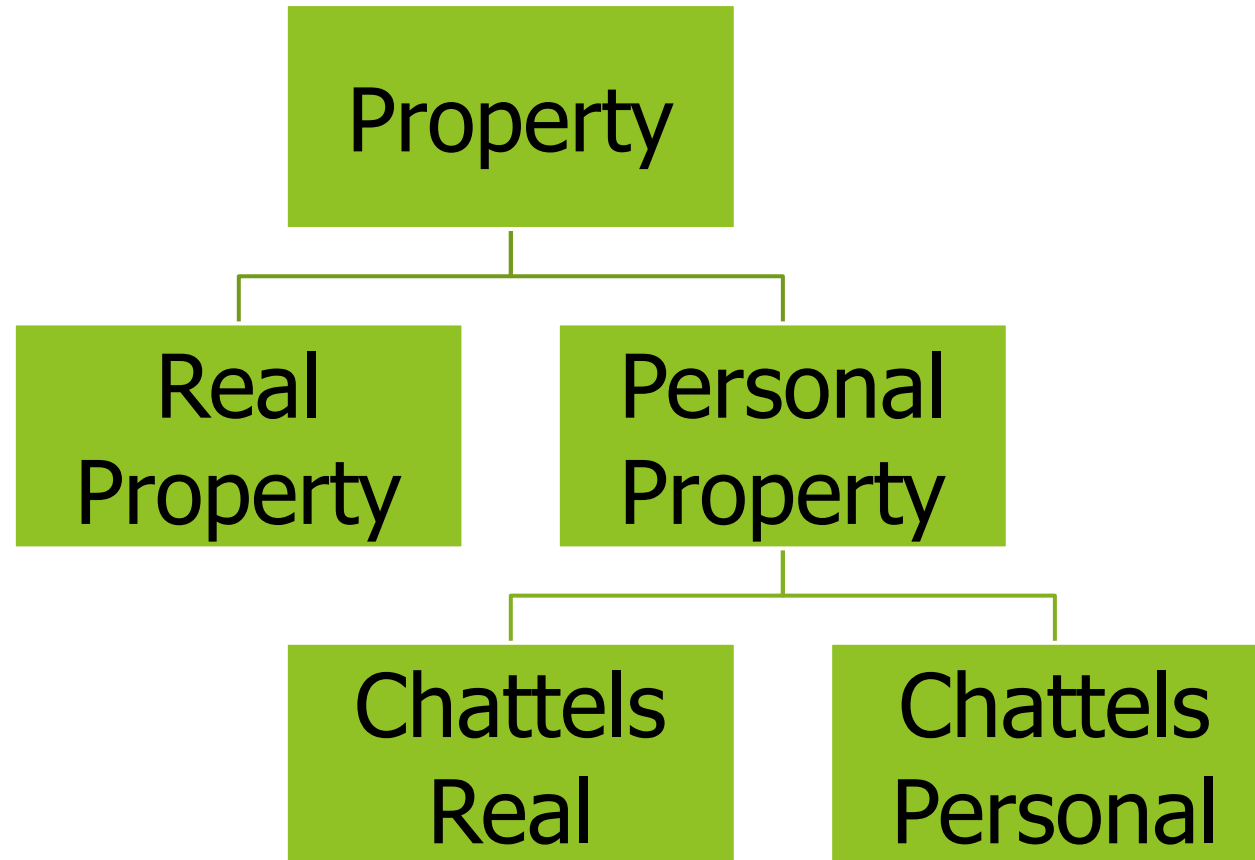


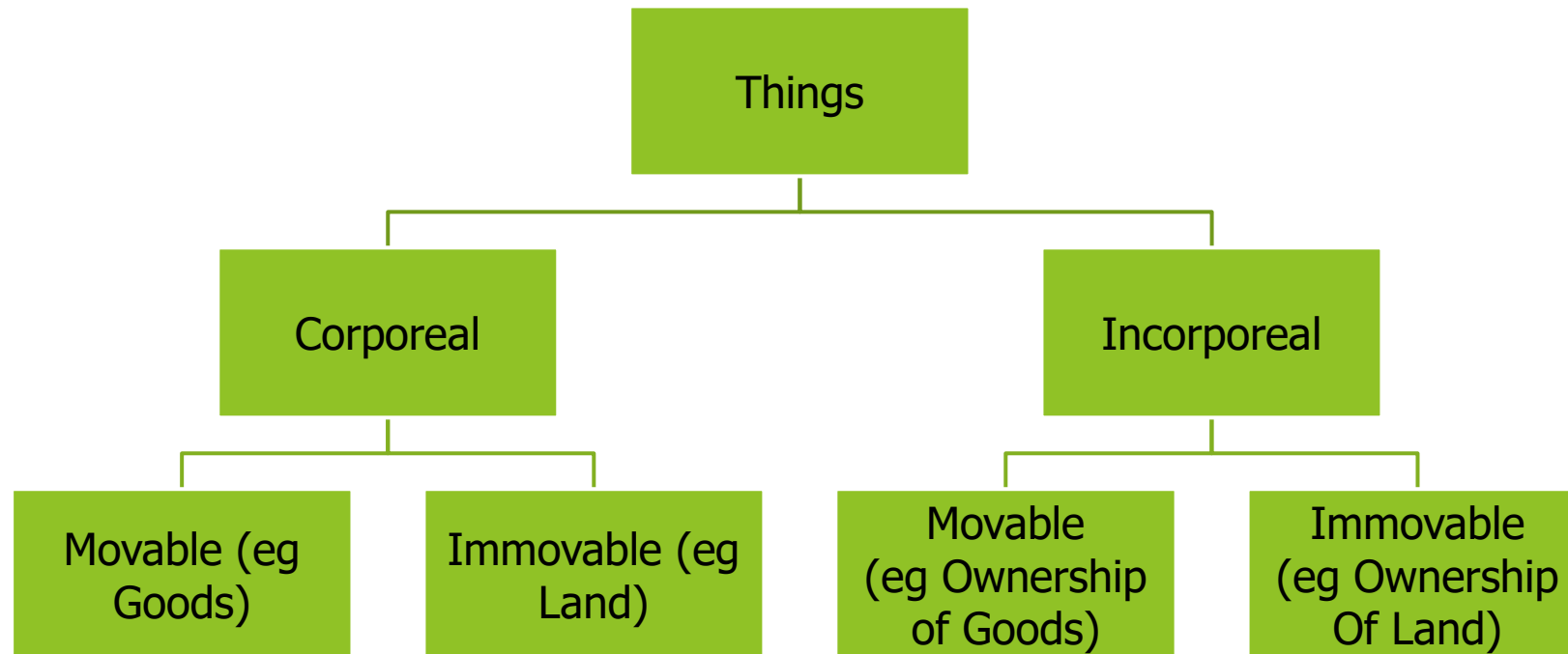
Personal Property

Personal Property



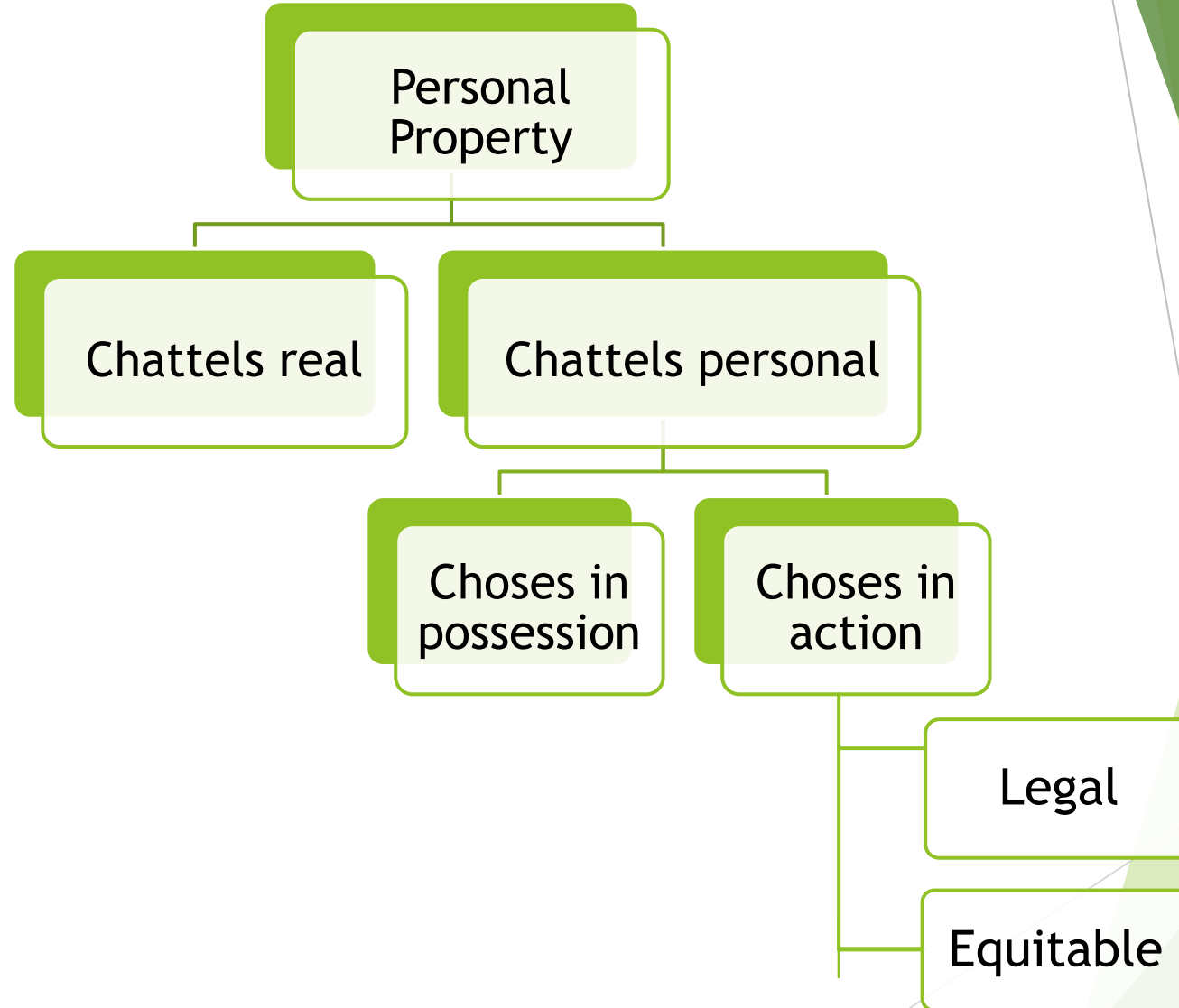
TBK p, 16.

Personal Property



Pearson, et al, 3rd ed, p.50

Personal Property



Personal Property

How is the word “property” used?

- ▶ To describe an object or thing capable of being owned, that is, personal property; and
- ▶ To refer to the type of right a person may have in that object or thing, that is, a property or proprietary right.
- ▶ See, further, the discussion at TBK [1.20]

Personal Property

- Tay and Kamenka describe property as a “burden as well as a privilege, a responsibility as well as an advantage”. What does this mean, and what are its implication for acquiring and using property?

TBK, p.5.

Personal Property

- ▶ W Blackstone, *Commentaries on the Laws of England* [...] speaking of the rights of (English) persons, said “The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.”
- ▶ Is the sentiment expressed by Blackstone still current today?

Personal Property

- ▶ Chattels real: interests in real estate that are less than freehold (eg, leasehold interests)
- ▶ Chattels personal: all other types of chattels apart from chattels real and are sub-divided into choses in possession and choses in action.

Personal Property

Choses in possession

- ▶ Tangible (they have a physical presence or substance)
- ▶ Can be physically possessed (are portable and deliverable)

The *Sale of Goods Act 1923* (NSW) concerns choses in possession or goods.

“Goods”: all chattels personal other than things in action and money, and also emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Personal Property

- ▶ Characteristics of choses in action
 - ▶ Enforceability
 - ▶ Incorporeal and intangible
 - ▶ “Bare Right”

TBK, p.26

Personal Property

► Equitable choses in action

Historically, legal choses in action were enforceable only at common law and equitable choses in action were enforceable only in equity.

