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## **CHAPTER 1: THE OBJECTS & NATURE OF PERSONAL PROPERTY**

Real property is freehold land or anything attached to the land, for example, a shed or piece of machinery. Personal property, or chattels, is moveable and perishable. Land can always be restored to its true owner, whereas goods cannot always be restored, and may be replaced with monetary compensation. If something (land) was recoverable by a real action it became known as 'realty', whereas something recoverable by a personal action (goods) became known as personalty.

'Chattels' is divided up into two categories, 'chattels real' and 'chattels personal'. Chattels personal includes all personal property plus intangible personalty, for example, debts, shares in a corporation, goodwill, and intellectual property. Chattels personal is divided up into two categories, 'choses in possession' and 'choses in action'.

A chose in possession is a thing, of which a person may not have only ownership, but also actual physical possession. A chose in action is every other right in relation to personalty, which is not a chose in possession. A chose in possession is a corporeal thing, which can be touched, whereas a chose in action is an incorporeal thing; it has an existence recognised by law but cannot be touched.

The interests in property existing at common law are ownership and possession. In bailment, the bailor has ownership and the bailee has possession.

### **Interests Created by Way of Security**

A security interest in personal property can arise by reason of agreement, by reason of transfer of title, because the law recognises that possession in some circumstances will give rise to a security interest, and because of the operation of law independent of possession.

The *Personal Property Securities Act 2009* (Cth) (PPSA), which commenced on 30 January 2012, applies a uniform national approach to personal property securities. It applies broadly to all personal property security interest transactions, which have the effect of securing payment for performance of an obligation.



## Four forms of consensual security

- Pledge
- Contractual lien
- Equitable charge
- Mortgage

### Pledge

A bailment of personal property as security for some debt or engagement; the creditor takes possession of the debtor's asset as security for an obligation, usually the repayment of a loan.

### Contractual Lien

A lien exists when a person in possession of goods has a right to retain possession of them until that person's pecuniary demands are met. A lien may exist by reason of the operation of law or by agreement. A lien created by contract will be governed by the terms of the contract. If the contractual terms are inconsistent with the existence of a lien, no lien can arise at common law. An example is the 'possessory lien', which exists in favour of solicitors on their files while they await payment of their fees. **E.g.** when you take your car to be services, and you do not pay the bill, they have an automatic lien over the car, by operation of the law.

### Equitable Charge

Created by trust or by contract, and entitles the chargee to have an asset subject to the charge so created appropriated to the satisfaction of the chargee's indebtedness. The charge does not involve the transfer of ownership, nor of possession.

### Mortgage: Security Interest Created by Transfer of Title

A transfer of ownership to the creditor on condition, express or implied, that the asset shall be reconveyed to the debtor upon payment of the debt to the creditor. In relation to mortgages over goods, the provisions of the *National Credit Code* are relevant, set out in Schedule 1 of the *National Consumer Credit Protection Act 2009* (Cth).

## Transfer of Personal Property (Personalty)

Choses in possession are commonly transferred by delivery of the possession itself. Such transfers are usually the consequence of a sale or gift. In this transfer, the following elements are incorporated (explained in *First National Bank of SA Ltd v Quality Tyres* (1995)):

- Intention and consent to transfer
- Transfer of possession of the property from transferor to transferee

Choses in action cannot be transferred by delivery, and are thereby assigned.

## Requirements for Transfer by Sale, Gift, or Assignment

### Sale

- A contract of sale of goods is a contract, whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the 'price'.
- There may be a contract of sale between one part owner and another.

### Gift

The clear distinction between a gift and a sale is the **absence of consideration** in a gift. A gift can be made **inter vivos, by will, or donatio mortis causa**, which is a gift made to take effect upon the death of the donor.

Essential elements of a gift *inter vivos*:

- Intention to gift the immediate ownership of the goods
- An act or acts sufficient to give effect to that intention; and
- Acceptance of the gift by the donee.

It is not enough to promise to transfer title to goods to somebody; there must be an act of immediate disposition — *Strong v Bird* (1874)

It is not possible to gift a mere expectation or property that is not yet in existence, or which does not yet belong to the donor — *Lunn v Thornton* (1845)

A gift, once completed, **cannot be revoked** — *Standing v Bowring* (1885)

Three ways a gift can be made:

1. It may be made by **deed**, in which case actual delivery of the goods is not necessary.
2. It may be made by **oral or written words** of intention to give the goods, together with the delivery of the goods.
3. It may be made by **declaration of trust**, in which case the gift will be of the equitable interest in the goods. The legal interest will be retained by the trustee, who may or may not be the donor.

