given such custody or control as renders him able to produce the documents?'**
- The **Bank has the physical control** of documents in its lockers. They hold the papers, the lockers, the **keys**. It is **able to open the locker even if, by contractual agreements, it has agreed not to do so.**

- [7] ‘There is thus a **statutory duty to comply** with a notice under s 264(1), and any **contractual duty owed** by the Bank to the depositor it is subject to, and **overridden by, this statutory duty.**’
- [8] ‘More than one person may have the control of a document within the meaning of the section...**the Bank has the physical control, whereas the Smorgons have the legal control: both may be required to produce the documents.**’
 - **SUMMARY:** While ANZ did not have **legal** possession, they had **physical** possession. That was enough to satisfy the definition of ‘custody’ (or possession) in the Act.

CHAPTER 10 – ENGAGING IN DEALINGS IN CHOSE IN POSSESSION

(i) Concept of Delivery

- **Actual Delivery:** Normally needs the deliverer to hand over the goods **physically** to the deliverer: *Olsson v Dyson* (1969) 120 CLR 365 at 385.
- **Constructive Delivery:** An alteration in control over goods without any change in physical possession – e.g. delivery by attornment: *Gamer’s Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236 (per Mason J):
 - A **seller in possession** attorns to the buyer after the sale. The seller holds the object as a bailee (e.g. seller sells machinery but the buyer hasn’t picked it up yet; the character of the possession has changed: the owner is not holding it for the buyer, i.e. bailment)
 - A buyer in possession prior to the sale holds goods after the sale on his own account
 - A bailee for the seller attorns after the sale to a buyer and holds as a bailee for the buyer (e.g. a third party holds the item for the owner when the seller sells to the buyer: the third party holds the item for someone else, i.e. bailment).

→ **Symbolic Delivery**: chattel that is **incapable of being practically delivered actually/manually**. For example, the **giving of a key to a safe where goods are stored** – [18] per Mason CJ; [14] Dawson J. Sometimes a type of constructive delivery, but sometimes separate.

Note: See *Sale of Goods Act* s 28 – exception to the *nemo dat* rule

(1) Where a person **having sold** goods continues or is in **possession** of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for that person of the goods or documents of title under any sale pledge or other disposition thereof to any person **receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same**.

(2) Where a person **having bought or agreed to buy goods** obtains with the consent of the seller **possession** of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for that person of the goods or documents of title under any sale pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent intrusted by the owner with the goods or documents of title.

(3) In this section the term "**mercantile agent**" means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

***Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR**

236 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ): considered the definition of 'delivery' in s 5 of the *Sale of Goods Act 1923* (NSW). E agreed to buy 8 cars from G – the contract said that no property rights pass until the full payment is made. The cars were delivered to the buyer (E), but not paid for yet. E then sells to N – but before N takes possession, G takes the cars back because E has not paid for them. N then argue that they owned the cars. A priority contest resulted between G and N. The issue: Did N have good title, that is, did property pass from G to E to N?

- Note: on normal property principles, title would not pass under the *nemo dat* rule.
 - But, held: **s 28 exception to the *nemo dat* rule** – title had passed.
 - For s 28 to apply, the section seems to contemplate that the second buyer takes possession (or receives delivery) – but here the cars are in G's possession.
- [12] (per Mason CJ): **Delivery: 'voluntary transfer of possession from one person to another'**
- [15]: **'A commodity or chattel incapable of actual physical delivery, except at great inconvenience and cost, such as a yacht, must be capable of constructive or symbolic delivery falling short of actual delivery.'**

- [27]: ‘Indeed, to treat ‘delivery’ as embracing constructive delivery is to enhance the protection given by s 28(2) to the innocent purchaser. There is no valid reason why his title should depend upon actual, as distinct from constructive, delivery.’
- [32]: ‘The delivery of the receipt is something apart from the sale so that the constructive delivery which it evidences is something more than a mere change in the right to possession arising from the sale from the Dealer to Natwest.’
 - **SUMMARY:** s 28 ‘delivery’ means ‘possession’ in its legal sense – i.e. both actual and constructive delivery. Here, N was in **constructive possession** (E had given **constructive delivery**). Title had passed to N – G had to pursue E in debt rather than in contract.
 - Cross-reference this with Topic 5 – exceptions to *nemo dat*.

(ii) Transfer of Ownership

(a) By losing and finding

Parker v British Airways Board [1982] 1 QB 1004 (Donaldson LJ): Parker found a gold bracelet in an airline lounge. He gave it to BA saying it was his if no one claimed it – SA sold it on. The issue: Who had possession (i.e. physical control and intention)? Held: Parker had possession. Donaldson LJ gave a list of **5 rights and obligations of the finder** regarding found goods; and **4 rights and liabilities of an occupier**.

Rights and Obligations of the Finder (at 1017):

1. Finders have no rights unless the item has been **abandoned or lost** and the finder takes it into his **care and control**.
2. Very limited rights if the finder has taken it into his care with ‘**dishonest intent** or in the course of **trespassing**’.
3. The finder has ‘a **right to keep it against all but the true owner**’ or a person asserting a prior right at the time of finding.
4. Any **servant or agent in the course of employment** acquires a finder’s **right on behalf of his employer**.
5. A finder’s right has an **obligation** to take ‘such measures as in all the circumstances are **reasonable to acquaint the owner of the finding and present whereabouts of the chattel and to care for it meanwhile**’.

Rights and Liabilities of the Occupier (at 1018):

1. Occupiers of land/buildings have **superior rights to those of a finder for chattels ‘in or attached to that land or building’** – whether the occupier is aware of the presence of the chattel or not.
2. An occupier of a building has superior rights to a finder of chattels ‘upon or in, but not attached to, that building’ but only if there is a **manifested intention to exercise control over the building and the things which may be upon or in it.**
3. An occupier with a **superior right** and the **intention to exercise control** must take **reasonable measures to ensure the lost chattel is found and to acquaint the true owner of the chattels with them, caring for them in the meantime.**
4. ‘Occupier’ of the chattel (ship, car, caravan, aircraft etc.) is treated as the occupier of a building for the purposes of these rules.
 - **Applied to the Facts:** Parker was not a trespasser; took the bracelet into his control with ‘obvious honesty’. Prima facie, he ‘had **full finder’s rights and obligations**’. No evidence he was there in the course of employment – even if so, his finding of the bracelet would have been ‘collateral thereto’ – though, the opposite would have been held for the BA staff.
 - Meanwhile, BA cannot assert title as an occupier over chattels ‘attached’ , since it was on the floor. They did not ‘manifest an intention to assert custody and control over lost articles. There was **no evidence that they searched for such articles regularly or at all.**’
 - By contrast, banks – ‘manifest intention to exercise a very high degree of control’ while parked in daylight hours have ‘no manifest intention to exercise any such control’
 - An air lounge is in the large middle ground – petrol stations; front gardens; public shops and supermarkets – types of land that **must show sufficient evidence of intention to exercise control over lost property before it was found** to give the occupier a superior right to the finder.
 - Since the true owner has not come forward, it is a case of ‘finder’s keepers’.
 - Parker was entitled to damages from the sale of the bracelet.