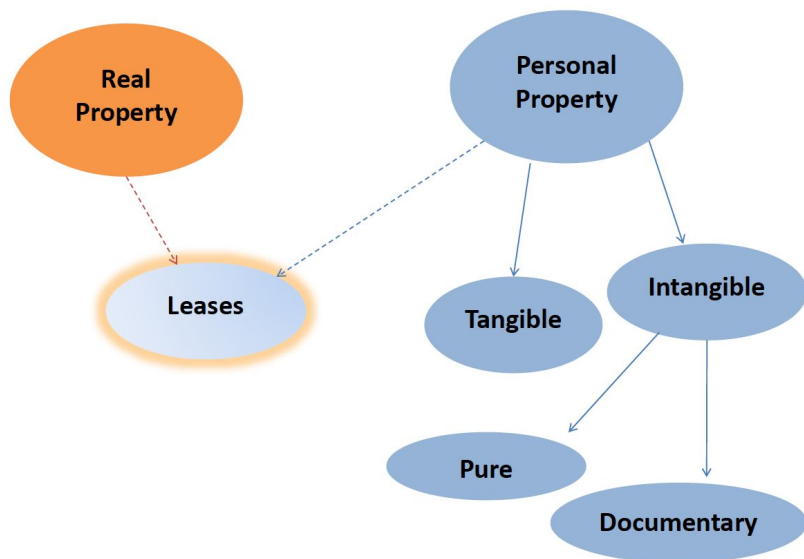


General

What is property?

- Property rights are the strongest interests recognised by our law, next to constitutional rights. *White v Chandler*
- Property Law is about rights to use things.
 - Who is entitled to use a thing?
 - How are they entitled to use it?
- Someone may have greater rights to property, although they are not in possession of it. Different rights have different strengths.
- People can have interests in property e.g. mortgage.
- Intellectual property
- Degree, License or Job cannot be property because there is no right to transfer. (Can't sell it).
- If things become part of the land/built on/attached in a secure way then they are just the land.



- Real Property = property in land
- Personal property = all other property.
- Tangibles = chattels
- Pure intangibles = intellectual property or debts.
- Documentary intangibles = document takes on its own special legal status. Delivery of documents changes rights.

The Idea of Property - Murphy/Roberts/Flessas Reading.

- How might property law emerge?
 - Core questions need resolving mean we need to create these rules.
 - Gathering berries > herding goats > farming goats.
 - Role of government to regulate.
- Importance of time in these developments. Contract can't take us that far.
- Communal understanding of interlocking rights (Māori) vs. individual ownership (English).

The institution of property - Smith/Merrill reading

- Property right is a legally binding expectation. 3 different understandings.
 - Just right to exclude everybody else.
 - Right to exclude everybody else, use and transfer.
 - Although regulation effects what you can do so not total exclusion.
 - "Bundle of Rights" - property comes with a bundle of rights, can be added to or taken away without necessarily changing the characterisation of the bundle as "property". So you may not lose your property right completely, by taking away one right, may still have other sticks.
- Justifying property rights
 - Managing resources
 - Incentives to invest
 - Facilitating contracts
 - Individual autonomy
 - Preserving Liberty

Personal v Property Rights

Property: Property rights are enforceable against the world/third parties.

Personal: Enforceable against a particular person e.g. rights under K between two people.

Why do we have this distinction?

- If someone was granted to live on land, that is later sold, can the new owner ask them to leave. If they were granted to live their on a personal right then yes (e.g. license or agreement) but if it was a property right e.g. if they were a tenant or lessee then they cannot be made to leave, as that property right is enforceable against all third parties, including the new owner, even if they weren't a party to the original agreement.
- If someone lent someone money and that money is destroyed. If it was a personal right, they would owe them back damages for the loss as they owe a debt but it doesn't have to be that exact \$100. If it was a property right, you can't get that exact \$100 back, so can't get anything back.
- In insolvency situation, if you only have a personal right to property, you are like any other creditor. So you only get a portion back of what you are owed. If you have a property right, the property is not within the insolvent person's assets, so they have to give car back or equivalent to full price of car.
 - However, there are ways creditors can get a property right over someone else's property, to be a more secure creditor.

Terms

- In personam = personal rights
- In Rem = property rights
 - Real property (in land) = remedy gotten if rights infringed - have to give it back.
 - Personal property (chattels) = value of thing - damages paid.
 - 3PS who are immune e.g. bonafide purchaser?

Numerus Clausus Principle

The numerus clausus principle = closed number of property rights possible.

- Don't want people to be caught off guard by different property rights.
- It can be expensive to find out who has rights over what.
- Policy reasons for not having anything be a property right, because it is enforceable against all the world.
- Judges should not be making up property rights, should be done through legislation, it depends on complexity and transaction costs.

Hill v Tupper

Facts: Plaintiff = boat proprietor. Defendant = Inn Keeper

Canal's as means of navigation. Create a new company (Canal Company) through statute who make canal and do legal things in relation to that. Get land, consent to build canal. Canal company grants boat proprietor a lease of land and exclusive rights to put pleasure boats in land. Inn Keepers inn abutted the canal bank and he was letting out pleasure boats.

Issue: Boat proprietor said they have exclusive rights to let out pleasure boats for hire upon the canal, which was the right the defendant alleged to have disturbed. Can boat proprietor exclude inn keeper from letting out pleasure boats?

Held:

1. It seems like anyone can put boats on the canal. It means the company can't grant a right that is inconsistent with statute, as statute set up company. Statute would allow Inn Keeper to use boats, so should follow that.
 - a. But it is arguable statute does not have that effect. It seems like it is saying you can use canal to move animals. You can't carry goods to market or people for hire.
2. It's not a property right, so it's not enforceable against third parties. They would need to sue the canal company for breaching personal right to exclusive use of pleasure boats on land, not Inn Keeper, because the Canal company should be the one who excludes D from selling pleasure boat rides since they have property right in Canal.
3. Boat proprietor said they do have a property right because it had a lease of a building from the company. Profits is a kind of right that a person can have in relation to land e.g. I get to take something from the land/resource. (Not like a right of passage or lease). Boat Proprietor couldn't get lease over water, but it was a recognised property right of profits.
 - a. *Keppell v Bailey* - certain property rights recognised by law. This is a closed list (Numerus clausus principle). Can't come up with new property, because it would forever be binding on whoever uses land in the future.

Otherwise it would be too complicated, people wouldn't know what rights might exist over property. - POLICY.

- b. Profits are rights to take things from the land.
- c. Lawyer tries to argue exclusive use of water, or of land covered with water, for a particular purpose is a property right the plaintiff has.
- d. Pollock: If this were so, the number and variety of rights that might be created over land would be infinite. You can't come up with a new property right that binds parties forever.
- e. The grant is just a covenant license and is only binding between the company and the plaintiff.

Have to ask:

- Is it the kind of right that can possibly be a property right?
- What transaction did the parties intend; was I given a property right?
- Did I comply with any formalities for creating the property right (e.g. writing, registration etc.)
- Example: Granted right to park car in a carpark building. Could be a property right, but is that the transaction entered into? Maybe it was a license, not a property right.

Numerus Clausus Today

- It still exists
- Should it still exist? If all rights are listed in written K is it really confusing? We have a registration system now so you could write into title deeds any new property right. Also would people actually make anything a property right if it was opened up?

Escrow Holdings v District Court

Facts: Dispute over lots 2, 3 and 4. Apartment owners own Lot 2 and building owners own Lot 4. Both co-own Lot 3. Lot 3 was a parking area. Both had right onto land and to exclude others. They agreed they would only ever use land for car parking through a **covenant** but otherwise they have right to use land how they want. They didn't need to say they had right to access because they were co-owners. Once covenant was registered, proprietary right they could both park on lot 4, and personal right that Apartment owners and Builders could go onto Lot 4. The Apartment owners lose their co-ownership of Lot 3. Original building owners sell property. Building owner 2 comes in and owns Lots 3 and 4. They say the apartment owners have lost right to access Lot 3 as they don't have shared ownership anymore. BUT building owner 2 is bound by covenant (as covenant passes to new owners) but all it says is that I have to use it for car parking, which they will do. But it doesn't say they can't exclude the apartment owners from parking unless they pay.

Issue:

1. Apartment owners argue that the binding covenant implicitly allows them access lot 3 for car parking even if they lose co-ownership.
2. Building owners argue that a property right to access land created by a covenant is a property right unknown to law. It is not a right that exists in the closed list and you can't make up a new property right (numerus clausus) so therefore the covenant is just a personal right between the apartment owners and building owners 1. This is following *Hill v Tupper*.

Held:

What is authority that you can't have right to access to land through a covenant?

- You can do this with an easement. They didn't use an easement because it wasn't necessary as they were co-owners. Easements exist for the purpose of granting right to access. If we allow a covenant to do this is expanding what covenants do. Numerus clausus principle = if we allow this it is something new, we can't create new property rights. Should only be able to be property rights when they have a certain character.

Elias CJ: Why do we still care about the numerus clausus principle today? Does it matter if we use a covenant to grant same thing you could grant under easement. Post a system of notification and notice it isn't useful to maintain a distinction between positive and negative covenants.

- The covenant is binding on building owners 2 and any knew building owner.
- Today we have a comprehensive registration system which provides notification of covenants on titles. It isn't necessary to apply *Keppell* or *Hill v Tupper* today, like it was back then.

Does this decision override numerus clausus?

- On one hand yes, allowed property right where there wouldn't be one before.
- But it is not a total departure. This can be a property right through an easement or lease, so they have just allowed a normal/common property right to be made through a new way, through a covenant. It isn't allowing a totally new kind of property right to be made, but the way it can be made has expanded.
 - It is a question of substance over form. Substance has always been there as a property right, they just did it through a different form.

Covenant = A covenant is a promise between two people about land, it can be either a personal or a proprietary right. It's personal when two people have made a promise. It becomes a property right when it's registered on the land register. Once it is a property right you can enforce it against third parties. So if A and B sell their land, the right still continues to be attached to the land. If B sells to C, A can enforce the property right against C.

Easement = Easement is another type of property right, granted when you want to give a right of access to another person across your land. E.g. grant owners of back section rights over your driveway so they can get access to their land. Whereas Covenants are promises about that land, what you do on the land.

