



PERSONAL PROPERTY

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PERSONAL PROPERTY

I. REAL AND PERSONAL PROPERTY DISTINCTIONS

A. GENERAL DISTINCTIONS

Real property is *immovable* property and consists of land, things fixed to land, and things incidental or appurtenant to land. Personal property is *movable* property, which includes every kind that is not real property. Real property may be converted into personalty by severance and vice versa by an annexation intended to be permanent.

B. LEASEHOLDS

Leases of land are an exception to the general rule. Leases are considered personal, not real, property.

C. CROPS

1. Fructus Naturales vs. Fructus Industriales

Fructus naturales are crops that grow spontaneously on the land (e.g., trees, bushes, grass), while fructus industriales are the result of cultivation (e.g., grain, vegetables). Title to fructus naturales passes with the land, and such crops are *real property*. Fructus industriales are *personalty*.

2. Conveyance

A conveyance of land includes annual crops, unless a reservation in the deed (or provision in the operative will) is made to the contrary. This result is based upon the presumed intention of the parties; however, a contrary intent may be shown.

3. Mortgage

In general, the prior mortgage of the land will prevail over the subsequent mortgage of the crops. Similarly, the prior mortgage of the crops will prevail over the subsequent mortgage of the land. In other words, the *first mortgage in time prevails*.

4. Doctrine of Emblements

Emblements is the well-established right of a *former tenant* (or her personal representative) to enter upon property to cultivate, harvest, and *remove crops* planted by her prior to the termination of her estate. The right of emblements exists where two requirements are fulfilled: (i) the tenancy was for an uncertain duration (i.e., life estate or tenancy at will); and (ii) the tenancy terminated without fault on the part of the tenant.

D. FIXTURES

Under the concept of fixtures, a chattel that has been annexed to real property is *converted from personalty to realty*. The former chattel becomes an accessory to the land (i.e., a fixture) and passes with ownership of the land. Section 9-334 of the Uniform Commercial Code governs priorities of conflicting security interests in fixtures and real estate. For a more detailed discussion of fixtures, *see* Real Property outline.

II. ACQUISITION AND LOSS OF RIGHT OR TITLE TO PERSONAL PROPERTY

A. PRINCIPAL MODES

Rights and title to personal property are acquired or lost by occupancy, adverse possession, accession, confusion, judgment, gift, or when the chattel is lost, mislaid, or abandoned. A person acquires title to personal property by voluntary act or by operation of law (such as conduct creating an estoppel). The intent of the parties is controlling in determining which goods pass and when title passes in a sale. In general, once a person has become the owner of personal property, she cannot be divested of title without her consent.

B. OWNERSHIP

A thing capable of ownership but not then owned belongs to the person who acquires actual or constructive *dominion and control* over it and has the *intent* to assert ownership over it.

1. Wild Animals

Wild animals (*ferae naturae*) in their natural state are *unowned*. They become private property upon being reduced to possession.

a. Acquisition of Title

1) Possession

The first person to exercise *dominion and control* over such an animal becomes, with possession, the owner of the animal.

2) Constructive Possession

Animals caught in a *trap or net* belong to the one who owns and has set the trap or net. By setting such a trap, one is said to *constructively* possess those animals snared.

3) Mere Pursuit

Mere pursuit does *not* constitute the exercise of dominion and control sufficient to give the hunter a property right in the animal. However, where an animal has been *mortally wounded* so that actual possession is practically inevitable, a *vested* property right in the animal accrues that cannot be divested by another's act in intervening and killing the animal.

4) Trespass

While a landowner is not regarded as the owner of all wild animals found on his property, a *trespasser* who kills game on another's land *forfeits* her *title* in favor of the landowner. This is to prevent the act of trespassing from benefiting the trespasser.

5) Violation of Statute

One who violates a statute (e.g., failure to have a hunting license) forfeits her title in animals caught pursuant thereto.

b. Loss of Title

1) Escape

If a wild animal, captured and held in private ownership, escapes and resumes its natural liberty, the former owner loses his property right in it. The animal once again is *unowned*, and the first person thereafter to capture it becomes the new owner.

2) Habit of Return

If a wild animal escapes and, though wandering about without restraint, *periodically returns* to its owner's home, or if, though endeavoring to escape, it is still pursued by the owner or is by other means liable to be recaptured by the owner, title is not lost.

3) Marked Animals

When certain animals, such as furbearing animals, have been captured and reduced to private ownership, it is common for the owner to mark or brand them for purposes of identification. If the animal escapes and resumes its natural liberty, the question becomes whether title is lost. Normally, modern courts will allow title to be retained in the former possessor as long as the animal is *marked* and the owner exercises all possible *effort to recapture* the animal.

2. Literary Property

The author of a book or literary composition has, by copyright, the exclusive right to continue to reproduce and sell her "original work of authorship" as expressed and "fixed" in a tangible medium of expression. Protection of this right exists solely under federal statute. [See 17 U.S.C. §301(a)]

a. Requirements for Protection

Certain requirements must be met before one is entitled to copyright protection.

1) Concrete Form

The work must have already taken on concrete form in order to be entitled to protection, e.g., an abstract idea for a future work is not entitled to protection.

2) Work Must Be New

The material involved must be new and original.

3) Must Be "Fixed"

The work must be "fixed" in a tangible medium of expression. A work is "fixed" when its embodiment in a copy or phonorecord (terms of art broadly defined) is sufficiently permanent to permit it to be perceived or reproduced, for a period of more than transitory duration, with or without the aid of a machine or device. [See 17 U.S.C. §101]

b. Extent of Protection

This protection securing the author's exclusive rights to reproduction, display, etc., is limited to her *lifetime plus 70 years*, or if the author was anonymous or working for

hire (e.g., an employee of a corporation), 95 years from publication or 120 years from creation, whichever expires first. [17 U.S.C. §302]

c. Copyright Enforcement

A claim of copyright ownership must be properly registered with the United States Copyright Office in order to enforce the author's rights, even though a copyright is deemed to be present from the time a work is created. Until a work is preregistered or registered, an author cannot bring a civil action for copyright infringement. [17 U.S.C. §411(a)] Once a work is properly registered, an infringement action may be brought even for infringement occurring before registration. Note that if an author does not register the copyright, his protection is limited to any contractual or quasi-contractual theories available under state law (e.g., recovery in implied contract for misappropriation of sketched idea for a movie).

d. Limitation on Protection

The protection is not good as against any individual who *independently creates* the identical or similar work product.

e. Letters

Letters are "literary works," which are "works of authorship" under 17 U.S.C. section 102(a)(1). The *sender* of a letter has the *exclusive right* to sell, publish, or reproduce the *contents* of the letter. Ownership of the *document* itself lies in the receiver of the letter.

f. Rights in an Idea

Although ideas receive no copyright protection, a person has a property right in her own idea that is *original, concrete, and useful* and is disclosed in circumstances that, reasonably construed, clearly indicate that *compensation is contemplated* if the idea is accepted and used. Damages may be recovered for the use or appropriation of the idea by another.

3. Persona

A celebrity's right of publicity (i.e., the right to control the commercial value of his name, likeness, or personality) is tangible personal property. This protects people from losing the benefit of their work in creating a recognizable persona or identity. This right exists both at common law and by statute.

4. Human Tissue

While a person has a property right to his own tissue, that right evaporates once a sample is voluntarily given to a third party. [See *Moore v. Regents of the University of California*, 51 Cal. 3d 120 (1990)—patient did not have property right to spleen following its removal by doctors who then used it to create a cell line of great commercial value]

5. Tortious Conversion

Tortious conversion of personal property *does not deprive the true owner of her title*. Moreover, one who does not have title to goods cannot pass title to even a bona fide purchaser, *except* in the following circumstances:

a. Money and Negotiable Instruments

Transfers of money and of negotiable instruments will pass title to a bona fide purchaser.

b. Owner Intended to Transfer Title

Where the owner of goods is induced by fraud or misrepresentation to sell the goods and the vendee subsequently transfers the goods to a bona fide purchaser, the latter retains the goods as against the original owner where the original owner *intended* to transfer title to the goods to the defrauder.

c. Owner Represented that Possessor Has Authority to Sell

The owner of goods may be estopped from asserting title if she has expressly or impliedly represented that the possessor of the goods is the owner or has authority to sell them and a bona fide purchaser has relied in good faith upon such representations.

Examples: 1) Owner delivers the goods to a retailer of similar items.

2) Owner delivers indicia of title to a third party.

6. Burden of Showing Title

One attempting to divest another of personal property has the burden of showing title and the right to do so. Any evidence is admissible, and ownership may be established by proof of acts of ownership as well as by direct testimony. Possession plus a claim of title is prima facie evidence of title and ownership.

C. LOST, MISLAID, AND ABANDONED PROPERTY

1. Concept

The fact that the owner has either *lost or mislaid* his property does not lead to the divestiture of his title. Title to such property persists despite the fact that it has been lost or mislaid. The owner relinquishes title when he *abandons* the property.

a. Lost Property

Property is “lost” when the owner has *accidentally and involuntarily* parted with his possession and does not know where to find it. To determine whether property is lost, the key factor is the place *where it is found*: judging from the place where found, would a reasonable person conclude that the owner had accidentally and involuntarily parted with possession of it and does not know where to find it?

Example: A wristwatch found on the floor in a public place will likely be regarded as lost property. Judging from the place where found, it is reasonable to conclude that one would not intentionally place a wristwatch on the floor.

b. Mislaid Property

Property is “mislaid” when, judging from the place where found, it can reasonably be determined that it was *intentionally placed* there and *thereafter forgotten*.

Example: A briefcase found on a desk, table, or counter will likely be regarded as mislaid property. Judging from the place where found, it is reasonable to conclude that the item was intentionally placed there and thereafter forgotten.

c. Abandoned Property

Abandoned property is property that the owner has voluntarily relinquished all ownership of without reference to any particular person or purpose. It is necessary to show an *intent to give up both title and possession*.

Examples: 1) Allowing refrigerators to remain in a building that the owner of the refrigerators knows will be destroyed is an act of abandonment.

2) A tenant's act of leaving her apartment for one week and being in arrears for one week's rent is not enough to constitute abandonment of the property in the apartment. A landlord's attempt to charge an extra fee to allow the tenant to regain the property constitutes conversion.

1) Distinguish from Lost

A chattel is not abandoned merely because the owner has parted with its possession. If the owner of a chattel *involuntarily* parts with possession of goods, they should be categorized as either lost or mislaid. Lost or mislaid goods are treated differently from abandoned chattels. To show that a chattel has been abandoned, one must show that the former owner *voluntarily* gave up and relinquished his ownership in the chattel.

2) Acquisition of Title

If a chattel can be categorized as abandoned, it becomes, by virtue of the abandonment, unowned. As with wild animals, ownership of an abandoned chattel is acquired by reducing it to possession. Title to abandoned chattel is acquired by: (i) *actual or constructive dominion and control* over the thing, and (ii) an *intent to assert ownership* over it.

3) Escheat

Where abandoned property is held by an intermediary with no property interest in the property (e.g., unclaimed funds held by banks or other depositories), the state may assume title to the property through a process called *escheat*. Property may be escheated only by the state in which the property is located. Intangible property is considered to be located at the domicile of the property owner. [Delaware v. New York, 507 U.S. 490 (1993)—state of owner's last known address is state with right to escheat unclaimed securities funds]

2. General Rules for Lost or Mislaid Property

Once you have established that property is lost or mislaid, you must discuss who has the right to possess the property as against the whole world—except the true owner.

a. Finder of Lost Property

1) General Rule—Finder Entitled to Possession Except Against True Owner

If property is categorized as "lost," the one who reduces it to possession becomes its finder. Possession is *physical control* coupled with an *intention to assume dominion* over the object. The intent may be manifested by an effort to keep others away, or may be implied, as in the case of an article discovered on the land of an owner. Generally, the finder of lost property is entitled to possession of it as against all except the true owner.

