**Property Law Summary**

Table of Contents

[The Physical Dimensions of Ownership 3](#_Toc37986967)

[Property: Mainstream and Critical Positions 3](#_Toc37986968)

[Property and the Right to Exclude 3](#_Toc37986969)

[*Didow v Alberta Power Limited*, 1988 ABCA 257 3](#_Toc37986970)

[*Manitoba (AG) v Campbell* (1983) 24 Man R (2d) 70 4](#_Toc37986971)

[*Edwards v Sims* 232 Ky. 791; 24 SW 2d 619; 1929 Ky. LEXIS 451 4](#_Toc37986972)

[*Bullock Holdings v Jerema* [1998] BCJ No 142 (BCSC) 5](#_Toc37986973)

[*Robertson v. Wallace* 2000 ABQB 1020, 276 AR 201 Alberta Court of Queen’s Bench 6](#_Toc37986974)

[*R v Nikal* [1996] 1 SCR 1013 6](#_Toc37986975)

[*Welsh v. Marantette* (1983) 33 OR (2d) 137 (Ont. Sup. Ct.) 7](#_Toc37986976)

[Estates in Land and Corresponding Future Interests 8](#_Toc37986977)

[*Thomas v Murphy* (1990) 107 NBR (2d) 165 (NBQB) 9](#_Toc37986978)

[*Re Walker [1924] 56 OLR 517 (CA)* 9](#_Toc37986979)

[*Re Taylor (1982) 12 ETR 177 (Sask Surr Ct)* 9](#_Toc37986980)

[*Re McKellar* (1972) DLR (3d) 289 (Ont. HC) 10](#_Toc37986981)

[*Re Tilbury West Public School Board and Hastie*, (1966) 55 DLR (2d) 407 (Ont HC) 10](#_Toc37986982)

[*McKeen Estate v McKeen Estate, (1993) 132 NBR (2d) 181 (QB)* 11](#_Toc37986983)

[*HJ Hayes Co v Meade* (1987), 82 NBR (2d) 419, 208 APR 419 (NBQB) 11](#_Toc37986984)

[*Re Tepper’s Will Trusts* [1987] 2 WLR 729 (Ch D) 12](#_Toc37986985)

[*McEachern v New Brunswick Housing Corp (*1991), 117 NBR (2d) 174 (NBQB) 13](#_Toc37986986)

[*Re Leonard Foundation Trust* (1990) 37 Ont App Cas 191 (CA) 13](#_Toc37986987)

[Registration Systems and Modern Conveyancing 15](#_Toc37986988)

[Registration of Interests in Land 15](#_Toc37986989)

[*Lawrence v Wright* 2007 ONCA 74, 84 OR (3d) 94 15](#_Toc37986990)

[*Walcer v Shmyr* (1982) 136 DLR (3d) 723, 19 Sask R 433 Saskatchewan Court of Appeal 17](#_Toc37986991)

[*Re Ellenborough Park* [1955] 3 All ER 667 17](#_Toc37986992)

[*Shelf Holdings Ltd v Husky Oil Operations Ltd* (1989) 65 Alta LR 300 (CA) 19](#_Toc37986993)

[Equity 19](#_Toc37986994)

[*Pecore v Pecore* 2007 SCC 17, [2007] 1 SCR 795 Supreme Court of Canada 19](#_Toc37986995)

[*Peter v Beblow* [1993] 1 SCR 980 21](#_Toc37986996)

[*Kerr v Baranow*, 2011 SCC 10 23](#_Toc37986997)

[De Facto Expropriation 24](#_Toc37986998)

[British Columbia v Tener, [1985] 1 SCR 533. 24](#_Toc37986999)

[Mariner Real Estate Ltd. v Nova Scotia AG, (1999) 177 DLR (4th) 696. 26](#_Toc37987000)

[Canadian Pacific Railway v Vancouver, [2006] 1 SCR 227 28](#_Toc37987001)

[Personal Property 29](#_Toc37987002)

[What Constitutes Personal Property? 29](#_Toc37987003)

[*R v Stewart*, 1 SCR 963 (1998) 31](#_Toc37987004)

[*R v Offley*, 1986 ABCA 110 32](#_Toc37987005)

[*Nowegijick v The Queen,* SCC, 1982 1 SCR 29 at para 38-39 32](#_Toc37987006)

[Classifications of Property 33](#_Toc37987007)

[*International News Services v The Associated Press*, 248 US 215 (1918, Supreme Court of the United States) 33](#_Toc37987008)

[*Victoria Park Racing and Recreation Grounds Ltd v Taylor* (1937), 58 CLR 479 (Aust HC) 33](#_Toc37987009)

[*JCM v ANA* 2012 BCSC 584 35](#_Toc37987010)

[*Brown v R in Right of British Columbia* (1980) 107 DLR 3d 705 (BCCA) 36](#_Toc37987011)

[*Nakhuda v Story Book Farm Primate Sanctuary*, 2013 ONSC 5761 Ontario Superior Court of Justice 37](#_Toc37987012)

[The Concept of Possession 38](#_Toc37987013)

[*Pierson v Post* 3 Cai R 175, 1805 NY 38](#_Toc37987014)

[*Popov v Hayashi* 2002 WL 31833731 (Cal SC) 39](#_Toc37987015)

[*Keefer v Arillotta*, (1976) 13 OR (2d) 680 (ONCA) 40](#_Toc37987016)

[*Teis v Ancaster (Town)*, (1997) 35 OR (3d) 216 ONCA 42](#_Toc37987017)

[Abandonment and Finder’s Rights 43](#_Toc37987018)

[*Simpson v Gowers et al* 1981 CanLII 1884 (ON CA) 43](#_Toc37987019)

[*Armory v Delamirie* (1722) 93 ER 664 (KB) 44](#_Toc37987020)

[*Hannah v Peel* (1945) 1 KB 509 44](#_Toc37987021)

[*Grafstein v Holme And Freeman* (1958) Ont CA 45](#_Toc37987022)

[*Parker v British Airways Board* [1982] QB 1004 47](#_Toc37987023)

[*Weitzner v Herman* [2000] OJ No 906 ON Superior Court 49](#_Toc37987024)

[Gifts 49](#_Toc37987025)

[*Rawlinson v Mort et al*, (1904-1905), 21 TLR 774 (KB) 49](#_Toc37987026)

[*In Re Cole*, [1963] 3 WLR 621 50](#_Toc37987027)

[*Watt v Watt Estate*, (1987) 28 ETR 9 (Man CA) 51](#_Toc37987028)

[*Hoiland v Brown*, (1980), 19 BCLR 4 (Co Ct) 51](#_Toc37987029)

[*Nolan v Nolan & Anor*, 2003 VSC 121 52](#_Toc37987030)

[*Re Bayoff Estate*, [2000] SJ No 114, 2000 SKQB 23 53](#_Toc37987031)

[*Thomas v The Times Book Co Ltd*, [1966] 2 All ER 241 (ChD) 55](#_Toc37987032)

[Bailment 56](#_Toc37987033)

[*Gobeil v Elliot* (1996), 159 Sask R 282 (QB) 56](#_Toc37987034)

[*Mason v Westside Cemeteries Ltd (*1996), 135 DLR (4d) 361 57](#_Toc37987035)

[*Blumenthal v Tidewater Automotive Industries (*1978), 29 NSR (2d) 291 (CA) 59](#_Toc37987036)

[*Taylor Estate v Wong Aviation Ltd*, [1969] SCR 481 59](#_Toc37987037)

[*Punch v Savory Jewellers Ltd*, 1986 ONCA 60](#_Toc37987038)

The Physical Dimensions of Ownership

* The maxim *cujus est solum ejus est usque ad coelum et ad inferos* means (roughly) whoever owns the soil, holds title all the way up to the heavens and down to the depths of the earth.
* Maxims is a concept of law, not an actual law.
* The courts have resisted applying the maxim literally.
* Instead they are limited in a way that strikes a balance between the realistic needs of landowners and those of the public, for whom the air is common property.
* Some courts speak of a standard based on ordinary use or define the limits on the basis that an intrusion must not interfere with actual or potential use and enjoyment.

Property: Mainstream and Critical Positions

* In current common usage, property is things; in law and in the writers, property is not things but rights, rights in or to things.
* What distinguishes property from mere momentary possession is that property is a claim that will be enforced by society or the state, by custom or convention or law.
* Common property is the property of the individuals, not the state.
* The state creates the rights, the individuals have the rights.
* State property, then, is to be classed as corporate property, which is exclusive property, and not as common property, which is non-exclusive property.
* State property is an exclusive right of an artificial person.

Property and the Right to Exclude

* It is possible to identify three different intellectual traditions regarding the role of the right to exclude:
  + Single-variable essentialism
    - Posits that the right to exclude others is the irreducible core attribute of property.
    - Another version posits that the essence of property lies not just in the right to exclude others, but in a larger set of attributes or incidents, of which the right to exclude is just one.
  + Multiple-variable essentialism
    - The right to exclude is a necessary but not a sufficient condition of property.
  + Nominalism
    - Views property as a purely conventional concept with no fixed meaning – an empty vessel that can be filled by each legal system in accordance with its peculiar values and beliefs.
    - States that property is a “bundle of rights”. Moreover, this bundle has no fixed core or constitutional elements. It is susceptible of an infinite number of variations, as different “sticks” or “strands” are expanded or diminished, added to or removed from the bundle altogether.
* The nominalist conception is the orthodox understanding of property within the American legal community.

*Didow v Alberta Power Limited*, 1988 ABCA 257

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| **Facts** | Alberta Power Limited constructed a power line (made up of 4 power poles) on the municipal road allowance along the east side of the appellants’ land. The crossarms conductors and attaching wires at the top of each pole protrude six feet into the airspace above the appellant’s land. The appellants consider the overhangs to be unsightly and expressed concerns about the danger associated with the lines and the location and operation of tall machinery and equipment. Additionally, the appellants state that the overhang will restrict the use of aerial spraying and seeding on the land, as well as a reluctance to plant trees under the overhang. At trial, the judge determined that there was no tresspass because the apellants were not making use of the space and had no intention to do so, and as such did not possess the area in question. |
| **Issue** | 1. Whether the overhangs installed by the respondents trespass the airspace of the land that the appellants own. 2. What part of the airspace does Didow own? |
| **Ratio** | The ratio of this case lies in the balancing criterion formulated by Griffiths, J. Haddad J. adopts this test and views it as saying: “a land owner is entitled to freedom from permanent structures which in any way impinge upon the actual or potential use and enjoyment of his land. This amounts to trespass.” [para40]. |
| **Reasoning** | Haddad, J. establishes through Wandsworth Board of Works v. United Telephone Co. (1884) 13 Q.B.D. 904 that a land owner has the right to the airspace above their land despite not explicitly stating the extent of those rights. He then cites Kelsen v. Imperial Tobacco Co. (1957) 2 All. E.R. 343 which Haddad, J. uses to discredit the trial judge’s reasoning that the appellants were not making use of the airspace and thus no trespass occurred. Haddad, J. proceeds to attack the respondent’s “strongest” submission, which is that the appellants were not making any use of the land, and a trespass can only occur if it materially interferes with the use or enjoyment of that space. Haddad, J. looked to the “balancing” criterion formed by Griffith, J. in Lord Bernstein of Leigh v. Skyviews & Gen. Ltd., [1977] 2 All E.R. 902 at 907 and found that to be most persuasive in discrediting the respondent’s argument whilst also providing a “logical compromise to the rights of the landowner and the general public” [para40]. |
| **Holding** | 1. The cross arms installed by the respondents interfere with the appellants potential and actual use and enjoyment, and thus interfere with their airspace which amounts to trespassing. 2. You own as much airspace as you can potentially and reasonably enjoy and use. |

**Takeaway:** “a land owner is entitled to freedom from permanent structures which in any way impinge upon the actual or potential use and enjoyment of his land. This amounts to trespass.”

*Manitoba (AG) v Campbell* (1983) 24 Man R (2d) 70

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| **Facts** | The Municipal Airport Commission decided to extend the 2500-foot runway northeastward by another 1500 feet. The defendant, whose farm is adjacent to the land is upset by the proposed extension. He has already had several problems with low flying aircrafts. The Planning Act was created so that the land could be controlled, and the project completed. However, just before the Planning Act went into effect, the defendant built a tall steel structure that made it impossible to fly at night and resulted in several curtailed flights. |
| **Issue** | Does Campbell’s right outweigh the safety of the public? |
| **Ratio** | “Until the issues in the action have been determined, concern for the public in the air and the public on the ground must prevail over the possible right of a disgruntled citizen to imperil public safety by indulging in a frustrated tantrum”. |
| **Reasoning** | The explanation behind the steel tower’s existence is questionable at best and not congruent with the filed affidavit. This led the judge to believe that the plaintiff erected the structure to obstruct the operation of the airport. Since the defendant did not breach any provincial or federal enactment, the case for the plaintiffs comes down to nuisance. As per decisions in *Commonwealth of Pennsylvania, et al v Von Bestecki* and *United Airports Co of California, Ltd v Hinman*, the courts decided that any structure which served no purpose other than a menace to safety were nuisances. The defendant’s steel structure, as mentioned before, serves no purpose other than to obstruct the airport, and is thus a nuisance. |
| **Holding** | No, the defendant must remove the steel structure. |

**Takeaway:** Property rights are not infallible. Property rights can lead to causing a nuisance towards another person’s property or towards the safety of the general public or government, and this can be unlawful.

*Edwards v Sims* 232 Ky. 791; 24 SW 2d 619; 1929 Ky. LEXIS 451

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| **Facts** | Edwards discovered the mouth/entrance of a cave beneath his land. He allowed people to enter and see the cave for money. However, part of the cave, approximately a third of it, was located directly under the lands of Lee. The cave was some 360 feet below Lee’s lands, was inaccessible to him. An action was commenced by Lee against Edwards for trespass. |
| **Issue** | 1. Can the court order a survey of the cave to determine if Edwards is trespassing on Lee’s property? 2. If so, is there a trespass? (Sims is the one ordering the survey, he’s the trial judge). |
| **Ratio** | “A court of equity, however, has the inherent power, independent of statute, to compel a mine owner to permit an inspection of his works at the suit of a party who can show reasonable ground for suspicion that his lands are being trespassed upon through them, and may issue an injunction to permit such inspection.” |
| **Reasoning** | Two conditions  1. Lee must meet the burden to show that a bona fide claim exists by alleging facts showing a necessity for the inspection  2. Because Edward’s property is to be inspected, he must be given reasonable opportunity to be heard.  These conditions were met. There is also no difference between the concept of inspecting mines and that of a cave. |
| **Holding** | Edwards’ appeal was dismissed, and the survey will happen. |

**Takeaway**: The court applied the maxim which states that an owner of land owns everything above and below. However, Logan, J. dissented and said that this is unreasonable and that an owner of land only really owns what he can really use above and below. Since Sims can’t even access, let alone use the cave, he does not own that part of the land and is not entitled to conduct a survey.

*Bullock Holdings v Jerema* [1998] BCJ No 142 (BCSC)

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| **Facts** | The defendants bought their land in 1992. The plaintiff bought his land in 1993. The common boundary between the two lots is 160 feet in length, with the plaintiff’s lot a few feet higher than the defendant’s at different points along the lot line. The defendants cleared their lot to make it more level, and blasted rock along the boundary which created a sharp line that is 3 to 10 feet in height difference between the two properties. The back one quarter of the line is loose soil and the defendant says they did not alter that area. The plaintiff wanted to install a mobile home and septic tank but was told he is unable to because the loose soil in the back quarter of the common boundary would make the septic tank susceptible to break-out points. An engineering report commissioned by the plaintiff said that a setback was needed or a retaining structure to stabilize the open cut for the full length of the property was needed so that any structure would not fail. The defendants said they would use their own engineering specifications but did not inform the plaintiff of what they were. The plaintiff expressed concerns about the adequacy of such proposal. No agreement could be reached on specifications. |
| **Issue** | 1.Does the plaintiff have a right to lateral support for its property, including the septic tank and field, and if so, have the defendants caused a loss of such lateral support for which they are liable to the plaintiff?  2.Have the defendants breached a common law duty to act reasonably in the use of their land to prevent or minimize a known risk of damage or injury to the plaintiff’s property for which they are liable to the plaintiff? |
| **Ratio** | “The general principles are set out in a series of older English decisions. In *Dalton v. Henry Angus & Co.* (1881), 6 App Cas 740 (UK HL), the House of Lords held that the owner of land has against a neighbor the right to have his or her soil supported in its natural state by the soil of the neighbor. Such right does not, however, extend to having the adjoining soil remain in its natural state.” |
| **Reasoning** | 1.There has only been minimal subsidence if any caused by the disturbed soil. There is also no evidence that the septic tank would be suitable to install before the defendant’s work. It is unclear what the cause of the plaintiff’s claim is. The restriction of the building envelope is not the result of actual subsidence and, therefore not a “consequence” of subsidence. It has not been established that the defendants excavated the loose soils area, and therefore there is no compelling evidence for the plaintiffs to extend the retaining wall to this area. There wasn’t enough evidence that the blasting resulted in loss of lateral support.  2. The plaintiff also misinterpreted the principle enunciated in *Leakey* which says “the duty owed to a neighbor is owed not only in cases where a hazard is created or caused by human activity but also in cases where the hazard arises as the result of natural causes.” |
| **Holding** | The action is dismissed. The plaintiff has not proven that the defendants have caused a loss of lateral support to the plaintiff for which they are liable to the plaintiff. In addition, the plaintiff’s argument that there is a separate common law duty transcending the duties included within the defendants’ duty not to interfere with the plaintiff’s right to lateral support of its land does not add to or support the plaintiff’s claim in this case. |

**Takeaway**: It is not a trespass if alterations are made to the common line of two properties.

* In Canada, you have the right to lateral support of your property.
* Loss of lateral support + damages = right to compensation
* Loss of lateral support and no damages = no right to compensation

*Robertson v. Wallace* 2000 ABQB 1020, 276 AR 201 Alberta Court of Queen’s Bench

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| **Facts** | A survey was done in 1893 that separated the land between the Robertsons and Wallaces along the west bank of the river. Another survey was done in 1994 that gave the Wallace’s 20 more acres and created overlapping titles to some lands. Mrs. Wallace sold her interest to someone else and when Mrs. Robertson tried to use what she thought was her land, she was challenged. |
| **Issue** | Was there an agreement on the boundary? |
| **Ratio** | “The principles set out in these cases illustrate that the necessary elements to prove a conventional boundary are: there must be adjoining land owners, they must have a dispute or uncertainly about the location of the dividing line between the properties, they must agree on a division line, and then recognize it as a common boundary.” |
| **Reasoning** | The recognition of a conventional line can be oral, or in writing or by conduct, but the evidence to support the conventional line must be clear and definite. The onus of proof is on the party claiming ownership by virtue of the conventional line. There is evidence to suggest a disagreement about the boundary. There is no direct evidence of an express agreement as to the boundary. |
| **Holding** | There is not enough evidence to prove that there was an agreement to the boundary or ownership of lands. |

**Takeaway**: Boundaries must be expressly and definitively agreed upon.

* Key thing on conventional boundary lines: the court requires clear evidence that the parties did agree on that boundary line.
* Bea v Robinson 🡪 if there is no inquiry into the boundary line, then there is no conventional boundary line.

*R v Nikal* [1996] 1 SCR 1013

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| **Facts** | The appellant was fishing for salmon in the Bulkley River at Moricetown. The appellant lives in the village of Moricetown which is within the boundaries of Moricetown Reserve No.1. The reserve comprises lands on both sides of the Bulkley River. He was charged for fishing without a licence. The appellant claims that the licensing scheme infringed on his aboriginal rights as per s 35 of the Charter. He also contended that the Bulkley River is part of the Moricetown Reserve and that as a result he was bound solely by the band by-law as it pertains to fishing in the river. |
| **Issue** | There are two issues.  1) When does the ad medum filum aque apply?  2) What is the correct test for navigability, and is the Bulkley River navigable?  3) Even if the presumption could apply, was it rebutted? |
| **Ratio** | 1) The presumption does not apply to navigable waters in Western Canada:  2) The entire length of the river must be considered. Navigability exists until navigability “entirely ceases”.  3) Even if the presumption may apply in the circumstances if it can be effectively rebutted it will not apply. |
| **Reasoning** | 1) Because of the “local” circumstances of public right to navigate waters supersedes private land owner rights.  2) The entire length of the river must be considered. Navigability exists until navigability “entirely ceases”. It would be too inconvenient if a river were treated differently in alternate stretches because of interruptions in navigability. The Bulkley River is navigable because although the river is not navigable at the Moricetown gorge, it is navigable both above and below this point.  3) The right of fishery is a property right and is severable from the title of land, even in circumstances where the presumption would otherwise apply. |
| **Holding** | The by-law of the Moricetown Band does not apply to the Bulkley River at Moricetown. |

**Takeaway**: The presumption of *ad medum filum aque* does not apply to navigable waters in Western Canada.

* The use of water falls under federal jurisdiction, but in provincial legislation, there is also jurisdiction regarding water rights.
* What is the presumption as it relates to water rights? Ad medum filum aque: you own to the middle of the water for which your property is adjacent.
* Presumptions are generally rebuttable.
* The presumption does not apply to navigable waters in Western Canada:
  + No, because of the “local” circumstances of public right to navigate waters supersedes private land owner rights.

*Welsh v. Marantette* (1983) 33 OR (2d) 137 (Ont. Sup. Ct.)

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| **Facts** | The defendants owned a canal which abutted the land of the plaintiffs. The plaintiffs claimed that the defendants were liable for the erosion of the plaintiffs’ land by the water in the canal, and that as riparian owners the plaintiffs were entitled to access to the canal and the defendants should be prohibited from maintaining a fence through the canal which restricted such access. The canal size was increased via dredge-cutting. |
| **Issue** | Was erosion of land suffered by the plaintiff at the hands of the dredge cut?  Does the plaintiff have riparian rights to access the canal, specifically to dock their boat on the water? If so were they infringed upon? |
| **Ratio** | Erosion must be directly caused by the defendants’ actions for a finding of liability.  “The law relating to the issues raised in this action is relatively well defined and it is generally that a land owner is entitled, as a right incidental to ownership, to lateral support for his land in its natural state and that such right is infringed upon as soon as damage is sustained in consequence of the withdrawal of the lateral support by an adjacent landowner…” |
| **Reasoning** | The first consideration on this issue is the distinction between land in its natural state and “fill” which is placed on top of the natural soil. The damage complained of by the plaintiff is erosion of the “fill”, and as such there is no remedy for fill. Secondly, the plaintiffs failed to prove that erosion to their properties in their natural state had been caused by the creation of the canal on what is now the defendant’s properties. The water action caused by boats which use the canal has no material effect with respect to the erosion of the plaintiff’s lands.  It was determined that the ditch in its original state was a watercourse. This means that the original owners, and current owners have riparian rights to the body of water. Part of riparian rights are rights to access, but does this include the right to launch and navigate a boat in that water? No it does not, as in order to do so the water must be a public navigable body of water. It is determined that this is not such a body of water as there is no public usefulness or public evidence of it being used to transport anything. |
| **Holding** | No, the plaintiffs are not entitled to damages of erosion because it was not caused by the dredge cut.  The plaintiff does have riparian rights to access the canal, but they were not infringed upon.  Actions dismissed. |

**Takeaway**: There must be proof that there was no erosion before the defendant’s actions and there was after for there to be a valid claim. Lateral support is protected only in its natural state, and the lateral support here that was taken away was not in its natural state.

# Estates in Land and Corresponding Future Interests

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| **Estate** | **Future Interest** | **Example** | **Future interest held by:** |
| Fee Simple Absolute. | None | O🡪A and his heirs (or modernly, just O🡪A). | N/A |
| Fee Simple Determinable. | Possibility of reverter (automatic) | O🡪A and his heirs so long as the land is used for church purposes. | Grantor |
| Fee Simple subject to condition subsequent. | Power of termination/Right to re-entry for condition broken (power needs to be exercised) | O🡪A on condition that the land is used for church purposes | Grantor |
| Fee Simple subject to an Executory Interest. | Executory Interest | O🡪A and his heirs but if the land ceases to be used for church purposes, then to B and his heirs | 3rd party |
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| Fee Tail. | Reversion | O🡪A and the heirs of his body | Grantor |
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| Life Estates. | Reversion  Remainder | O🡪A for life  O🡪A for life and then to B | Grantor  3rd party |
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| Estate for Years. | Reversion  Remainder | O🡪A for a period of 10 years.  O🡪A for a period of 10 years, and then to B. | Grantor  3rd party |
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* O🡪A = words of purchase.
* His heirs… = words of limitation. [*Wills Act, Ontario Property Act*].
* What is a reversion? A return to the previous state. It is also a future interest set up by the grantor.
* A “future interest” is a legal right to property ownership that does not include the right to present possession or enjoyment of the property.
* Historically, the common law would side with life estates in cases of ambiguity.
* Nowadays, they side with fee simple absolute.
* Why? Because of the shift from feudalism to capitalism. The state wants to promote alienation.
* What is a remainder? A future interest in favour of a third person.
* All else equal, a vested remainder is more valuable than a contingent remainder.