Ownership

Honoré's Bundle of Rights:

- Ownership as the "greatest possible interest in a thing which a mature system of law recognises"
 - Owner has most right to thing and right to do stuff with that thing.
1. Possession
 - a. Right to possession
 - b. Right to be given back possession
 2. Use/Manage/Income
 - a. Use - Liberty and freedom
 - b. Manage - can change their legal relationships over thing and with other people. Gift it/sell it/lend it/rent it. License other people to have rights in relation to thing.
 3. Capital
 - a. Right to use it, destroy it or sell it. If you rent, you don't have right to destroy or sell it.
 4. Security
 - a. No one will take property away.
 - b. Exception: if you are bankrupt, death, public works act - it has to be a special reason to take property away.
 5. Transmissibility/ No duration of term
 - a. Property won't run out. Does not apply with some intellectual property.
 6. Prohibition on harmful use
 - a. Can't use it harm other people. Regulated by tort law.
 7. Liability to execution
 - a. If you don't pay creditors who have security over property.
 8. Residuary Character
 - a. Owner gives lease, lease runs out, right to use goes back to the owner.

Problems

- Does this help us distinguish ownership from lesser interests?
- Could there be a more definite definition?

Yanner v Eaton (HCA)

Facts: Taking juvenile crocodile is illegal under Fauna Conservation Act 1974. Yanner took juvenile crocodile to eat, he didn't have a license to do so. Yanner's ancestors practised this for many generations.

Issue:

1. Yanner argues Native Title Act 1993 → if there is a regulation of right to hunt/fish and you don't have a permit you don't impose those restrictions on indigenous people in same way. He has existing native title right.
2. Police argue Fauna Act has extinguished this right because Fauna in Queensland is property of the crown. This would mean indigenous people have lost native title rights.
3. Does the legislation say that all property rights in flora and fauna are given to the crown?

Held:

- Property can mean ownership but it can also mean crown has some property rights (bundle of rights).
- What is the interest A has in the property?
- This must be a more limited right. How could a statute give such ownership over all wild animals to the crown?
- Want to charge tax on animals, regulatory control. Property is all different kinds of control that statute gives you.
- S 7 is a kind of control you are getting under the act, it didn't mean full beneficial ownership. So Native Title Rights were not extinguished, and control of Queensland was not full control, it was just regulatory rights. Regulating

indigenous rights does not extinguish those rights. Could use rights as a shield to say I am not bound under the Fauna Act.

- Property doesn't automatically mean ownership -Common law understanding. It can be a lot of different kinds of rights or stick in bundle of rights/lesser bundle of rights that a person has to a thing. Regulating rights was just one stick in the bundle, but that doesn't take away from indigenous title to property.
- Property just means all of the particular rights that are given under the act. It doesn't have to be ownership.

Dissent: - McHugh J

- Fauna is property of Queensland. Ordinary person/natural ordinary meaning = ownership. Should not discount them.
- S 7 destroyed all existing rights to take fauna.
- If term property has any recognisable meaning, it must have conferred full rights on the crown.
- S 7 gives to crown every right, power, privilege and benefit in relation to fauna.
- "Property just means all of the particular rights that are given under the act". If this is meaning of property, then provision is meaningless. It's not doing anything.

Should we apply a general idea of property or what common law is telling us?

Property in the Human Body

Once a body part is in some way separated from a person, no longer a person so should be able to have property right. Can we have property rights in people or body parts?

Doodeward v Spence

Facts: Stillborn baby born with two heads. Doctor kept it in jar, sold it for entertainment, police took it off them. Claimant wanted dead body back, claimed it was conversion.

Issue: Can claimant get dead body back?

Held:

- Previously, common law had said there had been no property in dead bodies.
- Could bring property based tort against someone who had detained slave before, but not anymore.

Griffith CJ: Do we have to apply this common law to the baby?

Barton J: Baby isn't really human, it's a monster.

Heath J: Outrageous way of talking about a human being

- It was not a dead body awaiting burial, which usually prevents possession, when it has changed its nature, preserved in jar, it becomes a thing which we can apply rights to.
- No real reason not to let someone possess it.

Higgins J: No it's still a human. Haven't done anything to change that, it should get a burial.

- Overall, claimant wins. We can recognise property in the body because it is no longer awaiting burial, it has changed its status. The court has carved out an exception to the common law position on bodies.
- Rule: when someone expends skill and care and changes the human body or part of it, to make it a thing that has its own value or purpose, common law protects property rights in this.

Moore v Regents of the University of California

Facts: Cells taken from Moore without informed consent, when Moore was a cancer patient receiving treatment at the uni. Used by scientists for profitable inventions worth billions. Can Moore use tort of conversion here for interference with his cells?

Issue:

1. Moore argues you have done something to it which I haven't done but you didn't have consent to use my property in that way (his cells). They are an independent thing that can be separated from his body and has value.
2. Can we overturn baseline common law rule by saying that cells or a part of a person can be property.

Held:

Majority = No, you can't have conversion of cells, it is still human.

- Legislation regulated what people can do with human tissue, this has destroyed people's ownership of property of their own body parts.
- Policy:
 - courts haven't recognised it before and we shouldn't extend the law now. Each scientist would be affected because anyone could turn up and say I didn't consent to the use of my cells for research. We don't want property claims inhibiting important cancer research that is in the public interest.
 - This is an area best suited for legislation.
 - There are other remedies available e.g. breach of informed consent.

Dissent = there was an intention to separate cells and give them a use independent from a person so we should be allowed to have property in them.

- Broussard J: We are allowing companies to take body parts and commodify them so why can't a person do that over their own cells. It should come down to the donor's intention.
- Mosk J: Property is a broad, evolving idea. The same bundle of rights does not need to attach to all forms of property for someone to have property in something. Just because it is regulated doesn't disqualify it from being property. Like *Yanner*.

Yearworth v North Bristol NHS

Facts: Men told they should store sperm in sperm bank before cancer treatment for later conception. Sperm bank malfunctions. Men sue in negligence.

Issue: Was it damage to property? Can the men assert a property interest in their sperm?

Held: rejects *Doodeward* skill and work conception.

- Here too human tissue and artificial reproduction is highly regulated.
- The men were only people who could decide if they wanted to go through with reproduction, they had only kind of control right you would want over sperm. They had right to ask for it to be destroyed. If you have these rights, that means you have ownership. Even though it is regulated and don't have full right to determine when it can be used, they still have ownership and they have only control and use rights anyone would want in sperm. It can be property for purposes of suing in tort.
 - 1. Has only kind of use right someone would want to have in relation to a thing
 - 2. Only person who can use it
 - 3. Can destroy it

Problem: Saying you have an important control/use right, you have ownership. That's not what Tony Enori said in his essay.

- If you have greatest bundle of rights, you have ownership.
- Many rights here have been taken away from men because of regulation. So they didn't have ownership.
- Tony Enori is not an account of how ownership works for the common law of property, it was theoretical.

We need to make a decision. Either:

1. We want people to be able to uphold value of body tissue to treat it as property. There is an exception here.
2. OR just because legislation allows them to have these rights (the 3 above) doesn't mean it is automatically property. Similar to *Yanner*, it just shows us men can use and control human tissue in certain ways, it doesn't mean they have property in these things.

Court does a strange midway position. Statute gave men most important rights to stuff so therefore common law property rights should apply.

Lee v Long

Facts: Lee dies unexpectedly. Wife wanted access to husband's sperm to fulfill their dream of having kids. Human Tissue Act, human artificial reproduction Act bars this because consent can no longer be given once person has died. Coroner denies request. Urgent application, Judge allows cells to be taken and allows fertility clinic to store them (which is not within usual procedures of legislation).

Issue: On what basis can a judge do this? And on what basis can Ms. Long claim use to sperm?

Held:

- Maybe we could argue it was her property. It was on her request, she is the only one who has interest in the sperm. Even if you are regulating the way I can use it in NZ, I can take my property elsewhere and it will allow her to do what she wants.
- But does it offend dignity to treat people as thing? Yes it does.

Takamore decision cited - Body cannot be disturbed through common law object of property. Rejects *Doodeward* as a misstep by HCAUS.

- Today *Doodeward* would be outrageous.
- This view that persons are not property has found its way into our regulation. We have huge regulatory oversight to understand the human body as sacred or with dignity.
- HC can assume jurisdiction to retain control of what happens next under regulation/ act of assisted reproduction. Finds another way.
- What if the only way to get to what we might think is the "right" result was to say it was property? Would the idea of human dignity weigh on the other scale.
- Is it really the case that any bit of the human body that has been separated from someone all the time has dignity like we say a human body or human does? We make wigs out of human hair, give blood, nails etc. and we think that is not us.

- In the meantime, the court steps in and has control to regulate equity.

Why are we claiming property?

- We want to access something and exclude other people. What could be more natural than saying I want control over my finger that got cut off, I want it back? I should be able to control things that were me and no longer me.
- If we allow property rights in body, they could bind third parties. Difficulties for researchers and medical people.

Possession

Exclusive physical control + intention to possess = possession at common law.

- Exclusive physical control:
 - Smaller chattels - take them with us, put them in our bags or in room.
 - Larger chattels - lock them/secure them.
- Intention to possess = determine what is done with this thing.
 - What did person do? What did they appear to do from those actions?

Possession and title

- Title is used in many property context. If you have possession you can get title against everyone else who can't claim a better title. But if someone has better title they can get it back.
- If you cannot show a better right to possession, it is my possession.
- Possessory title
 - Owner's
 - [Later possessor's]
 - Current possessor's.
- Title is relative.
 - Possessor has rights that are same as owners rights, and exist at the same time as owners rights. The strength of your title is relative to the strength other people have to that title. If you have best title to possession, it is yours.

Possession and ownership

- Possession is a key ingredient of ownership
- Common law fixation of possession: If common law gives possessor the same property based tort law remedies that are used to protect an owner, then possessor has created their own ownership.
- Possession is evidence of ownership.
- If you have possession of something and no one has better title to that thing, you have ownership of it.

Enforcing Possession

- Conversion: Repugnant interference with another's immediate right to possession of an item
- Detinue: withholding of an item from another with a better right of possession.
- Trespass: unjustified direct interference with an item in possession of another.

Possession, Finders and Occupiers

Intention to be in possession/control of a thing = property right.

- Test: Law will reward finding if you
 - manifest intention to possess thing (express or implied); and
 - Physical control over it.
- True owner has best title however.
- If you find something in a particular place, the owner of that place may claim better title to that property as occupier of the land.

Armory v Delamirie

Facts: Chimney sweep's boy finds jewellery. Gives it to jeweller for appraisal. Jeweller refuses to give it back.

Issue: Who has a stronger possessory?