- Examples:*
- 1) A boy who discovers a sock and throws it among his friends does not have the requisite intent to assert control over the sock or the money found in it.
 - 2) The act of placing markers over the spot where a wrecked boat is located is not a sufficient exercise of dominion and control to support a claim for title to the abandoned property.

2) Exceptions to General Rule

a) Trespasser

To penalize one who trespasses onto private property, most courts would hold that a trespasser-finder will not be allowed to secure possessory rights in the lost property. The right of possession will therefore fall to the owner of the place where the item of property is found (*locus in quo*).

b) Highly Private Locus

Where a chattel is found in a highly private locus, the owner of the locus in quo, and not the finder, will acquire the possessory rights. Several explanations have been given for this rule. One is that the owner of a highly private locus possesses, by definition, everything within the locus, and therefore possesses the item that has been lost. Another reason set forth is that the true owner, having lost property in such a private locus, will more likely return to the place to recoup his property.

(1) Private Place

For the finder to be deprived of his possessory right in the lost article, the place of discovery must be *highly private*. The rule is generally applicable only to locations wherein the public is not invited, e.g., a home.

(2) Public Place

If the place of discovery is open to the public, then the finder becomes entitled to the right of possession. The mere fact that the place of discovery is *privately owned* is not sufficient to render it a highly private locus.

c) Employer-Employee

There is some authority that holds that an employee who finds an article in the course of his employment should surrender the right of possession to his employer. Within the employer-employee relationship, the basic concept is that the employer has the right to direct the employee in his activities. On this basis, if the employee found the article by virtue of an act specifically directed by the employer, the employer should acquire the rights of possession in the article.

d) Buried Articles

On a theory of constructive possession, it can be held that the owner of real property possesses all that which lies beneath the surface of his land. On this

basis, if one finds an article buried beneath the surface, the right of possession ought to belong to the owner of the locus rather than the finder.

b. Finder of Mislaid Property

The finder of mislaid property does not acquire the right to possession. The *owner* of the *locus in quo* becomes entitled to possess the mislaid property against all the world except the true owner. *Rationale*: Since, by definition, mislaid property is that which has been intentionally placed where found and thereafter forgotten, when the true owner realizes where he has mislaid his property he will return to that location to retrieve his property. On this basis, in an effort to return property to its owner, the right of possession is given to the owner of the locus in quo and not the finder.

Example: A maid found a valuable brooch in the slats of a hotel bed. The possessor of the room at the time claimed the brooch as finder (the maid having put the brooch on his dresser). *Held*: The brooch must have been placed in the slats on purpose and not by inadvertence. Therefore, the brooch was mislaid property and possession was awarded to the hotel as owner of the premises. [Flax v. Monticello Realty Co., 185 Va. 474 (1946)]

c. Rights and Duties of Possessor

The foregoing rules, applicable under the common law, describe who acquires the right of possession as against the whole world except the true owner. Under these rules, however, neither the finder (as to lost goods) nor the owner of the locus in quo (as to mislaid goods) becomes the title owner of the property; he merely acquires the right of possession, and as possessor has the following rights and duties.

1) Possessor as Quasi-Bailee

The possessor is a quasi-bailee. His title is good as against all the world except the true owner, even to the point of suing for the return of the property if wrongfully taken from him.

Example: A lost ring belonging to O was found by X, who then lost it himself. It was then found by Y. X may recover possession from Y or anyone else but O.

2) Duty to Find Owner

Should the finder know or have reasonable means of discovering the true owner, he must do so, or he may be guilty of larceny, and he may be held liable in tort for conversion.

Example: X finds a wallet containing identification papers, including the telephone number of its owner, Y. X does not attempt to contact Y, but holds the wallet (including contents) with intent to return it to Y should Y ever ask for it. X has converted the wallet and its contents.

3) Duty of Due Care

The possessor must keep the goods with due care, considering that he is a gratuitous bailee and considering the nature of the goods. Failure to adhere to this standard will render him liable in negligence.

4) Extent of Obligations

These obligations persist until sufficient time has passed for the true owner to be

deemed to have abandoned her goods (which will depend upon the character of the goods and circumstances of the case) or until the statute of limitations has run.

5) Acquiring Title

As a general rule, after a sufficient time has run for the goods to be deemed abandoned, or after the statute of limitations has run, the possessor becomes the new owner of the goods.

d. Treasure Trove

Treasure trove is any gold or silver in coin, plate, or bullion found concealed (e.g., in the earth, in a house, in a bureau, etc.), the owner of which is unknown. Treasure trove has been held to include paper representatives of gold and silver.

1) Right of Finder

Treasure trove, according to the common law, belonged to the finder as against everyone in the world except the true owner. In addition, the fact that the finder was a trespasser would not deprive him of his possessory rights.

2) Modern View

Today, many states apply the usual rules applicable to lost property in dealing with treasure trove. No exception is made for the handling of treasure trove problems.

3. Uniform Unclaimed Property Act

Most states have adopted a version of the Uniform Unclaimed Property Act (the “Act”), which provides for the disposition of intangible property (such as money, checks, and stock) and property in safe deposit boxes. Under the Act, such property is *presumed abandoned* if the owner does not claim it or otherwise demonstrate an interest in it for the statutory period, generally five years. The Act provides a procedure for turning the property over to a state administrator, who sells it if unable to locate the owner. A holder who disposes of unclaimed property pursuant to the Act is *relieved of liability* to the owner.

A minority of states use the older *Uniform Disposition of Unclaimed Property Act*, which differs primarily in fixing the basic statutory period at seven years.

D. ACCESSION

Accession is the addition of value to property by the expenditure of labor or the addition of new materials. If the addition can be detached from the principal chattel, this will be ordered and each party will be put in status quo ante. If the addition cannot be detached from the principal chattel, the issue is one of ownership: Who is the owner of the chattel in its enhanced state? The answer depends upon whether the trespasser acted in good faith or was a willful trespasser.

1. Accession by Innocent Trespasser

a. General Rule—Trespasser Cannot Recover

Where a trespasser adds value to the original owner’s chattel, the original owner retains title, and the trespasser cannot sue for compensation for the value of his labor or materials added to the chattel.

b. Original Owner’s Remedies

1) **Damages for Conversion**

The original owner may sue the trespasser and obtain conversion damages—the value of the original materials plus any consequential damages.

2) **Replevin**

Alternatively, the original owner may seek replevin—return of the chattel.

c. **When Original Owner Is Limited to Damages**

In some cases the original owner is limited to a cause of action for damages; she may not sue in replevin because the act of accession divested her of title.

1) **Complete Change**

When the species of property has been completely changed by the addition of value to the property by the expenditure of labor or new materials, the original owner may not recoup the chattel.

2) **Great Increase in Value**

A similar exception is made when the increase in value is so great that it would be unfair to permit the original owner to reclaim her property.

Examples: 1) The owner of clay used by another in making bricks has no title to the bricks because the identity of the clay has been lost in the creation of a new species.

2) Where trees originally worth \$25 are converted by a person in good faith into barrel hoops worth \$700, the original owner cannot recover the hoops.

2. **Accession by Willful Trespasser**

A willful trespasser cannot gain any rights of ownership in the property he has enhanced in value under the rules of accession. The original owner of the chattel is entitled to the property in its improved state regardless of the degree of augmentation in value made by the trespasser.

a. **Complete Change**

The original owner's title persists even though there has been a complete change in the form of the chattel.

b. **Original Owner's Remedy**

The owner of the chattel subject to willful trespass may elect to sue the trespasser for *damages for conversion* (i.e., the full present value of the property in its improved state) *or for replevin* (i.e., the return of the chattel as now changed or improved).

E. **CONFUSION**

Confusion is an *intermixture* of goods owned by different persons such that the property of each can no longer be distinguished, i.e., fungible goods. If the property can be identified and returned, there is no confusion.

1. **Known Contributions**

Where goods are of the same kind and quality, the parties are *tenants in common* of the

mass *in proportion* to their respective interests, regardless of how the confusion took place, and even regardless of whether the confusion was fraudulent or willful.

Example: Where wheat of the same grade belonging to different persons is wrongfully and fraudulently mingled by one of them and ground into flour, the wrongdoer is entitled to his proportionate share of the mass.

2. Unknown Contributions

a. Innocent Confusion

If the confusion was innocent (e.g., by an act of God, act of a third party, or consent), the owners are *tenants in common* of the mass. If the amount of contribution is unknown, the parties share equally.

b. Wrongful Confusion

If the confusion was caused wrongfully by one of the owners, her agent, bailee, or trustee, the burden is on such owner to identify her portion. If she cannot do so, the *entire mass belongs to the innocent owner*.

Example: Where the owner of bales of cotton fraudulently mingles them with bales belonging to another so that they become indistinguishable, the wrongdoer is entitled to no part of the goods unless she can identify her property.

c. Negligent Confusion

In most states, negligent confusion is treated as wrongful confusion, but some states follow the innocent confusion rules when negligence is involved.

F. ADVERSE POSSESSION—STATUTE OF LIMITATIONS

Title to personal property by adverse possession results from the running of a statute of limitations, which requires that the cause of action for recovery of the property be brought within a specified period after it accrues. When the period specified has run, the presumption that the person in possession has the right to possession cannot be overcome by the former owner; the party in possession thereafter has an enforceable right to possession superior to everyone and thus becomes the true owner. In an action for recovery of the property, the defendant must plead the statute of limitations as an affirmative defense.

1. Requirements

As with real estate, the cause of action does not accrue and, therefore, the statute of limitations does not run unless the possession relied on is: (i) actual; (ii) open and notorious; (iii) hostile and adverse, under a claim of right; and (iv) exclusive and continuous.

a. Actual

Physical possession is usually required.

b. Open and Notorious

There must be some visible *act of dominion or use* on the part of the possessor that is inconsistent with the absolute right of property in the owner, so as to give reasonable notice to the owner. In the case of thieves, a secret holding is presumed. A *finder* of lost or mislaid property is presumed to hold openly.

c. Hostile and Adverse

Possession must not be by consent and not in subordination to the rights of the true owner.

d. Exclusive and Continuous

Possession must be exclusive to the adverse possessor (except for tacking—*see* below). Since the possession must be continuous for the statutory period, interrupted periods that together total the required time are insufficient.

2. Statute of Limitations

Title passes when the statutory limitation period has run.

a. Accruing of Claim

The accruing of the claim or cause of action is often a crucial question. Demand and refusal may be required, e.g., when possession passed originally as a gratuitous bailment.

b. Tacking

Successive possessors of the property may “tack” or combine their respective periods of possession *as long as they are in privity*, e.g., the property is sold, given, or bequeathed to the subsequent possessor.

c. Tolling the Statute

Tolling the statute means that the time during which the following conditions are met is not counted in the time period, or that the period, which has otherwise expired, is extended beyond a certain event.

1) Disability of Plaintiff

When a person entitled to maintain an action is a minor, mentally incompetent, or imprisoned on the date the action accrues, she may bring the action *after* removal of the disability within a period permitted by statute.

2) Defendant Out of Jurisdiction

When the possessor, who is a *resident* of this jurisdiction, is outside the jurisdiction, the statute is tolled until the possessor returns.

3) Fraudulent Concealment

When a potential defendant fraudulently conceals himself after the action accrues, so as to avoid service, the statute is tolled until the concealment has ended.

3. Bona Fide Purchaser of Stolen Goods

A bona fide purchaser of stolen goods is not protected against the claim of the owner unless the statute of limitations has run on the owner. Since a secret (rather than open and notorious) holding is presumed in the case of stolen goods, the running of the statute is unlikely. The risk is on the purchaser.

G. TITLE BY JUDGMENT

1. Election of Remedies

One who destroys, misuses, misdelivers, or otherwise wrongfully deprives the owner of a chattel of her possessory rights may be liable to the owner under various theories of recovery.

a. Replevin

Replevin is an action to *recover the chattel itself*.