### Thomas v Murphy (1990) 107 NBR (2d) 165 (NBQB)

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| **Facts** | The plaintiffs retained the defendants to counsel them on the purchase of property from grantees. The defendants said there would be no issue in purchasing the property as the grantees had the land in fee simple. However, the plaintiffs maintain that this is not the case since the grantees did not receive a grant to themselves and their heirs and had the property as a life estate which they could not sell. |
| **Issue** | The only issue here is whether the grantees in the trust deed received a fee simple interest in the property which they could convey. |
| **Ratio** | “There can be no question about the intention of the grantors. They held the property in fee simple pursuant to the grant under the will and they clearly indicated that the deed was executed for the purpose of conveying all of their interest in the property so that the grantees as trustees might give good and sufficient title to all their estate in the property to any purchaser.” |
| **Reasoning** | The court holds that there is no question about the intention of the grantors. They held the property in fee simple and they conveyed in their will that all property be given to the grantees for sale and in title. The plaintiffs argue that because heirs weren’t mentioned, that they held something less than a fee simple. The defense argues that there can be no limit to the heirs of the trustees, since the heirs can take no interest in the property. The court also applies the rule of construction to the estate to look at the document as a whole and the habendum. However, the court holds that heirs does not refer to succession but is a matter of limitation. The legislature tries to clear this up by saying that you don’t need to use the word “heirs” to grant fee simple, you can just say that “fee simple” is granted. The court believes that Ontario handles this in a better and more broad way, in which the Ontario law says that if no words of limitation are used, then fee simple is assumed. The courts interpret the will to say that the intent of the grantor was to provide fee simple to the grantees in trust. |
| **Holding** | The grantees held the deed in fee simple. The appeal is allowed, and the action dismissed. |

**Takeaway**: The use of “heirs” for a fee simple is archaic and the intent of the grantor and the will as a whole must be construed in order to determine the property rights.

### Re Walker [1924] 56 OLR 517 (CA)

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| **Facts** | John Walker died in 1903 and in his will said that his wife, Ellen Walker is to have his estate and real personal property. However, in that will he prescribed what would happen should the wife die and how the property is to be divided in that scenario. The wife died in 1922 and wrote in her will how the property is to be divided. There is a clash of parties regarding who gets the property because of the two wills. The trial judge was in favour of the husband’s will and the issue is now being appealed. |
| **Issue** | Which Will determines who gets the property in question? |
| **Ratio** | “I agree with the judgement in review that the words “undisposed of” do not refer to a testamentary disposition by the widow but refer to a disposal by her during her lifetime. I am however unable to agree with the construction placed upon the will otherwise. It appears to be plain that there is here an attempt to deal with that which remains undisposed of by the widow, in a manner repugnant to the gift to her.” |
| **Reasoning** | It is impossible to give property to one in absolute terms but also a gift over that belongs to the dead person. The court will try to do this to the best of its ability. The cases fall into two classes: the receiver gets absolute ownership and the gift over is null, or the receiver owns the property in life interest only. There is currently no case addressing this issue with a principle. The court believes that the gift must prevail and the attempted gift over is void because it attempts to deal with what is undisposed of by the widow which contradicts the gift given to her. |
| **Holding** | The will of the wife is the valid and the appeal is allowed. |

**Takeaway**: You are not allowed to try and determine what is done to a gift that is given to someone else if it is absolute.

### Re Taylor (1982) 12 ETR 177 (Sask Surr Ct)

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| **Facts** | The husband wrote in his will that the wife can have and use all real and personal estate that he once owned. However, he writes a provision that when the wife dies, the estate be divided amongst the 5 daughters. The wife writes in her will that when she dies, that the property be sold, and half the money be donated to charity and the other half split amongst the 5 daughters. |
| **Issue** | Which will determines the fate of the real property? Did the wife have absolute interest or just life interest of the property? |
| **Ratio** | “The fundamental rule to be applied by a Court in construing a will is that the intention of the testator is to be ascertained from a consideration of the will taken as a whole.” |
| **Reasoning** | Counsel for the defendant argues that the will of the husband gave the wife an absolute gift, which can achieve the same result as a gift of a life interest with a power to encroach capital. However, the court rejects this reasoning. They say that just because the two effects are the same, doesn’t mean the interests are identical. The defense counsel uses the judgement of Justice Thomson in *Re Rankin* which held that the donee held an absolute interest because no sufficient reference to use during lifetime was used. However, the court holds that this is not an authority in this case, and there was intention in *Rankin* to create a life interest, whereas there was a clear intention in this case. The court holds that *Re Minchell’s Will Trusts* is a better authority. Here, the testator gave the wife the property “for her lifetime” followed by a gift over “if anything should be left over” to X. The court found that the words “for her lifetime” were cut down in effect due to the preceding words which when taken alone support an absolute gift. The court here finds it difficult to see how the fact that words of gift necessarily precede words which in their grammatical sense are intended to qualify the gift, can have the effect of destroying the plain and ordinary meaning of the qualifying words. This would mean that the grammatical sense of the words would have no meaning at all, and this is not what the presiding judge intended to do. The judge rejects *Re Minchell* if that is the effect and believes that any significance a right to encroach on capital may have as evidencing an intention to give an absolute interest is displaced by the clear words of the testator. |
| **Holding** | The wife only had life interest and the property is to be divided amongst the 5 daughters. |

**Takeaway**: A life interest with the power to encroach capital is not an absolute interest, even though the effects are the same.

### Re McKellar (1972) DLR (3d) 289 (Ont. HC)

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| **Facts** | There are no facts set out in the case. There was a deed in 1892 and there is a dispute regarding the wording “subject to the above condition and understanding”. |
| **Issue** | Was the deed of 1892 a determinable fee or a fee simple subject defeasible by condition subsequent? |
| **Ratio** |  |
| **Reasoning** | The court starts out by providing the definitions for both a fee determinable and fee simple subsequent to condition. A fee determinable the court says, is a fee simple until a certain event occurs. A fee simple subsequent to condition is a fee simple that is granted provided a condition is met. The court distinguishes between the two in that a fee determinable exists until a certain point in time, which may or may not happen, and happens automatically, and a fee simple subsequent to condition occurs only when a condition is met and that the reverter can be exercised to the discretion of the grantor. The court looks at the wording used in the will and determines that the use of “upon the express condition and understanding” renders the estate a fee simple subject to condition. |
| **Holding** | The deed was a fee simple subject to a condition subsequent. |

**Takeaway**: A fee determinable is an estate that exists as a fee simple until a certain point in time. A fee defeasible by condition exists as a fee simple while a certain condition is being met. A fee determinable reverts automatically, and a fee defeasible by condition is exercised by the grantor.

### *Re Tilbury West Public School Board and Hastie*, (1966) 55 DLR (2d) 407 (Ont HC)

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| **Facts** | A lot was given fee simple defeasible by condition to trustees. The conditions on the fee simple were that the trustees were to use the land for school purposes and to not build a brick building. In August 1964, Ontario expropriated the land from the trustees for $1500. |
| **Issue** | The issue (one of many, others not discussed) is whether or not the wording in the will conveys a fee determinable or a fee simple defeasible by condition. |
| **Ratio** |  |
| **Reasoning** | The court began by defining and distinguishing between a fee simple determinable and a fee simple defeasible by condition subsequent. They then went on to look at the wording of the will. The judge was influenced to this conclusion by the words “so long as it shall be used and needed for school purposes and no longer” from the granting clause and said that these words denote a determinable fee. The judge also addresses a repugnant clause where the beginning of such clause indicates a determinable fee and the latter indicates a fee simple subject to condition subsequent. The judge applies the rule that in any case of inconsistency, the earlier direction governs. The granting clause here trumps the returning clause. |
| **Holding** | The court held that the wording conveyed a fee simple determinable with a right of reverter. |

**Takeaway**: Where there are inconsistencies, the granting clause and earlier direction trumps the release and later clause.

### McKeen Estate v McKeen Estate, (1993) 132 NBR (2d) 181 (QB)

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| **Facts** | Harry McKeen, in his will, stated that when him and his wife die, that the residue of his estate be given equally to his two sisters. If only one sister is alive, then that sister gets the residue. Harry McKeen died on March 1981. Alice McKeen died on May 1989 and Beatrice McKeen died on Sept 1989. Alice McKeen bequeathed her entire estate to her sister Beatrice. Beatrice McKeen bequeathed her will (equally) onto three nephews (Harry, Reginald, Robert). Ella McKeen (I’m assuming the wife?) lived to be older than Harry, Beatrice and Alice, and died on Jan 1992. The next of kin of Ella are a niece (Gladys) and 5 nephews (Arnold, Harry Cody, Harry Smith, Reginald and Robert). The heirs of Beatrice’s estate (Harry, Reginald, Robert) brought forth an application against the heirs of Ella’s estate. |
| **Issue** | Which estate takes precedent? |
| **Ratio** | The rule here is that the proposition that a gift is *prima facie* vested if the postponement is to allow for a prior life estate. The vesting takes place at the testator’s death. |
| **Reasoning** | The court looked at 5 areas in their decision.   1. The testator’s intention.   The court states that the intention of the testator is of paramount importance. The actual and subjective intention of the testator is to be considered.   1. The presumption against intestacy.   The court holds that when there are multiple interpretations of a will, that intestacy is to be discriminated against.   1. Construction in favour of vesting.   If the condition must happen for the gift to take effect, it is a condition precedent (contingent gift). If the gift terminates on a condition, it is a condition subsequent (vested interest subject to divestment). When there is a question as to the presumption in favour of vesting, the courts are inclined to hold a gift vested rather than contingent wherever the words used and the will as a whole admit of a construction that will result, as is said, in “early vesting”. The vesting takes place at the testator’s death.   1. The rule in *Brown v Moody*   The rule here is the proposition that a gift is *prima facie* vested if the postponement is to allow for a prior life estate.  The court holds that Dr. McKeen did not intent for a partial intestacy. The court holds that the wife’s death was not a condition precedent, but that the sisters had a vested interest upon Dr. McKeen’s death. The court uses *Re Stillman* as an example that is analogous to the present case and shows the application of the rule in *Brown v Moody*. A distinguishing case was cited, *Belliveau v Riopel*, where they talked about how the rule in *Brown v Moody* should be applied but could not in the case. |
| **Holding** | The estate of the sisters takes precedent. |

**Takeaway**: The rule here is that the proposition that a gift is *prima facie* vested if the postponement is to allow for a prior life estate. The vesting takes place at the testator’s death.

### HJ Hayes Co v Meade (1987), 82 NBR (2d) 419, 208 APR 419 (NBQB)

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| **Facts** | Thomas Hayes left his son James Hayes a property on “the following conditions that my son James reside on said land and cultivate the same should my said son James desire to reside on said property or cultivate same then that portion hereby bequeath to be the property of my son Harold he paying to my said son James the sum of one thousand dollars.” There is no evidence that Harold ever paid that money to James. The plaintiff here is successor in title to Harold where the defendants are successors in title to James. James returned to the land in the late 60s and built a house with his sister where they lived. |
| **Issue** | Was the condition set by Thomas Hayes a condition precedent or a condition subsequent? If it was a condition subsequent, was it void for uncertainty? Who does the land ultimately belong to? |
| **Ratio** | The ultimate intent of the will must be determined when deciding on vague conditions. The court will presume against condition precedents and intestacy, and if the condition subsequent is uncertain, then it is void. |
| **Reasoning** | When interpreting a will, the court must look at the intention of the testator. Additionally, when it comes to conditions, there are two key presumptions. First is the vesting presumption, which states that where there is doubt regarding a condition being precedent or subsequent, the court treats it as being subsequent. The second presumption is the presumption against intestacy. This states that when there are two constructions, one where estate is disposed and another where the estate is intestate, the court will favour the construction that disposes of the will. When looking at the will of Thomas Hayes, it is clear that through this condition that he meant to dispose of the whole estate. It was meant to either go to James or to Harold. This shows that there was no intention of intestacy. This supports the court’s holding that the condition was in fact subsequent, as a condition precedent would result in intestacy.  The court cited *Clavering v Ellison* for their decision. This a key case.  The court also found that the condition was void because there is uncertainty to the period of time within which the residence requirement must be met, as well as the uncertainty as to whether the beneficiary would forfeit his right if he left the property for any period of time. |
| **Holding** | The condition set by Thomas Hayes is a condition subsequent, and it was void for uncertainty. The land belongs to James. |

**Takeaway**: The ultimate intent of the will must be determined when deciding on vague conditions. The court will presume against condition precedents and intestacy, and if the condition subsequent is uncertain, then it is void.

### Re Tepper’s Will Trusts [1987] 2 WLR 729 (Ch D)

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| **Facts** | Nathan Tepper had 5 daughters: Millie, Lily, Priscilla, Clara, and Fanny. Clara had three children: Gertrude, Laurence and Shirley. Fanny had one child: Harvey. Priscilla had two children: Jon and Mike. The defendants in this case are: Laurence, Gertrude, Harvey, Jon, Mike, Shirley and Lily. Both Shirley and Jon married people that were not of the Jewish faith. Nathan Tepper was a very Jewish person and followed the tenets religiously. There are two provisions in the will that are being called into question. The first states that income will be paid to the grandchildren of Priscilla provided they reach 25 and are married to someone who is Jewish. The second states that upon the death of Millie, Lily and Priscilla, the residue of the estate shall be divided equally among all grandchildren provided they reach 25 and are married to someone of the Jewish faith. |
| **Issue** | Are the two provisions conditions precedent or conditions subsequent? If they are conditions subsequent, are they void? |
| **Ratio** | “Where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that was preceding vested estate was to determine.” |
| **Reasoning** | The court begins its analysis by examining authorities that have ruled on the issue of uncertainty as it relates to conditions on a provision.  The first such authority is *Clayton v Ramsden* which deals with a testamentary gift to a daughter provided that she does not marry someone that is not of the Jewish faith. The court was required to determine whether or not this condition was void due to uncertainty. The House of Lords held that the provision was void. They were unanimous in concluding that the condition related to the person whom the daughter married being “not of Jewish parentage” was too uncertain to be upheld. **The courts in this case cited *Clavering v Ellison* in defining a condition that can be held certain: “Where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that was preceding vested estate was to determine.”** In other words, it must be very clear what the condition is. The court decided that the condition was too vague, and the degree was too wide for it to be valid. It is important to note that this authority only applies to conditions subsequent.  **The second authority cited was i*n Re Allen* in which the court had to decide again whether that condition was or was not void for uncertainty.** However, here the condition was that of a condition subsequent. The court held that the rule formulated in *Clayton* did not apply to the case because in a condition precedent, there is an opportunity, before there is a vested interest, to establish that he satisfies the condition or qualification, whatever be the appropriate test.  The court went on to examine how these authorities were applied to different cases.  The court examined whether the provisions in question were a condition precedent or a condition subsequent. The court held that since the payments would occur and that the only thing that could stop them was the condition, that it was in fact a condition subsequent. However, the court is not convinced that the provision is uncertain enough to be void. They pointed to the life of Nathan Tepper and his religious values and lifestyle. The court said that the provision could be interpreted referred to how he lived his Jewish faith. |
| **Holding** | The court held that the provisions are conditions subsequent but did not rule that the conditions were void. The court is allowing for parties to bring evidence to elucidate the condition. |

**Takeaway**: A condition subsequent can be found void if it is too uncertain. However, a condition precedent cannot be found to be void due to uncertainty.

### McEachern v New Brunswick Housing Corp (1991), 117 NBR (2d) 174 (NBQB)

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| **Facts** | David McKenzie wrote in his will that he would give a 25-acre plot evenly to Arthur Roy and Perly Roy and that they will not sell the land as long as the grass grows, and the water runs. The property then eventually ended up in the hands of the applicants via sale and the respondents are looking to buy it. However, the solicitor for the respondents brought up an issue regarding the condition and whether the sale would be valid. |
| **Issue** | Is the condition that prevents alienation of the land valid? |
| **Ratio** | “The law has always considered that certain interests in property, in particular absolute interests, must of their very nature confer on the owner the right to do so as he pleases with the property.” |
| **Reasoning** | The court looked at *Kenneth Wood et al and the Estate of the late Charles Wood*. |
| **Holding** | The condition to restrict alienation is void because the fee simple provided by the will is repugnant with such a condition. |

**Takeaway**: Conditions the restrict the right to alienate are not valid on a fee simple.

### Re Leonard Foundation Trust (1990) 37 Ont App Cas 191 (CA)

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| **Facts** | A trust was created by Reuben Wells Leonard known as “The Leonard Foundation”. He directed that the income from the property transferred and assigned by him to the trust be used for the purpose of educational scholarships called “The Leonard Scholarships”. The Canada Trust Company has been appointed successor Trustee of the Foundation. The criteria for getting the scholarship is that you must be white, protestant, and British or of British parentage. Only a quarter of the trust can be given to girls at most. The trustee is also empowered at the expense of the trust to apply to a judge of the Supreme Court of Ontario possessing the qualifications set out in the recitals for the opinion, advice and direction of the court. There have been several complaints about the human rights aspect of this scholarship, with many organizations boycotting the scholarship. This has led to the present application. |
| **Issue** | There are two issues:   1. Do the provisions of the trust contravene public policy or are they void for uncertainty? 2. If the answer to that question is in the affirmative, can the doctrine of cy-pres be applied to save the trust? |
| **Ratio** |  |
| **Reasoning** | ROBINS  **The Public Policy Issue**   1. *Can the Recitals Be Considered in Deciding This Issue?*   The trial judge ignored the recitals when deciding if the trust contravened public policy because the recitals spoke to the motive of the settlor. However, the presiding judge holds a different view. He believes that where the recitals are not clearly severable from the rest of the instrument and themselves contain operative words or words intended to give meaning and definition to operative provisions, the instrument should be viewed in its entirety. This is the case here. The recitals also cannot be ignored because this is a matter of public policy. Notwithstanding the fact that the trust is private, it deals with the application of scholarships to publicly funded institutions and thus has entered the public realm. The motives of the trust must be considered with respect to the public policy aspect inherent in the trust.   1. *Does the Trust Violate Public Policy?*   The presiding judge recognizes the danger and criticisms associated with the courts making decisions on trusts related to public policy. However, there are cases where the interests of society require the court to intervene, and that this is one such case. The judge recognizes Leonard’s two propositions: the white race is best qualified to lead society, and the attainment of peace and advancement of civilization are best promoted by the education of British, white, protestants. To perpetuate these propositions, the judge holds, would not be conducive to the public interest. The trust directly conflicts with the public interests of Canadian society, which is a pluralistic society that values multiculturalism. Given this conclusion, the court finds it unnecessary to decide whether the trust is invalid by reason of uncertainty. The court does not need to decide on other such scholarships which only qualify those of a certain race, language or religion. That is because there is an absence of factual basis that these sorts of scholarships contravene public policy.  **The Cy-Pres Issue**  On this issue, the presiding judge agrees with the Weekly Court judge. The trust established is a charitable trust. The settlor intended for the trust property to be wholly devoted to the furtherance of a charitable object whose general purpose is the advancement of education or the advancement of leadership through education. In the circumstances described above, the trust should fail and the cy-pres doctrine should be invoked so that the trust is brought within contemporary public policy.  TARNOPOLSKY  To satisfy the public benefit requirement, the trust must be beneficial and not harmful to the public and its benefits must be available to a sufficient cross-section of the public. In the case at bar, all of these tests are met. The trust is dedicated to the advancement of education and it is wholly charitable. Education is clearly a benefit to the public. Because the class was not ascertainable by the settlor, there was no personal nexus between him and the beneficiaries. The benefit, although not available to everyone, is available to a sufficiently wide cross-section of the public.  With respect to validity analysis, the court may refer only to the operative words, unless they are ambiguous, in which case it can refer to the recitals. Based on the operative clause, the definition of the class of beneficiaries is a condition precedent. A condition precedent will not be void for uncertainty if it is possible to say with certainty that any proposed beneficiary is or is not a member of the class. The condition will not fail for uncertainty unless it is clearly impossible for anyone to qualify. The clause is sufficiently certain.  With respect to public policy issue, there is no help from the English cases. There are some Canadian cases, but they did not refer to the public policy argument. There are several examples of public policy not circumscribed by the exact words of the Human Rights Code alone. Therefore, public policy is not determined in reference to one statute or even one province, but it is gleaned from a variety of sources. When considering these sources, it is obvious that this charitable trust is void on the ground of public policy to the extent that it discriminates on grounds of race, religion and sex.  There was some concern about the far-reaching effects of this decision to other valid scholarships. This is not true because there are a number of private trusts that have certain protections, and it will need to be considered on the facts of each case. |
| **Holding** | The appeal is allowed. The provisions of the trust contravene public policy and are thus void. The doctrine of cy-pres can be applied. |

**Takeaway**: Private trusts can be rendered void if they contravene public policy.

Registration Systems and Modern Conveyancing

Registration of Interests in Land

* The feudalistic system of “feoffment with livery of seisin” was gradually replaced by written documents called deeds.
* This new system had a number of drawbacks:
  + It made land transfers expensive because the necessary work had to be repeated each time a transfer occurred.
  + Transfers might be subject to considerable delays until the root of title was satisfactorily established.
  + In some cases, recourse to the courts might be necessary to settle doubts as to title.
  + The custody of deeds against the hazards of fire, loss or theft posed a problem.
* The recording system provides for the recording of deeds affecting land in a recording office.
* In Canada, it was introduced into the Maritimes and parts of Ontario.
* The Torrens system is a registration system in which a fee simple interest is entered on the Register, and that is conclusive evidence that the person named on the Register is the owner of the interest.
* The system operates in 4 provinces in Western Canada.

