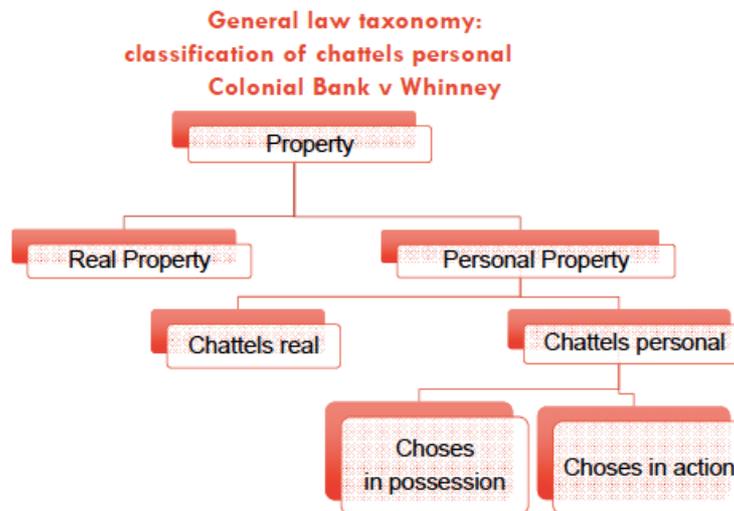


Topic 2: Personal Property- Choses in Possession

Taxonomy of personal property



- **Colonial Bank v Whinney [2.1]: Dissent by Frt LJ-** Discussed that chattels personal is categorised into choses in possession or choses in action. In relation to shares, majority of the court held that shares were not choses in action. In our current time, if we don't categorise them as choses in action then owners will have no proprietary rights, which is senseless

Ownership

- Ownership- highest legal right to property and residue of legal rights remain with true owner after specific rights have been granted to others

Possession

- Types of possession
 1. Actual possession
 - **Legal Possession: intention to possess + physical control- Tubantia [2.3]**
 - **Defacto Possession:** actual physical possession as a matter of fact, but not established at law (Gray et al)
 2. Right to immediate possession
 - Presently out of actual possession but has right to take possession of property immediately (Gray et al)
 3. Future possession
 - Right to possession of chattel in future chattel at the conclusion of the right of someone else who is presently entitled to possession (Gray et al)
- **Constructive possession**
 - **Intention** to possess, knowledge of an object and ability to control but **don't have physical control/possession**

Legal possession

- **Physical control:** requires that a person have sufficient factual control over the object but does not necessarily mean complete dominion- **Tubantia [2.3]**
 - Control is subject to particular context and type of property
 - In **Tubantia [2.3]** P has sufficient physical control to give them possession even though they couldn't bring the whole ship deck up due to nature of chattel

- **Intention to possess an control:** exclude others from the exercise of control – *Button v Cooper*

Custody:

- Very limited right that does not amount to physical or legal possession
- *FCT v ANZ Banking Group* [2.4]: Bank had key to safe deposit box but not to use to open it. Held that Bank had custody but not control-**means to access was sufficient to indicate they had custody**

Engaging in dealings in chose and possession

Delivery

- Delivery can be made- *Gamers Motor Centre* [2.5]
 - Actual delivery: actually handing over of goods to person receiving them
 - Transferee obtains physical possession
 - Constructive delivery- no change in physical possession but **change in the character of possession- transfer of rights to possession**
 - Donee had possession and has to relinquish possession in chattel
 - Change of possession without change of custody
 - Person in position to physically deliver goods is also in a position to acknowledge control of the goods by another –establish constructive delivery
 - Symbolic delivery: delivery by gift/sale of a chattel incapable practically of actual delivery
 - The act of giving a gift consists of such a transfer of control that the nature of the case admits it is practically suffice to allow the new possessor to recognise their rights
 - E.g. giving key to place where goods are stored

Gifts

- 2 Methods to make a gift
 - 1- Formal deed: signed sealed and delivering the deed
 - 2- Interest created through trust structure
 - 3- By **delivery** : *Nolan v Nolan* [2.7]
- There are three elements required to perfect an inter vivos gift: *Nolan v Nolan* [2.7]-
 1. **Unequivocal Intention to make a gift** on the part of the **donor**, usually expressed by words of present gift, but words are not necessary
 2. **Unequivocal Intention of done to accept the gift**
 3. **Delivery** of the object concurrent to intention (may be actual or constructive)- legal act to complete the gift
 - The donor must not only part with possession of the property, but must relinquish all present and future dominion and control over it beyond any power on his part to reclaim it *Nolan v Nolan* [2.7]
- **Obiter**
 - Delivery transfers possession, and by 'delivering the gift' it transfers ownership, marks the termination of the donors dominion.
- *Considerations*
 - More formal relationship between parties, less likely chattel is a gift
 - More valuable chattel, less likely is it a gift
- Held: Court found there was **no evidence of unequivocal intention in part of the donor, and no delivery** hence daughters claim failed
- **Delivery:**

- (1)- Form of delivery *Gamers Motor Centre* [2.5]
 - Actual/physical delivery
 - Constructive delivery: done already has pre-existing legal or de-facto possession (custody) and the donor later manifest a donative intention to give chose in possession to donee as gift > **changes donee's interest/possession from bailee to owner**
 - Symbolic- nature or bulk of the goods renders manual delivery impossible or impractical- *Nolan v Nolan* [2.7]
- (2)- Timing
 - Delivery can occur at any time, as long as the donor's intention and donee's possession coincide
- (3)- Delivery in common establishment
 - *Re Cole*
 - Husband saying to wife 'its all yours' and no further act is not sufficient to indicate change in nature of wife possession to property or intention to deliver, she only receives usage and access to goods
 - *Cf Horsley v Phillips Fine Art Auctioneers Pty Ltd (NSW)*
 - If there has been pre-existing possession, or custody between parties who live in same house- and there has been a change in possession, then subsequent words of gift, perfect the gift. There is no requirement for the donor to retake the possession, execute the deed or take any act
 - *Cf Tulberry v Sutton (Qld)*
 - Even though brother and sister lives in the same house, no automatic right of custody over property and no evidence pointing were in their common home. Painting was brother's, Sister has no prior possession. Also she took the painting and then told brother, who died before delivering it to her. Her act of taking does not constitute actual delivery. No change in sister's possession
 - **Need to look for act of delivery or change in nature of possession**

Donatio mortis causa- gift in contemplation of death

- 3 essential matters: *Public Trustee v Bussell* [2.8] (at 115)
 - Gift in contemplation of donor's death
 - Contemplation NOT expectation
 - Contemplation must be reasonable
 - Delivery of subject matter or transfer of 'essential indicia of title'
 - Indication of title being transferred
 - Gift conditional on donor's actual death
 - If donor doesn't die, gift not effective/valid
- No gift to D, as deceased had died before he issues certificate of registration of shares, which is an essential document to indicated title being transferred

Sale of Chose in possession under SoG

Test:

1) Consider definition of goods under s5

- Goods are chattels personal other than action and money
- Chose in action and money excluded
- Examples
 - Shares- chose in action: excluded
 - Software IP (chose in action)