**Property Theory**

Note: cases are not necessarily law in Canada, though they overlap with some cases taught in other sections of the property exam.

Property is the legal relationship between people in relation to things

*Armory v Delamirie*

* Finder can enforce owner’s rights against all but the true owner
* Broader point: being in possession of something gives you legal rights
* Distinction between possession and ownership
* Owner 🡪 possessor against who no one else can make a claim (best claim)
* However, there are caveats (ex: statute of limitations, etc.)

Pufendorf

* Proprietorship is only relevant in relation to others; thus convention
  + When owner changes, there is no physical change to the substance of the thing
* Are property rights natural or conventional?
  + Locke 🡪 natural (persons-things)
    - Natural right example: right to bodily integrity (not to be assaulted); are property rights like this or more like
  + Pufendorf 🡪 conventional (persons-persons)

Locke

* The world is ours and to use it we must take some of it
* You are appropriating when you take something
* If someone takes something from you, they have violated your rights
* Permission is inconceivable
  + People would starve if they needed to get permission to take an apple
* How Locke comes to the conclusion:
* *we have rights to our person, and by mixing our labour with the common, our rights extend to that thing*
* **Two limitations on acquisition:**
  + (1) there must be enough and as good left for others
  + (2) only as much as you can make use of before it spoils
    - There is a negative consequence of money (pick as many apples as possible and sell them because money does not spoil)
* **Objections to Locke**
  + Where is the line between mixing our labour and owning property?
    - E.g. throw tomato juice into ocean, now we own the ocean?
  + Our consent is required for the function of this system (mirrors that of a convention)
    - Response: implied consent by living in a society

*Pierson v Post*

* majority held that possession (wounding the fox to the point where they do not have their natural liberty) is required to own fox, but dissent held that the original hunter is mixing his labour by starting to hunt the animal
* demonstrates a philosophical disagreement about Locke

For lawyers, the relationship between people in relation to things is a matter of **rights**

***Three ideas associated with “bundle of rights”:*** (*Hohfeld*)

1. ownership comprises of a set of “incidents”
   1. incidents = collection of rights you have
   2. Three principal incidents (rights):
      1. Exclusion/claim-right
         1. Right to exclude others
         2. Imposes a duty on someone to do something or refrain from doing something
      2. Liberty/privilege
         1. You are free to do it (not under a duty not to do it)
         2. But no one else has an obligation to do something or to refrain from doing something
      3. Transfer/power
         1. Capacity to make something you own someone else’s (subject to their approval)
2. *In rem* rights disaggregate into complex set of *in personam* rights (basically in rem rights are a set of in separate personam rights against everyone)
   1. *In rem* rights: rights held against everyone
   2. *In personam* rights: right held against someone in particular
   3. Objections (*Penner*):
      1. Misses the interpersonal nature of property
      2. Idea is unwieldy and counter-intuitive
         1. E.g. every time a transfer is made
3. Property rights are always transferred rather than conferred
   1. Most controversial thought of bundle of rights
   2. Bundle of rights is more than the typical view of some rights because they have billions of combinations
   3. *Penner*: because there are indefinite rights with this view, Penner believes you have the potential to create all these rights, but that they don’t exist until you do, and when you create the easement you can making that right

Property and Taxation

Arguments about property right in pre-tax income:

* (1) You have a right to money if it’s not being withheld from you
* (2) If it is withheld from you, you did not consent to it

**Nozick (*the entitlement theory*)**

* Only state that is justified is a limited state (far less than we are accustomed to)
  + Limit on theory of entitlement theory (limits in distributive justice 🡪 distribution of material resources)
* There are only two rules: **if I got it justly, it is mine justly**
  + (1) principle of justice in acquisition
  + (2) principle of justice in transfer
* Taxation is absent; no right for a third party to have a right in my thing
* Later creates rectification principle so if the principles above aren’t followed, you can sue to recover your right in a thing
* Entitlement theory boiled down: any theory that is consistent with our liberty and equality
  + equals: no one subject to authority of anyone else
  + liberty to do as you want as long as you don’t harm others
* Wilt Chamberlain argument
  + People pay to see Wilt after a game; what does the state have to do with it?
* Taxation is forced occupation
* What does the state have to do with a legitimate transfer between two persons?
* Nozick is not opposed to forming a government consensually, but is against a lack of express consent
  + Even if you benefit from the government’s services, that does not impose an obligation on you (like receiving a gift)

**Responses to Nozick entitlement theory**

* Internal criticism (accepts premises but conclusion does not follow):
* **Fried**
  + *Much of the increase in value has nothing to do with you but rather services of the state/other people’s actions*
    - Thus, taxation is just redistribution to those who have a claim on the value
  + Example of house bought at $5k but sold for $250k; it is because of infrastructure improvements, people investing/moving in, etc.
  + Wilt chamberlain?
    - Can only extract value due to investments society made (e.g. building the stadium)
    - Others work equally as hard and do not make nearly as much
    - He relies greatly on luck/talent 🡪 society should have a claim on “natural lottery”
  + Sale realizes the value (so gov’t cannot randomly take tax)
* External criticism (disagrees with premises:
* **Murphy & Nagel**
  + Property rights are not independent of the whole system which allowed them
  + Main question: *is the society we live in fair?*
    - Making possible institutions we want?
    - Redistributing in a reasonable manner?
  + System should be changed if it is unfair, not whether the system should be part of a transaction

Necessity

*Ploof v Putnam*

* In situations of peril, it is permissible to use another’s property without her permission if that is the only way to save oneself from serious harm
* But, *only to the extent necessary to save yourself*
* In this case, right to dock boat because no other choice but to sustain injury

*Vincent v Lake Erie*

* You can also save your *property* by using someone else’s property if it would have been damaged (presumably if it’s valuable)
* But if you damage that property then *you must compensate its owner*
* In this case, added more cables to ensure boat is docked in a storm and the dock is damaged as a result

In both cases, if you do not compensate order, you have taken something more than necessary to save your life/property, and all you’re entitled to is to save your life/property

**Doctrine of necessity have two parts:**

1. the right of necessity
2. the duty of repair

Question: if you haven’t violated someone else’s rights, how come you have a duty to repair?

**Grotius:** (right of necessity is a property right)

1. The right of necessity marks a limit on the right to exclude
2. the duty to repair ensures that the limit is as modest as possible

Reasoning:

* In original community one has the right to take what they need to survive (negative community 🡪 no one has a claim to anything 🡪 no right to exclude others)
* Property rights are a convention which we adopted because of benefits of doing so
  + E.g. investing (since you know someone can’t just take it), etc.
* But, there are certain limitations to ownership and right of necessity is one of them
  + Duty to repair exists to ensure you only take what is necessary

**Response: Pufendorf** (right of necessity is a personal right)

* Perfect duty (do something in particular, regardless of your motive)
  + E.g. paying your taxes
* Imperfect duty (requires a certain purpose/motive)
  + E.g. duty to be charitable (not charitable if you do it to impress someone)
* Grotius does not account for duty to repair, but we can if we accept that the right of necessity is a personal right correlating to an imperfect duty owned by the property owner
  + Necessity is a contraction in the moment of an imperfect duty so it is just as good as a perfect duty (this is important because the law usually only enforces perfect duties)
    - Duty to rescue becomes so precise that it is a perfect duty

**Personal Property**

Property 🡪 legal relationship between people with respect to things (property should not be confused with things)

Property interests are relative. It does not matter if you have the best property interest in the thing. All that matters is that you have a better claim to the property than the challenger.

*Wilson v Lombank*

* Facts: P has possession of car but not title to it (thus not true owner). P takes car to get repaired at garage. Once garage finishes their repairs, they leave car outside. D mistakenly takes the car thinking it was theirs, and when they realize, they return it to the true owner (who has the title). P sues D for trespass
* Held: P had a possessory interest. P was removed
* Court wrongfully stated that he had a claim on the full value of the car. Only had a claim on the rental value of the car (period of time is the difficult question) because true owner could have sought the return at anytime

*R v Steward*

* Facts: union hired accused to collect personal info from employees, who asked security guard to do it and was then charged with theft
* Information is not capable of being stolen in the Criminal Code (for the purposes of theft)

*R v Offley*

* Asked a police officer to access confidential info
* Similar conclusion to Steward; information not capable of being stolen in CCC

**Property and Body Parts**

*Lamb v UBC*

* Facts: Members of UBC undergoing cancer treatment and stored sperm because they will likely not be able to have children after undergoing the treatment
* Held that sperm is property (and thus goods under the Act the P was relying on)

*JCM v ANA*

* Facts: Two women couple who bought sperm; each had a baby using the sperm; quantity of unused sperm left in facility; JCM entered a new relationship and wanted to use the unused sperm; ANA objects
* Held that sperm is property
* Judge ordered them to divide the sperm

Can you have a property interest in body parts? Not sure. Unresolved by courts.

