Personal Property Law

Fourth Edition

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PERSONAL PROPERTY LAW

FOURTH EDITION

MICHAEL BRIDGE FBA

Bencher of the Middle Temple,
Cassel Professor of Commercial Law,
London School of Economics, and
Professor of Law National University of Singapore

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'[M]y guiding-star always is, Get hold of portable property.'
(Wemmick, in Charles Dickens, Great Expectations, chapter 24)

PREFACE

The subject of personal property law, long neglected, has attracted increasing attention in recent years. It is no exaggeration to say that it is claiming its rightful place in the legal literature. Many changes in the law have occurred since the last edition in 2002, so a very substantial measure of updating has been necessary. In addition, extensive additions have been made in the coverage of the book. The introduction to the subject in the opening chapter has been significantly enhanced so as to allow a fuller discussion of the nature of property. There is more material on money and on body parts as property. The discussion of possession has been expanded, particularly when it comes to constructive possession. There is an extended analytical treatment of bailment. Throughout the book there is now a fuller treatment of equity and there is also a fuller discussion of tracing. New material has been introduced on knowing receipt and dishonest assistance. Greater attention is paid to the disposition of equitable interests and to the equity of rescission. Security interests now receive a fuller treatment.

A consequence of the expansion of the book is that the order of the material has been changed in parts and there are now eight chapters instead of seven. Although this fourth edition is somewhat longer than the third, the aim of the book, to encompass the vast subject of personal property law in an economical and readable form, has not changed.

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PROPERTY RIGHTS AND CLASSES OF PROPERTY

In this introductory chapter, we shall consider two principal questions. The first is, what type of right is a property right? The second question is, how are items of property classified for legal purposes? In lay terms, property and an item (or object) of a property right are commonly conflated, as in the expression 'That book is my property'. Bentham drew attention to this conflation and insisted on the distinction between the thing itself and rights in the thing.[1] It is nevertheless difficult, when writing about property, to maintain this pure separation, so the word property will in this book sometimes refer to the thing itself. The first of our two questions concerns the nature of the right and the second the attribution of the thing or things to the appropriate legal category. In the course of answering this second question, we shall isolate those items of property that are styled personal property. The different types of property right that exist in relation to a thing are the subject of the following chapter. This will entail an examination in some detail of common law rights of ownership and possession, as well as an examination of equitable rights. Property rights come in various shapes and sizes.

PROPERTY RIGHTS

The question what is a property right is a fundamental one but surprisingly difficult to answer at the general level. We can start by saying that the question deals with both the relationship between an individual and a thing, and the effect of that relationship on the world at large. The touchstone of a property right in a thing is its universality: it can be asserted against the

[1] *An Introduction to the Principles of Morals and Legislation*, 1789, chapter xvi (Division of Offences).

world at large and not, for example, only against another individual such as a contracting partner. This may be referred to as the persistence of the right. If, under a contract of sale, I acquire the ownership of a chattel, my property right to that chattel may be asserted not just against the seller but against the whole world. But even persistence has its limits: common law property rights may in certain instances, especially in the case of money, be overridden, and equitable rights, for example the interest of a trust beneficiary in the trust assets, are always vulnerable to the *bona fide* purchaser for value without notice of the legal estate.[2]

Apart from universality, there are other aspects of a right that are commonly referred to for the purpose of its classification as proprietary, though different writers may disagree as to their relative importance. One such aspect is the transferability of a thing. By investing a transferee with my property right, I do not merely affect the relationships of myself, the transferor, and the transferee towards the thing: I thereby affect also the relations of the world at large to that thing. Transferability, nevertheless, cannot be taken to be a universal feature of a property right. Certain things, for example a seat on a stock exchange,[3] are regarded as property even though they are not transferable at the behest of the person with the right.[4] Another stated aspect of a property right is its exigibility. The right must be exacted against a thing and is curtailed when the thing ceases to exist: 'you cannot have your cake and eat it'. Universality, therefore, is not enough. If I cross the road at a pedestrian crossing, I may fairly expect all road users to exercise due care and attention as I do so. Yet, though separated parts of the human body may become the subject of property rights[5] in particular circumstances, my right not to be negligently run down, though universal, is a personal right and not a proprietary right, because there is no separate thing that is the object of that right. Exigibility includes in an

[2] See further chapter 6.

[3] *Money Markets International Stockbrokers Ltd v London Stock Exchange Ltd* [2002] 1 WLR 1150.

[4] *Cf. Goel v Pick* [2006] EWHC 833 (Ch), [2006] RTR 28 (car registration number).

[5] Discussed below.

understated way the enjoyment of a thing. More negative in tone is a final feature of property rights, namely, excludability or the right to stop others from enjoying or intervening in relation to the thing. The dog in the manger may not physically be in a position to enjoy the thing but it may have the right to exclude others from doing so. Excludability, a defining feature of a property right,[6] is seen sometimes as the key feature, though this emphasis on excludability does not chime well with the notion of putting assets to productive use. Apart from those cases where a property right is shared, the attribution of a property right to A is inconsistent with the attribution of that same right to B.

As important as the conceptual features of property are, one must never lose sight of the practical. According to Lord Wilberforce, in a case dealing with the rights in a matrimonial home of a deserted spouse: 'Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability'.[7] When we look at the classification of personal property, we shall see some interesting examples at the margin of property rights.

One example that we can consider now in the light of Lord Wilberforce's statement is contract rights. At first glance, and especially in view of the doctrine of privity of contract, a contractual right that A has against B is a purely personal matter and not a proprietary one. We do not speak of A's proprietary right to performance from B. In a very real sense, there is a profound difference between what A owns and what A is owed.[8] As soon as we introduce a third party, C, to whom A transfers his contractual right against B, the picture changes. A central element in the law of assignment of things in action[9] is that the added third party dimension can convert a personal right into

[6] See generally Penner, J., *The Idea of Property in Law*, Clarendon, 1997.

[7] *National Provincial Bank v Ainsworth* [1965] AC 1175, 1247–48 (HL).

[8] Goode, R., 'Ownership and Obligation in Commercial Transactions' (1987) 103 LQR 433, 433.

[9] See chapter 7.

a proprietary right.[10] There remains an element of doubt, however, about the extent to which this can be achieved in law as the following competing quotations demonstrate. Lord Mance has recently asserted that 'a bare contractual claim is also a form of property'[11] whereas Sedley LJ has stated that not all contractual rights are to be treated as property.[12] In reconciling these two statements, Lord Wilberforce's words, quoted above, may be helpful.

The influence of statute law on the questions remains to be considered. Just as, in Jennings' famous statement, Parliament could legislate if it wished against red-headed men smoking in the streets of Paris,[13] so too it can endow a right with the attribute of property even if the underlying common law would not have done so.[14] To return to contract rights, these are treated as property in insolvency legislation permitting insolvency office holders[15] to exclude burdensome property from the insolvent estate.[16] The words of Lord Porter are salutary: 'In truth the word "property" is not a term of art but takes its meaning from its context and from its collocation in the document or Act of Parliament in which it is found and from the mischief with which that Act or document is intended to deal'.[17] In other words, the line separating property and personal rights, far from being absolute, is relative.

To say that a right is proprietary does not take us very far unless a further inquiry is launched into the remedial consequences of

[10] An enforceable option is regarded in *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430, 431 (CA), as a proprietary right but the option itself, as opposed to any land or other thing bound by it, only acquires a proprietary character on transfer to a third party.

[11] *Belmont Park Investments PTY Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38 at [167], [2012] 1 AC 383.

[12] *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015 at [29]. Lewison LJ concurred.

[13] Jennings, Sir I., *Parliament*, Cambridge, 1959, pp 170–71.

[14] See the insolvency examples in the Pure Intangibles section below.

[15] An expression used for convenience in this book as shorthand for trustees in bankruptcy, liquidators, and, in some instances, administrators as distributors of the insolvent person's estate, where it is not necessary to separate them.

[16] Insolvency Act 1986, ss 183, 315 (disclaimer of onerous property).

[17] *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, 1051 (HL).

its proprietary nature. In chapter 3 we shall see that the dispossessed owner is not normally entitled to recover a chattel from someone who is wrongfully in possession of it. The wrongful possessor is answerable in the tort of conversion, the usual remedy for which is damages. In the case of a thing in action, such as a debt, physical recovery is obviously impossible. If the debt is paid to the wrong person in such a way that the debtor is not discharged, the debt still exists and its payment can be sought again by the creditor.[18] If its due payment is intercepted by a wrongdoer, the debt ceases to exist as such but the recipient of the proceeds of the debt will be amenable to a restitutionary action for the recovery of the money, which will in some instances at least be reinforced by an equitable tracing claim.[19] A number of special statutory and tort actions also exist to protect rights in intellectual property.

The infringement of a property right does not necessarily give rise to a proprietary (that is, a real or *in rem*) remedy. How far the remedial consequences outlined above can be described as proprietary, and the practical consequences of their being so described, is best considered on the testing ground of insolvency. If, to take one example, an insolvent is wrongfully in possession of a chattel, the rightful claimant may maintain an action in conversion since the chattel is regarded as never forming part of the insolvent's estate. It therefore does not vest in the trustee in bankruptcy (individual insolvency) or fall within the management powers of liquidators and administrators (corporate insolvency) as the case may be.[20] If the insolvent were subject only to a personal claim, as would be the case if the action were for breach of contract or for failing to pay a debt, then the claimant would have to lodge a proof for the claim in the insolvency,[21] which would yield very modest results from an estate inadequate to meet the various claims made upon it. Even with a successful conversion claim, the claimant would be in the same disadvantageous position if the court were not prepared to exercise its discretion to order delivery up of the chattel instead of damages.[22]

[18] See chapter 7.
[19] See chapter 4.
[20] Insolvency Act 1986, s 283
[21] Insolvency Act 1986, s 322.
[22] See chapter 3.

If the conversion claim is made after the insolvent has already disposed of the chattel, the remedy is necessarily damages, as it would also be if the insolvency office holder had unlawfully disposed of or refused to deliver up a chattel not falling within the insolvent's estate. The difference in the latter case is that the solvent state of insolvency office holders held personally liable renders a damages award collectable.

Equitable proprietary rights and the remedies associated with them, such as tracing orders, are particularly significant in insolvency cases. Where the requirements for them are met,[23] a proprietary claim may be made against assets whose acquisition can be traced from the proceeds of the original unlawful disposition. If a tracing order is made and the defendant becomes insolvent, so many of the defendant's assets as are traceable to the wrongful disposition do not vest beneficially in the trustee in bankruptcy, or fall within the management powers of administrators and liquidators standing in the shoes of the insolvent.[24]

EQUITY AND COMMON LAW

The relationship between the common law and equity has profoundly shaped the law of personal property. Although interests in personal property will be discussed at some length in the next chapter, something needs to be said now about law and equity in order to demonstrate equity's responsibility for the creation of particular types of property right and for drawing the boundary between property rights and personal rights.

An eminent Australian judge once remarked: 'The lawyer dreads the layman's question, What is Equity?'[25] The starting point is to say that equity acts as a corrective to the common law. Before the great procedural reforms of the nineteenth century, the common law was a formulary system. Rights and remedies were recognized to the extent they fell within the four corners of executive writs, such as trespass, conversion, and assumpsit.

[23] See chapter 4.

[24] *Madell v Thomas* [1891] 1 QB 230, 238 (CA).

[25] Justice Kitto in the foreword to Meagher, R.P., Gummow, W.M.C., and Lehane, J.R.F., *Equity, Doctrines and Remedies*, 1st edn, Butterworth and Co, 1975.

Equity intervened at intervals, mainly by providing remedies where the common law provided none. It bore down on the conscience of the defendant and developed a procedure more apt to achieve this than could be provided by the formulaic common law system. Yet equity always worked with the grain of the common law instead of seeking to confront it directly.[26] By acting on the conscience of the defendant, it recognized his legal rights but compelled him to exercise them in accordance with the demands of conscience. In mediaeval times, equity was a body of unrecorded, discretionary interventions based on no clearly defined or continuous principle. Originally the domain of ecclesiastical Lord Chancellors charged with administering access to the monarch as the fount of justice, equity became laïcized as the incumbent of that office of state became a lay figure. Within a period broadly running from the time of Lord Nottingham in the late seventeenth century to Lord Eldon in the first quarter of the nineteenth century, equity emerged as a systematic body of rules that superseded an antecedent, formless discretionary system. It did so even as it retained one of its characteristic expressions, namely, a series of summative maxims that function more as guidelines than as strict rules. Examples of particular relevance for the current discussion are 'equity follows the law', 'equity looks on that as done that ought to be done', and 'equity acts *in personam*'.

As an episodic corrective to the common law, equity was a selective creature that did not amount to a rival system of comprehensive legal coverage. In the words of Maitland: 'At every point equity presupposed the common law'.[27] Rather, its characteristic technique was to restrain the unconscientious assertion of legal rights. Consequently, equity 'ranged across the entire Common Law legal landscape' though, in so doing, it failed to develop a 'distinct theoretical "peg"'.[28] Equity expressed

[26] Hence, when the courts of common law and equity were fused in the 1870s, the statutory provision that equity prevailed over inconsistent common law (Judicature Act 1873, s 25(11)) had and continues to have little practical impact.

[27] Maitland, F.W., *Equity*, Cambridge, 1909, p 19.

[28] Worthington, S., *Equity*, Clarendon, 2003, p 17.

a particular concern for vulnerable persons, such as married women, infants, and persons of impaired mental capacity. Numerous standard features of the modern law owe their existence to equitable initiative. These include trusts and mortgages; equitable remedies, such as injunctions and specific performance; various doctrines in the law of succession; remedies designed to counteract the rigidity or harshness of the common law, such as equitable set-off, the rule against penalties, relief against forfeiture, and relief from undue influence; and procedures for the more effective administration of justice, such as subpoenas, discovery, and interrogatories. Company law and the modern law of bankruptcy, as well as the greater part of the law of secured transactions, are also the creation of equity lawyers. Taken as a whole, Maitland's definition as the body of law that, prior to the fusion of courts of equity and common law in the 1870s, was administered in the courts of equity[29] is accurate and not intentionally facetious. The episodic character of equitable intervention admits of no better definition. The long-standing movement of the common law away from formulaic to rights-based entitlement ought in principle to lead in time to a substantive fusion of equity and the common law, especially since they are both administered in a unified court structure,[30] but there are few signs of such a process in train and a considerable degree of professional resistance to it. Ashburner's metaphor of equity and the common law—two streams flowing in the same channel whose waters do not mingle[31]—remains substantially true today.[32]

Equity's intervention in the law of personal property is deep rooted. Given its preoccupation with the conscience of the defendant, equity could have developed as a system of personal entitlement lacking a proprietary dimension.[33] The modern

[29] Maitland, F.W., *Equity*, Cambridge, 1909, p 1.

[30] Senior Courts Act 1981, s 49(1).

[31] Ashburner, W., *Principles of Equity*, Butterworth and Co, 1902, p 23.

[32] Despite Lord Diplock's treatment of the metaphor as 'mischievous and deceptive' in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 925 (HL).

[33] As was said to be the case by Maitland, F.W., *Equity*, Cambridge, 1909, p 112: '[E]quitable estates and interests are not *jura in rem* . . . but . . . are essentially *jura in personam*, not rights against the world at large, but rights against certain persons'.

orthodoxy, however, is that all interests in property recognized at common law may be the subject of divided ownership whereby one person has the bare legal ownership and the other the equitable (or beneficial) ownership, the latter having the substantial enjoyment of the thing.[34] Divided ownership most frequently occurs where property is held on trust.[35]

Apart from divided ownership, equity also possesses a flexibility in recognizing types of property interest that are absent at common law. The only interests in personal property recognized at common law are rights of ownership and possession. Any other interest has to exist in equity and will thus suffer from a weakness affecting all equitable proprietary rights: it is overridden by a *bona fide* purchaser of the legal estate without notice of the equitable interest. This flexibility is also apparent in the case of mere equities,[36] largely of significance in the case of land, which in some instances have proprietary consequences.[37] One example is the right of rescission available to a person to whom a misrepresentation is made inducing entry into a contract. This right may bind the conscience of a third party seeking to acquire the subject matter of that contract who has notice of its existence.[38]

Finally, equity also possesses the capacity to cut across proprietary classifications and to reassign property from one category to another for instrumental purposes. An example of this is the doctrine of conversion. According to the doctrine, if an obligation exists to convert land into personalty, then equity will for various purposes deem that the conversion has already taken place and treat the obligee's interest in land as an interest in personalty instead.[39] Equity looks on that as done that ought to be done. Conversely, money held on trust terms for the purchase of land will be deemed to be land and not personalty. Greatly reduced in scope in the modern law, the doctrine of conversion is

[34] See further chapter 2.

[35] See further chapter 2.

[36] See *National Provincial Bank v Ainsworth* [1965] AC 1175 (HL).

[37] See further the standard trust and land law texts.

[38] *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371; *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281. See further chapter 5.

[39] *Fletcher v Ashburner* (1779) 1 Bro CC 497.

still important in the construction of wills and other instruments and in the interpretation of certain statutes.[40]

CLASSES OF PROPERTY

The way in which property is classified does not depend in any overt way upon the distinction that is drawn between law and equity. The terminology, a mixture of the archaic and the modern, is particularly volatile and hard to use consistently.