Example: A bailed her automobile to B. Upon A's making proper demand for its return, B refused to redeliver possession of the car. A may sue B in replevin to have the subject matter of the bailment returned to her.

b. Trespass

The action in trespass is to *recover money damages* incurred by reason of the dispossession.

c. Trover

The action in trover is to *recover the value of the chattel* along with damages for dispossession.

2. Conversion

An owner may allege conversion and sue the wrongdoer in trover. The substance of the action is that from and after the time the property was converted (i.e., wrongfully dealt with, misdelivered, or damaged), the wrongdoer by her action "purchased the chattel." By proceeding on the theory of conversion, the court in substance forces a sale of the chattel for the value as of the date of conversion.

a. Effect of Suing in Trover

Should the owner proceed under a trover theory, title to the chattel, by virtue of the forced sale, becomes *vested in the converter* by operation of law.

1) Merger

If the remedy elected is trover, the right to possession, which is the basis of the cause of action and which is necessarily proved if the plaintiff prevails, is merged in the judgment awarding damages. It is not extinguished, however, until the judgment is satisfied, and the plaintiff *may elect to sue in replevin* until that time.

2) Relation Back

When the judgment is satisfied by the tortfeasor, title to the converted property passes to him but relates back to the date of conversion. Thus, if the property is destroyed after conversion but before satisfaction of the judgment, the loss falls on the converter. Likewise, if the property fluctuates in value, the tortfeasor recoups the benefits or the burdens of the fluctuation in value.

b. Who Can Sue?

Anyone who is in actual possession of the chattel in question or who is entitled to immediate possession of the chattel can maintain an action for trover. On this basis, a bailee who has the right of possession or who is entitled to the right of possession may elect trover as the action when faced with the wrongful conduct of another.

c. Who Can Be Sued?

Obviously, the tortfeasor-converter can be sued in trover. However, a situation frequently arises in which the converter sells the subject matter of the tort before the action is brought. In such cases, the *purchaser* (even a bona fide purchaser) *is liable* as a converter.

H. GIFT

A gift is a *voluntary transfer* of property by one to another without any consideration or compensation. To be valid, a gift *must be executed or actually made*. A gratuitous promise to make a gift in the future is not binding.

1. Gifts Inter Vivos

An inter vivos gift, once made, is irrevocable. There are three requirements for an inter vivos gift: (i) donative intent, (ii) delivery, and (iii) acceptance of the gift.

a. Donative Intent

1) Intent to Make a Present Gift

The donor must have a present mental capacity and must intend to make an effective gift of her property.

Example: Where the donor intended to retain use of so much of her bank account as she desired during her life and to give the balance remaining at her death to the donee, there was *no valid gift*, even though the bank book had been delivered to the donee. There being *no intent to make an immediate gift*, and the transfer not being effective until the donor's death, the transaction was testamentary.

2) Promise to Make a Gift in the Future

If, by the act of the donor, it can be determined that the donor manifested her intention to have title pass to the donee at some future date, the requisite *mental state is not present* and no gift follows.

Example: A mother tells her daughter, "I shall make a gift of this wristwatch to you tomorrow." The requisite mental state is not present. The mother, the would-be donor, has not indicated that she wishes to vest title in the daughter *at that moment*. The mother has made a mere gratuitous promise to make a gift in the future.

3) Donative Intent Applies to Title

The requirement of donative intent should not be construed to require that the donor intends the donee to obtain full and complete rights of use and enjoyment in the subject matter of the gift. The donor may intend to immediately vest title in the donee, and yet reserve a right of possession until some future date. Notwithstanding this intention, a *gift may be effective*.

Example: A father tells his son, "This wristwatch is now yours; however, I wish to use it until my new one arrives." As long as all other requirements for the valid execution of the gift are complied with, the gift is effective even though the donor has retained possessory rights in the subject matter of the gift.

b. Delivery

In addition to the requirement that the donor possess the requisite donative intent, delivery in one form or another must be made in order to effect a valid gift *inter vivos*.

1) Types of Delivery

The basic ways of accomplishing the delivery requirement are: (i) actual physical delivery, (ii) constructive delivery, (iii) delivery by written instrument, and (iv) symbolic delivery.

a) Actual Physical Delivery

If the donor physically vests the donee with possession of the subject matter of the gift, the delivery requirement is satisfied. To show that delivery has been accomplished in this manner, there must be a showing that the *donee has received dominion and control* over the subject matter of the gift.

Example: A husband places certain securities in an envelope. The envelope bears the following inscription: “The enclosed are for my wife, Mary.” The envelope is then placed with its contents into the husband’s safe deposit box. There would be no valid gift. The delivery requirement is not satisfied because the husband has not physically transferred the securities to his wife, and has retained dominion and control over his own safe deposit box.

b) Constructive Delivery

When an item, because of its size or location, would be impossible or impracticable to manually deliver, substitute delivery may be sufficient. In such cases, the delivery requirement will be satisfied if the donor *surrenders as much control* over the subject matter of the gift as he presently possesses.

Examples: 1) If A declares that he gives an antique desk and all its contents to B and hands B the key to the desk, the delivery requirement may have been satisfied because A has given B control over the desk.

2) Since a passbook to a savings account is evidence of control of that account, delivery of the passbook with the requisite donative intent is sufficient delivery.

c) Delivery by Written Instrument

Since delivery has been established as a fraud-prevention device, most courts will accept a written document evidencing the gift. The execution and subsequent delivery of this written “deed of gift” should be sufficient to accomplish the gift.

(1) Requirements

To be sufficient, the writing should manifest the donative intent, describe the subject matter of the gift, be signed by the donor, and be delivered.

(2) Physical Delivery Possible

One may accomplish delivery by written instrument even though the

subject matter of the gift was capable of being manually transferred. Note that some courts that do not recognize the validity of delivery by written instrument may still treat the writing as a form of *symbolic delivery* (see below) if manual delivery is impossible or impracticable.

d) Symbolic Delivery

When manual delivery is impossible or impracticable, symbolic delivery is permitted. Symbolic delivery occurs when the donor hands over some *object*, other than the item given, *that is symbolic* of the item. Symbolic delivery is most commonly effectuated by delivering a written instrument, as described above.

2) Donee Already in Possession

If the donee is already in possession of the article, the donor need not repossess the article and then return it to the donee, because the law will not require a useless act. But the donor must do something to make his intent objectively clear.

3) Gift Through Agent

a) If Agent of Donee

If a gift is given through an agent of the donee, the gift is effective when the *donor delivers* to the agent.

b) If Agent of Donor

If a gift is given through the agent of the donor, the gift is effective when the *agent delivers* to the donee, unless the agent has assented to hold the property for the donee. Thus, where such assent is missing and the donor delivers the item to his agent for delivery to the donee, if the donor dies before delivery is made, there is no gift. The agent's authority to deliver terminated upon the donor's death, and no delivery was made.

4) Special Problems in Delivery

a) Checks

(1) Check of Donor

The mere manual delivery of a check made by the donor does not fulfill the delivery requirement. Since the check simply orders the bank to perform the delivery of the real subject matter (i.e., the money), there is *no delivery until* such time as the *bank makes payment*.

(2) Check of Another

Since the check of another is not the directive of the donor to have complete delivery made by his agent, but rather a contract right given by another, its *transfer fulfills the delivery requirement*. It is important to note that even where a check must be indorsed by the donor for proper negotiation, the manual delivery of the unindorsed check (coupled with the requisite donative intent) completes the gift.

b) Promissory Notes

Because a promissory note, drawn by the donor, is merely a promise to deliver money in the future, the execution and manual delivery of a promissory note is not a valid gift. However, if a promissory note has been drawn in favor of the donor, and thereafter the donor transfers it to a third person (i.e., the donee), the gift is valid.

c) Stock Certificates

Delivery of shares of stock with the requisite donative intent constitutes a valid gift. This may be true though the donor continues to receive the dividends thereon up to the time of his death. In addition, indorsement of the stock certificate is not a prerequisite to valid and complete delivery. Also, it is not necessary that the donee's name be entered on the corporate books in order to complete delivery.

d) Life Insurance Policy

The rules for delivery of life insurance policies are similar to those for delivery of stock certificates.

e) Bank Savings Deposits

Delivering a bank book to the donee with intent to make a gift is a sufficient symbolic delivery when the savings bank book represents dominion over the amount on deposit.

f) Joint Checking Account

(1) Rebuttable Presumption of No Gift

In some jurisdictions, where a joint checking account is opened and one party puts in all or most of the money, there is a presumption that this is done for the convenience of that party and not as a gift, particularly where the person whose money is involved is an invalid or is otherwise unable to get to the bank easily. The presumption may be rebutted by clear proof of donative intent. It may also be rebutted by showing that convenience was not the reason; i.e., the person whose money was involved had ready access to the joint account.

(2) Survivor Becomes Owner

Other jurisdictions do not allow such a rebuttable presumption to be raised in the case of a joint checking account. If statutory formalities are complied with, the survivor of a joint account will automatically become the owner of the account (absent fraud, undue influence, mental incapacity, or mistake). [*See In re LaGarce's Estate*, 487 S.W.2d 493 (Mo. 1972)]

c. Acceptance of Donee

When the gift is beneficial to the donee, acceptance by her is presumed. However, the donee may refuse to accept a gift by an affirmative act.

d. Gifts in Contemplation of Marriage

Most jurisdictions hold that engagement gifts are made in contemplation of marriage and are conditioned on the subsequent ceremonial marriage taking place. If the marriage does not occur, engagement gifts must be returned. While an engagement ring by definition is given in contemplation of marriage, this may not be the case with other gifts given during the engagement period. Courts consider factors such as the type of property given, fraud, conditions attached to the gift, and the intent of the donor to determine whether the gift will be deemed to be given in contemplation of marriage (and thus recoverable by the donor if the marriage does not occur).

2. Gifts Causa Mortis

a. Concept and Essential Elements

A gift causa mortis is one *given in contemplation of death*. For the gift to be valid, the following elements must exist:

1) Present Mental Capacity

The donor must have the same present mental capacity to make the gift as is required for a gift inter vivos.

2) Gift Must Be Personal Property

Real property cannot be conveyed as a gift causa mortis.

3) Delivery and Acceptance

The delivery and acceptance requirements that are essential to the validity of a gift inter vivos are also required for gifts causa mortis.

a) Identical Test

To accomplish a gift causa mortis, the requisite *donative intent*, in addition to *delivery* and *acceptance* of the subject matter of the gift, is required. The rules relating to delivery and acceptance are identical for both gifts inter vivos and gifts causa mortis, with one exception.

b) Exception—Delivery by Deed of Gift (Symbolic Delivery)

There are a significant number of states that hold that the donor may not accomplish a gift causa mortis by virtue of symbolic delivery. The rationale given is that execution of a written document that acts as a testamentary device should be sufficient to vest title in a donee only if drawn in compliance with the Statute of Wills. All other forms of delivery previously indicated as being acceptable for the valid accomplishment of a gift inter vivos will be sufficient and acceptable for the valid accomplishment of a gift causa mortis.

4) Anticipation of Death

The definition of a gift causa mortis includes the requisite that the donor be in contemplation of imminent death. As originally envisioned, the donor must have been suffering from an illness that realistically confronted her with a fear of death.

a) **Imminence**

There is recognition of a valid gift causa mortis as long as the donor was suffering from an actual illness that threatened her life. The mere abstract fear of death from a future cause (e.g., fear of flying, fear of death in war, etc.) is not sufficient.

b) **Death as Anticipated**

To validate a gift causa mortis, older cases held that the donor had to die as anticipated. If she died from some other cause, some early decisions indicated that the gift was revoked. There has been, however, considerable liberality given to this concept in more recent decisions.