Held: That the finder or a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

Problem: Why talk about finders and ownership at all? This suggests a particular category of person when really we are just applying the idea of possession.

- He doesn't have fully possession (or full title to the jewellery) but his possession (or title) is good against anyone else other than the original owner.
- Chimney sweep has prior possession = better title.

Parker v British Airways

Facts: Parker was in an airport lounge and finds a piece of jewellery worth \$6,000. He hands it in to employer at British Airways and says if the true owner doesn't turn up then give it back to me. The owner does not turn up but British Airways does not give jewellery back to Parker.

Issue: Does he have ownership of jewellery?

Held:

Donaldson J's special rules

- Chattel must have been abandoned or lost (not hidden or in its usual place)
- Only limited rights if trespassing or being dishonest
- Obligation to find true owner and care for thing meanwhile.

What are the rights and obligations of the finder?

- Dishonest finder should not have good claim to thing you've found e.g. if you make no attempt to look for the true owner. - Common sense but there is no case where this has been said.

What are the rights of the occupier?

- An occupier of the land has rights superior to the finder over chattels in or attached to that land
- Occupier has superior rights to finder if before the chattel is found, they have manifested an intention (express or implied) to exercise control over the building and the things upon it or in it.
- If they have intention, they are under an obligation to take such reasonable measures to ensure that lost chattels are found and upon being found to acquaint them with true owner.
 - British Airways excluded people from the airport lounge but it is still a public place.
 - Can they show a manifest intention to have possession of lost items?
 - Did employees look around regularly for lost property? Or a sign determining what should be done with lost items?
 - Probably not.
 - They have some right to it as they had possession but it was not as strong as Mr. Parker's title, who had prior title as he had prior possession.

Other judges

- However, other judges asked: who has possession.
- Is there control and is there intent to control?
- What kind of control does an occupier of land have over things found on it?
- When does a high level of control mean that intention is implicit?

If it was someone's house it would be different. We know people who occupy a house want to control items in that house and can exclude people from the house.

- They must have a manifest intention that anything in their house is in their possession. Here, manifest intention speaks for itself. (Bank vault).

Simon Robert's Critique of Donaldson J:

Donaldson in *Parker* neglects the relativity of title approach in favour of finding a lesser title for trespassing and other wrongdoers. Case obscured position of finders possessory title in terms of later claimants and early people.

- There is no special law of finding, occupiers and finders.
 - It should be about title and possession.
- Title is relative
 - Don't talk about duties finder and occupier owe to true owner when they aren't in the court.
 - A basis of claim if true owner was there would be possession anyway so who cares how much care was taken.
 - Title is relative, so if the true owner turns up they will have better title anyway.
- Title is generally founded on possession
 - Whoever takes possession can have title, it doesn't matter if it is abandoned or lost?
- Title is not impaired by dishonesty.
 - If you were acting dishonestly that shows someone else has a prior possessory right that is stronger, not that they don't have a property right at all.

Flack

Facts: Police raid Flack's house, they find suitcase with \$433k of money. Son suspected of drug offences but is never prosecuted. Flack denies having any knowledge the suitcase was in her house, and appeared shocked when she saw the suitcase. Later Flack claims the money.

Issue:

1. Police claim title through possession as finder, deny Flack has possession.
 - a. Flack is the occupier, it was in her house. BUT she lacked intention to have possession of the suitcase, which is necessary to have possession in law.
2. Flack claims title through prior possession.
 - a. Police's argument would defy logic in *Parker* because they say if you find item in house there is a presumption of intention to possess any item in their house, including items they didn't know about.
3. Police rebut that: if there is a presumption you own property in your house and when you see it you say that is not mine, she was rebutted that presumption.

Held: There was possession

- Uphold *Parker* that there is a presumption to intend to possess any item in your house.
- What she said wasn't a disclaimer of her possession, more of a disclaimer that she had never seen it before.
- Even if she said that is not mine, we can interpret that is something I have never seen before.
- Doesn't matter in a place that she didn't go to show you can control and intend to possess anything that is in your house.
- Tamlin J: if it was something that buy it's very nature was illegal e.g. drug or dangerous weapon, that may be something that the presumption would be rebutted for. But that is not that kind of thing in this case. You have intention to possess the general class of chattels that are in your home.

Dissent:

- Foster J: possession of residential premises brings with it a presumption of fact of a manifest intention to control goods on premises, and therefore there is possession.
- But in this case the presumption is rebutted because Ms Flack did not intend to possess the thing. It was suspicious and likely related to criminal activities so she would have never intentionally come into possession of it.

Tamworth

Facts: Tamworth (company) has lease over land and buildings. Money and cannabis found in buildings. They were charged with possession for supply but were not convicted. They want \$50,000 found back.

Issue:

1. Tamworth argues they have right to money through possession of the land.
2. Crown argues they did not manifest intention to control it. They have current possession and have better title.

Held:

- Applies the possession/manifest intention test.
- Mr. Dodds didn't make sure people didn't get onto property. Anyone could get on property easily so didn't satisfy exclusive physical control/possession part of test.
- There was also no manifest intention to control 'lost property' on premises.
- However, the fact that money was tainted by criminal activity does not bar claim for money. This would be different today.
 - Previous English authority: even if claim to goods is based on something dodgy, if they have a possessory claim, courts will enforce it.
 - Even if you don't admit that it was obtained criminally, possession trumps all because it is civil law. This goes against *Parker* idea that if dishonesty involved, it is not a good claim to property.
 - 2009 Criminal Proceeds (Recovery) Act: If property was generated through crimes on the balance of probabilities, person can't get money back, even if guilt was not proved in the criminal court.
 - Judges should not make these moral judgements about whether to give her money or not based on drug money, just have to apply the law. It's up to parliament to make these exceptions.

When will possessor of land have possession of goods?

- Bank vault - control and presumed intention
- House - except for Tamlin J's exception in *Flack*, control and presumed intention
- Inside a shop
- Petrol station forecourt
- Public Park.

Crimes Act s 219

- In civil law - you receive title from taking possession, don't need to try give it back.
 - However, in civil law true owner can still sue you for tort of conversion or trespass if you don't try give it back to them as they will still have stronger claim to title. But if you don't try return it it doesn't make your claim to the rest of the world weaker. (Look at later, but if you try to return it and no one comes forward within the

reasonable time then you will have best claim to title and previous owners will be considered to have abandoned property).

- In criminal law - *Parker* saying you should try give it back is also true because if not it is theft, and person would be liable under Crimes Act. If person gives property to police and no one picks it up, then person can keep it.

Transferring Goods

How do we make goods we have title for, property of someone else?

1. Deed
 - a. Property Law Act 2007, s 9.
 - b. Unless you've transferred property in two other ways, you would have to go through this formality.
 - c. Have to write document in a particular way.
2. Contract
 - a. Transfer of goods could be when money is paid or later. Depends on intention of K.
 - b. CCLA = default rules if intention not demonstrated clearly in K.
3. Gift
 - a. Gifts *inter vivos* (in lifetime); so not looking at
 - i. Legacies under wills
 - ii. Passing of property under intestacy rules
 - iii. *Donatio mortis causa* - gift upon death
 - iv. Testamentary promises
 - b. Compare with 'gifting' property by setting up a trust.

Shower v Pilck

Facts: deceased had said to his daughter-in-law: "I will give you all the plate that is mine". Daughter-in-law had possession of the plate at the time.

Issue: Did deceased gift daughter the plates?

Held:

Trial Judge: Just saying I am giving gift without delivery is not enough to transfer property. So property is still owned by man who gave it.

- There needs to be an intention to gift by the donor.
- Needs to be delivery of goods.

Here, there is hardly a gift because:

- Words are in future tense, no intention only to do it in future.
- Barron Ralph: maybe says no delivery, maybe it agreeing with intention point. Would have them fail on both counts.

Why do we need delivery? If they have possession of an item they clearly don't own and owner intends to give it to them that should be enough.

- There are other cases where this perspective has been successful.
- If they have items that it is clear they don't own, and owner gives it to them, you don't need delivery, they have been gifted it.
- *Elder Trustees v Gibbs* - can have possession before delivery.

Williams v Williams

Facts: Father bought pianola. Son learned to play piano on it, only he could play it. Father said it was son's property. Family broke up, son left home. Pianola sat in the family home. Father sent pianola to an auction house. Son says he can't sell it because it is his.

Issue: Did the father gift the son the pianola, and therefore the father cannot sell the pianola?

1. Was there actual or constructive delivery of the pianola?

Held:

Law:

1. You need to have right to thing to transfer right to someone else.
2. Intention (express or implied?) to give gift
3. Assent of donee to gift (express or implied)
4. Actual or constructive delivery of gift

On facts

- Father owned pianola.
- There was clearly a present intention of the father to gift.

- The son's behaviour evidences an assent to the gift.
- Delivery? The pianola is still in the father's house. But it isn't type of property you can put in someone's hands. It is too big.
 - *Could we think that delivery is just further evidence a person intended to make a gift. Therefore, in cases of clear intention to gift, we don't need to show delivery?*
 - Courts have said no, it is a requirement.
- No delivery, so no gift here.
- Would have been a delivery if son had been given key to pianola by the father as this would equal constructive possession = He has a means of controlling it.
- Or if dad had placed hand on the pianola when stated passing of possession that would be enough for delivery.

Why do we have delivery as a requirement?

1. Cautionary: people may not know what it means to give something to a person. Having to deliver goods alerts them to the fact that it isn't theirs anymore.
 - a. But if words were enough maybe people would pay more attention to words.
2. If you can't deliver, could just write a deed. There are alternatives if you really want to gift property.

Bashall v Bashall

Facts: Wife claimed her husband gave her pony and trap, saddle and dog.

Held: No delivery, so no gift. It is hard to show when people live together and things are big that there was delivery. How do we know he gave it to her, as opposed to telling her she had use of it? No special ceremony done so not enough.

- Contrast with *Shower v Pilck* where it was clear they have possession of plates. Under Current law - if they clearly have possession, and intention to gift, property has been gifted/transferred. But here the wife doesn't have clear possession of property, so can't apply that rule.

Rawlinson v Mort

Facts: Donor went to church with donee (organist). Put hand on organ and said I give it to you.

Held: This is a special ceremony that does transfer possession. It is constructive delivery, because you can't physically deliver an organ.

How is this really different?

- Maybe it shows more thought has been put into the transfer e.g. evidence there definitely was intention.
- But wouldn't this show delivery isn't a requirement, just evidence of intention, so if intention clear it is not necessary?