PERSONAL PROPERTY AND LAND

It is a commonplace observation that personal property (or personalty) is all the property that is left once land—that is real property (or realty)—has been subtracted. Personal property is therefore residual in character, an attribute that contributes to the somewhat formless nature of the subject. Land is a finite entity whereas personalty has an expansive character with regard to both the recognition of novel kinds of personalty and to the quantity of personalty. The novelty aspect is evident in the enormous volumes of trading in abstract derivatives, like commodity futures spinning off from the physical commodities themselves. The quantitative aspect can be illustrated by shares in companies. As many companies exist as human ingenuity and enterprise can devise. The number of shares issued by those companies will be dependent upon their capacity for expansion, which depends upon national wealth and the appetite of investors. Shares come and go as companies rise and fall. The same elasticity and ephemerality apply to objects that we may heuristically refer to as widgets, manufactured from natural resources that for present purposes are assumed to be infinitely replenishable in response to a demand that is infinitely elastic. The law of personal property may lack the sophisticated, conceptual character of land law, but in a number of respects it deals with more complex problems. It is concerned with property rights in newly created things and also with the commingling of different items

[40] Bell, A.P., *Modern Law of Personal Property in England and Ireland*, Butterworth & Co, 1989, p 25.

of personal property as well as with their extinction[41]—all issues that have no equivalent for land lawyers.

The customary way to treat the definition of personal property is to break it down into its subcategories once land has been eliminated. Before that is done, however, we should ask why land and personal property are distinguished. The answer, which is not surprising given the character of English law, is historical, which accounts for this deep division in property law that has produced a rift in the treatment of the subject, apparent in textbooks and university law courses.

The evolution of land law and personal property law differed in at least three respects. First of all, land after the Norman Conquest was subject to feudal tenure and thus held from or through the Crown. The major tenants in chief held land directly from the Crown in return for feudal dues and service. By a process of subinfeudation, lesser tenants held portions of the same land from the tenants in chief on similar terms and so on.[42] The system of tenure, expressed through the doctrine of estates, is very much in place today, though feudal dues as such no longer exist. No such structure of ownership ever applied to property other than land.[43]

Secondly, interests in land were protected at law by the so-called real actions, which meant that the land itself could be recovered if the owner were wrongfully dispossessed.[44] This was not true of personal property, which after the demise of the appeal of felony could not thus be recovered *in rem* until the middle of the nineteenth century.[45] The owner's claim was a monetary one for damages. Nor was it true of all interests in land.

[41] See chapter 2.

[42] Holdsworth, W., *A History of English Law*, vol II, 4th edn, Sweet & Maxwell, 1956, pp 199–201, 250; Plucknett, T., *A Concise History of the Common Law*, 5th edn, Butterworth & Co., 1956, pp 506–20, 531–45; Pollock, F., and Maitland, F.W., *The History of English Law*, 2nd edn, Cambridge, 1898 (rev. 1968), vol I, pp 210–18.

[43] *Viscount Hill v Dowager Viscountess Hill* [1897] 1 QB 483, 492 (CA), *per* Chitty LJ: 'As the common law does not recognise such a thing as an estate in a chattel, a gift of a chattel for life accompanied by delivery passes the property at law'.

[44] Holdsworth, *A History of English Law*, vol III, 5th edn, 1942, chapter 1; Pollock and Maitland, *The History of English Law*, vol II, pp 570–72.

[45] Common Law Procedure Act 1854, s 78.

The highest form of freehold estate, the fee simple, was a grant to an individual and his heirs and therefore open-ended in time. Leasehold interests, on the other hand, were finite with a defined beginning and a defined end. They were not recoverable in a real action, though a similar remedy was eventually developed through the medium of a personal action, the action of ejectment, which was an offshoot of the writ of trespass. Because of their remedial shortcomings, leasehold interests, as we shall note, have always been a category of personal property though little turns on that classification in modern times.

Thirdly, the rules relating to descent on death differed for land and personalty. Land went to the heir at law, usually the eldest son. By the Wills Act 1540 and the Statute of Tenures 1660, owners of land acquired the power to devise by will, but the old rule of descent persisted in the case of intestacy until the Administration of Estates Act 1925. The order of descent on intestacy for the personal estate of the deceased followed the order laid down in the Statute of Distributions 1670; it went to the next of kin, including the widow, after first vesting in the personal representatives of the deceased. Since 1926, the rules for personalty and for realty have been the same: all property descends to the next of kin in a prescribed order.[46]

CHATTELS REAL AND PERSONAL

After its separation from land, the analysis of personalty starts with its division into chattels real and chattels personal. Chattels real consist principally of leasehold interests in land, the subject of personal rather than real actions. Since the 1925 property legislation, leaseholds have firmly been recognized as equivalent to other interests in land. Indeed, the term of years absolute is one of only two permitted legal estates in land, along with the fee simple.[47]

Chattels personal are those items of personalty that are not chattels real. The expression itself has little value in modern times except to signify the source from which are derived two

[46] Administration of Estates Act 1925, ss 45–46.

[47] Law of Property Act 1925, s 1.

mutually exclusive subcategories:[48] things (or choses, to revert to the traditional word) in possession and things in action.

THINGS IN POSSESSION

Things in possession are tangible (or corporeal) movable things like a jacket, a book, or a bicycle. The size of a thing is no obstacle to its being a chose in possession: microdots and ships both fall into the category. When they form the subject matter of a sale or similar transaction, things in possession are called goods,[49] which, in an earlier generation of mercantile statutes, were more compendiously known as 'goods, wares, and merchandise'.[50] A more convenient label for things in possession is tangible personalty which, when brevity demands it and because it tracks common legal usage, will at times be replaced in this book by the word 'chattels'.

Certain objects that might appear sufficiently corporeal to qualify as chattels are in fact not so. Documents of title to land,[51] as well as the very narrow category of heirlooms,[52] are so closely affiliated to land as to be an appendage of it for practical purposes. Items may become chattels upon severance from the land; a large body of nineteenth-century case law dealing with growing crops and natural produce distinguishes sale of land and sale of goods agreements for the purpose of the different contractual writing requirements for the two laid down in the Statute of Frauds 1677.[53] Conversely, items may become so attached to land as to constitute fixtures and therefore become part of it.[54] This idea has even been extended from attachment to close association and hence to keys, because enjoyment of the land is so difficult

[48] *Colonial Bank v Whinney* (1885) 30 Ch D 261, 285–86 (CA), *per* Fry LJ; *cf. Armstrong DLW GmbH v Winnington Network Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156.

[49] Not all things in possession qualify as goods for the purpose of treatment by the Sale of Goods Act 1979: see *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 575 (HL) (gambling chips).

[50] Statute of Frauds 1677, s 17.

[51] *Harrington v Price* (1832) 3 B & Ad 170.

[52] *Viscount Hill v Dowager Viscountess Hill* [1897] 1 QB 483, 494–96 (CA).

[53] Sections 4 and 17.

[54] See chapter 4.

without them:[55] attachment in such a case can only be metaphysical. Certain items of valuable commercial paper, known in modern times as documentary intangibles, have a mobile and corporeal existence, but because they are significant for what they represent rather than for what they physically are, they are not regarded simply as chattels even though the paper medium that embodies them would be.[56]

In the vast majority of cases, there is nothing controversial about the classification of items as tangible personalty, but advances in medical science have forced consideration of whether one can own body organs or even a human foetus.[57] This issue, discussed in the section following on body parts, has been in contention for some time but its importance in recent years has become more pressing.

THINGS IN ACTION

The other division of chattels personal is things in action, which embraces diverse types of intangible (or incorporeal) personalty. As we shall see in the following paragraphs, there is an untidy progression from the old terminology of things in action to the modern term 'intangible personalty'. Intangible personalty is what remains of chattels personal after the elimination of tangible personalty and, as the residual category of personal property, captures a number of innovative developments. The expansion in modern times of forms of intangible personalty means that many commercial entities operating in post-manufacturing industries have intangible property rights greater in value than their tangible property rights. Examples of intangible personalty are debts, goodwill, rights under an insurance policy, shares in a company, bills of exchange, and various forms of intellectual property. This last example, whose importance can barely be overestimated in modern commercial conditions, includes items such as patents, copyright, trade marks, registered industrial designs, trade secrets, and know-how. Property, in the sense of

[55] *Elliott v Bishop* (1855) 11 Ex 113.

[56] See the section on Documentary Intangibles below.

[57] Discussed below.

things that can be owned, is not a static concept. It is in the case of intangible personalty above all that its dynamic properties and potential are best appreciated.

As the long-standing name of things in action itself signifies, intangible personalty could not physically be possessed. Entitlement to it had to be vindicated through legal action, not permitted by early common law courts.[58] Hence, even today, intangible personalty such as an electronic database may not be the subject of a possessory lien,[59] though legislation in its omnipotent way treats financial collateral, a category of intangible personalty that embraces dematerialized securities and credit claims, as susceptible to being possessed.[60] Similarly, intangible personalty may not be the subject of an action in conversion[61] since standing to sue depends upon possession or the right to immediate possession at the time of the impugned act.[62] Against these developments, while the protection given to property by the European Convention on Human Rights[63] extends only to possessions,[64] that expression has been liberally construed to include contractual rights,[65] which, if proprietary in character, are a form of intangible personalty.

In view of the common law's resistance to recognizing property rights in intangible personalty, it was left instead to equity and the law merchant to give recognition to items of this type as proprietary in nature. All personalty depends for its enjoyment upon the fact that the law imposes duties on one or more individuals not to interfere with the use or enjoyment of the personalty by its rightful owner or possessor. What use is a jacket to me if it is liable to be torn off my back in a lawless society that knows

[58] The reasons are discussed in chapter 7.

[59] *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2014] CP Rep 31. Liens are discussed in chapter 8.

[60] Financial Collateral Arrangements (No.2) Regulations 2003 (as amended), SI 2003/3226, reg 3(2).

[61] *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1; *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2014] CP Rep 31.

[62] See chapter 3. [63] In the First Protocol, Article 1.

[64] 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions': Sch 1 para 1 to the Human Rights Act 1998.

[65] *Wilson v First County Trust Ltd (No. 2)* [2003] UKHL 40, [2004] 1 AC 816.

no means of supporting my ownership of it? Whereas, however, the jacket can be enjoyed in and of and for itself, the abstract thing that is intangible personalty is the medium through which those who are entitled may call upon others to do or refrain from doing something in response to a duty imposed upon them. This feature of intangible personalty accounts for the use of the label 'things in action'. That venerable expression, nevertheless, is somewhat incongruously applied to certain types of intangible property, such as carbon trading allowances and export quotas, that resist the notion of legal proceedings being brought to assert entitlement against third party interferers. Instead of confining the expression intangible personalty to those items that are not aptly described as things in action, the better course is to fold traditional things in action into the broader category of intangible personalty.[66] Intangible personalty might then be allied in a pairing with tangible personalty so that the terminology of things in possession and things in action would be allowed gradually to subside.

Intangible personalty breaks down into the two categories of pure intangibles and documentary intangibles.

PURE INTANGIBLES

Examples of pure intangibles include a debt, copyright, shares, and goodwill. A debt is a monetary obligation owed by one person to another which is an item of value because it can be transferred to a third party by way of sale or security for a loan (see further chapter 8). The debtor's duty to pay the creditor, which may or may not be recorded on a piece of paper, but which in principle can be purely informal, is a valuable piece of property because of its exchange value. If it could not be transferred in the above way, it would be no more than a contractual expectancy

[66] As in *Armstrong DLW GmbH v Winnington Network Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156 (carbon trading allowances). In interpreting the provisions of Hong Kong legislation, the Privy Council was encouraged to view textile export quotas as a separate category of personalty, since they could not accurately be classified as things in action, in *Attorney-General of Hong Kong v Nai-Keung* [1987] 1 WLR 1339 (PC).

of the creditor's and not as such an item of property at all. Copyright is the exclusive entitlement of the creator of an intellectual work to copy, publish, and distribute the work.[67] Shares in a company measure the interest of the shareholder in the company itself, as opposed to the assets owned by the company: 'A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se'.[68] The corporate assets are owned by the company itself, even if there is a single shareholder with a 100 per cent holding, since power over the company is not to be equated with ownership of the company's assets.[69] When a company effects a change in its register of ownership of the shares themselves, the limited effect of its actions should be noted: it amounts only to a representation by the company that documents representing *prima facie* evidence of entitlement to the shares have been presented to the company.[70] A share in a thing in possession, such as a racehorse, is also a pure intangible, given that it cannot be separated from the entirety.[71] The last example in this list is goodwill, which is more than merely the factual expectation that the former clientele of a business will continue to patronize it notwithstanding the change of ownership. It is an item of property that may be used as security for a loan and disposed of apart from the underlying trade premises. Goodwill is 'whatever adds value to a business by reason of situation, name, and reputation, connection, introduction to old customers, and agreed absence from competition'.[72]

[67] Copyright, Designs and Patents Act 1988, ss 1, 12.

[68] *Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch 279, 288.

[69] *Prest v Petrodel Resources Ltd* [2012] EWCA Civ 1395 at [71] and [94] *et seq*, upheld on this ground at [2013] UKSC 34 at [8] and [40] (Sumption SCJ), [2013] 2 AC 415, though the decision of the Court of Appeal was reversed on the different ground that the assets were held by the controlled companies on trust for the sole shareholder.

[70] Companies Act 2006, s 775; *Re Ottos Kopje Diamond Mines Ltd* [1893] 1 Ch 618, 628 (CA).

[71] *Re Sugar Properties (Derisley Wood) Ltd* [1988] BCLC 146.

[72] *IRC v Muller and Co*'s *Margarine Ltd* [1901] AC 217, 235 (HL), *per* Lord Lindley.

The law of insolvency is a testing ground for novel items of intangible personalty for various reasons, notably the duty resting on insolvency office holders to gather in as much as possible so as to maximize returns to creditors. Another reason is the right given to insolvency office holders to disclaim what is called 'onerous property',[73] which in broad terms is property (including contractual rights) that carries with it commitments or restrictions that on balance render it more of a liability than an asset. For example, a farmer's milk quota has been held to constitute 'property' within the meaning of the Insolvency Act 1986, despite the limited and cumbersome way required for its transfer to another holder.[74] The statutory definition covered 'every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property…'.[75] Whatever requirements the common law may impose in defining property—and statements to the effect that property takes its meaning from context[76] suggest these are few in number—they are liable to be overridden by expansive statutory draftsmanship. That same expansive definition led to the conclusion in another case that a waste-management licence, the function of which was to render the holder immune from prosecution for performing certain acts, was a property item.[77] There was evidence of a market in such licences and the statutory machinery for their transfer required the active participation of both transferor and transferee. It is not necessary for something to have present value to constitute property under the Insolvency Act. Hence, an expressly assignable preemption right over property that the owner might never decide to sell has been held to constitute property vesting in the grantee's trustee-in-bankruptcy.[78] There are nevertheless limits on the broad wording

[73] Insolvency Act 1986, ss 178 (bankruptcy), 315 (liquidation).

[74] *Swift v Dairywise Farms Ltd* [2000] 1 WLR 1177, affd [2001] EWCA Civ 145, [2003] 1 WLR 1606 (Note).

[75] Insolvency Act 1986, s 436.

[76] For example, *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, 1051 (HL).

[77] *Re Celtic Extraction Ltd* [2001] Ch 475 (CA).

[78] *Dear v Reeves* [2001] EWCA Civ 277, [2002] Ch 1.

of the statutory definition. It does not include items of a purely personal nature, even valuable ones, such as rights of action for damages for personal injury or injury to reputation[79] and the personal correspondence of a bankrupt.[80]

DOCUMENTARY INTANGIBLES

Documentary intangibles are instruments or documents that are so much identified with the obligation embodied in them that the appropriate way to perform or transfer the obligation is through the medium of the document. The abstract intangible right acquires such a degree of concretized expression that it takes on some of the characteristics of a chattel. The document recording the right is itself a tangible thing and thus a chattel, and the right is thoroughly fused with the document.

For example, a bill of lading embraces the carrier's delivery obligation to surrender the cargo to the lawful holder at the journey's end. This holder might be a purchaser to whom the bill has been indorsed and delivered or even a bank that has provided an advance against the security of the bill. A carrier is bound to deliver the cargo to the lawful holder of the bill of lading[81] and is liable for knowingly delivering to someone other than the lawful holder,[82] even the person consigning the goods for carriage in the first place. Again, the document might be a negotiable instrument such as a bill of exchange or promissory note. The promise to pay the stated sum of the acceptor of the bill, or the maker of the note, is to be performed in response to the demand of the holder of the bill or note, whoever that might be at the relevant time.[83] Where the bill of exchange has been made payable to bearer—that is, to its unnamed holder from time to time—its easy portability and transferability display characteristics associated with chattels.

[79] *Ord v Upton* [2000] Ch 352 (CA).
[80] *Haig v Aitken* [2001] Ch 110.
[81] *Erichsen v Barkworth* (1858) 3 H & N 601.
[82] *Glyn, Mills & Co v East and West India Dock Co* (1882) 7 App Cas 591 (HL).
[83] Bills of Exchange Act 1882, s 59.

A document may provide evidence of a right to intangible property, and even play an essential part in the transfer of property rights, without as such being a documentary intangible.[84] In the event of an insurance policy being transferred, the duty to the insurance company to indemnify in respect of the covered loss would be performed by paying the lawful holder of the policy.[85] The registered holder for the time being of certificated shares in a company at the time a dividend is declared is entitled to be paid that dividend.[86] The development in recent times of paperless share transfers, that in volume dwarf paper transfers, provides faster transactions and therefore a far greater volume of turnover.

