

# LAWS2204 Exam Notes

## PERSONAL PROPERTY

### Topic 1: What is Property? Possession and Personal Property

#### Indirect Enforcement of Personal Property Rights

- **Trespass** = direct interference with things (chattels or land) in the *actual possession* of the plaintiff
  - Wrongful interference where P has actual possession of the thing and D interferes with this. One cannot use reasonable force to recapture possession, because this is considered as an assault or trespass to the person. In common law it is actionable per se and one can recover nominal damages on the basis of interference.
- **Conversion** = dealing with goods (not land) in a manner inconsistent with the rights of the plaintiff, who had *actual possession* or the *right to immediate possession* →
  - Defendant intentionally denied the plaintiff's actual possession of the good at the time of the wrong. This is also dependent on superior possession rather than absolute ownership.
- **Detinue** = wrongful detention of goods (not land) following the plaintiff's lawful demand for return where plaintiff was in *actual possession* or had the *right to immediate possession* → if court order, return goods, IF they have a special value and are not easily replaced

**Relativity of Title (General Principle):** (X found [an object]) "[A] person in possession of land or goods, even as a wrongdoer, is entitled to take action against anyone interfering with the possession unless the person interfering is able to demonstrate a superior right to possession (true owner)" → Sackville and Neave Australian Property Law (11<sup>th</sup> ed) 2.2, p 79, (**Armory v Delamirie; Parker v British Airways Board**).

- A person's property is not absolute rather it is relative and possession can be enforced against those who don't have a superior claim of possession, i.e. its better against those in the world
- Note: if the true owner were to come forward and claim the item, they would have the superior title.
- Even thief (if not charged) has superior possession of item over others (**Costello** → stolen vehicle and police; **Armory** → chimneysweep, jewel and goldsmith)

"According to relativity of title principle, \_\_\_ will only need to demonstrate a greater claim than \_\_\_ to assert his/her right of possession (Jeffries v GWR). It is not necessary to prove that \_\_\_ has the greatest claim."

#### Finder

- To prove possession, X must have both physical possession/control and the intention to possess/control the lost or abandoned object → they will have good claim to title (**Armory**)
  - **Donaldson LJ in Parker** → chattel finder acquires no rights unless chattel has been abandoned or lost and they take it into their care and control with no dishonest intent.
- This right will be greater if it is earlier in time, and without abandonment (**Armory**).
  - (a) Must be lost or abandoned (**Parker, Willey v Syman**): abandonment requires giving up physical control & rights to the thing + Intention (**Moorhouse v Angus & Robertson**)
  - (b) Physical possession (actual physical control/custody [Young]) and intention to possess (**Parker**; objective test – individual must assert acts of independent possession; **Willey**).
  - (c) A finder has an obligation to take reasonable measures to identify the true owner/and return the lost item (**Parker**)

#### Better right to possession

- A finder's rights can be defeated if someone has a better right to possession (**Parker**)
- (a) **Occupier of Building/Property/Land**

