

## PROPERTY OUTLINE

### Elements of a Cause of Action in Property

Plaintiff must allege:

- 1) Some right to the chattel
- 2) Loss of the chattel by wrongful taking or detention of it
- 3) Defendant's retention of it at the time of the suit, after a demand and a refusal to return it by the defendant
- 4) As a result of which, the plaintiff suffers damages.

### I. Wild Animals (*animals ferae naturae*)

Definition: common property of all, hence no one's personal property; acquire possession by occupancy only.

A. ***Pierson v. Post*** (Fox hunt) → Property over animals *ferae naturae* can be acquired by occupancy only, and in order to constitute such occupancy, one must deprive the animal of his natural liberty, by wounding or otherwise, so that he is brought within the power and control of the pursuer. ***Possession, not pursuit, is key to establishing property. Pursuit alone gives no rights in the property.*** (Court's view: Rule based on intent, pursuit, capture, and control easier standard to apply in future cases.)

- a. Cause of Action: *Trespass on the Case* – when applied to personal property is an action to recover damages for any willful injury or harm done by defendant to a chattel where the plaintiff had a present right to possession and the defendant interfered with that right; specifically premised on a defendant's duty to respect the plaintiff's right – in instant case, Post did not have to show that he had possession of the fox, however, he still had to define the nature of his claimed "legal right." If possession were shown, so would an injury to Post's right. Thus, Post frames suit is interference with the lawful act of hunting, not a legal right to the fox.

- Dissent: Justice Livingston - Fox is a brutal creature that should be killed; pursuer who is within reach or has "reasonable prospect" of catching the fox should be considered to have taken property over it. If one interferes with another's pursuit, he is a wrongdoer.
- Blackstone in *Commentaries on the Laws of England*: if one has property over a wild animal in a cage, home, etc., and that animal escapes out of sight and does not return in the usual manner, property ownership ceases.

- b. Requirements for Possession

- i. A manifested intention to control the particular item (cannot take animal if just want to deprive someone else from it – should actually want to possess it).
- ii. Actual power (seizure or holding) over the chattel.

\* Includes delivery of the mortal wound.

- c. Delivery of the mortal wound (by one not abandoning pursuit) will show:

- i. Intention of seizing the animal.
- ii. Depriving the animal of its natural liberty.
- iii. Bringing the animal within one's control.

B. ***Buster v. Newkirk*** (Deer hunt) → If an individual does abandon the chase, he loses any rights to claim property over the wild animal. While the continuous use of the dogs in this case does negate any claim that Newkirk abandoned his chase for the night, the facts in the case dictate that it was not necessary to even prove the chase was a necessary component to determine property since the wound inflicted was not a mortal one evident by the deer's running of six miles after infliction. The deer was never

deprived of his liberty. *Further testimony to the unforgiving, winner-take-all nature of the rule of capture.* (Opinion relied exclusively on *Pierson v. Post*.)

- a. Cause of action: *Trover* – recovery of damages against a person who had found another's goods and wrongfully converted them to his own use.
- b. When is right of pursuit allowed without interference? If a wounding is followed by active pursuit, the hunter has this right if he ...
  - i. Closes in on his prey AND,
  - ii. Is about to administer the fatal wound. \*

\* Infliction of the mortal wound must be inevitable in order for the hunter to be protected from the interference of interlopers.
- c. Abandonment requires:
  - i. Intention to abandon
  - ii. Act of abandoning

C. ***Keeble v. Hickeringill*** (Duck pond) → Plaintiff could not in all likelihood show what his damages were because he did not take possession of the ducks, and he could not do so because of defendant's interference. Hickergill's intentional firing of gun to disturb Keeble's trade or livelihood. This interference alone was held actionable, using the writ of trespass on the case. ***If one does not physically commit trespass, that individual can still be found liable of trespass on the case.*** Court is more liable to find for someone who has property in interest of their livelihood.

- a. Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, an action will lie in all cases. But if a man does damage to another by using the same employment (e.g., setting up a similar duck pond on his own real property near the plaintiff's), and that had spoiled the custom of the plaintiff, no action would lie because he had as much liberty to make use of his property as his neighbor.
- b. Emphasized the control of competition: the neighbor with the gun could set up a competing decoy pond and fire a musket in order to reduce the fowl to possession by killing them, but could not fire the musket to scare away the fowl from the neighboring pond.
- c. Comparing *Keeble* with *Pierson v. Post* → degree of possession (or quantum of possession) is lower in *Keeble* than in *Pierson*

D. ***Young v. Hitchens*** (Frightening Away Fish w/ Gap in Net) → Action for the conversion of fish which were never in the plaintiff's net, but had been frightened away from entering into the plaintiff's net by the defendant who then caught them in his own net. Fish in a weir which remains open may still be captured by another fisherman depending on facts of case, such as in the case where a net or trap may be substantially closed but the remaining gap remains large enough for another net to be thrown inside it by a 2<sup>nd</sup> fisherman.

E. ***State of Ohio v. Shaw*** (Escapable Fish Net) → Fisherman who, using another's nets which have confined fish so that escape is possible, but have made their capture practically inevitable, takes these confined fish for his own, was found guilty of larceny. Possession is a relative concept. The first fisherman had possession as against the secretive defendant who trespasses on another's nets and interferes with another's efforts. ***Law does not require absolute security against the possibility of escape. To acquire a property right in animals ferae naturae, the pursuer must bring them into his power and control, and so maintain his control as to show that he does not intend to abandon them again to the world at large.***

- a. *State v. Thomas* → To prevent trespass, the avenues of escape must be closed and the chance at least reduced to a minimum (though the court observes it to be impossible to prevent escape under all circumstances).

F. *Dapson v. Daly* (Deer skin) → ***One must first show he is a lawful huntsman before he could invoke in his behalf the common law rights of a huntsman and the laws of the chase on his own behalf.***

- a. Cause of action: *Replevin* – an action for repossession. Plaintiff thinks that the object he seeks is more important than the compensation he seeks.
  - i. ***Damages are valued at the time of the incident. Thus if market value goes up, plaintiff will likely seek replevin. If it goes down, will likely sue for trover.***

### Custom

The second element required for gaining possession over a wild animal - *Possessory act* – may be modified by custom so that a person need not gain actual control over the animal.

G. *Ghen v. Rich* (Harpooned Whale) → Where a live fox in a trap, a fish in a net, or a harpooned whale on the beach, are customarily regarded by other trappers, fishermen, or whalers as already “reduced to possession,” the courts will take the custom as controlling. ***If a usage is found to generally prevail in a business, it will not be open to the objection that it is likely to disturb the general understanding of mankind by the interposition of an arbitrary exception.***

- a. Proof of a custom requires a showing of a shared set of values between the parties to the litigation. Custom is confined by circumstances and is not therefore as broadly applicable as a basis for judicial decision as is a rule of first possession. In some instances, however, it remains a doctrinal substitute for actual possession.
- b. Public Policy Interest in Custom
  - i. In *Ghen v. Rich*, the court said that if it gave the whale to defendant, then people would not hunt anymore if the fruits of his labor could be appropriated by any chance finder. Since it is not possible to capture the whale right away, the establishment of custom is almost necessary for business to continue. Custom can thus show possession, even if not actual (though if custom dictates markings and such, those elements observed by the custom must be present).
  - ii. Any system of property rights depends in part on assigning those rights to a person readily identified as their holder – and later their vendor, so that purchasers of those rights can be secure in the knowledge that they are buying from their true owner and not some pretender.

### Wild vs. Domestic Animals

H. Two classifications by law: \*

- a. Wild – *ferae naturae*
- b. Domestic – *domitae naturae*

\*Classification of an animal as wild or domestic is by species and not according to the wildness or tameness of a particular animal. (Pets are also usually classified as personal property.)

***If the underlying policy is to encourage the taming of wild animals, one way to do this is to return escaped animals to their first captor.***

- i. Owner of escaped wild animals is absolutely liable for the trespasses and damages caused by such animals.
  - ii. A trespassing animal of either type may be restrained or seized by a landowner suffering damages and held until the damages are paid or the animal is sold in order to pay them.
  - iii. Domestic animals will not become possession of those who take them because the hunter should realize that there exists a prior possessor. Prior rights in an animal can be deduced from the type of environment in which the animal is found.
  - iv. If a wild animal has escaped and has no intent to return and is found in its native habitat, then it is the property of its next captor.
  - v. If the animal has not returned to its native habitat and has identifiable features or exhibits behavior that link it with its first captor, its ownership remains with the first captor.
  - vi. When a formerly wild animal escapes from its domesticator, a second captor may would or kill it in defense of his property.
- c. *Animus revertendi* – If an animal has regained its freedom, it usually has no intent to return to its first captor. Actions in line with intent to return will reflect its prior training by the first captor.
- i. Examples: carrier pigeon, hunting falcon (Such animals exhibit behavior linking them to their first captor.)