MOVABLE AND IMMOVABLE PROPERTY

A critical division in continental systems based upon Roman law is between movable and immovable property, which does not exactly correspond to its closest common law equivalent, that between personalty and land. English courts are faced from time to time with cases involving a foreign element. When the foreign element is duly established and proved, a body of choice of law rules dealing with such cases is brought into play. These rules may point to the application of a foreign law. In order to minimize the awkward effects of the transition from English law to a foreign law, English choice of law rules in the area of property are not based upon the division between personalty and land but upon the division between movables and immovables.[87] In brief, the category of immovable property includes certain examples of what we regard as personalty. Thus a mortgage debt secured on land is an immovable,[88] likewise a leasehold interest in land,[89]

[84] *Cf. Goel v Pick* [2006] EWHC 833 (Ch), [2006] RTR 28 (car number plate recording a registration number).

[85] Merkin, R., *Colinvaux and Merkin's Insurance Contract Law*, 9th edn, Sweet & Maxwell, 2010, chapter 10.

[86] *Godfrey Phillips Ltd v Investment Trust Corpn Ltd* [1953] Ch 449.

[87] *Re Hoyles* [1911] 1 Ch 179, 185–87 (CA).

[88] Ibid.

[89] *Freke v Carbery* (1873) LR 16 Eq 461.

as well as land currently held under a trust for sale and expected to give rise at a future date to money proceeds.[90]

CLASSIFICATION: PARTICULAR CASES

Under this heading, we shall examine a number a number of cases that in their various ways raise questions about the outer limits of what constitutes property and about how, if something is to be recognized as property, it should be classified.

MONEY

Money is an item of personalty that merits special mention. It is classically understood by economists as a unit of account, a medium of exchange and a store of value. Money serves as a unit of account to the extent that it measures the obligation of a debtor. As a medium of exchange, it ensures liquidity of transactions and the avoidance of cumbersome barters. The seller of wheat seeking to acquire tin does not have the burden of finding a rare trading partner whose desires are equal and opposite. It is this function that comes closest to any legal definition of money. Currencies that are not sanctioned by the state, such as unofficial currencies used in local markets and virtual currencies, like bitcoin, qualify as money for this present purpose since they serve an exchange function. In an inflationary economy, the attraction of money as a store of value diminishes. The sum of £100 will purchase fewer goods and services tomorrow than it will today. Placing money in an interest-bearing bank account involves exchanging it for an equivalent capital sum plus accruing interest; it does not involve merely storing it. The 'money' in the account may be the depositor's money for the purposes of economists and accountants, but it is not the depositor's money in law.[91] Before the deposit with interest is repaid, the bank comes under a personal obligation to repay the equivalent sum according to the terms of its contract with the depositor. It is

[90] *Re Berchtold* [1923] 1 Ch 192.

[91] *Foley v Hill* (1848) 2 HLC 28.

perfectly possible for money to be loaned on terms requiring the exact notes or coin to be returned, so that the lender retained a property right in the money, but such a transaction is in practical terms highly unlikely. In modern times, money has become a tradeable commodity in its own right, the subject of intense speculation on foreign exchange markets as pounds sterling are traded for dollars and so on. The meaning of money may become enlarged according to the context—a statute or a will,[92] for example—in which the word is used.

Money, in the broad definition above that includes unofficial local and virtual currencies, is not legal tender. Legal tender, namely, the appropriate form of money[93] required to discharge a payment obligation, consists in the United Kingdom of coinage issued by the Royal Mint exclusively, subject to Treasury permission[94] and of banknotes, issued exclusively in England and Wales by the Bank of England[95] in denominations and overall amounts approved by the Treasury.[96]

The question whether money is a chattel or a thing in action is a purely analytical one, devoid of practical application. Although a banknote is literally cast in the form of a promissory note ('I promise to pay the bearer etc'),[97] which is a documentary intangible, it is no longer redeemed by the maker of the note, the Bank of England, in gold or other precious metal. If taken into a clearing bank, the banknote may be used as a medium of exchange, if it is deposited in an account or used to acquire foreign exchange or surrendered for money in different denominations. The banknote has therefore become a chattel, and the same applies *a fortiori* to coins.

[92] See *Perrin v Morgan* [1943] AC 399 (HL).

[93] This includes the number of denominations of a particular coin used in a transaction.

[94] Coinage Act 1971.

[95] Bank Charter Act 1844. In Scotland and Northern Ireland, certain named banks are authorized to issue bank notes and put them in circulation.

[96] Currency and Bank Notes Act 1954; Currency Act 1983. Bank notes issued by the Bank of England may also be put into circulation in Scotland and Northern Ireland, but this does not make them legal tender in those countries: Currency and Bank Notes Act 1954, s 1.

[97] The bank notes of other countries, for example Singapore, make no such promise.

BODY PARTS

One case that tests the notion of property is that of body parts. The Warnock Committee[98] recommended that there should be no ownership of the human foetus but muddied the waters by going on to recommend rights of disposal and sale, evidently rights of a proprietary character, in the foetus. In this same concessionary vein, it is hard to deny that recent developments in the law concerning corpses and body tissue support the view that in appropriate circumstances body parts are capable of being the subject of property rights.[99] In *Dobson v North Tyneside Health Authority*,[100] the court held that there could be no property right in a corpse or part of a corpse.[101] Nevertheless, those charged with the burial of a corpse had a legal right to its possession for the purposes of disposal and burial. In *Re Organ Retention Group Litigation*,[102] however, a duty on parents to take charge of the burial of their deceased children was not sufficient to give them a right to the possession of organs removed from their children without their consent. In *Dobson*, although there was no property as such in a corpse, it was 'properly arguable' that a corpse or a part of it could become property if subjected to a process such as embalming or stuffing. The fixing of a brain in paraffin in the present case did not amount to such a process. A medical student's skeleton ought, however, to support a sufficient proprietary right to maintain an action in conversion[103] in appropriate circumstances. Similarly, the Court of Appeal has held that body parts used as anatomical specimens are capable of being property for the purpose of the Theft Act 1968, once they have taken on different attributes in consequence of human skill, for example, by dissection and preservation.[104]

[98] *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd. 9314, 1984).

[99] See Magnusson, R., 'Proprietary Rights in Human Tissue', in Palmer, N., and McKendrick, E. (eds), *Interests in Goods*, 2nd edn, LLP, 1998.

[100] [1997] 1 WLR 596 (CA).

[101] *Cf. Doodeward v Spence* (1908) 6 CLR 406, which involved an action against the police for detaining the preserved foetus of a two-headed child who had died 40 years previously.

[102] [2009] EWCA Civ 37, [2010] QB 1.

[103] See chapter 3.

[104] *R v Kelly* [1998] 3 All ER 741 (CA).

Products of the human body, as opposed to the body itself or parts thereof when human life has ceased, demand separate consideration. Blood has been recognized as a 'product' for the purpose of the Consumer Protection Act 1987.[105] In *Yearworth v North Bristol NHS Trust*,[106] cancer patients about to undergo chemotherapy treatment were invited to provide samples of semen for storage in the defendant hospital's fertility storage unit. The hospital represented that the samples would be stored in liquid nitrogen and undertook to exercise 'all possible care'. The temperature of the liquid nitrogen fell below the requisite level and the samples became unusable. When claims were brought for mental distress and psychiatric injury, the Court of Appeal, overturning the trial judge, recognized that the claimants had ownership of the sperm for the purposes of pursuing a claim in negligence, despite limits placed by regulatory legislation on the exercise of rights of ownership (for example, the sperm had to be sued within five years and was not transferable). The claimants could at any time have demanded the destruction of the sperm and were to be treated as bailors at will of it.[107] Personal property law is commonly a curious union of the antique and the innovative. The court returned to Roman law principles and invoked the writings of Sir Edward Coke in the seventeenth century and of Sir William Blackstone in the eighteenth century in reaching its conclusion.[108] The *Dobson* case was distinguished on the grounds that the present case involved 'parts or products of a living human body' and that the pathologist in the *Dobson* case had never undertaken to preserve the brain. The likely future is one of increasing incremental acceptance, by statute or at common law, of the idea that corpses, body parts, and tissue are property: 'the common law does not stand still'.[109] To a significant extent, the question whether property rights arise can be sidelined by statute so far as it establishes a regulatory scheme for

[105] *A v National Blood Authority (No. 1)* [2001] 3 All ER 289.

[106] [2009] EWCA 37, [2010] QB 1.

[107] See chapter 2.

[108] An argument advanced in the past for the denial of ownership of a corpse is that it is the temple of the Holy Ghost: [2009] EWCA 37 at [31], [2010] QB 1 ('as implied by Coke and Blackstone').

[109] *R v Kelly* [1998] 3 All ER 741, 750 (CA), *per* Rose LJ.

dealings in body parts. This is the case for the Human Tissue Act 1961, laying down a scheme for organ donation and transplant surgery, and for the Human Fertilisation and Embryology Act 1990, dealing with human embryos and their development.

INFORMATION

A question that has not been satisfactorily resolved is whether information can constitute property.[110] If it can, a further question arises concerning how far the various rules of property law can properly apply to information. To put it another way, it may not be a stark choice between treating information as the subject of property rights or not. There may be an intermediate way that treats it as property only for certain purposes, thus avoiding some of the daunting problems of priority and remedies that would follow on from a proprietary analysis. Moreover, to the extent that an intermediate proprietary approach is adopted, it may not be materially different from existing approaches that use the law of trusts and tort to protect rights in respect of information in general and confidential information in particular.[111]

In a tax case, Lord Radcliffe treated know-how as a form of property, intangible in the way that goodwill is,[112] just as half a century previously Lord Shaw had described trade secrets as property in a restraint of trade case.[113] Support for a property approach emerges from some of the speeches in *Boardman v Phipps*,[114] though Lord Upjohn in the same case was clear that information was not property, but yet the unlawful transmission of confidential information could be restrained.[115] In its report on

[110] See Kohler, P. and Palmer, N., 'Information as Property', in Palmer, N., and McKendrick, E. (eds), *Interests in Goods*, 2nd edn, LLP, 1998.

[111] *Douglas v Hello! Ltd* [2007] UKHL 21, [2008] 1 AC 1; *Theakston v MGN Ltd* [2002] EWHC 137 (QB), [2002] EMLR 22. See also *Victoria Park Racing and Recreation Co v Taylor* (1937) 58 CLR 479 (denying tort protection).

[112] *Rolls Royce Ltd v Jeffrey* [1962] 1 WLR 425, 430 (HL).

[113] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 714 (HL). See also *Attorney-General v Guardian Newspapers Ltd* [1987] 1 WLR 1248, 1264.

[114] [1967] 2 AC 46 (HL), *per* Lords Hodson and Guest and Viscount Dilhorne. But for the view that there is no property in words transmitted over the telephone, see *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 357.

[115] [1967] 2 AC 46 127–128 (HL).

Breach of Confidence,[116] the Law Commission preferred not to subject breach of confidence to treatment as a property matter since the law had evolved without property notions. An Australian judge has also declined to treat the transmission of information as a transfer of property, saying that having a richly stored mind does not make one a man of property.[117] This last case highlights one of the real problems of treating information as property: the transferor retains the information that was transmitted, which denies one of the features of a property right, namely its exclusivity. A diamond ring cannot support two wearers at the same time. To the extent that the transferor covenants not to make use of the information transmitted, or someone makes unlawful use of information, it seems therefore preferable to invoke the law of contract and tort rather than to deal with the matter by a heavy-handed invocation of property law. If a property characterization of information adds nothing to the resolution of problems, then there is no need to go down a road full of pitfalls.

COMPUTER SOFTWARE

A difficult question of classification is presented by computer software which can be stored and downloaded by means of a portable disk but need not be. The question is complicated by the fact that the status of software on a disk as a thing in action or a thing in possession (or chattel) has to be filtered through the associated question whether for legislative purposes it constitutes 'goods'. If the software as stored on these disks constitutes a chattel, then that chattel may amount to 'goods' for the purpose of a supplier's strict liability for the quality and fitness of goods under the Sale of Goods Act 1979 or the Supply of Goods and Services Act 1982. On the other hand, if the software represents a thing in action stored for convenience on a disk, then strict liability under either of those statutes would not present itself and would exist in a given case only by virtue of a term implied in the contract

[116] Report No. 110 (Cmnd 8388, 1981).

[117] *Federal Commissioner of Taxation v United Aircraft Corpn* (1944) 68 CLR 525, 535.

pursuant to the parties' intention.[118] This would also be the case if the software were not stored or supplied on a disk. It seems now to have been settled that software is a thing in action (or intangible property) handled for convenience in a physical medium in those cases where a disk is employed.[119]

[118] See *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481 (CA).

[119] See *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281 at [20], [2014] CP Rep 31. Note, however, that the Consumer Rights Act 2014, ss 33–47, treats digital content as distinct from goods, without coming to any conclusion on whether it is tangible or intangible personalty.

2

INTERESTS IN CHATTELS AND BAILMENT

INTRODUCTION

The greater part of this chapter is devoted to common law interests in property, namely, possession and ownership. Particular attention is paid to the transfer of possession by delivery and to the relationship of bailment that arises when chattels are delivered to another for a limited time or purpose. Equity did not develop a particular notion of possession[1] but it did develop its own notion of equitable or beneficial ownership. This will be considered when legal (or common law) ownership is discussed along with other examples of equitable intervention affecting the exercise of legal ownership. Unless otherwise stated, references below to ownership are to legal ownership. As we shall see, possession has played the preponderant part in the common law of personal property and, since common law gave scant recognition to intangible personalty,[2] the focus of this chapter is on chattels (tangible personalty or things in possession).

In contrast with land, the law of personal property is conceptually underdeveloped. It was never subjected to the doctrine of estates which had, according to Maitland,[3] the following effect: 'Proprietary rights in land are, we may say, projected upon the plane of time. The category of quantity, of duration, is applied to them'. Land was permanent, ineradicable and unique; personalty, for the most part, was ephemeral and fungible. The tenure of land, an expression inappropriate to personalty, was an intimate feature of the feudal system, which did not extend

[1] Though it may intervene to prevent the forfeiture of a possessory interest: discussed below.

[2] The exceptions being documentary intangibles, essentially, bills of lading and bills of exchange as part of the process of absorbing the law merchant.

[3] Pollock, F., and Maitland, F.W., *The History of English Law*, vol II, 2nd edn, 1898, at p 10.

to interests in personalty. This is not to say that personalty was incapable of being an important source of wealth. Maitland cites the likely surprise at such a statement of a thirteenth-century Cistercian abbot with flocks of thousands of sheep.[4] After the demise in mediaeval times of the appeal of felony, there existed until the middle of the nineteenth century no means at common law for the recovery of goods of which the owner had been wrongfully dispossessed. The law of tort, as we shall see,[5] stepped in to protect property rights, more accurately to protect possession, by means of the award of damages. But the non-existence of proprietary remedies in the developing common law, such as the *vindicatio* of Roman law or its modern civilian equivalent of the revendication action in French law, makes it peculiarly difficult to define personal property law and thus to settle the contents of syllabuses and books on the subject.

Proprietary interests in chattels are defined[6] as possession and ownership. Each is hard to explain. Moreover, ownership is largely expressed in terms of the vocabulary of possession since, in the words of Pollock and Wright, 'possession is in a normal state of things the outward sign of ownership'.[7] The underdeveloped character of ownership at common law is then explained: 'The Common law never had . . . any adequate process at all in the case of goods for the vindication of ownership pure and simple. So feeble and precarious was property [ie ownership] without possession, or rather without possessory remedies, in the eyes of mediaeval lawyers, that Possession usurped not only the substance but the name of Property.'[8] A striking but not necessarily odd question to ask is whether there truly is a separate notion of ownership at common law. We may anticipate the discussion below by saying now that ownership amounts to the best available possessory right. Consequently, of the two, more space has to be devoted here to possession, which must be dealt with

[4] Pollock and Maitland, *op. cit.*, vol II, p 148.

[5] Chapter 3.

[6] More accurately described, see Harris, D., 'The Concept of Possession in English Law', p 70, in Guest, A.G. (ed.), *Oxford Essays in Jurisprudence*, Oxford, 1961.

[7] Pollock, F., and Wright, R., *An Essay on Possession in the Common Law*, Clarendon, 1888, p 4.

[8] Ibid., p 5.

before we turn to ownership. The difficulty of understanding possession comes especially into focus with the circumstances of its acquisition and loss, since unsurprisingly these are the events that attract the primary concern of the law. The present chapter will pay particular attention to these aspects of possession. The corresponding aspects of ownership, which are best detached from an understanding of what ownership is, will be dealt with later when we consider the passing of property in chattels by way of gift and sale and the transfer of title.[9]

In the case of intangible personalty, possession is impossible.[10] As we saw in chapter 1, rights in intangible personalty falling into the long-standing category of things in action have to be asserted through the medium of legal proceedings. They can of course be owned; the acquisition of ownership is dealt with in chapter 7. Things in action that amount to documentary intangibles can be possessed: statements about the possession of chattels can therefore normally be extended to cover the case of documentary intangibles. In addition, documentary intangibles can be owned but the ownership of them is valued, and the possession of them deemed significant, according to what they represent since the paper embodying them has no intrinsic value. These matters will be dealt with in subsequent chapters.

