

Personal Property

Topic 2

Objectives

- to understand the meaning and importance of *possession* and *control* of personal property;
- to be able to describe the tortious actions available for interference with personal property;
- to understand and apply rules relating to the finding of, and parting with, personal property

2.1 Possession- a basis for property rights

- an ancient foundation of property rights
- why?

Possession, ownership and title

- ownership:
 - fullest rights to control a thing
- title:
 - right to deal with a thing
 - derives from ownership or possession
 - a number of people may have title to a thing
- possession
 - Can be the basis of ownership and title
 - Can give rights against third parties

Possession, ownership and title to goods

- title to goods
 - right to use
 - right to enforce against the whole world
- possession of goods as:
 - a legal concept
 - a source of title
 - right to control, use
 - basis for actions to recover to good

Relativity of title

- weighing the comparative merits of rights
- a number of people may have title to a thing
 - Owen the Owner
 - Jeffries the first possessor
 - Great Western Railways the second possessor
- whose rights are better?
- how can those rights be protected?

2.2 Possession and Control

- Possession – 3 senses
 - mere physical possession
 - where the possessor is able to assume, exercise or resume manual control of the thing at will
 - where the thing is
 - protected by the presence of the possessor, or
 - in/on a house/land occupied by her/him or
 - in some receptacle belonging to her/him and under her/his control

What amounts to possession?

- Physical control of the thing (in any of the 3 senses above)

AND

- An intention to hold and use the thing as one's own – *animus possidendi*

Physical control

- What amounts to physical control?
- Depends on the circumstances

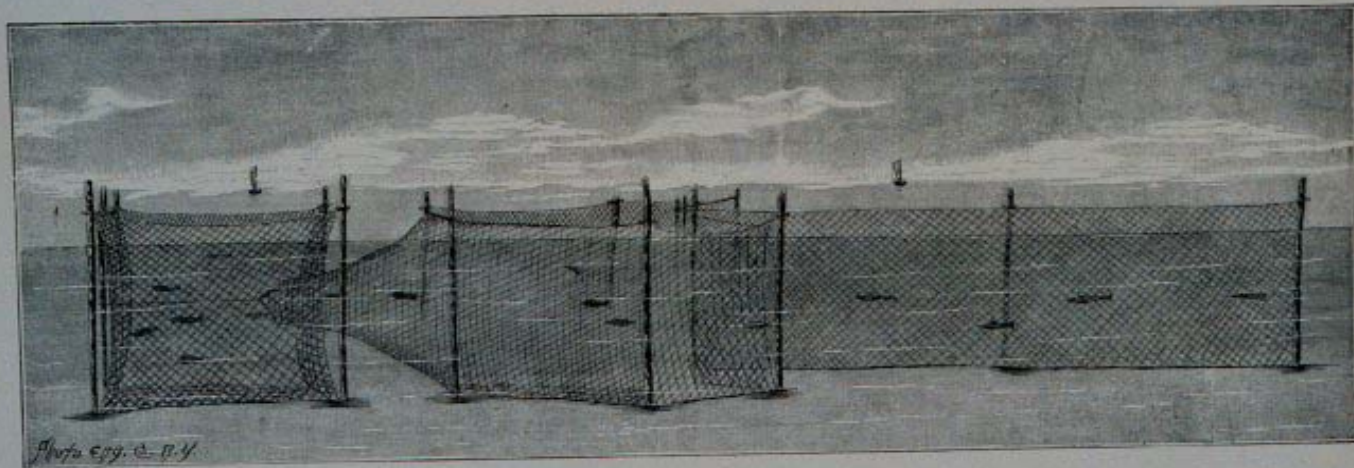
Physical control over wild animals, fish and ships

- Fish (and wild animals)
 - Young v Hichens
 - State v Shaw
- Ship wrecks
 - The Tubantia

Young v Hichens CB 95-96

- Facts
 - The fish were in the net
 - The net was almost closed
- Was the physical element for possession satisfied?
 - Would have closed the net and had the fish in actual control but for the interference
 - But actual control over the fish is required
 - Here there was no actual control

State v Shaw pm



THE FISHERIES OF THE GREAT LAKES.