#### I. Bees Case

- a. Possession of a bee hive gives the owner as much control of the bees as he can reasonably be expected ever to have. As such, he has a qualified right to these bees even if they go onto the land of another.
  - i. The qualification is that he must pursue the bees on the other property or keep them in sight (if he cannot go onto another's land).
  - ii. The owner of the land on which the bees swarm a second time has a right to them when they are unreclaimed. Although the original hive owner has a right in them, that right is defeasible upon his failure to pursue or keep them in sight.

***The first possessor of a previously unclaimed animal (or chattel) will be preferred; this is particularly so if, up to the time his right is disputed, he has labored to make sure that bees build their hive and give their honey on his land.***

#### J. Estray Statutes

- a. In the case of an escaped, domesticated animal, the finder must register his find. The true owner has a right to claim it within a certain time. When reclaimed, the finder can collect the costs of the animal's detention. If unclaimed after a certain period of time, the animal can be sold at a public auction, with the finder acquiring the compensation from the sale.
- b. Legal Consequences of Estray Statutes
  - i. Finder of the unclaimed estray obtains title to it after a report of the find and the passage of the required amount of time, whereas the common law would provide him only with a right to possession.
  - ii. Provide a rule of liability for the owner of the keeper of strays by either:
    - A. Making any owner of estrays strictly liable for property damages done by the animal, and in the case of an escaped wild animal, for personal injury as well, OR
    - B. Making the negligent owner liable for "reasonably foreseeable injury" by the estray if the estray was fenced, but imposing strict liability on the owner when the estray is unfenced.

## K. Landowners as First Possessors

- a. Landownership gives a defeasible or qualified right to take the wild animals, birds, and bee, into the owner's possession.
- b. *Ratione Soli* – “On account of the soil;” a qualified right which arises out of the ownership of land in which a wild animal is found; legitimizes the use of one's own lands to hunt and take possession of the wild animals found there (not very popular in U.S. as it was in England).
  - i. Example: right to hunt on one's own land is permitted under *rationae soli*.
- c. *Jus Tertii* – The right of a third party. An individual who pleads that the title is in some third person is said to set up a *jus tertii*. Not popular with the courts, who typically prefer litigants to rely on the strengths of their own arguments than on the weakness of others.
- d. *Constructive Possession* – principle of judicial economy which says a person has constructive possession of property if he has power to control and intent to control such item. Exists where one does not have physical custody or possession, but is in a position to exercise dominion or control over a thing.
  - i. Example: If a trespasser starts an animal on an individual's land and kills it there, the trespasser acquires no rights to the animal and it is the landowner's property

## L. Government as First Possessor

- a. Sovereign Power: As a trustee for the rights of its citizens, the government acquires an authority to protect every citizen's hunting rights. Government (as well as every citizen) has a collective interest in seeing that wild animals are conserved and protected so that they can continue to be reduced to private possession.
- b. Proprietary/Ownership Rights: Law refers to a “wildlife trust” and the government maintains title to wildlife for the benefit of its citizens.
- c. Conflict between Public Regulation and Private Acquisition of Wild Animals
  - i. State's public law seeks to conserve animals so that its citizens may acquire them, but there are no comparable incentives in the private law to spur conservation: acquisition of possession as quickly as possible is the effect of a rule requiring first possession.
- d. Government's ownership is for all intents and purposes a legal conclusion pending its showing a strong interest in preserving and protecting an important resource and subjecting it to “skillful capture.” → thus the trust theory of state ownership should be sufficient to sustain a state's trespass action against a person polluting an environment and so destroying fish or wildlife.
- e. *Parens Patriae* guardianship: “parent of the country;” refers to role of state as sovereign and guardian of that which cannot take care of itself.

## State Sovereignty over Wild Animals

M. *State of North Dakota v. Dickinson Cheese Co.* (Fish pollution enforcement) → State had power under the Antipollution Act to control, prevent, and abate pollution of State surface waters through creating regulations and quality standards, and can thus fix penalties for any violations thereof. However, the legislation did not provide the State ownership sufficient to support a civil action for damages against one who unlawfully pollutes a stream causing destruction of fish while they are running wild in the water. ***Though the State has ownership of fish in a wild state, it is only for the purpose of regulation and conservation. Ownership is “sovereign,” not a “property interest.”***

## II. POSSESSION AND THE FORM OF ACTION FOR PERSONALTY

### Shipwreck Cases

A. *Eads v. Brazelton* (Ship wreck case) → Eads had enough control of the river so that he could have stayed there and not brought up lead where if Brazelton came along and tried to bring up lead he would be found to be interfering. But Eads didn't remain there to show control. **(1) Property is said to be abandoned when it is thrown away. (2) Abandoned property is owned by him who takes it into his own possession. (3) Do not need manual control all the time to establish possession. Just need an intention to possess plus an action that indicates that you are going to take physical possession.**

- a. *Eads* showed the court's inclination to allow the heavy investor to capture the prize. Social policy decision geared towards encouraging investment in new inventions and the accumulation of capital over individual initiative unsupported by capital investments.

### B. Elements of Abandonment

- a. Intention to abandon
- b. Action (or inaction) – inaction over a long period of time gives rise to inference that owner intends to abandon

### C. Rule of Capture

- a. Results-oriented rule: ***Possession is all important – not the manner, the effort, or the time spent achieving it.***
- b. Brings both the need for inventions and investment, as well as the need to use them actively, to a court's attention.

### D. Law of Finds

- a. Dictates that the finder of abandoned property must continuously possess or be in the process of reducing to possession the property which he has found.
- b. Protects investment, effort, and continuous work – takes an equitable right to an injunction and ripens it into a possessory right.

### E. Law of Salvage

- a. Required Elements to assert a salvage claim:
  - i. Property rescued must be in marine peril.
    - 1. Courts will usually find underwater shipwrecks to be in marine peril, because sunken vessels and their cargo are in danger of being lost forever.
  - ii. Salvage service must be voluntary.
  - iii. Salvage must be successful, in whole or in part.
- b. The salvor can receive a salvage award only through actual recovery of the property. The law of salvage requires a salvor to establish actual possession over property before obtaining the right to exclude others.
- c. "Possession" in salvage law means the right to compensation for service, not the right to title.
  - i. Possession need not be continuous, but only as such the "nature and situation" of the salvage operations permit.

- d. The court will generally grant an exclusive right to salvage if the salvor's effort is ongoing and there is likelihood of success.
  - i. Elements of Abandonment once Salvage Right is acquired:
    - 1. Taking no action to recover the cargo \*
    - 2. Relinquishment of the right to recover it.

*\* Inaction does not equal abandonment – Yukon Recovery, LLC v. Certain Abandoned Property → Insurers took no action when they had no hope of recovery but once hope returned, they exhibited a care never to deny or relinquish their right in more than a decade of correspondence with several salvors, including the plaintiffs.*
- e. Law of Finders v. Law of Salvage
  - i. Advantage for Law of Finders over Law of Salvage – salvor is presumed to be working for the owner, while the finder works in the absence of an owner. Salvage law preserves the true owner's claim by requiring clear and convincing evidence of abandonment.