Possession and ownership of a chattel are real rights rather than personal ones. An executory contract for the sale of a chattel does not normally at law create real rights over it. Prior to delivery,[11] the buyer is not in possession and the property (or ownership) in the goods would not normally pass before delivery.[12] The significance of real rights is that they bind others apart from the parties to the transaction. More particularly, they survive the insolvency of the person granting the right. They can be asserted against the insolvency officer charged with winding up the insolvent's estate,[13] the holder of such rights not being limited to proving in the insolvency[14] and receiving the pitifully

[9] Chapters 5 and 6.

[10] Except where legislation deems it to be possible: Financial Collateral Arrangements (No. 2) Regulations 2003.

[11] Discussed in the section on Delivery below.

[12] See chapter 5.

[13] See Insolvency Act 1986, s 306.

[14] See Insolvency Act 1986, s 322.

small dividend that almost always results when the estate is finally wound up.

POSSESSION

In this section, we shall consider the general features of how possession is acquired before dealing with it at further length through a study of the cases on finding.

RELATIVITY OF POSSESSION

Earl Jowitt once confessed that English law had 'never worked out a completely logical and exhaustive definition of "possession"'.[15] The meaning of possession appears to vary according to context and indeed it sometimes appears in constructive and symbolic forms.[16] Possession takes its meaning very much from the operative facts, so its application differs according to whether it applies to a signet ring or a supertanker.

THE HISTORY OF A CHATTEL

Chattels cannot be possessed before they come into existence or after they have perished. They do not, however, appear from nothing and they commonly disappear, sometimes leaving tangible remains. To the extent that processes are at work involving changes in the nature of chattels when they are worked, commingled, adapted and converted, these have consequences that affect ownership rights.[17] In routine cases, the minute history of a chattel will not be recorded; a seller, for example, will not be required to demonstrate a good root of title or the way in which the chattel came into his hands. Nevertheless, in so far as it is practicable to do so, the chain of lawful possession is traceable to the first lawful possessor. This individual may have spun polymer yarn from petrochemical ingredients, or have captured a wild animal, or have manufactured a compact disc from a variety of materials and processes, or have cut cloth to make a

[15] *United States of America v Dollfus Mieg et Cie SA* [1952] AC 582 (HL).
[16] See the section on Delivery below.
[17] See chapter 4.

suit. The life of the ensuing chattel, as well as the number of transactions of which it is the subject matter, will obviously be variable. Polymer yarn may have a very brief existence before it is reworked into a wholly new product; a compact disc, on the other hand, has reached its mature form and is good only for scrap in the unlikely event of its destruction. Given the movable, commonly short-lived and protean character of chattels, it is hardly surprising that property rights in them should be defined in possessory rather than abstract terms.

LEGAL CHARACTER OF POSSESSION

Possession is largely a matter of fact, hence its relative nature. As a legal concept, it may be stated as consisting of two elements: first, the exercise of factual control over the chattel; and secondly, the concomitant intention to exclude others from the exercise of control. The presence of this second element, more than anything, serves to differentiate the legal meaning of possession from its looser, lay equivalent, which broadly approximates to the first element. The necessary degree of factual control is understood for present purposes to be established when the possessor has acquired such control as the nature of the case admits. This may be illustrated with the assistance of two decided cases. In *Young v Hichens*,[18] the claimant had almost encompassed a shoal of pilchards with a seine net when the defendant rowed his boat to the opening of the net, thereby preventing the claimant's placing of a stop net across the seven-fathom gap to take the fish. The claimant's suit in trespass required him to show that he was in possession of the fish at the time of the disturbance.[19] Although the claimant contended that 'a strong probability of complete capture is enough to give a right of possession against a party preventing the capture', the court disagreed: it was not enough that it was 'almost certain' that the claimant would have had the fish without the defendant's interference.

A contrasting case is *The Tubantia*.[20] It involved interference by the defendants with the claimants' attempts to salvage a sunken Dutch freighter, which lay in over 100 feet of water.

[18] (1844) 6 QB 606. [19] See chapter 3. [20] [1924] P 78.

The behaviour of the defendants consisted in sending down their own divers and attempting to raise the claimants' grappling irons and anchor. By means of marker buoys and various lines in 'the nature of fixed plant on and around the *Tubantia*' the claimants were able to put in about 25 working days in the year in which they claimed possession of the wreck, the roughness of the seas and weather preventing any more than this. In the circumstances, they were held to have acquired possession of the wreck. They had the necessary possessory intention, had recovered some valuable items from the wreck, and were exercising 'the use and occupation of which the subject matter was capable'. They were also in a position to prevent the defendants from asserting the same degree of control over the wreck as they (the claimants) themselves had already assumed. If the owner had done what the claimants had done, this would more clearly still have been enough to resume possession, given the 'presumption of law which aids the operative effect of the possessory acts of the owner'[21]

This last point demonstrates also that the degree of control necessary for the acquisition of possession in the first place may not be necessary for possession to be maintained. Peace and social order, one of the goals of the law in this area, would be at risk if too stringent a test were to be applied to the retention of possession. The law is defined in such a way as to avoid legitimating a free-for-all over disputed chattels. There is no need for the intention to exclude others to be constantly present to the mind of the possessor[22] or for the possessor to have a very specific intention about the object of possession.[23] A person in possession may, with the necessary intention, abandon it[24] so as to permit its occupancy by the first person to assume control of it with the necessary possessory intention. Even if a chattel has not been abandoned but has been seized by a wrongdoer, the latter may satisfy a court that it has thereby been reduced to his possession;

[21] See also *Ramsay v Margrett* [1894] 2 QB 18 (CA) for the resolution of evidentiary doubt in favour of the owner.

[22] Markby, Sir W., *Elements of Law*, 6th edn, Clarendon, 1905, p 190.

[23] See the finding cases, below.

[24] *Brown v Mallett* (1848) 5 CB 599, 617–18.

we shall see in chapter 3 that the wrongdoer is in principle entitled to complain of a wrong done to his possession by someone other than the true owner. The volume of evidence required to satisfy an unsympathetic court, however, may be beyond the capabilities of some wrongdoers.

Holmes[25] cites the example of someone who finds a purse of gold which he leaves in his country house, 'lonely and slightly barred', while he serves time in prison 100 miles away. The only person within 20 miles is 'a thoroughly equipped burglar' who is poised at the window to take the purse. Holmes rightly concludes that, until the burglar succeeds in making off with the purse, the finder is still to be regarded as being in possession, however precarious that possession may be. There is a marked disinclination in the law, clear cases of abandonment apart, to conclude that there has been a lapse in the possession of a chattel. The same point comes out in an illustration given by Pollock and Wright.[26] It concerns the careless banker who leaves the bank 'open and unguarded', thus facilitating the theft of cash and securities. However reprehensible that may be by the standards of careful bankers, the banker remains in possession of those valuables until effectively dispossessed.

CONSTRUCTIVE POSSESSION

As stated earlier, the elasticity of possession extends to the recognition of constructive forms of possession. This is often seen in cases of delivery where documents of title are employed or where a third party bailee in possession of chattels attorns to a new bailor in consequence of an agreement between old and new bailor for the possession of chattels held under a bailment at will to be transferred.[27] It is not possible to define with any precision the metes and bounds of constructive possession. A few examples give the flavour of constructive possession being recognized for instrumental purposes in a way that demonstrates the perennial difficulty of defining possession. In *Towers & Co Ltd*

[25] *The Common Law*, 1881, p 237. [26] *Op.cit.*, p 15.

[27] See the discussion of attornment in the section on Constructive Delivery below.

v Gray,[28] liability under a statute dealing with trade misdescriptions depended upon whether chattels (frozen chickens) were in the 'possession for sale' of the defendant. At all material times, the chickens were in the possession of a storage company under the terms of an agreement giving the storage company a general lien over all goods stored for all unpaid storage charges.[29] The defendant was entitled to call for delivery at any time within a stipulated hourly range on presentation of the appropriate forms. Given that a criminal statute was in play, the court considered that possession must be understood in its lay sense and that it should be examined for both civil and criminal purposes. Even so, there was possession in this case since the goods could be recovered on demand.

Charlesworth v Mills[30] concerned compliance with notoriously difficult legislation, the Bills of Sale Acts 1878–91, to which courts have often given a restrictive interpretation. After Wilson's goods had been seized by a sheriff under a writ of execution, Wilson verbally agreed with an auctioneer that, if the auctioneer paid out the sheriff, the auctioneer would sell the goods and account to Wilson for any balance. The sheriff having been paid, the person controlling the goods on behalf of the sheriff then held them for the auctioneer. The agreement between Wilson and the auctioneer was then reduced to writing. The question was whether the auctioneer was already in possession of the goods at the time of the writing; if he was, the legislation with its formal requirements did not apply since it applied only in cases where rights were derived from documents. Since the sheriff had been in possession through the person in control, and since the auctioneer taking over from the sheriff was just as much in possession as the sheriff had been, the court concluded that the auctioneer's interest in the chattels was derived from the fact of his possession of the goods and not from any written document. There was therefore no need to comply with the legislation.

[28] [1961] 2 QB 351 (CA).

[29] *Cf. Great Eastern Railway Co v Lord's Trustee* [1909] AC 109 (HL), discussed below.

[30] [1892] AC 231 (HL).

The final example of constructive possession is *Re Atlantic Computers Ltd*.[31] Insolvency legislation imposed a moratorium preventing the owners of computer equipment subject to hiring and related agreements from seizing them from insolvent company hirers in administration, even though those hirers were in default in making hire payments.[32] The question was whether, for the purposes of the legislation, the hirers were in possession when, at all relevant times, the computer equipment had been sub-hired on similar terms. Notwithstanding the sub-hires, the hirers were considered still to be in possession for the purposes of the legislation. The contrary conclusion would have rendered it difficult for the administrator to further the purposes of the legislation, which in the present case were to preserve the business if possible and, if not, to obtain the best price for the hirer's assets on behalf of its creditors.

INDIVISIBILITY OF POSSESSION

Possession, it is sometimes said, may not be shared,[33] given that it is based upon the exclusion of others.[34] This statement should be read carefully. It seems clear that adverse claimants will not share possession; the law will rule that one of them has succeeded in excluding the other. Nevertheless, it seems perfectly possible for there to be a consensually shared possession, as would commonly be the case with co-owners, 'each . . . in possession of the whole and of the half'.[35] Remarkably, the proposition has been accepted, for the purpose of suit in trespass against a wrongdoing third party,[36] that both bailor and bailee at will are in possession of the chattel bailed. The recognition that a bailee, able to call for the return of the chattel at any time, has possession is a pragmatic, instrumental device that, in feeding the relativity of possession as a concept, compounds the difficulty of defining it.

[31] [1992] Ch 505 (CA).

[32] At the time, the Insolvency Act 1986 Part II (now Sch B1).

[33] Fitzgerald, P.J., *Salmond on Jurisprudence*, 12th edn, Sweet & Maxwell, 1966, p 287; Markby, *op. cit.,* p 203.

[34] Holmes, *op. cit.,* p 220. [35] Markby, *op. cit.,* p 204.

[36] See chapter 3; *Ancona v Rogers* (1876) 1 Ex D 285 (CA).

The bailor at will's entitlement to call for the immediate return of a chattel equates instead to a right to immediate possession, which is not the same thing as possession itself. A resistant bailee unlawfully refusing the bailor to retake a chattel can hardly be said to be interfering with the bailor's actual possession.

The same pragmatism appears to be evident in certain cases dealing with liens.[37] A good illustration is the House of Lords decision in *Great Eastern Railway Co v Lord's Trustee*.[38] A railway company let to a merchant for the storage of coal certain allotments in one of its yards, which coal it also carried on behalf of the merchant. Under a 'ledger agreement', the railway was to have a continual lien on the contents of those allotments, which varied with the addition and withdrawal of coal from time to time, for all charges due to it from the merchant. This meant that, if payment was not duly made by the merchant, the railway had the right to sell the coal and pay itself out of the proceeds. The railway had the keys of the yard gates, the merchant not having a set, and the yard was kept closed outside business hours. Upon default by Lord, the railway closed the yard gates and detained the coal. Its action was challenged by Lord's trustee in bankruptcy, acting on behalf of his other creditors, on the ground that it had taken place under an unregistered, and therefore unlawful, bill of sale. Briefly, the legislation governing bills of sale[39] requires certain onerous formalities to be observed where a licence or equitable right is given to take possession of chattels in certain instances. The outcome of the case depended upon whether the railway company was already in possession of the coal stored in the allotments at all material times, because if this were so, there was no need to comply with the legislation.

By a bare majority, the House of Lords concluded that the legislation did not apply, since the railway was in possession of the coal and so did not exercise a licence to take possession when it refused to allow Lord to carry it off. It did not matter that Lord could be said to be in occupation of the allotments containing the coal, nor, evidently, that Lord could normally, during business hours, remove the coal without let or hindrance before the axe fell.

[37] Discussed further in chapter 8.

[38] [1909] AC 109 (HL).

[39] See further chapter 8.

The courts of this period were concerned not to apply too readily bills of sale legislation, with its ponderous requirements difficult to satisfy, especially where this would lead to the frustration of normal business transactions not falling, in Lord Macnaghten's words, 'within the mischief at which the Act was aimed'. Possession was therefore given an expansive reading of the kind that a more dispassionate review of the facts would not have afforded. Apart from Lord Macnaghten's observation that Lord had possession of the coal 'in a sense', the result of the case was not justified in terms of a joint possession. It is hard to see how Lord's control over the coal on a daily basis, coupled with his intention to exercise ownership rights over it, fell short of possession.

CONTROL FALLING SHORT OF POSSESSION

The result in this particular case prompts a reference to those cases where occupation of a chattel falls short of the legal sense of possession. The most obvious example is that of the employee, who is recognized as against the employer as not possessing the employer's chattels but rather as having only custody of them. As a university employee, I therefore have custody over the computer on which the manuscript for this book is being prepared, whilst possession is enjoyed by my employer, even though other employees, never mind anyone representing the directing mind and will of the corporate entity that is the university, rarely ever come near the computer. Such a legal conclusion cannot be said to follow from a neutral evaluation of fact.

This rule (for that is what it comes to) was formulated at a time when the offence of larceny required amongst other things an asportation (or removal) of the chattel from the possession of the owner. If the employee were already in possession of the chattel before forming a dishonest intention, the offence of larceny could not be committed. Treating the employer as still being in possession meant that the law of larceny could work within the employment relationship to protect the employer's property rights. The offence of larceny has now been superseded by theft,[40] which no

[40] Theft Act 1968, s 1.

longer demands an asportation but rather, any act of sufficient interference with the owner's property rights. Thus the custody rule, not affected by this development, has been separated from the criminal law's function as the protector of property rights.

The conclusion that an employee, even with extensive control, has only custody of the employer's chattels can always be excluded by the clear assertion of an intention by the employee to possess exclusively. Such an intention wrongfully to dispossess the employer would on the evidence involve the commission by the employee of a tort[41] or of a breach of the employment contract.

The same approach to custody can also be found in other circumstances where close physical control is exercised over a chattel. A hotel guest does not possess movable items in the hotel room, with the likely exception of disposable bathroom products when these, in response to the hotel's mute invitation, are packed away in the guest's suitcase. A diner does not possess the condiments on a restaurant table, yet it would be regarded as a gross breach of etiquette, though not a trespass, for a neighbouring diner to remove these without permission.

Physical control falling short of possession and causing problems under the old law of larceny emerges in another context. In *Cartwright v Green*[42] a bureau was entrusted to a carpenter for repair, neither party at the time being aware that a very large sum of money had been placed in a secret drawer. The carpenter found the money and appropriated it, and the question arose whether this was a felonious taking and therefore a larceny. If the carpenter had been entrusted with possession of the bureau together with its contents, then he could not be said to have taken the money for the purpose of committing larceny. But it was held that he was entrusted only with the bureau itself and for a limited purpose. Consequently, by analogy with the case of a common carrier who breaks open a parcel entrusted to him for carriage and appropriates its contents, he committed a trespassory (and therefore a larcenous) taking when he opened the secret drawer and removed the money.

[41] See chapter 3. [42] (1803) 8 Ves Jun 405.

The circumstances were different in *Merry v Green*,[43] where a bureau, sold at auction, was found by the purchaser to contain a substantial sum of coin and valuables in a secret drawer. On the question of felonious taking by the purchaser, the case supports the view that no such taking could have occurred if the auctioneer's intention had been to sell the bureau together with its contents, for this would have involved a surrender of total possession to the purchaser. It is more likely there will be a limited intention where an owner entrusts something for repair than where a seller disposes outright of his interest in the chattel containing the hidden contents.[44] In the latter case, it is the absence of any intention to retain possession of the unknown contents of the bureau that counts, rather than any positive intention to transfer possession of those contents.

POSSESSION AS A PROTECTED PROPERTY INTEREST

Proprietary rights, as stated earlier, bind those who are not parties to the transactions that create them. To that extent they differ from contractual rights, which, in accordance with the doctrine of privity of contract, do not impose burdens on third parties. The distinction between property rights in chattels and contractual rights to chattels[45] is not free from difficulty and is tested by an examination of the rights acquired by a hirer under a lease of chattels, which is a type of bailment. It has been argued that the hirer of a chattel does not have a proprietary right that can be opposed against someone purchasing it from the lessor.[46] If this argument is correct, it means that the possessory right of a hirer is a precarious one, whose vulnerability to a purchaser

[43] (1841) 7 M & W 623.