- If found on the land = The occupier of the premises will be held to have a superior title if before it was found they manifested an intention to exercise control over all things in the building, even if they were unaware of the item's presence (**Donaldson LJ in Parker, NCA v Flack; Elwes**) → requires evidence that control extended to all lost goods (limited entry rights is insufficient evidence; might need to show regular searches/conduct/ lost property policy)
- The intention is more easily manifested in private areas (**Flack**). In public areas, there is likely to be insufficient control by the occupier for this intention to be made out (**Parker**).
- Manifest intention: spectrum test (quasi-public/private distinction)
  - **Donaldson LJ in Parker**: there is a spectrum of how control can be manifested, ranging from a bank vault (where the occupier would assume control of everything in the vault); to a shop (was the chattel found in a public part of the store, or a private part of the premises?); to a public park (much more difficult to evince an intention to assume control of lost things, unless they did lost property sweeps).
  - True public area = finder will generally win v truly private area with high degree of control = owner will generally win (e.g. home or private residence)
- The private area of a shop/business (**Parker**)
- Tenant of a private property (**Flack**)
- **(b) Found in the course of employment**
  - Presumption → employer has superior right to found item → If the item is found in the course of employment, the employer holds a better title than the employee (**South Staffordshire Water Company v Sharman**)
  - There must be a causal connection to the employment, rather than a temporal connection, in that the object must have been found because of the performance of a work-related task (**Byrne**)
  - Employment may provide the occasion for finding but not be the effective cause of it. Employment must be the cause of the finding (**Byrne**)
    - Employee/contractor found on landowner's property = landowner's possession (**Sharman**)
    - Found while 'on the clock' but not in course of your duties = finders keepers (**Byrne**)
    - Accidental or incidental discovery in a public area not related to the employment (**Byrne**)
- **(c) Abandonment**
  - Must have physical control and intention to possess, or could be considered abandoned
  - A may assert that [the original owner] abandoned the chattel and thus they have better right to possession
  - Onus of proof → on A/party asserting property rights have been abandoned (**Moorhouse**)
    - Must show intention to abandon, more than 'mere faulty memory' (**Moffatt**)
    - To determine this, we consider the original owner's actions and agreement/intention (**Moorhouse**)
    - A must prove that B →
      - (a) relinquished his/her physical possession and;
      - (b) expressed a clear and unequivocal intention to renounce his/her ownership over the item (**Moorhouse**)
  - Failure to demand its return does not amount to abandonment (**Moorhouse**)
- **Conclusion** → Thus X has a better right. If person with better right doesn't have possession (wrongfully deprived → **Armory; Parker**) they have a right to bring cause of action for detinue (return goods) or conversion (damage).

## Cases

- **Armory v Delamirie** → The majority held that the chimney boy had the superior possession as he had only

parted temporarily with the jewel to get paid for it. (Finder)

- **Parker v British Airways Board** → Donaldson LJ distinguishes between public and private parts of the shop to elucidate an example whereby in the public part of the shop the owner would not likely control everything there compared to the private part of the shop. Additionally, he considered the example of the bank vault (control everything) versus the public park (not exercising control over this space) (finder)
- **Chairman, National Crime Authority v Flack** → Heerey J held that Ms Flack was entitled to the briefcase back because as the tenant of the property she manifested an intention to possess all chattels in her private space, whether they were known or unknown to her (finder)
- **Willey v Synan** → Dixon J held the concealment of goods on a is a matter that concerns the master and owners (employment)
- **South Staffordshire Water Company v Sharman** → Lord Russell ruled in favour of the landowner as it was deemed, he had a better claim to the rings than the contractor. He additionally noted, that one might consider the employment contract to see if it was in the scope of employment (employment)
  - pool cleaner found rings, court determined = landowner's possession
- **Byrne v Hoare** → Gibbs J said that one needs to differentiate between a temporal and causal connection whereby you need a causal connection in relation to finding the item. He further noted that the employer would have the right to the item if the employee found it by way of accident and his duties were not the cause as to him/her finding the object (employment)
  - Policeman found gold ingot while on duty, but not in context of performing duties = his property)
  - Not found by reason of employment, not conducting search, found as ordinary member of public/not via access to a private place
- **Moorhouse v Angus & Robertson** → Samuels JA held that relinquishment of physical possession of a chattel, coupled with a clear, unequivocal and express intention to renounce ownership, is effective to divest the interest of an owner or possessor
- **Elwes v Brigg Gas Co** → A prehistoric boat was found by a tenant six feet below the surface of the land → court held if buried, person in possession of the land has a better claim

## REAL PROPERTY

### Topic 2: Real Property and Personal Property; Possession of Land

**What is my land?** → "The person who has land has it from the heavens above to the centre of the earth below"  
→ **Bernstein of Leigh (Baron) v Skyviews and General Ltd [1978]**

#### **Fixtures/Chattels:**

Is it listed/described in the contract?

- If NO → Apply CL Rules: Where a chattel is deemed a fixture, it will pass with ownership of the land

"If the [object] was a fixture, it would be considered part of the land and A, as the owner, would have the greatest possessory title."

"The burden of proof will lie on \_\_\_ to rebut the presumption (Australian Provincial Assurance v Coroneo). The test is whether \_\_\_ objectively intended for the [chattel] to form part of the land (Belgrave Nominees v Barlin Scott). 'All the surrounding circumstances' should be considered in ascertaining \_\_\_'s objective intention (May v Ceedive)."