*Lawrence v Wright* 2007 ONCA 74, 84 OR (3d) 94

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| **Facts** | Lawrence owned a home in Toronto. An imposter, acting as Lawrence, sold the property to one Thomas Wright, another imposter. Thomas Wright obtained a mortgage from Maple Trust Company for the home. The Maple Trust Company had no knowledge of the fraud that was occurring. The courts decided that the transfer of the property was void but upheld the validity of the Maple Trust Mortgage (it is important to note that this mortgage was significantly higher than the TD mortgage). |
| **Issue** | Is the charge against the Property in the favour of Maple Trust valid and enforceable as against the true owner of the property, despite having been acquired from a fraudster? |
| **Ratio** | The underlying theory of the Act is that of deferred indefeasibility. |
| **Reasoning** | **Lawrence’s position**: Only the true owner of the land can bring charges against the land, and all transactions arising from fraud are void. This position reflects the common law principle that a person could not pass better title than he or she had.  **Maple Trust’s Position:** It maintains that the charge is valid based on the theory of “immediate indefeasibility”. This theory creates a title by registration which is designed to protect the interests of innocent parties who rely on the register. Once an instrument is registered, even if procured by fraud, it is effective. This view reflects the notion that the fundamental purpose of this Act (Land Titles Act) is not to protect “true owners” but to protect parties who rely on title, as effected by registration. Consequently, Maple Trust’s charge is valid despite the registration being obtained fraudulently. Maple Trust relies on the decision in *Chan* and reflects that the only rational interpretation of the Act that is consistent with the essential purpose of a land title system for land registration. There is also a Land Titles Assurance Fund which Lawrence can use to recuperate the cost of the fraud.  **Ontario’s Position**: Ontario advances a view of “deferred indefeasibility”. In this theory, there are three parties: the original owner (Lawrence), the immediate owner (the party dealing with the fraudster, in this case Maple Trust), and the deferred owner (someone who purchases from the intermediate owner, not present in this case). The intermediate owner has an opportunity to investigate the fraud, whereas the deferred owner cannot. This fact means renders the charge against Lawrence invalid. The second argument is that money was advanced before the 21 day period had expired for the registry to complete registration upon receipt. The act (78(3)) does not give retroactive effect to events occurring within that period, and Maple Trust is not entitled to rely on 78(4) to claim a valid interest.  **The Act:**  In *Durrani v Augier*, Justice Epstein said that the essential purpose of land titles legislation is to provide the public with security of title and facility of transfer. The philosophy of a land titles system embodies three principles. The mirror principle where the register is a perfect mirror of the state of the title. The curtain principle, which holds that the purchaser needs not investigate the past dealings of the title. The insurance principle, where the state guarantees accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility and are the essence of the land titles system. The relevant provisions are:  78(4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.  155 Subject to the provisions of this Act, with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land that, if unregistered would be fraudulent and void is, despite registration, fraudulent and void in like manner.  **Analysis**  The legislative provisions are must relevant here. S155 must be interpreted in light of other sections of the Act due to its introductory clause. Under S155 alone, Maple Trust’s charge is void, but when combined with S78(4) it is valid. The combined effect results in its charge being immediately indefeasible. However, Ontario relies on the deferred indefeasibility theory to invalidate Maple Trust’s charge. The argument runs like this. Wright obtained the property by fraud and was never the registered owner. S68 states that only the registered owner of the land is entitled to transfer or charge of the land. Maple Trust never took from the registered owner and therefore cannot rely on s78(4). However, Maple Trust was a bona fide purchaser for value without notice and registered its charge. This allows them to pass valid title to a third party. And that deferred owner can rely on the charge pursuant to 78(4). On this view, all of ss68(1), 78(4) and 155 are given effect, and appear strained. Since both interpretations are available on the wording, it is necessary to decide whether the act is predicated on the theory of immediate or deferred indefeasibility.  **Immediate or Deferred Indefeasibility**  The court looks to *Dominion Stores Ltd v United Trust Co* to understand which theory prevails. This case dealt with United Trust locking out Dominion Stores (who had an unregistered lease) and whether it was in their right to do that. The majority held that it could not do that due to the common law principle of actual notice. It states that the legislation does not abrogate common law principles, and if it were to do so, the legislation must be unequivocal and in the clearest of terms. The dissenting opinion disagrees, and it says the doctrine of notice is incompatible with the registry system and the intention of the legislation. The presiding court holds that the decision in United Trust cannot be reconciled with the theory of immediate indefeasibility because if it did, United Trust would taken the title free of Dominion’s claim because the register did not reflect the claim and fraud was not involved. In contrast, the decision is compatible with the theory of deferred indefeasibility. This theory is consistent with s155 and s78. The court also holds that deferred indefeasibility is preferable for policy reasons. It is not right for a homeowner to lose their property and be compensated in damages, that goes against the basics of real property. It is more congruent with the concepts of real property for the lender to be compensated in damages. Additionally, the homeowner had no opportunity to avoid fraud, but the intermediate owner did. With respect to Chan, it did not address if the Act provides for deferred or immediate indefeasibility. The court also holds that the result and reasoning in Chan is invalid. |
| **Holding** | The charge is not enforceable against Lawrence. |

**Takeaway**: The underlying theory of the Act is that of deferred indefeasibility.

*Walcer v Shmyr* (1982) 136 DLR (3d) 723, 19 Sask R 433 Saskatchewan Court of Appeal

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| **Facts** | The plaintiff used the land on an unregistered year-to-year basis to harvest crops and paid the landlord with 1/3 of the yield. The landlord transferred the land to his brother, who then later transferred the land to his son. They tried seeding some of the land and told the plaintiff to stop. |
| **Issue** | The priority between two unregistered interests in land must be settled: a lessee’s interest under an unwritten year-to-year lease and a purchaser’s interest under an agreement for sale. |
| **Ratio** | Where you have 2 unregistered interests the interest supported by time and equity wins out. Whereas if you have one registered and one unregistered, the unregistered can win if they can prove some sort of occupation. |
| **Reasoning** | The trial judge cited *Trotzuk v Zilka* (does not work for this case) and *Hackworth v Baker*. In the former, the court held that the relief depended on the construction of s63 and found that the plaintiff did not actually occupy the land (they lived 1.5 miles away). He used this in the present case to say that the plaintiff in the present case was not in actual occupation of the land. The latter case finds that the plaintiff had no claim upon enforceability of fraud because the mere knowledge of the lessee’s interest did not constitute fraud. No other basis for priority was considered.  There must be two periods considered in this case. The first period is that of the first defendant’s unregistered purchase of the land from May 14 to July 30, where the plaintiff seeded 41 acres and was prevented from seeding the remaining 70. The cases cited by the trial judge do not assist the first defendant because in those cases the parties were registered owners. The first defendant does not have priority under the statute. In the second period, from July 31 onward, the second defendant prevented the plaintiff from harvesting. The cases do not help the second defendant because the plaintiff was in actual occupation of the land. |
| **Holding** | A registered interest does not trump an unregistered year-to-year lease under the Act. |

**Takeaway**: Where you have 2 unregistered interests the interest supported by time and equity wins out. Whereas if you have one registered and one unregistered, the unregistered can win if they can prove some sort of occupation.

Easements

*Re Ellenborough Park* [1955] 3 All ER 667

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| **Facts** | Ellenborough Park is located across the street from a row of houses. The person who owned the land that the park was on gave the builders of the houses "the full enjoyment at all times hereafter in common pleasure of the ground" when he sold them the land to build the houses. The people who now live in the houses are applying to have their right to use the park recognized as an easement. The trial judge found that this did constitute an easement, which the owners of the land appealed. |
| **Issue** | What do you need in order to have an easement to exist?  Did the easement accommodate the dominant tenements and was the use of the park connected to the houses?  Could the easement be material enough for a grant? |
| **Ratio** | The 4 requirements for an easement are:   1. there must be a dominant and servient tenement; 2. an easement must "accommodate" the dominant tenement (the use of the land in question must be "connected" to the use of the dominant land - merely adding to the property value is not enough to satisfy this); 3. the dominant and servient owners must be different people; and 4. the right must be capable of being the subject matter of a grant.   There are three sub conditions under condition 4:   1. The grant cannot be too wide or too vague. 2. The grant cannot be inconsistent with the servient owner’s proprietorship. 3. The right has to be one of “utility and benefit” as opposed to mere recreation and amusement. |
| **Reasoning** | The 4 cases cited by the court on the matter of easements are currently insufficient to answer the present question at law. Counsel consented to adopt the definition of an easement formulated by Dr. Cheshire’s Modern Real Property. An easement must:   1. There must be a dominant and a servient tenement. 2. An easement must “accommodate the dominant tenement. 3. Dominant and servient owners must be different persons. 4. A right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.   The court holds that for this case that the first and third conditions can be ignored as they are obviously met. Therefore, the focus of this case will be on the second and fourth conditions. First, whether the alleged easement can be said in truth to “accommodate” the dominant tenement – in other words, whether there exists the required “connection” between the one and the other. Second, whether the right alleged is “capable of forming the subject matter of a grant.”. With respect to the 4th condition, the court must find that the following 3 sub-conditions are not met for the 4th condition to be filled:   1. Whether the rights purported to be given are expressed in terms of too wide and vague a character. 2. Whether such rights would amount to rights of joint occupation or would substantially deprive the owners of the park of proprietorship or legal possession. 3. Whether such rights constitute mere rights of recreation, possessing no quality of utility or benefit; and on such grounds cannot qualify as easements.   **Condition 2**  It is clear from the conveyance that Ellenborough Park was meant to be a large, “private”, garden for each of the houses that were in front of it. The fact that this right to enjoy the park was extended to other houses not in font of the park is immaterial. In the court’s opinion, the language of the deed of 1864 is clear to the effect that the right of enjoyment of the garden was intended to be annexed to the premises sold, rather than given as a privilege personal to their purchaser. The right to the enjoyment of the land was also akin to the other rights conveyed in the deed, like sewers and roads. They are only valid if the upkeep costs are given as mentioned in the deed.  It remains to interpret the grant itself: “the full enjoyment of the pleasure ground set out and made…”. Counsel for the park owners hold that full just means that they can roam and enjoy the amenities with no limit. In the court’s judgement, “full” does not import some wider, less well understood or definable privilege. The grant of the park was the use of the park as a garden, the proprietorship of which (and of the produce of which) remained vested in the vendors and their successors.  Counsel for the defendant holds that the right held by the dominant tenement is not valid because it an be enjoyed by others as per the judgement of Willes J. in *Bailey v Stephens*. The court does not believe that is the construed meaning of the judgement and that if it is, there is no authority supporting it.  Counsel for the defendant believes that the right to enjoy the garden is not in concert with the normal use of the house and there is not a sufficient connection and thus the easement fails. The court holds that the enjoyment of the garden is akin to each house having their own garden and there is a sufficient connection and constitutes normal use.  **Condition 4**  The interpretation of the deed by the court answers the first sub-condition of condition 4. The deed is not too wide and vague and can be construed to be precise as it was in this case. The second sub-condition is also met in that, by construction of the deed, there is no joint occupation or possession of the parklands.  The big question regarding the third sub-condition, whether the right constitutes mere recreation is of utility, relies on the ruling pertinent to *jus spatiandi*. In the case cited by the defendants, there is no binding authority that says *jus spatiandi* is not a right of utility and is mere recreation. However, Danckwerts J judgement in *Duncan v Louch* seems to support the proposition that *jus spatiandi* is in fact of utility. Therefore, the third sub-condition is met and the entirety of condition 4 is met. |
| **Holding** | An easement is met when the 4 conditions in the ratio are met.  The easement did accommodate the dominant tenements.  The easement could formulate the substance of a grant. |

**Takeaway**:

The 4 requirements for an easement are:

1. there must be a dominant and servient tenement;
2. an easement must "accommodate" the dominant tenant (the use of the land in question must be "connected" to the use of the dominant land - merely adding to the property value is not enough to satisfy this);
3. the dominant and servient owners must be different people; and
4. the right must be capable of being the subject matter of a grant.

There are three sub conditions under condition 4:

1. The grant cannot be to wide or too vague.
2. The grant cannot be inconsistent with the servient owner’s proprietorship.

The right has to be one of “utility and benefit” as opposed to mere recreation and amusement.

*Shelf Holdings Ltd v Husky Oil Operations Ltd* (1989) 65 Alta LR 300 (CA)

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| **Facts** | Husky wants to build an underground pipeline through a plot of land owned by Shelf. Husky has an easement for that plot of land but Shelf wanted the easement to be removed. |
| **Issue** | Was the easement going far beyond its function as an easement? |
| **Ratio** | “There is no easement known to law which gives exclusive and unrestricted use of a piece of land.” |
| **Reasoning** | The court cited the relevant authorities on easements and the definition of an easement as per *Re Ellenborough Park.* The judge then went on to cite the rule used by the trial judge from *Reilly v Booth* “There is no easement known to law which gives exclusive and unrestricted use of a piece of land.” The appeal judge said that the authorities used by the trial judge (Metropolitan Railway and Reilly) can actually be distinguished from the present case. In Metropolitan, the grant was acquired by statute and in the present case it was acquired by private contract. The court examined the grant in this case and determined that the privileges granted to Husky do not detract from the servient owner’s right of ownership. |
| **Holding** | The easement did not go beyond is function as an easement and is valid. |

**Takeaway**: An easement cannot give exclusive and unrestricted use of a land, otherwise it is no longer an easement.

Equity

*Pecore v Pecore* 2007 SCC 17, [2007] 1 SCR 795 Supreme Court of Canada

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| **Facts** | A father had a joint bank account with his eldest daughter. The father was the only one depositing money into the account. The father passed away and the daughter gained control of the bank account through the right of survivorship. |
| **Issue** | 1. Do the presumptions of resulting trust and advancement continue to apply in modern times? 2. If so, on what standard will the presumptions be rebutted? 3. How should courts treat survivorship in the context of a joint account? 4. What evidence may courts consider in determining the intent of a transferor? |
| **Ratio** | 1. Yes, the presumption of resulting trust and advancement still apply today in specific circumstances. 2. The presumptions will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities. 3. The right of survivorship is vested in the joint owner at the time of opening the account. |
| **Reasoning** | Trial judge found that the father actually intended a gift and held that his daughter may retain the assets in the accounts.  **Do the Presumptions of Resulting Trust and Advancement Continue to Apply in Modern Times?**  A resulting trust arises when title to property is in one party’s name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original owner.  Advancement is a gift during the transferor’s lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor.  In certain circumstances, there can be a presumption of resulting trust or presumption of advancement. Each are rebuttable presumptions of law.  The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption.  *The Presumption of Advancement*  The presumption of resulting trust is the default. However, depending on the relationship, the presumption of advancement will be used. This happens when the transfer is between spouses or parent-child. The rational is that a parent should take care of their child and that parents commonly make gifts to their kids. This presumption applies equally to mother and fathers now. Does this presumption apply to parents and adult independent children? A number of court cases have decided that it does not. The rationale is that older parents add their kids to joint accounts to help them manage finances. The court agrees with this reasoning and restates that the presumption is intended for dependent children, not independent adults. One other reason to support independent adults is that the presumption should hold on the basis of parental affection. The court disagrees. The remaining question is whether the presumption applies to dependent adults? The court holds that the presumption should not hold because there is too wide an array of “dependent” children to apply. The court concludes that the presumption should apply from parent to minor child. There are cases of a gift to an adult from a parent, but the adult would have to rebut the presumption of resulting trust. The adult can use dependency to rebut this presumption.  **On What Standard Will the Presumptions Be Rebutted?**  The presumptions will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.  **How Should Courts Treat Survivorship in the Context of a Joint Account?**  There are a few reasons why a child might be added to a joint account. In some easy cases, it’s clear that the intention is that the account is a gift. In other cases, the child is there to manage the assets for the parent or the elder is trying to avoid probate fees. There is difficulty in determining the intention of the elder because the benefit arises only upon death. This has led some judges to conclude that the gift of survivorship is testamentary in nature and must fail as a result of not being in proper testamentary form. This court is of the view that the right of survivorship is vested when the joint account is opened. The court cites *Re Reid* and *Edwards v Bradley*. Since the legal right was vested on the opening, the account cannot be subject to testamentary disposition as some courts claim. The presumption of resulting trust means that it will fall to the surviving joint account holder to prove that the transferor intended to gift the right of survivorship to whatever assets are left in the account to the survivor. Otherwise, the assets will be treated as part of the transferor’s estate to be distributed according to the transferor’s will.  **Should the Decision of the Trial Judge be Overturned?**  The trial judge considered the closeness between Paula and her father. Her father was closest with Paula outside of his own wife. However, Michael and the father were just “good friends”. Paul relied on her family for assistance and the trial judge found that Paula’s dad was concerned with providing for her after his death. This is consistent with an intention to gift a right of survivorship when the accounts were set up. Paula’s dad while writing the will was also considered. The trial judge should not have applied the presumption of advancement as Paula is not a minor. The appeal is dismissed.  ABELLA J (Dissent): The presumption of advancement should apply to all ages and to mothers. In her reasoning, she cited *Nelson v Nelson* from the High Court of Australia which stated that the need for the presumption of resulting trust has passed and that it is more likely that those instances were meant as gifts. |
| **Holding** | 1. Yes, the presumption of resulting trust and advancement still apply today in specific circumstances. 2. The presumptions will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities. 3. The right of survivorship is vested in the joint owner at the time of opening the account. |

**Takeaway**:

1. Yes, the presumption of resulting trust and advancement still apply today in specific circumstances.
2. The presumptions will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.
3. The right of survivorship is vested in the joint owner at the time of opening the account.

*Peter v Beblow* [1993] 1 SCR 980

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| **Facts** | Step-mom was in a domestic relationship with a man and would do housework and raise the kids while the man worked. They are breaking up and she wants an interest in the house and is suing in a cause of action of unjust enrichment? |
| **Issue** | 1. Is the claim for unjust enrichment made? 2. What is the appropriate remedy? |
| **Ratio** | An action for unjust enrichment arises when three elements are satisfied:   1. An enrichment. 2. A corresponding deprivation. 3. The absence of a juristic reason for the enrichment.   The remedy can be one of two things:   1. Monetary award (quantum meruit). 2. Constructive trust. – Can be awarded if the monetary award is insufficient or if there is a low probability it will be paid (*Lac Minerals*). Additionally, the contribution to the property must be sufficiently substantial and direct as to entitle the plaintiff to a portion of the profits realized upon sale of the property. (*Petkus v Becker*). Must use the “value survived” approach and balance the value survived and value received. |
| **Reasoning** | McLACHLIN: An action for unjust enrichment arises when three elements are satisfied:   1. An enrichment. 2. A corresponding deprivation. 3. The absence of a juristic reason for the enrichment.   The remedy can be one of two things:   1. Monetary award (quantum meruit). 2. Constructive trust. (*Lac Minerals Ltd v International Corona Resources, Petkus v Becker).* “if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property.” (La Forest in former), “contribution [to the property] sufficiently substantial and direct as to entitle [the plaintiff] to a portion of the profits realized upon sale of [the property].” – Constructive trusts are granted when the monetary award is insufficient, or the party cannot pay it. The value of the trust is to be determined on the basis of the actual matrimonial property (“value survived” approach).   The remedy of constructive trust arises where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed.  There has been some uncertainty to how unjust enrichment has been applied. Specifically, there have been instances in which unjust enrichment and a construct trust are inseparable.   1. *Is the Appellant’s Claim for Unjust Enrichment Made Out?*   McLachlin shares the view of Cory J and finds that the three elements required for unjust enrichment are made out in this case. The argument on appeal was the appellant cannot use their housework as a vehicle for unjust enrichment because the appellant had voluntarily assumed the role of wife and stepmother. It was also argued that the law of unjust enrichment should not recognize such services because they arise from natural love and affection.  The question with these arguments is where to analyze them under the requirements of unjust enrichment? The CoA analyzed them under the detriment element. However, the SCC here is analyzing them under the juristic reason element. The first two elements typically have had more of a straightforward economic approach (*Pettkus v Becker; Sorochan v Sorochan, Peel v Canada).*  What matters should be considered in determining whether there is an absence of juristic reason for the enrichment? It will be different depending on the type of case. However, in every case, the fundamental concern is the legitimate expectation of the parties (*Petkus v Becker)*. In family cases, this concern may raise the following questions:   1. Did the plaintiff confer the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which her or she owed to the defendant? (Argued here) 2. Did the plaintiff submit to, or compromise, the defendant’s honest claim? 3. Does public policy support the enrichment? (Argued here)   There is no duty for a wife to do any work for home or land (*Sorochan v Sorochan)*. The trial judge ruled in the same manner and the SCC adopts the reasoning. The SCC holds that there is no gift because the central element is missing (intentional giving to another without expectation of remuneration).  There are public policy arguments to support the enrichment. Law professors have said that rearing children and housework is of mutual love and affection and that it is unfair for someone to be forced to compensate for these services. The court rejects this argument based on logic and authority. (*The Law of Family Property, Moge v Moge*). The courts also recognize that the value of domestic services is about equal to that of financial support (*Sorochan*).   1. *Remedy – Monetary Judgement or Constructive Trust?*   McLachlin writes that for a constructive trust to arise, the plaintiff must establish a direct link to the property which is subject of the trust by reason of the plaintiff’s contribution (*Rawluk*). This notion is affirmed in *Petkus v Becker, Sorochan v Sorochan and Lac Minerals*. So in order for a constructive trust to be the equitable remedy, the monetary award must be insufficient, and there must a sufficient connection between the plaintiff and the property. The court should use common sense when applying this equitable principle.  The next question is what is the sufficient amount of contribution? Dickson J writes in *Pettkus v Becker* “The extent of the interest must be proportionate to the contribution, direct or indirect, of the claimant. Where the contributions are unequal, the shares will be unequal.” However, it is not correct to simply calculate the worth of the work of the plaintiff and assign it to the trust. There must be a link between the value received with the value surviving. The court must determine the extent of the contribution which the services have made to the parties’ property. In this case, the step-mom raised the children and maintained the house while the husband was away and worked. This allowed him to pay mortgages and buy other vehicles. As a result, the SCC thinks that an assignment of half is fair and would not disturb it. |
| **Holding** | 1. The claim of unjust enrichment was made. 2. The plaintiff should be awarded a constructive trust of half the house. |

**Takeaway**:

An action for unjust enrichment arises when three elements are satisfied:

1. An enrichment.
2. A corresponding deprivation.
3. The absence of a juristic reason for the enrichment.

The remedy can be one of two things:

1. Monetary award (quantum meruit).
2. Constructive trust. – Can be awarded if the monetary award is insufficient or if there is a low probability it will be paid (*Lac Minerals*). Additionally, the contribution to the property must be sufficiently substantial and direct as to entitle the plaintiff to a portion of the profits realized upon sale of the property. (*Petkus v Becker*). Must use the “value survived” approach and balance the value survived and value received.

*Kerr v Baranow*, 2011 SCC 10

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| **Facts** | A couple in their late 60s separated after a common law relationship of more than 25 years. Both had worked through much of that time and each had contributed in various ways to their mutual welfare. Ms. Kerr claimed support and a share of property held in her partner’s name based on resulting trust and unjust enrichment principles. The trial judge awarded her 1/3 of the couple’s residence grounded on these claims. The judge also ordered substantial monthly payment support for Ms. Kerr pursuant to statute. |
| **Issue** | 1. What are the juristic reasons to justify an enrichment? 2. When should reasonable or legitimate expectations be considered? |
| **Ratio** | Two-step analysis for the absence of juristic reason:   1. Does the juristic reason for the enrichment fall into: 2. A contract. 3. A disposition of law. 4. A donative intent. 5. Other valid common law, equitable or statutory obligations. 6. In absence of those reasons, through a consideration of the reasonable expectations of the parties and public policy, should recovery be denied? Here consider reasonable or legitimate expectations of **both** parties to show that the retention of the benefit was just. |
| **Reasoning** | In *Garland* the Court set out a two-step analysis for the absence of juristic reason. The first step of the juristic reason analysis applies the established categories of juristic reason. They include: a contract (*Petkus*), a disposition of law (*Petkus*), a donative intent (*Petkus*), and other valid common law, equitable or statutory obligations (*Petkus)*. The second step, in the absence of those reasons, permits the consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied.  In some cases, the fact that mutual benefits were conferred or that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons is present. An example might be whether there was a contract for the provision of the benefits. However, generally the existence of mutual benefits flowing from the defendant to the claimant will not be considered at the juristic reason stage of the analysis.  The parties' reasonable or legitimate expectations have a role to play at the second step of the juristic reason analysis, that is, where the defendant bears the burden of establishing that there is a juristic reason for retaining the benefit which does not fall within the existing categories. It is the mutual or legitimate expectations of both parties that must be considered, and not simply the expectations of either the claimant or the defendant. The question is whether the parties' expectations show that retention of the benefits is just. |
| **Holding** | See ratio. |

**Takeaway**:

Two-step analysis for the absence of juristic reason:

1. Does the juristic reason for the enrichment fall into:
2. A contact.
3. A disposition of law.
4. A donative intent.
5. Other valid common law, equitable or statutory obligations.
6. In absence of those reasons, through a consideration of the reasonable expectations of the parties and public policy, should recovery be denied? Here consider reasonable or legitimate expectations of **both** parties to show that the retention of the benefit was just.