[44] *Cf. Moffatt v Kazana* [1969] 2 QB 152, where the owner of cash in a biscuit tin placed in a chimney piece, who appeared to have forgotten about its existence, had not abandoned ownership of it when the house was conveyed to the defendant.

[45] This was the issue in *Jarvis v Williams* [1955] 1 WLR 71 (CA). The contractual right *itself* may have a proprietary character: see chapter 1.

[46] Swadling, W., 'The Proprietary Effect of a Hire of Goods', in Palmer, N., and McKendrick, E., *Interests in Goods*, 2nd edn, LLP, 1998.

would defeat conventional commercial expectations. This argument, if successfully advanced, would also draw an invidious line between the rights of a hirer and the rights of a pledgee of a chattel,[47] since the latter certainly acquires a valuable security right that would not be overreached on a sale of the pledged chattel. A lease of chattels and a pledge equally confer on the party in possession rights of a proprietary and not merely of a contractual kind.[48] There is moreover the considerable authority of Lord Holt that the purchaser takes subject to a bailee's possessory right.[49] Possessory rights, furthermore, can be asserted against insolvency officers representing the owner,[50] insolvency being a well-defined, indeed the best, touchstone for determining whether rights are proprietary and not merely contractual. Sometimes, proprietary rights are contrasted with 'rights of possession and use',[51] but in a way that assimilates 'proprietary' to ownership without relegating all possessory rights to the status of mere contractual rights.

The proprietary character of the hirer's rights is confirmed by authorities on relief against forfeiture. Briefly, if a contracting party commits a discharging breach of contract and the other party exercises termination rights, equity will not step in to relieve the former party from the rough features of the contract.[52] Nevertheless, the House of Lords in *On Demand Information plc v Michael Gerson (Finance) plc*[53] held that the possessory right of a hirer of chattels under finance leases could be protected as a proprietary right from forfeiture consequent upon the termination of the leases as a result of the hirer's stated default, which was entry into receivership. This relief was available provided

[47] See chapter 8. [48] *Franklin v Neate* (1844) 13 M & W 481.

[49] *Rich v Aldred* (1705) 6 Mod 216; see Calnan, R., 'Property, Security and Possession in Insolvency Law: *Re Cosslett (Contractors) Ltd*' (1997) 11 JIBFL 530, 535–36.

[50] *Re Cosslett (Contractors) Ltd* [1998] Ch 495 (CA).

[51] Ibid, 508, *per* Millett LJ.

[52] See in general the attitude of Lord Radcliffe in *Bridge v Campbell Discount Co Ltd* [1962] AC 600, 626 (HL).

[53] [2002] UKHL 13, [2003] 1 AC 368, affirming the decision of the Court of Appeal at [2001] 1 WLR 155 on this ground, but reversing the result on another ground.

that the forfeiture provision was inserted in the lease primarily to attain a result that could be attained by other means when the matter came to court.[54] Those other means would almost always be the payment of moneys outstanding under the lease agreement. In the normal case, the lease would continue in the event of the owner's financial interest being protected in this way.

Forfeiture relief, however, is not tantamount to reviving a contract that has been lawfully terminated because of a party's discharging breach. Hence, it was held not to be available where a contracting party's rights were merely contractual, which was why it could not be given to time charterers, who do not take possession of the vessel, upon its withdrawal from hire because of late payment by the charterer.[55] Similarly, no relief is available to the licensee of trade marks or other intellectual property rights,[56] though it may be given where such rights have vested in the transferee.[57] The decision in *On Demand* goes a step beyond the hire-purchase cases, where forfeiture relief has been granted,[58] in that the hirer in such cases has an option to purchase which in the past has itself been treated as proprietary in character.[59] The hirer in *On Demand*, however, did not have a true option, though it did have a contractual right to require the owner to sell, to act as the owner's agent in arranging the sale at a price approved by the owner, and to claim the lion's share of the proceeds of sale. *On Demand* establishes beyond any doubt that a hirer's right to possession is proprietary and not merely contractual.

OWNERSHIP

RELATIVITY OF OWNERSHIP

Ownership is defined in terms of possessory entitlement and therefore is not qualitatively different from possession itself. Hence, instead of being dealt with in chapters concerning the

[54] *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL).

[55] *The Scaptrade* [1983] 2 AC 694 (HL).

[56] *Sport Internationaal Bussum NV v Inter-Footwear Ltd* [1984] 1 WLR 776 (HL).

[57] *BICC Plc v Burndy Corpn* [1985] Ch 232 (CA) (patent rights).

[58] For example, *Transag Haulage Ltd* v *Leyland DAF Finance* [1994] 2 BCLC 88.

[59] *Whiteley v Hilt* [1918] 2 KB 808 (CA). For a description of hire purchase, see below.

transfer of ownership to chattels and intangible personalty,[60] it is for the sake of convenience dealt with here. 'What is ownership?' and 'Who is the owner?' are two separate questions, though they have a tendency to merge in practice. It is convenient to take first the latter question.

It is common to speak of owners in absolute terms. The literature is full of references to the true owner, the proprietary equivalent of the True Cross or the Philosopher's Stone. Yet proprietary disputes are solved in bilateral litigation where the court has traditionally been called upon only to adjudicate in favour of one or the other of two claimants, an exercise in the relative rather than the absolute. It has rightly been said that 'the English law of ownership and possession, unlike that of Roman law, is not a system of identifying absolute entitlement, but of priority of entitlement'.[61] Changes introduced in 1977[62] have created the procedural possibility of all potential claimants being made party to litigation involving a disputed chattel. Because more than two parties may be involved, this creates a search for the best instead of the better possessory right. It does not, however, quite equate to the discovery of the absolute owner. Registers of chattel ownership do not, except in unusual cases,[63] exist and, as we have seen, the history of ownership of a chattel, as well as the history of a chattel as a thing with an identity of its own, are not explored when transactions are concluded. Consequently, it may not be possible in proceedings to track down all parties with an interest in a disputed chattel. Commerce, furthermore, would become paralysed if the care and deliberation taken when investigating title to land were also taken when chattels are bought and sold.

This is why the owner of a chattel may be described as the person with the best possessory interest in it. The affinity between possession and ownership has long been recognized by the law. Under the old bankruptcy law, goods in the 'possession, order or disposition' of a bankrupt were liable to be distributed amongst

[60] Chapters 5 and 7.

[61] *Waverley Borough Council v Fletcher* [1996] QB 334, 345 (CA)

[62] Torts (Interference with Goods) Act 1977: see chapter 3.

[63] For example, British ships: Merchant Shipping Act 1995, ss 8–10.

his creditors where the bankrupt 'appeared the reputed owner thereof.[64] The link between possession and ownership is not so obvious in a credit economy where suppliers notoriously reserve ownership until they are paid (see, for example, the discussion of hire purchase, below) and where non-possessory security is taken by creditors,[65] so the doctrine of reputed ownership is absent from modern legislation on the subject.[66] It survived, however, until recently in legislation governing a landlord's right to distrain property found on the rented premises for rent unpaid by the tenant.[67] Even here, the modern trend was to restrict the operation of reputed ownership.[68]

The grant by the owner of extensive rights of possession may almost eviscerate ownership. When we examine the law of bailment, we shall see that the owner may have granted possessory rights for such a lengthy term that the reversionary value of a wasting chattel is slight. This grant may be subject to conditions that, if not observed, result in a premature reversion of the chattel to the owner before the term has expired. Thus the owner's otherwise negligible reversionary rights are endowed with a little more substance.

As stated above, a distinction exists between the definition of owner and the definition of ownership. Ownership may be regarded as the *'greatest possible interest in a thing which a mature system of law recognizes'* (original emphasis), consisting of a bundle of rights and incidents in respect of the thing.[69] For our purposes, the most important rights may be abbreviated as the perpetual right to possess and enjoy the thing; the perpetual right to the fruits and profits generated by it; and the right to alienate, bequeath, or destroy it. Ownership may also attract certain incidents such as the legal obligation to purchase a licence, the amenability of the thing to execution pursuant to a judgment,

[64] Bankruptcy Act 1914, s 38(1)(c).

[65] See chapter 8.

[66] Insolvency Act 1986.

[67] Distraint was abolished by the Tribunals, Courts and Enforcement Act 2007, s 71.

[68] See *Salford Van Hire (Contracts) Ltd v Bocholt Developments Ltd* [1995] CLC 611 (CA).

[69] See Honoré, A., 'Ownership', in Guest, A.G. (ed.), *Oxford Essays in Jurisprudence*, Oxford, 1961, citing eleven incidents of ownership.

and the obligation not to use it so as to breach a duty imposed by law (for example, allowing a car to be driven on the road in an unroadworthy state; not abandoning a chattel in such a way as to cause a public nuisance or offend against litter legislation). The above rights may be surrendered in part without surrendering ownership of the thing itself. For example, I may lend you my book for an agreed period of one month. Until you actually obtain possession of the book pursuant to our antecedent agreement, you have a personal, contractual right to the book which becomes the proprietary right of possession once I deliver it to you.[70] In a very real sense, the owner is the person who has residual rights in the thing whatever lesser interests may have been granted in respect of it.[71]

GENERAL AND SPECIAL PROPERTY

In sale of goods transactions, the ownership of the seller, the transfer of which for a money consideration is the hallmark of a sale, is called the general property[72] and is defined as being other than the special property.[73] The latter expression is certainly used to signify the possessory entitlement of a pledgee[74] but is also used in a looser way to describe the possessory right of a bailee, who may hold as against the owner but whose right falls short of ownership.[75] Possession and ownership[76] together exhausting the category of legal property rights in a chattel, it follows that the general property is the ownership, in view of the identification of the special property with possession. Apart from defining a sale of goods agreement, the distinction between special and general property seems largely to be of terminological significance only.

[70] See McKendrick, E. (ed.), *Goode on Commercial Law*, 4th edn, Penguin, 2010, p 50.

[71] Honoré, *op. cit.*, pp 126–28.

[72] Sale of Goods Act 1979, s 2(1). Perhaps for reasons of understandability to lay readers, the Consumer Rights Act 2014, s 4, prefers 'ownership' to 'general property'.

[73] Ibid, s 61(1).

[74] See chapter 8.

[75] Holmes, *op. cit.*, at p 242; *Nyberg v Handelaar* [1892] 2 QB 202 (CA); *Donald v Suckling* (1866) LR 1 QB 585, where special property is used to differentiate pledge and lien as opposed to pledge and other forms of bailment.

[76] Plus the immediate right thereto: see chapter 3.

INDIVISIBILITY AND CO-OWNERSHIP

It was stated earlier that personal property was never subjected to the doctrine of estates by which ownership can be divided on the temporal plane.[77] The quality of ownership can, however, be affected by the possession enjoyed by someone else, but the transfer by the owner of possession is not in law the grant of ownership rights. That legal principle can be pressed hard by practical reality is evident in the case of bailment, which is capable of definition in terms of the life span of the person receiving possession of the chattel, namely the bailee, or of the useful life of the chattel itself. The bailee, nevertheless, acquires only a possessory interest and not ownership since the chattel, however devalued and however lax the terms on which it is bailed, will revert to the bailor at the end of the bailment. As small as the bailor's residue might be, its existence prevents the transaction from effecting a transfer of ownership.

Chattels may be the subject at law of co-ownership, taking the form of either a joint tenancy or a tenancy in common, the latter being a form of co-ownership that is no longer possible in the case of land[78] and evidently, at law, not possible in the case of intangible property.[79] Tenancy in common serves a useful purpose at law where chattels are commingled to form an undifferentiated mass,[80] since the common law does not recognize encumbrances or unseparated interests operating by way of charge.[81] The difference between joint tenancy and tenancy in common is that the ownership rights of a joint tenant descend on death to the other joint tenant(s). By contrast, each tenant in common, while sharing possession of the whole, owns only his share of the whole, which therefore goes to his next-of-kin on death. Since joint tenancy thus favours longevity, it offends the equitable maxim that equality is equity, which is why

[77] See also McKendrick, E. (ed.), *Goode on Commercial Law*, 4th edn, Penguin, 2010, at pp 37–39.

[78] Law of Property Act 1925, s 36(2).

[79] Bridge, M., Gullifer, L., McMeel, G., and Worthington, S., *The Law of Personal Property*, Sweet & Maxwell, 2013, para 20-002.

[80] See chapter 5, dealing with Sale of Goods Act, s 20A, introducing a statutory version of common law tenancy in common.

[81] See chapter 8.

equity leans in favour of construing joint ownership as a tenancy in common.[82]

ABANDONMENT

Subject to the demands of a regulatory statute, neither ownership nor possession are burdens upon the entitled person and both therefore are capable of abandonment. This proposition is less easy to establish in the case of ownership. It is convenient to take the abandonment of both ownership and possession together, not least because of the extent to which ownership is defined in terms of possession. Abandonment, however, is so closely connected and indeed even integrated into the law related to finding that it is better to defer its further treatment until we come to the rights of finders.[83]

EQUITABLE INTERESTS IN PERSONALTY

It was stated in chapter 1 that equity, working with the grain of the common law, at intervals stepped in to restrain the exercise of common law rights. There are numerous examples of this in property law. A number of these interventions will now be considered with particular attention being paid to trusts.

TRUST

A most important exception to the principle that the law does not recognize the divisibility of ownership of personalty, as opposed to co-ownership, is the trust. The ownership of personalty, just as much as land, can be divided between the legal owner (the trustee) and the beneficial owner (the beneficiary or *cestui que trust*).[84] The effect of this is that the trustee has the bare

[82] Meagher, Gummow, and Lehane, *Equity, Doctrines and Remedies*, 4th edn, Butterworths LexisNexis, 2002, para 3-150.

[83] Discussed below.

[84] For the contrary assertion that the beneficiary of a trust does not acquire a direct interest in the subject matter of the trust but rather a right in or to the trustee's legal interest therein, see McFarlane, B., and Stevens, R., 'The Nature of Equitable Property' (2010) 4(1) Journal of Equity 1.

legal ownership while the fruits of beneficial ownership go to the beneficiaries whose interest may be of either a vested or contingent kind. Through the structure of the trust, the ownership of personalty may therefore be divided in myriad ways and the common law's limitation of proprietary interests to ownership and possession is exploded. The flexibility thus introduced by equity has been exploited in many commercial situations, from pension funds to syndicated loans and on to investment portfolios. The trust permits assets to be pooled for more efficient management and ease of disposal. It is not just the original subject matter of a trust that can be held on trust; the beneficiary's rights can themselves be the subject matter of a sub-trust and so on *ad infinitum*. So far as an intervening beneficiary/sub-trustee has no active duties to perform, that person might be disintermediated with the result that the particular sub-trust link is collapsed and the holding chain abbreviated.[85]

Trusts may arise in various circumstances. They may be created expressly where A, the owner, settles property on B on trust for C, or where A declares himself trustee in favour of B. B may be a class of beneficiaries and that class may also include A himself. Trusts are commonly set up in testamentary instruments and sometimes imposed by statute. They are sometimes used to establish security rights favouring creditors.[86] Trusts may arise by operation of law. One example is the constructive trust which arises in numerous cases, for example where an agent makes a secret profit or accepts a bribe.[87] Constructive trusts, very much at the forefront in modern commercial law developments as well as in other areas of law, are imposed in an instrumental way to render effective certain equitable obligations affecting the conscience of the constructive trustee. It is a matter of some concern to commercial lawyers that the proprietary character of a trust, imposed in some cases as a matter of conscience between two parties, can have a significant impact on third parties whose

[85] In special circumstances, disintermediation in a sub-trust case was not recognized in *Nelson v Greening Sykes (Builders) Ltd* [2007] EWCA Civ 1358.

[86] In North America, aircraft are often acquired on the terms of an equipment trust and then leased to airlines.

[87] *Attorney-General of Hong Kong v Reid* [1994] 1 AC 324 (PC); *FHR European Ventures LLP v Cedar Capital Partners* [2014] UKSC 45, [2014] 3 WLR 535.

concerns are not factored into the decision whether a trust should be imposed. This is particularly so where the trustee is insolvent. In some cases, a resulting trust[88] may arise by operation of law, as where a settlor transfers property to trustees without specifying the trusts on which the property is to be held. In other cases, a resulting trust may arise out of presumed intention, as where the legal interest in property is transferred to another in circumstances where no sufficient intention, actual or presumed, to transfer also the beneficial interest can be shown.[89] Under a resulting trust, the transferee holds the property on trust for the transferor. Since the beneficiary obtains a proprietary interest in the subject matter of the trust, this property right is shielded from the creditors of the trustee. The subject of trusts is much too large to deal with here except in the broadest outline. The vulnerability of beneficial interests to those acquiring a legal interest in the subject matter of the trust will be dealt with in a later chapter.[90]

MORTGAGE

One of the most important instances where equity restricts the assertion of legal property rights is the case of mortgages where the legal title is transferred in full to a mortgagee on terms providing for its automatic reversion once the obligation secured by the mortgage has been performed by the mortgagor.[91] At law, the legal estate vests in full in the mortgagee until it is automatically reconveyed when the mortgage is redeemed.[92] Regardless of the terms of the mortgage, the mortgagor is considered in equity to have a reversionary right in the asset transferred. The mortgagee's full legal title is in effect reduced to a security for the enforcement of the secured debt.[93] The mortgagor's equity of redemption is protected by an equitable doctrine that prevents it from being 'clogged' by any provision restricting or prohibiting

[88] See chapter 5.
[89] *Re Vandervell's Trusts (No 2)* [1974] Ch 269.
[90] See chapter 6.
[91] Or designated third party.
[92] *Keith v Burrows* (1876) 1 CPD 722. See further chapter 8.
[93] *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 2 at [73].

the redemption of the mortgage or imposing a penal deterrent on its exercise.[94]

FORFEITURE

In a not dissimilar way, equity, as seen above, will intervene to protect proprietary rights from being forfeited in the event of non-payment of hire or sale instalments. It should not be assumed that equity will step in just because a bargain between competent persons, in the words of Lord Radcliffe, 'shows a rough edge to one side or the other'.[95] For this reason, relief was not granted to the holder of an option to purchase a flat who was just ten minutes late in exercising the option and consequently lost its deposit.[96] In those cases where relief is available, it will usually take the form of the claimant being given more time to perform against the background of a termination or forfeiture provision that is designed to encourage due performance by the claimant.[97] In some cases, the claim will be for the recovery of prepaid moneys.[98] Forfeiture relief is most frequently met in the case of realty but it can also arise with respect to personalty.