Types of property interests

**1. Possession**

1. Physical control over the thing
2. Manifest intent to exclude others

*Young*

* Facts: P was fishing, and was in the process of blocking the net to take the fish, when D deliberately interrupted this process and most of the fish escaped
* Lack of physical control will result in no finding of possession

*Tubantia*

* Facts: P began salvaging the wreck (they did numerous things to exclude others) and the D interfered with their salvage operation
* Physical control and intent to exclude indicates you have possession

*Eads*

* P determined where the shipwreck is and marked trees on a bank to identify where it is
* They had a lack of physical control and a lack of an intent to exclude others
  + Marking the trees does not indicate an intent to exclude others
* Merely finding a thing is insufficient to establish a property interest in the thing
  + Need intent to physical control and intent to exclude others
    - E.g. find an apple (insufficient), but pick it up and put it in your pocket (sufficient because it satisfies both components of possession)

**2. Right to Immediate Possession**

Allows a person to lawfully take a thing from the current possessor

E.g. a bailment; a prior possessor (this will all be discussed later)

**3. Ownership**

Highest interest in a thing; includes a right to immediate possession

**4. Security interests**

Credit can take possession of something in case of default by the debtor

This is purely statutory: personal property and security act (PPSA)

Creation

The maker of a new thing acquires ownership of the thing by being the first possessor unless the state has legislation altering this

Domain of IP is whether someone can copy the process or formula, but personal property is concerned with ownership of the thing itself

1. **Manufacturing things**
   1. Accession
      1. When things are combined and considered to be one unit, yet remain separately recognizable (e.g. a car 🡪 combining tires, engine, etc.)
   2. Mixing
      1. Mix things together and create a non-separately identifiable thing (e.g. blending chemicals into a new matter; putting wheat in a silo with a bunch of wheat already inside it)
2. **Crops**
   1. Crops are treated as land until they are severed from the land (once severed, first possessor is the owner)
   2. In the case of air plaints, first possessor is the owner
3. **Birth of livestock**
   1. *Wood Ash v Foster*
      1. Facts: 20 year lease which covered land and sheep. At end of 20 years, sheep multiplied (and none of the original sheep were alive)
      2. Leasee owns livestock/offspring subject to the original amount of animals provided in the lease
   2. *Tucker*
      1. Facts: Acquired 84 sheep under hire-purchase contract. Sheep gave birth to lamb. Sold all of the sheep and lamb to his neighbour. No right to sell sheep, but held that Perry acquired ownership of the lamb when they were born (even though he was never the owner). Thus, Tucker has a right to the lamb.
      2. Leasee or a person with mere possession (but not ownership) has a right to offspring of the animal

Wild Animals

No right to immediate possession with wild animals. The one with *possession is the owner*. If the wild animal escapes and someone else gains possession, you have no claim against them

**Wild vs Domestic animals:**

* Either based on *species or a* *combination of species and traits* of particular animals (degree to which they try to escape and voluntarily return)

*Pierson v Post* (fox)

* Post chasing fox, intending to kill it. Pierson killed fox.
* Pursuit alone is insufficient to create a property interest. Need to deprive the animal of its natural liberty

*Young v Hitchens* (fish)

* To acquire wild animals, actual physical control is required

*Nakhuda v Story Book Farm* (Ikea money)

* Animals classified as wild by virtue of their traits (behaviour and qualities)
* Monkey escaped the moment it had a chance to; therefore wild animal
* Nakhuda does not have an immediate right to possession

Destruction

Three ways in which property is lost by way of destruction:

1. **Natural decomposition**
   1. If the thing decays and becomes part of the land so it is indistinguishable, no property interest in the thing (it is part of the land)
   2. If the thing rots but is not part of the land (still distinguishable), it is a different thing
2. **Accession, mixing, fixtures**
   1. **Accession**
      1. When will property be lost in the original things as a result of the accession?
      2. *Ochoa v Rogers* (bought stolen car in good faith and made improvements)
         1. Facts: Car stolen from P and gets in the hands of US govt which auctions it to rogers. At the time the car was destroyed and a piece of “junk”, and Rogers made significant improvements to it. P found his car with D and demanded it
         2. If the D was a **thief**, obtained the property knowing it did not have good title, or failed to exercise care to ascertain that the car was stolen, the car with all the improvements would be the P’s
         3. However, in the case of an **innocent trespasser**, the true owner is only entitled to receive the market value of the car at the time it was stolen, and the innocent trespasser is entitled to keep the car with the improvements
            1. Where it can be shown that the labour/materials of the innocent trespasser contributed more to the value of the present chattel than those materials which he took without intending a wrong, he is entitled to keep the chattel as his own (subject to paying the market value of the original chattel)
      3. Factors to consider:
         1. Can the incorporated thing be removed from the whole?
         2. Would the removal of the incorporated thing destroy the utility of the whole?
   2. **Mixing**
      1. In a dispute where mixed things are lost, the court will typically apportion it depending on the proportionate interests they had in the whole
         1. In effect, shared losses, since you do not know exactly who’s materials you lost
   3. **Fixtures**
      1. When you attach the thing to land, it becomes part of the land and the prior property interest ceases to exist
      2. Best evidence? *Degree of fixation* (how permanently was it affixed? How much damage would result if it was removed?)
3. **Death of livestock**
   1. First discovery principle as animal is dead, not many disputes

Abandonment

Abandonment requires intention to abandon. Losing does not mean abandonment (no intention)

*R v Edwards and Stacy* (dug up diseased pigs)

* Employer told employees to kill pigs that were diseased and bury them
* They did so, but later came back and dug them up and sold them. Charged with larceny
* Court accepted the idea of abandonment but stated it did not occur on the facts

*Canada (AG) v Brock* (found $300k in car)

* Facts: Police officer stopped Brock. Officer asked to search Brock’s vehicle. Brock allowed the search. Police officer found $300k in cash. When asked about it, Brock said “what money?” Brock claimed ownership of the money the next day with his lawyer on behalf of some foreign investors
* Held: the evidence supports the conclusion that he had possession of the vehicle but did not have possession of the money
  + Seems as though he did not indicate an intention to exclude others (do not necessarily own everything within your vehicle 🡪 this comes up in later cases)
* Court assumed that abandonment is possible
  + also, trial judge held that he abandoned the money by asking “what money?” when asked about it (express intention to relinquish his rights)

Property in your garbage? No, generally police are able to search garbage without a warrant (if it’s not on your property), which supports the idea of abandonment possible in garbage.

Lost and Found

Finder of a lost thing has rights against all but the true owner (*Armory v Delamirie*)

Concerned with subsequent possession. Recall that property interests are relative to other claimants. Who has the *better* claim?