### **Trash and Possession**

Rule: *A person generating trash and intending to retain ownership or control of it must take affirmative steps to do so; no constructive possession is retained until it is hauled away or destroyed (Derived from Eads v. Brazelton)*

- F. ***Haslem v. Lockwood*** (Manure case) → Trover - Horse manure left on a town's street has also been abandoned, but once raked into a heap, it might be defensible personalty again. ***If after discovering something and doing nothing to enhance its value, upon leaving the property as found, the right is lost. If, however, the plaintiff substantially adds to its value after its discovery, leaving it as he enhanced it – as with the manure gathered into heaps – preserves his right as against a later possessor doing nothing further to it. Possession then gives notice of his claim: his right is preserved for the time necessary to take it away for his use. The period of time allowed is subject to a rule of reason, and increases according to the value added.***
  - a. In *Haslem*, no public official claimed the manure (as it was found left on a public roadway and is thus the responsibility of the government to remove). The public official's lack of action suggests that, as to the generation of toxic and otherwise hazardous trash or waste, the owner might be said to be in constructive possession of the waste until it is hauled off.
- G. Other First Possessors and the Forms of Action
  - a. ***Doctrine of Emblement***: The right of a tenant to take and carry away, after his tenancy has ended, such annual products of the land as have resulted from his care and labor.
  - b. ***Fixtures***: Chattels which are attached to real property and intended to be permanently attached or annexed to it. They are personal property before attachment and real property thereafter, being then considered part of the realty on which they are located.
    - i. When crops are severed from the land – cut or harvested – they are no longer fixtures, but become personal property. As the basis for legal action, the crop or timber is probably more valuable as personal property and so whatever cause of action is brought to protect them after a wrongful severance, its objective will be to assert rights in what is now personalty.
    - ii. Even if an original or prior possessor has treated a chattel as real property, his seeking to assert rights to it in its present form allows him to bring an action that relates only to personal property.
  - c. Trespass v. Trespass on the Case
    - i. Trespass – an unauthorized and intentional taking or interference with the possession of a chattel of another

1. May be under a mistake of fact or law, but still be intentional – level of intent necessary for the action does not require wrongful motive.
  2. Must result in more than nominal damages → loss of possession is generally of sufficient value to satisfy the requirement of actual damages.
  3. Objective – to protect the possession of the disputed chattel as it was at the time of the trespass.
  4. Possession lies at the heart of the action; not title to the chattel. Thus, *jus tertii* (rights of a third party) is unavailing.
- ii. Trespass on the Case – where damages were not immediate, but were consequential or indirect.

**GENERAL RULE: POSSESSION IS PRIMA FACIE EVIDENCE OF TITLE.**

- d. *Conversion*: wrongful exercise of dominion or control over personalty; completed by any distinct act of control whether by way of assumption, use, detention of, or interference with personalty. (Personalty involved must be tangible.)
- i. While the carrying away of a chattel may not constitute a conversion when it is done without serious consequences, even a verbal assertion of ownership can be sufficient for a conversion when serious consequences are present.
  - ii. Refusal to return the chattel upon demand is *prima facie* evidence of conversion.
  - iii. Value always measured at the nearest market.
    1. Inability to pay – “Blood from a stone”
  - iv. Distinguished from *Trespass*:
    1. Trespass is an interference with another’s rights in personalty.
    2. Conversion does not involve the wrongful taking of a chattel (as would trespass) but looks instead, later in time, at a wrongful exercise of control over the chattel → that exercise is taken to be a denial or repudiation of another’s (the plaintiff’s) right to the property.
    3. If the personal property allegedly converted is afterwards incorporated into real property, an action for conversion based upon its use thereafter will not lie.

**Choosing Replevin or Trover**

- e. Trover
- i. Definition: action for the recovery of damages for a wrongful taking of, interference with, or detention of a chattel, which results in an exercise of control over the chattel and is referred to as a conversion of it. (“converted the thing for his own”)
  - ii. Judgment in favor of the plaintiff results in a monetary judgment, not the chattel itself. If the defendant has the chattel, he keeps it. ***Judicial sale occurs – right that is transferred is not an ownership right, but instead is a use right.***
  - iii. Plaintiff has prior right to chattel, so payment of the judgment transfers the plaintiff’s right to it. Plaintiff who pursues a trover action to judgment has in legal effect elected to give up his right to the chattel.
  - iii. Chattel is valued at the date on which the wrongful taking took place because:
    1. Action for trover is one for damages; AND,
    2. Damage was done upon the taking of the chattel.
  - iv. Trover v. Trespass
    1. Trespass – title is assumed to stay with the plaintiff; trover – defendant is assumed to have acquired the title from the plaintiff
    2. Economic incentive: Trover is like a forced sale as where you can recover a larger measure of damages. Trespass gives you a recovery for any damages done to the chattel and the value of the lost possession for the time during which the defendant had the chattel. Trover allows you to treat the chattel as already sold to the defendant, and so the measure of damages is the value with which the plaintiff parted – the full fair market value of the chattel.

3. In both trover and trespass, a defendant can lack a motivation to interfere with plaintiff's rights and still have the requisite intent to convert another's chattel.
- v. In evaluating seriousness, the bad motive or the intent to interfere will be taken into account as one of the many factors considered.

f. Replevin

- i. More advantageous to select replevin as a remedy if there has been an increase in value. Property sought must be tangible personal property.
- ii. Theory is that through all the facts alleged in the complaint, the title remained with the plaintiff.
- iii. In some instances, replevin may yield an equal benefit to the plaintiff even though there has been a decrease in value caused by the defendant's wrongful taking. Successful plaintiff is then entitled to:
  1. An additional monetary damage award for the decrease in value caused by the defendant; AND,
  2. still another award for the mesne or interim "lost of use" damages which he incurred because of his lost possession.
- iv. Useful where the decreased value is not caused by the defendant, but by the depreciating value of the chattel itself, in which instance the plaintiff would have sold the chattel and prevented further loss to himself.
- v. Subsumes writ of Detinue → specific recovery is sought for a chattel not necessarily wrongfully taken, but wrongfully detained.

H. *Goddard v. Winchell* (Meteorite case) → Replevin - *The finder of lost articles, even where they are found on the property, in the building, or with the personal effects of third persons, is the owner thereof against all the world except the true owner.* True owner in case was found to be landowner and not man to whom land was leased for grazing rights; court determined the meteorite was so embedded in soil that it was real property and thus *ratione soli* dictates ownership.\*

- a. Cause of action – *Replevin*. Complaint must allege:
  - i. Some immediate right to possession of or title to the chattel
  - ii. A wrongful taking or detention of the chattel by the defendant
  - iii. Defendant's retention of it at the time of the suit and after the plaintiff demands it back and the defendant refused to return it
  - iv. Damages

\* Case was brought as replevin because once meteorite was dug up, it became personalty. However, the court ruled that actual property rights must be decided by its status before it was dug up, which it found to be real property and therefore, belonging to the true owner of the property.

### III. PRIOR POSSESSION

A. *Armory v. Delamirie* (Chimney Sweep case) → Cause of Action: Trover (forced sale). **(1) Same rule as Bridges: Protects rights of every finder subsequent in the chain of possession of a chattel. (2) A mere finder may recover against a wrongdoer the full value of the thing converted. (3) Against a wrongdoer, possession is title.** Possession gives the right to maintain trover.

- a. Goldsmith's shop in *Armory* attempted to set up a *jus tertii* argument by asserting that title lies in some third person.
- b. A bailee can be held twice liable (to finder and to original owner in this case).
- c. *Even if you are a finder, you can be a prior possessor.*

- d. **Theory of Judicial Economy** – We want the true owner to have the opportunity to sue anywhere down the chain of possession – no interest in having true owner sue subsequent possessor who sues subsequent possessor, etc.
  - i. Award prior possessors because prior possessor is likely to be closer to the true owner than a later possessor

#### Right of Possession Against a Third Party

- B. *Jefferies v. the Great Western Railway* (Railroad case – in Notes) → **In actions to recover Possession, the jus tertii defense - a defense that claims neither the plaintiff nor the defendant but a third party is the true owner and only that true owner can bring the lawsuit - is not allowed.**
- C. *Rusell v. Hill* (Land Grant case) → Woman transferring title to the plaintiff herself had no title. Court felt it would be “manifestly wrong to allow the plaintiff to recover the value of the property. **No person may transfer a better title than she has. One implication of such a rule is that someone who has no right to the chattel may transfer none, even though the transferee pays a reasonable price and has no reason to believe that the transferor is not the chattel’s owner.**
  - a. Trover can never be maintained unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant, except where the property is restored, and the conversion is temporary. To maintain trover, then, the plaintiff must show title and the possession, or a present right in possession.
  - b. Court cited *Armory v. Delamire* and implied the possibility that if it had ruled for the plaintiff, the door would be open to the defendant having to pay twice, if the real owner were to come along and claim trover as well.