EQUITABLE LIEN

A question that has arisen from time to time is whether equity will recognize purchasers as having acquired an equitable proprietary interest in the subject matter of a sale agreement prior to the acquisition of the legal interest thereunder. To the extent that any such 'equitable lien' arises in order to secure the rights of a pre-paying purchaser,[99] it is considered further in chapter 8, where it will be shown that equity's intervention is confined to

[94] *G. and C. Kreglinger v New Patagonia Meat & Cold Storage Co Ltd* [1914] AC 25 (HL); *Santley v Wilde* [1899] 2 Ch 474 (CA).

[95] *Bridge v Campbell Discount Co Ltd* [1962] AC 600, 626 (HL).

[96] *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 (PC).

[97] *Shiloh Spinners Ltd v Harding* [1973 AC 691 (PC).

[98] Eg *Stockloser v Johnson* [1954] 1 QB 476 (CA).

[99] The question has not arisen in respect of sellers who deliver goods prior to payment, since sellers are expected to look after themselves by means of a suitably drafted reservation of title clause: see chapter 5.

realty and intangible personalty. Even in the latter case, there are few instances of such recognition. The issue also arises in relation to sale of goods contracts, where the resistance of the courts to the recognition of equitable proprietary principles in the case of a pre-paying buyer has been overtaken by statutory reform giving the buyer legal tenancy in common rights in identified bulk goods to the extent of any payment made.[100]

RESTRICTIVE COVENANT

The last example of equitable intervention is perhaps the most contentious. It concerns the question of whether equity will encumber chattels with a restrictive covenant so as to bind them in the hands of a third party purchaser. In the case of land, covenants of a negative nature (that the land shall not be used in a certain way) or sometimes of a positive nature (that something shall be done on the land) may run with the land so as to bind successors in title who were not privy to the giving of the covenant. Suppose that A covenants in favour of B and subsequently disposes of the land to C. Since its beneficiary (B) obtains a proprietary right, the covenant diminishes the proprietary entitlement of the disponee of the land (C).[101] In a sweeping dictum, Knight Bruce LJ said in *De Mattos v Gibson*[102] that:

> Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller.

This attempt to extend to chattels the doctrine of covenants in land law has not found favour.[103] A straightforward application

[100] See chapter 5.

[101] *Tulk v Moxhay* (1848) 2 Ph 774.

[102] (1858) 4 D & J 276, *per* Knight Bruce LJ.

[103] See *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146; *Swiss Bank Corpn v Lloyds Bank Ltd* [1982] AC 584 (CA); Treitel, G.H., *The Law of Contract*, 13th edn (Peel, E. (ed.)), Sweet & Maxwell, 2011, paras 14–138 to 14–141.

of the doctrine of indivisible ownership of personalty would have it that covenants do not have a proprietary effect outside land. Nevertheless, there may be exceptional cases where a contractual covenant will bind a third party acquiring the chattel[104] with notice of the covenant.[105] It would also seem that the third party acquirer in such cases can only be restrained in negative terms from acting in disregard of the covenant, and may not be enjoined in positive terms to perform the contractual covenants of his predecessor in title.[106] This demonstrates that equitable intervention can take a form that makes it difficult to observe a bright line between the personal and the proprietary. It is clear that the doctrine in *De Mattos v Gibson* will remain exceptional in its scope so as not to 'provide a panacea for outflanking the doctrine of privity of contract'.[107] Someone acquiring a chattel may, however, do so with the knowledge that its acquisition gives rise to a breach of contract by the transferor. The acquirer may thereby incur liability in tort for interfering with the contractual relations of covenantor and covenantee.[108] The need for knowledge, combined with the negative form that an injunction will take, is what separates a duty in tort not to interfere with the contractual rights of others from a universal obligation in property law to respect restrictions, originating in contract, on the use and enjoyment of a chattel.

ACQUISITION OF POSSESSION BY FINDING

Chattels may be lost or abandoned. Since in both cases the person with the prior entitlement no longer has possession, subsequent finders may acquire property rights in the chattel. Whether that right can be said just to be a possessory right or an ownership right will depend upon the circumstances of the finding. It is not practicable to separate ownership and possession at this point so finding is

[104] *Lord Strathcona S. S. Co v Dominion Coal Co* [1926] AC 108 (PC).

[105] *Law Debenture Trust Corpn v Ural Caspian Oil Corpn Ltd* [1993] 1 WLR 138, 143, treating the covenant as giving rise to only an equitable right in the covenantee

[106] Ibid, 146. [107] Ibid, 144.

[108] *Law Debenture Trust Corpn v Ural Caspian Oil Corpn Ltd* [1995] Ch 152 (CA).

being treated here as a unitary category. The finder of a lost chattel acquires a possessory title to it that is usually effective against all but the true owner; the rights of the finder of an abandoned chattel are more difficult to state because, as noted above, abandonment may go to either or both of possession and ownership. The abandonment of possession means the voluntary surrender of that possession by dispensing with both the fact of possessory control and the intention to exercise that control against others. The abandonment of ownership means that the owner is voluntarily abdicating ownership. For practical purposes, it will occur only when the owner is either out of possession or, at the same time, also abandons possession. Where the abandonment of ownership occurs, the former owner may no longer be said to have a right to immediate possession. Consequently, the next possessor will have a possessory title that is good against the former owner and will succeed to that person's position as having the best possessory title in the world at large. Where only possession is being abandoned by an owner, the owner is entitled to resume possession at a later date. The finder, meanwhile, will still acquire a possessory title to the chattel, but one that is liable to ouster by the asserted right to immediate possession of the owner.

The law on abandonment of ownership is obscure and difficult to relate to modern conditions.[109] Early law was resistant to the idea that ownership could be abandoned,[110] even to the point of holding in one case that burial shrouds had not been abandoned by their former owners and present wearers.[111] Blackstone, however, states that 'the right to take or resume possession' of a sunken ship can be lost by abandonment.[112] The abandonment of ownership gains further support from the House of Lords in *The Crystal*,[113] where a statutory claim was made by harbour commissioners against the owner of a sunken ship for expenses incurred

[109] For a fuller statement, see Hudson, A., 'Abandonment', in Palmer, N., and McKendrick, E., *Interests in Goods*, 2nd edn, LLP, 1998.

[110] Possession too.

[111] *Haynes's Case* (1614) 12 Co Rep 113. See also St. Germain, C., *Doctor and Student* (1551), 91 Selden Society at pp 290–92.

[112] *Commentaries on the Laws of England* (1765), Book I, chapter 8 'Of the King's Revenue', p 285.

[113] *Arrow Shipping Co Ltd v Tyne Improvement Commissioners (The Crystal)* [1894] AC 508 (HL). See also *Keene v Carter* (1994) 12 WAR 20.

in disposing of the wreck. Since the owners had given notice of abandonment prior to the incurring of expenses, they could not be regarded as the 'owner' under the Act. The outcome is consistent with the view that a statutory liability with no common law counterpart will not receive an expansive interpretation, but *The Crystal* does contain broad statements of support for the abandonment of ownership of vessels on the high seas.[114] Lord Macnaghten echoes Blackstone's language[115] but then leaves open the possibility that the property remains in the original owners despite the abandonment.

Lord Macnaghten also indicates that, if ownership has indeed been abandoned, then the ownership of the wreck vests in the Crown as *bona vacantia* (that is, as goods otherwise without an owner).[116] If this view is correct, it has restrictive implications for the rights of finders since they would necessarily take subject to the Crown's right to immediate possession, though it has to be said that the distinction between lost and abandoned chattels is illusory if there is no-one on hand to explain the circumstances of abandonment or loss. Nevertheless, Romer LJ once sought to confine finders' rights to keep chattels to those cases where chattels had been lost rather than abandoned,[117] with ownership of abandoned articles vesting in the Crown as *bona vacantia*. It is however questionable that all ownerless property belongs to the Crown. Furthermore, Blackstone asserted that chattels can exist without an owner when he wrote that 'absolutely abandoned' chattels have been 'returned . . . into the common stock'. Since they were thus 'in a state of nature', they would belong to 'the first occupant or finder'.[118] In authorities dealing with intangible property, there seems to be a greater reluctance to infer abandonment, possibly in view of the prospect of the property in question reverting to the Crown as *bona vacantia*, with a

[114] [1894] AC 508, 519, 521 (HL).

[115] Ibid, 532 (abandonment of the 'right to retake or resume possession').

[116] See Bell, A., 'Bona Vacantia', in Palmer, N., and McKendrick, E. (eds), *Interests in Goods*, 2nd edn, LLP, 1998.

[117] *Re Wells* [1933] 1 Ch 29, 56 (CA).

[118] *Commentaries on the Laws of England* (1765), Book I, chapter 8 'Of the King's Revenue', at p 285.

consequent inference of a resulting trust in favour of the supposed abandoner.[119]

Assuming then that the ownership of a chattel can be abandoned effectively by the true owner and that the Crown has no *bona vacantia* claim, the finder first to take possession would succeed to the position of the true owner. If a chattel has been lost, or if only the possession of it has been abandoned, then the finder who takes possession acquires a proprietary right that is good against the world with the exception of the true owner. This is subject to the law on treasure trove.[120] To legitimate such behaviour in assuming control of the chattel in this way, the law deems the finder to hold it under the terms of a fictitious bailment.[121] This fiction also submits the finder to the obligations of a bailee.[122] So, if the finder's subsequent behaviour is so serious a denial of the true owner's title that it would be a conversion[123] if committed by a bailee, it will be similarly wrongful on the part of the finder.[124]

The finder acquiring a possessory title in this way seems also under a duty to seek out the true owner. In *Parker v British Airways Board*,[125] Donaldson LJ stated that a finder 'has an obligation to take such measures as in all the circumstances are reasonable to acquaint the true owner of the finding and present whereabouts of the chattel . . . '. If this is correct, it would seem not to be a condition of the finder acquiring and retaining a lawful possessory title; rather, the inactive finder would lose the immunity from liability in conversion that arises within the protective walls of the fictitious bailment. This is borne out by Donaldson LJ going on to refer to the finder's duty to take care of the chattel. Any finder who uses or abuses the chattel to an extent not allowed a bailee will be liable in conversion, although the true owner's claim against the finder may become statute-barred.[126] The scope

[119] See chapter 5.

[120] See below.

[121] *Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd* [1970] 1 WLR 1262 (PC); Palmer, N.E., *Palmer on Bailment*, 3rd edn, Sweet & Maxwell, 2009, para 1–037.

[122] See the paragraph below.

[123] See chapter 3.

[124] *Moffatt v Kazana* [1969] 2 QB 152.

[125] [1982] QB 1004 (CA).

[126] See chapter 3.

of such liability is, however, unclear since different types of bailment permit use and consumption in varying degrees.

In one category of case, acute difficulties have been caused in determining who acquires the possession of lost goods, namely where one person discovers a chattel on land occupied by another. In *Parker v British Airways Board*, a passenger at Heathrow Airport found a gold bracelet in the executive lounge. He handed it in to the airport authority, requiring it to be returned to him if the true owner were not found. The authority, however, sold the bracelet and appropriated the proceeds of sale when the search for the owner proved unavailing. The ensuing contest between the authority and the passenger was adjudicated in favour of the passenger, with the following principles emerging from the judgments. First, the issue depended on whether the authority had already acquired a possessory title to the bracelet before the passenger discovered it. If not, the law would protect the finder's claim against subsequent claimants.[127] Secondly, whether the authority already had possession at the moment of finding depended upon whether it had shown a sufficiently strong intention to control both the premises on which the bracelet was found as well as 'the things which may be on or in it'. No such intention had been shown by the authority, so it followed that the passenger had established a prior and therefore superior possessory claim.[128] Thirdly, in the case of chattels becoming attached to or embedded in the land, the decision would go in favour of the occupier of the land, because possession of land also carries with it possession of things attached to or under the land.[129] In such a case, it might have been better to say that the occupier of land would find it easier to establish the necessary possessory intention to establish a claim that is prior to that of the finder. Legal possession being a function of both physical control and an intention to exclude others, the greater the physical control possessed by the occupier the less forcefully

[127] See also *Armory v Delamirie* (1722) 1 Stra 505.

[128] See also *Bridges v Hawksworth* (1851) 21 LJQB 75; *Hannah v Peel* [1945] KB 509.

[129] *South Staffordshire Water Co v Sharman* [1896] 2 QB 44; Goodhart, A. (1929) 3 CLJ 195.

an excluding intention would have to be asserted. But it seems clear that a rule of law favours the occupier of land. This is borne out by *Waverley Borough Council v Fletcher*,[130] where a local authority was held to be entitled to a mediaeval brooch which was discovered underground by a finder with a metal detector, notwithstanding that the authority held the land under the terms of a covenant empowering it to allow access to the land for recreational purposes. The fourth principle in *Parker v British Airways Board* was that, as a matter of public policy, the law would rule in favour of the occupier when the finder was trespassing upon the land at the time of the finding.

Another point emerging from *Parker v British Airways Board* is that, as between an employer and an employee, when the latter finds something in the course of employment it must be accounted for to the employer.[131] This complements the rule that the employee does not possess, but merely has custody of, the employer's chattels.[132]

TREASURE TROVE

Whatever may be the relative outcome of a dispute between the occupier of land and the finder, the prerogative claim of the Crown, having the right to immediate possession, will be paramount (provided the true owner does not appear) if the chattel found is treasure trove. This is a case where the claim of a legal owner prevails over the lesser possessory right of the finder. At common law, treasure trove is 'money or coin, gold, silver, plate, or bullion' that has been hidden.[133] The significance of the hiding is that it negatives an intention by the owner to abandon the valuables. Where such objects are found buried or in a place of concealment, the Crown benefits from a presumption that they have been hidden.[134] This presumption is not displaced by 'fanciful suggestions more suited to the poem of a Celtic bard than the

[130] [1996] QB 334 (CA).
[131] See also *City of London Corpn v Appleyard* [1963] 2 All ER 843.
[132] Discussed above.
[133] Blackstone, *op. cit.,* Book I, chapter 8, at p 285.
[134] *Attorney-General v Trustees of the British Museum* [1903] 2 Ch 598.

prose of an English law reporter'[135] that valuables have been given up (and not hidden) as votive offerings to the gods.

The Treasure Act 1996 recasts and expands the range of the common law of treasure trove, and thus has important ramifications for the rights of finder and occupier over certain objects found in or upon land. For the purpose of the Act, 'treasure' means, in addition to objects within the common law definition of treasure trove, a range of objects that are at least 300 years old; this includes coins (defined in terms of age, composition, and number) together with other metallic objects having a gold or silver content of at least 10 per cent[136] In addition—and this departs from the narrow common law definition—the Secretary of State is empowered to designate as treasure objects that are at least 200 years old and have 'outstanding historical, archaeological or cultural importance'.[137] Conversely, the Secretary of State also has power to exclude objects from the definition of treasure that otherwise would be considered treasure.[138] Treasure, when found, vests in the Crown, except where there is a franchisee (the Duke of Cornwall, for example) with a prior entitlement.[139] The previous system of discretionary payments to finders has now been put on a statutory footing[140] but remains a discretionary system.[141] It would seem that the Secretary of State could divide any reward between the finder and the owner of the land on or in which the treasure is found.[142] Finally, the common law requirement that the treasure be hidden, together with the concomitant presumption that treasure trove was hidden, has been dispensed with under the new law.

BAILMENT

DEFINITION OF BAILMENT

We have already made a number of references in this chapter to bailment. Bailment is a possessory relationship by which a bailor transfers possession of a chattel to a bailee. It is a consensual

[135] Ibid.
[136] Sections 1(1), 3(3).
[137] Sections 1(1)(b), 2.
[138] Sections 1(2), 2(2).
[139] Section 4(1).
[140] Section 10.
[141] Section 10(6).
[142] Section 10(3)(d).

relationship, except for the fictitious bailment that exists between a true owner and a finder[143] and for the involuntary bailment that arises where someone receives a chattel without having requested it.[144] The bailor need not be the owner of the chattel. Over and above the case of sub-bailment,[145] an auctioneer who receives a picture from a customer with instructions to sell it is a bailee of that customer and not of the true owner.[146]

The bailment may be at will, in which case the bailor has the right to terminate the bailment at any time,[147] or it may be for a fixed or determinable period, in which case the bailee has the right to resist a demand for the early return of the chattel. At the end of the bailment, the bailee must place the chattel at the disposal of the bailor, either to be delivered to the bailor or dealt with according to the bailor's instructions. Whether it is the bailee's duty actively to return the chattel or simply to make it available for the bailor to collect will depend upon the construction of the relationship, in particular, upon the terms of any contract governing the bailment. The bailment may serve one or more of a wide variety of economic and social purposes. If executed pursuant to a contract, the contractual incidents will be added to those that flow out of the proprietary relationship of bailor and bailee. If no contract exists, the rights and duties of the bailor and bailee *inter se* may be defined according to law of torts.[148] There was never such a thing as a form of action in bailment, but in recent times courts, in order to deal with perceived problems posed by the doctrine of privity of contract, have surrendered to the notion of a cause of action in bailment.[149] This is an unnecessary step since contract and tort rules are perfectly adequate to deal with the problems thrown up in bailment cases,[150] though tort rules may have to be adapted at times in their application to

[143] See above. [144] See chapter 3.