**Four important points:**

1. Finding in itself does not create rights/obligations
   1. Merely discovering something means nothing, need physical control and a manifest intention to exclude others
   2. Therefore, finder in possession versus regular possessor means nothing in the legal sense except for a different name
2. Taking possession upon finding is not interference with property
   1. By merely taking possession upon finding, you do nothing wrong
   2. You may lose if the owner re-claims it, but you did not interfere with their property interest
   3. *Thomas v Canada (AG)* (mailed $18k accidentally)
      1. Facts: Thomas receives parcel containing $18k and gives to police to find the true owner (probably misdelivered package). Police do not find true owner and decide to keep money. Thomas sues.
      2. Thomas has a better claim than AG because he had possession first
3. A finder who takes possession is in the same position as any other possessor
4. A possessor by finding will lose possession to the holder of the right to immediate possession of the thing found

*Keron* (boy found sock with money)

* Facts: Boy found a stocking initially and played with it with other boys. During the course of play, the stocking burst open and the money fell out. Who has a claim to the money, Crawford or all the boys?
* Money is in the common possession of all the boys
  + Crawford did not have possession of the money in the sock because Sock had a common intention to use the sock as a “play thing” and did not have an intention to exclude others
  + Court drew a distinction between the sock and a wallet/purse (the type of thing you would expect to contain money); result may be different
  + When the sock burst open, they all had possession

*Stonkus* (via rail employee)

* Via rail employee discovered an unattended bag and in accordance with Via Rail policy he put it in the claim room without looking at the bag. However, later another employee opened a bag and it has $90k cash. True owner had disclaimed the interest after being interviewed.
* Proceeds of crime may have a lawful owner if an innocent person comes to the money in good faith
  + In this case, held Stonkus did not come to the money in good faith
* *Dicta*: Stonkus was unaware of the existence of money, therefore he could not claim a possessory interest (manifest intent to exclude others from money missing)

*Popov* (“million dollar baseball”)

* Facts: Hyashi was standing near Popov and forced to the ground. Popov catches the ball. A crowd descends on them and the ball slips on the ground. Undisputed – until it was hit the ball was property of MLB. Upon being hit, the ball was abandoned
* Whoever has first possession of the ball has claim of the ball.
* Held:
  + A baseball which is dislodged by incidental contact while momentum is still there is not possessed; Only have possession after incidental contact with people and things
  + But, where the effort is interrupted by the unlawful acts of others, he has a property interest
* The judge concluded that they had equal and undivided interest in the ball

*Bird v Fort Frances* (boy found container with money on someone’s property)

* Facts: P 12 year old playing in basement when he found a can with cash. Mother hid in a chair. Boy disclosed the true facts once questioned by police. Police officer asked the mother for the money and she gave it. Treasurer did not find true owner.
* This is not a case of finding because the money was never lost; rather it was hidden
* But same principle is used (finding is legally irrelevant, all that matters is possession): relative to the police officer, the boy had a better claim (first possession)

*R v Christie* (driving around with daughter’s drugs in her car)

* Involved in a car accident. Said that she found drugs in her car and thought they were her daughters. She was frantically driving around town to get some advice.
* Lacked intent to exclude others; therefore not in possession of the drugs

*Grafstien* (employee broke box)

* G was employed as a cleaner and found a locked box. He was told to leave it on a shelf. Years later, he was curious and broke the lock, and found a bunch of cash inside of the box.
* Held: Employer owns the money
  + Some possible explanations between this and Stonkus/Keron/Brock: P is an employee (and broke a box…), lock on the box made examination difficult (could still manifest intent to exclude others even without knowledge in this case), things on land are presumed to be part of the land unless rebutted (and he knew about it from years prior)

**Finders against those with Weaker Interests**

*Armory v Delarmirie* (jewel found in chimney sweep)

* Finder in possession does not acquire absolute ownership, but will have an interest over everyone but the rightful owner (and any other dispossessed prior possessors 🡪 discussed later)

*Bridges v Hawkesworth*

* Facts: Someone lost money in D’s store. P found it and brought it to the attention of the D to advertise and find the true owner. When the owner was not found, P demanded it back and said he would indemnify D for costs with advertising.
* P has a better claim than the D
  + D must have indicated his intention to exclude others which did not occur
  + Also, P did not intend to transfer it to the D, only gave it for the purposes of advertising
* Later cases make this somewhat blurry (because things on your land are often considered your property) but this still stands, just qualified
  + Consensus is that it depends on the public accessibility of the land (later cases)
* Something is found on another person’s land does not necessarily mean that it is the landowner’s property

*R v Doucette*

* Cannot use physical violence to assert your property rights

Damages for a possessory interest (that is not the owner) is calculated as the *lost rental value* (during which time the property interest was unlawfully disturbed). It is NOT the ownership value (since the owner could have dispossessed you at any time. What the rental value is depends on the circumstances of the case.

**Finders versus those with stronger interests**

Those with a better claim than a finder in possession

1. **Owners**
   1. Owners defeat FIP
      1. Owners have a right to immediate possession
   2. Owner interests arise from: discovery, creation, transfer, enforcement of a security interest, state grant.
   3. But, ownership is difficult to prove
   4. Generally FIP does not interfere with the property interest and thus would not be liable for damages
      1. However, *hiding or converting* the property may constitute damages because it constitutes intentional interference with the property
      2. *Mackenzie*
         1. D sent employees to retrieve rafts that had went down the river. Employees took 3 rafts, one of which was not the D’s. D tells P. P successfully sues D for trespass to property.
         2. How can this be reconciled then?
         3. Because they thought it was their own and took it with the intention of treating it as their own (rather than a possessor)
            1. Mistaken belief is irrelevant 🡪 intention only relevant as to take the raft
   5. **Prior Possessors**
      1. **First possessors**
         1. Generally, except for wild animals. King believes there’s no difference between ownership/first possessors
      2. **Dispossessed prior possessors**
         1. Possession terminated by someone acting without lawful justification
         2. DPP has an right to immediate possession and will defeat dispossessor (e.g. *Bird*)
            1. While possession may be lost, right to immediate possessions till exists
         3. Action between DDP and innocent buyer, DPP will win
      3. **Other prior possessors**
         1. Prior possessors not unlawfully dispossessed this time
         2. As a general rule, prior possession defeats subsequent possession
         3. *Exceptions* to this rule:
            1. (1) wild animals, and
            2. (2) state confiscatory claims (e.g. proceeds of crime)
         4. *Sutton v Buck* (transfer failed, honestly thinking you are the owner means nothing)
            1. Previous possessor defeated, ownership transfer failed because of failure to abide by ship transfer statute, man possessed it thinking it was his, pieces of boat drifted into other guy’s property, plaintiff won. Whether or not you honestly think you are the owner means nothing.
      4. **Finders versus finders**
         1. Fall into the same category of other prior possessors (prior possession defeats subsequent possession)
         2. *Clarke* (found logs and then lost them)
            1. P found logs in a bay, brought them to a creek and tied them up. They broke loose and D finds them floating in the creek, takes possession.
            2. P’s claim is stronger 🡪 prior possession defeats subsequent possession generally
   6. **Estate Holders in Land**
      1. *Bridges v Hawkesworth* (suitcase on floor of shop)
         1. Cannot be a rule that estate holder in land will always defeat the finder of the thing
      2. *McAvoy v Medina* (*outlier*) (wallet on table)
         1. P was customer and found wallet on table, who then gave it to the D to advertise to find the true owner
         2. Crucial fact is that wallet was not accidentally placed there by a customer
            1. Placing a wallet on a table and forgetting to take it is not to lose it
         3. Reconciling these two cases:
            1. American case; prior was a British case
            2. Bridges is lost and found, McAvoy not lost
      3. *Elwes* (2000 year old boat)
         1. Both parties had estates in land. P held life estate and D 99 year lease. D under the lease could excavate, dig, and receive minerals found. D finds a boat underneath which was 2000 years old.
         2. Court rejected that it is part of real property because it is still distinguishable from the land (not yet fossilized/did not rot fully)
         3. Held that P had property in the boat before D dug it up (even without knowledge of its existence) 🡪 essentially P is a DPP
         4. Reconciling this with *Bridges*:
            1. Thing is buried (attached to land), *Bridges* is in plain view

Things attached to the land is generally part of the land

* + 1. *South Staffordshire* (gold rings under mud)
       1. D was a worker who was part of a team hired to clean out a pool. While cleaning out the pool, 2 gold rings were *found in the mud* at the bottom of the pool. P demanded the rings, but the worker refused and instead gave them to the police to find the true owner. But the police could not find the true owner and returned it to the D. P sued D in detinue
       2. *Possession of land carries with it everything which is attached to or under the land*
          1. Makes no difference if they are not aware of the thing’s existence
          2. Manifest intention to exclude others from land includes intention to exclude others from things inside of the land
       3. How is this reconcilable with Bridges?
          1. Rings were buried in this case whereas they were on top of the land in Bridges
       4. Also: Rule seems to say that a person holds an interest to things in a private place rather than a public place (this will be dealt with in later cases)
    2. *Hannah v Peel* (soldier finds brooch)
       1. Brooch was unattached to the land and the landlord manifested no intention to exclude others
       2. Therefore soldier has the better claim
    3. *Parker v British Airways* (bracelet in airport lounge)
       1. D has an exclusive members’ lounge in an airport. P was a passenger in the lounge and found a bracelet and gave it to D to give to true owner. True owner not found, who has better claim, P or D?
       2. It was not attached to the land (otherwise intention to exclude others is implied, and physically in control because it’s on their land) so there needs to be a manifest intention to exclude others
       3. There was no manifest intention to exclude others
          1. Even though it was restricted to members, it was still open to the public generally

