

TOPIC 1: INTRODUCTION TO GENERAL PROPERTY CONCEPTS

THE NUMERUS CLASUS PRINCIPLE

[Intro]: Per the principle of numerous clasus, the law recognizes a fixed class of rights to land and it is limited in nature. A license does not qualify as a proprietary right, this is because it delivers insufficient control over the land (King v DA)

ID: is the nature of the relationship between [X] and [Y] a license?

- 1) **ID: is there a lease agreement evincing an intention to pass possession of the land?**
 - a) **King v DA :** King's agreement with DA to affix advertising on a wall was not evincing an intention to lease the land. Hence, no interest in land was transferred.
- 2) **ID: Can the agreement between [X] and [Y] be better characterized as a licensure agreement**
 - a) **King v DA :** The licensor (DA) did not give the Licensee (king) interest in the land (in rem) which would be enforceable against anyone, but merely created a personal obligation on the part of the licensor to allow the licensee to use the wall for advertisements. (in persona obligation only (Buckmaster)

Rights and obligations of licenses

- 1) **If found to just be a license it only gives a contractual right** and no interest to land. By itself, the right to [see the agreement on the facts] as this would be a contractual entitlement. Any claims would be for a breach of contract.

FIXTURES

Principle: Fixtures are choses in possession (chattels) that have been joined to land and thereby become part of an estate, losing their legal identity as separate object. ([Reid v Smith](#))

- If representing a tenant = we want to characterize the object as chattel
- If representing a landlord = we want to characterise the object as fixture

ENQUIRY FOR FIXTURES:

[starting point]: X is the [tenant/landlord] and likely wants the object to be a [chattel/fixture] On the facts, it is likely that the following object is a [chattel / fixture] for the following reasons, [apply both factors below]

- 1) **Factor 1: degree of annexation (extent of physical attachment to the land)** : If attached in such a way as to be impossible to remove without injury to goods or land then very likely to be a fixture (e.g., paint to wall, tree in the ground) – [Re Cancer Care](#)
 - a) **Presumption:** Goods that merely resting on the land continue to be chattels and that any degree of attachment (bolts, nails, cement) turns them into fixtures ([Belgrave Nominees Kaye J](#))
 - b) **Rebutting the presumption ([Re Cancer Care](#))**
 - i) Are goods joined to the land in a way it permits removal? ([re Cancer Care](#))
 - ii) Affixation only way to use : chattel not fixture : the only way that the machine could be used was through affixing steel frame for better enjoyment of the machine and it was the only way to use it ([Re Cancer Care](#))
 - iii) Steel frame installed separately : chattel not fixture : steel base frame that is sued to anchor the machine and if installed and used separately or each part has ‘separate and independent viability’ ([Re Cancer Care](#))
 - c) **Other factors to practical consider:** Would remove destroy the item or land, Cost of removal
 - i) Example in [Leigh v Taylor](#) valuable tapestries tacked to canvasses and nailed to the walls of the mansion house remained goods as they could have been removed easily without damage were goods
- 2) **Factor 2: object of annexation:** if its practical to remove the fixture form the land, then its status is determined by the object of annexation
 - a) **Intention of person who affixed it (objective enquiry)** – was the apparent purpose for the [fixture] joined to the land for the purpose of better enjoying the land or enhancing enjoyment of the chattel, as revealed by observable circumstances ? ([Reid Smith; Re cancer care](#))
 - b) **Case examples:**
 - i) **the valuable tapestries’ nailed to the walls only objective way to enjoy the chattel** : tapestries were nailed into the walls of the mansion house was to improve

the enjoyment of the land as objectively, this was the only practical way to enjoy the tapestries. ([Leigh v Taylor](#))

- ii) **installation of AC is for better enjoyment of land:** Air conditioning plant installed to roof of a building. Rested on pads on the roof and connected with nut and bolts to water cable and electrical pipes. It was apparent that the air conditioning was not for better enjoyment of the plant, but for permanent improvement to the land. ([Belgrave Nominees](#))

c) Factor: Cost of the item and financing of the item

- i) **If object is on loan or financing would objectively make it chattel :** the linear accelerator was purchased on credit by cancer care. The terms and conditions of sale stated that the vendor of the equipment retains a security interest in the machines until final payment is made showed that it was a chattel ([Re Cancer Care at \[33\].](#))
- ii) **Item on loan or financing would be property of creditor:** Where chattels obtained under security agreements that convey contractual right to enter land and take back item then become annexed as fixtures, the creditor obtains an equitable property right in the land to enter and remove them if the hirer defaults. This equitable right takes precedence over rights of 3rd parties, incl to fixtures (e.g., on default of property mortgage) ([Kay's Leasing Corp](#))