Generally, it was only possible to assign common law choses in action under common law and equitable choses in action in equity

TBK p.27

Personal Property

- ▶ *Equitable* choses in action include:
 - ▶ A share or interest in a partnership
 - ▶ The interest of a beneficiary under a trust
 - ▶ The interest of a legatee
 - ▶ A reversionary interest under a will

TBK, p.29

Personal Property

- ▶ *Legal choses in action* include:
 - ▶ A debt
 - ▶ Negotiable instruments (including bills of exchange, promissory notes and cheques)
 - ▶ A policy of insurance
 - ▶ Shares in the issued capital of a company
 - ▶ The benefit a creditor enjoys under a guarantee given by a guarantor

TBK, p.28

Personal Property

Degrees of Possession

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

Personal Property

► Degrees of Possession

Possession can be either actual or constructive. *Actual possession* is where a person has physical possession of goods accompanied by an intention to control or exercise power over the goods. *Constructive possession* is where a person, having the requisite intention, has taken symbolic delivery, as opposed to physical possession, of goods through, for example, obtaining the physical means of control over the goods or entering into an arrangement where the goods are held to the order of that person.

► See, further, the discussion in TBK at [1.340] - [1.390]

Personal Property

► Degrees of Possession

The framework of the law of possession can be broken down according to what are called the *elements* of possession, namely *intention* and *control*. These elements of intention and control function as benchmarks or yardsticks by which to gauge whether a particular person has “possession” of a tangible corporeal thing...On a further refinement of *degrees of possession* see F Pollock and R S Wright, *An Essay on Possession in the Common Law*...

TBK, p.32

Personal Property

► Degrees of Possession

- *De facto* possession: occupation or control
- Ownership does not make one an occupier, nor necessarily confer any right to occupy; but occupation is easier and more effective, (in a settled country at any rate) when armed with the real or supposed authority of the owner. Physical or *de facto* possession readily follows the reputation of title; we shall see that possession in law is ordinarily adjusted to follow the true title, in cases where physical possession is contested or ambiguous; and in this the law does not cross, but rather develops and confirms, the practical instinct of mankind.

F Pollock and R S Wright, *An Essay on Possession in the Common Law*, (Clarendon Press, Oxford, 1888)

Personal Property

► Degrees of Possession

► *Possession in Law*

When the fact of control is coupled with a legal claim and right to exercise it in one's own name against the worlds at large, we have possession in law as well as in fact. We say as against the world at large, not as against all men without exception. For a perfectly exclusive right to the control of anything can belong to the owner, or to some one invested with such right by the will of the owner or some authority ultimately derived therefrom, or, exceptionally, by an act of the law superseding the owner's will and his normal rights. Such a right is a matter of title; the person bearing it has a definite estate or interest known [to] the law,...a general or special property if it be in goods. If he has not the actual control, the law will help him to it; in other words, he has the right to possess the thing in question...

F Pollock and R S Wright, *An Essay on Possession in the Common Law*, (Clarendon Press, Oxford, 1888)

Personal Property

► Degrees of Possession

- The significance of possession of goods is measured by those attributes of possession which externalise possession of a material object in relation to those persons who do not have possession. Possession is an interest that other people must respect.

Pearson, et al, 3rd ed, p. 76

Personal Property

- ▶ Attributes of Possession
 - ▶ Exclusivity (*Moors v Burke* (1919) 26 CLR 265)
 - ▶ Exclusion (*Knapp v Knapp* [1944] SASR 257)
 - ▶ Indivisibility (*Gatward v Alley* (1940) 40 SR (NSW) 174)

Personal Property

► Attributes of Possession

- Cases concerning the rights of ‘finders’ as against either subsequent possessors or the property owners on whose property the goods were found:
- *Amory v Delamirie* (1722) 1 Stra 505; 93 ER 664
- *Parker v British Airways Board* [1982] 1 QB 1004
- *Chairman, National Crime Authority v Flack* (1998) 86 FCR 16

See also:

- *Waverley Borough Council v Fletcher* [1996] QB 334
- *Tamworth Industries Ltd v Attorney-General* [1991] 3 NZLR 616

Personal Property

The acquisition and loss of possession:

- ▶ Delivery (can be actual or constructive)
- ▶ Abandonment (unsettled question whether ownership can be abandoned)
 - (1) physical act of abandonment
 - (2) intention of the owner to abandon (Re Jigrose)
- ▶ Finding

Personal Property

- ▶ The framework of a ‘finding dispute’ helps us to understand some fundamental personal property concepts, in particular the concepts of abandonment and possession.
- ▶ A finding dispute arises when a person finds goods which have been lost or abandoned by their owner. The dispute will usually be between the finder and the person upon whose land the goods were found.
- ▶ The dispute is resolved by determining **who had a better possessory title** - the finder or the occupier.

Personal Property

What is abandonment?

- ▶ Owner no longer intends to possess the goods. Different in that sense to losing goods: *Re Jigrose Pty Ltd* [1994] 1 QdR 382.
- ▶ The distinction may be important in determining who is entitled to the goods if found.
- ▶ If abandoned - they have been returned into the common stock and will belong to first occupant or finder. Finder, upon appropriation, may acquire **ownership** of the abandoned goods.
- ▶ If lost - the person who finds the goods obtains a **possessory title** that is subject to the rights of the true owner.

Personal Property

Can ownership be lost by abandonment?

- ▶ No: *Hayne's case* (1614) 77 ER 1389 - where person found guilty of stealing a shroud around a body buried in the ground; *R v Edwards* (1877) where employees found guilty of stealing the carcasses of 3 pigs which a farmer had buried because they had been bitten by a mad dog.
- ▶ Yes - *Re Jigrose Pty Ltd* [1994] 1 QdR 382; *Elwes v Brigg Gas Co* (1886) 33 ChD 562.

Personal Property

Abandonment occurs when there is a 'giving up, a total desertion, and absolute relinquishment of private goods by the former owner. It may arise when the owner, with the specific intent of desertion and relinquishment, casts away or leaves behind his property: *Simpson v Gowers* (1981) 121 DLR (3d) 709

Elements of abandonment:

- (1) Physical act of abandonment;
- (2) Intention on part of owner to relinquish ownership: *Munday v ACT* [1998] ACTSC 62.

Personal Property

Abandonment

Physical element:

The best evidence of abandonment is to throw the goods away (*Re Jigrose*). Beyond that, it can be difficult to establish abandonment: *Moorhouse v Angus & Robertson (No 1)* [1981] 1 NSWLR 700.

The element of intent:

The owner must no longer intend to retain either possession or property of the goods: *Re Jigrose*. (This distinguishes abandonment from mere loss: *Keene v Carter* (1994) 12 WAR 20).

Intention may be inferred from the circumstances: *Keene v Carter*

Person asserting goods have been abandoned bears the onus.

Personal Property

Moorhouse v Angus & Robertson

Plaintiff, an author left a manuscript, *The Americans, Baby*, among other things, with a publisher for some years before asking for it to be returned.

Manuscript could not be found.

Author sued publisher for damages for detinue.

Publisher claimed author had abandoned ownership in the manuscript.

NSWCA held: Assuming rights in chattels could be lost by abandonment, there was insufficient evidence of an intention to abandon the manuscript. Issue resolved by reference to the publishing contract which provided that the manuscripts remained the property of the author.

***Murray v McOnie* [2019] NSWSC 189**

Beneficiaries of an estate failed to collect goods stored in the deceased's unit for some 8 months despite being asked many times to do so in order that the unit could be sold.

The goods were held to have been abandoned and able to be disposed of as waste.



- ▶ cf with ***ACN 116 746 859 (formerly known as Palermo Seafoods Pty Ltd) v Lunapas Pty Ltd* [2017] NSWSC 1583** where tenant not held to have abandoned goods when given one day to collect them.

Personal Property

How does the occupier of an abandoned chattel become the owner?

- ▶ Title to abandoned goods is not automatically transferred.
- ▶ The goods must have been **appropriated** by the finder.
- ▶ Appropriation in this sense means taking to oneself as one's property: *Re Jigrose*
- ▶ That would require a manifest intention to exercise control over the goods: *Parker v British Airways Board* [1982] QB 1004.
- ▶ Examples of appropriation: *Re Jigrose*; *Lang v Le Boursicot* (1993) 5 BPR 11, 782.