*The more public the space, the more evidence required to prove manifest intent to exclude others*

* + - * 1. Intention needs to be manifested/obvious

In cases in the middle (somewhat restricted), this is really important

Lost and found policy was only communicated to employees (would have been)

* + - 1. Examples of places with a manifest intention to exclude others are: bank vault, householder; public park has no manifest intention
      2. Judge errs in saying that they must take reasonable steps to find owner 🡪 needs only to take reasonable care of the thing found and to not obstruct or deceive the true owner
  1. **Employers**
     1. If employee finds something in the course of employment, then it is an implied term in the employment contract that they must turn over what they find to their employer
     2. However, this relies on *contract law rather than property law*
        1. The distinction? No immediate right of possession (do not have same remedies available because the employer is not a possessor in property law 🡪 can only sue the employee if they violate the contract)
     3. If there is an express provision, then that supersedes the common law rules
     4. *Lister v Stubbs*
        1. D purchasing agent employed by P and accepted bribe instead of negotiating a deal for the employer
        2. P sued D but D already converted proceeds into something else; P lost because he had no property interest; therefore no immediate right of possession
     5. ***SOME CASE 🡪 FIND IT OUT***
        1. Decisive factor was that the maid was expressly within the scope of her employer
     6. Most of the time it is not explicit:
     7. *Grafstein*
        1. Box was not buried, estateholder knew of it from years prior
     8. *White v Alton Lewis*
        1. Shopkeeper awarded possession of bracelet
        2. Had *Parker* been an employee, result would be different (due to lost and found policy)
     9. *Burn v Horr* **???** (police officer finds golden nugget)
        1. Policeman found gold nugget in the ground
        2. Not related to his employment responsibilities and it was found on property on which the public was invited so it was held to be the policeman’s property
     10. *London v Appleyard*
         1. Employees employed by building contractor and uncovered a wall safe; estateholder (employer) won on prior possession
     11. *Millas v BC* (police officer finds $900k in garbage)
         1. Off-duty police officer found $900k in garbage container. No evidence that the money was proceeds of crime. Finder not acting in capacity as a police officer (was walking his dog)
         2. Therefore, treated as ordinary member of the public, has a claim over the money
  2. **The state**
     1. The state may introduce legislation that trump common law rules
        1. Not common but it happens
     2. The Crown has *royal prerogative to unclaimed shipwrecks*
     3. *Atlantic* passenger steamer
        1. Ontarian made numerous dives to the wreck, discovered artifacts, etc. for archival purposes. Then an American started scavenging it for profit. The Crown intervened. The Ontarian assigned his claim to the government so they would fight it. California court ruled on this but an Ontario court said there is *no real and substantial connection* to the court in California and that the wreck belonged to Ontario
        2. Also because the wreck was abandoned (no longer owner of Atlantic’s property), buried in the mud in Ontario soil (Elwes, South), but lastly for parts not submerged in mud, there is the royal prerogative (Crown entitled to any shipwreck unless they have given an interest in the wreck to others)
     4. Dr Burger (fossils in cave)
        1. Used an open approach and allowed everyone to access it for free
        2. Contrast this approach to most treasure hunters

Transactions

Four types of transactions by which property interests get transferred:

1. Purchase and sale
2. Gifts
3. Bailments
4. Leases

Purchase and Sale

Seller and buyer enter into an agreement in which they change their property interests in the things.

Contract of sale 🡪 determines the parties and their obligations

Rules of property 🡪 inform when the property interest is transferred (recall: property interests enforceable *in rem*)

Legislation that affects transactions are: (1) consumer protection legislation and (2) sale of goods act.

Consumer protection legislation 🡪 complex, constantly updated. Applies where the person is acting for the purpose of purchasing domestic/household goods (same thing can be bought for business purposes, depends on what your intention is to do with the item – e.g. bring it back home or put it in your office)

**Sale of Goods Act**

Helps us determine when property passes from seller to the buyer.

* This is important because: risk follows title, bankruptcy, remedies, claims against third parties

Implies conditions and warranties into sale of goods contracts

* Matches the description
* Suitability (reasonably suitable for their intended purpose)
* Delivery
* Payment
* No encumbrances on goods (e.g. liens)
* Free from defects.
* Etc.

**Sale by Owners**

* Only applies in which *money* is exchange (or promise thereof)
* Barters, trades, exchanges, etc. not included
* **When does the buyer get property in the thing bought?**
  + s 18(1) where contract for sale of specific or ascertained goods, property transfers when the *parties intend* it to be transferred
  + (2) all relevant circumstances considered
  + specific goods: identified at the time the contract is made
  + ascertained goods: not identified at the time the contract is made but identified later
  + unascertained goods: goods which are not separately identified but are indicated only be description (e.g. the 5kg of sugar ordered for shipment are not set aside, it’s still in a pile of sugar of 100kg 🡪 don’t know which one is yours)
    - unascertained goods become ascertained goods when the specific shipment is set aside and you know what it is
  + If the intention cannot be determined, the sale of goods act provides five rules:
    - (1) for specific goods, property is transferred at the time the contract is created
      * Even if the parties arrange for payment/delivery at a later date
    - (2) for things the seller must alter, property is transferred when the alteration has been done and the buyer has been notified
      * Notice cannot be made in advance
    - (3) where the seller is required to weigh, measure, or test the goods to calculate the price, property is transferred when the appraisal has been done and the buyer notified
    - (4) if the contract between the parties allows the buyer to approve or reject the goods, property is transferred when the buyer approves of the goods, or after a reasonable period of time
    - (5) for sales of unascertained or future goods, property is transferred from seller to buyer when the goods matching the description of the goods have been unconditionally appropriated to the contract by one party with the assent of the other
      * Essentially, property happens when two things happen:
        + (1) Set aside and identified as the goods for that specific buyer

Unconditional appropriation can happen by the buyer (e.g. buyer chooses the bottle)

* + - * + (2) by one party with the assent of the other

Different form notice 🡪 need to assent to the method of appropriation

* + If delivery is delayed by the fault of one of the parties, that party is responsible for the property
  + In a bailment, a bailee must exercise reasonable care (spoke about later)

**Sales by non-owners**

You can sell things you do not own (example: stolen, voidable title (e.g. purchase it from a minor), sell future goods (which you do not own but expect to own/manufacture), sell something which you do not expect to own but arrange for it to be delivered to the buyer (e.g. Amazon)

If you sell goods to buyer but state that property transfers upon payment (their intent pursuant to s 18(1) of sale of goods act), buyer becomes a buyer in possession but does not retain title

Common law principle 🡪 ***Nemo dat***: you cannot sell something which you do not own

If *nemo dat* applies, the buyer does not receive title in the goods

**Exceptions to *nemo dat***

1. Estoppel exception
   1. Estoppel 🡪 cannot assert something and then deny the truth of the assertion later on
   2. If the *owner does something to convey the impression that the agent is authorized*, they are estopped from claiming that the agent was not authorized’
   3. E.g. if you say that this is my agent and she is authorized to sell rings on my behalf
2. Seller in possession
   1. If buyer allows the goods to remain in the seller’s possession, second buyer wins
   2. Because this sets the stage for the seller to make a fraudulent transaction
3. Buyer in possession
   1. If buyer has possession but not property in it, second buyer wins against seller

These exceptions require that the second buyer acts in good faith and completes the transaction

Right to immediate possession gets transferred when the parties intended (can be transferred through words)

Possession transferred to buyer can only be done through actions (physical control and a manifest intent to exclude others)

Delivery 🡪 When possession transferred to buyer

Therefore, e.g. if the seller delays delivery of goods, possession may be delayed but the right to immediate possession is transferred