[145] Discussed below.

[146] *Marcq v Christie Manson & Woods Ltd* [2003] EWCA Civ 731, [2004] QB 286.

[147] In some cases, the bailee may have a lien over the bailed chattel for charges incurred: see chapter 8.

[148] *Morris v C. W. Martin & Sons Ltd* [1966] 1 QB 716 (CA); but see Palmer, *op. cit.*, para 1–039.

[149] See *The Pioneer Container* [1994] 2 AC 324 (PC); *East West Corpn v DKBS AF 1912 A/S* [2003] EWCA Civ 83 at [24], [2003] QB 1509. See further below.

[150] See McMeel, G., 'The Redundancy of Bailment' [2003] LMCLQ 169.

bailment relationships just as they have to be adapted for other types of particular relationship. In allowing a separate category of bailment to spill out of contract and tort, English courts have acted in a way that is similar to their recognition in recent years of a category of restitution that is larger than is needed to deal with deficiencies in other areas of private law.

BAILMENT AND POSSESSION

If the possession of a chattel is not transferred, there can be no bailment. This is illustrated by the well-known case of *Ashby v Tolhurst*,[151] where the owner of a car left it in a private car park. He paid his parking fee and received a ticket. A thief later appeared and was permitted by the attendant to take away the car, though he had neither the ticket nor the key. Because of a clause on the ticket exempting the car park from liability, the outcome of the case turned upon whether there had been a misdelivery of the car by the car park as bailee. Reversing the trial judge, the Court of Appeal held that the owner of the car had merely availed himself of a permission (or licence) to park his car on the other's land. Possession of the car had not passed to the car park (which had been paid in advance). Whether transactions of this kind can amount to a bailment involves construing the relationship, in deciding which the handing over of keys to an attendant will argue strongly in favour of the transfer of possession of the car.[152]

An arrangement that was held to give rise to a bailment, and not to a mere licence to place a chattel on landed premises, arose in *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd*,[153] which concerned whether, under consumer credit legislation, a so-called 'location agreement' was a bailment by way of hire. The agreement provided for the installation of photocopiers on retail premises. The retailers did not pay for the machines but received payments from customers who used the machines. They

[151] [1937] 2 KB 242 (CA).

[152] See *Mendelssohn v Normand Ltd* [1970] 1 QB 177 (CA); *Chua Chye Leon Alan v De-luxe Nite Club Pte Ltd* [1993] 2 SLR(R) 420 (Singapore).

[153] [2009] UKHL 35, [2009] 1 WLR 1375.

retained commission from the gross payments, and accounted for the residue to the owners of the machines. Although the location agreement in the case was recognized as a bailment, it was not a hire in that the retailers were not paying for the use of the machines.

TYPES OF BAILMENT

The nature of the bailee's liability depends to some extent upon the type of bailment relationship created. Before Lord Holt's masterly summary of bailment law, drawing upon Roman law principles and categories, in *Coggs v Bernard*,[154] the view was that a bailee was absolutely liable for the loss or destruction of the chattel.[155] This position complemented the bailee's entitlement to sue third party wrongdoers and recover the value of the chattel in full.[156] It is unclear whether the bailee was absolutely liable because of this extensive entitlement to sue[157] or whether each rule was predicated upon the other.[158]

In *Coggs v Bernard* itself, the defendant promised to take up the claimant's brandy from one cellar and lay it down carefully in another. One of the casks was staved and a great quantity was spilled. Seeking to prevent judgment being given in the claimant's favour, the defendant made the pleading point that, since he could only be liable if he had been paid to perform the task (which would have been implied if he had been engaged as a common carrier), the claimant ought to have expressly mentioned payment (or the common carrier status of the defendant) in the declaration setting out his grievance. The defendant's attempt to arrest judgment was unsuccessful, the court ruling that the claimant could succeed on the promise without necessarily paying for the service.

The significance of the case lies principally in Lord Holt's attempt to classify various types of bailment and lay down the

[154] (1703) 2 Ld Raym 909.

[155] *Southcote's Case* (1601) Cro Eliz 815.

[156] See chapter 3.

[157] Holmes, *op. cit*., at p 167: '[A]s all the remedies were in the bailee's hands,... he was bound to hold his bailor harmless'.

[158] Pollock and Maitland, *op. cit.,* at p 172: 'The bailee had the action because he was liable and was liable because he had the action'.

principles governing the bailee's liability when handling the subject matter of the bailment. He said there were six types of bailment: first, a deposit of the chattel with the bailee for the bailor's purpose (for example, luggage left for safeguarding); secondly, a gratuitous loan for the bailee's purpose (for example, a book); thirdly, the hire of a chattel to be paid for by the bailee (for example, a carriage); fourthly, a pledge of valuables as security for a loan made by the bailee;[159] fifthly, delivery of a chattel to permit the bailee to perform a service for which the bailor pays (for example, goods to be transported); and sixthly, delivery of a chattel for the purpose of a gratuitous service (as the transaction in *Coggs v Bernard* was for procedural reasons assumed to be).[160]

THE BAILEE'S LIABILITY

This is not the place for dealing with the contractual liability for bailors for the satisfactory quality or fitness for purpose of chattels that they supply under hire or related agreements. There is also no need in a book dealing with property to analyse in great detail the various degrees of duty that, in Lord Holt's view, the different bailees owed to their bailors, though it is useful to look in outline at the matter for the light it throws on the relationship of bailment. Whatever duty is laid down, it may be excluded or varied by any contract between the parties, subject to controls abridging freedom of contract contained in the Unfair Contract Terms Act 1977[161] and the Consumer Rights Act 2014. The levels of duty as classically articulated respond to the following standards of liability: first, liability for slight negligence; secondly, liability for ordinary negligence; thirdly, liability for gross negligence; and fourthly, strict liability (subject to the defence of act of God or the King's enemies).

Liability for slight negligence was seen by Lord Holt as appropriate where the bailee benefited from the bailment (the second and third of his categories of bailment). Liability for ordinary negligence was appropriate for pledge (the fourth category) and

[159] See chapter 8.

[160] In Jones, W., *An Essay on the Law of Bailments*, 1781, five categories of bailment are listed.

[161] For which see the standard contract texts.

liability for gross negligence applied where the bailment benefited the bailor (the first and sixth categories). In the case of *Coggs v Bernard* itself, the bailee's promise to answer to a higher standard of care superseded the lower imposed standard. Strict liability governed in the case of Lord Holt's fifth category (common carriers); it was needed to maintain the honesty of carriers. Furthermore, the public nature of the carrier's employment made his conduct a matter of importance to the whole community.[162]

Although the circumstances of bailment are different from the driving of a car, Lord Holt's attempt to calibrate in refined degrees the obligation to take care has largely fallen foul of the twentieth-century trend to standardize the duty of care in the tort of negligence as one of reasonable care. Consequently, the notions of slight and gross negligence have fallen by the wayside.[163] Strict liability has remained but may be displaced by a contractual exemption clause or by the assumption by a common carrier of the status of private carrier. Furthermore, various statutes exist permitting or prescribing the means by which liability may be excluded or limited in monetary or other terms, some of them pursuant to international conventions.[164]

The liability of a bailee in negligence, however, differs from that of other defendants in the law of tort in at least one major respect. The burden of proof lies upon the bailee to show that any loss or damage occurred despite the fact that reasonable care was taken.[165] This is a pragmatic response to the fact that the bailee, having controlled the chattel, knows its bailment history better than the bailor. Even if the bailee establishes, for example, that the chattel was stolen despite the taking of reasonable care, the bailee will be liable in the event of a failure to take steps to secure its recovery, if unable to show that such steps would have been unavailing in any event.[166] Similarly, a bailee who deviates in the conduct of a bailment, whether by storing a chattel in other than the

[162] *Clarke v West Ham Corporation* [1909] 2 KB 858 (CA).

[163] *Houghland v R. R. Low (Luxury Coaches) Ltd* [1962] 1 QB 694 (CA).

[164] For example, the Carriers Act 1830, Carriage of Goods by Sea Act 1971, Carriage by Air Act 1961: see generally Palmer, *op. cit*.

[165] *Houghland v R. R. Low (Luxury Coaches) Ltd* [1962] 1 QB 694 (CA).

[166] *Coldman v Hill* [1919] 1 KB 443 (CA).

agreed place,[167] or by entrusting it without authority to another,[168] or by carrying it other than by the prescribed route, will be liable for its loss or destruction unless able to prove that this would have occurred even without the deviation. Thus, in *James Morrison & Co v Shaw, Savill, and Albion Co*,[169] a ship carrying a consignment of New Zealand wool was sunk while deviating to Le Havre. The carrier, unable to shift the above burden, was left with the liability of an insurer for the loss that occurred. Furthermore, the carrier lost the protection of a clause in the contract giving protection for loss caused by the actions of the King's enemies.

While the bailee must in general exercise reasonable care, the standard becomes very much stricter if the bailee refuses, or inexcusably fails, to surrender the chattel at the end of the bailment in response to a demand made at that time by the bailor.[170] The bailee's liability now becomes that of an insurer and so the bailee will be liable if the goods are stolen, even if no amount of care would have prevented the theft.

SUB-BAILMENT

Where the bailor consents, the bailee may sub-bail the chattel to another, who now stands as a sub-bailee in relation to the bailor.[171] The relationship between bailor and sub-bailee, who are separated by the bailee, remains unclear, but the notion of a separate liability in bailment, mentioned above, has been brought into play, for instrumental reasons, to circumvent the doctrine of privity of contract in circumstances where the application of the doctrine is perceived to be commercially inconvenient.

It is convenient to start with *Morris v C.W. Martin & Sons Ltd*,[172] where a furrier, to whom a mink stole had been sub-bailed for specialist cleaning by the bailee dry-cleaner, was held to owe a direct duty to the bailor to take reasonable care of the stole and

[167] *Lilley v Doubleday* (1881) 7 QBD 510.

[168] *Edwards v Newland & Co* [1950] 2 KB 534 (CA).

[169] [1916] 2 KB 783 (CA).

[170] *Mitchell v Ealing London Borough Council* [1979] 1 QB 1.

[171] Pollock and Wright, *op. cit.,* p 169.

[172] [1966] 1 QB 716. See also *Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd* [1970] 1 WLR 1262 (PC); Bell, A., 'Sub-Bailment on Terms', in Palmer, N., and McKendrick, E. (eds), *Interests in Goods,* 2nd edn, LLP, 1998.

a duty not to convert it. If the language of the exclusion clause in the contract between bailee and sub-bailee had been apt to give the latter protection from the consequences of its employee's theft of the stole, Lord Denning MR would have been prepared to modify the relationship of bailor and sub-bailee, that would otherwise have arisen, so as to afford the sub-bailee protection in accordance with the language of the clause.[173] The justification for doing so would have lain in the bailor's consent to the receipt of the stole by the sub-bailee on terms that were usual in the trade. By this device, a way existed to impose restrictions on the rights of the bailor against the sub-bailee that otherwise could not have been justified, given the rule of contract law that a third party may not be bound by the terms of a contract, in this case the contract between bailee and sub-bailee, to which he is not privy.

The doctrine of sub-bailment on terms was given a more extensive analysis and also applied on the facts by the Privy Council in *The Pioneer Container,*[174] where the several bailors, owners of cargo, were held to have consented to an exclusive jurisdiction clause in contracts concluded between the bailee carrier and a sub-bailee carrier brought in for one stage of the journey. The decision of the Privy Council reveals a curious doctrine. A bailment relationship is consummated directly between the bailor and the sub-bailee without, it seems, displacing the other bailment relationships (bailor/bailee, bailee/sub-bailee). As against the bailor, the sub-bailee owes the duty of a bailee for reward, even though the sub-bailee is paid by the bailee and not by the bailor. Furthermore, this bailment relationship between bailor and sub-bailee exists even though the latter has not yet 'attorned'[175] to the former. This last conclusion is difficult to reconcile with basic principles of bailment law. A more natural characterization of the relationship between bailor and sub-bailee would have been one of implied contract, since, in consenting to the delegation of the last leg of the journey to a sub-bailee, the bailor could aptly be said to have authorized the bailee to offer the goods for carriage by the sub-bailee on the sub-bailee's terms. That offer could then have been accepted by the sub-bailee in the form of taking charge

[173] [1966] 1 QB 716, 729–30 (CA).
[174] [1994] 2 AC 324 (PC).
[175] See below.

of the goods, which act would also have supplied consideration for the bailor's undertaking to be bound by the exclusive jurisdiction clause. This implied contract route, however, was rejected by the Privy Council for unstated reasons[176] even though the direct bailment relationship between bailor and sub-bailee was consensual: the sub-bailee was entitled to rely upon the terms of the sub-bailment only to the extent that the bailor had expressly or impliedly agreed to them, or had given the bailee actual or apparent authority to agree to them on the bailor's behalf.

The bailment approach in *The Pioneer Container* amounts therefore to implied contract by another name but without the need to embrace unilateral contracts and the doctrine of consideration. Implied contract was not available to Lord Denning MR in *Morris v C.W. Martin & Sons Ltd* since the trial judge found a contract to be lacking and this finding was not challenged on appeal. The contract approach, nevertheless, is far from dead. As Lord Phillips expressed the matter firmly in *Sandeman Coprimar SA v Transitos y Transportes Integrales SL*:

> *The Pioneer Container*…does not exclude the possibility that the law of contract may have a role to play in this area. The principles of the law of bailment have always overlapped with those of the law of contract, for bailment and contract often go hand in hand. Where a bailee has the consent, and thus the authority, of the bailor to enter into a sub-bailment on particular terms and does so, and where those terms purport to govern the relationship not merely between the sub-bailee and the bailee, but between the sub-bailee and the bailor, it seems to us that all the elements of a collateral contract binding the sub-bailee and the bailor will be present, for there will be privity, via the agency of the bailee, and no difficulty in identifying consideration, at least if the terms are capable of resulting in benefit to each of the parties.[177]

[176] [1994] 2 AC 324, 339 (PC). In support of this approach, see Mance LJ said in *East West Corpn v DKBS AF 1912 A/S* [2003] EWCA Civ 83 at [24], [2003] QB 1509: '[I]t is now well established that the existence of claims in bailment does not depend on contract. What is fundamental is not contract, but the *bailee's* consent. The duties of a bailee arise out of the voluntary assumption of possession of another's goods…'.

[177] *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113 at [63], [2003] QB 270, relying on *New Zealand Shipping Co Ltd v A. M. Satterthwaite & Co Ltd* [1975] AC 154 (PC).

The adoption of an independent doctrine of bailment on terms does not add anything useful to the armoury of the common law in dealing with the complex issues presented by bailment and sub-bailment.

LOANS FOR CONSUMPTION

If you place money in a bank, whether in a current, savings, or deposit account, the relationship between you and the bank is that of creditor and debtor.[178] It is not a case of bailment at all. The bank is under no obligation to deliver to you the original coinage or bank notes left with it. Rather, it owes you a personal obligation to repay the debt in accordance with the terms of its contract with you. Consequently, if you authorize your bank to debit your account and credit someone else's account in another bank, no money is transferred between the two banks.[179] The first bank's indebtedness to the payer is reduced by the amount transferred, and the second bank's indebtedness to the payee commensurately increased.

Certain agreements involve the storage of fungible chattels, such as wheat or other types of grain, and permit the chattels to be mixed with the indistinguishable chattels of others in a common stock. It may be that the depositor ends up selling the chattels in question to the storage company or it may be that it is contemplated that the same quantity as that deposited will later be returned. In the latter of these eventualities, it is important for various reasons to know whether the transaction amounts to a loan of fungible goods, like the agreement with the bank in the sense that the original chattels deposited need not be returned, or whether it is a genuine bailment. If it is merely a loan to be repaid by the delivery of equivalent chattels, the insolvency of the storage company, for example, would leave the depositor in the position of an unsecured creditor having to prove for the amount owed when the insolvent's estate is wound up.[180] If the transaction is one of bailment, however, the depositor has a real,

[178] *Foley v Hill* (1848) 2 HLC 28.
[179] *R v Preddy* [1996] AC 815 (HL).
[180] Insolvency Act 1986, s 322.

proprietary right which can be maintained in full against the liquidator of the storage company (providing the grain or whatever it is has not altogether disappeared). Until the decision of the House of Lords in *Mercer v Craven Grain Storage Ltd*,[181] it could have been said that the above transaction was not a bailment, the reason being that bailment requires the return of the original chattel as opposed to an equivalent quantity of an otherwise identical chattel.[182] In *Mercer*, however, the House of Lords by a bare majority on a summary judgment appeal found a bailment in the deposit of grain on terms calling, not for the return of the very same grain, but of an equivalent quantity. The various depositors were tenants in common of all of the grain so deposited and mixed. No mention was made of any of the relevant authorities and the issue of principle was not discussed. It may not be safe to rely upon this decision, but it is consonant with the recent resurgence of the notion of tenancy in common.[183] Furthermore, the decision of the court on this point, though casually reached, was trenchantly expressed.