Parker v British Airways [1982] QB 1004



- ▶ Passenger at Heathrow airport, Parker, found a gold bracelet in the British Airways executive lounge.
- ▶ British Airways was the lessee and occupier of the lounge from the British Airports Authority.
- ▶ Parker handed the bracelet to a British Airways official and left his contact details.
- ▶ Bracelet not claimed but British Airways refused to return it to Parker. They sold it and kept the proceeds.
- ▶ Parker sued British Airways for the value of the bracelet.

Parker v British Airways [1982] QB 1004

Parker (cont'd)

English Court of Appeal held:

Parker, as the finder of the bracelet, which was found unattached to the land, had a **better possessory title** than the occupier at the time of finding.

The occupier had to establish a **prior** possessory title if they were to defeat the title of the finder. The occupier could not show that they had possession of the chattel immediately before it was found.

Whether occupier already had possession at time of finding depended upon whether they had shown a **sufficiently strong intention to control both the premises on which the bracelet was found and the things which may have been on or in it.**

No such intention. Parker entitled to damages.

***Parker v British Airways* [1982] QB 1004**

See principles set out by Donaldson LJ in *Parker* at 1017-1018:

Rights and obligations of the finder

1. The finder of a chattel acquires no rights over it unless (a) it has been abandoned or lost and (b) he takes it into his care and control.
2. The finder of a chattel acquires very limited rights over it if he takes it into his care and control with dishonest intent or in the course of trespassing.
3. Subject to the foregoing and to point 4 below, a finder of a chattel, whilst not acquiring any absolute property or ownership in the chattel, acquires a right to keep it against all but the true owner or those in a position to claim through the true owner or one who can assert a prior right to keep the chattel which was subsisting at the time when the finder took the chattel into his care and control.

***Parker v British Airways* [1982] QB 1004**

- 4. Unless otherwise agreed, any servant or agent who finds a chattel in the course of his employment or agency and not wholly incidentally or collaterally thereto and who takes it into his care and control does so on behalf of his employer or principal who acquires a finder's rights to the exclusion of those of the actual finder.**
- 5. A person having a finder's rights has an obligation to take such measures as in all the circumstances are reasonable to acquaint the true owner of the finding and present whereabouts of the chattel and to care for it meanwhile.**

Finding

Rights and liabilities of an occupier

- 1. An occupier of land has rights superior to those of a finder over chattels in or attached to that land and an occupier of a building has similar rights in respect of chattels attached to that building, whether in either case the occupier is aware of the presence of the chattel.**
- 2. An occupier of a building has rights superior to those of a finder over chattels upon or in, but not attached to, that building if, but only if, before the chattel is found, he has manifested an intention to exercise control over the building and the things which may be upon it or in it.**

Finding

- 3. An occupier who manifests an intention to exercise control over a building and the things which may be upon or in it so as to acquire rights superior to those of a finder is under an obligation to take such measures as in all the circumstances are reasonable to ensure that lost chattels are found and, upon their being found, whether by him or by a third party, to acquaint the true owner of the finding and to care for the chattels meanwhile. The manifestation of intention may be express or implied from the circumstances including, in particular, the circumstance that the occupier manifestly accepts or is obliged by law to accept liability for chattels lost upon his 'premises', eg an innkeeper or carrier's liability.**
- 4. An 'occupier' of a chattel, eg a ship, motor car, caravan or aircraft, is to be treated as if he were the occupier of a building for the purposes of the foregoing rules.**

Finding

Finding (cont'd)

- ▶ Important distinction is whether chattel is **separate from** or **attached to** either the land or the building upon or in which it was found.
- ▶ Chattels in or **attached** to the land
 - South Staffordshire Water Co v Sharman [1896] 2 QB 44
 - Elwes v Brigg Gas Co (1896) 33 Ch D 562
 - Waverley Borough Council v Fletcher [1995] 4 AllER 756
- ▶ If chattel found attached, **occupier** in general obtains a better possessory title. Presumed occupier held a general intention to control all items attached to their land. Applies whether occupier knew of the chattel or not.