Gifts

Voluntary transfer of property from one person to another

No consideration in gifts, therefore not contracts

Things that are not gifts

* Deeds 🡪 contract under seal
* Trusts
* Statutory and equitable assignment

**Requirements to gift something**

1. **Donor intent**
   1. Donor must intend to transfer property now (no such thing as a future gift)
   2. Donor intention can come after possession but not before
   3. Intent must be to transfer the property without consideration and to transfer a specific type of property
   4. Most common contention 🡪 is it a loan or gift?
   5. *Scott v Howton*
      1. Gift functioning in condition subsequent
      2. P bought lottery tickets and distributed to employees, on the condition that if anyone wins over 20 shillings, then the daughter will receive the gifts
      3. But can be interpreted as a conditional contract
2. **Delivery**
   1. Transfer of possession from one to another
   2. *Cochran v Moore*
      1. Delivery is necessary even when the donor’s intent is perfectly clear
   3. *Ridgeway*
      1. Promised to give son bottle of expensive liquor when he turned 20, but went bankrupt (unsure about result)
   4. *McEdee*
      1. Decreased owned paintings and gave son painting every year for five years. It was presented to the son. After each painting was unwrapped, it was put back on the wall which it came from.
      2. Presentation of painting with wrapping paper was delivery
      3. This was a valid gift; the son gave the father possession (but not title) when they put it back on the wall
   5. *Thomas v Times Book Company*
      1. *Constructive delivery*
      2. DT lost manuscript of one of his works before he went to America. DT was thankful and listed bars for C to go to find his manuscript and said if he found it that he could keep it (gift). C visited the pubs and found the manuscripts
      3. Delivery can be proved by a mutually voluntary transfer of things (even if it does not go through the hands of the donor to the donee)
   6. Other methods of delivery
      1. Church donating organ: by pointing to it, possession was transferred (could be the case with large objects)
      2. By giving keys to a vehicle
      3. Putting hand on an object
3. **Donee acceptance** (or lack of rejection)
   1. Onus shifts on other party to dispute donee acceptance (it’s generally presumed)

Example to sum it up: if you promise to give someone a computer, it is legally nothing; but if you give the computer and tell them it’s a gift, then that’s a gift legally.

**Donatio Mortis Causa**

Gifts in contemplation of imminent death

**Requirements:**

1. Must be a gift (intent, delivery, donee acceptance)
2. Must be contemplating imminent, though not certain, death (e.g. heart transplant would count)
3. Gift is conditional on donor’s death
   1. Condition subsequent (gift transferred unless the donor recovers)
   2. Solves logical problem, because gifts cannot be conditions precedent (i.e. transfers if donor dies would not work)

Bailment

Transaction consisting of (1) a contract and (2) a transfer of possession of a chattel (tangible)

**Basics**

* Bailor transfers possession to the bailee
* Bailment must be temporary
* After bailment is over, possession goes to the bailor or elsewhere as designated
* Bailee must accept the transfer of possession
  + Cannot be a bailee against your will
  + If you let someone park in your driveway, you are not a bailee but rather they have a licence to park on your driveway
    - Because you do not have possession
    - However, giving of keys would indicate that you have possession
  + Animals leaving farmyard without knowledge of farmer; no bailment because there is no transfer of possession
  + Often stated that finders in possession are bailees but that is wrong since (1) bailees and FIP have different obligations and (2) they come to it differently (voluntarily vs involuntarily)
* Bailees must exercise reasonable care
  + Started out as more or less strict liability (basically insurers of goods), but now the negligence standard is used
  + Unless statutory rules apply or there is a formal agreement to the contrary, a bailee must exercise reasonable care

*Gaudreau v. Belter*

* Test for bailment should be what is *reasonable in the circumstances*

*Longley v Mitchell Fur Company*

* Sent coat to D for summer storage and told the D the value of the coat was $3k. D insured coat for that value. D lost it while transporting it to Montreal via train. Fur company paid her $3k for which the coat was insured. However, she said it was worth $7k
* Not liable 🡪 D had to do what is reasonable in the circumstances
  + In this case transporting the coat in the manner was reasonable because they had been doing it for 21 years and there was not a single incident
* To require more of a bailment would make the bailee an insurer which it is not

**Bailment contract**

Enforced so long as the terms of the contract are enforceable

Terms such as: the services to be provided, the price to be paid by the bailee, the standard of care provided, limitations on liability, remedies for breach

**Limitation Clauses**

Courts do not like limitation clauses, so they require them to meet certain requirements.

Court will enforce them if the parties agree voluntarily and consensually but any ambiguity will be interpreted against the party seeking to uphold the clause.

*Solway v Davis*

* P contracted with D to have household contents moved out of old house, stored temporarily, and then move them to a new house. Goods stored in trailer and were stolen. The P sued for the value of the goods which were several hundred thousand dollars. D relied on limitation clause of $7k
* Limit on $7k would be unconscionable because D made false statements about the security of the goods

*Samuel Smith*

* Parked car in lot. Paid $0.5 to the attendant and left keys with him. When he returned, it was stolen.
* There were prominent signs limiting liability and the ticket given to the bailor stated that in large and unambiguous terms said that there was a limitation of liability
* Held that the signs were sufficiently clear and any reasonable person would observe them, thus D not liable

**Gratuitous Bailments**

Gratuitous bailment: Entirely to the benefit of the bailor’s benefit

Bailment without consideration: Entirely for the bailee’s benefit

In those cases, no contract because it’s gratuitous. Law still requires reasonable care in the circumstances. However, *standard of care is greatly decreased* because they are not compensated.

In most gratuitous bailments, you have an right to immediate possession.

Specific rules for: common carriers, repair & storage, innkeepers. Common law rules replaced by statutory rules in these areas

**Bailor vs a Third Party**

Can the bailor sue a person to crashed into the car while the bailee was in possession?

Claims based on P’s right to immediate possession

* Easy, they interfered with property

Claims based on P’s reversionary interest

* E.g. a lease for a year, bailor doesn’t have an immediate right of possession but will receive property interest back when the lease is done
* Difficult to make a successful claim but may have a claim stating that your reversionary interest has been devalued (that thing you will have an immediate right to possession in)
* Issues:
* (1) standing to use
* (2) calculation of damages
* *Punch*
  + Facts: P received ownership of ring from aunt, and sent it to a jeweler who could not repair it and sent it to another jeweler who shipped it back via CN to original jeweler. CN contract had a limitation clause. It was lost.
  + The bailor must give express or implied consent to the terms of the carriage in order for it to take effect
  + The bailor did not consent to the terms of the sub-bailee in this case, so the owner is not bound by the limitation clause
    - There is a duty of care between the owner and someone who comes into possession (sub-bailee)
* Another case where the person with reversionary interest is not an owner (no right to immediate possession) and someone else is a bailee
  + Only way to sue in this case is negligence; cannot claim damage to property because there is no property

**Bailee v Third Party**

Bailee can sue third party in tort

Can sue for the amount

* (1) standing to sue
  + *Armory*: possession alone gives standing to sue
* (2) Calculation of damages
  + *Armory*: confused rental value with ownership value
  + *Claridge* (**note: overruled by *Winkfield***)
    - Claridge is a bailee who was using the horse temporarily, and during which it was injured by the D’s negligence
    - Claridge cannot sue for the full possessory interest (aka for the bailor’s injury); only for his injury personally (temporary possession of the horse)
    - *As the bailee, you can only bring an action for the loss sustained by yourself*
    - The bailor can bring a separate action for the loss sustained by them
  + *Winkfield*
    - Ship sank with all of the mail it was carrying (bailee)
    - Claridge was wrongly decided
    - *in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods*
    - The bailor would then recover for their damages from the bailee

**Personal Property Torts**

* While property law explains a lot about the relationship (e.g. who has rights over the thing), it does not explain a lot about enforcing those rights
* Tort law used to enforce property rights
* Criminal law has lots of protections, but no benefit to victim generally
* Our focus will be the torts of trespass to chattel, detinue, and conversion (intentional torts); but there are other torts that protection property rights such as trespass to land, nuisance, negligence, rule Rylands v Fletcher

Possession is very important for some torts (recall: physical control and an intention to exclude others).