TENANT FIXTURES

[Starting point]: There is an **assumption** that tenants are not intending to make valuable gifts, and “should be able to improve the estate for his enjoyment without being thereby compelled to make a present to the remainderman” ([per Barton J in Registrar of Titles v Spencer](#))

However, what must be determined is if **the object attached so that tenant could better enjoy the estate or as a permanent improvement to the land?** (*note that the enquiry depends LITTLE on the degree of annexation and A LOT on the OBJECT of annexation.*)

Factor 1: Damage caused by removal

- 1) **Removal would cause serious Damage = Permanent:** Anything that can cause serious damage to land or the fixture, is permanent fixture
- 2) **Tenant liable to repair damage and can remove if not irreparable:** Tenants are liable to repair the damage caused by removing fixtures, but this does not affect their right to remove their own tenant fixtures ([Spyer v Phillipson \(1872\) at 335](#)) so long as it can be removed without doing irreparable

Factor 2: time in which the object is removed

- 1) **Object must be removed in a reasonable amount of time:** Tenants are entitled to remove their fixtures at any time during the lease or while they continue in possession thereafter within a reasonable time ([Pincus JA in McMahon's \(Transport\) Pty Ltd v Ebbage \[1999\] 1 Qd R 185 at 198](#)); [Re Cancer Institution of Australia Pty Ltd \[2013\] \[35\]-\[39\]](#))

- a) What is reasonable time? In *Wincant Pty Ltd v South Australia*, the court decided that a tenant is required to remove fixtures at the end of lease if they would interfere with the landlord's use of the premise
- b) Effect of failure to remove within reasonable amount of time If not removed, and the fixtures are abandoned, then they belong to the landlord.

Factor 3: whether the object was on loan/ was subject to security rights

- 1) **Equitable security right trumps defendant's legal interest:** Fixtures that were subject to **security rights** before they were joined to the land (hire-purchase contracts)
 - a) **Example – Hire Purchase Contracts:** People can buy goods under hire-purchase contracts and attach them to the land before the purchase price is paid in full.
 - i) The owner would hold an equitable interests: Adam J said the company still had a right to enter the land, remove it and take it away, as the contractual right confers an **equitable interest** which entitles the plaintiff, as against the hirer, to enter the premises and sever and remove chattels **which have become fixtures** (*Kay's Leasing Corp at 436*).

TOPIC 3: PERSONAL PROPERTY: CHOSSES IN ACTION

WHAT ARE CHOSSES IN ACTION – CHARACTERISTICS OF CHOSSES IN ACTION

- 1) **Not able to take physical possession as Incorporeal and Intangible:** this means it is not reducible to physical possession
 - a) **Examples:** ID Copyrights, patents shares and debt, vouchers (contractual promise)
 - b) **Money in Bank(legal) account:** note that when money is paid into a bank. The customer no longer owns the money, and the customer has a personal right, not real right to the money. (*Foley v Hill*)
The Bank becomes the owner and need not retain all the money it receives as cash in vaults.
 - i) The bank has to have an available sufficient sum of cash to meet all demands on the particular day. The Bank incurs an obligation to pay client an equivalent sum of money on request, establishing a debtor-creditor relationship. (*Libyan Foreign Bank 1989*)
 - c) **Shares and debts are (legal) chosses in action:** Fry LJ at 286 in *Colonial Bank v Whinney* (1885)
 - i) *Colonial Bank:* issue concerned whether the shares were considered property pursuant to *Bankruptcy Act 1883* to be put towards payment CB? Given that shares were considered chosses in action, they were not deemed as goods which could be given to CB during bankruptcy. (*Colonial Bank v Whinney* per Cotton LJ at 273)
 - d) **Databases are chosses in action:** *Your Response Ltd v DataStream Business Media Ltd* [2015], affirming the principles derived in *Colonial Bank v Whinney*
 - (1) *Your Response:* Your Response engaged DataStream to hold and maintain its subscriber's electronic records. Your Response terminated the contract and demanded release of the database information, and DataStream claimed a lien over it until outstanding fees paid. Whether possessory lien (legal right to retain possession of property until services paid) could be claimed is dependent on whether it was a chose in action or possession
 - (2) **Reasoning – No physical manifestation of database = no lien allowed** [23] As the database are chosses in action as they have no physical manifestation, it could not be detained and there was no possessory lien