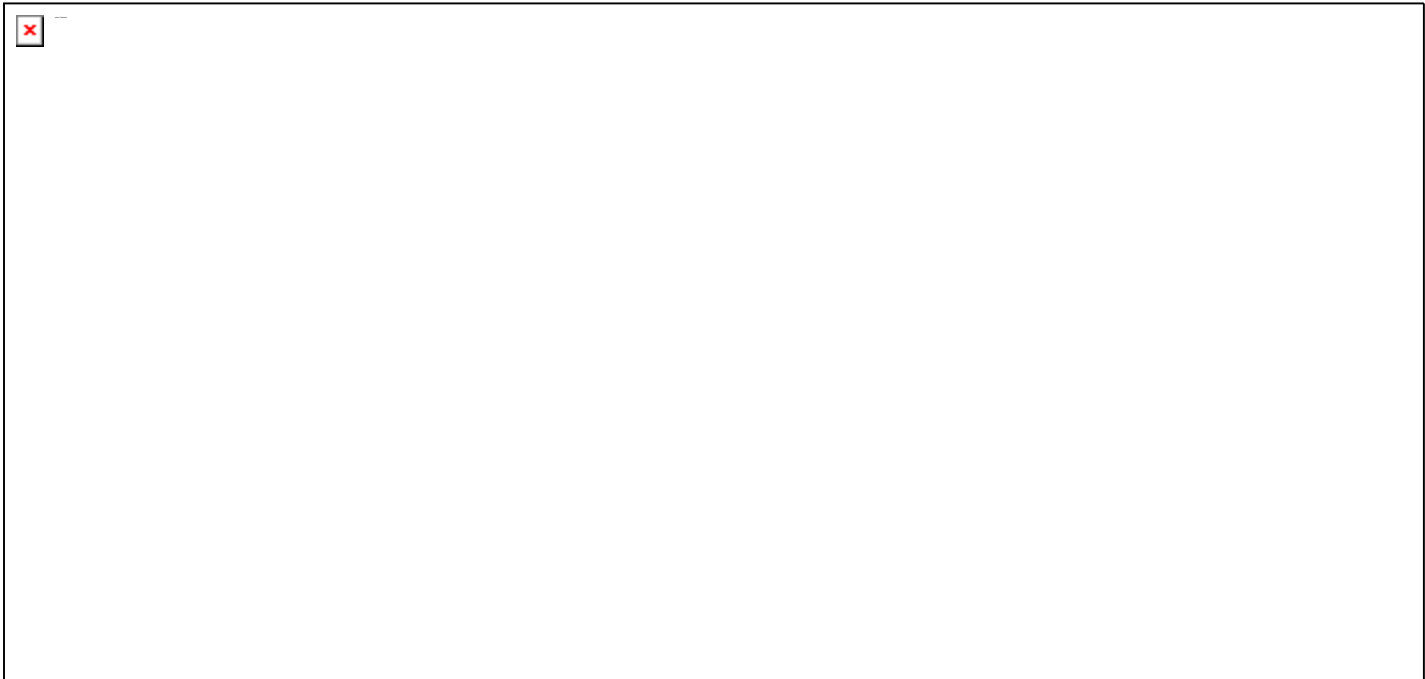
Pound-net at Detroit River. (Sect. v, vol. i, p. 758.)

From sketch by L. Kaulder.

State v Shaw

- Facts
 - different type of net- tunnel net
 - the fish were in the tunnel and the chance of escape was remote
- Were they in possession of the fish?
 - yes
 - absolute security not required

The Tubantia



The Tubantia

- Facts
 - Discontinuous possession- North Sea and deep water
 - Buoyed moorings, salvage work
- Intention to possess not in question
- Physical control amounts to
 - “ the use and occupation of which the subject matter is practically capable”
- Control sufficient to exclude others from interfering without the use of unlawful force
- Note policy considerations- to promote salvaging