#### Finder’s Rights Cases

*Finders are “special bailees” of property. Once you assert the right as a finder, you have the duty to locate the true owner and hold the chattel until there is no reasonable expectation of the true owner’s being found (Rules of Reason and Reasonable Expectations must be considered). Once a finder decides to keep a found chattel, he must recognize that he has only the right to possess it, and not the title to it. In consequence, he should keep it safe. Treating it as trash at any point when it clearly has great value, would be gross negligence. Finder is a gratuitous bailee, liable only for gross negligence (there is an implied contract of bailment between finder and true owner.). In the interim of possessing find before (and if) true owner comes along, finder may undertake reasonable expenses to preserve the find and charge them to the owner who later claims it. If true owner refuses to pay, courts sometimes may say finder has a lien on the find and may withhold delivery of the possession, though sale will not be allowed to recoup the expenses.*

- D. *Bridges v. Hawkesworth* → **The finder of lost property has a valid claim to the chattel against all the world except the true owner, and generally that the place in which the chattel is found creates no exception to this rule.**
  - a. Exceptions:
    - i. When found on soil of another without permission – trespass.
    - ii. When property was voluntarily placed somewhere and accidentally left.
- E. *Clark v. Maloney* (Floating Logs case) → **(1) Mere finder may recover against a wrongdoer the full value of the thing converted. The loss of a chattel does not change the right of property. (2) Possession is prima facie evidence of property because it may be rebutted by evidence of better title, but in the absence of better title it is as effective a support of title as the most conclusive evidence could be.**

- F. ***Barker v. Bates*** (Timber on Soil case) → Case decided on strength of owner’s right of soil on which timber came to rest. ***By virtue of title to the soil upon which a thing is found, the preferable right of possession lies with that titleholder, and he maintains the right to recover any value of the thing against anyone claiming possession over the same who cannot justify their legal entry onto the real property of the titleholder.***
- G. ***South Staffordshire v. Sharman*** (Pool Cleaner case) → (1) ***Legal possession rests on a real de facto possession constituted by the occupier’s general power and intent to exclude unauthorized interference.*** (2) ***Where a person has possession of house or land, with a manifest intention to exercise control over it, and the things which may be upon or in it, then if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the locus in quo (place in which the cause of action arose).*** (3) ***If a man finds a thing as the servant or agent of another, he finds it not for himself, but for that other.***
- a. Cause of action – *Detinue*: recovery from one who acquires possession of something lawfully, but retains it without right, together with damages for the detention.
- H. ***Hannah v. Peel*** (Military Brooch Finder case) → ***A man does not necessarily possess a thing which is lying unattached on the surface of his land even though the thing is not possessed by someone else.***
- a. Court rationale: The defendant was never clearly in possession of the premises at any time. It is clear that the brooch was never his, in the ordinary acceptance of the term, in that he had the prior possession. He had no knowledge of it until it was brought to his notice by the finder. “Brooch was ‘lost’ in the ordinary meaning of that word; that it was ‘found’ by the plaintiff in the ordinary meaning of that word, that its true owner has never been found, that the defendant was the owner of the premises and had his notice drawn to this matter by the plaintiff, who found the brooch.”
- b. Distinguishing *Hannah* from *Sharman* → Hannah is not required to get familiar with the property in ways that Sharman has to become familiar with the pool.
- I. ***Favorite v. Miller*** (King George Statue case) → Case didn’t involve an innocent trespass, there was intention (distinguishes from *Barker v. Bates*) ***Except where the trespass is trivial or merely technical, the fact that the finder is trespassing is sufficient to deprive him of his normal preference over the owner of the place where the property is found.***
- a. Decision builds on *Barker v. Bates* because it allows property owner to maintain possession over that which is unknowingly on his property by saying that when someone trespasses trivially and intentionally, possession may still not be acquired.
- J. OTHER DEFINITIONS:
- a. *Lost Property*: involving an involuntary parting, i.e., where there is no intent on the part of the loser to part with the ownership of the property.
- b. *Abandonment*: voluntary relinquishment of ownership of property without reference to any particular person or purpose, i.e., a “throwing away” of the property concerned.
- c. *Mislaid Property*: intentionally placed by the owner where he can obtain custody of it, but afterwards forgotten.
- d. *Embedded Property*: property (1) other than gold or silver that is (2) buried in the ground under circumstances indicating that the owner will not return.
- e. *Treasure Trove*: personal property that is (1) not lost or mislaid, because the owner meant to put it where it is found for safekeeping, (2) money or coin, gold or silver, plate or bullion, and (3) an antiquity, having been hidden long enough ago to indicate that the owner is dead, or was prevented from reclaiming it (as when the Romans were driven out of Britain).
- i. A majority of cases give treasure trove to the finder in the United States.

- f. *Escheat*: Legal procedure by where the sovereign acquires title to a deceased's property when after a number of years, no heir owner appears and claims it.

#### IV. BAILMENTS

##### A. Bailment Defined

- a. Minimal Definition
  - i. The rightful possession of a chattel by one who is not the holder of the title to it.  
\*\* *Bailment arises when the alleged bailee assumes possession or takes control of the chattel, with an intent to exercise control.*
- b. Law of Property Definition
  - i. Delivery of possession of a chattel to another who intends to possess it and take possession, agreeing that his possessory right in it will cease upon a demand by the transferor for redelivery.
  - ii. Requires delivery and acceptance of the chattel, with an actual transfer of the chattel itself.
  - iii. Bailment arises under this law upon delivery of the chattel, regardless of whether any consideration passes between bailor and bailee.
- c. **Elements of Bailment \***
  - i. Possession established in plaintiff
  - ii. Transfer to the defendant
  - iii. Delivery to the defendant
  - iv. Acceptance (sometimes indicated by mutual assent and sometimes by simple act)
    - 1. *Alleged bailee must know of the presence of the chattel on his premises for bailment to occur. If the bailee has no knowledge, there can be no intent to possess the chattel on his part, and hence no bailment. For a bailment to arise, all that is needed is the consent of the parties to the transfer of possession.*  
\* Bailments must be qualified by "absent special terms" (parties are free to contract reasonable terms).  
\*\* Bailors must exercise **ordinary care** while they are subject to special rules.
- d. Two types of bailments: Mutual benefit & Sole Benefit (*Peet* case is ex. of mutual benefit as hotel was in business of holding items for hotel guests.).
- e. Law of Contracts Definition
  - i. Transfer by mutual consent of the possession of a chattel for some specific purpose under an express or implied contract to carry out the purpose of the transfer and to return the chattel to the holder of its title once that purpose is accomplished.
  - ii. Bailment requires consideration.
- f. Cause of Action for the recovery of the value of a bailed chattel is *Trover*.
  - i. The *Bailor* may bring a trover action even though he doesn't have the right to possess the chattel at the time he brings the action → "**General Property**" – consists of his title to the property and a future right to possess it.
  - ii. The *Bailee* may bring a trover action because he is said to have "**Special Property**" in the bailed chattel – the right to present possession of it. (Bailee's right to recover damages rests on the hypothesis that he is the bailor's agent and is charged to protect the property entrusted to him. If bailor is not satisfied with recovered value from trover action, bailor may still sue in trespass for uncompensated interference with his rights to the chattel.)  
\* Both may pursue action in replevin as well.  
\*\* If one pursues action to judgment, the other is precluded from doing the same.

- B. *Peet v. The Roth Hotel Co.* (Engagement Ring Case) → The defendant as bailee was under duty of exercising, in respect to the subject matter, *ordinary care*, that is, *the degree of care which an ordinarily*

prudent man would have exercised in the same or similar circumstances. **The mutual assent necessary to a contract may be expressed as well by conduct as by words; or it may be manifested by both.**

a. **Practical Working Rule**

- i. Rule of decision law puts upon the bailee the burden of proving that the loss did not result from his negligence.
  1. This burden is “not merely the burden of going forward with proofs, nor a shifting burden, but a burden of establishing before the jury that its negligence did not cause the loss.”

**Parking Garage Cases**

C. *Allen v. Hyatt Regency – Nashville Hotel* (Garage Parking case) → **A bailment is created when the operator of a parking garage does assume control and custody of the vehicles parked, limiting access thereto and requiring the presentation of a ticket upon exit.**

- a. Test – Whether the operator of the vehicle has made such a delivery to the operator of the parking facility as to amount to a relinquishment of his exclusive possession, control, and dominion over the vehicle so that the latter can exclude it from the possession of all others. If so, a bailment has been created.

D. *Swarth v. Barney’s Clothes, Inc.* (Wallet in Garage Parking case) → **(1) Delivery, actual or constructive, to the person sought to be held as bailee is not enough to create a bailment; acceptance, actually or constructively, by the latter is equally essential. (2) Acceptance is absent when the property is not such as is usually and customarily left with a custodian in like circumstances and no disclosure of this fact is made. In that situation, the person sought to be charged as bailee having no reason to suppose the property has been delivered to him, is liable only if on express notice, “for the bailee cannot by artifice be compelled to assume a liability greater than he intended.**

- a. In parking lot cases, what must be present for bailment to occur:
  - i. How you enter, how you select a space, who parks the car, whether attendant is present, who locks the car – must determine if these types of facts are present
  - ii. ISSUE: has the purported bailor given up the sufficient amount of control to be equivalent to a transfer of possession and control?
  - iii. Issue shifts to delivery of car and must assess which way each factor cuts for each party.