Finding

- If chattel found **unattached**, occupier has to show a manifest intention to exercise control over anything lying unattached on the land or in a building: **Bridges v Hawkesworth (1851) 21 LJ QB 75**
- Whether manifest intention to exercise control over objects found on the land will depend upon the circumstances. Largely a question of degree: compare finding goods on the floor of a bank vault to finding goods in a park.
- ▶ No manifest intention shown in: *Parker*; *Hannah v Peel* [1945] 1 KB 509; *Bridges v Hawkesworth* (1851) 21 LJ QB 75; *Tamworth Industries Ltd v A-G* [1991] 3 NZLR 616. Finder held to have better possessory title than occupier.

Finding

Are the goods under or lying on the land? (ie attached or not)

Held **'in or attached' to land:**

- ▶ Rings in mud at bottom of a pool : *South Staffordshire Water Co v Sharman* [1896] 2 QB 44
- ▶ Prehistoric boat six feet below surface: *Elwes v Brigg Gas Co* (1886) 33 Ch D 562
- ▶ Medieval gold brooch nine inches below surface of public park: *Waverley Borough Council*
- ▶ Bank notes in an old safe built into the wall of a demolished building: *Corporation of London v Appleyard* [1963] 1 WLR 982.
- ▶ Occupier in each case held to have the better possessory title.

***Byrne v Hoare* [1965] QdR 135.**

- ▶ Where employee finds goods in course of employment, general principle is that the goods belong to the employer: *Corporation of London; Willey v Synan* (1937) 57 CLR 200.
- ▶ However, if finder was employed at the time but the employment was not the effective cause of the finding, the goods do not belong to the employer: *Byrne v Hoare* [1965] QdR 135.



Finding

Where finder a wrongdoer

- ▶ Where person in possession a wrongdoer (trespasser) his or her title may be defeated by the absolute owner, or by any person claiming to hold the goods by virtue of the absolute owner's authority (ie, the police): *Buckley v Gross* (1863) cf *Russell v Wilson* (1923) 33 CLR 558.

Personal Property

The transfer of personal property

Chose in possession:

- ▶ Sale
- ▶ Gift (elements of a gift: intention to gift; acts sufficient to give effect to intention; acceptance of gift: *Rowland v Stevenson* [2005] NSWSC 325).

Chose in action:

- ▶ Assignment

Personal Property

Acquiring ownership

- ▶ By transfer
- ▶ By gift
- ▶ By will or descent
- ▶ By taking possession of ownerless things, including abandoned property; and
- ▶ By creation

Personal Property: changes to the nature of the chattel

Ways the nature of a chattel can change:

- ▶ Accession
- ▶ Commingling
- ▶ Specification
- ▶ Fixtures

See Ch 2, TBK;

see also, Ch 4 (Accession, Specification and Intermixture) in Traves, Commercial Law, LexisNexis, 5th ed, 2020.

Personal Property

- ▶ Cases concerning issues of ‘accession’, ‘mixture’ and ‘specification’ (concerning property in derived products)
- ▶ *McKeown v Cavalier Yachts Pty Ltd* (1988) 13 NSWLR 303
- ▶ *Caltex Oil (Australia) Pty Ltd v The Dredge “Willemsted”* (1976) 136 CLR 529
- ▶ *Associated Alloys Pty Ltd v Metropolitan Engineering and Fabrications Pty Ltd* (1996) 20 ACSR 205

Personal Property

Accession

The doctrine whereby a person loses ownership of a chattel by the chattel (the accessory) being attached to or incorporated in a principal chattel which belongs to another person. Prima facie property does not pass merely because of annexure. Needs to be an intention on the part of the owner of the accessory to pass the property to the owner of the principal chattel. If not then for the owner of the principal chattel to show the necessity of case requires application of principles of accession so that property deemed to pass by operation of law.

Rendell v Associated Finance Pty Ltd [1957] VR 604 at 609

Pell hired utility truck from Associated Finance under a hire-purchase agreement. Clause: 'any accessories or goods supplied with or attached to the goods shall become part of the goods'

Pell removed old engine and replaced it with new engine hired from Rendell.