EQUITABLE CHOSES IN ACTION VS LEGAL CHOSES IN ACTION

- **Differentiation is in its assignability:** it is not possible to assign common law choses in action under common law, while equitable choses in action were freely assignable in equity

Equitable choses in Action	Legal choses in Action
<ul style="list-style-type: none"> - A share or interest in a Partnership (Federal Commissioner of Taxation (1963) [447]. - An interest of a Beneficiary under a trust (Norman v Federal Commissioner of Taxation (1963) [30] ; Wilson v Commissioner of Probate Duties, [84] per Murphy J) - Interest of a legatee (Perpetual Trustee Co Ltd v Commissioner of Stamp Duties 1961) 	<ul style="list-style-type: none"> - A debt (At general law, the essence of a 'debt' is that a debtor is obliged to pay money to the creditor <i>King v Brown</i> (1912) 14 CLR 17 [25] per Griffith CJ and [36] per Isaacs J) - A negotiable instrument (Bills of exchange, promissory Notes, cheques) (<i>Colonial Bank v Whinney</i> (1886) 11 App Cas 426) - Benefit of a Creditor Enjoys Under a Guarantee Given by a Guarantor (<i>Loxton v Moir</i> (1914) 18 CLR 360; <i>PT Ltd v Maradona Pty Ltd</i> (1992) [660].)

EQUITABLE CHOSES IN ACTION

INTEREST IN UNADMINISTERED DECEASED ESTATES

- 1) [Starting Point] : A legatee (beneficiary from will) has no rights in respect of the estate of a will until the testator dies. On the facts, the testator dies.
 - a) *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] – Qld could not tax the Wife (legatee) for the property willed to her by her husband as the administration was still ongoing. While the estate was being administered, she had no property rights in the assets of the estate and hence could not be taxed.
- 2) **Beneficiaries have a 'Livingston right' once testator dies** – Beneficiaries under a will have a chose in action known as '**Livingston right**'/ residuary right which is a right to force the executor to administer estate properly and compel due administration. (*Commissioner of Stamp Duties (Queensland) v Livingston* [1965] (at 713))
 - a) Location of Choses in Action: It is a form of property. The Privy Council states that the chose in action is enforceable against the executor and so the location depends on location of executor.
- 3) '**Livingston right**' is an equitable chose in action which can be assigned under s12 (*FCT v Everett* 1980, [447].)
 - a) [starting point]: Livingston right does not itself amount to an interest in the estate or property (Livingston) and hence it is not an equitable interest in the property and may not squarely fall under s23C(1)(c). '**Livingston right**' is an equitable chose in action which can be assigned under s12 (*FCT v Everett* 1980, [447].) Accordingly, s12CA requires the Livingston right to be in writing and signed for assignment and this would enable the assignee would have the Livingston right including whatever may come out from the administration of the estate (Re Leigh Wills Trust)

- 4) **'Livingston right' is a chose of action which can be confiscated by crime legislation**
- a) Chose in action is an *assignable* property asset and hence **COULD** be confiscated by a confiscation order (at [17] in *Re Maye* [2008])
 - i) *Re Maye* – Mr Maye pleaded guilty to criminal activity and court made confiscation order against him after both his parents died intestate) Their estates were still being administered at the time of the confiscation order) Held; his 'Livingston right' could be confiscated as this right is a chose
 - b) A similar position was reached in *Re Leigh's Will Trusts* (at 282), where it was held that a transmission or assignment of a chose in action **must** carry with it the right to receive the fruits of the chose in action when they mature.
 - i) *Re Leigh's Will Trusts* – Mrs Leigh died and left all her shares that she held, but the shares were owned by her husband (Husband died and left shares to her in his will but it was still being administered). Held: while she did not own the shares, she had a chose in action (Livingston right) which could be assigned with the right to receive the benefits of the administration.
- 5) **Legatee bankruptcy during administration of estate (*Official Receiver in Bankruptcy v Schultz*)**
- a) **Timing Importance:** The timing of when the chose in action arises can be vitally important in determining the outcome of the case
 - b) **RULE: Chose in action will be part of bankruptcy assets if testatrix dies DURING or BEFORE insolvency**
 - i) *Schultz* – **Schultz was declared bankrupt and was STILL in a state of bankruptcy WHEN the testatrix died and left her house and the contents of her house to the executors on trust for Ms Schultz. She was later discharged from that bankruptcy state.** At the time of her discharge from bankruptcy, the estate of the testatrix still had not yet been administered and hence had a claim to any benefit that came out of the estate when it was fully administered. Because of that vesting effect, it meant that the trustee in bankruptcy acquired the chose in action at that point and thus had a right to receive the fruits of the chose in action when it matured (i.e. after the administration of the estate)
 - c) **Chose in action will NOT be part of bankruptcy assets if testatrix dies AFTER insolvency**
 - i) *Schultz* – If the testatrix had still been alive when Schultz had been discharged from bankruptcy, then Schultz would be able to obtain the chose in action AFTER the testatrix died, vesting the property interest in Schultz.