# De Facto Expropriation

### British Columbia v Tener, [1985] 1 SCR 533.

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| **Facts** | The respondents (Tener) are the registered owners of sixteen mineral claims granted by the Crown. They were granted ownership in 1934. They paid $100,000 for the claims. The grants had a provisio that they were “subject to the laws for the time being in force respecting mineral claims”. The owners of the mineral claims had the right to all the minerals in the claims, the right to the use and possession of the surface for the purpose of getting the minerals out, and the right to take and use a right of way to the claims. In 1939, a new provincial park was created that surrounded the land subject to the respondents’ mineral claims. In 1965, new act was legislated that required a permit if natural resources were to be exploited. In 1973 the owners of the claims arranged for work to be done on the claims and written permission was given for flights into the claims and out again. When park use permits were requested by the respondents in 1974, 1975, 1976, 1977, none were issued. A rejection was given in January 1978 that conclusively denied them the opportunity to exploit mineral claims and they issued a lawsuit in May 1979 claiming compensation of the initial acquisition costs of the claims and of the expenditures made on them throughout the years. |
| **Issue** | The **central issue** is whether a refusal by the Crown in right of British Columbia to grant a park use permit so as to enable the respondents to exploit their mineral claims gives rise to a statutory right to compensation.  Sub-issue: What was the nature of the respondents’ interest.  Sub-issue: What was the effect of the refusal of the permit on that interest?  Sub-issue: Was it expropriation or injurious affection? |
| **Ratio** | “By depriving the holder of the profit of his interest – his right to go on the land for the purpose of severing the minerals and making them his own – the owner of the fee has effectively removed the encumbrance from its land. It would, in my view, be quite unconscionable to say that this cannot constitute an expropriation in some technical, legalistic sense.” |
| **Reasoning** | Reasons by Dickson and Wilson:  The Supreme Court held that in order to answer this question, it was necessary to consider the following:   1. The nature of the respondents’ interest; 2. The effect of the refusal of the permit on that interest and, in particular, whether it constitutes an expropriation of or injurious affection to that interest; and 3. Whether, if it constitutes expropriation or injurious affection, a statutory right of compensation is provided under any or a combination of the applicable statutes.   **Issue A: The Nature of the Respondents’ Interest**  The common ground here is that the mineral claims themselves constitute an interest in the land. The respondents submit, with Justice Rae agreeing, that the right to sever the minerals and to enter upon the surface for this purpose is also an interest in land in the nature of a *profit a prendre*. What *profit a prendre* means is a “right to make some use of the soil of another””. The Chambers judged distinguished these two interests and claimed that a refusal of permit could not be expropriation of the mineral claims but saw the issue as whether it was an expropriation of the surface rights. He found that it could not. This was the end of the matter because the learned judge believes that there needed to be an actual “taking” of some interest in land before compensation, and there was no such “taking” here. The court of appeal on the other hand found that an actual taking was unnecessary. The SCC holds that the Chambers Judge was in error in treating the respondents as having two separate and distinct interests in the land. The SCC references *In Re Reliance Gold Mining and Milling Co.* to show that it is not possible that an owner of a mineral claim to dispose of its surface rights as if they were a separate interest. The SCC holds that what the respondents had was one integral interest in land in the nature of a *profit a prendre* comprising both the mineral claims and the surface rights necessary for their enjoyment. It is important to note that a holder in *profit a prendre* owns the mineral claims and the right to exploit them through the process of severance. In this case, the respondents would appear to have a *profit a prendre* in gross since they do not own any land to which the profit is appurtenant. A *profit a prendre* can be extinguished if the owner of the land becomes the owner of the profit, and there can no longer be a separate interest.  **Issue B: The Effect of the Refusal of the Permit**  The refusal of the permit was in effect preventing the owners of the claims to the minerals from exercising their rights on those claims. The problem is whether this refusal translates into an expropriation or an injurious affection in law. Before answering this, it is needed to determine which statutes apply in these circumstances, and what needs to be shown by the respondents in order to obtain compensation under them.  **Issue C: Expropriation or Injurious Affection?**  The presiding judge holds that this is a case of expropriation under s.11(c) of the *Park Act* to which the *Highways Act* applies. This conclusion is reached n the basis that the absolute denial of the right to go on the land and sever the minerals so as to make them their own deprives the respondents of their *profit a prendre*. Their interest is nothing without the right to exploit it.  The Crown holds that regulation and expropriation are tow different things and that what has occurred here is simply regulation. They use the analogy used by the learned trial judge of down-zoning property. Both cause a loss in the form of devaluation of property, but neither result in expropriation or gives right to a claim. The Crown also holds that the respondents knew that that their interest could be subjected to any use the Crown wished to make of them. The only way to defeat this would be to purchase the surface rights outright. The Crown also holds that it is not enough to show that what the Crown did was prevent the respondents from realizing their interest – it must be shown that the Crown has appropriated the interest to itself.  The presiding judge holds that a refusal of a permit cannot be viewed as a mere regulation when it has the effect of defeating the respondents’ entire interest in the land. It is also no valid to say that they should purchase the surface rights outright, as that would only result in greater expropriation. The respondents have no access to their claims, and as such, the claims are worthless. The presiding judge cites *Manitoba Fisheries Ltd v The Queen* as an authority to respond to the Crown’s last argument. The court here held that an act which stripped the right to market fish from private businesses and to Crown corporations was an expropriation despite the Crown not “taking” anything. The effect of the legislation was to strip the plaintiff of their business and acquired by the Crown.  It is unconscionable to say that the removal of an encumbrance via acquiring the outstanding *profit a prendre* cannot constitute an expropriation in some technical, legalistic sense. This case is different, and stronger than Manitoba Fisheries, inasmuch the doctrine of merger would appear to operate so as to make the respondents’ loss the appellant’s gain. But what has happened here is the derogation by the Crown from its grant of the mineral claims to the respondents’ predecessors in title. It may be lawful, but it is radical, and results in the denial of the interest held by the respondents. In the court’s view, this constitutes an expropriation.  Judgement of Beetz, Estey, McIntyre, Chouinard and Le Dain:  In their view of the law, only the former regulations are to be taken into account in the valuation process and only the latter regulations in the taking process. The acquisition (via statutes) by the Crown constitutes a taking from which compensation must flow. The justices again use Manitoba Fisheries as an example to compare to the current case. They proceed to distinguish past cases, such as *Re Bridgman and City of Toronto* from this case. The aforementioned case is related to the imposition of zoning regulations which add nothing to the value of public property. However, in the presiding case, there is a clear addition of value to the Crown’s asset, the park. They believe that the refusal of the permit constitutes an expropriation. |
| **Holding** | The appeal is dismissed.  **Main issue:** The respondents do have a right to compensation as a result of the refusal of the permit.  Sub-Issue: The nature of the respondents’ interest was a singular *profit a prendre*.  Sub-Issue: The effect of the refusal was in effect the prevention of respondents’ ability to exercise their rights.  Sub-Issue: It is in fact expropriation. |

**Takeaway**: “By depriving the holder of the profit of his interest – his right to go on the land for the purpose of severing the minerals and making them his own – the owner of the fee has effectively removed the encumbrance from its land. It would, in my view, be quite unconscionable to say that this cannot constitute an expropriation in some technical, legalistic sense.”

### Mariner Real Estate Ltd. v Nova Scotia AG, (1999) 177 DLR (4th) 696.

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| **Facts** | The respondents’ lands were designated as a beach under the *Beaches Act*. This designation brings with it a host of restrictions on the uses of an activities on the land. Pursuant to power conferred by the Act and Regulations made under it, the Minister refused to grant the respondents permission to build single family dwellings on their land. The respondents sued, claiming their lands had, in effect, been expropriated and that they were entitled to compensation. The trial judge agreed. |
| **Issue** | **Main Issue:** Do the stringent land use regulations applied by the Province to the respondents’ lands qualify as an expropriation of them within the meaning of the *Expropriation Act*.  Sub-issue: Were the respondents sufficiently deprived of their right to their interest?  Sub-issue: Does the enhancement of value of the Crown’s land qualify as an acquisition of land? |
| **Ratio** | “The question is whether the regulation is of ‘sufficient severity to remove virtually all of the rights associated with the property holder’s interest’”  “There must be an acquisition of an interest in land and that enhanced value is not such an interest” |
| **Reasoning** | **Preliminary**  The trial judge decided in favour of the plaintiff for two reasons. First, he decided that the respondents had been deprived of land within the meaning of the *Expropriation Act*. Second, the trial judge held that the province acquired land within the meaning of the *Expropriation Act* because the regulation of the respondents’ land enhanced the value of the provincially owned property from the high watermark seaward. The presiding judge believes that trial judge erred on both counts.  ***De facto* Expropriation**  *De facto* expropriation does not have a long history or clearly articulated basis in Canadian law. It is constrained by two governing principles. The first is that valid legislation or action taken lawfully with legislative authority may very significantly restrict an owner’s enjoyment of private land. The second is that the Courts may order compensation for such restriction only where authorized to do so by legislation. In other words: was the restriction lawful and does the *Expropriation Act* entitle the owner to compensation as a result. The bundle of rights associated with ownership carries with it the possibility of stringent land use regulation. The laws and cases relating to expropriation in the United States and Australia are abundant, but not relevant. In Canada, the courts’ task is to determine whether the regulation in question entitled the respondents to compensation under *the Expropriation Act*, not to pass judgement on the way the Legislature apportions the burdens flowing from land use regulation. Stringent regulation on property is the norm here in Canada. The burden of proof is very high on the plaintiffs to meet compensation under *the Expropriation Act*. In each of the three Canadian cases which have found compensation payable for *de facto* expropriations, the result of the governmental action went beyond drastically limiting use or reducing the value of the owner’s property. In reviewing these cases, the test for *de facto* expropriation should be confiscation of “…all reasonable private uses of the lands in question.” Additionally, Marceau J.’s formulation is helpful in determining where regulation ends and taking begins: whether the regulation is of “sufficient severity to remove virtually all of the rights associated with the property holder’s interest.” In this case, it is not reasonable use to build residential property on a sand dune.  **The Effects of Regulation**  The actual application of a statute in the specific case must be examined, not the potential use. This rule is based on the common-sense proposition that a “…Court cannot determine whether a regulation has gone ‘too far’ unless it knows how far the regulation goes.” *MacDonald, Sommer & Frates v Yolo County*. In the courts view, this same principle applies to *de facto* expropriation. The designation alone of the land in this case is not crucial, but its combination with the refusal of permission. That is where the trial judge erred. He did not consider the regulation with both aspects in conjunction.  **Loss of the “Bundle of Rights”**  The claim here is that the impact of a regulatory scheme has, in effect, taken away all rights of ownership. It is not the existence of the regulatory authority that is significant, but its actual application to the lands. The respondents had the burden of proving that virtually all incidents of ownership (having regard to reasonable uses of land in question) have, in effect, been taken away. The respondents have not shown that they would be denied the required permits with respect to such other reasonable or traditional uses of the lands. There is an absence of evidence of refusal of permission for the respondents to engage in other reasonable or traditional uses. In the opinion of the court, the respondents have failed to establish that virtually all incidents of ownership have, by the effect of the *Act* and Regulations, been taken away.  **Acquisition of Land**  There must not only be a taking away of land from the owner, but also the acquisition of land by the expropriating authority for there to be an expropriation within the meaning of the *Act*. The argument here is that the effect of the regulatory scheme is, for practical purposes, the acquisition of an interest in land. The respondents use *Tener* for the proposition that where regulation enhances the value of public land, the regulation constitutes the acquisition of an interest in land. However, the court disagrees, and says that *Tener* is at best equivocal on this point. The effects of the regulatory scheme in *Tener* was not only to extinguish the mineral rights of the respondents, but to re-vest them in the Crown. The respondents place great weight on Justice Estey’s words, however they are taken out of context. He said that when the Crown extinguished Tener’s mineral rights, that it was in effect the re-acquisition of such rights by the Crown. However, him saying that the re-acquisition enhanced the value of the park does not take away from his holding that the Crown re-acquired in fact, though not in law, the mineral rights which constituted land under the applicable definition. In conclusion, the court holds that for there to be a taking, there must be, in effect, an acquisition of an interest in land and that enhanced value is not such an interest. The respondents also attempted to use US constitutional case law, however the court determined that these are not of assistance due to the stark differences between the laws. |
| **Holding** | **Main issue:** The stringent land use regulations do not qualify as an expropriation.  Sub-issue: The respondents were not sufficiently deprived of their rights, there was not enough of evidence to prove this claim.  Sub-issue: The enhancement of the value of the land of the Crown does not qualify as taking an interest in the respondents’ land. |

**Takeaway**:

“The question is whether the regulation is of ‘sufficient severity to remove virtually all of the rights associated with the property holder’s interest’”

“There must be an acquisition of an interest in land and that enhanced value is not such an interest”

### Canadian Pacific Railway v Vancouver, [2006] 1 SCR 227

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| **Facts** | In 1886, the provincial Crown granted the Canadian Pacific Railway Company a corridor of land for the construction of a railway line. Traffic decreased on the railway and there was talk of using it for an urban transit line, but that was placed elsewhere. In 1999, CPR formally began the process of discontinuing railway operations. CPR proposed using the corridor for residential and commercial purposes and indicated that if anyone wished to acquire it, that they would sell the corridor. Nothing happened. CPR chastised the city for not purchasing the corridor. The city adopted the “Arbutus Corridor Official Development Plan By-law” that designated the corridor as a public thoroughfare for transportation and greenways. The effect of the by-law was to freeze the redevelopment potential of the corridor and to confine CPR to uneconomic uses of the land. CPR regarded this effect as unfair and unreasonable. |
| **Issue** | 1. Was the ODP By-law beyond the statutory powers of the City? 2. **If not, must the City compensate CPR for the land?** 3. Should the by-law be set aside for procedural irregularities? |
| **Ratio** | “For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property. “ |
| **Reasoning** | CPR argues that the ODP By-law, by limiting its use, constitutes an effective taking of its land. Its real complain is that the by-law prevents it from developing or using the corridor for economically profitable purposes. This amounts, it argues, to a *de facto* taking of its land, requiring compensation.  For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property.  First, the City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land. This is not the sort of benefit that can be construed as a taking.  Second, the by-law does not remove all reasonable uses of the property. The by-law does not prevent CPR from using its land to operate a railway, the only use to which the land has ever been put during the history of the City. Nor, contrary to CPR’s contention, does the by-law prevent maintenance of the railway track. Finally, the by-law does not preclude CPR from leasing the land for use in conformity with the by-law and from developing public/private partnerships.  CPR also argues that the British Columbia *Expropriation Act* requires the City to compensate CPR. The *Expropriation Act* requires compensation for land expropriated, while the *Vancouver Charter* states the City is not obliged to compensate for adverse effects to land caused by an ODP. CPR argues that this constitutes an inconsistency and that, under s.2 of common law. However, the provisions of the *Vancouver Charter* prevent a conflict from ever arising. Property affected by a by-law “shall be deemed as against the city not to have been taken”. The *Expropriation Act* applies only where there has been a taking or expropriation. Since by statute there is no taking or expropriation, there is no consistency and s.2()1 cannot apply. |
| **Holding** | The City must not compensate CPR for the land as none of their positions withstand scrutiny. The appeal is dismissed. |

**Takeaway**: “For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property. “

# Personal Property

## What Constitutes Personal Property?

*Ownership*, AM Honore, *The Nature and Process of Law: An Introduction to Legal Philosophy*

* There are eleven leading incidents of ownership of personal property. They are the, the right to:
  + Possess
    - Foundational right of ownership.
    - Split into two aspects:
      * The right to be put in exclusive control.
      * The right to remain in control.
    - There is a key distinction between present possession (simply having something) and having a right to something. Extremely important.
  + Use
    - Narrowly, use refers to the owner’s personal use and enjoyment of the thing owned.
    - Widely, it includes management and income.
  + Manage
    - The right to decide how and by whom the thing owned shall be used.
    - This right depends on a cluster of powers, chiefly on powers of licensing acts which would otherwise be unlawful and powers of contracting.
  + Income
    - Income may be thought of as a surrogate of use.
  + Capital
    - This right consists in the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of it.
    - The power of alienation is the more important aspect of the owner’s right to the capital of the thing owned.
    - The power to alienate may be subdivided into the power to make a valid disposition of the thing and the power to transfer the holder’s title (or occasionally a better title) to it.
  + Security
    - An owner should be able to look forward to remaining owner indefinitely if he so chooses and he remains solvent – this is known as the right to security.
    - Immunity from expropriation, provided you don’t go bankrupt.
  + Incident of transmissibility
    - You cannot enjoy something after you die.
    - However, your successors can enjoy it through the incident of transmissibility.
    - The number of transmissions is indefinite.
  + Incident of absence of term
    - There are three categories of interests:
      * Determinate – leases, copyrights, etc.
      * Indeterminate – ownership and easements
        + These are really determinable interests.
        + There are contingencies like bankruptcy that make it not indeterminate.
        + It seems better to deny the existence of indeterminate interests and to classify those which are not determinate according to the number and character of the contingencies on which they will determine.
      * Determinable
  + Prohibition of harmful use
    - There exist limitations where you cannot use your property for prohibited harmful uses.
  + Liability to execution
    - The liability of the owner’s interest to be taken away from him for debt, either by execution of a judgement debt or on insolvency.
    - Without this incident, growth of credit would be impeded, and ownership would be an instrument by which the owner could defraud his creditors.
  + Ownership and lesser interests

### *R v Stewart*, 1 SCR 963 (1998)

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| **Facts** | Stewart instructed Hart to commit fraud, theft and mischief by telling him to steal a list of hotel employees. The hotel protected this information and it was confidential. The union was trying to get the names and information of the employees but was unable to, so they hired Stewart. Stewart tried to get the security guard to try and steal the information for a fee. Hart ratted out Stewart and the charges are laid. There was no physical list that Stewart was trying to steal. |
| **Issue** | 1. Can confidential information be the subject of theft under s.283(1) of the CC? 2. Would the appropriation of the information have amounted to fraud contrary to s.338(1) if the CC? |
| **Ratio** | “Anything” is not restricted to tangibles but includes intangibles. To be the subject of theft it must, however:   1. Be property of some sort; 2. Be property capable of being: 3. Taken – therefore intangibles are excluded; or 4. Converted – and may be intangible 5. Taken or converted in a way that deprives the owner of his proprietary interest in some way.   Confidential information should not be, for policy reasons, considered as property by the Courts for the purposes of the law of theft. |
| **Reasoning** | Justice Krever adopted the approach that for theft to have occurred, it had to be property of some kind, but not necessarily tangible (*R v Scallen*). Houlden JA was of the opinion that confidential information gathered through the expenditure of time, effort and money by a commercial enterprise for the purpose of its business should be regarded as property and entitled to the protection of the criminal law. This position was supported by reference to the definition of property in the CC and to a number of English and American civil cases recognizing confidential information to be property. Cory JA held that even if confidential information is not property per se, there remains a right of property in confidential information. Cory JA therefore concluded that copyright constitutes property of a nature that falls within the scope of s.283(1), but he stressed that such complications will only be capable of being stolen if they are confidential. Lacourciere JA, in dissent, was of the opinion that it is for Parliament to broaden the criminal definition of property if the needs of modern Canadian society require it (this is what Krever J said).  **Theft**  Under Canadian law, as it now stands, “anything” has been held to encompass certain choses in action, which are intangibles (*R v Scallen*). In *R v Offley*, the Alberta Court of Appeal was of the view that information, even when qualified as confidential, is not “anything” within the meaning of s.283(1), because it is intrinsically incapable of being an inanimate thing. In the view of Lamer J, the wording of s.283 restricts the meaning of “anything” in two ways. First, whether tangible or intangible, “anything” must be of a nature that it can be the subject of proprietary right. Second, the property must be capable of being taken or converted in a manner that results in the deprivation of the victim. It is clear that to be the object of theft, “anything” must be property in the sense that to be stolen, it has to belong to in some way to someone. No Canadian Court has so far conclusively decided that confidential information is property, with all the civil consequences that such a finding would entail. The case law is therefore of little assistance to us in the present case. Even if confidential information was found to be property in the civil courts, it would not automatically follow that it would be property in the Criminal Courts. From a social point of view, whether confidential information should be protected requires a weighing of interest much broader than those of the parties involved. If the unauthorized appropriation of confidential information becomes a criminal offence, there would be far-reaching consequences that the Courts are not in a position to contemplate. Treating confidential information as property would create a host of practical problems as well. What is the precise definition of “confidential information”? What criteria is confidentially assessed on? Should only confidential information be protected, or information of commercial value as well? The answers to these problems should be left to Parliament, not to the Courts. For reasons of public policy, confidential information should not be property for the purposes of s.283 of the CC. |
| **Holding** | 1. Confidential information cannot be the subject of theft. 2. No. |

**Takeaway**:

“Anything” is not restricted to tangibles but includes intangibles. To be the subject of theft it must, however:

1. Be property of some sort;
2. Be property capable of being:
3. Taken – therefore intangibles are excluded; or
4. Converted – and may be intangible
5. Taken or converted in a way that deprives the owner of his proprietary interest in some way.

Confidential information should not be, for policy reasons, considered as property by the Courts for the purposes of the law of theft.

### *R v Offley*, 1986 ABCA 110

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| **Facts** | A retired RCMP officer (Offley) wanted to do CPIC checks on two lists of names. He was unable to do so because only police officers could do that. He contacted a police officer by the name of Constable Brown and asked him to do the background check for a fee of $2 per name. Brown reported this offer to his superiors and they set up Offley. Offley was charged with theft. |
| **Issue** | The issue in this appeal is whether protected information is “property” capable of being stolen. |
| **Ratio** | Confidential information is not capable of being property. |
| **Reasoning** | Justice Belzil compares two cases, *R v Stewart* and *Oxford v Moss* that dealt with the stealing of confidential information. While the definition of theft in each case comes from different sources of law (Canadian vs English), they are the same for the purposes of this case.  In *Stewart,* Krever J held that confidential information is not property, and that for the “anything” referred to in the CC, it must be property. However, on appeal, Houlden JA held that the definition of property is inclusive of the things in the ambit of civil law’s definition of property. Houlden JA relied on the dicta from *Exchange Telegraph* and *Boardmen et al v Phipps.* The confidential nature of the property is destroyed when it is taken and thus the information cannot be returned to the owner in its same state and there is a resulting deprivation. Cory JA concurred but added additional reasoning with the analogy of copyright. Lacourciere JA dissented by distinguishing the aforementioned cases on the basis that they are actions for breach of confidential information. The protection in the cited cases does not come from a proprietary right but rather from rights of equity and good faith. Belzil J does not agree with the majority in *Stewart* and holds that what constitutes anything “animate or inanimate” in s283 must be determined by the intrinsic nature of the “thing” and not by its quality. *Oxford v Mos*s is cited and uses the same reasoning as Krever J and Lacourciere JA in *Stewart*. |
| **Holding** | Appeal allowed; conviction quashed. Confidential information is not capable of being property. |

**Takeaway**: Confidential information is not capable of being property.

### *Nowegijick v The Queen,* SCC, 1982 1 SCR 29 at para 38-39

* Issue: Is taxable income personal property?
* The SCC adopts the holding in *Bachrach v Nelson* where The Supreme Court of Illinois held that income is personal property.
* As such, taxable income is personal property in Canada.

## Classifications of Property

### *International News Services v The Associated Press*, 248 US 215 (1918, Supreme Court of the United States)

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| **Facts** | There were laws preventing the appellants from gathering news on the war in Europe. The respondents were their competitors. The appellants pirated the respondent’s information in three ways:   1. By bribing employees of newspapers published by the respondent’s members to furnished Associated Press news to the appellant before publication; 2. By inducing Associated Press members to violate its by-laws and permit the appellant to obtain news before publication; 3. By copying news from bulletin boards and from early editions of the respondent’s newspapers and selling this, either bodily or after rewriting it, to the appellant’s customers.   TJ: Injunction based on the first two heads but not the third. |
| **Issue** | Is there any property in news? |
| **Ratio** | While there is property in the literary aspects of a news story, there is no property in the facts except as between competitors. However, there is quasi-property to the extent necessary to prevent unfair competition. |
| **Reasoning** | **Justice Pitney:**  When considering the news as property, it is important to recognize the dual character of the news: (1) the substance of the information and (2) the particular form or collocation of words in which the writer has communicated it. The news of current events may be regarded as common property. News to the parties in this matter are like stock in trade. News to them is to be gathered at the cost of enterprise, organization, skill, labour, and money, and to be distributed and sold to those who will pay money for it. For these reasons, news can be regarded as *quasi*-property. Those who have fairly paid the price of acquiring property through the expenditure of labour, skill, and money, should have the same beneficial use of property.  **Justice Holmes:**  Property depends upon exclusion by law from interference and a person is not excluded from using any combination of words merely because someone has used it before even if it took labour and genius to make it.  **Justice Brandies** (dissenting):  The fact that a product of the mind has cost to its producer (money and labour) and has a value for which others are willing to pay is not sufficient to ensure to it this legal attribute (the right to exclude) of property. Once something produced by humans is communicated to the public, others are free to use it. Except for certain classes of human production: things involving creation or invention (as deemed by public policy). There are also cases in which a plaintiff can protect their creation (outside of the protected classes) against a defendant. For this case however, the courts are ill-equipped to deal with creating a new law to protect news. There are public policy concerns that need to be addressed, and this is best left to the legislature. |
| **Holding** | The injunction was upheld. |

**Takeaway:** While there is property in the literary aspects of a news story, there is no property in the facts except as between competitors. However, there is quasi-property to the extent necessary to prevent unfair competition.