**Involuntary Bailees & Constructive Bailment**

E. *Cowen v. Pressprich* (Railroad Bond Delivery case) → Court held that though initially an involuntary bailee, the defendant took decisive action in attempting to return the bond to the messenger, and thus assumed a level of responsibility commensurate with a voluntary bailee. The defendant’s attempt to divest themselves of the wrong bond to the wrong messenger amounted to a conversion of the property or at least a breach of an implied agreement on their part to return the bond only to the plaintiffs. **An involuntary bailee, as long as his lack of volition (act of willing, decision, or choice) continues, is not under the slightest duty of care for or guard the subject of the bailment, and cannot be held, in respect of custody, for what would even be the grossest negligence in the case of a voluntary bailment, but that in case the involuntary bailee shall exercise any dominion over the thing so bailed, he becomes as responsible as if he were a voluntary bailee.**

- a. **Involuntary Bailee** defined – A person who has been put, through no act or fault of his own, in such a situation as that in which the defendants (in *Cowen v. Pressprich*) were put upon the delivery to them of the wrong bond. The bailment created in this case within the context of an involuntary bailment is called a *constructive bailment*.
- b. **Dissenting Opinion** (by Justice Lehman – becomes controlling opinion) – Bailment only arises through an express or implied contract, and defendant had never consented to accept the bond as a deposit, they

claimed no title to it, and they were not subject to any trust or obligation as bailees. Although involuntary bailees come into possession of the property of others without their consent, they incur no responsibility to the true owner. It is only where they commit some “overt act” of interference with the property that an implied contract of bailment is created. “They had assumed no obligation of any kind to the plaintiffs; any act they performed was for the plaintiff’s benefit, and it was through plaintiff’s mistake that they were called upon to act at all in the premises.”

### **Bailment locatio operis faciendi**

Definition: When the purpose of the bailment is to alter or manufacture goods, and the bailee under contract for compensation is to work on the property delivered (ex: leather into shoes, grapes into wine, wheat into flour). When the product of the identical property is to be returned, a bailment may be found, even though the identical goods may not be returned.

F. ***Carr v. Hoosier Photo Supplies, Inc.*** (Exposed Film case) → The court held that the bailment was actually created when the unused film was purchased because Carr then agrees to the terms included on the box in an **exculpatory provision**. Manifestation of assent was established when Carr, a knowledgeable party (as an attorney) aware that such terms are part of a proposed contract, enters into the contract without indicating any non-acquiescence to those terms, brought the film back to Kodak for processing understanding and aware of the effect of the limitation of liability clause. If there was sentimental value, Carr had plenty of time to consider other developing options where these terms would not have been binding (could have developed film himself or taken to an independent lab – availability of options not limited to Kodak). The court also did not want to allow for sentimental value to be taken into account in assigning damages since it is so subjective. ***A bailee may limit their liability in agreements of bailment so long as they contain conscionability (does not place the weaker party in a ‘take it or leave it’ position) and a manifestation of assent to the terms exists.***

- a. When is exculpatory provision a reasonable business practice?
  - i. Kodak is in the business of making bailments so it is reasonable for them to protect themselves in this process. This is justified for Kodak because Carr is a lawyer and should know about disclaimer. Protects Kodak from allowing customers opportunity for potential fraud in attaching sentimental value when lost.
- b. Difference between a bailment and a sale:
  - i. Where property in an unmanufactured state is delivered by one person to another, on an agreement that it shall be manufactured or converted in form, or there is a delivery of chattels under an agreement that the party receiving them shall improve them by his labor or skill, whether the transaction is a sale or a bailment depends generally on whether the product of the identical articles delivered is to be returned to the original owner, though in a new form. If it is so returned, it is a bailment. **The intention of the owner is the controlling factor.**

G. ***Mieske v. The Bartell Drug Company*** (32 Rolls of Film case (in Notes on Carr)) → Facts were similar to Carr. Court held that plaintiffs lost not merely film able to capture images by exposure but rather film upon which was recorded a multitude of frames depicting many significant events in their lives. Established a standard of recovery for destruction of personal property:

- a. **Standard of recovery for destruction of personal property:**
  - i. Personal property which is destroyed may have a market value, in which case that market value is the measure of damages.
  - ii. If destroyed property has no market value but can be replaced or reproduced, then the measure is the cost of replacement or reproduction.
  - iii. If the destroyed property has no market value and cannot be replaced or reproduced, then the value to the owner is to be the proper measure of damages.
    1. However, it has been held that in this situation, damages are not recoverable for the sentimental value which the owner places on the property.

- b. In this case, it was determined that the third rule should be the appropriate measure of damages. Difficulty of assessment is not cause to deny damages to a plaintiff whose property has no market value and cannot be replaced or reproduced. Since sentimental value cannot be compensated, this is difficult.
  - i. Court must distinguish between the sentimental value for which they will allow compensation and that which they will not in saying, the type of sentiment, which is not compensable is that which relates to ‘indulging in feeling to an unwarranted extent’ or being ‘affected or mawkishly emotional’ as defined in Webster’s Dictionary.
  - ii. Court thus allows for “recovery for the actual or intrinsic value to the plaintiffs but denied recovery for any unusual sentimental value of the film to the plaintiffs or a fanciful price which plaintiffs, for their own special reasons, might place thereon.

## Pawnbrokers

### H. Pawnbrokers Defined

- a. A pawn is a bailment of tangible personal property as security of the payment of a debt and in which the creditor also holds the property and has a power of sale on default. A pawn is also known as a pledge of personalty, except that a pledge is also possible for intangible personalty – securities (stocks) and bonds, as well as commercial paper (personal and corporate notes).
- b. Structure of a Pawn (One of the following)
  - i. A purchase of the personalty with the pledgee promising to hold it for a specified period of time and the pledgor having the exclusive right to repurchase it within that time (the repurchase price is set at a higher amount than the original); **OR**,
  - ii. A loan of money collateralized by a pledge of personalty, again for a specified period, with the pledgee having the right to sell it to third parties thereafter.
- c. In each of these two arrangements, the specific period of time is typically set by state regulation as a minimum period of time, say 30 or 60 days.

## **MUST READ NUTSHELL AND INCORPORATE**

### V. UNAUTHORIZED POSSESSION AND BONA FIDE PURCHASERS

- A. Bona Fide Purchaser (Good Faith Purchaser) Defined
  - a. A purchaser of chattel who gives a valuable consideration (1) paid in the belief that the vendor had a right to sell and (2) parted with in circumstances which would not make him inquire in the vendor’s title and right to sell.
  - b. Part of a legal triad which included the chattel’s true owner, a rogue, and himself.
  - c. Law typically favors the party representing the societal interests of trade and commerce.
  - d. Required Elements: **(1) Gave a fair and reasonable value for the chattel (2) in an honestly held belief that he was (3) acquiring its title, or whatever legal rights he bargained for, and (4) under circumstances which would not lead him to question his vendor’s title or right.** Thus, he must (1) for value and (2) in good faith, (3) purchase property (4) without notice.
  - e. A good faith purchaser must advance some new consideration, surrender some security, or do some act which will cause him to be in a worse position if the transfer is rescinded, all of which must be done in advance of any notice to him of a true owner’s adverse claim.
  - f. *Someone in collusion with a rogue can never become a good faith purchaser.*

- g. Relativity of Title Doctrine: *A good faith purchaser of a stolen chattel has a right to that chattel against everyone except the true owner.*

## B. Void Title vs. Voidable Title

### a. Void Title

- i. If a true owner does not intend to transfer the title to a chattel to another who nonetheless obtains possession of it, that person acquires no title to it and cannot pass good title to it to yet another transferee to whom its later transfer is made.
- ii. *If a title was void in the hands of a transferor, its quality does not improve in the hands of the next transferee.*
  - 1. Implied by commonly held notion that along with the transfer of the chattel comes a transfer of title.
  - 2. *“One cannot give what one does not have.”*
- iii. Intended to instill an attitude of wariness in purchasers: *caveat emptor* – let the buyer beware.
- iv. Exception to Void Title Rule → Rule cannot control in the case of money, negotiable commercial paper, promissory notes, or bank checks.
  - 1. Needs of capital markets and trade overwhelm the void title rule here.
- v. Void Title Rule has never been overruled, however, courts have added a new issue to protect the good faith purchaser, called *voidable title*.