Example: A victim of an automobile accident is placed in an ambulance. In fear of death from the injuries sustained in the accident, she attempts to make a gift causa mortis. En route to the hospital the ambulance is struck by a train and the donor is killed. Can it be said that the donor died “as anticipated”? The more modern authorities would say yes.

c) **Recovery**

(1) **Gift Is Revoked by Operation of Law**

An important ingredient in determining the validity of the gift causa mortis is the failure of the donor to recover from the illness that placed her in contemplation of death. Once it can be said that the donor “recovered,” the gift is revoked by operation of law. As long as the donor has failed to recover, the gift is not revoked. The concept of “recovery” predominates in most modern cases. As in the example given above, the donor did not recover from the illness that prompted the attempted gift causa mortis. Therefore, one who attempts a gift causa mortis in contemplation of death will have made a valid gift as long as she fails to recover, though the precise cause of death is different.

(2) **Compare—Deed to Real Property Not Revoked**

Because the property given must be personal property, a deed to real property executed and delivered in contemplation of death is not revoked as a gift causa mortis when the donor recovers.

5) **Absence of Revocation**

In addition to the failure of the donor to recover, a requirement of a valid gift causa mortis is that it *not be revoked*.

a) **Affirmatively by Donor**

The definition of the gift causa mortis contemplates that the donor has passed title to the donee. However, it is a revocable transaction. The donor reserves the right, as a condition subsequent, to revest ownership in herself by any affirmative act manifesting such intention.

b) **Failure of Donee to Survive**

The gift causa mortis is given on the essential condition that the donee

survive the donor. Should the donee fail to survive the donor, the gift is revoked by operation of law.

b. Creditor Claims

A gift causa mortis is always *subject to the claims* of creditors of the donor's estate.

I. UNIFORM TRANSFERS TO MINORS ACT

1. Purpose of Act

While at common law a minor may legally receive a gift, a gift to a minor may be troublesome because of uncertainty over who will manage or care for the property until the donee reaches majority. There may also be questions about the donor's eligibility for the annual gift tax exclusion provided by the Internal Revenue Code. A donor who gives property in a manner prescribed by the Uniform Transfers to Minors Act ("UTMA") makes a completed gift to the minor donee and qualifies for the gift tax exclusion.

2. Subject Matter of Gift

The UTMA applies to *all kinds of property* whether real or personal, tangible or intangible.

3. Types of Transfers

The UTMA applies to *all types of transfers*, not just lifetime outright gifts. It includes transfers from trusts, estates, guardianships, and the minor's debtors.

4. Title

The *gift is irrevocable*. The custodial property is indefeasibly vested in the minor, subject to the rights, powers, duties, and authority of the custodian.

5. Possession of Gift

The donor must place the custodian in control of the property as soon as practicable. However, the donor's failure to comply with this requirement, his designation of an ineligible person as custodian, or the death or incapacity of the person designated as custodian does *not* affect a consummation of the gift.

6. Creation of Custodial Property

Custodial property is created when:

- (i) A *security* is registered in the name of the donor, other adult, or trust company as custodian for a minor, or delivered with endorsements to someone other than the donor.
- (ii) *Money* is paid or delivered to a broker or financial institution for credit to account in the custodian's name, as custodian for the minor.
- (iii) A *life insurance policy or annuity* is registered or assigned and delivered.
- (iv) An interest in *real property* is recorded.
- (v) *Other property* interests are transferred to a trust company or adult other than the donor, and the custodian signs the receipt.

- (vi) A *certificate of title* is issued by state or federal government (e.g., for aircraft, boats, automobiles).

[UTMA §9]

7. One Minor

Each gift may be to only one minor.

8. Custodian

a. Who Is Custodian?

Only one person may be the custodian. The custodian may be the donor, another adult, an adult member of the minor’s family, the guardian of a minor, or a trust company.

b. Duties of Custodian

1) Preservation of Property

The custodian must take control of custodial property, register or record title if appropriate, and collect, hold, manage, invest, and reinvest it as would a prudent person dealing with the property of another.

2) Payment to Minor

The custodian pays to the minor for expenditure by him, or expends for the minor’s benefit, so much of the custodial property as the custodian deems advisable.

c. Compensation

The custodian is entitled to reasonable compensation and reasonable expenses, but may act without compensation.

d. Successors

The custodian, should he resign, designates a successor custodian, or a successor may be appointed by the court upon petition.

e. Removal

The custodian may be removed by the court upon petition of the minor (if age 14 or older), the donor, an adult member of the minor’s family, or the guardian of the minor.

9. Final Distribution

Final distribution to the minor should be made when the minor reaches the age of *majority*. If the minor dies before reaching majority, distribution should be made to the minor’s estate.

10. Uniform Gifts to Minors Act

Two states, Vermont and South Carolina, continue to use the Uniform Gifts to Minors Act (“UGMA”), which the UTMA was designed to replace. The UGMA differs from the UTMA primarily in that it covers fewer types of property and transfers.

a. Subject Matter of Gift

The UGMA applies only to gifts of securities, money, life insurance, or annuity contracts.

b. Types of Transfers

The UGMA applies only to lifetime outright gifts. It does not include transfers from trusts, estates, guardianships, or the minor's debtors.

III. LIENS

A. IN GENERAL

1. Concept

A lien is the right of one (the lienor) to possess and retain personal property that she has improved or enhanced in value, or otherwise serviced, as security for the payment by the person claiming the property (the lienee) of all charges for the improvement or service.

a. Conditions for Lienor's Right to Possess

The lienor has a right to possess for a period of time only if the following conditions are present:

- 1) A debt arises from services performed on the thing;
- 2) Title to the thing is in the debtor (lienee); and
- 3) Possession of the thing is with the creditor (lienor).

b. Pawn Distinguished

The pawn is held to secure the performance of a promise or other obligation. There may or may not be improvements to or services upon the pawned article.

c. Mortgage Distinguished

In a common law mortgage there is a transfer of legal title to the mortgagee as security for the performance of the mortgagor's obligations. Upon the failure of the mortgagor to perform, the mortgagee's title becomes absolute, subject to the equity of redemption.

2. Classes of Liens

a. General Lien

A general lien is the right to retain *all of the property* of another as security for a general balance due from that person. It exists only when (i) *separately contracted* for, (ii) conferred *by statute*, or (iii) (most commonly) according to the *usage or custom* of a particular trade, a general lien is so well established that the parties to a particular transaction must be taken to have made their contracts in relation to the usage or custom. This custom is well established for certain professions, e.g., attorney, banker, universal agent, and innkeeper.

b. Special Lien

A special lien is the right to retain *specific property* as security for payment of charges for work done on or services rendered concerning that specific piece of property.

1) Lienor Has Possession

For the special lien, the article must be in possession of the lienor. Thus, if work is done on the owner's premises, no lien will attach unless the parties intended that the lienor should possess the chattels, e.g., materials used in a building on the owner's land.

2) Lienor Must Add Value

For the special lien, the lienor generally must add value to the chattel. It is not enough that the chattel be used to produce a valuable result.

Examples: 1) The local gas station washes Smith's car. Value is added, no matter how infinitesimal. (A clean car is worth more than a dirty car.) There is a lien.

2) Owner sent type to a printer, who used the type to produce a printed work for Owner. There is no lien in the type, for no value was added to it.

a) Exception—Special Lienors

The special lien may exist for a common or private carrier, a warehouse, an ordinary bailee, a trustee, an arbitrator, a general agent, or a special agent (*see* B.1., below). They are entitled to a lien without having added value to the chattel. Furthermore, if a person performs labor on the chattel which does not increase the value of the chattel, she should have a special lien for the reasonable value of the services performed.

c. Consequence of Classification

The classification of liens is important only when the lienor releases a portion of the chattels held as security.

1) General Lien

If the lienor has a general lien and releases some of the chattels, the chattels released are freed from the lien, but the lienor may hold the unreleased portion until the *entire* lien charge is paid.

2) Special Lien

If the lienor has a special lien and releases some of the chattels held, he thereby waives his lien to the extent of the chattels released.

3) Ambiguous—Construe as Special

In case of doubt, a lien is *construed as special* rather than general, because the law does not favor general liens.

B. RIGHTS OF DIFFERENT LIENORS

As a rule, the lien is given by the owner of the property. In exceptional circumstances, a lien may be given by one who is not the owner of the chattel.

1. Lienors Under the General Rule

a. Attorney

Attorneys have a lien on all papers, securities, money, and documents in their possession for the general balance of accounts with their clients.

b. Cleaner and Launderer

Cleaners, launderers, dyers, and pressers have a lien on clothing for the value of the services performed.

c. Mechanic or Artisan

A mechanic or artisan who makes, alters, or repairs any article of personal property at the request of the owner has a statutory lien on that property for her just and reasonable charges for work done and materials furnished.

d. Motor Vehicles, Including Trailers

Any person who stores, repairs, or furnishes supplies of or concerning motor vehicles has a lien for the agreed or reasonable charges when the charges are incurred by the owner, the conditional vendee, or the chattel mortgagor.

e. Warehouser

A warehouser has a lien to secure him for the time and labor expended upon the chattel and for his storage charge.

f. Landlord

A landlord has a lien for rent upon the tenant's personal chattels on the premises, from the time of execution of the lease and the bringing of a chattel onto the premises.

g. Common Carrier

A common carrier has a lien for charges on the theory that the common carrier is compelled by law to accept all persons who present themselves. However, it has no lien on the goods that it receives from persons other than the owner, such as goods stolen by the shipper. The reason for this rule is that the carrier may demand transportation charges in advance, or in the alternative, proof from the shipper that she is acting with authority from the owner. This bailee for hire should be particularly distinguished from the innkeeper (*see* below).

2. Exceptions to Rule

a. Innkeepers

The lien of an innkeeper is peculiar in that it attaches to any property brought into the inn by the guest. It is not essential in all cases that the guest is the owner of the property. The property may be that of a third person, or even stolen. As long as the innkeeper has no knowledge that the property is not rightfully in the possession of the guest, his lien will attach generally to all the property to the extent of a reasonable charge for the services rendered.

Example: The samples of a traveling salesman are subject to a lien for an innkeeper's charges and may be sold, after proper notice, to satisfy the charges, even though the innkeeper has full knowledge that they are owned by the guest's employer.

b. Other Bailees for Hire

Other bailees for hire acquire no lien on goods received from someone not the owner, for there is no similar duty to accept all goods offered. Therefore, the situation is governed by the general rule that “a lien is a proprietary interest,” a qualified ownership, and, in general, can be created only by the owner or by some person authorized by her.

Example: A person in possession of a truck with the owner’s permission cannot create a lien for repairs. That the repairs are of benefit to the owner is immaterial.

C. WAIVER OF LIEN

1. By Contract

Although a lien is conferred by law, it may be waived by any contract inconsistent with the existence of the lien. Such contracts usually occur when the artisan agrees to deliver the goods before payment for his services is to be made.

Example: If a person delivers cloth to a tailor to be made into a garment, under agreement by which the tailor is to be paid for his services 30 days after the completion and delivery of the garment, the tailor has no lien on the goods.

2. By Acceptance of Other Security

So too, where a lienor accepts security for payment, the security eliminates the common law lien. The acceptance of the security indicates an intention to regard it as a substitute for the lien.

3. Demand for Excess Charges

A lienor who in good faith demands charges in excess of the original amount of the lien does not waive the lien. However, if the lienee tendered the original amount due under the lien before the lienor demanded the excess amount, the lienor must discharge the lien. If the lienor does not discharge the lien, he may be subject to statutory penalties or liable in an action for replevin or trover.

4. Reservation of Lien or Temporary Use by Bailor

The lien is not lost if the lienor surrenders the goods to the bailor, specially reserving his lien, or if the bailor is permitted to make temporary use of the property. Therefore, a garage proprietor does not lose his lien on automobiles stored in his garage where the owners are permitted to use their cars daily. In the case of the surrender of temporary possession, the lien enjoys priority over the claims of the bailor’s subsequent creditors.

D. MECHANIC’S LIEN VS. PERFECTED SECURITY INTEREST

In many states, the *mechanic* who performs labor at the request of the mortgagor *has priority* as against the holder of a perfected security interest. This is true even though the mechanic performs her work at a time when the security interest exists. The rationale is that the mechanic has enhanced the value of the article.