### *Victoria Park Racing and Recreation Grounds Ltd v Taylor* (1937), 58 CLR 479 (Aust HC)

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| **Facts** | The plaintiff is the owner of a racing grounds for horses. The defendant is the owner of land near the racecourse. The defendant elevated a platform on his land so he could see the races. He would then report the races to a broadcasting company. Customers would prefer this means of watching the races as opposed to physically attending. This affected the plaintiff’s sales. |
| **Issue** | Does the plaintiff have a cause of action against the defendant for looking into their land and broadcasting the races? |
| **Ratio** | There is no principle in English law that says you can get an injunction against someone if they are lawfully looking into your land. |
| **Reasoning** | **LATHAM CJ:**  There is no law which prevents people from looking into someone else’s land. The plaintiff does not have a legal right to an injunction to put up fences. If the plaintiff doesn’t want people looking into his land, then they should put up fences (which is a common practice). The plaintiff argues that because of the expenditures related to the spectacle, that they have quasi-property. There is no authority supporting this claim. The mere fact of damage does not lend the plaintiff to a cause of action. CJ Latham finds difficulty in attaching any precise meaning to the phrase “property in spectacle”. It cannot be “owned” in any sense of the word and there is no legal principle supporting property rights in spectacle.  **RICE J:**  The plaintiff is using their land reasonably and legally as understood in the common law. The plaintiff’s case is actually a nuisance case. The court also holds that the defendant is using their land reasonably and legally, but to answer this question affirmatively does not answer whether the defendant can disseminate that information and broadcast it. The right of the defendant to look over the plaintiff’s land is not absolute. It must be balanced with the plaintiff’s right to profit from their land. Rice J finds that the plaintiff’s case falls squarely in the ambit of private nuisance and that the appeal should be allowed.  **DIXON J:**  The English law is clear that the natural rights of an occupier do not include freedom from the view and inspection of neighbouring occupiers, or of other persons who enable themselves to overlook the premises. Just as the plaintiff would be free to put up fences preventing others from viewing their land, so too is the defendant allowed to look into the plaintiff’s land. The court cites *Chandler v Thompson Le Blanc* which said there is no action for invasion of privacy by looking into someone else’s land. That case also cites *Eyre*, which also said that such an action did not lie, and that the only remedy was to build on the adjoining land opposite to the offensive window. The court also cites *Johnson v Wyatt Turner* which said that the windows of a house may be overlooked, and its comparative privacy destroyed, and value thus diminished and that this is not a matter for the courts. This principle formed a reason for the decision of the HOL in *Tapling v Jones*. When applying these cases and the principles that flow from them to the case at bar, there is no legal action that they can take in nuisance or otherwise.  **EVATT J:**  It is clear that what the plaintiff is suggesting is true. The defendant is using their land in a manner that impacts the plaintiff’s ability to profit off of their land. The defendant claims that the law of England does not recognize any general right of privacy. That is true, but this case is not merely a right of privacy. Additionally, the defendants say that the law of England does not forbid one person to overlook the property of another. That is true, but it is not an absolute principle. There are circumstances where systematic watching can amount to a civil wrong. The court cites *J Lyons & Sons v Wilkins* and *Ward Locke & Cov Operative Printers’ Assistants’ Society* which indicate that, under some circumstances, the common law regards “watching and besetting” as a private nuisance, although no trespass to land has been committed. Evatt J cites *International News Service v Associated Press*. The majority’s decision evidences an appreciation of the function of law under modern conditions and that the principles are not alien to English law. Both cases are similar in that the defendant in the case at bar “endeavoured to reap where it has not sown” and that it has enabled all its listeners to appropriate to themselves “the harvest of those who have sown”. The cases are similar because the interference with the plaintiff’s land take place “precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not” just as it occurred in *International News Service*. Additionally, in the case at bar, as well as *International News Service*, the conduct of the defendants cannot be regarded as honest. Consequently, the statement of Lord Esher is still true, that any proposition of law with an unreasonable result should not be the law. |
| **Holding** | The appeal is dismissed. There is no cause of action for the plaintiff. |

**Takeaway:** There is no principle in English law that says you can get an injunction against someone if they are lawfully looking into your land.

### *JCM v ANA* 2012 BCSC 584

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| **Facts** | The claimant seeks an order declaring 13 sperm straws stored at Genesis Fertility Clinic to be her sole property. The respondent opposes the application, requesting the sperm straws be destroyed by order of this court. |
| **Issue** | Are the sperm straws property? |
| **Ratio** | The sperm straws are property for the purpose of dividing them upon the dissolution of the spousal relationship of the parties. The parties are the joint owners of the sperm they used in their successful attempts to conceive children. |
| **Reasoning** | Claimant cites case law from USA, UK, and one Canadian case for the principle that if awarding gametes to one party does not create a parental obligation on another party who does not wish to procreate, there is no “logical reason to treat the gametes as other than property”.  The claimant cites the Canadian case of *CC v AW*. In this case, AW gave CC sperm to help her have kids. She had twins and 4 embryos remaining from the sperm donation. AW wanted the embryos back, but the courts ruled in favour of CC saying that the embryos were chattels that were donated by AW and that he is not entitled to them.  The claimant also relies on the UK case of *Jonathan Yearworth & Ors v North Bristol NHS Trust.* In this case, 6 men gave semen to a lab that was held in trust because they were undergoing chemo and there was a chance they’d become infertile. The lab could not keep the semen in proper storage and the semen perished and the men brought a cause of action in negligence. In this case, the court reviewed the history of the common law’s refusal to recognize the body as capable of being owned. The same principle applied to corpses, with an exception as per *Doodeward v Spence*: “a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial…”.  The court then considered the jurisprudence on owning parts and products of a living human body. Without any English precedent to assist them, they turned to two cases from California: *Moore v Regents of the University of California* and *Hecht v The Superior Court of Los Angeles County*. In *Moore*, the court disallowed the plaintiff’s claim for ownership over organ tissue removed during surgery. In *Hecht*, the court found that a testator’s semen sample did not amount to property for the purpose of being disposed under his will. The end result in *Yearwoth* is that the men did have a property interest in the sperm, but not based on the exception *Doodeward*.  The court’s finding of sperm as property was based on the following reasoning:  f) In our judgement, for the purposes of their claims in negligence, the men had ownership of the sperm which they ejaculated:  i) By their bodies, they alone generated and ejaculated the sperm.  ii) The sole object of their ejaculation of the sperm was that, in certain events it might be used for their benefit.  iii) Ancillary to the object of later possible use of the sperm is the need for its storage in the interim.  iv) The analysis of rights relating to use and storage in (ii) and (iii) above must be considered in context, namely that, while the licence-holder has *duties* which may conflict with the wishes of the men, for example in relation to destruction of the sperm upon expiry of the maximum storage period, no person, whether human or corporate, other than each man has any *rights* in relation to the sperm which he has produced.  v) In reaching our conclusion that the men had ownership of the sperm for the purposes of their present claims, we are fortified by the precise correlation between the primary, if circumscribed, rights of the men in relation to the sperm, namely in relation to its future use, and the consequence of the Trust’s breach of duty, namely preclusion of its future use.  The U.S. cases cited by the claimant deal with frozen embryos in the process of divorce. The first of which is *Davis v Davis*, in which a couple could not procreate and tried *in vitro* fertilization. They got divorced later and had frozen embryos left over. Mr. Davis wanted them destroyed and Ms. Davis wanted to donate them to another couple. The court ruled that embryos are not a “person” nor are they “property”. Neither person has a true property interest, but an interest in ownership of the embryos. The court balanced the right to procreate with the right to avoid procreation and favoured Mr. Davis. If there was an agreement on what to do with embryos, the courts would honour it.  The claimant cites 5 more U.S. cases:   1. *Kass v Kass*   The court agreed with *Davis* in that any agreement on what to do with the embryos should be enforced. There was an agreement in *Kass* to donate the embryos for research purposes and it was enforced.   1. *AZ v BZ* and *JB v MB*   The court looked for any previous agreements to determine the intention but could not determine it. They then balanced the right to procreate with the right to avoid procreation and favoured the right to avoid procreation.   1. *Litowitz v Litowitz*   The courts based its decision solely on the contractual rights of the parties under the contract with the fertility centre. The contract stated that after 5 years, the embryos would be thawed. The five years had passed, and the embryos were thawed as per the contract.   1. *In the Matter of the Marriage of Dahl and Angle*   The court upheld the parties’ agreement to have the wife instruct the fertility centre on what to do with the frozen embryos if the parties could not agree. The court said that the frozen embryos were in fact personal party as they looked to the agreement and determined that there was an understanding that the husband and wife had the “exclusive right to possess, use, enjoy, or dispose of” said embryos.  Respondent submits that there is no legislation (provincial or federal) and no jurisprudence supporting the claim that gametes are in fact personal property. They submit that this question should be a moral one.  The court in the case at bar holds that the sperm straws should be treated as property and divided between the claimant and respondent as such. The parties have the right to use the sperm straws for their benefit and have an ownership interest in the sperm straws. The court relies on the Canadian cases of *CC* and the UK case of *Yearworth*. The court decided that the facts of *CC* were analogous to the case at bar (the sperm was transferred from one party to another). The court in *CC* had no reservations about finding that the sperm was property, and that the simple approach use there is applicable to the facts of the case at bar. The facts of *Yearworth* make it difficult to apply (they produced the sperm for their benefit, it was for a claim in negligence). However, the court accepts the argument in *Yearworth* that the common law’s position on ownership of body parts and bodily products must evolve with the medical sciences. The court in *Yearworth* did not ignore that sperm could be owned by another but were just not asked to determine this point.  The U.S. cases were not helpful because they involved frozen embryos in which a gamete was provided by each party. The balancing of the right to procreate and right to avoid procreation is not relevant since ANA is not a biological parent if the sperm were used.  With respect to the respondent’s arguments, the court rejects them. The court is ill equipped to handle a moral and philosophical argument. This is not the court’s role. The moral argument does not hold up on the basis that the sperm was treated like property throughout the entire process and a moral objection is only being made now. It is inconsistent. |
| **Holding** | The sperm straws are property for the purpose of dividing them upon the dissolution of the spousal relationship of the parties. The parties are the joint owners of the sperm they used in their successful attempts to conceive children. |

**Takeaway:**

The sperm straws are property for the purpose of dividing them upon the dissolution of the spousal relationship of the parties. The parties are the joint owners of the sperm they used in their successful attempts to conceive children.

### *Brown v R in Right of British Columbia* (1980) 107 DLR 3d 705 (BCCA)

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| **Facts** | The appellant Brown was charged tax on electricity provided to her by the Hydro company. Brown sued the Hydro company on the basis that section 87 of the *Indian Act* exempts her and other indigenous people from paying tax on electricity. Section 87 of the *Indian Act* states that an interest of an Indian or a band in reserve or surrendered land and the personal property of an Indian or band situated on a reserve is exempt from taxation.  The respondents submit that:   1. Electricity is not personal property. 2. The tax was not on the electricity but on the sale of transaction. 3. The law is *ultra vires*.   TJ held that electricity is in fact personal property but dismissed the action. The personal property mentioned in section 87 was meant for property that would be subject to levies which would not include electricity. TJ also found that s 87 did not include exemptions from the social services tax on electricity. TJ found it unnecessary to answer the constitutional question of validity. |
| **Issue** | Is electricity considered personal property with respect to section 87 of the *Indian Act*? |
| **Ratio** | Electricity is considered personal property under the common law and is considered personal property with respect to section 87 of the *Indian Act*. |
| **Reasoning** | The *Tax Act* defines personal property in a manner that includes electricity. However, there is no definition of “personal property” in the *Indian Act*. The inclusion of the definition of personal property in the *Tax Act* has no application to the definition of personal property in the *Indian Act*. The answer to question in the case at bar lies in the common law.  *Low v Blease* was cited to support the holding that electricity was not considered personal property with respect to the crimes of larceny or theft in the criminal law of the UK. The respondents relied on this case to support their position that electricity was not “property” but a “service”. Several cases from England, Canada and the USA were cited for the proposition that electricity is a commodity of commerce and hence is property of a personal as opposed to real. Authorities included *City of Montreal v Montreal Light, Heat and Hydro Power Co*; *Deputy Minister of National Revenue v Quebec Hydro Electric Commission et al*. TJ concluded based on the case law of *City of Montreal* that electricity is personal property.  The present court agrees with the trial judge and cites the Illinois Supreme Court in *People of the State of Illinois v Menagas* in which the judgement said electricity “is a valuable article of merchandise, bought and sold like other personal property and capable of appropriation by another”.  However, this does not answer the issue at bar. The TJ concluded that s 87 of the *Indian Act* does not include electricity as personal property because later in the section there are references to personal property being of a nature subject to succession and a chose in action. The appellants argue that this is too narrow an interpretation and that the latter part of the section deals with a different situation, namely where property passes on the death of an Indian. The court agrees with this position. |
| **Holding** | Electricity is considered personal property with respect to section 87 of the *Indian Act*. |

**Takeaway:** Electricity is considered personal property under the common law and is considered personal property with respect to section 87 of the *Indian Act*.

### *Nakhuda v Story Book Farm Primate Sanctuary*, 2013 ONSC 5761 Ontario Superior Court of Justice

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| **Facts** | Plaintiff had a pet monkey and left it locked in a crate and in her car as she went to the store. The monkey escaped the crate and the car and ran away. The monkey was picked up by Toronto Animal Services (TAS). When the plaintiff went to pick the monkey up from the shelter, they refused to give it back to her. She signed a document saying she surrendered the monkey to TAS. TAS then gave the monkey to Story Book Farm Primate Sanctuary. Plaintiff brings her action against Story Book Farm Primate Sanctuary to recover the monkey. |
| **Issue** | 1. Is a monkey a wild animal? 2. Who owns the monkey? |
| **Ratio** | A monkey is a wild animal. A person owns a wild animal when it is possessed. Once the wild animal escapes, it is no longer owned by that person. |
| **Reasoning** | The parties agree that the court does not have jurisdiction to determine what is in the best interests of the monkey. The monkey is chattel, not a child, and only property law principles will be used.  It is first important to determine whether the monkey is ferae naturae (a wild animal) or mansuate naturae (a domestic animal) because different property rights apply to those two categories of animals. There is only one case that deals with ownership of a wild animal: *Campbell v Hedley*, a century-old Ontario Court of Appeal Case. In this case, the plaintiff bred foxes and a fox escaped onto the defendant’s property and the defendant shot and killed the fox. The plaintiff sued for the value of the pelt of the fox. In considering this matter, the court had to determine whether the fox was a wild or domestic animal. It considered the qualities of wild animals and stated that they are “wild by nature because of habit, mode of life or natural instinct, are incapable of being completely domesticated and require exercise of art, force or skill to keep them in subjection.”. It concluded that wild animals are only owned while they are possessed. If they are no longer possessed by a person, that person no longer owns them. *Campbell* also sets out a classification for what types of animals are to be considered wild. However, the present court rejects the classification as it is too harsh and does not reflect the modern times. The court in *Campbell* goes on to note that domestic animals have certain characteristics. They have been “domestic from time immemorial [and] have been accustomed to the association of man or by his industry have been subjected to his will and have no disposition to escape his dominion.”. The court, based on this definition, has no hesitation in finding that this monkey is not a domestic animal. *Campbell* states that the nature of an animal, rather than how it is treated, determines whether it is wild. The court here finds that the monkey is a wild animal by virtue of his behaviour and qualities (would bite people, had to wear diapers).  Counsel for the plaintiff argued that a wild animal has to regain its natural liberty before the owner’s property rights are lost. Reference was made to an American case *Wiley v Baker*. This case concerned an elk that was shot and killed a month after it had escaped from a game farm. The court found that the elk had regained its natural liberty and therefore its status as a wild animal. Accordingly, it was no longer the property of the owner. In *Mullet v Bradley*, the plaintiff had a sea lion on an island which escaped. The defendant bought the sea lion from someone who had captured it. The court found that the owner had lost his qualified property right in the sea lion once it had regained its natural liberty.  Both *Wiley* and *Mullett* are distinguishable in that: 1) both were able to return to their natural habitat (the monkey could not do that here), 2) both are American cases and are not binding, 3) the requirement for a wild animal to regain its natural liberty before ownership is lost is not applicable to the facts of this matter.  For those reasons the court concludes that when the monkey ran away and the plaintiff lost possession of him, she lost ownership of him. Accordingly, she has no right to have him returned to her.  The plaintiff understood the contract in which she surrendered the monkey. She was not under duress as she had many options before her. |
| **Holding** | 1. A monkey is a wild animal. 2. The monkey is owned by the defendant. |

**Takeaway:** A monkey is a wild animal. A person owns a wild animal when it is possessed. Once the wild animal escapes, it is no longer owned by that person.

## The Concept of Possession

### *Pierson v Post* 3 Cai R 175, 1805 NY

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| **Facts** | Post was hunting a fox and Pierson saw it. Pierson saw the fox as well and killed it and carried it off. Post sued Pierson for damages and the trial judge found in favour of Post. Pierson appealed. |
| **Issue** | 1. Who owned the right to the fox? 2. What amounts to occupancy as applied to acquiring the rights to wild animals? |
| **Ratio** | A dead wild animal is owned by whoever has corporeal possession of the animal, not by the person who pursues it. |
| **Reasoning** | **TOMPKINS J:**  A fox is a wild animal (ferae naturae) and that property of a wild animal is acquired by occupancy only. Pursuit alone vest no property or right in the huntsman and that even pursuit accompanied with wounding is equally ineffectual for that purpose unless the animal be actually taken. Puffendorf defines occupancy of beasts ferae naturae to be the actual corporal possession of them. The foregoing authorities are decisive to show that the mere pursuit of Post gave him no legal right to the fox. It became the property of Pierson when it was intercepted and killed by him.  Barbeyrac in his notes on Puffendorf goes on to say that actual bodily seizure is not indispensable to acquire possession of the wild animal, but that the mortal wounding of such an animal by one pursuing it may be in possession of the animal. If the person pursuing the animal is able to deprive the animal of its natural liberty or make it impossible for it to escape, the pursuer is deemed to have possession of that animal. However, this is not applicable to this case. |
| **Holding** | Pierson owns the fox. A dead wild animal is owned by whoever has corporeal possession of the animal, not by the person who pursues it. |

**Takeaway:** A dead wild animal is owned by whoever has corporeal possession of the animal, not by the person who pursues it.

### *Popov v Hayashi* 2002 WL 31833731 (Cal SC)

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| **Facts** | Barry Bonds broke the single homerun record. Popov and Hayashi were standing in the area where Barry Bonds hit the record-breaking homerun. The ball landed in the webbing of Popov’s glove, and while he was in the process of catching the ball, he was tackled to the ground by a mob and assaulted. At some point, the ball left his glove and ended up on the ground. It is impossible to establish the exact point in time that this occurred or what caused it to occur. Hayashi was in the area of the ball and committed no wrongful act. While involuntarily on the ground, he picked up the ball and pocketed it. Hayashi wanted the cameraman to videotape him with the ball and eventually the cameraman complied. Neither the camera nor any witnesses were able to establish whether Popov retained control of the ball as he descended into the crowd. It is impossible to know if Popov would have been able to retain control but for the crowd interference. |
| **Issue** | Did Popov achieve possession or the right to possession as he attempted to catch and hold on to the ball? |
| **Ratio** | 1) Where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others, the actor has a legally cognizable pre-possessory interest in the property. That pre-possessory interest constitutes a qualified right to possession which can support a cause of action for conversion.  2) Where more than one party has a valid claim to a single piece of property, the court will recognize an undivided interest in the property in proportion to the strength of the claim. |
| **Reasoning** | Plaintiff brings cause of actions for:   1. Conversion; 2. Trespass to chattel;   1) A conversion is the wrongful exercise of dominion over the personal property of another. There must be actual interference with the plaintiff’s dominion. Wrongful withholding of property can constitute actual interference even where the defendant lawfully acquired the property. The defendant need not know who the true owner is to commit conversion.  2) Trespass to chattel exists where personal property has been damaged or where the defendant has interfered with the plaintiff’s use of the property. Popov claims that Hayashi intentionally took the ball and refused to give it back. There is no trespass to chattel, and if there is a wrong at all, it is conversion.  Conversion does not exist unless the baseball rightfully belongs to Popov. **Did Popov achieve possession at any point?**  The parties agreed to the starting point that the MLB owned the baseball and that it was intentionally abandoned when it was hit. The first person who came in possession of the ball became its new owner. The parties disagreed on the term possession. This is expected as possession is intentionally left vague to its varied definitions in different industries. However, there are central principles to the term of possession. Generally, these principles are that there is physical control over the object and an intent to control it or exclude others from it. The focus of analysis in this case is whether Popov’s act was sufficient to create a legally cognizable interest in the ball. Hayashi argues (based on Professor Brian Gray) that possession is not established until the fan has complete control of the ball. That is to say, the momentum of the ball and the fan have ceased, and the fan is still in control of the ball. Popov argues that this definition is rejected by several leading cases. Popov submits a definition of possession (based on Professors Finkelman and Bernhardt) which says that possession is achieved where there is an intent to possess and manifests that intent by stopping the forward momentum of the ball whether or not complete control is achieved.  However, the cases that use Popov’s rule are contextual in nature. They involve cases of hunting or salvaging ships. It would be impossible to apply a rule of possession other than the one stated. It is impossible to wrap your arms around a fleeting fox or a shipwreck. This is not true about a baseball. There is an expectation among fans that you have unequivocal dominion over the ball before asserting possession. The legal rule should not be inconsistent with that expectation. Therefore, Gray’s rule (Hayashi) is adopted as the definition of possession in this case.  The central tenet of Gray’s rule is that possession is maintained after the incidental contact with people and things. Popov did not present evidence that he would have retained possession through incidental contact. As such, Popov did not achieve full possession.  However, this was not mere incidental contact, Popov was assaulted by a band of wrongdoers. For public policy reasons of not condoning violence or allow the case to be dictated by violence, the case cannot be decided merely by who has possession.  The legal question at this point is whether an action for conversion can proceed where the plaintiff has failed to establish possession or title. It can. An action for conversion may be brought where the plaintiff has title, possession or the right to possession. The court adopts the following rule so as to be equitable (Popov is asking for equitable remedies): where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others, the actor has a legally cognizable pre-possessory interest in the property. That pre-possessory interest constitutes a qualified right to possession which can support a cause of action for conversion.  However, there is still the interest of Hayashi. He was a victim the same as Popov. He was able to grab the ball and obtain complete dominion over it. Ruling in favour of Hayashi would be unfair to Popov and ruling in favour of Popov would be unfair to Hayashi. There is a middle ground.  The court here applies the concept of equitable division explored by Professor Helmholz. There is no California case directly on point, but *Arnold v Producers Fruit Company* can provide some insight. In that case, fruit growers gave fruits to a producer to dry the fruit. The producer mixed the fruit together and did a bad job and the fruits all became rotten. Each fruit grower had an undivided interest in the sum proportional to how much they contributed. The principle at work here is that where more than one party has a valid claim to a single piece of property, the court will recognize an undivided interest in the property in proportion to the strength of the claim. This principle is applied in *Keron v Cashman*. Five boys found a sock with something heavy, and at some point, each had possession of the sock until it burst open. There was money in the sock and each of them wanted it. The court split the money 5 ways. The case at bar is no different. Popov and Hayashi had or have control and have an interest in the ball. One interest is not superior over the other.  Each party, Popov and Hayashi, have an equal and undivided interest in the ball. For the plaintiff’s claim in conversion to be sustained, the ball must be sold, and proceeds divided equally. |
| **Holding** | Popov achieved a pre-possessory interest in the ball in the process of trying to catch the ball. Both Popov and Hayashi own the ball jointly. |

**Takeaway:**

1) Where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others, the actor has a legally cognizable pre-possessory interest in the property. That pre-possessory interest constitutes a qualified right to possession which can support a cause of action for conversion.

2) Where more than one party has a valid claim to a single piece of property, the court will recognize an undivided interest in the property in proportion to the strength of the claim.