Kiplin v Ratley

Facts: Mr Ratley sold his furniture to his father-in-law. Furniture remained in the house where Mr and Mrs Ratley lived.

Father-in-law came to visit his daughter, pointed to the furniture and said: "I give you this furniture. It will be something for you". Then he went home, leaving her in sole charge of the furniture. Mr. Ratley goes insolvent, and creditors try to sell furniture.

Held: This is enough to be a gift. Clear intention. Father in law turned up, ceremony in statement, and leaves daughter in control of it in the room = constructive delivery. But again do we really need delivery? But in situations like *Williams* we can say there can be a gift if there is clear intention even if not clear possession.

Thomas v Times Book Co

Facts: Thomas was about to leave for US. Had lost the original manuscript. His BBC producer, Clevedon, gave him three copies at the airport. Thomas said "if you can find it you can keep it" referring to the original. Clevedon found it and kept it. Thomas dies in the US. Clevedon sold the manuscript to Cov, who sold it to Times Book Co. Thomas's wife wants the original back (she is executor of his property).

Issue: Do the facts on the balance of probabilities show that there was gifting of the manuscript?

Held:

1. Was there delivery?
 - a. He had possession when he found it.
2. Was there intention?
 - a. When person is dead, we will be suspicious of claims of intention.
 - b. A lot of this is in hindsight. Value of manuscript was not same when it was given as it is now.
 - c. Thomas may have thought it wasn't going to turn up. He was grateful to Clevedon and he knew him well.
 - d. Evidence of what he said which sounds like a gift, contest about whether he said this.
 - e. Why would Clevedon say Thomas gave him the manuscript when Thomas was still alive? Isn't of the same value, Thomas could come back and say I didn't say that, so shows he is not trying to take advantage of Thomas's inability to say he didn't gift since he is dead.

f. Yes, there was gift.

StockCo v Gibson

Facts: Person gifts someone 750 cows, out of their herd.

Issue: Was there a gift?

Held: Affirmation of law stated in early cases in COA.

- Can you transfer property when you haven't ascertained what the property is?
- No, no gift because we don't know which cows you are giving out of the massive herd of cows. You need to ascertain which property has been transferred, which could have been solved if there was delivery.

Smith v Jones

This isn't really a gift case, judges get confused.

Facts: P and D had an escort arrangement. There is a breakdown in the relationship. P gave D \$500k, but wants it back.

Issue: Was there a gifting of money? They talk a lot about this, and apply rules.

Problem:

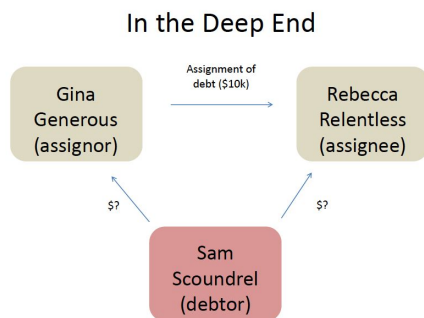
- It wasn't a gift of chattel, it was a gift of money, and not of notes.
- That's not a gift of a physical thing, don't have to ask was their intention, was their delivery.
- This is just obligations between people and bank. I ask bank to pay this person \$500k. Matters of K law. Obligations changed by insistence of one. Donee can claim against bank to give money.
- We do not need to ask whether title has been transferred like in gift cases.
- They are trying to fit an analysis for property to different legal situation. We can't sensibly ask if there has been delivery, because all that happens is obligations have changed on insistence of one.

Transferring Intangibles (Assignment of Things/Choses in Action)

Example:

Sam owes \$10,000 to Gina. Gina assigns that debt to Rebecca. Gina assigns that debt to Rebecca. Sam not happy because Gina is nicer, better to deal with. Rebecca is relentless in following up debts. Can Gina give benefit of debt to someone else?

- Yes.



Terms

- Debtor= someone who owes obligation
- Creditor = someone who is owed obligation.
- Assignor/Donor = one transferring property rights to Assignee/Donee
- Assignee/Donee = the one receiving property rights from Assignor/Donor.
- Choses in action = Things in action.
 - "In action" vs "in possession": You must bring an action to secure right. Don't have physical property where you can take back possession, because it is intangible property.
 - Certain rights to things can only be enforced/established by court action.
 - Wealth/Assets have this nature. Payment/obligation a person owes you. Contractual right. Debts. Often because of a contract. Shares a company. Intellectual property.
 - Sometimes they are written down, sometimes they are entwined in a document that have their own special rules about how to transfer rights to other people.
 - Our focus is on debts or rights under K.

Why have these rules?

- Goes back to nature of intangibles - you can't deliver it so we a way to transfer them.
- Think about the risks involved for each party. Think about things in terms of your own obligations.
- If you have paid debt to assignor, do you have to still pay assignee?
- Section 48 of Property Law Act.
 - Define debt - any kind of obligation to deliver or transfer property.
 - Debt is much broader. Things in action = Debt.

Why do we discuss this in a property law course?

- It's an asset, part of your wealth, it's got value.
- It is possible to transfer thing
- When you do transfer them they stop being your asset which in an insolvency situation means your creditors can't go after that gift or assignment.
- We associate it with ownership and they have value.
- But it is not a right enforceable against the whole world, it is only enforceable against other party. So it seems more like a personal right than a property right.
- And in an insolvency situation, where the debtor goes insolvent the Assignee will only get a portion of what is owed back. If it was true property e.g. a watch she would get full watch back.
- Example
 - When there is assignment to Rebecca, it is still a personal right but now to Rebecca.
 - If Gina goes bankrupt but she had previously assigned debt to Rebecca, Gina's creditors can't claim the debt is hers as she is no longer the owner.

Why do we need this legislation?

- Common law did not recognise assignment.
 - Upheld personal obligations.
 - This is not commercially useful. If you need money now more than right you can sell right to someone. Say just pay assignee, not assignor.
- Equity did, but this had practical problems
- Statutes were enacted to remedy problems.

Property Law Act 1952, s 130 - This was replaced in 2008.

- Any absolute assignment
- Assignment must be in writing, and with signature.
- Assignment can't just be a charge, eg. I will owe you this if I fail to do this.
- Debtor does not have to give consent.
- Not effective until notice is given. Express notice in writing.
- We are going to make the assignment valid in law, not equity, but it has same nature.
- It also transfers remedies in relation to those rights e.g. remedies.
- You transfer title subject to all equities that would have been entitled to priority over the right of the assignee if act had not been passed
 - Subject to equities = debt could have something wrong with it
 - When it was only equitable assignment, assignee might find their right was less valuable than they thought. Maybe assignor misrepresented the position. Debtor can say they have debt to assignee, but it is less than what they thought because of this misrepresentation. Assignee is bound by that problem with the debt.
- How do you avoid this situation as debtor? Non-assignment clause in K.

Property Law Act 2007, ss 50-51

- Still want absolute assignment
- S 50 - absolute = not conditional, not by way of charge.
- Still writing/signature requirement
- Still transferred all your rights if you have fulfilled requirements. - Rights, Remedies and power to discharge.
- Applies whether or not it was given for valuable consideration, if it is gratuitous assignment
- Still subject to equities.
- Can still do equitable assignment.
- Priorities - s 50 - 51.
 - Situation where assignor assigns to assignee and then assigns to someone else the same debt owed by Sam. What if assignor gets paid twice for assignment?
- Section 51 Consequences:
 - (2) Payment of all or part of the debt to the assignor by the debtor who does not have actual notice of the assignment discharges the debtor to the extent of the payment.
 - If debtor, pays assignor because they didn't have notice, this reduces their obligation to assignee.
 - If debtor didn't receive notice, they were just doing what they were supposed to do.
 - (3) If they do know of assignment, have to pay assignee full debt.
 - (4) Debt is payable to another assignee if

- Before discharge, the debtor receives actual notice of the assignment of the same thing in action to the other assignee
- The rights of the other assignee in relation to the thing in action have priority over the rights of the first assignee.
 - This is the rule is from *Dearle v Hall* - if there has been multiple assignments of a debt in writing and signed, the assignee who turns up first and tells the debtor about the assignment is the one the debtor must pay.
- Used to have requirement to give notice for assignment to be effective. That is no longer only happening on giving of notice. Now don't need to give notice for assignment to be effective. But s 51(4) means there is incentive to give notice to ensure they have priority assignment.

The Shengala

Facts: Boat Spray Half Moon Bay Ltd paints the Shengala. Boatspray HMB is sold to Boatspray Ltd. They sell all tangible and intangible assets, including rights under K with customers and \$30k owed by Barwell. Boatspray demands payment. Barwell says he has no K with boatspray don't have to pay. Boatspray argues there was a valid assignment.

Held: Para 40-41.

- This is an assignment under all rights relating to K.
- Property law act 2007 is one way of making the assignment.
- S 50 - act. S 51 - effect.
- There was writing/signed.
- Doesn't matter that Barwell didn't consent.
- No notice is required under the new legislation.
- Notice relevant if debtor had paid assignee before notice, but that isn't relevant here.
- Barwell made another argument that while he is bound to pay assignee, the amount he needs to pay is less because there is something wrong with K, misrepresentation.

Absolute Assignment -

- S 48 - not conditional and not by way of charge.
- Entire interest in chosen action is transferred unconditionally to the assignee.

Durham Bros v Robertson

Facts: Smith + Co building dwellings for Robertson. Builders borrowing money from Durham Bros. Smith and co couldn't repay, so assigned some of their rights/debt against Robertson to Durham Bros. in meantime. When they get cash to pay then assignee will lose the assignment. Durham said the building was completed so money should go to them because they were assigned the debt.

Held:

- Assignment condition- if event occurs assignment goes back to Assignor.
- This is not effective under statute as per s 48. If debtor is presented with notice of conditional assignment they don't know who to pay eg. Smith and Co or Durham. It is too unclear - unlike absolute assignments where once it is signed, all rights and title is transferred.
- Statute ensures assignments are more clean and easy to enforce. Improving on equity.
- In equity, you could make a conditional assignment because in equity Assignee has to get the assignor to also turn up to court, has to join them to action. So when debtor says in court who do I have to pay, it is more clear who has to since they are both there and can explain situation.
- If it's not absolute, it is equitable. Goes back to equity which is still enforceable, but you can't use a statutory mechanism.