E. ENFORCEMENT OF LIEN

A common law possessory lien is merely a right to hold possession until the debt is paid. The lienor has no right to sell the goods to reimburse himself unless this right is conferred by statute or special agreement. Statutes in practically all states give the lienor the power to enforce the lien *by sale*, either by notice or by judicial foreclosure.

IV. BAILMENTS

A. DEFINITION

A bailment is the relationship created by the transfer of possession of an item of personal property by one called the bailor to another called the bailee for the accomplishment of a certain purpose.

Example: If a coat is delivered to a tailor to be repaired, she acquires a right to its possession as against all the world except for the owner, who, as bailor, retains an unconditional title to the coat with the right to its return.

1. No Transfer of Title

The bailment relationship involves the transfer of possession of an item of personal property to the bailee *without a transfer of title*. The bailee acquires the right to possess the property in accordance with the terms of the bailment. A bailment obligates the bailee to return the item of personal property to the bailor or otherwise dispose of it according to the terms of the bailment.

2. Contract Aspect

The bailment arises where one possesses the property of another. This relationship may be part of an express contractual arrangement between the parties; however, an *express contract is not necessary*.

Example: If one finds a lost article and takes it into her possession, she is a bailee for the unknown owner, although she made no contract with that owner.

B. ELEMENTS OF BAILMENT

1. Possession of the Property

There is no bailment unless the bailee obtains *physical custody* over the property coupled with *intent to exercise control*.

Example: Plaintiff's overcoat disappeared after he hung it on a hook on the wall immediately behind, and within two feet of, the table at which plaintiff sat in defendant's restaurant. Plaintiff did not notice a placard stating: "Not responsible for hats, overcoats, umbrellas, etc." Neither defendant nor any of her employees ever saw the coat. It was held that there was no bailment for the overcoat since the facts are inconsistent with the hypothesis that plaintiff intended to transfer to defendant or her employees such possession of the coat as would exclude plaintiff's possession.

2. Bailee's Consent Required

Possession cannot be thrust upon the bailee without her consent. Therefore, a delivery without acceptance by the bailee will not create a bailment, and the *mere custody* of a chattel is *not sufficient* in law to constitute possession.

Example: B, who has bought goods from S, claims that they are defective. He takes them back to S's shop. S asserts that they are perfect and refuses to accept a return of them. Thereupon B walks out of the shop, leaving the goods there. S is not a bailee, although she is now in possession of goods belonging to another. S cannot be made a bailee except with her consent. Therefore, S is under no duty to exercise care of the goods. She may even remove them from her shop.

3. Knowledge of Presence

It cannot be said that a person is in possession of an article as a bailee unless she has knowledge or can be charged with knowledge of the presence of the article.

Example: Where a customer, while trying on garments, lays her coat on the counter in the presence of a clerk, the store is liable for the loss of the coat. In such a situation, the clerk (and the store) impliedly invite customers to remove their coats and lay them aside. Therefore, the removal of the coat in the presence of a clerk who has an opportunity to watch it constitutes a transfer of possession to the store with the consequent duty of caring for it as a bailee. A contrary conclusion may be appropriate where neither the store nor its employee is aware of the fact that a customer placed her coat on a counter.

4. Property Concealed in Bailed Property

If a bailment exists with respect to an article, it does not follow that a bailment exists with respect to something that is concealed within that article.

Examples: 1) Where a coat with a fur piece concealed in it is deposited in a coat check room, and the fur piece is not returned, the owner of the coat check room is not liable, because she was not a bailee for the fur piece. Although she had custody of the fur, she could not have intended to assume control over it, because it was concealed and she did not know of its existence.

2) The articles in a car stored in a garage, parking lot, etc., are considered the subject of a bailment only if the bailee has actual or imputed knowledge of them. For example, there would not be a bailment with respect to musical instruments left in the trunk of a car without notice to the garage.

5. Constructive Bailment

Although the normal bailment is consensual, a constructive or involuntary bailment arises by operation of law in a few situations where the agreement of the parties is implied. For example, a constructive bailment arises when someone finds lost goods and retains physical custody of the goods or when a landlord repossesses premises.

C. BAILMENT DISTINGUISHED FROM OTHER TRANSACTIONS

1. Renting

a. Parking Lots

1) Examine Surrender of Control Over Car

Parking a car in a parking lot may constitute a renting of parking space or it may constitute a bailment. Whether a particular transaction amounts to a bailment or to a mere renting of parking space depends on whether the owner surrenders control over the car to the operator of the lot. Thus, the turning over of the keys by the owner to the operator or use by the operator of a checking system would indicate a bailment. Where the owner parks her own car, selecting her own space, locking the car, and taking the keys, she leases the space, and the operator of the parking lot or garage is not a bailee.

2) Where Lot Owner Is Deemed a Lessor

Where the parking lot owner is held to be a lessor, the lessor must still exercise ordinary care. The lessor is therefore liable to a car owner for damage done to the car where the attendant was on actual notice of tampering.

b. Safe Deposit Boxes

The relationship existing between a bank and the one who rents a safe deposit box in the bank is that of bailor and bailee. Usually, the bank and the “renter” of the box have duplicate keys, but the renter cannot have access to the box except with consent and use of the bank’s key. This type of almost *absolute control by the bank* of the box and its contents makes the bank a bailee.

2. Employer and Employee Relationship

a. Employee Cannot Be Bailee of Employer’s Goods

The ordinary possession by an employee of his employer’s goods does not constitute a bailment. The employee merely has custody of the goods. Possession and control of the goods remain with the employer. In a bailment, the bailee has the right of possession and control of the goods, for the term of bailment, against all the world including the bailor. Because an employee is at all times subject to the orders and control of his employer, he cannot, as an employee, be a bailee of his employer’s goods.

Example: A truck driver, while using his employer’s truck in the course of his employment, is not a bailee of the truck. If, however, the employer permits the truck driver to use the truck over the weekend for his pleasure or convenience, a bailment results.

b. Negligence of Bailee Not Imputed to Bailor

As to liability, the negligence of the employee is imputed to the employer if the tort is committed in the course and scope of the employment. In contrast, the negligence of a bailee is not usually imputed to the bailor because the possession and control is in the bailee and the act of the bailee is usually in her own interest.

3. Consignment

A consignee differs from an ordinary bailee in that she is authorized to sell the goods in the ordinary course of trade. Hence, a *consignment* may be described as a *special bailment* for the purpose of sale. In a true consignment for sale, the consignee is not only a bailee, but also an agent of the consignor to sell the goods. In such cases the consignor’s right to the goods will be sustained as against: (i) the consignee’s creditors, and (ii) the trustee in bankruptcy of the consignee.

4. Sale

a. In General

1) Distinction Is Relevant as to Risk of Loss

A sale involves a transfer of title to the vendee. A bailment involves merely a transfer of possession to the bailee, the title to the goods remaining in the bailor. The importance of this distinction appears whenever it is necessary to determine which party undertook the risk of loss. In a sale, the loss of goods is sustained by

the vendee because she is the owner. In a bailment, the loss of goods falls upon the bailor because he has title.

2) Test for Bailment vs. Sale

A fairly workable rule to determine the nature of the transaction, whether bailment or sale, is the following: When the identical thing delivered is to be restored in the same or an altered form, the contract is one of bailment, and the title to the property is not changed; but when there is *no obligation to restore* the specific article, and the receiver is at liberty to return another thing of equal value or the money value, the title to the property is changed—it is a *sale*.

Examples: 1) When the article, however altered in form (e.g., wheat into flour, grapes into wine, or milk into butter), is to be returned, the transaction is a bailment and the title remains in the bailor.

2) But if a farm and cattle are leased with a stipulation that the lessee is to return an equal number of cattle of the same quality at the expiration of the tenancy, the transaction is a sale because it does not call for the redelivery of the same property.

b. Sale on Approval vs. Sale or Return

1) Sale on Approval

Where goods are delivered on “approval” or “on trial,” the transaction constitutes a *bailment*, the bailee having an option to purchase. Title to the goods does not pass until the option is exercised by an indicated approval or until the expiration of a reasonable time, when a time for approval is not otherwise fixed. This should be distinguished from a “sale or return.”

2) Sale or Return

A “sale or return” transaction is a sale with the privilege on the part of the vendee to reinvest title in the vendor upon notice to him. Thus, where goods are shipped to a vendee on a “sale or return” and the vendee gives notice of her election to reinvest title in the vendor, the vendee becomes a bailee while the goods remain in her possession. Thus, in a “sale or return,” the transaction *may end as a bailment*, although it begins as a sale.

5. Pledge

A pledge is a particular type of bailment by which the bailor delivers property to the bailee to secure an obligation owed by the bailor to the bailee.

6. Intra Hospitum

A hotel or innkeeper is an *insurer* of the goods of a guest taken into custody and control of the establishment. It is therefore liable for any loss or damage, except where it can be shown that it was caused by an act of God, a public enemy, or the fault of the guest.

Examples: 1) Guest gives his car to a doorman for parking in the garage of a hotel. The hotel is an insurer of the car and all of its contents (regardless of notice) unless it can show the loss or damage is due to an act of God, a public enemy, or the fault of the guest.

2) Guest leaves his car with the doorman for parking in a nearby garage, knowing that it is an independent establishment. The garage is liable only as a bailee.

D. BAILEE'S RIGHTS IN BAILED CHATTEL

1. Possession

The bailee has the exclusive right to possession of the property during the bailment, provided she is exercising this right according to the terms and conditions of the bailment. This right is operative not only against third persons, but also against the owner of the property.

a. Rights of Action

The bailee may maintain a trover, trespass, or replevin action against third parties interfering with her possession, or even against the bailor. Unless she is a gratuitous bailee, she may replevy even as against the bailor to recover her possession if, for example, the bailor takes the object bailed before the termination of the term.

b. Attachment by Bailor's Creditor

A creditor of the bailor has no greater rights than the bailor himself and no right to take the bailed goods by attachment.

2. Use of Bailed Goods

Ordinarily, the bailee has no right to use the subject matter of the bailment. However, she may acquire this right by express contract with the bailor. But, even where there is no such contract, the circumstances may indicate a presumed intention that the bailee make some use of the property.

Example: A stablekeeper has presumed authority to exercise a horse and milk a cow in order to preserve the health of the animals.

a. Agreed Use

In bailments for the hired use of personal property, as where A rents his horse, car, or launch to B for B's use, the bailee (B) obviously has the right to make the agreed use of the property bailed. The same is true of the gratuitous loan of an article for use. In such cases, however, the bailee's use of the bailed article is limited by the terms of the agreement. Any *intentional, unauthorized use* of the goods that results in loss or damage *renders the bailee absolutely liable* to the bailor, irrespective of the question of care or negligence. (See F.4., below.) However, if the departure from the terms of the contract is unintentional, no liability ensues unless the bailee has been negligent.

b. Incidental Use

In bailments for storage, repair, or transportation, the bailee is under a duty not to make any use of the goods except such use as is incidental to the performance of her services.

Example: A stores his car in B's garage. B, without A's knowledge or consent, uses A's car on the highway. While the car is being so used, and without any negligence on B's part, it is damaged or wrecked. B is absolutely liable to A for the damage or loss.

E. BAILOR'S RIGHTS IN BAILED CHATTEL

1. Actions Against Bailee

Where, due to the wrongful act of the bailee, the goods bailed have been lost or damaged, the bailor can maintain an action against the bailee.

a. Action for Damages for Breach of Contract

For example, a bailor can maintain an action against a bailee for money paid to the bailee for work improperly done on the bailed goods.

b. Tort Action for Damages

A bailor can maintain an action for damages against a bailee who by her wrongful act has destroyed or injured the goods bailed.

c. Conversion Action

Where the bailee's wrongful conduct constitutes or amounts to a conversion of the bailed goods, the bailor can maintain trover (conversion) against the bailee.

d. Replevin

A bailor entitled to immediate possession can maintain replevin against the bailee to recover the bailed goods.

