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TOPIC 2 – Introduction to Choses in Possession

What is commercial law?

Totality of the law's response to the needs and practices of the mercantile community – trade is one of the most powerful forces of human activity – commercial law provides the infrastructure for this. The essence of commercial law is to accommodate rules, usages and documents drawn from contracts and other broader areas of law.

Tension between Property & Commercial Law: There is a distinction between vested interest (strong property rights should always be protected) and free flow of *commercial* transactions.

Scope of Topic 2 (Choses in Possession):

- *Taxonomy of personal property*
 - o General Law
 - o *Personal Property Securities Act 2009 (Cth)*
- *Identifying legal interests in choses in possession*
 - o Ownership
 - o Possession
- *Engaging in dealings in choses in possession*
 - o Concept of delivery
 - o Transfer of ownership (e.g. losing and finding; gift; sale)
 - o Transfer of possession

General Law Taxonomy

Chattels Personal (All Personal Property other than Chattels real [lease])

- *Choses in Action*: Intangible interests
- *Choses in Possession*: Tangible interest in possession

Colonial Bank v Whinney (1885): Court considered whether shares were caught by English legislation. The question was – were the shares in the reputed ownership of the bankrupt? Under the legislation, property of the bankrupt that was owed to the creditors under reputed ownership. There was an exception for choses in action. Question was whether shares were choses in action. The bankrupt had shares in a railway company registered in his name and he used stock broker partnership money to buy them. He had an equitable mortgage over the shares – traded an equitable interest as security to the bank (he still had legal title). When he went bankrupt, bank claimed the shares but the trustee said that the bankrupt was the reputed owner.

- Court held that they were under reputed ownership but they were choses of action.
- **Fry J (dissenting):** No third category – personal property is either a chose in possession or action. It is clearly not a chose in possession because it is *not tangible* – it is a *bundle of rights to receive benefits of a corporation (shares)*. This argument was later upheld in the HOL.

Taxonomy under Personal Property Securities Act 2009 Section 10 (Definitions) ('PPSA')

- Property
 - o Land (excluding fixtures)
 - o Personal Property (doesn't include choses in action or possession anymore)
 - Goods (tangible property)
 - Financial Property (what would be previously described as choses in action)
 - Intermediated Security (previously described as choses in action)
 - Intangible Property (everything that is not goods, financial property or intermediated security)

Identifying Legal Interests in Choses in Possession – Ownership & Possession

Thinking about Ownership: There is no doctrine of tenure/estates in relation to personal property – it is an abstract relationship between a person and a thing. It has been described as a *residue of legal rights in an asset remaining in a person after specific rights over the assets have been granted to others*. But can 'chattels' exist without an owner? How do you determine when chattels are abandoned? How do you acquire ownership of an abandoned chattel?

Re Jigrose Pty Ltd [1994]: Contract for the sale of a farm that provided that the vendor is to remove property not sold under the contract prior to giving up possession. Cl23 said that property not removed is deemed to be abandoned and purchaser can appropriate, remove or otherwise dispose of the property. Vendor sold the farm but forgot about \$20,000 worth of hay on the paddock and wanted it back. Purchaser refused and put a lock on the paddock gate.

- Purchaser argued vendors abandoned the hay and they had acquired ownership through appropriation. Vendor argued they had not acquired ownership and that the goods were still in their ownership.
- Court held that the common law does not require there to always be an owner and abandonment can divest ownership. Abandonment was defined as *the intention of no longer retaining an interest in the chattel* – was there an abandonment here?
- Court held that because there was the clause that stipulated that leaving anything will amount to abandonment, and the purchasers attempted to appropriate by excluding everyone else and claiming ownership (putting padlock on gate), the purchasers gained ownership of the hay.

Thinking about Possession: Definite legal relation to something capable of having an owner (*Pollock v Wright*). Just holding something does not always amount to possession – you may be holding something in *custody* (lecturer holding screen that is owned by the University).

The Tubantia [1924]: Dutch steamship sunk and the plaintiffs were a salvage company. In 1923 a rival salvage company, moored alongside and sent their own divers down. The original salvage company sought an injunction to prevent the other company from interfering in their work and sought a declaration of possession.

- Court found that they were at the site, they carried out work on the hull, they marked out the wreckage and they cut out a hole enabling them to enter the ship. They asked questions from *Pollock v Wright*.
 - o Degree of Control?
 - o Has physical control been applied to the thing as a whole?
 - o Has there been a complete taking?
 - o Was there sufficient occupation so they could prevent others from interfering?
 - o Was there an *intention to possess*?
- Court said a thing taken by a person and being used for which it is capable is in that person's possession. They concluded that the plaintiffs had the use and occupation of which the subject was capable, power to exclude and dealt with the wreck as a whole.

Possession is needed because it is evidence of ownership and it also gives possessory title (*rights against the whole world except for the true owner*). However if you have a temporary holding (pick up a knife and fork at a restaurant) you have custody.

FCT v ANZ Banking (1979): Taxpayer deposited a box with a bank in safe deposit facilities. The locker was double locked – one key was left for the bank and another was left with the taxpayer. There was a duplicate in an envelope and kept safe. It was a term that the duplicate key would not be used without the taxpayers consent. The bank was required to produce documents in its custody or control and they refused to give up the contents of the locker arguing it had neither custody nor control.

- Court said it wasn't concerned with the legal relationship between bank and legal documents. The contract agreement it had with the taxpayer was subservient to the statutory requirement of the FCT to disclose items in its custody. It referred to *Pollock v Wright* and found that there was custody.

Degrees or levels of Possession:

- Custody
- Actual Possession (De Facto/Mere Possession): Where there is physical control without the relevant intention to possess
- Legal Possession: Where there is physical control *and* the relevant intention to possess
 - Unlawful Legal Possession: Where there is legal possession obtained unlawfully
- Constructive Possession: Where the legal possessor does not actually have physical possession