Part of a debt

- 1952 Act - could not assign part of a debt, had to be whole debt. This was because if you are only assigning part of debt it is confusing for debtor about what is happening and who to pay what amount to.
- 2007 legislation -
 - s 50(1) - what is assigned and how to assign.
 - s 48 definition of things in action includes part of a thing in action.
 - S 52(4) - assignor must be joined in any proceeding brought by the assignee against the debtor if only part of the thing in action has been assigned in accordance with s 50(1) or there has been an assignment only in equity of all or part of a thing in action.
 - S 49(5) - if only part of a thing in action is assigned, the rights and obligations under this subpart of the assignor, the assignee and the debtor relate only to the part assigned.

- Idea: crisp way of getting assignee to have rights. Makes it easier in court.
- But now we are going to allow part of thing assigned but it is more procedurally complicated. Everyone in court is arguing about state of the debt or obligation.

Notice Requirement

- Most substantial difference between new and old legislation.
- Old legislation = notice must be given to debtor before assignment is valid.
 - S 930
- S 50(1) new Act - this is not required. It is not a compulsory requirement.
- From a practical/commercial business perspective, you want to be giving notice as soon as possible. It's a thing you need to do to make sure assignment is of the most possible, practical use to you, to ensure you have the benefit. It doesn't matter who gives notice though. But don't need to give notice from such a validity perspective.
 - In case the assignor assigns to multiple people, it ensures that your assignment is better.
 - Whoever gives notice first is the one the debtor has to pay, even if someone else got a valid assignment first.
 - The exception is if the second assignee new about the first assignment.
 - These priority rules are equitable rules that statute accepted.
- Does this mean injustice for the first assignee?
 - No, because if they just remember to give notice to debtor straight away they can secure rights.
- Is this unfair to the debtor?
 - No because when the assignee wants to enforce their rights they will have to give notice anyway.
- Now notice falls to the charge of the assignee.
- Example: someone has debt to credit card company. They will often assign this debt to Baycorp or other company that is in charge of chasing people down to pay debts.
 - Credit card holders say who are you, we don't owe you money.
 - In contract, it expressly refers to the right to assignment. They have been assigned debt.
 - They debtor could have tried to contract out of this assignment clause, said that there can be no assignment of the debt.

Does Assignee have to agree?

- No. But they can reject it later (disclaim the property).
- But normally they wouldn't say no, it is a gift but it's valid before assignee knows about it.

Standing v Bowring 1885

Facts: Standing was an 86 year old widow. She assigned \$6,000 in government bonds to godson for when she died. She didn't tell him because she didn't want him to anticipate wealth and not work as hard. At 88, she gets married and wants money back (probably because new husband wants the money).

Held: She cannot get money back. She has assigned her rights and title of \$6,000 in bonds to the son. Like giving a gift of chattel, once it is complete you can't take it back if it was valid.

- It doesn't matter that he didn't consent to the assignment.
- When bank asked if he would give them back, he said no.

"Subject to Equities"

Roxburghe v Cox

Assignment of \$3,000 to Assignee. Assignee says to debtor bank give us the \$3,000. But the bank say assignor owed bank \$600, so Assignee only gets \$2,400 from them.

- "Assignee takes benefits of that chose in action subject to the rights of set-off and other defences which would have been available against the assignor, subject only to this exception, that after notice of an assignment of a chose in action the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of notice"
- Subject to equities if there was a misrepresentation in the creation of that chose in action, this can be a counter-claim against the assignor.
- If you are going to take benefit of chose in action, you have to take problem.
- Benefits that assignee would get were lessened by something assignor had done e.g. breach of K. Debtor doesn't have to pay any more to the assignee than they would have paid to the assignor.
- If you were company like baycorp would have clause in K saying there are no equities applied in these debts you are selling to me, I don't want to find out they are less than what you represented to be bc you were fraudulent or made misrepresentations or performed K badly so as to reduce what debtor actually owes.

- It is like the idea of *Nemo Dat*. True owner has better title to property. Assignee did get title/ ownership to thing in action but assignor cannot give a better thing than they had. Assignor didn't have right to a debt that was that great, assignee can't get better than what Assignor had.

Roxburghe rule in legislation

- S 50(3)(b) - assignee gets all rights and remedies subject to equities in relation to thing in action that arose before the debtor has actual notice of the assignment.
 - Something to do with obligations that the debtor and assignor owe to each other that can be set off against each other before the assignee gives notice to the debtor, then debtor is protected as they can assert equity against assignor or assignee.
- What kinds of things are we looking at?
 - Problems with debt; counter-claims closely related to the chose in action
 - misrepresentation/fraud. Damages for breach of K - mean debtor owes assignee much less money.
 - Could be something unrelated to the debt assigned or liquidated damages between assignor and debtor.
 - If they both exist as debts to each other, although unrelated to chose in action, before assignee gives notice, you can set those off at each other.
 - But it always has to be before the debtor is given actual notice of the assignment.

Commercial Factors Ltd v Maxwell Printing Ltd

Facts: Commercial factors is a company that is assignee in lots of different transaction. Maxwell printing owes ESP money under K, and ESP assigns right to commercial factors. Maxwell printing, when asked to pay money to commercial factors, said that they did work for ESP and they owe me a \$100,000.

- Maxwell does not need to pay anything to commercial factors because ESP ltd owed Maxwell paintings more than the debt they owed ESPN. However, Commercial factors doesn't owe Maxwell the debt that ESPN owes them.

Assignment of Future Amounts

McLeay v CIR - VALID

Facts: Son owes interest payments to farmer. Farmer wants to use them for charity, and assign debt to charity. CIR says no that money doesn't exist yet, son might not make that money, so can't assign it.

Held: Father wins. Interest payments are not conditional, so are not barred under s 48 from being a chose in action. Not just a mere expectancy.

Norman v FCT (HCA) - comes to opposite conclusion. It is invalid.

Williams v CIR - INVALID

Facts: Beneficiary of trust and receives money from a farming operation. Wants to assign first \$500 he receives each year from a trust to church. IRD says it is future property that doesn't exist until it is paid into your hands.

Held: No assignment. Property you are assigning has to exist. You could assign all your rights under the trust, or half of it, but can't assign a certain amount of money, this \$500, because it doesn't exist yet.

Legislation PLA:

- S 53: can assign existing right to (future) money or amount that will or may be payable in future.
 - If you are a beneficiary of trust (and assign all of trust), or someone has to pay you loan, you don't have money yet or know that it will come into existence, but you don't have to know that. It may be payable.
- But still cannot assign a "mere expectancy" e.g. a will as a person could change their mind so there is no existing property right. Similarly, a beneficiary of trust cannot assign a certain amount of money because it doesn't exist and they may get nothing.

Examples of Assignment

Palmer v Sharpe

Facts: Palmer contracted with castlecliff to build something. Palmer assigns to Sharpe some of money due under the K. Palmer goes bankrupt. Town Board finished works, and had withheld \$500 of what Palmer had already earned in accordance with K. Sharpe said he had already assigned \$150 of that money to him before bankruptcy. That means when assignor goes bankrupt, proprietary effect of assignment means assignment was before he went bankrupt so entitled to full \$150.

Held:

Moneys already earned by assignor can be assigned by him, they are not invalidated by his bankruptcy intervening before the money has become due and payable. Wasn't an issue of future property.

Aicken v Bradley

Facts: Drake borrows \$550 from bradley = mortgage. Drake was meant to build dwelling and fence. Bradley obtained \$150 of loan until completion of work. But Drake was really entitled to full money and was paying interest on it. Drake says he will

assign you \$100 of what I am owed to Aicken. Drake goes bankrupt. Drake is owed \$150 from Bradley which creditors want. Aicken says \$100 of that is his.

Held: This is a valid assignment, meets all requirements. Bradley should pay \$100 to Aicken.

Percival v Dunn

Facts: Claim that assignment was made. The debtor owes the assignor some money, an obligation. The assignor transfers some of that obligation to the assignee. Davis asks Dunn to pay percival the amount of his account \$42.

Issue: Is this an assignment?

Held:

- Written, signed, notice.
- They just say please pay this person some money. There is no ground on which we can say this is an equitable assignment. They are requests to pay money which Davis owes to someone else.
- Yes, Dunn owed Davis some amount. If you want to assign something you have to identify it, you can't just say please pay this person some money.
- Lesson - be more careful.
- It is just not clear enough what is being assigned, need to use language of assignment.

Assignment in Contract

Someone in position of original debtor has said to original creditor, you cannot assign the benefits of the K or you can only assign benefits of K if you ask me first and I agree etc. or if assignee is a bank. Just some condition.

- The assignor is the creditor at the start. It is only when they make the assignment that they become to the assignor and they lose right to be creditor, and assignee becomes a creditor.

Are these conditions on assignment effective? YES.

Linden Gardens v Lenesta Sludge

Before: What should affect of non-assignment clause be? Discussion...

- Damages for assignor to Debtor - Non-assignment clause might not prevent that assignment being made, so that the assignee could not sue the debtor /enforce the rights and obligation under chose in action. You could still make assignment and breach of non-assignment clause would be met by damage claim to assignor and debtor.
 - But then that means assignment is in place. Does that mean Assignee can sue debtor? They contracted out of this though so seems unfair.
- Specific Performance - Tried to make assignment but non-assignment clause made transfer of property rights/assignment invalid so that assignee could not sue the debtor.

Facts: SC contracts with M and H. M and H do bad job removing asbestos. SC has to incur further costs to get rid of asbestos. SC sells land to Linden, and assigns rights under K with M + H to Linden. Linden wants to sue M and H for breach of K without a participation of the assignor. But there was a non-assignment clause in K between SC and M and H (had to get written consent to do so).

Issue: Can Linden sue or does non-assignment clause bar them?

Held:

- Can only assign benefits under K, not burdens.
- What happened in this assignment?
 - You can't assign a contract, only benefits under a K.
- Are we going to allow this when K says you can't assign benefit of K? Is breach of non-assignment clause = damages or say that no assignment occurred?
 - Distinction between performance of K versus economic fruits of that performance. Judge doesn't like this.
 - Aims of clause is to say no one can take assignment to allow assignee to take benefits and remedies associated -
 - Real property = we don't want land to never be assignable because we want free market in land.
 - Linden argues on similar line. Of course we want to be able to assign chose in action and as matter of public policy we should be able to transfer/make assignments. So non-assignment clauses should be void.
 - Browne-Wilkinson: there is no policy reason to not give effect to plain meaning.
 - No public need for market for choses in action. Person can have genuine commercial interest to be in relations with only the other person they selected to be in K with.
 - Are they effective to transfer causes of actions to assignee? Can Linden still enforce against debtor even if non-assignment clause is upheld?
 - Existing authorities establish that an attempt at assignment is ineffective to transfer such contractual rights.