2. Actions Against Third Parties

a. Bailment of Definite Duration

Where the bailment is for a definite time, a bailor *cannot* maintain trover or replevin during the life of the bailment against a person who converts the bailed property from the bailee because, although he has the general property right in the thing, he has neither the possession nor the right to possession. Trover and replevin are predicated upon the immediate right to possession. However, he may bring an action for damages that he has suffered on the theory of the common law action of trespass on the case. (See 2.c., below.)

Example: X rents a book to Y for one year and Z wrongfully takes the book from Y on the second day. X may not bring, until the year has passed, replevin against Z for recovery of the book, nor may he bring an action in trover for its value when taken, for he is not entitled to possession during the term of the bailment. He may bring replevin after the term of the bailment has expired.

b. Terminable Bailment

Where the bailor may treat the bailment as ended by reason of a gratuitous bailment, a bailment terminable at will, or the bailee's unauthorized act, he may maintain the actions of conversion or replevin against a third party.

Example: Where a bailee of a sewing machine sells it to a third party, the bailor may replevy it from him, as the bailee's conversion terminates the bailment contract and gives the bailor an immediate right to possession.

c. Actions for Damage to Future Right of Possession

A bailor may sue a third party who injures the bailed property for damages for injury to his reversionary interest, even though he may not maintain trover or replevin for lack

of the immediate right to possession. In such an action it is *immaterial* that the bailee may have been contributorily negligent, as the negligence of a bailee is not imputed to her bailor. The sole issue in the case is whether or not the third party was negligent. The reason for this rule is that the use and care of the chattel is in the control of the bailee and subject to her exclusive control. The bailor has relinquished all control.

Example: A husband who gratuitously lends his automobile to his wife, a physician, to enable her to make professional calls, is permitted to recover from a third party for injury to his car caused by the concurring negligence of his wife and the third party, since the bailee's negligence is not imputed to the bailor.

F. BAILEE'S DUTY WITH RESPECT TO BAILED GOODS

1. Bailee's Duty of Care

a. Bailee Is Not Insurer of Goods

A bailee must exercise due care with respect to the bailed goods; she is not an insurer of their safety. If the goods are damaged or lost through no fault of the bailee (e.g., theft, earthquake), the loss falls on the bailor.

b. Type of Bailment May Determine Degree of Care

The specific degree of negligence upon which liability will rest is said to vary with the type of bailment. Generally, where the bailment is for the *sole benefit of the bailor* (the bailee is uncompensated), only slight diligence is required and liability is said to rest on gross negligence. Where the bailment is for the *sole benefit of the bailee* (e.g., where the bailor gratuitously loans his property), great diligence is required and liability will result from slight negligence. Bailments for hire and pledges are for the *mutual benefit* of bailor and bailee and ordinary due care is required. Today, the trend is away from such classifications and toward a rule that considers whether the bailee exercises ordinary care under all circumstances. These circumstances include the value of the goods, the type of bailment, any custom of a trade, etc.

2. Burden of Proof as to Bailee's Negligence

Where goods have been lost, destroyed, or damaged during the bailment, the burden is on the bailee to prove that the loss, etc., was caused *despite* her due care. Consequently, when the bailor has shown a delivery of the goods to the bailee and that the latter has failed on proper demand to return the goods, or has returned them in a damaged state, he has made out a prima facie case for recovery. The burden is then on the bailee to explain why the goods were not returned or why they were returned in a damaged condition. The reason for this rule is that the bailee has in her possession the means of ascertaining the exact cause of the damage or the nonreturn of the goods.

3. Contractual Provisions on Bailee's Duty of Care

The parties may prescribe the extent of the bailee's liability by contract and may impose either a lesser or a greater obligation than the law ordinarily requires.

a. Waiver of Liability for Negligence

Such contracts are *not generally favored* and are therefore strictly construed. Thus, a

general exculpatory clause (e.g., “bailee assumes no responsibility for loss or damage to bailed chattel”) does not exempt a bailee from liability created by her own negligence.

b. Liability May Be Limited

An *ordinary* bailee (e.g., a neighbor who borrows an item) may exempt herself from liability for her own negligence. On the other hand, public policy prevents a *professional* bailee from exempting herself from liability for her own negligence, although she may, under proper circumstances, limit her liability. However, a professional bailee’s limitation is not valid unless the bailor knows or should know of the limitation and assents to it.

1) Posted Signs

It is the customary practice of check room proprietors, warehousemen, and garage-keepers to post public notices limiting their liability. It is held, however, that such a limitation is not binding on the bailor in the absence of proof that the bailor *read the notice* or, considering its size and location, should have read the sign.

2) Claim Check

It is also a customary practice for check room proprietors, garages, and warehousemen to place a limitation of liability on the claim check. Most courts hold that a claim check *does not evidence a contract* between the parties. A claim check is generally issued for purposes of identification, and the mere fact that a would-be contract provision is contained on the claim check is not sufficient proof that the bailor actually knew, or should have known, of this term.

3) Hotels

a) May Limit Liability

By statute, hotels may limit their liability for articles placed in their care by providing notice thereof. The hotel is limited to a certain sum in liability for items placed in a safe provided for that purpose, unless it specifically contracted for higher liability. Also, by providing a safe and such notice, the hotel’s liability for loss of goods from the hotel room is limited to such amount of money and jewelry or other articles of value as it is usually common or prudent for guests to retain in their rooms.

b) Compliance with Posted Notice Required

If a hotel posts a notice requiring guests to bolt the door and deposit their key with the desk when leaving, the hotel is not liable for lost luggage or other articles should it appear that the door was not locked or bolted or that the key was not deposited, unless the loss is directly or indirectly caused by, or attributable to, the proprietor or his employees.

4) Warehouses

A warehouseman may limit the amount of his liability in case of loss or damage to stored goods by including a limitation provision in the warehouse receipt or storage agreement. On the other hand, at the time of signing the storage agreement or within a reasonable time after receiving the warehouse receipt, the bailor may

request in writing that the warehouse increase the amount of his liability. In this event, the warehouse may charge increased rates based on the increased valuation of the goods. A limitation with respect to the warehouse's liability for conversion to his own use is not effective.

4. Absolute Liability

The bailee is absolutely liable for loss or damage without regard to her care under the following circumstances.

a. Departure from Terms of Bailment

The bailee is rendered absolutely liable as a converter when she departs from the terms of the bailment, as by using the goods for a different purpose than the one agreed upon. In addition, absolute liability attaches if the bailee removes the goods from an agreed place of storage to another without the bailor's knowledge or consent.

Examples: 1) B rents a car and agrees to use it only within City M. On impulse, she drives the car to City P, and while it is legally parked on the street, a car driven by X totally demolishes it. B is liable for the damage because the use was unauthorized and outside the scope of the bailment.

2) A stores his car in B's garage. B, without A's knowledge or consent, uses A's car on the highway. While the car is being so used, and without any negligence on B's part, it is damaged or wrecked. B is absolutely liable to A for the damage or loss.

b. Breach of Agreement to Insure

When the bailee expressly agrees, or by custom or previous course of dealing impliedly agrees, to insure the goods against hazards, but fails to do so and the goods are damaged or destroyed by such hazard, the bailee is rendered absolutely liable.

5. Duty to Redeliver

Upon the termination of the bailment, the bailee owes a duty to redeliver or account for the thing bailed in its original or agreed-upon, altered form. Delivery must be made to the bailor or someone claiming under him.

a. Absolute Liability

Although a bailee is held only to a standard of reasonable care with respect to protection and preservation of the bailed chattel, she is absolutely liable for improperly delivering the bailed chattel to someone other than the bailor. Such misdelivery is a breach of the bailment and a conversion of the bailed chattel. Therefore, the liability is absolute and not based upon negligence.

Example: A bailee who in good faith delivers the bailed chattel to the wrong person under an expertly forged order is held liable to the bailor for the value of the goods.

b. Exception—Indispensable Instrument

An *exception to the rule of absolute liability* for misdelivery has been made by some courts when the bailee delivers the chattel to one holding an indispensable instrument (e.g., claim check) as long as the bailee had no notice or knowledge that the one presenting the instrument was not the original bailor.

Example: A bails his car to a parking garage and receives a numbered claim check, which he then loses. B finds the claim check and presents it to the bailee garage. The garage delivers the car to B in reliance upon the indispensable instrument (i.e., the claim check). As long as the garage had no knowledge or notice that B was not the original bailor, it will not be held to a standard of strict liability for delivering the car to B.

c. Exception—Involuntary Bailee

An involuntary bailee is liable only if the bailee was negligent in delivering the goods to the wrong person. Courts impose strict liability on an ordinary bailee because he is in breach of contract when he misdelivers. An involuntary bailee has no contract.

Example: A hotel guest leaves her purse in the hotel restaurant. The hotel is liable for delivering the purse to the wrong person only if it was negligent in doing so.

d. Adverse Claimants

When a bailee has notice of, or reason to know of, an adverse claim to the bailed property, the bailee will be absolutely liable for delivery to the original bailor if the original bailor is not the true owner. The appropriate action to be taken by the bailee is to *interplead all claimants* of the property.

e. Excuses for Nondelivery

However, the bailee is excused from making delivery to the bailor in the following cases:

- 1) Where, during the life of the bailment, the bailor has sold the property to the bailee or to a third party with notice given to the bailee;
- 2) Where there is title paramount in a third party and such party claims the article; or
- 3) Where the property is taken from the bailee by judicial process.

6. Estoppel of Bailee to Deny Bailor's Title

Since the bailee acquires possession by means of the bailment contract, she is thereafter estopped to deny or dispute the bailor's title, because one of the provisions of the contract is to return the article after the purpose of the bailment is accomplished. Thus, the bailee of an article cannot excuse her failure to return it by asserting a claim to it herself or on behalf of another.

7. Conversion by Bailee

A conversion is an unauthorized act over the property of another of such nature as is inconsistent with the rights of the owner. If the bailee has authority to use a chattel in a particular way, the use of it in another manner, or in the same manner but to a greater extent than authorized, is a conversion for which the bailor may maintain trover. Moreover, and very importantly, a *conversion makes a bailee an insurer* and therefore liable without reference to the question of negligence. In the case of a bailment, a demand and refusal is a condition precedent to an action in trover.

8. Bailee's Liability to Third Parties

If the bailee's use of the bailor's chattel results in harm to a third person, the bailor is not liable. The liability is the bailee's alone, for she wields possession and control of the article.

G. COMPENSATION AND REIMBURSEMENT

1. Compensation

In a bailment for the mutual benefit of the bailor and the bailee, the bailee is entitled to receive the agreed compensation for her services or, in the absence of such agreement, the reasonable value of such services. (For recovery of compensation, follow the rules for enforcement of liens.) In a bailment for the sole benefit of the bailor or for the sole benefit of the bailee, the bailee is entitled to *no compensation*.

2. Reimbursement

The general rule is that *ordinary expenses* must be borne by the bailee and *extraordinary expenses* by the bailor. Consequently, if the bailee pays an extraordinary expense, not incurred through her own fault, she is entitled to reimbursement from the bailor for such expense. For example, in the rental of a car, the cost of gasoline and oil and such minor repairs as fixing a flat tire would be ordinary expenses. The cost of a new tire, necessitated by a blowout (there being no spare tire), or the repair of a broken axle, would be extraordinary expenses.

3. Bailee's Lien

A bailee's lien is *not a general lien*; it extends only to the property bailed. The right to a lien is waived by a previous agreement to give credit, i.e., by an agreement made in advance to deliver or redeliver the goods without receiving contemporaneous compensation for services expended upon them. The lien is forfeited by the lienor's refusal to accept a proper tender of the charges due. The lien is lost by voluntarily parting with possession of the property.

H. BAILEE'S RIGHTS OF ACTION

1. Against Bailor

Where the bailor wrongfully takes from the bailee's possession and converts the subject matter of the bailment, the bailee can maintain an action against the bailor for such *conversion*.