ESTABLISHING AN EXPRESSED TRUST

[starting point]: For X to [claim], he would need to prove that [item desired] was held on trust by [trustee] for [beneficiary]. For an expressed trust, this requires certainty of the subject matter, persons and intention to create a trust (Walker v Corby [385-396]). Further, while on the facts the words “trust” is not used, Paul v Constance indicates that the use of words ‘trust’ is not necessary in finding an intention to create a trust. (Paul v Constance)

- 1) **Certainty of Subject matter: identifying the trust property , must be specific**
 - a) ‘Bulk of my estate’ is not sufficiently quantifiable. If there is no certainty of the subject matter, the trust will fail (Palmer v Simmonds)
 - b) The person establishing a trust must express a definite, clear, certain part of their estate, otherwise no trust is created (Palmer v Simmonds)

- 2) **Certainty of persons (identified beneficiary + trustee): It must be clear for whom the trustee is holding the trust property and must receive it**
 - a) Trustee needs to know who to give the trust property to and who the beneficiaries are (Palmer v Simmonds)
 - b) Identified beneficiary
 - i) Must be able to identify the beneficiary, naming them is the easiest way to achieve this.
 - ii) ‘My children’ could be identified with reasonable certainty
 - iii) ‘My relatives’ ‘my friends’ or ‘my colleagues’ is less certain

- 3) **** An intention to create the trust (must be by writing only)**
 - a) **Intention is objectively ascertained**
 - i) **Byrnes v Kendle facts** – husband and wife executed an acknowledge of a trust declaring the husband held an undivided half interest in the house to which the husband had legal title as tenant-in-common upon trust for the wife. The husband, following the breakdown of the relationship declared that he did not intend to create a trust despite signing it.
 - ii) **Factors considered Byrnes v Kendle :**
 - (1) **signing the agreement of acknowledgement** : showed objective intention to create trust
 - (2) **language of the agreement:** the agreement twice described it as a trust and a kept operative provision used the language of the trust and no other part of the document has contradicted)
 - b) **No need to use the language of trust to find that there was an intention to create a trust (Paul v Constance)**
 - i) **Paul v Constance** – Constance’s statement that his partner ‘*should consider the money as much hers as it was his*’, and surrounding circumstances (both parties had drawn money’s from the account for mutual purchases and placed lotto winnings) had evinced an objective intention on the part of Mr Constance to hold the money on trust for his partner (Paul v Constance)
 - c) **There must have been a clear intention that the trustee was holding the asset for someone else (Re Adams 1884)**
 - i) **Re Adams** – The testator gave all of his property to his wife, stating he gave it to her ‘*in full confidence that she will do what is right as to the disposal thereof between my children*

either in her lifetime or after her death” The statement did not impose a trust on the wife because the intention to create a trust was not imperative

(1) The settlor (the person creating the trust) must demonstrate a clear command or obligation on the part of the trustee to hold property for the benefit of the beneficiaries

d) ID: conduct

i) **whole of the circumstances attending the relationship between the parties** (Walker v Corboy, [288])

(1) keeping a separate bank account for trust money means the subject matter of the trust has been segregated such that it can be identified. ([Re Kayford](#))

(2) Lottery money earnings being collectively placed into the bank ([Paul v Constance](#))

ii) **Look at the language employed by the parties** and whether the court can infer an to create a trust ([Associated Alloys \[34\]](#); [Re Australian Elizabethan Trust \[503\]](#).)

(1) **sufficiently clear terminology:** “If the purchaser takes the steel and on-sells it, they are holding any proceeds on trust for the vendor” court held the language of trust was sufficiently clear to establish the intention to create a trust, rather than a charge ([Associated Alloys](#))