- If this was law it would defeat commercial reason for avoiding becoming into contractual relations with third parties.
- Assignee cannot sue. Not restricted to damages for breach.
 - That means the assignor still holds onto their rights and they might be able to sue the debtor and get damages.
 - And as between assignor and assignee, there is still a K, and there is a breach of that K. So assignee could sue assignor under that.

FTG Securities v Bank of New Zealand

- Are we going to give effect to a non-assignment clause?
- They quote Linesta sludge.
- We can specially perform non-assignment clause. Debtor can say to assignee “you cannot sue me” not restricted to damages.
- Final point: A prohibition on assignment works between the debtor and the initial creditor/the assignor as a contractual term between them. If assignor attempts to assign to assignee, the assignee may acquire rights including proprietary rights but has no contractual rights against debtor. Cannot enforce beneficial terms of K against debtor.
 - In HC, it said FTG did not have title to interests. This is saying no property has passed. Assignor was still owner of rights.
 - The assignee cannot sue the debtor, but what if assignor goes bankrupt? Do they still have the best right to those things even if they cannot assert them against the debtor.
 - COA - HC judge did not need to go that far. Assignments are ineffective against debtor but there may be still an enforceable K between the assignor and assignee. It might still be that the assignee owns the chose in action, although the assignor has to sue debtor and holds any fruits of that action, and the assignee cannot enforce contractual benefits against debtor.
 - This is a third option - the assignment is still valid between benefit of assignor and assignee. So if assignor goes bankrupt assignee would have title to it.

Bailment

What is it?

- It's about possession?
- Or is it's not its own category. Bailment is term to working out rules of possession and tort law based on possession and contractual rights that arise. Or is it it's own thing.

Terms

- Bailor = person doing the [lending] = retains ownership
- Bailee = person doing the [borrowing] = gets possessory interest, but don't get all rights to thing.
 - Generally this is voluntary, but there can be involuntary bailment in a finding situation or lost property situation.

Bailee has to be in possession of thing for bailment to arise

- License: you can do something in relation to my land e.g. drive car on land, but I will not be in possession of your car. Will not have obligations as bailee.

Ashby v Tolhurst

Facts: Ashby parks car at T's car park. Pays 1 shilling and gets ticket which says they don't take any responsibility for cars or damage caused. Car park attendant is watching over car park. His friend turned up and said I am taking the car. Ashby turns up and asks where the car is. The attendant said it as gone, thief had taken it, thought it was friend.

Issue: Ashby argues this was a bailment. Carpark owed obligations as bailee. They admitted negligence but said they were not liable because there was no bailment and terms on ticket destroy liability for terms that would exist if there was a bailment.

Held:

- Carpark wasn't in possession of car, just because it was sitting on the land. It would mean owners of car park could have action for trespass or conversion for the car. This seems odd.
- Even if they had possession, conditions exclude liability in K. They allow the car park to take no care in relation to the thing, to be negligent.
 - Gives you a license to leave your property on their land without making them a bailee. It is clear on ticket that any liability if it was a bailment has been excluded.
- There is a distinction between license and bailment - need transfer of possession.

Other arguments could have been made

- Possession = there was a car park attendant, thief assumed they would ring police if they took it.
 - Also it says “owners are requested to show ticket when required” on ticket. This could suggest they wouldn’t let people leave unless they show the ticket. Shows possession
- Should exclusion of liability be interpreted strictly against bailee?

Different facts

- If keys were given to car park owner = that would be possession. Constructive possession.

What are Bailee’s Obligation?

- Protecting the goods from loss/damage.
 - To what standard of duty of care?
 - What is reasonable to do to protect good in circumstances?
 - What do the particular circumstances suggest?
 - Is there a contract?
 - There is general duty of care but has K imposed a higher or lesser duty of care, or specified things you must or must not do with the item in relation to protection of item.
- Can’t just convert it. You have to give it back, can’t treat it as your own. It’s a limited right to possession.
 - Is this just applying rules of title/possession?
 - If you have possession of chattel and someone has a better right to it they can take it back. But no conversion if they haven’t asked for it back or if contract allows you to have possession of it, e.g. lease, they have parted with chattel for a period of time.
- If bailee has breaches duty to do or not do something, there is strict liability. Liable for any loss, no matter how careful they were being, unless they can show that their actions did not cause the loss. The loss would have occurred anyway. Causation question.

Coggs v Bernard

Facts: Bernard is moving Coggs’ brandy, for free. No K, and contract wasn’t really there at this time, and neither was the idea of negligence. Brandy is damaged during the move.

Held:

- 6 categories about situations where someone possesses something owing to another. Obligations in each category is slightly different e.g. was it for bailees benefit or bailors benefit, was there money changing hands or was it gratuitous?
- Category = Carry things for free.
- Old Law of bailment: Fraud not to take care when you have undertaken to take someone’s goods. Breach of trust. There are different standards of care.
- Defendant is liable.

Wellington Racing Club v Symons

Facts: Miss Symons goes to the races. She leaves her coat in the WRC’s cloakroom. When she comes back it is gone.

Issue: Is WRC liable?

Held:

- There is some discussion about gratuitous, but mostly doing away with distinctions between categories for different obligations or standards of care.
- Main Q: Did bailee take the kind of care that the owner of item would be reasonably satisfied with? Duty of care
 - Possession is clearly transferred so it is a bailment situation.
 - You can alter obligation through K, e.g. putting up a notice. In cloakroom there was notice saying every care will be taken, club accepts no responsibility.
 - She argues I never saw that.
 - Also what does this notice mean?
 - You haven’t excluded all responsibility still have to take every care. So still apply liability of general law of bailment.
 - What is reasonable care in circumstances?
 - She would think coat is safe against thieves, ticket systems, attendants.
 - She wouldn’t expect them to protect it from a massive mob or fire. That is not unreasonable.
 - But reasonable standard of care would have stopped thieves.
 - Attendees are unable to say when it disappears or anything that happened - no reasonable care.

Southland Hospital Board v Perkins Estate

Facts: Mrs Perkins dies in hospital, ring goes missing. Is hospital liable as bailee? They have by law saying not responsible for any loss or damage unless they hand it over to them.

Held:

- Courts are going to try read exclusions of liability down as much as possible, want to protect bailors.
- If someone dies they no longer have an ability to hand stuff over to hospital so you should have some mechanism where you can take property. Hospital does take possession.
- Bailment is a unified idea. In circumstances did bailee take reasonable care?
- Onus lies on bailee to show they did exercise reasonable care looking after the thing in the circumstances, when it is damaged or loss. (Don't need to prove negligence).
 - Have to show on BOP that staff would have followed procedure that we normally do and that would be reasonable. Even if they don't have evidence or proof in that way

Wilson & Horton v AG

The bailee must prove either that it took appropriate care of them, or that its failure to do so did not contribute to the loss.

Barton Ginger & Co v Wellington Harbour Board

Facts: Fishing rod discharged off ship into WHB's possession. They leave it for 15 minutes and it disappears. BG says WHB is liable.

Held:

Was reasonable care taken in circumstances?

- They left it for 15 minutes.
- In circumstances: it wasn't a public place, truck drivers and employees only people who had access to area. They couldn't stop truck drivers from coming onto the wharf and can't check everything that comes in and out of wharf.
- It would be uneconomical to expect them to do so since no such loss had occurred before.
- Thus, they did take reasonable care.

Bailment and Contract

Common to see clauses dealing with bailee's liability - exclusion or alteration (*Wellington Racing/Ashby*)

- They will take reasonable care but not responsible for loss. If this sign is clear, or clause it clear, hard to say you couldn't have known this disclaimer.

The Kostis Prois

The degree of care required of a bailee who has taken possession varies according to the circumstances under which the goods came into his hands.

Sub-Bailments

Bailor sends car to garage for repair (bailment).

Garage (bailee) sends car to specialist (sub-bailee) (sub-bailment)

Edwards v Newland & Co

Facts: Newlands K's to store Edward's furniture. Newlands sub-contracts the storage to Burchett and delivers of possession of goods to them. Burchetts warehouse is bombed in war, left open. They try and keep things dry so asks everyone to come get their furniture. Newland copies letter and sends to Edwards. Edwards turns up thinking Newlands has it, B won't give it to her until she pays them. Some furniture was stolen subsequently. She sues Newlands.

Held:

Did Newland's take reasonable care?

- Are they taking care if they sub-bail to Newlands? Did they take reasonable care in inquiring whether the person was a good person to bail with?
 - But they don't ask this. Not focus.

What was bailment conditions? Was Newlands allowed to sub-bail these items or did they have to look after them themselves?

- Was K supposed to be only held by Newlands? Was this contractive personal performance, only they can perform it?
- This K looks like it was supposed to be held by Newlands. It was a bailment where bailee was meant to keep the goods.
- Sub-bailment was not authorised.
- If person breaches that direction or part of the deal, they are liable for any loss that was caused. Strictly liable.

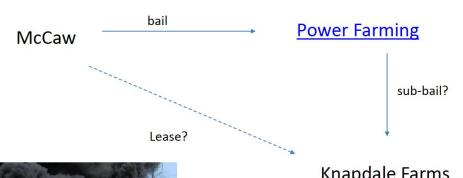
Power Farming NZ Ltd v McCaw Contracting Ltd

Facts: McCaw owns tractor, sends it to power farming (act as agents for people who sell/lease machinery). Knapdale farms wants to lease tractor. McCaw is happy for PF to organise this. Power Farming delivers tractor to knapdale, it blows up by electrical issue and it wasn't insured.

Issue:

1. Sue Knapdale as sub-bailee or leasee?
 - a. No terms were agreed or fleshed out on paper.

Power Farming NZ Ltd v McCaw Contracting Ltd [2017] NZHC 441



- b. Sub-bailee is liable to bailor even if no K agreement between them.
 - c. But you have to show Knapdale didn't take reasonable care which is hard, electrical fault.
2. Sue PF? Better option breached bailment obligations.
 - a. McCaw doesn't know anything about whether lease had occurred or not. Doesn't know Knapdale.
 - b. Saying sub-bailment was unauthorised = strict liability for loss unless they can show loss would have occurred despite the breach of the obligation (causation)
 - c. Until I had confirmed lease, you weren't allowed to give tractor to anyone else.
 - d. This is different to tort. Onus is on defendant to show reasonable care. Sub-bailment = strict liability.
 3. PF argue if they hadn't breached obligation, formal lease would have been negotiated and they would have had it anyway and would have exploded. So they can show loss would have occurred anyway so no strict liability.