2. Against Third Parties

The bailee may maintain an action against third persons for damage, destruction, or interference with the bailed goods, and may replevy them from third persons who have wrongfully taken them from her possession. Any recovery by the bailee beyond her interest in the bailed goods is for the benefit of the bailor. Full recovery by either the bailor or bailee against a third person bars the action of the other toward the third party.

I. DEFECTS IN SUBJECT OF BAILMENT

A bailor must exercise care so that the bailee is not harmed through a defect existing in the bailed chattel.

1. Gratuitous Bailments

Where the bailment is gratuitous, the bailor must inform the bailee of any defect that he

knows exists in the chattel that might cause injury to the bailee. There is no duty to disclose unknown defects.

2. Bailments for Hire

Where the bailment is for hire, the bailor is bound to inform the bailee of defects that are known to him, or of which he could have known by exercising reasonable diligence.

J. TERMINATION OF BAILMENT

Generally, a bailment may be terminated by agreement or conduct of the parties.

1. By Agreement

Mere lapse of the specified time or accomplishment of the purpose terminates a bailment.

2. By Conduct of Parties

Notice to the other party (where the bailment is for an indefinite period), resumption of possession by the bailor, mutual agreement, destruction of the property, or misconduct of the bailee (at the election of the bailor) will terminate a bailment.

V. COMMON CARRIERS

A. CONCEPT

A common carrier is one who undertakes for hire to transport persons or goods from place to place. Three requirements must be met: (i) there must be a holding out to perform service for all those who apply, (ii) the carriage must be for hire, and (iii) the service must be one for carriage.

B. LIABILITY FOR LOSS OR DAMAGE OF GOODS SHIPPED

The common carrier is an *insurer of the goods* given to it by the shipper and is liable for any loss or damage to the goods under any circumstances other than the following: (i) an act of God; (ii) an act of a public enemy; (iii) an act of state—e.g., legal process; (iv) an act of a shipper—e.g., defective packaging of goods by the shipper; or (v) the inherent nature of the goods—e.g., perishable fruit damaged due to natural causes.

1. Commencement of Liability

A carrier's liability as a common carrier commences when the goods are expressly or impliedly *delivered* to, *and accepted* by, the carrier *for immediate transportation*. Where the goods are stored in a warehouse and immediate transportation is not contemplated, the carrier is merely liable as a warehouseman.

2. Limitation of Liability at Common Law Allowed

a. Cannot Limit Liability Due to Negligence

By contract with the shipper, the common carrier may limit its liability for loss of the shipped goods. Such a contract is binding even though the shipper has not read the contract. Since the shipper is entitled to demand that the carrier accept and carry its goods at a reasonable rate and subject to full responsibility, the carrier must offer some additional consideration for the shipper's agreement to a limitation of liability—e.g., a lower rate to the shipper. A contract that relieves the carrier from all liability for

damage to the shipper's goods due to the *negligence* of the carrier is void as against public policy.

b. Effect of Posted Notice

Posted notices limiting liability, even though brought to the attention of the shipper, are not effective to relieve the carrier of liability.

3. Limitation of Liability Constrained by Statute

The Interstate Commerce Act, and more particularly the Carmack Amendment, restricts the ability of carriers operating in interstate commerce to limit the liability imposed on them by the Act. Under the Act, contractual limitations of liability are *void except* regarding (i) passenger baggage, and (ii) released rates (i.e., amount of liability agreed to in writing by the shipper). [49 U.S.C. §§11706(c), 14706(c)]

C. PASSENGER BAGGAGE

Baggage is goods that a passenger carries with him on a trip for his personal use, convenience, or enjoyment, that are suitable to his station in life.

1. Delivery

A common carrier is liable as an insurer for baggage delivered to it. A carrier is not liable for goods that are not baggage unless the carrier, knowing the nature of the goods, accepts them anyway.

2. Nondelivery

A carrier is *not liable as an insurer* for goods retained in the possession or control of the passenger. However, the carrier may be *liable in a negligence action* for failure to properly protect its passengers.

REVIEW QUESTIONS

INTRODUCTORY NOTE

The true/false questions that follow are intended to serve as both a substantive review and a diagnostic test. Respond to the questions quickly and compare your answers with those found at the end of this section. This will allow you to identify areas in which you may need further review.

- | | FILL IN
ANSWER |
|--|-------------------|
| 1. Farm crops, such as corn, are personal property. | _____ |
| 2. Wheat stored by farmers in a grain elevator is an example of confused goods. | _____ |
| 3. Replevin is an action to recover damages for an injury to a chattel. | _____ |
| 4. There are two requirements for a valid inter vivos gift: donative intent and delivery. | _____ |
| 5. A deed to real property executed and delivered in contemplation of death is revoked as a gift causa mortis if the donor recovers. | _____ |
| 6. A bailment can be accomplished without the transfer of possession to the bailee. | _____ |
| 7. A bailee may maintain an action for conversion against the bailor for interference with the bailee's right of possession. | _____ |
| 8. A bailor cannot maintain an action for money against a bailee for payments already made to the bailee for work improperly done on the bailed goods. | _____ |
| 9. A bailee expressly agrees to insure bailed goods. The goods are destroyed by fire. The bailor must prove negligence against the bailee to recover the value of the goods. | _____ |
| 10. Generally, a common carrier is an insurer of the goods given to it. | _____ |

ANSWERS TO REVIEW QUESTIONS

Ques. No.	Answer	Explanation
1.	<i>TRUE</i>	Farm crops are considered fructus industriales and are personalty.
2.	<i>TRUE</i>	Confusion is an intermixture of goods owned by different persons.
3.	<i>FALSE</i>	Replevin is an action to recover the chattel itself.
4.	<i>FALSE</i>	Acceptance of the gift is also required.
5.	<i>FALSE</i>	Real property cannot be conveyed as a gift causa mortis; therefore, a deed to real property is not revoked in these circumstances.
6.	<i>FALSE</i>	There is no bailment unless the bailee obtains possession of the property.
7.	<i>TRUE</i>	The bailee has the exclusive right of possession during the bailment; this right is operative against the owner as well as against third persons.
8.	<i>FALSE</i>	A bailor may maintain such an action for damages for breach of contract.
9.	<i>FALSE</i>	In this circumstance, the bailee is rendered absolutely liable.
10.	<i>TRUE</i>	A common carrier is generally an insurer of goods given to it.

APPROACH TO EXAMS**PERSONAL PROPERTY**

IN A NUTSHELL: Personal property is movable property, which includes every kind of property that is not real property. Laws involving personal property focus on the right or title to property and liability for loss or damage of property.

I. RIGHT OR TITLE TO PERSONAL PROPERTY**A. Ownership**

1. Dominion and control over the property and intent to assert ownership
2. Tortious conversion does not deprive true owner of title

B. Lost, Mislaid, and Abandoned Property

1. Lost
 - a. Owner accidentally and involuntarily parted with possession
 - b. Owner does not know where to find the property
 - c. Finder has physical control with an intention to assume dominion
 - d. Finder has right to possess as against whole world, except true owner
2. Mislaid
 - a. Intentionally placed but thereafter forgotten
 - b. Owner of locus in quo is entitled to possess as against whole world, except true owner
3. Abandoned
 - a. Intent to give up both title and possession
 - b. Title acquired by dominion and control with an intent to assert ownership

C. Accession

The addition of value to property through labor or addition of new materials

D. Confusion

Intermixture of goods owned by different persons such that property of each can no longer be distinguished

E. Adverse Possession

Title to personal property results from the running of a statute of limitations

1. Title passes when statutory limitation period has run
2. Tacking—successive possessors in privity may combine their possession periods
3. Tolling—statutory period tolled if disability such as minority, mental incompetence, or imprisonment
4. Requirements:
 - a. Actual possession
 - b. Open and notorious
 - c. Hostile and adverse
 - d. Exclusive and continuous

F. Gift

1. Gift inter vivos—requirements:
 - a. Donative intent—must be present intent to make gift

- b. Delivery—must be delivery:
 - 1) Actual physical delivery
 - 2) Constructive delivery
 - 3) By written instrument
 - 4) By symbolic delivery
- c. Acceptance—generally presumed
- 2. Gift causa mortis—requirements:
 - a. Donative intent, delivery, and acceptance
 - b. Gift must be in contemplation of imminent death
 - c. If donor recovers, gift is revoked by operation of law

G. Uniform Transfers to Minors Act (“UTMA”)

- 1. Donor places a custodian in control of the property transferred to a minor
- 2. Custodian
 - a. Only one custodian
 - b. Custodian’s duties
 - 1) Holds, manages, invests, and reinvests custodial property
 - 2) Pays minor for his expenditure
- 3. Final distribution to minor when minor reaches majority

II. LIEN

A. Definition

Right of lienor to possess and retain personal property he improved or enhanced in value as security for payment by lienee of all charges for the improvement or service

B. Conditions That Must Be Met

- 1. Debt arises from services performed on the property
- 2. Title is in the debtor (lienee)
- 3. Possession is with the creditor (lienor)

C. Classes of Liens

- 1. General lien—right to retain all property as security
- 2. Special lien—right to retain specific property as security

III. BAILMENTS

A. Definition

Relationship created by transfer of possession of personal property by the bailor to the bailee for accomplishment of a certain purpose

B. Elements

- 1. No transfer of title
- 2. Bailee must return the property to bailor
- 3. Bailee obtains physical custody with intent to exercise control
- 4. Bailee must consent (although in few situations there is constructive or involuntary bailment where agreement of the parties is implied)
- 5. Bailee must have knowledge of presence of property

C. Bailee's Rights in Bailed Chattel

1. Exclusive possession during bailment, even against owner of property
 - a. Rights of action:
 - 1) Trover
 - 2) Trespass
 - 3) Replevin
2. No use of bailed goods without express contract with bailor or a presumed intention

D. Bailor's Rights in Bailed Chattel

1. Actions against bailee where, due to bailee's wrongful act, goods were lost or damaged
 - a. Damages for breach of contract
 - b. Damages for destruction of or harm to the bailed goods
 - c. Conversion
 - d. Replevin to recover the bailed goods

E. Bailee's Duty with Respect to Bailed Goods

1. Bailee's duty of care
 - a. Bailee must exercise due care but is not an insurer of bailed goods
 - b. Type of bailment may determine degree of care:
 - 1) Sole benefit of bailor—only slight diligence, liability results from gross negligence
 - 2) Sole benefit of bailee—great diligence, liability results from slight negligence
 - 3) Bailments for hire and pledges are for mutual benefit, and ordinary due care is required
 - 4) Trend is away from classifications and toward consideration of whether bailee exercised ordinary care under all circumstances
2. Burden of proof is on bailee to prove due care
3. Contractual provisions to limit bailee's duty of care allowed but strictly construed
4. Absolute liability if bailee:
 - a. Departs from terms of bailment
 - b. Breaches agreement to insure
 - c. Fails to redeliver
 - 1) Absolute liability for improperly delivering bailed chattel to someone other than bailor
 - 2) Exception by some courts when delivery is to one holding indispensable instrument
 - 3) Exception for involuntary bailee who is not negligent
5. Conversion makes bailee an insurer and liable without regard to negligence

IV. COMMON CARRIERS**A. Requirements**

1. A holding out to perform service for those who apply
2. The carriage must be for hire
3. The service must be one for carriage

B. Liability for Loss or Damage of Goods Shipped

1. Common carrier is generally insurer of the goods
2. Liability commences when goods are expressly or impliedly delivered to and accepted by carrier for immediate transportation

4. APPROACH TO PERSONAL PROPERTY

C. Passenger Baggage

1. Carrier not generally liable for baggage in passenger's control or possession

ESSAY EXAM QUESTIONS

INTRODUCTORY NOTE

The essay questions that follow have been selected to provide you with an opportunity to experience how the substantive law you have been reviewing may be tested in the hypothetical essay examination question context. These sample essay questions are a valuable self-diagnostic tool designed to enable you to enhance your issue-spotting ability and practice your exam writing skills.