- General (rebuttable) presumption: Objects "fixed to the land to any extent...other than by its own weight,

is prima facie a fixture" (**Blackburn J in Holland v Hodgson (1872)**)

- Slightest fixing may be enough (**Belgrave** chillers attached by own weight)
- "When the article in question is no further attached to the land... by its own weight it is generally to be considered a mere chattel" (**Blackburn J in Holland v Hodgson (1872)**)
- BUT must consider all of the circumstances of the case, particularly degree of annexation (presumption step) and purpose of annexation
- **Problem Solving Process:**
  - 1. Apply the presumption (attached or resting on its own weight? If former: fixture; latter: chattel)
  - 2. Allocate burden of proof
    - If fixture → "the burden of proof is upon anyone who asserts that it is not" (**Australian Provincial Assurance Co Ltd v Coroneo (1938)**)
    - If chattel → "the burden of proof is on anyone who asserts that it is" (a fixture) (**Australian Provincial Assurance Co Ltd v Coroneo (1938)**)
  - 3. Apply the (objective) intention test: the "object and purpose of annexation" to confirm or rebut the presumption → would a reasonable person assume an intention to fix, determined by the surrounding circumstances? (Belgrave; Leigh)
    - List of factors, none determinative (per **Belgrave Nominees/Agripower**):
      - a. The extent of physical attachment;
        - Secure attachments more likely to be fixtures
      - b. Ease of removal, cost
        - Whether removal would significantly damage the property or object (**May v Ceedive/Leigh v Taylor**)
      - c. The nature of the chattel and its relationship with the realty
        - Clearly very large commercial equipment/units not meant to be moved, should probably remain permanently in place (**Belgrave Nominees**);
      - d. Common understandings and practice (**May v Ceedive**):
        - Expect a stove to be in a house but not a fridge
        - Would a reasonable bystander assume them to be part of the property? (**Reid v Smith**)
      - e. Whether the attachment is permanent/indefinite/substantial or merely temporary;
        - Indefinite duration (**Australian Provincial Assurance v Coroneo**)
      - f. The nature of the interest in the realty (if any) held by the attacher (person who commissioned the thing to be attached, usually the owner);
      - g. The objective purpose of attaching the chattel,
        - Does normal/functional/efficient usage require annexation?
        - e.g. stability of chattel versus benefit to the land
        - Improving the land more likely to be fixtures (**Hobson v Gorringe**)
      - h. The subjective intention of attachment (including contract of ownership)
        - Intention that matters is that of the original affixer, not necessarily the parties to the dispute (**May v Ceedive**)
    - 4. Conclude → "On balance, a court is likely to find that the object is a fixture/chattel as a reasonable bystander would/not assume them to be part of the property (**Reid v Smith**)"

### **Cases for Step 3:**

- **Agripower Barraba v Blomfield** → Dispute concerning ownership of (valuable) mining plant and equipment. Some equipment was attached to the land, some resting by its own weight. Dispute between owner of land and a creditor of previous tenant who had security rights over chattels.

- **Leigh v Taylor** → Tapestries, life tenant, presumption rebutted
  - Attached but not a fixture (chattel)
  - Tenant for life affixed valuable tapestries to wall, were attached to canvas' which were nailed to the walls (high degree of annexation), tapestries held to be chattels; no intention to dedicate tapestries to house
- **Reid v Smith** → House (QLD) not fixed/attached, but still a fixture, presumption rebutted
  - Lessee erected dwelling house not affixed to the land, rested on own weight upon brick piers, this was normal practice in WA to avoid white ants, house held to be fixture → was a building lease (obliging lessee to erect a dwelling i.e. improve the land) suggested intention that dwelling should be considered annexed to land
- **May v Ceedive Pty Ltd** → House (NSW) fixed, was fixture, clear subjective intent irrelevant, presumption confirmed
- **Belgrave Nominees v Barlin-Scott Airconditioning (Aust) Pty Ltd** → not attached but a fixture
  - Installed 2 air conditioning plants, each sat on platforms (on their own weight) attached to the roof (i.e. not direct annexation), each A/C unit was connected to water pipes and electrical cables of the building → A/C unit held to be fixture, "attached" by water supply despite resting, formed essential part of the building necessary for its use and occupancy
- **Australian Provincial Assurance Co Ltd v Coroneo** → Theatre contained rows of seats bolted to the floor; the seats could/were regularly unbolted & moved around for adjusting seating plans → seats held to be chattels; object and purpose was not to permanently improve the building.
- **D'Encourt v Gregory** → Heavy garden ornaments improving the land, was a fixture
- **Commissioner of State Revenue v Snowy Hydro** → Electricity generators (moveable, transportable), was a fixture