### *Keefer v Arillotta*, (1976) 13 OR (2d) 680 (ONCA)

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| **Facts** | TJ: Respondents (Keefer) had acquired a possessory title to a portion of the appellants’ land subject to an easement remaining in the appellants.  There is an 8ft wide, 105 ft long strip of land that separates the respondent’s residential land (south of the strip) and the appellant’s commercial land (north of the strip). The most easterly 41 ft of the strip is a stone driveway. Extending the remaining way westward is a grassy area running up to a frame garage owned by the respondents.  The respondents have a right of way to the strip of land a portion of the appellant’s land.  Respondents would park their cars or their friend’s cars on the driveway. The grassy area was tended to by the owners of the respondents’ property for many years. Occasionally held picnics and barbecues with no objection. The respondent submits that no objection was made by Mr. Cloy when the respondent moved his garage from the rear of his property to the end of the grassy part of the strip.  The Cloys would use the strip for an icehouse, and later used it to store soft drinks in a one-storey attachment to the business property. The trucks would occasionally park on the driveway to deliver the soft drinks. Sometimes customers of Mr. Cloy’s would park on the driveway when making purchases. Sometimes tenants of the apartments would use the driveway for moving trucks. |
| **Issue** | The question is whether the respondents’ possession challenged in any way the right of the legal owner to make the use of the property he wished to make of it. |
| **Ratio** | A person claiming a possessory title must establish (*Pflug and Pflug v Collins*):   1. Actual possession for the statutory period by themselves and those through whom they claim; 2. That such possession was with the intention of excluding from possession the owner or persons entitled to possession; and 3. Discontinuance of possession for the statutory period by the owner and all others, if any, entitled to possession.    1. Possession of part is possession of the whole if the possessor is the legal owner. (*Great Western R Co v Lutz*). |
| **Reasoning** | A possessory title claim cannot be acquired against a legal owner by depriving him of uses of his property that he never intended or desired to make of it. A person claiming a possessory title must have an intention to exclude the owner from such uses as the owner wants to make of his property. The test is not whether the respondents exceeded their rights under the right of way, but whether they precluded the owner from making the use of the property that he wanted to make of it (*Re St Clair Beach Estates Ltd v MacDonald*). Acts relied on as dispossessing the true owner must be inconsistent with the form of enjoyment of the property intended by the true owner (*Leigh v Jack*). The onus of proving possessory title is more difficult when he is on the property pursuant to a grant from the owner. Acts done on another’s land may be attributed to the exercise of an easement, even an excessive exercise of an easement, rather than to adverse possession of the fee (*Littledale v Liverpool College*).  With respect to the legal test set out in *Pflug and Pflug v Collins*, the respondents fail in both (2) and (3). The evidence of the relationship between the Cloys and Keefers was excellent. The posture of the Cloys was that of an accommodating neighbour, anxious to avoid any trouble. This indicates that the Keefers never intended to oust the Cloys from their limited use of the strip of property. With respect to discontinuance of the possession of the strip of property, the court finds that the only area that was discontinued from ownership from the Cloys was the garage area near the grass. With respect to the balance of the strip, the owners made use of it as they wanted. Just because the Cloys didn’t use the whole strip of the land does not mean they are discontinued from ownership of the strip. Possession of part is possession of the whole if the possessor is the legal owner (*Great Western R Co v Lutz*).  The appeal is allowed, and the respondents are entitled to a declaration that the appellants’ title has been extinguished only with respect to that part of the land occupied by the respondents’ garage. |
| **Holding** | The respondents’ possession did not challenge in any way the right of the legal owner to make use of the property he wished to make of it. The only area in which the appellants’ title has been extinguished is the land occupied by the respondents’ garage. |

**Takeaway:**

A person claiming a possessory title must establish (*Pflug and Pflug v Collins*):

1. Actual possession for the statutory period (10 years) by themselves and those through whom they claim;
2. That such possession was with the intention of excluding from possession the owner or persons entitled to possession; and
3. Discontinuance of possession for the statutory period by the owner and all others, if any, entitled to possession.
   1. Possession of part is possession of the whole if the possessor is the legal owner. (*Great Western R Co v Lutz*).

### *Teis v Ancaster (Town)*, (1997) 35 OR (3d) 216 ONCA

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| **Facts** | The plaintiffs claimed possessory title to two strips of land: a ploughed strip and a laneway on the western edge of Jerseyville Park (a public park owned by the Town of Ancaster). For more than 10 years, both the plaintiff and defendant mistakenly believed that the plaintiffs owned the strips of land. Lazier J declared that the plaintiffs were owners by adverse possession of the ploughed strip and the laneway but that the public was entitled to travel over part of the laneway by car and all of the laneway by foot. The defendants appeal and ask for the plaintiff’s actions to be dismissed. The plaintiffs cross-appeal and ask to delete that part of the judgement granting the public right of way over the laneway. |
| **Issue** | 1. Does a person claiming possessory title have to show “inconsistent use” when both the claimant and the paper title holder mistakenly believe that the claimant owns the land in dispute? 2. Did the trial judge make a palpable and overriding error in holding that the plaintiffs had “actual possession” of the disputed strips for the ten-year period prescribed by the *Limitations Act*. |
| **Ratio** | * For actual possession to be satisfied, the acts of possession must be open, notorious, peaceful, adverse, exclusive, actual and continuous. If any one of these elements is missing at any time during the statutory period, the claim for possessory title will fail.   + The element of adversity means that the claimant is in possession without the permission of the owner.   + For some types of property, even intermittent use will satisfy the element of continuity (*Walker v Russell*;*Laing v Moran*). * When both the claimant and the true owner mistakenly believe that the claimant is the true owner, the claimant does not have to satisfy the inconsistent use test. |
| **Reasoning** | The requirements a claimant must satisfy to establish a possessory title were out by Well J in *Pflug v Collins*:   1. Actual possession for the statutory period by themselves and those through whom they claim; 2. That such possession was with the intention of excluding from possession the owner or persons entitled to possession; and 3. Discontinuance of possession for the statutory period by the owner and all others, if any, entitled to possession.   TJ found that the plaintiffs satisfied all three requirements. TJ referred to *Madison Investments Ltd v Ham* where ONCA held that, to establish possessory title, the plaintiffs “must show that for an uninterrupted period of 10 years they were in actual possession of the strips of land in question; they intended to exclude the true owners from possession; and the true owners were in fact effectively excluded from possession.”  **Actual Possession**  For actual possession to be satisfied, the acts of possession must be open, notorious, peaceful, adverse, exclusive, actual and continuous. If any one of these elements is missing at any time during the statutory period, the claim for possessory title will fail. This is a finding of fact, which cannot be set aside unless the TJ made a “palpable and overriding error”.  Possession must be open and notorious because: 1) it shows that the claimant is using the property as an owner might, and 2) it puts the true owner on notice that the statutory period has begun. The defendants challenge that the TJ’s findings that the plaintiff’s possession was adverse and continuous. The element of adversity means that the claimant is in possession without the permission of the owner. If the claimant acknowledges the right of the true owner, then the possession is not adverse. TJ rejected evidence brought forth by the defendant disputing the adversity. He was entitled to do so. Defendant argues that the use wasn’t continuous and was intermittent and seasonal. For some types of property, even intermittent use will satisfy the element of continuity (*Walker v Russell*;*Laing v Moran*). The court agrees with the TJ that the possession was adverse and continuous.  **Inconsistent Use**  Inconsistent use means that a claimant’s use of the land is inconsistent with the true owner’s intended use of the land (*Leigh v Jack*). In other words, the claimant must use the land in a manner that prevents the true owner from using the land the way they wanted to. This was imported into Ontario caselaw in the case of *Keefer v Arillotta* and *Fletcher v Storoschuk*. Moldaver J held in *Wood v Gateway of Uxbridge Properties Inc* that the test of inconsistent use did not apply to a case of mutual mistake about title. The court here agrees. The inconsistent use test was also applied in *Madison Investments Ltd v Ham* but with respect to the third requirement of possessory title. This is where the notion of “adversity” comes into play for adverse possession. The TJ found that both parties had a mutual mistake about title, and the ONCA agrees, therefore the inconsistent use test is not applicable. The inconsistent use test should not be applied to mutual mistake about title because it would be impossible to determine the true owner’s intended use and a claim of adverse possession could never be made out by a claimant where there is mistake about title. The test being applied here would also set a precedent that would punish those who adversely possessed land by accident and reward those who are knowingly trespassing. Policy considerations should support a contrary conclusion. Additionally, how could the inconsistent use test be applied with respect to the second requirement of possessory title; how would the claimant’s use be inconsistent with the use of the true owner when they believed they were the true owner?  **Cross-Appeal**  A possessory title may be subject to a right of way (*Ziff*).  Notes: In Canada, only Albert protects all municipally owned land against claims of adverse possession. In Ontario, streets, highways, and road allowances have been protected from adverse possession or encroachment claims (*Household Realty Corp v Hilltop Mobile Home Sales*). However, this issue of municipal parks being protected was not brought up and won’t be decided until it is brought up. |
| **Holding** | 1. When both the claimant and the true owner mistakenly believe that the claimant is the true owner, the claimant does not have to satisfy the inconsistent use test. 2. The trial judge did not make an overriding and palpable error when finding that that the claimants had actual possession of the land. |

**Takeaway:**

* For actual possession to be satisfied, the acts of possession must be open, notorious, peaceful, adverse, exclusive, actual and continuous. If any one of these elements is missing at any time during the statutory period, the claim for possessory title will fail.
  + The element of adversity means that the claimant is in possession without the permission of the owner.
  + For some types of property, even intermittent use will satisfy the element of continuity (*Walker v Russell*;*Laing v Moran*).
* When both the claimant and the true owner mistakenly believe that the claimant is the true owner, the claimant does not have to satisfy the inconsistent use test.

## Abandonment and Finder’s Rights

### *Simpson v Gowers et al* 1981 CanLII 1884 (ON CA)

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| **Facts** | The appellant sued the respondent for the alleged conversion of some 1500 bushels of soya beans. The jury found in favour of the respondents. The appellant owned a farm where he grew beans. He sold the farm to someone else, but still stored his beans at the farm. The new owners then sold the farm to someone else, and that someone else sold the farm to the respondents. The respondents were not made aware that the appellant owned the beans. The person who sold the farm to the respondents says that he told the appellant that the farm was being sold. The respondents discarded some beans, spread some on a nearby field, and sold the rest for $5900. The defence was that the appellant had abandoned the beans and therefore he no longer had title to them. |
| **Issue** | Did the TJ err in his instruction to the jury on abandonment and the onus of proof? |
| **Ratio** | Abandonment occurs when there is “a giving up, a total desertion, and absolute relinquishment” of private goods by the former owner. It may arise when the owner with the specific intent of desertion and relinquishment casts away or leaves behind his property. The onus of proof to prove abandonment is on those claiming the goods were abandoned. |
| **Reasoning** | The law of conversion is clear and has been recently restated by Lord Justice Diplock in *Marfani & Co Ltd v Midland Bank Ltd*:  “At common law, one’s duty to one’s neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is usurpation of his proprietary or possessory rights in them. Subject to some exceptions which are irrelevant for the purposes of the present case, it matters not that the doer of the act of usurpation did not know and could not by the exercise of any reasonable care have known, of his neighbour’s interest in the goods. The duty is absolute; he acts at his peril.”  The TJ did not define abandonment to the jury, and he should have. Abandonment has been defined in Brown’s on *The Law of Personal Property*. Abandonment occurs when there is “a giving up, a total desertion, and absolute relinquishment” of private goods by the former owner. It may arise when the owner with the specific intent of desertion and relinquishment casts away or leaves behind his property.  The TJ erred in his direction to the jury and his general direction as to the onus of proof. The respondents raised the defence of abandonment, and thus the burden of proof was on them to prove the elements of abandonment, not on the plaintiff as the TJ states. |
| **Holding** | Yes, the TJ erred in his instruction in that he did not define abandonment to the jury and stated that the onus of proof was entirely on the plaintiff. |

**Takeaway:** Abandonment occurs when there is “a giving up, a total desertion, and absolute relinquishment” of private goods by the former owner. It may arise when the owner with the specific intent of desertion and relinquishment casts away or leaves behind his property. The onus of proof to prove abandonment is on those claiming the goods were abandoned.

### *Armory v Delamirie* (1722) 93 ER 664 (KB)

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| **Facts** | The plaintiff found a jewel and brought it to the defendant’s shop (goldsmith). The apprentice took out the stones and valued it. They offered him the value for the jewel, but the plaintiff refused to take it and insisted to have the jewel back. The apprentice delivered him back the socket without the jewels. |
| **Issue** | Does the plaintiff have any property rights regarding the jewel? |
| **Ratio** | The finder of the jewel does not acquire an absolute property or ownership, but he has the right to exclude others from the property against all but the rightful owner. |
| **Reasoning** | 1. The finder of the jewel does not acquire an absolute property or ownership, but he has the right to exclude others from the property against all but the rightful owner. 2. The master is answerable for his neglect despite it being the apprentice’s actions. 3. If the item cannot be presented, then it will be assumed to have the maximum value available. |
| **Holding** | The plaintiff owns the jewel against all but the true owner. |

**Takeaway:** The finder of the jewel does not acquire an absolute property or ownership, but he has the right to exclude others from the property against all but the rightful owner.

### *Hannah v Peel* (1945) 1 KB 509

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| **Facts** | The plaintiff was staying in the defendant’s home. While he was adjusting the curtains, something fell onto the ledge of the window. It was a brooch worth considerable value. The plaintiff gave it to his commanding officer who then gave it to the police. The brooch went unclaimed and the police gave it to the defendant who then sold it. The plaintiff asked for the brooch from the defendant claiming he is the rightful owner since it went unclaimed, but the defendant sold it. The plaintiff is suing for the brooch or its value and damages for its detention. |
| **Issue** | Who has legal title of the brooch? |
| **Ratio** | The finder of a lost item has an absolute property right against all but the rightful owner. There are three exceptions to this rule:   1. When the owner of the property is already in possession of the lost item even without knowledge of their ownership. 2. If someone finds something in the course of their employment to their employer, it is the employer who holds title to that thing. 3. No title is given to a finder in which he obtains the thing through a trespass or other unlawful act. |
| **Reasoning** | The law on this issue is uncertain. The plaintiff claims that since he found it, he is entitled to ownership save the true owner. The defendant claims that since it was found on his property, that he is entitled to ownership save the true owner. The court cites *Armory v Delamirie* for the proposition “that the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner and consequently may maintain trover.”. The court also cites *Bridges v Hawkesworth* which is an analogous case. The plaintiff found a parcel containing some money in the defendant’s store. He gave it to the defendant and asked him to find the true owner. The defendant was unable to find the true owner and the plaintiff asked for the parcel, but the defendant refused. Ultimately, the case was decided on appeal that the plaintiff is the owner of the parcel citing the rule in *Armory*. It is not the circumstance in which the parcel was found that determines the owner, but the finder itself.  Three legal scholars (Mr. Justice Oliver Wendell Holmes, Sir Frederick Pollock and Sir John Salmond) all agreed with the result of *Bridges*, but for different reasons. The common theme threading their reasoning together is that: 1) the shopkeeper never had control over the parcel and 2) the shopkeeper did not know of the parcel’s existence. There was no intent to control or exclude others from the parcel.  The court reviewed two cases: *South Staffordshire Water Co v Sherman* and *Elwes v Brigg Gas Co*. These cases show that the law is in an unsatisfactory state. Sir John Salmond writes of some exceptions to the rule in *Armory* and *Bridges*. There are three exceptions to the rule:   1. When the owner of the property is already in possession of the lost item even without knowledge of their ownership. 2. If someone finds something in the course of their employment to their employer, it is the employer who holds title to that thing. 3. No title is given to a finder in which he obtains the thing through a trespass or other unlawful act.   The court here decides to follow the law in *Bridges* and rules in favour of the plaintiff. The cases are analogous as the defendant was never in possession of the brooch and had no knowledge of it until the finder told him so. |
| **Holding** | The plaintiff has legal title of the brooch. |

**Takeaway:**

The finder of a lost item has an absolute property right against all but the rightful owner. There are three exceptions to this rule:

1. When the owner of the property is already in possession of the lost item even without knowledge of their ownership.
2. If someone finds something in the course of their employment to their employer, it is the employer who holds title to that thing.
3. No title is given to a finder in which he obtains the thing through a trespass or other unlawful act.

### *Grafstein v Holme And Freeman* (1958) Ont CA

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| **Facts** | The appellants are employees of the respondents. The appellants found a lockbox in the basement of the respondents’ store. They opened the lockbox and discovered that there was $38k. They bought a new lock and informed the respondent of the contents of the lockbox. At first the respondent agreed to split it 3-ways but then told them to wait. The respondent claimed the money was his and gave it to police so that the true owner could claim the money. The money was never claimed, and the money was paid into the Court. Appellants claim they are entitled to the lost money. |
| **Issue** | Who has finder’s rights to the lockbox and its contents? |
| **Ratio** | 1) There are two types of “lost” property: treasure-trove (designedly abandoned, belongs to the King until the true owner retrieves it) and casually lost items (abandoned).  2) To be true finders it must be held that one come into de facto possession of the object at a time when no one else has possession of it. De facto possession may be paraphrased as effective occupation or control. It is also important to consider the intent of the possessor (did they intend to exercise assertion of domination) and exclude others from enjoying the thing which they found.  3) There is a rebuttable presumption at law that the occupier/owner of a building does in fact possess the things which may be upon or in the land.  4) Ownership of a receptacle does not automatically mean you own the contents of the receptacle. However, there is a rebuttable presumption at law that the possessor of the receptacle is presumed to have possession of its contents. |
| **Reasoning** | **Arguments of Both Sides**  The appellants rely on the rules in *Armory v Delamirie*, *Bridges v Hawkesworth*, and *Hannah v Peel*. The respondent’s counterargument is that the appellants are servants of the respondents and that they found it for him. Additionally, the respondent submits that the appellants were trespassing, and they should not be allowed to profit from their wrongs. The respondent cites *South Staffordshire Water Co v Sharman* and *Elwes v Brigg Gas Co*.  **TJ and the “Lost” Property**  The TJ ruled that the money was not “lost” in the legal sense because it was not found in a public place and because it was neatly organized and place in a lockbox. The ONCA rejects this argument. The money need not be in a public place for it to be lost, and the location of the money and condition of the rubber bands show that no one intended on returning to it. The ONCA cites *Atty Genl v British Museum Trustees* to define what constitutes lost property. There are two types of “lost” property: treasure-trove (designedly abandoned, belongs to the King until the true owner retrieves it) and casually lost items (abandoned). The court here finds that the money was casually or accidentally lost because no one has come to claim it after all the publicity of this case.  **Ownership of the Lockbox**  It does not follow then that the appellants are the “true finders”. To be true finders it must be held that they came into de facto possession of the money at a time when no one else has possession of it. De facto possession may be paraphrased as effective occupation or control. It is also important to consider the intent of the possessor (did they intend to exercise assertion of domination) and exclude others from enjoying the thing which they found. These concepts come from Sir Frederick Pollock’s *Possession in the Common Law*.  The respondents’ first argument, based on *South Sharmon, Elwes* and *R v Rowe* is that the respondent is the true owner of the cash because it was found on his property. Each of these three cases had to do with articles found attached to or under land – not on the surface of the land or in a building. The items were attached to the land - a passer-by could not pick them up. Pollock and Wright state a principle governing these decisions in their *Possession in the Common Law*. They say that possession of land carries with it possession of everything which is attached to or under the land and it makes no difference that the possessor is not aware of the thing’s existence. Lord Russel in *Sharman* (quoted by the learned TJ) extends the language of Pollock and Wright to things that are “upon or in” land or house. There should be no issue with the principle because there must be a basis for the presumption that the occupier has in fact the “possession of house or land with a manifest intention to exercise control over it and the things which may be upon or in it”. There must be a natural presumption of possession in favour of the person in occupation. Appellants contend that the presumption is not valid due to the respondent’s ignorance and lack of intention to possess the money.  **Possession of the Contents of the Box**  On the facts, it cannot be denied that the respondent had possession of the box after the appellant brought it to him. However, the appellants submit that possession of the box did not give him possession of the contents since he did not know of their existence. As such, the appellants are the true owners of the money since the respondent had no possession and found it first and did not trespass and the action of finding it was not in their normal course of acting as servants, nor did they abandon the money.  The court speaks on the *ratio* of *Bridges v Hawkesworth*. The ratio here is that the shopkeeper did not have a right to the parcel because the existence of said parcel was not brought to his attention. Therefore, the shopkeeper did not owe a duty to the true owner. Since no duty was owed to the true owner, there is no custody of the parcel. This *ratio* distinguishes *Bridges* and *Hannah* from *Sharman*, *Elwes*, and *Rowe*. In *Hannah*, the owner of the apartment building never knew about the jewel that was found, therefore no duty was owed by the owner to the true owner, and therefore did not have custody.  The respondent then argues that being in possession of the box put him in possession of the contents. This cannot be held as a positive rule of law. *Merry v Green* is cited to support either side of the argument of the respondent. In that case, the plaintiff had a secretary delivered to him that contained a purse and money. Neither the deliverer or the plaintiff knew of the purse and money. Neither intended to deliver or receive the purse and money. As such, when the plaintiff discovered the purse and money in the secretary, it was a case of finding and the law applicable to cases of finding applied. The result in that case was that a new trial was directed so that it might be decided whether the sale of a piece of furniture with an article contained inside included the article inside. Thus, the acquisition of a chattel does not necessarily import the acquisition of its contents. Whether it does, or does not, appears to be a question of fact. On this issue, the same presumption related to the occupier of the building can be applied to the possession of a receptacle – he is presumed to have possession of its contents. This can be rebutted.  **Application to the Facts**  The respondent undertook custody of the lockbox when appellant first brought it to its intention. The finder must exercise reasonable diligence in preserving the goods and the least degree of care (*Beals Law of Bailments*). This case is distinguished from *Bridges* upon the single fact the respondent knew of the lockbox and intended (through is actions and words) to exercise dominion over the lockbox. For these reasons, it must be concluded that the respondent had the *de facto* possession or custody of both box and contents. |
| **Holding** | The owner of the shop (the respondent) is the owner of the lockbox and its contents. |

**Takeaway:**

1) There are two types of “lost” property: treasure-trove (designedly abandoned, belongs to the King until the true owner retrieves it) and casually lost items (abandoned) (*Atty Genl v British Museum Trustees*).

2) To be true finders it must be held that one come into de facto possession of the object at a time when no one else has possession of it. De facto possession may be paraphrased as effective occupation or control. It is also important to consider the intent of the possessor (did they intend to exercise assertion of domination) and exclude others from enjoying the thing which they found (*Possession in the Common Law*).

3) There is a rebuttable presumption at law that the occupier/owner of a building does in fact possess the things which may be upon or in the land (Based on Lord Russel’s words in *South Staffordshire Water Co v Sharman*).

4) Ownership of a receptacle does not automatically mean you own the contents of the receptacle (*Merry v Green)*. However, there is a rebuttable presumption at law that the possessor of the receptacle is presumed to have possession of its contents.