Possession = Physical control+ mental element

- Physical control
 - control need not be absolute
 - control of which the chattel is capable
 - consider the issue in light of the circumstances
- Mental element
 - intend to use goods as own

2.3 What consequences flow from possession?

- presumed rightful
- person presumed to own the thing
- gives a proprietary interest
- possession may be based on a security transaction eg mortgage, lien
- adverse possession develops into full (best) title at expiration of limitation period

Possession as a proprietary interest

- An interest in possession
 - may be assigned
 - is subject only to a better right to possession
 - true owner has the best right to possession (unless has created a right to possession in another

2.3.1 What actions can be taken to protect a possessory interest?

- Tortious actions:
 - Trespass to goods
 - Detinue
 - Conversion
- All these actions are based on possession not ownership
- The superior right of the true owner is not relevant (*jus tertii*)
 - Refer to Chambers 55-57

Bremner v Bleakley CB 100-103

- Facts
 - Sand from neighbours part of the beach is blown into Bremner's holes and cannot be blown back out
 - Bremner was selling the sand
- Can Bleakley obtain damages and an injunction to prevent Bremner from digging holes in his part of the beach?
- Did appropriation of the sand give rise to a cause of action?

Bremner v Bleakley

- What is the character of the blown sand?
 - Chattel
 - Consider the practical issues of proof- which grains of sand are mine?
 - How could the tests of factual possession and intention to possess be applied?
 - Contrast sand and fish- is there a reason to treat them differently?
 - Land
 - Blows onto the neighbouring beach and becomes part of the beach
 - Consider accretion- non consensual acquisition of property (CB p 102)

Jeffries v Great Western Railways Co

"I am of the opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer and cannot defend himself by showing that there was title in some third person; for against a wrongdoer possession is title." S&N p. 64

Jeffries v Great Western Railways Co

- An action by possessor who is wrongfully dispossessed can succeed even though that possessor does not have best title
- Second possessor cannot defend its actions on the basis that another party has a better title than the first possessor. i.e. *jus tertii* - unless second possessor is acting on behalf of the true owner

Acquiring possession

- Consensual transactions
 - Purchase/sale
 - Gift
 - Loan

Acquiring possession

- Non-consensual transactions
 - Capturing an animal
 - Creating something –bread/painting
 - Finding something
 - Theft

2.3.2 Bailment

- a bailor gives possession to a bailee (whether under contract or not)
- for a limited period and
- at the end of the period the bailee must return the thing

Bailment

- duties of bailee
 - to return the thing at the end of the bailment
 - if not returned – bailor can sue for breach of bailment
 - Onus on bailee- to exercise reasonable care in relation to the bailed goods

Bailment

- if interference with bailee's possession
- the bailee may sue for recovery or damages (tortious action)

The Winkfield PM

- Facts

- Postmaster General was bailee of the mail
- the mail was on the Mexican which sank after collision with the Winkfield

- Question

- Is the PMG entitled to claim compensation for the value of the lost mail?
- Note the PMG was not liable to the senders of the mail
- Assumed that PMG was in possession

The Winkfield

As against a wrongdoer possession is title and the wrongdoer must compensate the person in possession accordingly, a complete equivalent for the whole loss or deterioration of the thing.

Problem

Manuel and Eleanor enter into a contract under which Manuel and Eleanor agree that Eleanor can have Manuel's gold watch for 3 months while he goes on a boating trip. Two weeks later while Eleanor is sleeping on the beach at Portsea, Pierre takes the watch. Manuel returns from his boating trip after one month.

Can Eleanor take action to recover the watch from Pierre?

Can Manuel take action to recover the watch from Pierre?

Topic 2.4 Personal Property – Finding goods

What rights does a finder obtain over
goods that have been lost or
abandoned?

Problem

Whilst walking along the railway reserve Claude found a stone Buddha statue near an old railway bridge.

Claude is employed by Bayside Trains. He was on his way home from work when he found the Buddha.

He put it on his front porch.

One night after visiting Claude, his friend Humphrey took the statue.

Who is entitled to the statue?