It is suggested that you approach each question as though under actual examination conditions. The time allowed for each question is 60 minutes. You should spend 15 to 20 minutes spotting issues, underlining key facts and phrases, jotting notes in the margins, and outlining your answer. *If* you organize your thoughts well, 40 minutes will be more than adequate for writing them down. Should you prefer to forgo the actual writing involved on these questions, be sure to give yourself no more time for issue-spotting than you would on the actual examination.

The BARBRI technique for writing a well-organized essay answer is to (i) spot the issues in a question and then (ii) analyze and discuss each issue using the “CIRAC” method:

- C** — State your *conclusion* first. (In other words, you must think through your answer *before* you start writing.)
- I** — State the *issue* involved.
- R** — Give the *rule(s)* of law involved.
- A** — *Apply* the rule(s) of law to the facts.
- C** — Finally, restate your *conclusion*.

After completing (or outlining) your own analysis of each question, compare it with the BAR/BRI model answer provided herein. A passing answer does *not* have to match the model one, but it should cover most of the issues presented and the law discussed and should *apply the law to the facts* of the question. Use of the CIRAC method results in the best answer you can write.

EXAM QUESTION NO. 1

John Adams of Chicago owned a late-model, customized Volkswagen van in which he had installed carpeting and a folding bed. The windows on each side of the van were custom-made for him in the shape of the letter “J.” In the summer of 2010, while vacationing in Atlantic City, New Jersey, Adams’s van was stolen. A few months later, the van was abandoned on a street in New York City, completely stripped of its engine, battery, seats, bed, carpeting, wheels, fenders, and radiator. The transmission was damaged beyond repair. The license plates had been removed, and only part of the van’s vehicle identification number remained.

In early 2011, the New York City Police impounded the van and, being unable to trace its ownership, sold it as “junk” at an auction sale to Dan Smith for \$250, which was market value at the time. Smith, who lived in New York, was a weekend mechanic who wanted to own a recreational van. Smith proceeded to restore the van. He used approximately \$3,000 of his own savings to buy replacement parts and completely restore the van to running condition. In June 2011, John Adams was visiting New York City and happened to pass Smith’s home. The van with windows in the shape of a “J” was parked outside. After carefully checking the van and the circumstances surrounding Smith’s purchase of the vehicle, Adams was able to establish that the van Smith bought at the auction was in fact the van stolen from Adams in 2010. Adams’s insurer, the Holy Grail Insurance Company, having paid the loss and taken assignment of Adams’s right in the van, sued in the supreme court of New York County to replevy the van or, in the alternative, for the value of the vehicle as fully restored and equipped by Smith at the time of the suit (value was alleged to be \$5,500), and for the value of the use of the van at the rate of \$20 per day from the time Smith acquired it from the New York City Police. The case is charged before you as a trial judge without a jury.

How would you rule on the respective rights of the Holy Grail Insurance Company and Smith? State your reasons and discuss all issues fully.

EXAM QUESTION NO. 2

Mary Smith, a 50-year-old resident of New Jersey, became ill while visiting friends in California. The doctor who examined her strongly recommended that Mary undergo exploratory surgery while she was still in California to ascertain whether a small growth on her thyroid gland was malignant. On March 1, 2011, a few days before the scheduled surgery, Mary called Wendy Lloyd, her longtime close friend and neighbor in New Jersey. Mary told Wendy that, since the doctor told her about the need for surgery, she had been giving a great deal of thought to certain things she had planned to do since the beginning of the year but had not done. Mary said, "Wendy, I want you to have the grand piano in my living room. I know how much you have admired it over the years, and since my husband died, I have not played it. You would get a lot of pleasure from it. Since I am away from the house, why don't you use the spare house key I left with you a couple of years ago and move the piano over to your house?"

Mary also told Wendy that she had a strange premonition about not surviving the surgery and she wanted Wendy to take care of two matters for her. Mary told Wendy that she had planned to send a letter to her nephew, Tom Smith, before she left for California. An envelope addressed to Tom containing the letter was in her wall safe in the house, and Mary gave Wendy the combination to the safe. Mary asked Wendy to put a stamp on the envelope and mail it to Tom. Also, she wanted Wendy to take Mary's diamond bracelet from the wall safe and "if I don't come through the surgery, I want you to give the bracelet to my niece, Susan Smith."

The envelope contained the following letter signed by Mary Smith:

New Jersey Atlantic Bank
100 Commerce Street
Newark, New Jersey 07751

Dear Sir:

Please give to the presenter of this letter the two \$5,000 bearer bonds you are holding under my name for the purpose of collecting the semiannual interest payments. He is my nephew, Tom Smith, and the bonds now belong to him.

Sincerely,

/s/ Mary Smith

On March 3, 2011, Wendy and her husband went to Mary Smith's house. They decided that professional movers would be necessary to move the piano because of its size. Wendy opened the wall safe and removed the envelope addressed to Tom and the diamond bracelet. The same day, Wendy mailed the envelope to Tom Smith and placed the diamond bracelet in her own strongbox. Wendy's husband arranged with Ace Moving Company to come by on March 11, 2011, and move the piano.

On March 6, 2011, Wendy received a call from Mary's friend in California, who told Wendy that while Mary was walking into the hospital for her surgery that morning, she slipped on a wet floor and struck her head, causing a fatal concussion. The next day, Wendy called Susan Smith and told her that her aunt Mary had died and that Mary wanted Susan to have her diamond bracelet if she did not survive the surgery scheduled for the preceding day. Susan came over to Wendy's the following day and picked up the bracelet. On March 11, 2011, Ace Moving Company moved the piano from Mary's house to Wendy's house. On March 5, 2011, Tom Smith received the letter mailed by Wendy. On March 9, 2011, Tom went to the New Jersey Atlantic Bank and was given the two bonds.

The administrator of Mary Smith's estate, which is being probated in New Jersey, seeks to recover for the estate the piano, the bracelet, and the two bearer bonds. How would you rule on the administrator's request for each item of personalty? State your reasons.

ANSWERS TO ESSAY EXAM QUESTIONS

ANSWER TO EXAM QUESTION NO. 1

An analysis of the question necessarily involves a consideration of the rights of the Holy Grail Insurance Company and Smith. Considering each in turn:

The Holy Grail Insurance Company

Any analysis of the right of the Holy Grail Insurance Company necessarily involves an analysis of the rights of Adams because the insurance company is subrogated to Adams's rights and can properly assert any claim that Adams would have against Smith. Although title never passed to Smith, he was entitled to possession of the van. The New York City Police had possession of the van but would not acquire title until the statutory period for adverse possession had elapsed. There is no basis for assuming that Adams abandoned the van, as the facts clearly state that the van was stolen from him. Therefore, Adams retained title. However, because Smith will almost certainly be deemed an innocent converter who greatly enhanced the value of the converted chattel through no known wrongdoing on his part, the insurance company's claim is limited to a suit for conversion damages in the amount of the fair market value of the vehicle at the time of the innocent conversion. Hence, the Holy Grail Insurance Company is entitled to recover \$250 from Smith.

Dan Smith

As previously noted, although Smith never received title to the van as a result of its being stolen, he is nonetheless entitled to retain possession. He was an innocent converter of Adams's property and should not be charged as having been on notice of any defects in title. The general rule is that accession in the value to property by labor of an innocent converter does not prevent the rightful owner from retaining title. However, an exception to the general rule of accession applies when an innocent converter of property in good faith through his labor or through the addition of new materials greatly increases the value of the chattel converted or changes its essential nature. Here, although the refurbished van is similar in nature to the van at the time it was stolen from Adams, Smith received only a stripped frame. Therefore, Smith's labor greatly enhanced and increased the value of what he had converted. He cannot be held liable for the original destruction of the van and should be entitled to retain possession. Smith is, however, liable to Adams as the original owner for the fair market value of the chattel at the time of the innocent conversion, which is stated as being \$250. The van was unusable at the time it was impounded by the police; therefore, there is no basis on which to assess a daily rental charge. However, because the Holy Grail Insurance Company is asserting Adams's claim in his place, Smith has no additional liability to Adams.

ANSWER TO EXAM QUESTION NO. 2

A valid gift inter vivos or gift causa mortis requires donative intent, delivery, and acceptance by the donee. Delivery can be actual, constructive, or symbolic, and the donor must completely surrender dominion and control over the item intended to be conveyed. Generally, most problems occur in determining whether delivery has been effected. Acceptance poses few problems and is generally presumed.

Gift of the Piano to Wendy

The gift of the piano to Wendy was a valid inter vivos gift. Mary had the intent to transfer the possession and control of the piano to Wendy immediately, and her intent was not conditioned upon fear of her death. Because Mary was physically away from her home, she could not manually deliver

the piano. However, because of its size, even if Mary were at home, she could not have made physical delivery. Mary instructed Wendy to take delivery and authorized her to use a key to enter the house. The following day, Wendy went to Mary's house and, solely because of the size of the piano, Wendy was unable to take actual possession at that time. If a gift is not readily susceptible to manual transfer because of its size, delivery can be accomplished if the donative words are accompanied by express authority or license to take the property. In such cases, the delivery requirement will be satisfied if the donor surrenders as much control over the subject matter of the gift as she presently possesses. Although Wendy already had the key to Mary's home, the express authorization to use the key, enter the house, and remove the piano amounted to constructive delivery. The fact that professional movers, as agents of Wendy, did not transfer the piano to Wendy until after Mary had died will not affect the validity of the gift.

Bracelet to Susan Smith

This was an attempted gift causa mortis. A gift causa mortis is one given in contemplation of imminent death. Mary wanted Wendy to take Mary's bracelet and give it to Susan if Mary did not survive the surgery, but there is a question as to whether Mary believed that her death was imminent. She had been told that she might have cancer, and she also had a premonition about not surviving the surgery. Courts have held that a subjective apprehension of death is not in and of itself sufficient, absent objective evidence to support the belief. Susan could try to argue that the likelihood of Mary having cancer would provide the objective support for her premonition.

Mary died from a cause other than that which gave rise to her apprehension. In the past, a gift causa mortis would generally be upheld only if the donor died as a result of the event that gave rise to the making of the gift. However, the weight of authority now follows the rule that it is not essential that the sole cause of the donor's death be from that peril giving rise to the apprehension.

Nevertheless, the gift will fail because of improper delivery. Although delivery may be accomplished through a third party, if the third party is the agent of the donor, the gift is not effective until the agent delivers it to the donee. If the donor dies before delivery is made, there is no gift; the agent's authority terminates on the donor's death. The rationale behind this is that, since the donor can control her agent, she has not parted with dominion and control. On the other hand, if the third party is the agent of the donee, the gift is effective on delivery to the donee's agent. As Mary's longtime close friend, Wendy would likely be considered Mary's agent. The bracelet was in Wendy's strongbox when Mary died and therefore was not effectively delivered to Susan so as to complete the gift. Therefore, the gift to Susan would be invalid.

Bonds to Tom Smith

The gift of the bearer bonds to Tom was a valid inter vivos gift. Where actual manual delivery is impracticable because the situation of the parties will not permit it, symbolic delivery is permitted. Symbolic delivery is most commonly effectuated by delivering a written instrument. To be sufficient, the writing should manifest the donative intent, describe the subject matter of the gift, be signed by the donor, and be delivered to the donee. If the gift is in the possession of a custodian, the gift may be perfected when the donor gives the donee the means of obtaining possession of the contemplated gift, accompanied by declarations clearly showing a present intent to give the gift and to divest the donor of possession.

Here, the bonds were in the possession of a custodian (the bank). The letter to the bank, when delivered to Tom, was tantamount to symbolic delivery of the bonds themselves. In her letter to the bank, Mary expressed her intent that the bonds belong to Tom immediately. She signed the letter, and it was delivered to Tom through the mail.

The letter to the bank was sufficient to transfer complete control and possession of the bearer bonds to Tom.