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

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| **Facts** | The plaintiff was sitting in the lounge of an airport leased by the defendants. He found a gold bracelet on the floor. He gave the gold bracelet to an anonymous official of the defendant with his name and address and told them to try and find the true owner, and if they couldn’t, to return the bracelet to him. The defendant went ahead and sold the bracelet. The plaintiff sued the defendant for the sale price and interest and won. The defendants now appeal. |
| **Issue** | Who has finder’s rights of the bracelet? |
| **Ratio** | In some circumstances the intention of the occupier to assert control over articles lost on his premises speak for itself. On one extreme is a bank vault (everything lost in the vault is intended to be controlled) and the other extreme is a public park (everything lost in the park is not intended to be controlled). In the middle are most of every other kind of land. In the middle cases, there is no sufficient manifestation of any intention to exercise control over lost property before it was found such as would give the occupier a right superior to that of the finder. |
| **Reasoning** | The plaintiff claims that he has finder rights when he found the bracelet. The defendant claims that their rights to the bracelet precede the discovery of the bracelet by the plaintiff. The defendants claim that an occupier of land has such rights over all lost chattels which are on that land, whether or not the occupier knows of their existence and that these rights are superior the finder rights of the plaintiff.  The court sets out the rights and obligations of the finder and of an occupier as seen below:  **Rights and obligations of the finder**  1. The finder of a chattel acquires no rights over it unless (a) it has been abandoned or lost and (b) he  takes it into his care and control.  2. The finder of a chattel acquires very limited rights over it if he takes it into his care and control  with dishonest intent or in the course of trespassing.  3. Subject to the foregoing and to point 4 below, a finder of a chattel, whilst not acquiring any absolute  property or ownership in the chattel, acquires a right to keep it against all but the true owner or  those in a position to claim through the true owner or one who can assert a prior right to keep the  chattel which was subsisting at the time when the finder took the chattel into his care and control.  4. Unless otherwise agreed, any servant or agent who finds a chattel in the course of his employment  or agency and not wholly incidentally or collaterally thereto and who takes it into his care and  control does so on behalf of his employer or principal who acquires a finder's rights to the exclusion  of those of the actual finder.  5. A person having a finder's rights has an obligation to take such measures as in all the circumstances  are reasonable to acquaint the true owner of the finding and present whereabouts of the chattel and  to care for it meanwhile.  **Rights and liabilities of an occupier**  1. An occupier of land has rights superior to those of a finder over chattels in or attached to that land  and an occupier of a building has similar rights in respect of chattels attached to that building,  whether in either case the occupier is aware of the presence of the chattel.  2. An occupier of a building has rights superior to those of a finder over chattels upon or in, but not  attached to, that building if, but only if, before the chattel is found, he has manifested an intention  to exercise control over the building and the things which may be upon it or in it.  3. An occupier who manifests an intention to exercise control over a building and the things which  may be upon or in it so as to acquire rights superior to those of a finder is under an obligation to  take such measures as in all the circumstances are reasonable to ensure that lost chattels are found  and, upon their being found, whether by him or by a third party, to acquaint the true owner of the  finding and to care for the chattels meanwhile. The manifestation of intention may be express or  implied from the circumstances including, in particular, the circumstance that the occupier  manifestly accepts or is obliged by law to accept liability for chattels lost upon his "premises," e.g.  an innkeeper or carrier's liability.  4. An "occupier" of a chattel, e.g. a ship, motor car, caravan or aircraft, is to be treated as if he were  the occupier of a building for the purposes of the foregoing rules.  **Application to the Case**  The plaintiff was not a trespasser in the executive lounge and *prima facie* had full finder’s rights and obligations and discharged those obligations when he handed the bracelet over. Those finder’s rights were not displaced in favour of an employer or principal.  The defendants cannot assert title to the bracelet based upon the rights of an occupier over chattels attached to a building. The bracelet was lying loose on the floor. Their claim must be based upon a manifest intention to exercise control over the lounge and all things which might be in it. They did not. There was no evidence that they searched for such articles regularly or at all.  It was suggested in argument that in some circumstances the intention of the occupier to assert control over articles lost on his premises speak for itself. This is correct. On one extreme is a bank vault (everything lost in the vault is intended to be controlled) and the other extreme is a public park (everything lost in the park is not intended to be controlled). In the middle are most of every other kind of land. The lounge is in the middle band. There was no sufficient manifestation of any intention to exercise control over lost property before it was found such as would give the defendants a right superior to that of the plaintiff or indeed any right over the bracelet. |
| **Holding** | The plaintiff had finder’s rights to the bracelet. |

**Takeaway:** In some circumstances the intention of the occupier to assert control over articles lost on his premises speak for itself. On one extreme is a bank vault (everything lost in the vault is intended to be controlled) and the other extreme is a public park (everything lost in the park is not intended to be controlled). In the middle are most of every other kind of land. In the middle cases, there is no sufficient manifestation of any intention to exercise control over lost property before it was found such as would give the occupier a right superior to that of the finder.

### *Weitzner v Herman* [2000] OJ No 906 ON Superior Court

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| **Facts** | Mr. Weitzner placed $130k in a fire extinguisher and hid it in the basement. He died and left the house and all his property by will to his wife. She was unaware of the hidden money and sold the house to Mr. and Mrs. Herman who contracted with Gansevles for the demolition of the house. Gansevles found the fire extinguisher with the hidden money. |
| **Issue** | Who is the owner of the $130k? |
| **Ratio** | Something cannot be delivered between two parties for which they have no knowledge of that thing’s existence. |
| **Reasoning** | **Gansevles**  Gansevles defendants claim to be entitled to the money because they enjoyed salvage rights in connection with the demolition of the building. This position is unsupported contractually or in their customs of their trade.  **Hermans**  The defendants submit a number of defenses, but one is analyzed by the court in the reading. “The plaintiff was unaware of the existence of the money and therefore was unable to exercise the degree of control over it necessary to constitute her the owner of it.”  Neither party knew about the money. The possibility of it being included in the transaction was not in the contemplation of either side when the agreement was made. The words “as is” serve as a warranty to the plaintiff to protect them from liability. Nor does s. 15 of the *Conveyancing and Law of Property Act* assist the defendants because it does not refer to or include chattels.  Neither party was aware of the hidden money nor had an intention to pass the money from the plaintiff to the defendant. While there may have been delivery of “all chattels in personal residence”, there was no delivery in law of the money (*Merry v Green*). |
| **Holding** | The plaintiff is the owner of the $130k. |

**Takeaway:** Something cannot be delivered between two parties for which they have no knowledge of that thing’s existence.

## Gifts

* In law, three elements are required to perfect a valid *inter vivos* (between living people) gift in personal property (*The Principles of Property Law*, Ziff):
  1. An intention to make a gift on the part of the donor;
  2. An intention on the part of the done to accept the gift;
  3. And delivery of the gift.

### *Rawlinson v Mort et al*, (1904-1905), 21 TLR 774 (KB)

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| **Facts** | A church needed a new organ. One of the churchwardens (Mr. Copelin) of the church offered to pay for an organ and have it placed in the church so long as it was still recognized as his property. The vicar of the parish (Mr. Briggs) wrote a letter stating that the organ was only on loan and still belonged to Mr. Copelin. The organ player and plaintiff received the organ because Mr. Copelin was thoroughly satisfied with his organ playing skills. Mr. Copelin gave him the letter from Mr. Briggs and the receipts for the payment of the organ. In front of his son, the plaintiff, and a previous churchwarden, Mr. Copelin said “I have given”. This indicates delivery of the gift. A year later, the church wanted to get rid of the organ, but the plaintiff objected and asked that it remain and claimed the 5 rent. The vicar repudiated the plaintiff’s claim to the organ.  Plaintiff argues: 1) What took place at the plaintiff’s room constituted a gift; and 2) that if it did not, it was completely by delivery at the church. |
| **Issue** | Did the plaintiff receive the organ as a gift? |
| **Ratio** | Where it is impractical to deliver personal property as a gift, there may be some symbolic delivery to complete the gift. |
| **Reasoning** | The defendants hold that the plaintiff never legally owned the organ as it was under loan to the church and could not be given to the plaintiff, and that a deed was necessary to make a valid gift.  Justice Bray disputes that last point by citing *Kiplin v Ratley* by saying in that case the wife received a gift in the husband’s absence when the intention was to give it to the husband. There was no evidence that the husband had notice of the gift, but it was still deemed a gift to the wife. The Court expressly declined to decide as to what was necessary where the possession at the time of the gift was in a third party.  Justice Bray then considers the points made by the plaintiff’s counsel. With respect to the first point, he cites *Chaplin v Rodgers*. In that case, it was decided that delivery could be symbolic where delivery of the actual item would be impractical. This is analogous to the case at bar: Mr. Copelin handed the papers to the plaintiff and this was tantamount to delivery of the organ as the papers were indicia of property.  Even if delivery was not completed here, it was certainly completed in the church when Mr. Copelin put his hand on the organ and said, “I have given”. |
| **Holding** | The plaintiff received the organ as a gift. |

**Takeaway:** Where it is impractical to deliver personal property as a gift, there may be some symbolic delivery to complete the gift.

### *In Re Cole*, [1963] 3 WLR 621

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| **Facts** | A husband bought a house while his wife was away. He furnished it and put a lot money into the house. When his wife came back, he said “It’s all yours” in reference to the house. The husband went bankrupt and the contents of the home were claimed by his trustee in bankruptcy. The wife claims that the contents of the house belonged to her before the sale and that a she is entitled to proceeds of the sale. |
| **Issue** | Was there delivery either preceding or succeeding or coincident with the words of gift so as to make it perfect? |
| **Ratio** | The courts will not perfect an imperfect gift. The delivery, as required to perfect a gift, may precede, succeed, or be coincident with the words of the gift. |
| **Reasoning** | The bankrupt husband said that a gift is delivered if the donee is brought to the chattels and the words of the gift are spoken. Justice Harman rejects that submission as there is no authority supporting it. He says that it is trite law for a gift to be without some delivery of the gift. The judge then goes on to say that there is no equity in the courts to perfect an imperfect gift. It must follow one of the forms in *Milroy v Lord*. Lord Turner LJ says that everything must be done in order to transfer the property and render the settlement binding upon him. However, the delivery may have been a “constructive delivery” as it was in *Winter v Winter* where the delivery preceded the actual gift. Where chattels are many or bulky, there may be symbolic delivery as there was in *Lock v Heath* or *Rawlinson v Mort*.  Counsel claims that the wife entering the home or being brought to the home constitutes delivery of the gift and put her into possession of the contents of the home. He cites *Ramsay v Margretti* and *French v Gething*. The former was a case where the wife actually paid for the furniture from the husband and received good consideration in the form of a deed, so it is not applicable. In the second case, the furniture was again passed down by a deed and not by the disposition of the husband. The judge cites *Bashall v Bashall* for the proposition that a delivery is necessary for a perfect gift. However, in that case there were difficulties that arose between spouses who lived together. How could a husband who wants to gift a horse to his wife but keep the horse at his property deliver the gift? A similar case, *Valier v Wright and Bull Ltd* had an issue where the husband gifted a car to a wife but there was no change in custody of the car. It was held that there was no valid gift. The husband cites *Smith v Smith* where there is mixed possession of furniture. However, the court rejects this case as the jury found for the defendant, and it is a jury’s opinion on what amounts to sufficient delivery. A better authority would be *In Re Magnus, Ex parte Salaman* where the husband settled furniture to his wife by settlement and was to add more furniture. The husband never delivered the furniture to the wife, but the wife came and saw it, and this amounted to delivery. However, this is not analogous to the present case. The strongest case for the wife is *Kiplin v Ratley* where the father-in-law owned title to furniture and orally gave the furniture to the wife in the presence of the furniture.  With these cases considered, the judge cannot find any change of possession. She is able to use the furniture not by virtue of ownership, but by her position as a wife. |
| **Holding** | There was no delivery to perfect the gift. |

**Takeaway:** The courts will not perfect an imperfect gift. The delivery, as required to perfect a gift, may precede, succeed, or be coincident with the words of the gift.

### *Watt v Watt Estate*, (1987) 28 ETR 9 (Man CA)

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| **Facts** | RJ Watt owned a boat called “Thunderbird”. He died in 1984. Shirley Watt, a friend of RJ Watt produced a document that said that RJ Watt, and Shirley Watt owned the boat jointly. Shirley Watt wrote to the estate to claim the boat, but it was denied. At trial, Shirley Watt was awarded sole ownership of the boat. The estate now appeals. |
| **Issue** | How much of the boat is Shirley Watt entitled to? |
| **Ratio** | When there isn’t a clear and delivered gift, a trust exists between the two parties on the property. |
| **Reasoning** | The document wasn’t forged. RJ Watt built the boat jointly with the husband of Shirley Watt. Shirley had keys to the boat and would take it for a wide with her family. The logbook of the boat recognized her as an owner.  The appellant has three arguments:   1. Even if the document isn’t forged, the appellant claims that there was no delivery and the gift was not completed. 2. Even if it was a completed gift, the deceased severed the joint tenancy and the claimant is entitled only to ½ of the boat. 3. The document constitutes a declaration of trust and is enforceable as such against the estate.   If 3) is true, then is it a trust of a joint tenancy or a tenancy in common?  The trial judge erred in holding that the boat was given as a complete gift with the right of survivorship. The delivery of the keys was not a delivery of a perfect gift, but delivery of the right to use (she received other keys too). If it is not a gift, then it was a trust and the estate is entitled to ½. This is analogous to the case of *Cochrane v Moore* where Cochrane had ¼ interest in some horses of Benzon’s but Benzon sold them to Moore before the bill of sale to Cochrane was executed. Moore then became a trustee to Cochrane. This is what happened in the case at bar: RJ Watt became a trustee for Shirley with respect to the boat. This is reaffirmed by RJ’s dealing with third parties that corroborated the rights of the plaintiff.  The final question is whether the trust includes the right of survivorship or is an undivided ½ interest. The court cites *McEwan v Ewer* as an analogous case. In that case, they used the wording of the will to establish that the use of the word “jointly” coupled with the proviso that disposition be divided equally create an equal division of shares. Justice Barlow in *McEwan* also cited *Jarman on Wills*: “Anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint-tenancy, and to create a tenancy in common.” For these reasons, the court finds that the use of the words “jointly” and “joint ownership” in the trust cannot be said to connote survivorship. |
| **Holding** | She is only entitled to ½ of the boat. |

**Takeaway:** When there isn’t a clear and delivered gift, a trust exists between the two parties on the property.

### *Hoiland v Brown*, (1980), 19 BCLR 4 (Co Ct)

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| **Facts** | Plaintiff bought a motorcycle for defendant’s use. The defendant and her associates thought it was a gift. The defendant forged the plaintiff’s signature to register the motorcycle under her name. The plaintiff and the defendant’s relationship deteriorated to the point where the plaintiff tried to get the motorcycle back. The plaintiff did not ever have possession until he tried to get a replevin order. |
| **Issue** | Did the failure to register the motorcycle to the defendant result in an imperfect gift? |
| **Ratio** | * “Everything required by law, and I emphasize ‘required by law’, to perfect a gift must be done and has to be done before the gift cannot be revoked by the donor.” * In the case of a motor-vehicle, it must be registered to the donee. * A gift can be retracted before it is perfected. |
| **Reasoning** | The court cites *Jacques v Hopkins* for the proposition that there is no equity in the court to perfect an incomplete gift. The statute required that in the case of a gift, that the motorcycle be registered to the donee. The defendant tries to explain that the reason she did not ask for the registration to be completed was due to the fact that she was receiving social assistance from the government and did not want to explain a $4000 motorcycle. “Everything required by law, and I emphasize ‘required by law’, to perfect a gift must be done and has to be done before the gift cannot be revoked by the donor.”  In the case of a motor-vehicle, it must be registered to the donee. |
| **Holding** | The failure to register constituted an imperfect gift. |

**Takeaway:**

* “Everything required by law, and I emphasize ‘required by law’, to perfect a gift must be done and has to be done before the gift cannot be revoked by the donor.”
* In the case of a motor-vehicle, it must be registered to the donee.
* A gift can be retracted before it is perfected.

### *Nolan v Nolan & Anor*, 2003 VSC 121

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| **Facts** | The plaintiff is seeking a declaration that states that she is the full owner of three paintings and is entitled to possession. She claims that they were given to her as a gift. |
| **Issue** | Were the three paintings given to the plaintiff as a gift? |
| **Ratio** | The essential elements of a valid gift of a chattel *inter vivos* in the absence of a deed of gift or a declaration of trust are:   1. An intention to make a gift, usually expressed by words of present gift;    1. The words that accompany a gift are required to manifest donative intention but can be fulfilled by other means (*Corin v Patton*).    2. In those unusual circumstances, the onus falls on the donee to prove the donative intention. 2. Intention on the part of the donee to accept the gift, and 3. Delivery    1. There must be an act that signifies the changing of possession in a shared establishment. |
| **Reasoning** | There are three recognized methods of making a valid gift of a chose in possession, such as a painting, *inter vivos*:   1. Deed; 2. Declaration of trust; 3. Delivery.   The plaintiff cannot rely on a) and b).  The plaintiff has many hurdles in their claim. First is the established principle that the law of equity will not assist in completing an incomplete gift. Second, is that possession is *prima facie* evidence of property (*Russell v Wilson*). The owners possessed it for so long (27 uninterrupted years) that in law their title cannot be called into question (for public policy reasons). Thirdly, the plaintiff must establish the necessary elements of a gift. Sir Sidney Nolan honoured good gifts and gave many to Cynthia.  The essential elements of a valid gift of a chattel *inter vivos* in the absence of a deed of gift or a declaration of trust are:   1. An intention to make a gift, usually expressed by words of present gift; 2. Intention on the part of the donee to accept the gift, and 3. Delivery   Are Words of Gift Essential?  The plaintiff does not have enough evidence for the words of a gift to evince the donative intent. The plaintiff submits that the words of a gift are not required to show donative intent. The argument in cases about gifts don’t typically surround the words of a gift but are usually around delivery. The court cites *Horsley v Phillips Fine Art Auctioneers Pty Ltd* for the assertion that oral words of gift with delivery are required. The plaintiff uses *Corin v Patton* to support her claim that words of gift are not required, but that case did not concern gifts of chattel but a transfer of interest in land and is therefore *obiter*. The better view in the *dictum* of *Corin v Patton* is that words are not necessarily the means to manifest the donative intent. There can be other means to fulfill those functions. In those unusual circumstances, the onus falls on the donee to prove the donative intention. The plaintiff relies on documents and statements that acknowledge that the paintings belong to Cynthia. The court finds that this is satisfactory in establishing the manifestation of donative intention. The court uses *Re Ridgeway* in which the alleged donor apparently believed that he had made a gift of port to his children and thereafter acknowledged the port’s reputation as “Tom’s port” or “Alice’s port”. However, in that case, the port remained with the father because delivery was not fulfilled.  Another problem that arises with the plaintiff’s reliance on the donor’s apparent acknowledgement is that the donative intention must subsist throughout the delivery. Until delivery occurs, the donor can validly retract the gift. In *Re Ridgeway* and in *The National Trustees Executors & Agency Company Limited v O’Hea* the intending donor intended to make a gift and believed it was valid, but it was not valid as delivery was not performed.  Delivery in Common Establishments  Delivery in a common establishment poses special difficulties. Whether the parties are in a common establishment is a question of fact. In *The National Trustees Executors and Agency Company Limited v O’Hea*, an employer intended to give a gift to its employee within a shared establishment. However, no possession change occurred, and the coach and horses continued to be maintained at the deceased’s premises. In requiring delivery, A’Beckkett J stated, “It would be dangerous to relax a rule which requires some visible act as an essential, when the only other essential is that certain words should be spoken.”. With respect to gifts between spouses in a shared establishment, *Re Cole* addresses this issue. In this case, the husband bought a home for him and his wife with furniture inside. He brought the wife to the home and said “Look, it’s all yours.”. The husband went bankrupt and the trustee in bankruptcy claimed entitlement to the contents of the house while the wife said the contents were gifted to her. The trial judge was in favour of the wife, holding that there wasn’t anything else Mr. Cole could have done to deliver the gift. However, the court of appeal overturned that ruling, saying that it is trite law to gift chattels without an act that constitutes a change of possession.  The court in this case concludes that the plaintiff has failed to establish the requisite elements of donative intention and delivery in relation to the three paintings. |
| **Holding** | The three paintings were not a gift to the plaintiff. |

**Takeaway:**

The essential elements of a valid gift of a chattel *inter vivos* in the absence of a deed of gift or a declaration of trust are:

1. An intention to make a gift, usually expressed by words of present gift;
   1. The words that accompany a gift are required to manifest donative intention but can be fulfilled by other means.
2. Intention on the part of the donee to accept the gift, and
3. Delivery
   1. There must be an act that signifies the changing of possession in a shared establishment.

### *Re Bayoff Estate*, [2000] SJ No 114, 2000 SKQB 23

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| **Facts** | The deceased, Dr. Bayoff had terminal cancer and before he died, got two lawyers to write his last will. In that will, he had 3 beneficiaries: his daughter Marina, his niece, and Antoinette Simard. Before he died, he gave a key to his CIBC safety deposit box (in the presence of the two lawyers) to Antoinette Simard and said, “everything there is yours” and that she should go to the safety deposit box and clean everything out. |
| **Issue** | Did Dr. Bayoff make a valid gift *donatio mortis causa* or *inter vivos* of $70k and sixteen coins which were then in his bank safety deposit box. |
| **Ratio** | There are three essential elements that must be present for a transfer of property to be classified as a *donatio mortis causa*. The three elements were set out in *Rushka v Tuba*:   1. Impending death from an existing peril, 2. Delivery of the subject matter; and 3. The gift is only to take effect upon death and will revert to the donor should he/she recover.   There is a principle in the common law that an unfulfilled gift will be treated as complete if the donee becomes an executor under the Will of the donor (*Strong v Bird*). So long as the intent to make the gift continues until death. |
| **Reasoning** | **Donatio Mortis Causa**  A gift that has the same characteristics as an *inter vivos* gift, but does not take effect until death is known as a *donatio mortis causa*. There are three essential elements that must be present for a transfer of property to be classified as a *donatio mortis causa*. The three elements were set out in *Rushka v Tuba*:   1. Impending death from an existing peril, 2. Delivery of the subject matter; and 3. The gift is only to take effect upon death and will revert to the donor should he/she recover.   The first element is satisfied. Dr. Bayoff knew he was dying.  The second element is established based on three case cited by the courts.  1) First is *Pembery v Pembery* in which a key to a trunk where a safety deposit box was located was handed to the done by the testator. This was found to be enough to establish a *donatio mortis causa*. 2) Second is *McDonald v McDonald* in which the deceased wanted to split $6k between three people (his wife, brother and sister). The brother wrote out three $2k cheques and the wife placed the cheque payable to her back in the trunk where the bank receipt book had been. These actions were found to constitute a valid *donatio mortis causa*. The gift was complete when the cheques were written. This situation is analogous to the case at bar. Delivery of the gift was completed when Dr. Bayoff handed the safety deposit box key to Simard. The completion of the paperwork that would allow her access was incidental to the delivery. The third case is *Brown v Rotenburg* where the court held that delivery of the key for a safety deposit box was a valid and effectual delivery of the contents of the box. Dr. Bayoff parted with the only means of accessing the contents of the box and therefore parted ways with the contents.  3) With respect to the third element, there are two difficulties. Dr. Bayoff was terminally ill when he made the gift; there was no possibility of recovery. The second difficulty is that he wished for Simard to have the gift immediately. There was no suggestion based on the words of Dr. Bayoff that the gift should take place upon his death. It is likely that any gifts which he intended to take effect on death were included in his Will.  **Inter Vivos Gift**  There are three elements that perfectly constitute a gift *inter vivos*:   1. An intention to donate; 2. Acceptance of the gift; and 3. A sufficient act of delivery.   Of those three requirements, only delivery is an issue in the case at bar. The courts will not complete an imperfect gift (*Kooner v Kooner*). Where it is not possible to physically deliver a gift due to its size or bulk, symbolic delivery will suffice (*Lock v Heath*). However, the simple delivery of a key should not be regarded as symbolic delivery of a gift contained in a safety deposit box. This is supported by the case of *Watt v Watt Estate* where a delivery of a duplicate set of keys to a boat was found not to be sufficient delivery of a gift. The donor must give up control of the gift and do everything possible to vest title in the done. This is supported by *Kooner* where the court in that case cited *Milroy v Lord* which said that a gift takes effect when the settler has done everything in order to transfer the property and render the settlement binding upon him. In *Beavis v Adams*, a mother gave her son a GIC by delivering the certificate after incorrectly filling out the form. This was held to be a gift despite the incorrect form. However, this case is distinguished from the case at bar because the contents of the safety deposit box never were in the possession of Ms. Simard. Therefore, the gift is incomplete.  However, there is a principle in the common law that an unfulfilled gift will be treated as complete if the donee becomes an executor under the Will of the donor (*Strong v Bird*). So long as the intent to make the gift continues until death. This principle was affirmed in *Rennick v Rennick*. A similar view was expressed by Parker J in *Innes, Re*.  Based on the following, the court is satisfied that Dr. Bayoff intended to make an immediate gift to Simard but failed to perfect the gift. His intention did not change before he died. The gift was perfect when Simard became the executrix of Dr. Bayoff’s estate and was able to take delivery of the contents of the safety deposit box. |
| **Holding** | There was not a valid gift *donatio mortis causa*, but there was a valid gift *inter vivos* when Ms. Simard executed the Will of Dr. Bayoff. |

**Takeaway:**

There are three essential elements that must be present for a transfer of property to be classified as a *donatio mortis causa*. The three elements were set out in *Rushka v Tuba*:

1. Impending death from an existing peril,
2. Delivery of the subject matter; and
3. The gift is only to take effect upon death and will revert to the donor should he/she recover.