Railway Bridge and Reserve — Crown land



26 Garden Street – Statue: chattel or fixture? Claude found it by the railway line – can Claude keep it?



What should be the purpose of the laws on finding goods?

- Ensure goods are returned to true owner
- Incentives: land owners to control the use of their property
- Incentive to find
- Not to reward dishonest finders
- Re-allocation of lost or abandoned goods-without violence
- Practical reconciliation of interests of finders, owners and occupiers of land

Preconditions to finding

- Goods are available to be found where they are:
 - Lost or
 - Abandoned

General rules

- finder has a good title as against the whole world (*in rem*) apart from the true owner
- the person in possession of the land where goods are found is entitled to them before the finder *if* manifest intention to control goods left on/in the land

Does a person who finds a chattel which has no apparent owner obtain possession?

- Armory v Delamirie (1722)
 - Chimney sweeps boy found a ring
 - What did he need to show to succeed in an action in trover (conversion)?
- Pratt CJ
 - The finder of the jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such property as will enable him to keep it against all but the rightful owner

Does a finder obtain a better right than the occupier of the land/premises on which the thing was found?

- Does it matter where the thing was found?
- Does it matter that the thing was embedded in the soil?
- Who else apart from the true owner might assert better title to goods that are found?

Rights of occupiers where the goods are embedded in the soil

- South Staffordshire Water Co v Sharman [1896] QB 44
 - Workmen employed to clean out a pool found two rings embedded in the mud
 - Possession of land carries with it general possession of everything which is attached to or under the land and in absence of better title elsewhere, the right to possess it
 - Irrelevant whether or not occupier aware of the existence of the thing

Waverley Borough Council v Fletcher [1996] 2 QB 334

- Facts
 - WBC freehold of park held subject to covenants that it be used as a pleasure ground
 - Sought to prohibit use of metal detectors
 - Fletcher found medieval gold brooch with a metal detector and dug it up
- Who has a better right to possession?

WBC v Fletcher (Auld LJ)

- Distinguish rights of occupier where the thing is **in** rather than **on** the land
- Occupier has prior and so better right to possession
 - thing treated as part of the land against all but the true owner
 - finder must do something to detach the thing so either
 - has permission from owner or
 - is a trespasser- Fletcher is a trespasser

Things found on the land

- Bridges v Hawkesworth- notes found in a shop
- Parker v British Airways Board [1982] 1 QB 1004
 - If goods are not attached to land, the occupier has better rights than the finder **only** if
 - before the chattels are found
 - occupier has a right to control and
 - manifests an intention to exercise control over the building and the things in it

Parker v BAB

- Facts
 - BAB lessee of executive lounge
 - Control the people who can come in
 - Parker finds gold bracelet
 - Hands over to official so that the true owner may be found and asks for its return if owner not found

Parker v BAB Donaldson LJ

- Rights and liabilities of finder
 - No rights unless
 - goods lost or abandoned
 - finder takes the goods into care and control
 - Limited rights if take possession with dishonest intent
 - Possessory rights good against all except someone with prior, better right
 - If find in course of employment then find on behalf of employer
 - Finder has an obligation to take reasonable measures to find the true owner

Parker v BAB

- Rights and liabilities of occupier
 - Superior rights if goods are **in** or **attached** to land regardless of awareness of presence of the goods
 - Superior rights if chattel **on** the land only if prior to the finding the occupier manifested an intention to exercise control over the buildings and things in or on it
 - To manifest an intention must take reasonable precautions to ensure lost things are found.
 - Same principles apply to boats and cars as for buildings

Was there a manifest intention shown here?