### b. Voidable Title Rule

- i. A voidable title can only be created voluntarily → occurs when an owner voluntarily delivers the possession of chattel to a purchaser, even though the delivery is procured by fraud or larceny.
- ii. Voidable title is a defective title, but it is not wholly defective. It is a title that has been transferred by a deed or contract that one party to the document (the true owner or his agent) has the power to rescind.
- iii. Possessor of chattel can only trump rights of true owner if he has a voidable title.
- iv. Under common law, judges asked two questions:
  - 1. Did the true owner of the chattel intend to transfer it to the rogue?
  - 2. If the rogue received a “voidable” title, did the rogue transfer the title to a good faith purchaser in whose hands the voidable title becomes absolute?
- v. Allows judge an intermediate position to maintain the void title rule in non-commercial settings while relaxing it in commercial settings.

## **MUST COMPLETE DISTINCTION B/W VOID AND VOIDABLE RULE**

### Possession by a Trespasser

- C. *Anderson v. Gouldberg* (Pine Logs Trespass case) → Plaintiffs were trespassing initially when they took the logs but it doesn't matter because they still had prior possession against wrongdoer. Case operates under the rule of *Armory*. Logs are shown by title and possession (*Anderson* is a good case for rebutting presumption of title and possession. *A possessor, even a wrongful possessor or thief, has the right to possession as against all but the true owner and is entitled to recover either the chattel or its value from a converter. Though true owner's rights are never defeated. Case was put in terms of possession is title.*

### Right of Possession Against Bona Fide Purchasers

#### D. Rule of Estoppel

- a. An owner is estopped from claiming a superior title as against the bona fide purchaser for value because the owner's acts were largely responsible for the loss and the innocent purchaser was not in a position to protect him or herself.
- b. UCC 2-403

- i. Provides that “any entrusting of goods to a MERCHANT who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ORDINARY COURSE OF BUSINESS.” This buyer is defined as a “person who in GOOD FAITH and without knowledge that the sale to him is in violation of ownership rights...of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind.”
- E. **Porter v. Wertz** (Fraudulent Art Sale case) → Neither statutory or equitable estoppel was permitted. Plaintiff was held to be the true owner of the painting and is entitled to its possession. Defendant wrongfully detained it. **Possession without more is insufficient to create estoppel.** (See section UCC 2-403(2), and 2-403(1).)
  - a. **A bona fide purchaser of personal property may transfer the property to another who can then defeat the rights of its true owner. In a sense, the bona fide purchasers may transfer more rights than they acquire.**
  - b. **Statutory estoppel:** Not available to Feigen because he does not fit the definition of a “buyer in the ordinary course of business” for two reasons: Wertz (from whom Feigen bought the Utrillo) was not an art dealer and never held himself out as one; and Feigen acted did not act in good faith himself since he did not inquire into the status of the painting. Court can’t permit countenance or condone commercial standards of sharp trade practice or indifference as to the “provenance” (history of ownership or the right to possess or sell and object d’art).
  - c. **Equitable estoppel:** Focus is on the true owner. Did true owner get to a point where he clothed Von Maker as an art dealer? Porter’s allowing Von Maker to hang piece in his home and not in a gallery is important (was not allowing him to use it for business purposes). Porter’s conduct was not blameworthy. Among his actions taken after discovering Von Maker’s history, he obtained a comprehensive agreement covering several paintings, within which was the assurance (now proven false) by Von Maker that he still controlled the Utrillo. Although Porter had permitted Von Maker to possess the painting, he conferred upon Von Maker no other indicia of ownership – did not confer any authority or agency upon Von Maker. Porter’s conduct in no way contributed to the deception practiced on Feigen by Von Maker and Wertz.
  - d. **Ordinary course of business – Expectations Test** → Does the buyer have expectation of getting good ownership, or good title, to the property? Can he reasonably believe that he can rely on the validity of the transaction?

**Must read 252-272 in Nutshell.**

## VI. GIFTS

### A. Gift Defined

- a. Gratuitous transfer made voluntarily by one person to another and made without consideration or payment of any type.
- b. It is presently effective and does not take effect at some future time (not a promise to give a chattel sometime in the future - law would treat that like an executory contract).
- c. Not testamentary in character (law would treat that like a will, requiring the transfer comply with the state’s Statute of Wills).
- d. Accomplished by donor’s **delivery** of the chattel or deed to it, made or executed with the **present intent** to complete the gift, and the donee’s **acceptance** of the chattel or deed.
  - i. Clear and convincing evidence must be shown by the donee (70/80 percent of the burden).
- e. Delivery Defined

- i. Transfer of possession – either in the form of a deed or instrument, or in actual delivery of the thing to the donee. **Indispensable element of a valid gift. Default rule for delivery of gifts requires an actual delivery. (Must show Evidence of Intent and Act of Gift itself.)**
  - ii. **Valid Deed of Gift – Elements**
    - 1. Must use language indicating a present intent to give (“I hereby grant...”)
    - 2. Must identify the donee and the subject of the gift
    - 3. Must be signed or otherwise authenticated by the donor, as well as comply with other formalities imposed by applicable state law.
- f. American judges have been less inclined to permit a gift to be accomplished by use of a deed alone when physical delivery of the chattel was possible. For them, deed is evidence of donative intent, but the gift must be completed by a delivery.
- i. Delivery is held as integral because it is both definitional and functional:
    - 1. Serves to show that the donor formed his intention too give into a resolve to make the transfer.
    - 2. The “wrench of delivery” serves to protect the donor from acting hastily and to impress upon him the finality of his act.
    - 3. Provides evidence of the gift.
      - \* If these functions can be served without actual delivery of the chattel, American courts have shown a tendency to validate the gift by finding that some other type of delivery is present.

### Gifts Inter Vivos

#### B. *Gifts Inter Vivos* Defined

- a. Irrevocable, unconditional gifts between the living, which are perfected and become absolute during the lifetime of donor and donee.
- b. An immediate, voluntary, and gratuitous transfer of personalty by one to another. **Irrevocable present transfer – cannot have a condition precedent, but you can put a condition subsequent on the gift.**
- c. Essentials of an Inter Vivos Gift
  - i. Donative intention
  - ii. Delivery to the donee – donor must strip himself of all dominion and control over the thing taken
  - iii. Acceptance by donee
    - \* Proponent of a gift has the burden of proving each of these elements by clear and convincing evidence.
- d. Constructive v. Symbolic Delivery
  - i. **Constructive** → Permitted when the donor relinquishes access to or control of a gifted chattel – courts require that end result be as close to actual delivery as nature of chattel permits. Recognition of the act of intending that title to property be transferred to someone, even though the actual, physical delivery of the property is not made because of difficulty, impossibility; you are giving donee access.
    - 1. e.g., giving someone a key to a trunk
    - 2. Most cases of constructive delivery entail things that are difficult to move, however, one can also provide a deed to shares of stock to convey transfer until a third party changes the owner’s name on the corporate books in order to satisfy the delivery requirement. **Delivery is essential, but actual manual delivery is not required.**

- ii. *Symbolic* → Involves situations in which the gifted chattel may be small and capable of manumission but are unavailable for delivery. The level of accessibility is measured by courts in matters of degree, and no fixed rules apply. The nearer to the donor, the less likely it is that a court will permit symbolic delivery. The actual delivery of some article which is conventionally accepted as the symbol or representative of it, or which renders access to it possible, or which is evidence of the purchaser's or donee's title to it.
    - 1. Surrender – surrender of control, even if not giving up control
      - a. Letter in *Gruen v. Gruen* stands for painting.
    - 2. E.g., the present gift of the contents of a box in a bank vault, accompanied by a transfer of the key thereto, is valid as a symbolic delivery.
    - 3. Exception for Symbolic Delivery – gift of a wardrobe: If donee is given key to donor's bulky wardrobe, the donee may acquire that piece of furniture but will not become beneficiary of a life insurance policy or shares of stock found in its drawers. The donee is likely to get only what cannot be actually delivered, i.e., the wardrobe.
- \* Underlying reason for symbolic or constructive delivery – there is some good reason why you just can't give the gift.