There is a principle in the common law that an unfulfilled gift will be treated as complete if the donee becomes an executor under the Will of the donor (*Strong v Bird*). So long as the intent to make the gift continues until death.

### *Thomas v The Times Book Co Ltd*, [1966] 2 All ER 241 (ChD)

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| **Facts** | Mrs. Caitlin Thomas (plaintiff, the widow of the late Dylan Thomas, and the sole administratrix of his estate) is suing The Times Book Co (defendants) to recover the manuscript of Dylan Thomas’ best work *Under Milk Wood*. The defendants claim that Dylan Thomas made a gift of this manuscript to Douglas Cleverdon, a BBC producer, and they claim title through him.  In October 1953, Dylan Thomas delivered the manuscript to Mr. Cleverdon and he had a copy made of the manuscript. Dylan Thomas lost the manuscript and Mr. Cleverdon made three more copies. Dylan Thomas received the copies and said that if Mr. Cleverdon ever find the original manuscript, that he could have it. Mr. Cleverdon found the manuscript. Dylan Thomas died in America the next month. After his death, Mrs. Thomas made a copyright settlement with three people, none of which included *Under Milk Wood* as a chattel. Therefore, if there was no gift of *Under Milk Wood* and the defence of the *Limitation Act* is not valid, then the plaintiff as administratrix of the estate is entitled to recover the manuscript. |
| **Issue** | Did Dylan Thomas make a gift of the manuscript to Mr. Cleverdon? |
| **Ratio** | As per *Re Garnett, Gandy v Macaulay*, where the donor of the gift is dead and not able to corroborate the story, the evidence must be approached by the judge with suspicion. |
| **Reasoning** | The onus is on the defendants to prove that there is a gift. Plaintiff submits that for a gift to be made, there must be 1) intent to make a gift, and 2) delivery. The court agrees. With respect to the claim of the gift, the judge must look at the claim with suspicion. As per *Re Garnett, Gandy v Macaulay*, where the donor of the gift is dead and not able to corroborate the story, the evidence must be approached by the judge with suspicion. The plaintiff submits that the story is improbable. Dylan Thomas would often sell his manuscripts and handled them with great care and devotion. It would seem unlikely that he would make a gift of his manuscripts, especially since he would refer back to them. Based on these conversations with Mr. Todd which were submitted as evidence, there could be no gift. However, that evidence must be approached with the same suspicion, as it is a conversation that took place over 12 years ago. There is no record of the conversation. Those circumstances must be taken into account.  It is the judge’s job to weigh the affirmed evidence on the balance of probabilities and make a judgement. The judge sides with the defendants for the following reasons:   1. When Dylan Thomas made the gift, the manuscript was lost. The character of Dylan Thomas was that he was generous, impulsive and capable of spontaneous gestures. The action of giving the gift seems in line with that character in that he made a gesture. 2. Mr. Cleverdon was not a stranger to Mr. Thomas; they had worked together for 6 or 7 years and it is not improbable that was the story Mr. Cleverdon is telling is true. 3. It would have been stupid for Mr. Cleverdon to tell Miss Fox and Mr. Cranston this story because everyone expected Dylan Thomas to come back alive. Mr. Cleverdon is not stupid.   There is a submission that Mr. Cleverdon was concealing the manuscript from Dr. Jones. However, that submission is weak because there are many interviews and correspondences by Mr. Cleverdon telling the story of the manuscript. There is no foundation that Mr. Cleverdon was concealing the manuscript from anyone.  The last issue is that of delivery. The gift was delivered when Mr. Cleverdon obtained possession of the manuscript at the pub. |
| **Holding** | Dylan Thomas made a gift of the manuscript to Mr. Cleverdon. |

**Takeaway:** As per *Re Garnett, Gandy v Macaulay*, where the donor of the gift is dead and not able to corroborate the story, the evidence must be approached by the judge with suspicion.

## Bailment

* A bailment occurs when a bailor transfers possession of a chattel to a bailee for a specific purpose.
* A condition of the bailment is that the chattel will be re-delivered to the bailor (or the person designated by the bailor) when the bailment has elapsed.
* Depending on the purpose of the bailment, the bailed chattel may be returned in their original form or an altered form.
* While the bailment exists, the bailee acquires possessory rights (enforceable against third parties) and also owes duties in relation to the bailed chattel.

### *Gobeil v Elliot* (1996), 159 Sask R 282 (QB)

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| **Facts** | The defendant had an empty Quonset that he rented to the plaintiff to store his combine. The Quonset caught on fire and everything inside was damaged. They were able to remove some machinery but had to stop because it became dangerous. There was an electrical lamp in a wooden barn which was attached to the Quonset. |
| **Issue** | 1. Was the defendant a bailee for the plaintiff? 2. Was the defendant negligent? |
| **Ratio** | 1. **Bailment**: Bailment has been defined as “a delivery of personal chattels in trust, on a contract, express or implied that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on which they were bailed, shall have elapsed or been performed”. 2. **Licence**: A licence on the other hand is simply the grant of such authority to another to enter upon the land for an agreed purpose as to justify that which otherwise would be a trespass and its only legal effect is that the licensor until the licence is revoked is precluded from bringing an action for trespass.   Licence is distinguished from a bailment on the fact that a bailment requires a delivery by the bailor.  It is settled law that a bailee for reward owes a duty of care to the bailor and is liable to the bailor for any negligence on the bailee’s part. The burden of proof is on the bailee to prove, on the balance of probabilities, that he was not negligent (*National Trust Co v Wong Aviation*). One obligation that does not arise is the requirement on the bailee to insure the goods (*Petriew et al v Tricom Electronic Ltd)*. |
| **Reasoning** | Plaintiff submits that he had a contract of bailment with the defendant. The court distinguishes between a bailment contract and a licence contract using the case of *Heffron v Imperial Parking Co*.   1. **Bailment**: Bailment has been defined as “a delivery of personal chattels in trust, on a contract, express or implied that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on which they were bailed, shall have elapsed or been performed”. 2. **Licence**: A licence on the other hand is simply the grant of such authority to another to enter upon the land for an agreed purpose as to justify that which otherwise would be a trespass and its only legal effect is that the licensor until the licence is revoked is precluded from bringing an action for trespass.   Licence is distinguished from a bailment on the fact that a bailment requires a delivery by the bailor.  The following factors favour a bailor-bailee relationship in the case at bar:   1. The defendant directed that the plaintiff places the chattel in the exact same spot as the previous year. 2. The plaintiff parted with the possession and it was placed in the back (which was a logical place to put the combine). 3. The plaintiff made arrangements to deliver the combine and asked for permission from the defendant. 4. The defendants were in the business of strong farmers’ machinery. 5. There was some degree of security of the Quonset because it was far away from the road. 6. The defendant provided a receipt to the plaintiff saying, “machine storage”.   The defendants say that their agreement was a licencing agreement similar to that of *McLennan v Charlottetown*. In that case, the plaintiff’s airplane was damaged while in a rented space of a hangar. However, this case is distinguished from the case at bar because in the former the airplane or keys were never delivered to the defendant. The defendants in the case at bar are bailees for reward, and that being so, certain obligations result from this contract of bailment.  It is settled law that a bailee for reward owes a duty of care to the bailor and is liable to the bailor for any negligence on the bailee’s part. The burden of proof is on the bailee to prove, on the balance of probabilities, that he was not negligent (*National Trust Co v Wong Aviation*). One obligation that does not arise is the requirement on the bailee to insure the goods. Plaintiff says that the defendant was to provide sufficient insurance on the combine. This is not the case. The bailee is not responsible, in the absence of negligence, for property damage to third parties or accidents (*Petriew et al v Tricom Electronic Ltd*). However, whether the bailee provided insurance is not a factor to be considered in determining the liability of a bailee for reward.  **Negligence Claim**  Based on the evidence, on the balance of probabilities the defendants were not negligent. There were no instructions that came with the brooder lamp. Other farmers used similar methods as the defendants and the defendant himself learned the technique for keeping the piglets warm from his father. There was nothing inherently dangerous about the system. No one knows how the fire started. It was not centralized in the area of the pig pens. |
| **Holding** | 1. The defendant was a bailee for the plaintiff. 2. The defendant was not negligent. |

**Takeaway:**

1. **Bailment**: Bailment has been defined as “a delivery of personal chattels in trust, on a contract, express or implied that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on which they were bailed, shall have elapsed or been performed”.
2. **Licence**: A licence on the other hand is simply the grant of such authority to another to enter upon the land for an agreed purpose as to justify that which otherwise would be a trespass and its only legal effect is that the licensor until the licence is revoked is precluded from bringing an action for trespass.

Licence is distinguished from a bailment on the fact that a bailment requires a delivery by the bailor.

It is settled law that a bailee for reward owes a duty of care to the bailor and is liable to the bailor for any negligence on the bailee’s part. The burden of proof is on the bailee to prove, on the balance of probabilities, that he was not negligent (*National Trust Co v Wong Aviation*). One obligation that does not arise is the requirement on the bailee to insure the goods (*Petriew et al v Tricom Electronic Ltd*).

### *Mason v Westside Cemeteries Ltd (*1996), 135 DLR (4d) 361

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| **Facts** | Plaintiff’s parents died and he had them cremated. Due to uncertainty, he asked the funeral home company to hold onto the urns until he decided what he wanted to do. The funeral home company was not compensated for holding onto the urns nor were they in the business of doing so. The funeral home company did not want to hold onto the urns and asked the plaintiff what he wanted to do. The plaintiff asked that the urns be transferred to the defendants and so they were. The plaintiff, 14 years later, went to the defendant and asked for the urns as he thought that they were temporarily holding onto the urns until he retired. The urns could not be found and there was no record that they were ever received or buried. It is important to note that the plaintiff had never even seen the urns himself and his only dealings with the urns was decision to transfer them from the funeral home to the defendant. |
| **Issue** | Was the defendant a bailee for the plaintiff? If so, did they breach their duty as a bailee? |
| **Ratio** | If the original bailee of goods transfers them to a sub-bailee, a relationship of bailment will arise between the original bailor and sub-bailee provided that the sub-bailee receives the goods knowing that the original bailor “is interested in the goods” (*Chitty on Contracts*).  If a bailee loses goods placed in his possession, the onus of proof is on the bailee to show that it was not caused by a failure on his part to take reasonable care (*Chitty on Contracts*). |
| **Reasoning** | **Background Information**  The evidence at trial suggests that the plaintiff instructed the defendant to bury the urns in the common ground. There is no evidence of either the funeral home delivering the urns or the defendant receiving the ashes. But it is contradictory to say that the funeral home did not deliver the urns because they wanted to get rid of it in the first place and confirmed delivery with the plaintiff. Based on the evidence and on the balance of probabilities, that the funeral home delivered the urns to the defendant.  **Liability of the Funeral Home**  The plaintiff asserts alternative causes of action against the funeral home in bailment, contract and negligence. These claims are dismissed based on the evidence.  **Liability of the Defendant**  The plaintiff’s claim against the defendant is based on bailment, and in the alternative, on negligence.  **Bailment**  If the original bailee of goods transfers them to a sub-bailee, a relationship of bailment will arise between the original bailor and sub-bailee provided that the sub-bailee receives the goods knowing that the original bailor “is interested in the goods” (*Chitty on Contracts*). If a bailee loses goods placed in his possession, the onus of proof is on the bailee to show that it was not caused by a failure on his part to take reasonable care (*Chitty on Contracts*).  The plaintiff submits that the defendant is a sub-bailee and that he has an interest as the next of kin. Additionally, the plaintiff submits that the defendant did not exercise reasonable care and is liable for damages.  The relationship between the kin and a cemetery is that of a bailment. There is no ownership in a body, or a dead body. However, the next of kin may have a *prima facie* right to custody and control of the remains until disposition. The defendant was willing to comply with the plaintiff and retrieve the urns from the common burial in return them to the plaintiff. This is consistent with the concept of bailment. The court finds that the defendant was holding the urns as a bailee. It is irrelevant whether or not they were sub-bailees. The same result applies in both situations. The defendant has not discharged the onus that they exercised reasonable care because they were unable to locate the urns, possibly due to human error. The defendant breached their duties as a bailee, and they are liable in damages to the plaintiff.  **Negligence**  The defendant owed a duty of care to the plaintiff to handle the remains and keep track of them in the cemetery. The plaintiff, as next of kin, falls within the class of people to be affected by the negligence. The fact that the remains are missing indicates negligence by the defendants. The defence of limitation does not apply because the plaintiff had no duty of reasonable diligence since the defendants are expected to be a competent cemetery provider.  **Damages**  There are two main types of damages: special damages (compensation for financial and material loss) and general damages (compensation for non-pecuniary loss such as pain and suffering or injury to feelings). The plaintiff’s claims fall under both headings.  With regard to the special damages, the plaintiff gets his $50 plus interest back for the interment. There is no value for human remains as there is no market for them. Therefore, the trial judge assigns them a nominal value of $1 each. The fact that the remains were special to the plaintiff is relevant in the calculus, but the plaintiff’s feelings cannot be the sole factor in making the remains special.  The level of emotional damage should be reflected in the damages awarded. The plaintiff ignored his parent’s remains for 23 years, and it is therefore trivial. He is awarded $1000 on that basis. |
| **Holding** | The defendant was a bailee for the plaintiff and did breach their duty of reasonable care. |

**Takeaway:**

If the original bailee of goods transfers them to a sub-bailee, a relationship of bailment will arise between the original bailor and sub-bailee provided that the sub-bailee receives the goods knowing that the original bailor “is interested in the goods” (*Chitty on Contracts*).

If a bailee loses goods placed in his possession, the onus of proof is on the bailee to show that it was not caused by a failure on his part to take reasonable care (*Chitty on Contracts*).

### *Blumenthal v Tidewater Automotive Industries (*1978), 29 NSR (2d) 291 (CA)

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| **Facts** | The respondent (plaintiff) had the appellant (defendant) do some work on his car. The respondent instructed the appellant to keep the car inside and that the appellant agreed to do so. The car was left outside by the appellant. The appellant knew that the car could be accessed and started by crossing wires. A few days later, the appellant went to check on the car, it was gone. The respondent phoned the appellant later that day asking about the car which shocked the appellant since he assumed the respondent picked up his car. The car was in fact stolen and never seen again. The TJ awarded the respondent approximately $4k for the value of the car and other things. |
| **Issue** | Was the appellant liable to the respondent? |
| **Ratio** | As per *Halsbury’s Law of England*, the bailee must observe the term of the bailor as authorised by the bailor. He cannot pass off the chattel to a third-party for storage, and in doing so, would open himself up to liability unless the causes of damage or loss are independent from his acts or inherent in the chattel itself. |
| **Reasoning** | This is a case of bailment for reward. One of the terms of the bailment was that the car be kept inside the appellant’s building. This term was not observed. As per *Halsbury’s Law of England*, the bailee must observe the term of the bailor as authorised by the bailor. He cannot pass off the chattel to a third-party for storage, and in doing so, would open himself up to liability unless the causes of damage or loss are independent from his acts or inherent in the chattel itself. The facts of this case fall squarely into that definition and the appellant is liable for the loss of the car. |
| **Holding** | Yes, the appellant was liable to the respondent. |

**Takeaway:**

As per *Halsbury’s Law of England*, the bailee must observe the term of the bailor as authorised by the bailor. He cannot pass off the chattel to a third-party for storage, and in doing so, would open himself up to liability unless the causes of damage or loss are independent from his acts or inherent in the chattel itself.

### *Taylor Estate v Wong Aviation Ltd*, [1969] SCR 481

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| **Facts** | The respondent leased an aircraft to a company that gave flying lessons and leased aircraft to licenced pilots. The deceased rented the aircraft and was told to fly the aircraft in a tight circuit around Toronto and to return the aircraft in the same condition it was returned. The deceased and the aircraft were never to be seen again.  **TJ**: The respondents are to recover a sum of $10.5k from the appellant with respect to a lost aircraft.  **ONCA**: It was on the appellant to disprove the negligence of the bailee by affirmative proof of reasonable care by which the bailee was not discharged by producing an explanation equally consistent with negligence or no negligence. |
| **Issue** | Is it the bailee’s executor’s responsibility to show that the disappearance did not occur through his fault, or is the onus on the bailor to prove that it did disappear through the bailee’s fault? |
| **Ratio** | The rule explained by Lord Atkin respecting burden of proof in bailment cases (in that the bailee must disprove the negligence) does not apply to the peculiar circumstances of this case and that the general rules governing proof where performance of a contract has become impossible due to the destruction of the subject-matter should be applied.  If the cause of the destruction of the chattel is unknown, then there is no *prima facie* case of fault and thus no liability. The plaintiff may offer up a cause of fault or default in the defendant.  Where there is no direct evidence of negligence, no more can be required of the executor of a deceased bailee who perished with the chattel. |
| **Reasoning** | The rule explained by Lord Atkin respecting burden of proof in bailment cases (in that the bailee must disprove the negligence) does not apply to the peculiar circumstances of this case and that the general rules governing proof where performance of a contract has become impossible due to the destruction of the subject-matter should be applied. The rules are stated by Lord Russel in *Joseph Constantine Steamship Line ltd v Imperial Smelting Corporation*. The rule is basically that the defendant will prove what caused the destruction of the chattel, which may exonerate them or put them at *prima facie* fault. If the cause of the destruction of the chattel is unknown, then there is no *prima facie* case of fault and thus no liability. The plaintiff may offer up a cause of fault or default in the defendant. The facts of the case indicate that there was an inference of air turbulence, carburettor icing or loss of vision with reference to the ground, which could have caused the loss of the aircraft without any negligence from the deceased. Therefore, *res ipsa loquitor* would not apply.  There is evidence to suggest that there was no negligence and it would be equally reasonable to assume that there was. Where there is no direct evidence of negligence, no more can be required of the executor of a deceased bailee who perished with the chattel. |
| **Holding** | The onus is effectively on the bailor to prove direct negligence. |

**Takeaway:**

The rule explained by Lord Atkin respecting burden of proof in bailment cases (in that the bailee must disprove the negligence) does not apply to the peculiar circumstances of this case and that the general rules governing proof where performance of a contract has become impossible due to the destruction of the subject-matter should be applied.

If the cause of the destruction of the chattel is unknown, then there is no *prima facie* case of fault and thus no liability. The plaintiff may offer up a cause of fault or default in the defendant (*Joseph Constantine Steamship Line ltd v Imperial Smelting Corporation*).

Where there is no direct evidence of negligence, no more can be required of the executor of a deceased bailee who perished with the chattel.

### *Punch v Savory Jewellers Ltd*, 1986 ONCA

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| **Facts** | Plaintiff received an $11k ring from her aunt. The ring needed repair and was given to the defendant. The defendant couldn’t do the repairs and sent it to Walker by mail with a value of $100 for insurance purposes (common practice). The repairs were carried out by Walker and he was ready to mail it back to the defendant, but the postal service went on strike. They both heard that CN rapidex was being used to deliver jewellery, but the defendant never agreed to it. Walker decided to use CN rapidex and put $100 as the value for the ring. The driver of the CN rapidex made many errors and should not have accepted the ring because it was too valuable. The ring was never delivered to the defendant. Walker told CN to call the defendant and they told him to “forget it” as the defendant only had $50 in coverage. CN had no explanation for the lost ring. |
| **Issue** | Who is liable to the plaintiff for the damages flowing from the loss of the ring? |
| **Ratio** | A bailee is liable for the loss of goods arising out of his servant’s theft on the grounds that he is responsible for the manner in which his servant carries out his duty. It matters not whether the servant is careless, whether the goods are stolen by a stranger, or if the servant himself steals them. As per *Morris v CW Martin & Sons*, a bailee can escape liability for damaged or lost goods if he can prove that he took appropriate care of the items or that his failure to do so did not contribute to the loss.  The unexplained disappearance of a bailed chattel constitutes a fundamental breach which would render the limitation of liability clause inapplicable. |
| **Reasoning** | **Trial**  Defendant was a bailee and Walker and CN were sub-bailees of the ring. Walker and CN breached their duty, but the defendant did not. Walker did not discuss the terms of the shipment with the defendant and grossly misrepresented the value of the ring on the bill of lading. CN was responsible for failing to deliver the ring without an explanation. The conditions on the reverse of the bill of lading were not binding because CN did not take reasonable measures to draw the conditions to Walker’s attention. Holding was that Walker and CN were found liable to the plaintiff but not the defendant.  **Duty of Bailees**  The bailee for reward must exercise due care for the safety of the article entrusted to him by taking such care of the goods as would a prudent man of his own possessions. A bailee is liable for the loss of goods arising out of his servant’s theft on the grounds that he is responsible for the manner in which his servant carries out his duty. It matters not whether the servant is careless, whether the goods are stolen by a stranger, or if the servant himself steals them. As per *Morris v CW Martin & Sons*, a bailee can escape liability for damaged or lost goods if he can prove that he took appropriate care of the items or that his failure to do so did not contribute to the loss.  **Bailment Principles Applied to the Case**  Walker  A prudent owner of a ring would insure the ring. A prudent owner would wait and ensure that the ring arrive in a dependable manner. Walker did not take such care of a valuable ring as would a reasonable and prudent owner as described above. Walker was in breach of the duty owed to the plaintiff and is liable to her for the damages flowing from the loss of her ring.  Defendant  It is said that there is no duty on a bailee to insure goods. That principle is true in the case of goods stored as per *Mason v Morrow’s Moving & Storage Ltd*. However, insurance is an essential term of condition for the transportation of the goods. Any prudent owner of a ring such as this would make certain that insurance coverage was available for its true value (especially when employing an untried carrier). Insurance is a minimal step that a prudent owner would take for goods of this type, and based on this, the defendant was in breach of its duty to the owner of the ring.  CN  The liability of CN depends on whether the issue of bailment is an action in tort or an action in contract. If it is an action in contract, then CN can rely on their limitation clause and be free of liability. If it is an action in tort, then CN’s negligence would make them liable to all parties. The relationship of bailment combines elements of both contract and tort.  Walker and the defendant agreed to use CN as a shipper, but the defendant was not privy to the terms of the sub-bailment to CN. However, based on Lord Denning’s decision in *Moris*, the sub-bailee can only rely on the exempting clause as against the owner if the owner expressly or impliedly consented to the bailee making a sub-bailment “containing those conditions, but not otherwise”. The defendant did not consent expressly or impliedly to the sub-bailment on the terms agreed by Walker. Thus, the defendant was not bound by the limitation of liability clause.  What about liability to the plaintiff? The plaintiff, much like the defendant, knew nothing about the limitation of liability clause to which it did not consent. The plaintiff cannot be bound by a contract for which it did not know about. CN is liable to her for the full value of the ring since its contract of carriage specifically contemplates the existence of an owner to whom a duty of care is owed.  **The Effect of the Limitation of Liability Clause in Determining the Claim of Walker for Indemnity from CN**  In *Heffron v Imperial Parking Co* there was an unexpected disappearance of a car from a parking lot where both the parking tickets and the signs on the lot excluded any liability for loss or theft of vehicles. It was the view of this court that in the face of an unexpected disappearance of car left on a parking lot, a clause excluding liability could have no effect and could not protect the parking lot owner for there had been a fundamental breach going to the root of the contract. This authority and *Levison* indicate that the unexplained disappearance of a bailed chattel constitutes a fundamental breach which would render the limitation of liability clause inapplicable. |
| **Holding** | The defendant and Walker are liable to the plaintiff for the loss of the ring. CN is liable to the plaintiff for the loss of the ring, but the defendant and Walker are indemnified by CN for any loss which they must make good to the owner. |

**Takeaway:**

A bailee is liable for the loss of goods arising out of his servant’s theft on the grounds that he is responsible for the manner in which his servant carries out his duty. It matters not whether the servant is careless, whether the goods are stolen by a stranger, or if the servant himself steals them. As per *Morris v CW Martin & Sons*, a bailee can escape liability for damaged or lost goods if he can prove that he took appropriate care of the items or that his failure to do so did not contribute to the loss.

The unexplained disappearance of a bailed chattel constitutes a fundamental breach which would render the limitation of liability clause inapplicable (*Heffron v Imperial Parking Co*).