Pierson v Post; MV Polar Star (killed seals and spread skins for collection through a bunch of places; D wrongfully took them)

*Costello*

* Thief sues police for wrongfully converting stolen car (thief in possession and owner absent)
* Court upheld right of possessor

*Penfolds wines*

* Penfold (P) made wine and sold it in bottles, but retained ownership of bottles (put their name on them, etc.). The idea is that the customers would return the bottles
* The D gets the bottle of wine and puts in a different wine in the bottle, and then gives it to his brother. P subsequently sues D. Claim fails because P is in lawful possession
* *Trespass is a wrong to possession, not ownership*

You can also abandon property and thus lose your interest in it:

* *Wicks Estate*
  + To abandon property:
  + (1) Physical act of abandonment
  + (2) Intention to relinquish interest
  + Accidentally leaving behind drawings in house does not amount to abandonment
* *Air Canada v West Jet*
  + Documents shredded and tossed into recycling are abandoned

Need to distinguish between actual possession and the right to immediate possession

* Bailment classic case of right to immediate possession (e.g. bailee at will)

Things are messy when you discuss intangible chattels

* E.g. electronic information
* Technically they protect all chattels but these torts were founded upon tangible things
* *Century 21 v Rogers*
  + In easy cases where they steal the physical thing the data is stored on, it is trespass
  + But when data itself is stolen, the courts have not taken a stance (said the data was on a third party server and thus they did not have possession in this case)

Trespass to Chattels

* Initially limited to wrongful taking of chattels, but over time it expanded and now includes interfering with chattels

**Elements of Trespass to Chattels:**

1. **Intentional and direct interference with the P’s chattel**
   1. Intention: desire to bring about the consequences of one’s act
      1. Different from mens rea in criminal law (more than just the intention to perform the act itself)
      2. Test is subjective, with one objective aspect: consequences were certain or substantially certain to occur
   2. Direct: cannot be some intervening act between the D’s action and the tortious consequence
      1. Needs to be practically perfectly direct 🡪 e.g. throwing paint satisfies this, but rigging an elaborate trap so when a car drives somewhere the paint splashes is not direct

*Fouldes v Willoughby*

* P does not want to leave ferry so D takes two horses and leaves them off the ferry. D’s brother takes the horses. D’s moving horses off ferry enough to establish trespass to chattels?
* *A simple moving (asportation) of a chattel without any intention of making any use of it is not sufficient to establish a conversion, but may well be enough to establish a trespass to chattels*

Note about possession specific to tort of trespass to chattels

* because P must have possession, Ps who are entitled to possess something in the future cannot sue
* e.g. bailment for a term. The owner will get it back at some point, but not until the end of the term, so cannot sue
* To remedy this, tort law recognize an *innominate action for the benefit of owners who are out of possession and those who hold reversionary interests*

**Defences**

* Consent
* Mistake is not a defence
  + Even if you make a reasonable and honest mistake as to the ownership of the chattel, you are still liable (only need intent to produce the consequences of the act 🡪 e.g. you meant to take something and exclude someone else, but you may think it’s yours when it’s not)

**Remedy**

* Trespass to chattels is actionable *per se*
  + Does not need to be actual damage. Nominal damages awarded to reflect the violation of your right
* Need actual damages to be compensable
* Punitive damages available

Detinue

* **D is wrongfully withholding or maintaining a chattel to which the P has requested back and has a better property interest**
  + (1) P has a better right (not necessarily ownership)
  + (2) P must have requested return
    - Demand does not require an immediate return; D is entitled to reasonably inquire about the allegation
  + (3) D must have refused to return it
* Exceptions to demand/refusal requirement:
  + D’s conduct is already wrongful (e.g. D steals chattel and is aware of the P’s superior rights)
  + P can show that any such demand would on the facts be refused
* Normally, D needs to have possession, otherwise detinue will not work (trespass to chattel or conversion will work though)
  + Exception exists, but cases conflict:
    - *General and Finance*: certain Ds are estopped from denying that they do not have possession anymore
      * Depends on the class and type of the D
      * Does not care about what happens to chattel
      * Claim works but remedies may be an issue
    - *Aiken v Gardener*: claim from D who was improperly parted with possession of the chattel
      * e.g. threw it out, lit it on fire, etc.
      * Cares about circumstances by which you have possession

**Remedies**

* Actionable *per se*
* General remedy has three options:
  + All of these forms would include damages arising from the detention of the thing
  + Which of these options to award are at the court’s discretion
  + (1) Value of the thing
  + (2) get the thing back
  + (3) the value or return
    - D’s option
* *Value of the thing as of the day of the judgment*
* Punitive damages can be awarded

Conversion

**Intentional exercise of control over a chattel which so serious interferes with the right of another to control it that the intermeddler may justly be required to pay its full value**

*Boma*: conversion is a wrongful interference with the goods of another such as taking, using, or destroying the goods in a manner inconsistent with the owner’s right of possession

P’s interest in chattel for conversion would need:

1. **Possession or a right to immediate possession**
   1. recall: right to immediate possession enough for both conversion and detinue, but not trespass to chattels
2. **Requirement of loss**
   1. not actionable per se (unlike detinue and trespass to chattel)
3. **Intention**
   1. recall intention discussion in trespass to chattels (it’s the same)
   2. relates to the physical consequences of the wrong, not the legal consequences
   3. do not have to intend to violate the rights of the P
   4. *Mackenzie*
      1. D sent employees to retrieve his rafts that floated away and in the process of doing so they took someone else’s raft which also had flown again and was similar to D’s
      2. Liable for conversion because they intended to take the raft (no intention to steal someone else’s raft but that’s not necessary)
4. **Property** (the kind of property)
   1. Tangible assets, not land
   2. What about cheque?
      1. Tangible, but more than a piece of paper; evidence of a legal obligation
      2. *Numbered company case* (373 …. v Bank of Montreal)
         1. Held cheques are tangible property (harder question is for intangible chattels)
         2. Could recover for the physical cheque and underlying legal obligation
   3. What about intangible property?
      1. UK law differs: *OBG*: cannot convert intangible chattels; since conversion protects right of physical possession
      2. Canadian law says you could succeed in a conversion claim in respect of intangible property (e.g. McLachlan 🡪 name not important)
      3. What about goodwill?
         1. Canadian courts have split
         2. *Borden chemical*: misappropriation of a customer list; written on a customer paper; but damages were not awarded as to the value of the piece of paper but rather the value of the information on the paper
5. **Interference**: what form of interference with the chattel constitutes conversion?
   1. Requires the D to act in some positive way (e.g. hand cheque to wrong person, not leave cheque on desk and wrong person picks it up)
      1. The wrong is the assertion of the right that is not consistent with the P’s rights
   2. Examples of kinds of interferences that would suffice:
      1. Taking possession
      2. Causing the detention of the chattel (i.e. third party detains it)
         1. *Club Kruz Entertainment*: prevented P from leaving port but did not cause anyone to take the ship or claim the ship as their own
      3. Withholding possession
         1. But note: as long as you are prepared to give it back within a reasonable time, that is not contrary to your rights (e.g. asks to give it back at 3am, you say you’ll drop it off in the morning)
      4. Transferring possession (i.e. selling it or giving it away)
      5. Destruction, damage, use
         1. Though using it is usually not sufficient since we commonly use things while not asserting rights in the thing that are inconsistent with the rights of the owner (e.g. pencil example)
      6. Asserting ownership
         1. *Miller v Jackson*: discussion about ownership; would not be wrong to leave the ball on your property and deny them the right to retrieve it, but taking it is asserting ownership (cannot do that)

**Defences to Conversion:**

1. Consent
   1. P consents to the interference with the right in the chattel
   2. E.g. numbered company case 🡪 Lacosta was sole shareholder and directing mind; therefore there is consent (owner of the cheque and consented to it being handled that way)
2. Mistake
   1. Generally not a defence (*Mackenzie*)
   2. 3 exceptions
      1. involuntary bailees
         1. Does not acquire possession of the chattel by choice
         2. E.g. by mail, if someone left something in your house
         3. There are still duties like any other bailee, but they are lesser
         4. Not liable for misdelivery of the property as long as they took reasonable steps to give it to the owner of the property and deliver it for that purpose
      2. Rule in *Hollins v Fowler*
         1. D receives item from someone who is not the true owner and returns it to that person; cannot be sued by true owner for conversion
      3. Under certain statutes, an estate can be a defence (consignment)

**Claims between two innocent parties**

Two legal maxims that clash

* *Nemo dat*: one cannot give what they do not have (title does not pass to buyer)
* *Bona fide* purchaser: buyer bought in good faith (no reason to suspect anything) and put up good consideration
* Generally the law prefers *nemo dat*
  + Unless the chattel is money
* Statutory exemptions:
  + Sale of Goods Act
  + *Barton*: example of how the statute protects a subsequent buyer; buyer let seller keep possession of it who sold it to the subsequent buyer
    - This rule makes sense because the buyer is “more” at fault (let the seller keep possession after paying for it/acquiring title)

**Remedies**

* *Aitken*: Conversion requires the forced sale that requires the D to pay the market value of conversion (unlike detinue)
* Generally conversion provides monetary damages
* But possible for the P to get the specific thing back if D chooses to give it back and P agrees (*Mackenzie*); but court cannot order it back
  + In this case: best P would receive is nominal damages
* *Fleming*: no nominal damages for an innocent conversion with no loss
* Punitive damages are available
* Consequential losses can be recovered (*General and finance*, *Aiken*)
  + the judgment is for a single sum of which the measure is generally the value of the chattel at the time of conversion and any consequential damages that follow from the conversion and are not too remote
* P receives *value of the thing at the time of conversion*
* What happens in conversion of the value of the thing rises over time?
  + D keeps the profit.