### C. Problematic Examples of Gifts

- a. Gifts of an Insurance Policy or Stock
  - i. Just giving the policy to the donee will not make him the beneficiary or, in the case of stock, just changing the owner's name on the certificate will not suffice either.
    - 1. Gives up control of the chattel, but more is required to give the donee access to it. The corporation's or the insurer's records must be changed. Unless a deed of gift is clear and capable of compelling a change in those records through judicial process, no delivery has occurred.
- b. Gift of a Safe Deposit Box in a Bank
  - i. Delivering the key to someone will not provide unfettered access to the box since the alleged donor will have not only to give the donee a key, but also sign him into the vault area in which the box is located. Only with this second step complete can it be said that the donor has provided access to the contents of the box *and* relinquished control over them.

### D. Gifts Through Third Parties

- a. Use of Third Parties
  - i. Since American courts often hold that inter vivos gifts of personal property must be irrevocable and unconditional, third parties may play an agency role in the delivery so that conditions may be attached.
  - ii. Two Stages
    - 1. Delivery of chattel or, where appropriate, a deed to it to a third party;
    - 2. Third party, in turn, hands it to the donee.
      - \* ***Donor gains the ability to impose conditions upon the person holding the chattel, the fulfillment of which permits the third party to transfer possession of it or a deed to it to the donee.***
- b. Unclear Status of Third Parties
  - i. Question arises whether third party is agent of the donor or the trustee of the donee.
    - 1. Agent of Donor – donor still has the right to recall the gift, as it has not yet become irrevocable.
    - 2. Trustee of the Donee – gift has become irrevocable pending only the donee's fulfilling the condition (if any) imposed by the donor (e.g., reaching his majority, graduating from college, marrying).
  - ii. Decision on the Status of a third party should consider:
    - 1. Whether the donor or donee paid the third party

2. Whether the donor or donee received any income from the chattel while he held it
  3. Whether the donor or donee instructed the third party and whether or not such instructions were taken as binding on him by one or both parties to the gift.
- iii. Test
1. Intent of the donor (of which the third party's perception of his status constitutes evidence but is not necessarily dispositive.)
  2. For all practical purposes, if the donor has not communicated to the third party that the gift is irrevocable, he has a power to revoke it.

## E. Corporate Stock

- a. Definition: Shares of stock in a corporation are personal property even if the corporation owns only real property.
- i. If considered to be the certificate itself, that piece of paper must be delivered to the donee, and the transfer on the books is superfluous except as evidence of donative intent.
  - ii. If the shares are a representation of an undivided fractional interest in the assets of the corporation or its operations, then the property is not capable of manual delivery. Thus the transfer of the certificate is symbolic delivery, while a transfer on the books is a constructive delivery giving the donee access to the benefits of being a corporate stockholder.
    1. With only a symbolic or constructive delivery possible, the transfer on the books becomes a substitute for an actual delivery.
      - \* Transfer on the corporate books is "of great importance" but not dispositive in establishing donative intent.
        - Where transfer on the books has been held not to complete the gift, the donor regained possession of the certificate, and persons executing the transfer have been found to be the donor's agents.
        - Where the donor regains possession of the certificate, his long-continued retention of it serves as proof of a failure of donative intent.
- b. Validity of Gift of Shares – Requirements
- i. Delivery
  - ii. Donative Intent
  - iii. Transfer of ownership on the corporation's books issuing the stock (sometimes satisfies the delivery requirement and sometimes is an additional requirement)

## Donative Intent

F. *Kenyon v. Abel* (Painting in Goodwill Box case) – *The unintentional inclusion of a valuable painting in boxes taken to good-will shop when cleaning out deceased relative's house negates a donative intent and invalidates the gift.*

- a. To be valid, a gift must be made with donative intent on the donor's part. At minimum, this requires that the delivery be voluntary.

## G. Expressions of Intent

- a. "I give you this thing, but I am keeping the income or the use of it until after my death."
- i. The gift is valid. The gift is a present one, and the retention of the income or the use is consistent with keeping a life estate in the donor, followed by a remainder in the donee. Both interests in the chattel are simultaneously established at the time of the gift. As to the remainder, the donor has a present intent to establish a future interest.
- b. "You shall have this thing when you reach 21."

- i. The gift is invalid as one taking effect in the future. The condition precedent to making the gift is a future event. The donor lacks a present intent to make the gift, and it falls afoul of the rule that an inter vivos gift must be unconditional.
- c. “You shall have this thing when I die.”
  - i. The gift is invalid because there is no present intent. The gift also fails because it is, in effect, a testamentary gift and should be contained in a validly executed will. Would be invalidated because of failure to comply with the applicable Statute of Wills or Probate Code.
- d. “I give you this thing, but if I do X, I want it back.”
  - i. There is a present intent to give the chattel, and the gift is valid but subject to a condition subsequent.
- e. Other Relevant Contextual Facts Court may Examine
  - i. Whether it is witnessed by others
  - ii. Whether the donee is someone to whom the donor might be expected to make a gift (parent, spouse, offspring, etc.)
  - iii. Whether the transfer looks like a bona fide gift or a tax avoidance scheme
    - \* While each is not dispositive in itself, cumulatively they may have great weight.

### Conditional Gifts

#### H. Engagement Rings

- a. While typically no pre-conditions can be attached to a gift, this is a court-recognized exception if given in connection to an ensuing marriage.
  - i. An engagement ring is a gift to which a **condition subsequent**, the fulfillment of the marriage agreement, is attached.
  - ii. Implied by law – symbolizes a pledge to marry and is given on the implied condition that the marriage will take place.
  - iii. Revoked by the donee’s failure to meet the donor’s condition.
  - iv. Donor can sue in replevin or trover for its value or return if the marriage does not take place.
    - 1. Valid defenses:
      - a. Where donee can show that the occasion for the gift was no dependent on fulfillment of the condition.
      - b. Birthday or holiday.
      - c. Distinguish between engagement (made at the time the marriage is proposed and accepted or thereafter) and courtship (made beforehand to introduce the donor to the donee and gain favor) gifts. Courtship gifts are not presumed to have been made upon a condition of marriage.
  - v. Intention of parties is controlling test → the more extraordinary the gift, the more likely it is that it is an engagement gift.
    - 1. Where engagement broken by donor, the traditional and prevalent rule permits the donee to retain engagement gifts or to sue for their value, and likewise deny the donor a right to recover even their value. \*
    - 2. Where donee breaks off the engagement without legal justification or the engagement is ended by mutual agreement, the donor may recover the gifts. \*
    - 3. Where one party dies, engagement gifts need not be returned b/c neither party was at fault for termination of engagement.
      - \* Justified because courts believe engagement should not be entered into lightly. All other situations arising out of broken engagements are dictated by public policy interests.

- I. ***Irons v. Smallpiece*** (Gift of two colts case) → Though the promise of a gift had been made orally, because the father retained possession over the colts property was never vested in the son. No actual transfer occurred. Property did not pass to the son by the verbal gift – not classified as a *donatio causa mortis* (gift made in

expectation of imminent death). *In order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee.*

- J. *Gruen v. Gruen* (Painting Gift case) → *Established a gift is provided when a donor intends to transfer ownership of a chattel to his son but elects to retain a life estate in it and transfer a remainder interest to the donee. Both interests in the chattel are simultaneously established at the time of the gift. As to the remainder, the donor has a present intent to establish a future interest.*
- a. Test – Whether the maker intended the gift to have no effect until after the maker’s death, or whether he intended to transfer some present interest.
    - i. As long as the evidence establishes an intent to make a present and irrevocable transfer of title or the right ownership, there is a present transfer of some interest and the gift is effective immediately.
  - b. Once the gift was made, the donor’s status is that of a holder of a life estate. His possession, maintenance, loan, and repair of the painting thereafter is not inconsistent with this status. Title to the remainder vests immediately, with possession postponed to the donor’s death.
  - c. Court in *Gruen* distinguished between a testamentary gift and an inter vivos gift.
    - i. An inter vivos gift requires that the donor intend to make an irrevocable present transfer of ownership; if the intention is to make a testamentary disposition effective only after death, the gift is invalid unless made by a will. Despite the defendant’s contention that the father did not intend to transfer any present interest in the painting back in the initial letter but only expressed an interest that the plaintiff was to get the painting upon his death, the Court stated that evidence proved otherwise.
  - d. **Difference between present gift of remainder with the reservation of a life estate vs. testamentary dispositions:**
    - i. Once the gift is made it is irrevocable and the donor is limited to the rights of a life tenant and not an owner.
    - ii. With the gift of remainder, the title vests immediately in the donee and any possession is postponed until the donor’s death whereas under a will neither title nor possession vests immediately.
    - iii. Postponement of enjoyment of the gift is produced by the express terms of the gift not by the nature of the instrument as it is with a will.