### Adverse Possession

- A person's title arising from prior possession can be defeated by a defendant showing adverse possession against the person for the duration of the limitation period through adverse possession (**Mabo (No.2)**)
- Show physical possession of the property + with requisite intention to possess + without consent from the owner + for the limitation period or longer
- 1. When does time begin to run?
  - s 28 of Limitation Act → Where the plaintiff in an action on a cause of action to recover land or a person through whom the plaintiff claims:
    - (a) has been in possession of the land, and
    - (b) while entitled to the land, is dispossessed or discontinues his or her possession,
  - the cause of action accrues on the date of dispossession or discontinuance.
  - **Possession starts from the date the adverse possessor moved in (s 38(1) of LA) →**
    - "cause of action does not accrue until the date on which the land is first in adverse possession."
  - How to stop time running/reset the clock
    - Prior possessor
      - retakes possession physically
      - recovers possession by court proceedings
      - consents to the defendant's possession
    - Defendant
      - gives up possession (abandonment)
- 2. Is there adverse possession?
  - a. Physical possession/control? (**Powell v McFarlane**)

- As per Cockburn CJ in **Asher v Whitlock**, possession is good against all the world except the person who can show a good title.
- Factual possession is an appropriate degree of physical control (**Abbatangelo**)
- Evidence of use or steps to prohibits other's access (fences, signs, locks)
  - Fences → Enclosure is the strongest possible evidence of adverse possession (**Abbatangelo**)
- Type of Land factors in (e.g. using agricultural land for farming/grazing)
- Paying rates, expenditure of money on the land
- Recreational use (in some situations, e.g. fishing in marshland)
- NOTE: Explain how the acts from factual possession demonstrate this intention to possess
- b. Intention to possess?
  - Intent involves the objective intention, in one's own name and on one's own behalf, to exclude the world at large so far as it reasonably practicable (**Abbatangelo**). One only needs to establish an intent to possess not an intent to own (**Abbatangelo**).
  - **Abbatangelo** → Abbatangelos bought land surrounding council on 3 sides, expended money and effort on council land. Removed boundary on one side, council did nothing. Didn't claim to own it during planning application and council inspection, but irrelevant.
- c. Without consent from the owner?
  - Consent = lease. Having a written letter isn't enough to claim consent.
- 3. Has the limitation period expired? Are there any gaps?
  - NOTE: Must know when time starts to run against the paper title owner or prior possessor → time starts to run when the possessor moves in
  - To bring an action under s 20 Civil Procedure Act a claim for a judgment for possession of land through an action for ejectment has a limitation period in NSW of 12 years (s 27(2) of LA)
  - a. NSW: 12 years, or 30 years for Crown Land (s 27(2) of Limitation Act NSW)
    - "an action on a cause of action to recover land is not maintainable ... if brought after the expiration of a limitation period of twelve years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims."
  - b. Continuous → restarts if possession is interrupted (s 38(3)(b) of LA)
    - Needs to be abandonment, not mere absence (e.g. did they take everything they owned out of the property)
    - S 38(3) of LA → Where a cause of action to recover land accrues and afterwards, but before the cause of action is barred by this Act, **the land ceases to be in adverse possession**, for the purposes of this Act:
      - (a) the former adverse possession has no effect, and
      - (b) a fresh cause of action accrues on, but not before, the date when the land is first again in adverse possession.
    - Limitation extinguishes right of action and title of claimant *as against the adverse possessor*
  - c. Adverse possession period is cumulative AGAINST original owner if unbroken (s 38(2) of LA)
    - Person in possession has better claim than all but the rightful owner (**Perry v Clissold**)
    - Original owner would lose property, but then FIRST adverse possessor has best claim BECAUSE they become the 'rightful owner' (**Mabo**)
    - Prior claim can be inherited (**Asher v Whitlock**)
    - s 38(2) of LA → where a cause of action accrues to recover land from a person in adverse possession of the land,
      - and the land is afterwards in the adverse possession of a second person,
      - whether the second person claims through the first person or not,