Therefore, several things flow from this:

1. If you have a thing that rises in value over time, you are better off suing in detinue
   1. If the opposite is true, you would rather sue at conversion
2. Can plan around what we anticipate courts will do
   1. if you are holding the thing to make a gain, you can buy something similar
3. *Conflicting judicial decisions whether you can get the gain under the general principle of consequential loss*
   1. Gain is arguably another form of consequential loss
   2. First approach:
      1. *Aiken*
         1. suggests you can get the gain as consequential losses if:
         2. (1) increase would have happened anyway (regardless of anything the D did)
         3. (2) the P did not know or should have known of the conversion
         4. But then the court provides some broad language
            1. Maybe you can even get the gain if you do know that is converted
      2. *Sacks*: also takes a broad view of the recovering gains under the heading of consequential losses
   3. Second approach:
      1. *General and Finance* and *Steiman*: no consequential loss on gain (assumes P mitigated by replacing chattel as early as reasonably possible)

**Intellectual Property**

**Justifications for IP**

* Lockean Theory of Entitlement 🡪 author’s rights are the ends (reflected in droit d’auteur (in Europe))
  + People entitled to fruits of their labour
  + But, limitation: need “enough and as good” left for others; one must not take more than one can use
  + Three core rights: (1) right to use and enjoyment, (2) right to exclude others, (3) right to transfer
* Utilitarianism 🡪 copyright and patents are means to an end, not an end themselves (meant to promote creation of work (seen in Statute of Anne and US Constitution)
  + to promote the progress of science and the useful art
  + provide incentives for production of works
  + assumption that there are more benefits from the creation of additional works and disclosures than losses from limiting access and costs of administration
  + contention of whether they increase the use of intellectual property more than they restrict availability/use

Economic Justifications: key concepts: rivalry and exclusivity

* pure public goods: non-rival and non-exclusive
* pure private goods: rival consumption (use depletes good), exclusive mechanism present

Copyright

Outline of Copyright

* Copyright subject matter (works and other subject matter)
* Idea-expression dichotomy, originality and fixation
* Formalities, duration, ownership and assignments
* Owners’ exclusive economic rights
* Authors’ moral rights
* Copyright infringement
* Defenses to infringement and users’ rights

Key concepts:

* Utilitarian vs rights-based theories of justification
* Private Goods vs Public Goods
* Subsist (copyright “subsists” in works and other subject matter)
* Works (literary, dramatic, musical artistic)
* Other subject matter (performers’ performances, sound recordings, broadcast signals)
* Authors and Owners
* Economic Rights and Moral Rights
* Originality
* Ideas and Expressions
* Fixation
* Public Domain
* Infringement

**2 systems of copyright laws**

* (1) Anglo copyright system (utilitarian-based) (American/
* (2) Authors rights (droit d’auteur) (European)
* Canada has mixed influence from these two

**(1) In what subject matter does copyright subsist?** (note: sections are not important, just the concepts)

* s 3: work
  + s 5(1): every *original* *literary, dramatic, musical, and artistic* work
    - such as (not exhaustive), compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science
    - literary work: includes tables, computer programs, and compilations of literary works
    - dramatic work: includes (a) any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise, (b) any cinematographic work, and (c) any compilation of dramatic works;
    - musical work: *means* work of music or musical composition, with or without words, and includes any compilation thereof
    - artistic work: includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works
    - “compilation” means (a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or (b) a work resulting from the selection or arrangement of data
* Other subject matter:
  + s 15, 26: performer’s performance
  + s 18: sound recording
  + s 21: communication signal
* Must differentiate between works and other subject matter because they have different rules and legal consequences

**Idea-expression dichotomy**

* Copyright does not apply to facts/ideas
* Copyright applies to the original expression of ideas in a tangible medium (fixed)
* *Baker* (USSC)
  + Blank account books not subject to copyright (facts) but the book is
* *Cuisenaire* (SCC)
  + P created method of teaching children math through colored rods of different lengths and described it in a book
  + Method was not protected by copyright, but the book was a work and thus received copyright protection
* *Anne of Green Gables*
  + Copyright includes right to licence depictions of characters

**(2) Criteria for copyright to subsist in a work**

* **Originality** (standard set in *CCH v LSUC*)
  + Exercise of skill and judgment
    - Between “sweat of the brow”/industriousness standard and creativity standard
    - Need not be unique, but expression is the exercise of skill and judgment
    - Skill 🡪 use of one’s knowledge, developed aptitude or practised ability in producing the work
    - Judgment 🡪 use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work
    - The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise
      * E.g. changing the font of a work is too trivial
* **Fixation** (but not required for a performer’s performance

**(3) Formalities and Registration, Assignment, Crown Copyright**

* No requirement of registration but has benefits includes (1) evidence of facts (raises presumption of ownership) and (2) prevents D from claiming innocent infringement
* Duration: Life + end of year which author dies + 50 years; afterward it becomes part of the public domain
* Initial ownership of copyright in works
  + Generally: author is the first owner
  + Exception: employer for works made in the course of employment
    - Has conditions to apply: (1) employment of another under contract, (2) work made during course of employment, (3) absence of any agreement to the contrary
* Initial ownership in other subject matter
  + Performers’ performance 🡪 performer
  + Sound recording 🡪 maker
  + Communication signal 🡪 broadcaster
* Assignment
  + Can assign economic rights in whole or in part, as you wish (very flexible)
  + CANNOT assign moral rights
  + Same rules apply to performers’ performances and sound recordings
* Crown Copyright
  + Copyright subsists in Crown’s (government) work (unlike US)
  + But strong licence provided

**(4) Owner’s Economic Rights in a Work (s 3(1))**

* Sole right to produce/reproduce any substantial part thereof in any material form, perform the work, publish the work, convert the work, etc.
* And sole right to authorize such acts

*Theberge*

* D lifted ink off the first medium and put it onto a canvas
* Only one work – no infringement of copyright
  + New fixation does not infringe copyright; one copy is one copy
* There were not extensive changes (only the medium)
  + But if they were to do more, e.g. transfer ink onto another one of the author’s works, then perhaps there would be infringement

Communication to the public (right)

* *CCH*: fax transmissions to single person is not communication to the public
* *Rogers v SOCAN*: streaming services constitute communication to the public

Authorization right

* *CCH*: Photocopies in library did not infringe authorization right (the library was not authorizing the users to infringe copyright 🡪 assumes that they will act legally; and measures taken to ensure that)
  + Library lacks sufficient control over patrons to permit conclusion that they authorized it
* Authorize 🡪 sanction, approve, countenance (give approval to/encourage)

However, in *CCH* there was a prima facie reproduction right violation; then move on to fair dealing to determine if there is an infringement

(5) Copyright Infringement (s 27)

* For any person to do anything that only the owner has the right to do without the consent of the owner
* Applies to other subject matter was well
* *Consent can be implied*

Moral Rights (different from economic rights)

* Exist in Canada but barely in the US
* Described as:
* (1) the right to the integrity of the work
  + Only if the work or performance is, to the prejudice of the author’s or performer’s honour or reputation,
    - (a) distorted mutilated or otherwise modifies, or
    - (b) used in association with a product, service, cause, or institution
  + Subjective and objective elements used to determine prejudice to author’s reputation (case law after *Snow* advocate for objective assessment)
  + Now prejudice is deemed presumed for painting, sculptures, or engravings
  + Snow v Eaton
    - Hats on geese sculpture
    - Wins.
* (2) the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym
  + BUT, limited to where it is “reasonable under the circumstances”
* (3) the right to remain anonymous
* Cannot assign moral rights, but can waive them in whole or in part
* Duration of moral rights same as copyright
* Moral rights also expanded to performers with respect to “live aural performances or performances fixed in a sound recording” (i.e. not dancers)
* Comparison to French: perpetual and inalienable

Review (questions to ask for whether prima facie copyright infringement has been met)

* Is there protectable subject matter?
* Have requirements of fixation & originality been met?
* Is the work or other subject matter still within the copyright term?
* Has one of the section 3 rights (i.e., reproduction, public performance, communication, authorization, etc) been implicated?
* In the case of a reproduction or public performance, the threshold requirement of substantiality been met?
* Was there consent (which can be either expressly or implicitly given and which can be written or oral)?