Held:

- Judge disagrees with PF. Tractor would have been sitting there in showroom, not used, so it would not explode.
- More convincing that they are allowed to make the lease but if they had done this, they would have sorted out insurance, wouldn't have loss.

Morris v C W Martin & Sons

Facts: Mink stole sent to furrier for cleaning. Furrier sends stole to dry cleaner. Stole is stolen. Can owner sue dry cleaner in bailment?

Held: No K between bailor and sub-bailee, so can they sue them?

- Yes. The bailor can sue sub-bailee by virtue of voluntarily receiving goods in their possession.

Gilchrist v York Products

Facts: Clocks to shipowners for carriage. Shipowners unload clocks onto wharf. Clocks stolen. Can owner sue wharf in bailment as sub-bailee?

Held: Bailment is different from K, don't need direct link between sub-bailee and owner.

- Sub-bailees took upon themselves an obligation to the bailor to exercise due care for the safety of goods, although there was no contractual relation between sub-bailee and bailor.
- Owner can sue sub-bailee for not taking reasonable care, as if they were a bailee.

The Pioneer Container

Facts: Plaintiffs = Bailor. Defendants = Shipowners. Ship sank, plfs sue shipowners in HK.

Issue:

1. Shipowners say they can only be sued in Taiwan bc of clause in K. Time had run out to sue in Taiwan so no claim there.
2. Bailor says no that clause is part of K between bailee and sub-bailee. We don't have K which says we must sue you in Taiwan, but you are a sub-bailee so liable to us.

Held:

English Law = privity of K. So how can sub-bailee insist bailor be bound by K they are not party to?

- But we can't do this through a contractual analysis.
- Have to look at bailment.

Bailment on Terms

- Bailee can bind the bailor to terms of sub-bailment with sub-bailee under certain circumstances.
- Bailee has to accept it was bailment on certain terms e.g. jurisdiction clause.
- Obligation between bailee and sub-bailee only binding on bailor if bailor authorised bailee to make sub-bailment
 - In this case, they had permission to sub-bail and they had permission to sub-bail on different terms. Although this is limited to what is usual and reasonable.
 - Jurisdiction clause is usual and reasonable. It is necessary when operating internationally for clarity, makes sure they can be sued in one place.

So obligation between bailor and sub-bailee is subject to terms between bailee and sub-bailee.

- Bailment K may explicitly allow sub-bailment terms in K.
 - In this case, they said they could make sub-bailment on any terms that were reasonable.
- Bailment K may implicitly allow sub-bailment terms in K.
 - Most shipowners have this clause in their bailment K. It is a necessary clause for the system to work. We want them to be able to rely on terms in their K otherwise their K would be meaningless and prevent flow of trade.
 - Circumstances around industry also say this would be implied.

Test

1. Consent to sub-bailment
2. Express or implied that sub-bailment can be on new terms (made by bailee and sub-bailee)

- If sub-bailee doesn't know that they are holding goods for a third party, then they never had opportunity to consent to hold goods for bailor. So bailor would not have recourse against sub-bailee only bailee.
- Contrary argument in textbook on bailment, a sub-bailee's lack of knowledge as to the identity of the bailor shouldn't matter. It does not prevent that sub-bailee from owing the original bailee the same duties they are owing the bailor.
- This isn't a settled point of law. Where the existence and identity of bailor could be crucial to sub-bailee's decision to accept to look after the goods = instance where it could material and would apply first point.

Abandoning and Destroying Goods

Did person divest themselves of ownership? If yes, then finder has best title to goods. Can do what they want with them e.g. sell or dispose of them.

How does it tie in with finders law?

- when you find something you are expected to try reunite it with person who has better possessory title to it than yourself. Take reasonable steps to take it back to the true owner.

Haynes

Facts: Man dug up graves and took winding sheets and buried people again. These sheets express hope of resurrection and respect for the body.

Issue: Can owner abandon item so that they no longer have rights in it?

Held: Man cannot relinquish property in goods unless they be vested to another.

Was this theft?

- Yes, this stuff still belongs to someone. It can't be dead bodies because they can't do anything with it. But whoever originally owned the sheets is the owner. Just because they gave them away for burial doesn't mean they don't own it.

A very old debate

- Can we have divesting abandonment so that you are no longer the owner?
 - Romans/Bracton: can divest
 - St Germain/Haynes: cannot divest.
 - Blackstone: can divest. Absolutely abandoned his property and returned to common stock, when you scatter your possessions and have no intention of reclaiming it.
 - If someone clearly does not want to own something anymore, they will be able to do that.
- Haynes - want to find liability, but rationally we should be able to abandon.
- We have interest in being able to divest property for criminal purposes too, because we don't want to punish people for theft when there is clearly no owner.

Simpson v Gowers

TEST: Abandonment occurs when there is a giving up, total desertion and absolute relinquishment of private goods. It may arise

1. With specific intent of desertion
 - a. Actions may allow us to infer this.
2. Relinquishment casts away or leaves behind his property. (physical manifestation)

HongKong and Shanghai Banking Corporation Limited v Erceg

Courts give effect to rational approach.

- Abandonment = owner must divest by unequivocal actions.
- No clear distinction between intention to divest itself and unequivocal actions. It may be implicit.
- Clearly there needs to be an action, and we might read in an intention. Later person who finds it can have title against all the world and against original owner, because they abandoned it.

Robot Arenas Ltd v Waterfield - type up then re listen.

Facts: Set for robot arenas tv show was stored in RAF hanger. RAF base was sold. The whole set was left. The new owner tried to find out who wanted it, what to do with it, no one came forward so they threw it away. Robot Arenas say they still wanted it, and want to sue for loss.

Issue: When new owner of hanger decided this stuff was junk and throws it away, were they justified (e.g. because goods were abandoned) or can they come under claim in bailment or conversion?

1. Robot Arenas argued they shouldn't have converted goods by selling scraps. They were an involuntary bailee. Should have given back so they have to pay damages of \$35,000. Only bought it for \$11,000, and sold scraps for \$250.
2. Waterfield argue the claimants abandoned the goods.

Held:

LAW

- Law under *Haynes case*: we can't have abandoned goods. Good for owners of rights, can have action even though ordinarily may be junk.
- However, we need to have a doctrine to allow abandonment. The law needs to give effect to when people want to abandon things, although the usual position = someone who owns item has claim against any third parties.
- Distinction between colloquial idea of abandonment and legal
 - Abandoning the search for a lost object is not abandonment of thing because they still want that item.
 - It is abandonment when you don't want something anymore. - Divesting abandonment.
- TEST: Previous owner renounced possession and has actually relinquished possession.
 - Evidence of intention to abandon
 - Physical act of relinquishment
- If goods are left on land but are NOT not abandoned, then you are involuntary bailee of item.
 - Like when you are a finder, you have to not convert it and take reasonable care of it in the meantime. This would involve trying to return it to the true owner.
 - What is reasonable care?
 - Try find owner
 - Store it somewhere else. Even if that incurs fees.

On facts

- Was it abandoned?
 - The set was not abandoned because robot arenas had no subjective intention to abandon. Robot Arenas is still the owner. Waterfield is an involuntary bailee. Can't destroy it because this is conversion. Woodfield should have known it wasn't abandoned.
- Does RA have a claim against Waterfield for failure to take reasonable care as involuntary bailee?
 - What would it mean to take reasonable care of the hanger?
 - Objective intention - at what point in time was it reasonable to think this is abandoned?
 - Waterfield was allowed to think it was abandoned.
 - Vendor's didn't say if they wanted it, he asked about it and no answer in 5 weeks.
 - It wasn't abandoned but we can treat it as abandoned.
 - Claimant should know they can't leave stuff and not say anything.

FM Custodians v Cribb

Facts: Claimants bought land, stuff was still there, they could see it wasn't abandoned so stored it.

Issue: Can we charge person who owns goods left on land for storage costs that involuntary bailee incurred in taking reasonable care of their items?

Held:

- If someone is an involuntary bailee and take reasonable care, then they can charge person who leaves goods for storage costs.

Specific Legislation

- Residential Tenancies - s 62
 - Specific regulation of involuntary bailees
 - Landlords have duty of care to hold onto valuable stuff left by tenant. They have to tell tenant to get it. If they don't turn up, then value it. It worth storing store it, if not can get rid of it.
 - Personal documents you have to look after in a particular way
- CCLA S 289
 - Specific regulations for carriers of goods. What they can do.
- Impounding Act 1955
 - What to do with wandering stock.
- The Litter Act 1979
 - S 15 offence of littering. Don't want people just to abandon property.

Holding Goods: Liens

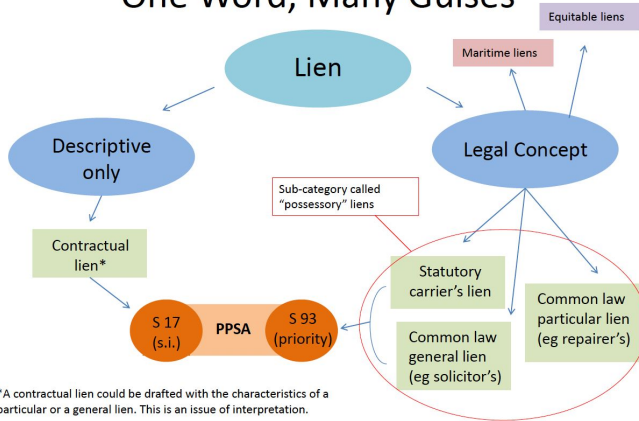
Security = Proprietary rights in things but it's not ownership. If you don't satisfy obligation under personal right, I'm not giving this property back (Lien) or I will take property off you and sell it to pay back the debt or satisfy the obligation.

- If a person goes bankrupt, this property right is binding on liquidators, they will get full item or amount back, not just a distribution of what is left like general creditors.

Lien = A right of one person to retain possession of property belonging to another or to have a charge over it, pending satisfaction of the lien holders claim against the other person.

- To have a charge over property = is a different kind of lien to do with trusts, that is not our focus.
- Equitable lien = don't generally have possession. More like security interest under the PPSA.
- Common Law Lien = when you retain possession property. (Our focus)
- Can sometimes be used without common law or equity, but through contract to set up a type of lien requirement.
 - However, this is more like a security interest under the PPSA.

One Word, Many Guises



*A contractual lien could be drafted with the characteristics of a particular or a general lien. This is an issue of interpretation.