Pell failed to make payments due for hire of the truck and AF repossessed truck.

Rendell sued AF for conversion of the engine.

AF said had not converted because engine had become part of the truck via accession

Court held in favour of Rendell. Engine could be detached without damage to the truck or engine.



Personal Property

- ▶ Doctrine of accession only applies if severance from a practical point of view is impossible, eg, sewing of cotton into a garment or laying of planks on a ship): *Rendell*.
- ▶ This reflects the fundamental principle underpinning transfer of property in goods, that is, that the transfer of property depends upon intention and consent. It is only in circumstances of necessity when resort will be had to transfer of property by operation of law: *Rendell*.
- ▶ Usually evident which is the accessory and which is the principal chattel: *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 WLR 485 accessories were diesel engines incorporated into generator sets.

Personal Property

The effects of accession

The accessory becomes part of the principal. The title of the owner of the accessory is extinguished and the owner of the principal becomes entitled to the principal in its improved state.

If owner of principal does not have possession of the improved chattel, he or she may bring action in detinue or conversion against the person in possession of the chattel. The court has a discretion as to whether to award specific restitution of chattels in lieu of damages, but ordinarily court will not order return of the chattel unless it has special value or is unique: *McKeown v Cavalier Yachts Pty Ltd* (1988) 13 NSWLR 303.

Owner of accessory may be entitled to compensation for the improvements: *Thomas v Robinson* [1977] 1 NZLR 385.

Personal Property

Specification

The process where a raw material is altered without authorisation of the original owner of the material by the application of manual work or some other process to produce a different product.

Examples: making whiskey from corn, making oil from olives and making a cake from eggs, flour and butter.

Under the doctrine the maker becomes the owner of the new product. The maker is only liable in damages to the original owner for the value of the materials converted.

Personal Property

Specification (cont'd)

Unlike intermixture, where specification applies there is an “all or nothing” approach in that no scope for sharing ownership of the new product.

The maker becomes the owner of the new product, liable only in damages to the owner of the original materials used to manufacture the new product.

Applied in *International Banking Corp v Ferguson, Shaw & Sons* [1910] SC 182 where oil bought by defendant from person without title to it and used to make lard by blending it with materials of his own. Plaintiffs brought action to recover the oil or damages in lieu.

Held: that the mixer of the new species (the defendant) became the sole proprietor of the lard.

Personal Property

Commingling (or intermixture)

Where goods of different people, A and B, are inextricably mixed and merged: *Sandeman & Sons v Tyzack and Branfoot Steamship Co Ltd* [1913] AC 680; *Indian Oil Corporation v Greenstone Shipping SA (Panama)* (1988) 1 QB 345

Where not practicable to separate the goods, issue arises as to who is entitled to the resultant mixture.

If goods mixed due to wrongful act of one of the owners the innocent owner entitled to the goods.

If mixing accidental or not the fault of either party then neither has done anything to forfeit the right to possession of their own property and if neither willing to abandon that right, only solution is that the owners become owners in common of the mixed property.

Personal Property

Indian Oil

Unauthorised mixing of crude oil on board a vessel.

The owner's vessel had been chartered for the carriage of a cargo of 75 000 tons of crude oil from the Soviet Union to India.

At time oil loaded there was residue of oil from its previous voyage and the Soviet crude was inextricably mixed with the residue.

After delivery of the 75 000 tons, 9 545 barrels of oil remained on board.

Consignees claimed that because the goods had been mixed, and because they were the innocent party, the property in the whole of the mixed goods should belong to them.

The consignee's claim to the residue failed.

Staughton J held:

- ▶ Where B wrongfully mixes the goods of A with his own, which are substantially of the same nature and quality, and cannot in practice be separated, mixture is held in common and A is entitled to receive out of it a quantity equal to that of his goods that went into the mixture. He is also entitled to claim damages from B for any loss he may have suffered by reason of the admixture.

Personal Property

- ▶ Generally where goods of A and goods of B have become indistinguishably and inseparably mixed and mixing was B's fault, A can claim the goods: *Sandeman*.
- ▶ However this principle 'gives way' where the nature of the goods is such as to permit a fair distribution between wrongdoer and the innocent party.