### **Gifts Causa Mortis**

#### K. Gifts Causa Mortis Defined

- a. Gift of personal property made in contemplation of the donor’s imminent death upon the condition that the donor die as he anticipates. Gifts causa mortis have all characteristics of gifts inter vivos except that it cannot be delivered constructively.
- b. The gift must remain unrevoked before his death takes place.
  - i. It is revocable at any time before the donor’s death.
- c. Delivery of the chattel is generally required along with proof of the donor’s donative intent.
  - i. Proof is often difficult given the haste and privacy of conversation in which this gift is usually made – leaves large window for court to examine credibility of witnesses and donee.
- d. Gift is revoked by the donor who, in fact, lives through the experience which he previously thought would kill him.
  - i. Exception: Unless he subsequently regains full mental powers and reaffirms the gift, in which case the gift is validated as an inter vivos gift.

- e. A later will does not invalidate an otherwise valid gift causa mortis because the will is not effective until the death of the donor, and the gift has previously taken the chattel out of the donor's power to place it under the control of the executor.
- f. The death of the donor must not be a precondition to the validity of the gift. Some cases have made issue out of the following phrasing. However, Burke points out that given immediacy of event, it is too much to expect the donor to find the right phrase in the face of death.
  - i. Valid: "This is yours so long as I die (from whatever)." → Condition subsequent
  - ii. Invalid: "If I die (from whatever), this is yours." → Condition precedent
- g. It is not necessary that the donor be *in extremis* at the time of the gift. It is sufficient that the donor is apprehensive of death and be anticipating it.
  - i. Anticipation may be inferred from the context.
    - 1. If in situation where a patient made a promise while on the operating table and then survived the procedure but later died from disease operation intended to cure, there is no evidence the donor revoked gift in time in between, the gift will likely stand despite the time lapse of months.
    - 2. If sickness induced by disease is ongoing (cancer, series of strokes, etc), a context in which the donor might anticipate or contemplate death is established.
    - 3. Suicide of individual who leaves behind a negotiable check in a position where donee would find it in their shared apartment qualifies as constructive delivery
      - a. Often unsure if this will constitute stable mental capacity for even making a gift insofar as being competent to form a donative intent. Relationship between donor and donee typically examined.
  - ii. Instances where gifts causa mortis are not valid due to insufficient contextual evidence
    - 1. Gifts by soldier departing for war combat
    - 2. Person fearing assassination that took place the next day

L. *Woo v. Smart* (Uncashed Check at Death case) → ***Because a check does not operate as an assignment of funds, mere delivery of a check does not place the gift beyond the donor's power of revocation and a check issued on the donor's deathbed to the donee is an unenforceable promise to make a gift. The check must be actual and complete, so that it deprives the donor of all further control and dominion. Until the check is paid, the donor retains control and dominion over the funds and the gift is incomplete. The donor could stop payment or write another check for the funds payable to a third person, or the donor may die thus revoking the donor-drawer's command to the drawee bank to pay the money.*** In this case, no money was delivered. Because no money was delivered, no many can be claimed by the donee as a gift causa mortis.

## VII. ADVERSE POSSESSORS OF PERSONAL PROPERTY

### A. Adverse Possession Defined

- a. Use of a chattel in a way inconsistent with the right of the true owner of the title to it. The title to a chattel can be transferred by adverse possession. Adverse possessors are typically not sympathetic characters.
  - i. Theory → something is possessed for so long that it would be unjust to separate it from possessor.
- b. Statute of Limitations govern adverse possession, limiting the amount of time after which a cause of action for the recovery of possession of property is barred. Typically run 10 to 20 years for real property, and 2 to 6 years for personal property.
- c. Courts have added a judicial gloss to statutes of limitations where it examines the behavior of the adverse possessor.
  - i. **Required Elements:**
    - 1. Holds chattel for the requisite, statutory period of time.

2. In exclusive physical possession (may on occasion be constructive, or at least as exclusive as custom and usage permit).
  3. Holds it openly and notoriously for his neighbors and all the world to see. (Must assert his "right or title.")
  4. Holds it for a continuous, or uninterrupted period of time.
  5. Displays it in a hostile manner so as to put the world, including the true owner or prior possessor, on notice that he was holding it so as to bar any other rights in it.
- \*Good or bad faith of the adverse possessor makes no difference – the statute runs in either case.
- d. *Color of Title* (evidence of legal ownership of real property) is not required to acquire adverse possession of a chattel.
  - e. **Doctrine of Tacking (or Substitution)** → a new cause of action begins to run against each successive adverse possessor of a chattel (*O'Keefe* exception to Statute Timing). Each successive transfer is also a new basis for an allegation of conversion.
    - i. Tacking is not permitted for personalty → rule best protects chattel's true owner.
  - f. Once an adverse possessor acquires his title, he is entitled also to all of the rents, income and profits derived from a chattel for the period of time during which he has been running the statute (***Mesne or interim profits***); also acquires the rights to any off-spring born to adversely possessed animals, crops grown on land adversely possessed, and any other chattels affixed to land adversely possessed.
- B. ***Chapin v. Freeland*** (Counters case) → Although the plaintiff did not possess the counter himself for six years (required for s.o.l), the statutory period ran before the plaintiff acquired the counters. ***If the purchaser bought the chattel from one protected by the statute of limitations, he stands in as good a position as his vendor.***
- C. ***Solomon Guggenheim Foundation v. Lubell*** (Missing Museum Painting case) → Among other defenses (good faith, laches, and the museum's culpable conduct), the Lubells raised an adverse possession defense, claiming that the s.o.l. had run on the plaintiff's right to possession. Court determined that the only relevant factors in this case for determining the merits of the statute of limitations defense were 1) the timing of the museum's demand for the piece and 2) the appellant's refusal to return it. Court rejected the s.o.l. defense because the rule that it adopts - ***demand and refusal rule*** – begins when the original owner demands the painting back, and the purchaser refuses.
- a. **Demand and Refusal Rule** – applies to the measuring of accrual for replevin claims. Rule that affords the most protection to the true owners of stolen property. Court felt it appropriate measure in *Guggenheim Foundation v. Lubell* because it would not be prudent to impose an additional duty of diligence before the true owner has reason to know where its missing chattel is to be found.
    - i. Less Protective Alternatives:
      1. Discovery Rule – Where the whereabouts were or should have been discovered, the s.o.l. begins to run. This would create a duty of reasonable diligence, which would be difficult for courts to identify a type of conduct that would be required for such a showing.
      2. O'Keefe Discovery Rule – Accrual of cause of action begins at the time of theft, unless the owner can show that she used due diligence and failed to locate the chattel. If the owner can show due diligence, s.o.l. runs when the owner locates the chattel.
      3. Running statutory period from the time of the theft even when the good-faith purchaser is in possession of the stolen chattel.
      4. Calculating the statutory period from the time that the good-faith purchaser obtains possession of the chattel.
  - b. ***The Laches Issue*** – One of the defenses asserted by the Lubells, it is an excessive delay combined with prejudice. Neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity. The neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done.

## VIII. FIXTURES

Whether an object is a fixture is an issue arising in here transactional contexts:

- 1) When a vendor removes an object from realty after agreeing to sell it to a purchaser who expects the object to be his when the sale is complete.
- 2) When a mortgage lender seeks foreclosure of a lender's lien on real property, including its fixtures.
- 3) When a landlord claims that an object is a fixture when a lease is terminated.

Chattels used in connection with real estate can fall into one of three categories:

- 1) Chattels that are not physically attached to realty are always personalty.
- 2) Chattels which are annexed to realty in such a manner that they cannot be removed without materially damaging either the realty or the chattels are always fixtures.
- 3) Chattels that are physically connected to the real estate but can be removed without material injury to either the land or the chattels → status as personalty or a fixture depends upon the "objective intent of the owner to permanently incorporate the chattel into real property, as evidenced by the proven facts and surrounding circumstances entered into evidence."
  - a. Factors the court may consider in making this determination:
    - i. Length of time which the chattels have been attached to the realty
    - ii. Whether the chattels are essential to the purpose for which the realty is used
    - iii. Whether the parties to the lease treated the chattels as part of the leasehold estate

\* These factors are not exclusive, and the court may consider any other objective manifestations of intent.