- Intention to possess?
- Actual possession?
- Eveleigh LJ
 - need to show control and intention to possess
 - intention to control must be **obvious**- the greater the physical control over the property the less need to show independently the animus possidendi

Chairman, NCA v Flack (1998) 86 FCR 16

- Did Mrs Flack manifest an intention to control the chattels in her rented house?
- Did it matter that Mrs Flack didn't know of the presence of the goods?
- Heerey J (Tamberline J agreed)
 - immediately prior to the briefcase being found, Mrs Flack must show an intention to exercise control of the chattels
 - exclusive possessor of an ordinary residential property would ordinarily manifest an intention to control all chattels in the house- because of the high level of physical control- despite others having the keys

NCA v Flack- intention to control

- Presumption that she intends to exercise control is rebuttable
 - Tamberlin J: Expressions of surprise and anxiety do not amount to a disclaimer of **possession**
 - Foster J: presumption rebutted by the finding of fact by the appellate judge (unusual) that she would never have allowed the briefcase and money to be left if she'd been asked and would never have voluntarily taken possession of it.

NCA v Flack- comparison of rights of the parties

- NCA
 - possession obtained under a search warrant
- Mrs Flack
 - Possession of the house
 - Didn't know about the goods- lack of knowledge distinct from denial of possession
 - Does it matter that the goods are suspicious?

Parker and Flack

- Flack
 - Relevant intention is to **exclude** others from the house rather than an intention to exercise control over particular items
- Parker
 - Superior rights only if prior to the finding the occupier manifested an intention to exercise **control** over the buildings and things in or on it

Application of principles of possession to finding

- Principles of possession
 - Factual possession and
 - Intention to possess
- What if the finder is a trespasser or a thief?
 - Consider reasoning in Fletcher and Parker
 - But Costello v Chief Constable and Battersby (RG 25) a person can acquire a possessory title by theft

Rights of Finder vs Occupier

- Is the rationale convincing that an occupier should have priority on the basis they intend to exercise control over everything on the land?
- What policy reasons may there be for preferring an occupier where the goods are embedded in the soil?

Employees and finding

- Byrne v Hoare
 - Policeman on special duty in Mt Isa at the drive-in
 - Finds a gold ingot on the side of the road
 - Was his position the real or effective cause of the finding?
 - Was the performance of special duties merely incidental to the finding?

Problem

- Alice v Myer
 - finder v occupier
- Alice v Mingy
 - finder v employer

2.5 Parting with title to goods

- What title does the person have to give:
principle of *nemo dat quod non habet*
 - A person cannot give a greater title than they have
- In what ways can title be transferred or lost?
- At what time does title pass?

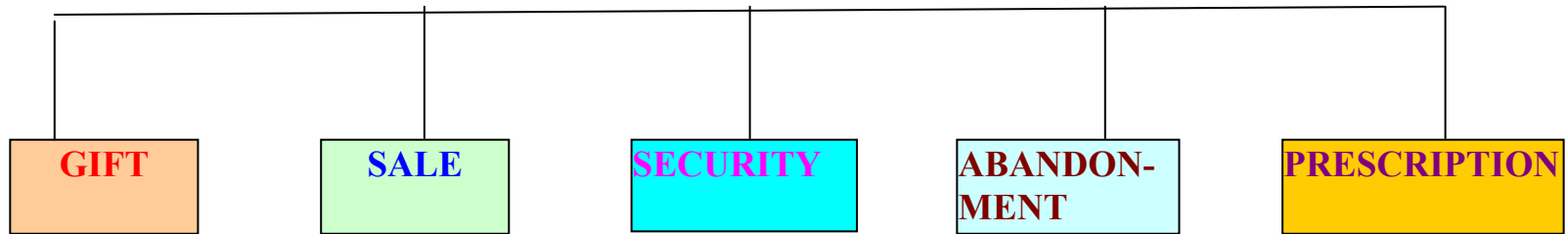
2.5.2 Interests in Goods

*Re McKay, Associated Securities Ltd v
Official Receiver* CB 118

- McKay bankrupt
- Transfer of his property to the trustee in bankruptcy, including his car
- Associated Securities claims that McKay does not own the car

- What was the effect of the agreement between McKay and Associated Securities?
- Provisions seeking to vest temporary or defeasible ownership of the car in McKay are void
- Balance of agreement is for sale and purchase- so McKay owns the car and company must seek to recover as a creditor under the bankruptcy

PARTING WITH TITLE TO GOODS



NEMO DAT

NEMO DAT

NEMO DAT

INTENTION

LIMITATION

INTENTION

INTENTION

INTENTION

(to abandon)