Common Law Lien

- Arises because of dealings in property, it was not actually agreed to in K.
- It does not fall within PPSA.
- S 93 gives common law liens/statutory carrier's lien priority over contractual liens
- Primitive "Self-help" remedy: if I worked on something, you can't get thing back until you pay.
- To have a common law lien you need
 - Debt owed by X
 - Possession of X's chattel
 - Continuing right to retain possession.
- Mechanics are a good example of ppl who have lien

Burrow v Container Sales

Facts: Dispute over container lease. B's horse training gear in container. CS attempted to assert lien over gear.

Held:

Law

- Thing you are possessing has to relate to the obligation. Must be sufficient nexus between what is owed and item you are holding.
- It doesn't matter if goods are worth much more than the obligation owed.

On facts

- No connection between disputed lien debt (over container money) and goods over which lien asserted (horse gear).

Raitt v Mitchell

- Payment has to be due. Issue if payment is due later on (if granted on credit). Cannot have lien.

Common Law particular lien/repairer's lien

- When someone is working on/improving another person's chattels.
- There must be some improvement to the chattel to have a lien.
- Particular lien only applies for particular property the work is done on.
- Self-help: courts not involved. Not so good if person is indifferent to whether they get back chattel.
 - Before: no power to sell.
 - Now: CCLA s 341 = repairer's with lien do have power to sell goods if they haven't been claimed.

Stockco v Walker

Facts: Stockco has security in Capehorn's cows. Walker has the 200 cows on her farm under K, Capehorn just bails cows to other people to fatten them up. Capehorn is going insolvent. Stockco wants the cows to repay obligation/debt. They are happy for Walker to hold onto cows, and they'll pay her from time to time. Walker claims a lien on cows for work done to them as she has not been paid by Capehorn.

Issue:

1. Does Walker have a lien given Stockco is saying Walker did not improve the animals? If you just maintain animal you can't have a lien because there is no improvement to the cows.
2. Continuing right to possession is necessary to have a lien. If in K at any time owner can take back possession, can you have a lien?

Held:

- It doesn't matter what happened, look at K. K was for improvement, so walker has a common law lien and this trumps StockCo's security interest under the PPSA.
 - Would there not be a breach of K if she didn't actually improve them?

- In K, it doesn't say possession goes back to Capehorn when weighed and Walker retains it so won't lose possession automatically. So this argument fails as well.

Different Liens with Statutory Rules

- Selling goods
 - CCLA s 341: If person has done work on goods in their possession and A has a lien. And there is no payment of debt for 2 months or more after it should have been paid, they can sell the goods.
- Unpaid Seller's Lien
 - CCLA s 175: Sold goods, retain possession, haven't been paid.
 - Can keep possession if the goods have been sold without any stipulation as to credit, the goods have been sold on credit but the term of credit has expired, or the buyer becomes insolvent.
- Innkeeper's lien
 - Innkeepers act 1962: Lien for allowing people to stay at their property. Claim lien over goods left in their possession if the person who owns goods, owes them money.
 - They may sell and dispose of property to satisfy debt.
- Carrier's lien
 - CCLA 285: Not improving goods but carrying goods from A to B. In certain circumstances of lien.

Bay Flight v Flight Care

Facts: Flight care had a repairer's lien over Bay flights plane. Before final day of payment they asked for plane back for a photoshoot. Companies are on same airfield. After photoshoot, Bay flight takes plane back to flight cares hanger because repairs aren't finished. But then Bay Flight takes plane back and they don't get it back out. Bayflight goes bankrupt and can't pay debts. Liquidator sells plane as good owed by Bay Flight to pay off debts. Bay Flight 2012 buys plane from liquidators. They want Flight care to fix it so Flight care has possession again.

Issue:

1. Flight care argues they are owed \$37,000 for repairs.
 - a. They claim a lien over the log books needed to fly the plane.
 - b. They then say if director of flightcare new plane was going to go back for photoshoot they wouldn't have allowed it, so they didn't consent to loss of possession.
 - c. Then they send invoices to director of bay flight personally, which would mean they didn't have claim against property.
 - d. Flight care now asserts lien to Bay Flight 2012, since they have possession of plane again.

Held:

Was there a debt?

- No debt due or payable at time plane was given back

Was possession lost?

- Even if debt was due, person holding lien had given up possession.
- They had a lien, but they gave up possession and then took plane back later when owned by a separate person.

Could FC rely on the *Albemarle* exception: giving that possession to owner on understanding that it will be re-delivered to lien holder.

- We need an acknowledgement of lien and agreement that lien was to continue.
- We don't have that in this case. Lien only mentioned after flight care gets plane back from Bay Flight 2.
- Claim over lien of log books was early but they didn't say they should have lien over the plane.
- They didn't do this because these people had worked together a lot, trusted each other, but legally this is a fundamental problem for flight care.

Right to continuing possession examples

- If owner can take it back at any time, not lien situation.
- **Forth v Simpson** - Horse trainer. But owner can take the horses out whenever he likes so no lien.
- **Hatton v Car Maintenance Co** - Car service company. But owner can take car out whether she likes so no lien. Need in K that they can't take car back until paid.

Common law general lien

Particular lien = hold that thing or debt relating to work on that thing.

General lien - hold anything for debt relating to work for that person generally (even if they only worked on some of that thing)

- Certain people may be able to assert a general lien e.g. lawyers, solicitors, bankers, shareholders.
- Workers or repairers only get a lien over specific thing they worked on.

- To establish what people could come under a general lien, you need to prove through common law that there is an existing custom that these people get a general lien. This can create new liens.

Toll Logistics v McKay

Facts: Toll is warehouse for Scene 1's DVDs. Toll packs and distributes orders. Toll has 500,000 DVDs, worth \$2.6m. Scene 1 owes Toll \$287k. Scene 1 goes into liquidation. Receivers act for general creditors ASB. Bank has general security agreement over all of tolls property. They want to sell DVD's to pay off debt. Toll argues they have a lien, and have to be paid what they were owed before they give back the DVD'S.

Issue:

1. Do they have a particular repairer's lien?
2. Do they have a general lien?

Held:

- Toll hasn't worked on them enough to create a repairer's lien. If packing them and sending them "improves them" those are gone now, and are not part of the DVD's in tolls warehouse.
- If Toll had a general lien, they could hold onto any good relating to the work they did, so could hold onto the DVDs.

Is there a custom that recognises these kinds of people having a lien? Is there a custom proved so many times that we just assume they have a lien?

- Some text book authorities say packers do have general lien, some don't.

COA:

- Textbooks idea of packers having a general lien is premised on historical idea that packers would lend money to people they were packing for. It wasn't that they packaged goods that gave them the lien but that they lent money, acting as factors.
 - Even if packers did have a general lien, does Toll fall into the category established?
 - In all cases, packers had to prove it was customary.
 - More than one way of disputing packers would have a lien.
 - Toll was not engaging in money lending so they can't show they came under this general lien.
 - And it didn't lead any custom to show that this was the practice in NZ community.
- Wants to be careful about recognising a new kind of instance where there is a general lien. We want to be careful with common law lien in a wider context.
 - To expansive of an approach in recognition of common law liens would be inconsistent with PPSA. It gives a comprehensive set of rules and a single register to create certainty and reduce commercial costs.
 - Liens are a limited exception through s 93. Toll would be asserting a security interest outside of the PPSA, but also expanding what common law and statutory liens are.
 - If we expand this, it would detract from the intention to get majority of Security Interests in PPSA.
 - Because a lien trumps of SI, it creates more uncertainty for secured creditors who are following the priority rules in the PPSA, which also goes against aims of PPSA.
- Toll didn't have a common law lien but they had a contractual lien. However, contractual liens come under the definition of security interest in s 17 of the PPSA so have to establish same priority rules as all other security interests, so their interest does not trump ASB's SI because ASB registered first so they had priority.

Waitomo Wools v Nelsons

Facts: Nelsons has Waitomo Wools' wool. WW owes Nelson \$71k. WW is doing badly. Nelson's say they have a general lien for all wool they have, whether or not they had worked on it. It is written into K, even though they wouldn't be the kind to normally get a general lien.

Held:

- It is binding, this is a type of Security Interest using the term lien that allows someone who would not have got a general lien to have one through K.
- Court enforces this, although we don't know background about how it's enforced against other security owners.

Today under PPSA

- You have just made a SI, so just like any other it comes under the PPSA and priority rules are determined by those rules. It doesn't come under s 93 and have a super priority over other security interests.

Application of Tests

Possession

1. Exclusive physical control
2. Intention to possess

Gift

1. Gift donor must own/possess the thing (this is a non-issue)
2. Donor intends to make a gift
3. Donee intends to receive the gift
4. Actual or constructive delivery.

Bailment

1. Is there a bailment?
 - a. Exchange in possession
 - b. Understanding the thing will be returned.
2. If yes, then onus on bailee (*Perkins*) to show they:
 - i. Exercised a reasonable level of care; or
 - ii. There was no causation (*Power farming*)

Sub-Bailment

1. Is sub-bailment unauthorised?
 - a. If yes, then bailee is strictly liable for all damage.
2. If sub-bailment is authorised, is sub-bailee aware the goods are bailed goods?
 - a. If yes, then sub-bailee is treated as if they are bailee (*Morris*).
 - i. Did they exercise a reasonable level of care;
 - ii. Or there was no causation.
3. If sub-bailment is authorised, and sub-bailee was not aware, bailor will try sue bailee.
 - a. Did they not exercise reasonable care in sub-bailing?
4. If sub-bailment is authorised, does K authorise sub-bailment on any terms? (*Pioneer container*)
 - a. If yes, bailor is subject to terms of sub-bailment between bailee and sub-bailee.
 - b. Sub-bailee is able to invoke against the bailor the terms of the K which were expressly or implicitly stated in the owners K with the first bailee.
 - i. Did it expressly permitted on terms of bailors K?
 - ii. Did it impliedly permit terms on of bailors K?
 - c. Sub-bailee can take advantage of anything favourable/beneficial to bailee in first K with bailor. Any exclusion clauses that affect bailee, will affect sub-bailee.

If there is an issue of interpretation, can argue *contra proferentem rule* = if there is an ambiguous thing in the K the person who put that clause in the K won't benefit from that interpretation.

Abandonment

1. Was there an intention to abandon?
 - a. This is subjective intention of previous owner.
2. Was there a physical act of relinquishment?
 - a. Clear, unequivocal act.
 - b. Not always clear if you don't know them so have to take reasonable steps and at certain point it is reasonable to assume it has been abandoned.