Fair Dealing (defence to copyright infringement, after prima facie violation has been established)

* Two Part Test
  + (1) activity comes within enumerated categories
  + (2) apply fair dealing factors
* Step 1: Fair dealing for the following purposes does not infringe copyright (must fall into one of the categories):
  + research, private study, education, parody or satire does not infringe copyright
  + criticism or review and news-reporting (with certain attributions)
* Relationship between moral rights and fair dealing still vastly unknown
* Michelin: Strict interpretation (no longer used for fair dealing cases)
* Allen v Toronto Star: first sign of “purposive” approach to fair dealing
* American cases can be useful in guidance since they are similar, though not binding
* *CCH* (leading decision)
  + User’s rights and owner’s rights is a balancing exercise (user’s rights are not a strict exception)
  + Step 2: ***Six factors to determine fairness:***
  + Purpose of the dealing
    - Allowable purpose that falls into one of the enumerated categories
    - Consideration of motive; e.g. charitable vs commercial purposes
    - Purposive interpretation of the real purpose/motive
    - Point of view of end user
  + Character of the dealing
    - Multiple copies widely distributed or single copy?
    - Copy destroyed after use?
    - Custom/practice of industry considered
  + Amount of the dealing
    - Not determinative; in some uses it is acceptance to copy entire work
    - Acceptance amount depends on the purpose
    - From the point of view of end user
  + Alternatives to the dealing
    - Defence more likely
    - Availability of a licence is not relevant
  + Nature of the work
    - Strong public interest?
    - Was the work disseminated widely or confidential (tip toward unfair)?
  + Effect of the dealing
    - Is it a market substitute? Economic impact on owner?
* to establish fair dealing, need to show that either:
  + (1) all individual dealings with the materials were fair, OR
  + (2) their *own practices and policies* were fair
* No authorization of copyright by posting a notice warning that they are not responsible for any copies made in infringement of copyright
* **Pentalogy**: *emphasis on USER’S rights* (not the copyright owner and not the institution providing access necessarily)
* SOCAN v Bell
  + Online music previews fall within the scope of research (for the user)
  + Research is broad; generous interpretation of categories in the first stage of analysis (fair dealing enumerated categories)
  + *User’s rights point of view, not provider*
  + streaming; millions of streams but only one per user!
  + Streaming = temporary copy, which is destroyed upon completing stream
* Alberta v Access Copyright
  + Education K-12: Within private study; now education is a category
  + Private study does not have to be completely private
  + User’s rights: when board is sued for teachers copying, there are millions of copies, but only one per student

There are also other defences available apart from fair dealing

* For educational institutions, libraries, museums, people with perceptual disabilities, etc.

Trademarks

* word, symbol, drawing, shape, packaging, colour (or combination) used to distinguish a product or service from others
* creates a mental link between consumers and trademark owner
* purpose is to distinguish different wares and services from each other
  + protects consumers by providing them with information about the source
* Federal jurisdiction, but some components in provincial jurisdiction (e.g. tort of passing off, slander of title)
  + Features a national registry system
* Once trademark is registered, it enjoys a presumption of validity but it can be impeached
  + Party opposing the mark has burden of proof though

**Types of Marks**

* Common law marks (unregistered) have as a remedy the tort of passing off
* There are also official marks
* Forms of registered trademarks: proposed marks (which become registered), general registered trademark, distinguishing guise, certification marks)

**What is a trademark?** (s 2)

* (1) a mark that is **used** by a person for the purpose of distinguishing or so as to *distinguish wares or services* manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others
  + Note: used is a very important concept because it must actually be utilized to be valid (entire concept of trademarks)
* (2) a certification mark
  + means a mark that is used for the purpose of distinguishing or so as to distinguish goods or services that are of a defined standard with respect to
* (3) a distinguishing guise
  + a shaping of goods or their containers or a mode of wrapping or packaging goods
* (4) a proposed trademark

Is the mark registrable? (note registrable means this is a pre-condition but not sufficient)

* **Cannot be:**
* Person’s Name**:** name or surname of individual living or who has died within preceding 30 years
  + But small exception for already-well known goods under that name and meaning other than name/surname (e.g. town)
* Either clearly descriptive or deceptively misdescriptive
* Name in any language of any wares in connection with which it is used
* *Confusing with an existing mark*

Central concepts

* **Use**
  + Enforcement requires particular use
  + For goods: marked on wares themselves or on packaging
  + For services: displayed in performance or advertising of services
* **Confusion**
  + Governs liability
  + Uses hypothetical of “casual purchaser in a hurry”
  + All relevant circumstances considered, including the factors
  + **Factors**:
    1. Inherent distinctiveness and extent to which it is known
    2. Time in use
    3. Nature of the wares
    4. Nature of the trade
    5. Degree of resemblance
* **Distinctiveness**
  + Essence of trademark for acquisition and enforcement purposes

*Pink Panther*

* Pink panther movie and pink panther beauty products
* Movie mark is strong but products are too dissimilar to cause confusion

*Lexus*

* Lexus car brand and lexus canned foods
* Pink Panther correct; the wares are too different to cause confusion

*Barbie* (*Mattel*)

* Barbie doll and barbie’s restaurant
* Mark did not cause confusion; enormous difference between nature of the wares
* Possibility of confusion but falls short of “reasonable likelihood of confusion”

Owner’s “exclusive right” (s 19)

* Use the trademark **throughout Canada** in respect of *those wares/services*

Patents

Patents are a bargain: inventor discloses the patent and in exchange the inventor gets a monopoly for 20 years

Contrast with confidential information: no term limit, but protection is lost if information is disclosed (including through reverse engineering, inadvertently or wrongfully)

**Patent Requirements**

* New (novelty)
  + One-year grace period
* Non-obvious (this is inferred from novelty)
  + Not obvious to a person skilled in the art
* Useful (utility)
  + Must work
  + Made out either through demonstration or sound prediction
* Patentable subject matter (closed list 🡪 “means”)
  + Art, process, machine, manufacture, or composition of matter
  + Can be an improvement of another invention
    - But you only receive right to improvement, cannot practice the patent it was based off of without a licence

Cannot patent mere scientific principles or abstract theorems (Only applications thereof)

**Life Forms**

* *Diamond v Chakrabaty* (USSC)
  + Question is not whether it is animate or inanimate
  + But rather whether it is made by a person or naturally occurring
* *Abitibi*
  + Yeasts able to because of their ability to reproduce the yeast uniformly
* *Pioneer*
  + Strain of naturally grown plant derived from artificial cross-breeding is not an invention
* *Harvard college (mouse)*
  + The methods for producing the onco-mice were patentable
  + The onco-mice were not patentable
  + Development of genetically engineered mouse in the uterus of host mouse (hence, laws of nature apply, some features transcend the mouse, therefore no longer fully control reproduction)
  + Manufacture is for non-living mechanist product/process
  + Composition of matter does not include higher life form

**Exclusive Rights of Patent-holder**

* Make, construct, use, sell
* Date of filing + 20 years

**Patent infringement**

* You reference the claims as contained in the patent application
  + Legal question: construing the claims of the patent
  + Factual question: do they allegedly infringing acts fall within the claims
* *Monsanto v Schmeiser*
  + Strain of seeds
  + Farmers not allowed to “save seed”
  + Argument not successful that they “blew” onto his property
  + Onus on the D to impeach it since it was already issued
* Assignability of patents
  + Assignable in whole or in part
  + Assignment Needs to be registered with the patent office