PERIOD

DELIVERY

**CONTRACT/
LEGISLATION
DELIVERY**

**CONTRACT/
LEGISLATION**

**SS5 and 6 LAA
limitation
extinction**

Consensual

Consensual

**Operation of law/
Consensual**

**Op of law/
Consensual**

**Operation of
law**

Gift

- For a valid gift of chattels there must be
 - Intention (and capacity) to give and
 - Delivery
 - Re Stoneham [1919] 1 Ch 149
 - Grandson already in possession of the house
 - Grandfather verbally gave the chattels
 - Deed
 - Declaration of trust
- Intangible property
 - Document assigning rights
 - Statutory requirements of registration

Problem

Manuel decides to give his gold watch to Eleanor as a gift. He tells her that he intends to do this before he goes on a three month boating trip. He forgets to give her the watch before he leaves.

Pierre steals the watch from Manuel's unattended house.

Can Eleanor take action to recover the watch?

Sale

- When does property pass?
- Goods Act
 - s.22 (1) if goods specific or ascertained then in accordance with the parties' intention
 - s. 23 sets out rules for ascertaining intention
 - Contrast unascertained goods and future goods
 - s.27 only acquire a title as good as the seller
 - s29 if take without notice of a voidable title

2.5.4 Losing title to goods

- Abandonment
- Extinction of title to goods by prescription

2.5.4 Abandonment

- A person does not lose title to goods simply by leaving them somewhere
- It is possible for a person to abandon goods: *Re Jigrose*
- An intention to abandon must be proved
 - *Moorhouse v Angus & Robertson*
 - To abandon goods must show an unequivocal intention to abandon
 - Person claiming abandonment must show express intention or evidence from which the intention can be inferred
- Forgetting to take something with you is not enough to show an intention to abandon (*Moffat v Kazana*)

Re Jigrose (CB 114-117)

- Facts
 - Sale of property
 - Vendor forgets to take his hay
- Has he abandoned it?
 - Distinguish the intention to abandon from losing something
 - At common law it is possible to abandon goods
- What is the intention in the contract of sale?
 - Clause 28 requires vendor to remove goods prior to completion. After completion the goods as between the parties to the contract the goods are deemed abandoned

Munday v ACT [1998] ACTSC

- Could the ACT government enclose and impose conditions on the right to enter the tip?
- When were the goods at the tip abandoned?
 - If abandoned then indicates an unwillingness to assert superior title as owner
 - Finder then can take possessory title against the world- if take possession lawfully
 - Could the ACT government assert control over the goods for the benefit of Revolve?

Munday v ACT

- Rights of Revolve
 - ACT asserts superior right to possession after goods abandoned for benefit of Revolve
 - No superior right until goods abandoned
- Rights of Munday
 - Prior to abandonment people have not lost the right to give the goods away

2.5.5 Extinction of title to goods by prescription

- When will a person lose the right to bring an action for wrongful interference with possession?
- Limitation of actions Act provides that after a prescribed time
 - I lose the capacity to commence an action to recover the goods or assert title, and
 - My title to the goods is extinguished

Limitation of Actions Act

- s. 5 contract and tort- 6 years from date the action accrued
- s. 6 successive conversions
- s. 6(2) after 6 years title to chattel is extinguished

Problem

Bethany is cycling across Australia with her friend Rufus. They stop one night at the side of the road and camp near the boundary of the vast property 'Wisconsin' owned by Loki and Bartleby. As they are packing up their camp, they find a religious icon resting in the fork of a tree. They want to take the icon with them but it is too big to fit in their backpacks. So they attach a sign to the icon saying 'Property of Bethany and Rufus. Loki and Bartleby (who have never seen the icon before and don't know how it got there) see the sign and replace it with one that says 'Property of Loki and Bartleby'. Bethany and Rufus come back with a truck to collect the icon.

Can Loki and Bartleby stop them? What further information do you need?

Next class Topic 3: Property and its Boundaries

- Large lecture
- RG pages 28-30
- Problem page 30