## Assignment

The only way that a chose in action can be alienated is by assignment. Assignment is the immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee.

Important features of an assignment include:

1. The assignment **must be in writing** under the hand of the assignor.
2. The assignment must be **absolute / unconditional**, and must give the assignee the sole right to debt as against the debtor; it is not possible to assign part of a debt.
3. **Notice in writing** must be given to the debtor or trustee. The assignment takes effect from the date of receipt of the notice by the debtor.
4. **Consideration is not necessary**.

In order to be effective in equity, an assignment of a legal interest in personal property must satisfy the following requirements: *Shepherd v FCT* (1965)

1. There must be an expression of an intention to assign.
2. Where there is no consideration, the donor has done everything necessary to transfer ownership to the donee.

If assignment is of an equitable interest in personal property: *Norman v FCT* (1963)

1. If the interest is a subsiding interest, any disposition of it must be in writing.
2. There must be a clear expression of an intention to make a disposition from assignor to assignee.

## CHAPTER 2: OWNERSHIP AND POSSESSION

### Proprietary/Property Rights

A property right has the following features:

1. It is **universal**; can be asserted against the world at large, not just against a contracting party.
2. **Remedy for infringement** — the infringement of a property right does not necessarily give rise to a proprietary (that is, a real or *in rem*) remedy. A dispossessed owner of a chattel may not be able to recover the item, but instead may recover damages for conversion.
3. **Transferability** — the rights in respect of goods can be transferred to another.

If someone owns property they are said to have a ‘bundle of rights’ — right to possession, to use, to use up, to alter, to hire out, to grant as security, to gift, and to sell. These rights are described as the content of ownership.

### Possession

Gleeson CJ: “One has in one’s possession whatever is, to one’s own knowledge, physically in one’s custody or under one’s control” — *Tabe v Queen* (2005)

Possession in personal property law consists of two elements: *Button v Cooper* [1947]

- The exercise of factual control over the chattel; and
- The concomitant intention to exclude others from the exercise of control.

Possession is important because:

**In absence of evidence to the contrary, possession is conclusive evidence of ownership.**

It is the **interference with possession** of goods (not ownership), which gives rise to detinue, trespass, and conversion.

The creation of some security interests in goods (possessory liens) depends upon possession.

## **Six Forms of Possession**

1. Custody
2. Actual or de facto possession
3. Legal possession
4. Lawful possession
5. Constructive possession
6. The right to possession

### **Custody**

Custody is the lowest form of holding goods. It exists where there is a mere holding of the goods, which does not amount to possession. E.g. an employee has custody of goods belonging to the employer, however the employer has possession of the goods.

### **Actual / De facto possession**

Actual possession is effectively physical or manual control evidenced by some outward act.

In *William v Douglas* (1949), police found gold bars under the bath in a man's hotel room, the issue was whether he was in possession of the bars. The High Court held, "De Facto possession is wide enough to include any case where the person alleged to be in possession has hidden the thing effectively so that he can take it into his physical custody when he wishes and where others are unlikely to discover it except by accident".

In *Gray v Official Trustee in Bankruptcy* (1991), the issue was whether the father of a person charged with trafficking heroin was in possession of money found in the father's home. The Federal Court held that the father had both de facto possession and possession in law (legal possession) of the money. "The money was on a property, of which he was the occupier. He knew of its existence. He was able to deal with it according to its nature and in fact did so by removing it from his bedroom to the drawers in the backyard".

In *Kilpin v Ratley* [1892], the court held that sharing premises without restriction with another person may mean that both people are in de facto possession of the personal property in a house. E.g. two people in a de facto relationship living together.

### **Legal possession**

The state of being in possession in the eyes of the law; a person in de facto possession has legal possession. The law recognises other situations as giving rise to a form of possession. E.g. an employer has legal possession of the office equipment in the custody of his/her employee. A thief may also have legal possession (distinct from lawful possession).

### **Lawful possession**

Lawful possession exists where the possession is not wrongful; this distinguishes lawful from legal possession. E.g. a thief may be in legal possession, but not in lawful possession. The term is thereby used to denote 'rightful' legal possession.