In *Crawford v Kingston*,[184] a Canadian court refused to recognize as a bailment the delivery of cattle on terms calling for the return of the survivors together with their young at the end of a stated period. As the law stood before *Mercer,* the arguments were quite delicately poised. On the one hand, it may be that none of the original cattle will survive and it cannot be known in advance which ones will survive. On the other hand, it is perfectly possible for there to be a bailment if, during its course, the chattel perishes for whatever reason. In the light of *Mercer,* this would be more clearly seen as a bailment.

A bailment may exist even if it is contemplated that changes will be made to the chattel during the bailment, such as the repair or modification of a car. One Canadian case appears to take this point too far in holding that the delivery of seed to a

[181] [1994] CLC 328; Smith, L. (1995) 111 LQR 10.

[182] *South Australia Insurance Co v Randell* (1869) LR 3 PC 101; *Chapman Bros v Verco Bros & Co* (1933) 49 CLR 306.

[183] See chapter 5.

[184] [1952] OR 714 (Ontario); *cf. Harding v Commissioner of Inland Revenue* [1977] 1 NZLR 337.

farmer, with an obligation on him to return the mature produce represented by the seed, was a bailment.[185] Where some of the necessary materials were provided by the Crown to an arms manufacturer in order to permit the latter to make them up, with additional materials, into rifles, which were then to be supplied to the Crown at an agreed price, the House of Lords held that the manufacturer had sold the rifles to the Crown.[186] It could not be said that the Crown had bailed the materials that it provided to the manufacturer. Bailment ought not to be the conclusion where the parties contemplate a change in the basic nature of the chattel supplied.

Similar questions to those above arise in the case of intangible property, particularly dematerialized securities. It is common in the financial markets for such fungible, unnumbered securities to be transferred on terms providing that their exact equivalents be later retransferred even though the originals cannot as such be identified and therefore returned.[187] If the transfer is a loan to accommodate the transferor, this transaction is known as a 'repo'. The transferor does not pay interest as such on the price received from the transferee but, in buying back the fungible equivalents of the original securities at an enhanced price, is paying the equivalent of interest in the form of the difference between sale and resale price. If the transfer is designed to accommodate the needs of the transferee, who may for example need the securities to close out a short position, the transaction is known as a stock lending agreement. In neither case has there been any judicial exposure to the question whether the transferor has an interest by way of a tenancy in common in respect of equivalent securities held by the transferee in the period between the execution of the transfer and of the retransfer. The question could only credibly be posed if the transferee in fact held such securities in that period, which might very well not be the case.[188] Even then, for the question to be answered in the affirmative, there would

[185] *Stewart v Sculthorp* (1894) 25 OR 544.

[186] *Dixon v London Small Arms Co* (1876) 1 App Cas 632 (HL).

[187] See *Pearson v Lehman Bros Finance SA* [2010] EWHC 2914 (Ch) at [78]–[82].

[188] The transferee may redeliver equivalent securities 'from its own holdings or in the open market': *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Ltd* [2008] FCA 594 at [56].

need to be an appropriation to the contract by the transferee of an identifiable fund of equivalent securities; the mere holding of such a fund would not be enough.[189] There is every reason to believe that these dealings in dematerialized securities are not conducted on that basis.

HIRE PURCHASE AND RELATED BAILMENTS

On the face of it, it seems odd to classify as a bailment a transaction contemplating that the bailee will never return the chattel to the bailor and will indeed enjoy it beneficially for the rest of its useful life. This is precisely the case with the contract of hire purchase which is regarded as a bailment until the hirer exercises a future and contingent option to purchase the subject matter of the contract.

A common type of hire purchase takes the form of a bailment of a chattel (a car, for example) by a finance company to a hirer after the finance company has purchased the car from a car dealer. Preliminary discussions will take place between the hirer and the car dealer, the latter forwarding the hirer's request for finance to the finance company, which will accept or reject it according to the degree of risk involved. The hirer will pay a deposit, taking the form of cash or a trade-in vehicle, which will be retained by the dealer and deducted from the purchase price of the car to be received by the dealer from the finance company. The finance company is unlikely to see the car before the hirer takes possession and fervently hopes that it will not physically have to deal with the car in the untoward event of a serious default by the hirer. If the hirer duly makes payment of the monthly instalments for, say, the agreed term of 24 months, the hirer may exercise an option to purchase the car for (normal) a nominal consideration. Consequently, once consummated, the dealings between hirer and finance company consist of a bailment for the agreed period followed by a sale.

[189] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC); *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Ltd* [2008] FCA 594 at [57].

Thus stated, hire purchase is a legal fiction sanctioned as such by the highest courts and the legislature. The economic purpose of the transaction is to permit the acquisition of a chattel for consumption by a buyer who cannot yet (or does not want to) pay the price. The finance company's purpose in structuring its relations through the medium of bailment is twofold. First, it wishes to avoid the conclusion that it is taking a non-possessory security interest in the chattel by way of a mortgage,[190] for this would involve compliance with intricate and tiresome bills of sale legislation.[191] If successful, it would also succeed in demonstrating that it was not in the business of lending money. The House of Lords in *McEntire v Crossley Bros*[192] gave the finance company its full backing on this issue.[193] Secondly, the finance company, at the time hire purchase in its modern form was devised, wished to avoid the conclusion that the hirer was really someone who had agreed to buy the goods, because otherwise (as the law then stood) the finance company's retained ownership rights would be at risk if the hirer disposed of the chattel to a *bona fide* purchaser for value without notice.[194] This conclusion could be avoided by treating the hirer as someone who at no time ever promised to buy the chattel. The hirer in a hire-purchase agreement never agrees to buy, but rather agrees to hire and unilaterally decides to buy at the end of the hire-purchase term when it makes overwhelming economic sense to exercise the purchase option. The House of Lords gave the finance company its full backing on this issue too in *Helby v Matthews*.[195]

For reasons connected with the relative power of hirers and owners to transfer to purchasers a title that overrides the owner's property rights,[196] it may be in the interest of owners to draft a contract that is in the form of a hire-purchase agreement but nevertheless maximizes the instalment payment obligations of the 'hirer' in a way that is consistent with conditional sale. This

[190] See chapter 8. [191] See chapter 8, [192] [1895] AC 457 (HL).

[193] The agreement in that case was in fact a conditional sale under which the finance company undertook to return any surplus on resale to the buyer, but the position would have been the same if it had been a hire-purchase agreement.

[194] See chapter 6.

[195] [1895] AC 471 (HL); see also *Lee v Butler* [1893] 2 QB 318 (CA).

[196] See chapter 6.

occurred in *Forthright Finance Ltd v Carlyle Finance Ltd*[197] where the agreement required the 'hirer' to pay all of the instalments making up the price of a car, whereupon it would be deemed to have exercised the hirer's purchase option 'unless the hirer has told the owner before that time that such is not the case'. This was dismissed as a 'specious' attempt to dress up conditional sale as hire-purchase.

In other respects, however, the courts have not assiduously respected the form of hire-purchase contracts as bailments. One example concerns the liability in tort of a third party who converts the chattel[198] where the courts are prepared to look through the transaction and recognize that the finance company's only real interest in the chattel is measured by the (diminishing) amount of the unpaid instalments.[199] Although in this, and in certain other respects, finance companies have not succeeded in persuading courts to accept fully the bailment characterization of their dealings, hire purchase has successfully withstood the test of time in furthering their interests. An offshoot of it, which may have tax advantages for the hirer, is the simple finance lease by which, without obtaining an option to purchase, the hirer simply agrees to hire the chattel over a lengthy period, commonly the economic life of the chattel. The finance company's interest in, for example, a worn-out office computer system or photocopier at the end of the lease may be so small as to make it not worth its while to collect the photocopier. Commonly, sale terms are agreed on an ad hoc basis between finance company and hirer at a discounted price at the end of the finance lease.

Another example of what might be termed a wasting bailment, where it is contemplated that the chattel will never be returned to the bailor, more particularly that there will not be a chattel at the end of the bailment term, is afforded by the House of Lords decision in *The Span Terza (No. 2)*.[200] The time charterers of a ship, the possession of which at all material times remained with the shipowners, had the usual right to direct the ship to various ports for the purpose of loading and unloading cargoes. Under the charter party agreement, it was the charterers' obligation to

[197] [1997] 4 All ER 90. [198] See chapter 3.
[199] *Wickham Holdings Ltd v Brooke House Motors Ltd* [1967] 1 WLR 295 (CA).
[200] [1984] 1 WLR 27 (HL).

supply the bunker fuels needed to operate the ship. When the ship was arrested and thus immobilized by one of the shipowners' creditors, the charterers put an end to the time charterparty. They then sought a declaration that they were the owners of valuable bunker fuels still on board and were successful. The possession of the bunker fuels had been transferred by the charterers to the shipowners who, as bailees, had a contractual duty to see to it that the fuels were used by the ship's master in responding to the voyage directions given by the charterers from time to time. It was not a case where the ownership of the fuels had been transferred outright to the shipowners.

Bailment akin to sale emerges in another way too. A chattel may be sent on approval (for personal consumption) or on sale or return (for resale purposes) to a potential buyer who need not yet buy but, in the meantime, holds the chattel as a bailee. Needless to say, the potential buyer pays no hire during the course of the bailment. The Sale of Goods Act 1979[201] contains rules that assist in determining when the bailment has been superseded by a sale between the two parties.

TRANSFERRING POSSESSION

DELIVERY

The transfer of possession by manual means is effected by delivery. Whilst delivery is not confined to the performance of sale of goods agreements, it achieves there its most characteristic and comprehensive definition. Sale can therefore serve as the medium through which we explore delivery, though the consequences of delivery within the contract of sale need not detain us. The transfer of possession by constructive means will also be discussed in this section.

According to section 61(1) of the Sale of Goods Act 1979, '"delivery" means voluntary transfer of possession from one person to another…'. The seller will therefore deliver to the buyer when effective control over the chattel is surrendered in favour of the buyer, who simultaneously demonstrates an intention to

[201] Section 18 *Rule 4*; another example is the buyer holding on reservation of title terms: see chapter 5.

assume effective control. Delivery is therefore a bilateral matter; it would not occur if the seller tendered the chattel to the buyer who refused to assume control over it. In certain cases, it will be a question of some difficulty to determine whether the seller has permitted the buyer such liberties with a chattel as to surrender possession thereto.[202] Notwithstanding the above, delivery will be deemed to have occurred if the seller and buyer agree as from a certain time that the seller shall thereafter retain the chattel in the capacity of bailee.[203] In such a case, possession and delivery go their separate ways since the seller's possession is unbroken although the capacity in which the seller is in possession does change.

CONSTRUCTIVE DELIVERY

Delivery may occur where the effective means of securing the chattel is transferred rather than the chattel itself. In *Wrightson v McArthur and Hutchinsons (1919) Ltd*,[204] the keys to various rooms in the defendants' premises were transferred to the claimant, who was not given a key to the outer door, which was kept locked outside business hours. A true delivery was held to have occurred since the claimant, by means of an irrevocable licence to enter the premises, had effective control of the contents of the locked rooms. The court was at pains to say that the delivery was not merely 'symbolic'[205] and could not adequately be described as 'constructive'. A more accurate example of symbolic delivery would occur if the seller handed over a portion of the contract goods with the accompanying intention, shared by the buyer, that this would be representative of the whole.[206]

A clear case of constructive delivery occurs where chattels are transferred to an agent of the buyer who holds them on account of the buyer. If the agent were an employee it would be more

[202] *Cooper v Bill* (1865) 3 H & C 722: possession lost because buyer allowed to treat, measure and stamp timber.

[203] *Dublin City Distillery v Doherty* [1914] AC 823 (HL).

[204] [1921] 2 KB 807.

[205] But see *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53 (PC).

[206] See *Kemp v Falk* (1882) 7 App Cas 573, 586 (HL).

accurate to call this a true delivery since the employee only has custody of the employer's chattels. The agent, however, might be an independent operator such as a carrier who, under the Sale of Goods Act 1979, is *prima facie* the agent for the buyer.[207] Delivery to the carrier is therefore delivery to the buyer, even though the carrier holds the chattel under the terms of a carriage bailment.[208]

Another type of constructive delivery occurs where, at the time of the contract of sale, the goods are held by a third party, such as a wharfinger or warehouseman, under the terms of a bailment with the seller. It may be that the buyer will collect the chattel, in which case a delivery occurs at that time. But it may be that the buyer is content to allow the third party to retain possession but to hold the chattel thereafter on the buyer's account. In the latter case, it will be necessary for a new bailment between the buyer and the third party to be substituted for the old one between the seller and the third party. This is accomplished not merely by the seller instructing the third party to hold the chattel for the buyer; the third party must 'acknowledge to the buyer that he holds the goods on his behalf'.[209] This process is known as an attornment. A warehouseman who merely entered details of the sale in his books without more ado could not therefore be said to have attorned to the buyer so as to incur the responsibilities as bailee to the buyer.[210]

Attornment and constructive delivery present themselves in another common commercial case where an owner of goods sells them to a financier and then takes a leaseback of the goods which in the meantime never leave his possession. The seller's acknowledgment that he holds the goods on account of the buyer amounts to a delivery, so that thereafter he retains the goods as bailee.[211]

[207] See s 32(1); *Wait v Baker* (1848) 2 Ex 1.

[208] As true as this may be for commercial sales, in consumer sales the Consumer Rights Act 2014, s 28(2), suggests that delivery takes place only when the buyer receives the goods from the carrier.

[209] Sale of Goods Act 1979, s 29(4).

[210] *Laurie and Morewood v Dudin and Sons* [1926] 1 KB 223 (CA).

[211] *Michael Gerson (Leasing) Ltd v Wilkinson* [2001] QB 514 (CA).

DELIVERY DOCUMENTS

Suppose that the seller delivers to the buyer a document, concerning a chattel held by a third party, whose purpose is to effectuate a later physical delivery of the chattel to the buyer. May this document be described as a documentary intangible so that its delivery to the buyer is tantamount to delivery of the chattel itself?

The short answer is that it depends upon whether the document is a document of title as that expression is understood at common law. To discover what this means, it is convenient to begin by defining the types of document used in commercial practice. For our purposes (though note that the terminology in the cases is not always consistent), we may distinguish between a delivery order and a delivery warrant. A delivery order is a command issued by the seller to the warehouseman that the chattel be given up to the buyer. A warehouseman failing to respond to that order may well be in breach of an obligation owed to the seller under the warehousing contract, but he owes no delivery duty to the buyer unless and until an attornment to the buyer occurs. It follows that a seller has not delivered under the contract of sale before the warehouseman attorns, whether the delivery order is given to the buyer[212] or to the warehouseman.[213]

A delivery warrant, on the other hand, is a document generated by the warehouseman (or other bailee) and not by the seller. It records an undertaking[214] by the warehouseman to deliver to the seller 'or order'. By virtue of the latter words, the seller may indorse and deliver (that is, negotiate) the warrant to the buyer, who may do likewise for a sub-buyer and so on. Although it might have made perfect sense to regard the warehouseman's undertaking in the warrant to deliver to order as an advance attornment, the position is well established that a constructive delivery does not occur when the warrant is negotiated to the buyer.[215] An attornment remains necessary.

Certain documents containing a bailee's undertaking, however, may work a constructive delivery upon their negotiation.

[212] *Lackington v Atherton* (1844) 7 Man & Gr 360.

[213] *M'Ewan v Smith* (1849) 2 HLC 309.

[214] *Gunn v Bolckow, Vaughan & Co* (1875) LR 10 Ch App 451.

[215] *Farina v Home* (1846) 16 M & W 119; *The Future Express* [1993] 2 Lloyd's Rep 542 (CA).

By virtue of the law merchant, bills of lading attesting to the shipment of goods on board a vessel have long been accepted as negotiable documents of title in that the carrier's delivery obligation is transferred to the holder of the bill when it is duly negotiated.[216] Left to its own devices, the common law would have been content to treat bills of lading in the same way as it treats delivery warrants in general, namely, as 'merely tokens of an authority to receive possession'.[217] A carrier who delivers to someone other than the holder of the bill of lading commits the tort of conversion.[218] Nevertheless, delays in the transmission by post of bills of lading mean that carriers often surrender the cargo to a consignee buyer, not yet in receipt of the bill of lading, against the posting of a suitable indemnity against such liability by the seller or buyer. The Carriage of Goods by Sea Act 1992 has extended the range of claimants entitled to bring suit against a carrier for breach of the contract of carriage, but it has not effected changes to the nature of a document of title as discussed above.

There is some controversy about what constitutes a bill of lading for present purposes, but the better view is that it is a document issued by a carrier attesting to the fact that the cargo has actually been shipped on board and not merely received for shipment.[219] Only where it is confidently known that the cargo is on board, locked in the 'floating warehouse',[220] may transactions be effected through the documentary intangible ('the key') that represents the cargo.

Certain special statutes extend to particular documents the above attributes of a negotiable bill of lading.[221] In addition, documents that fall short of being negotiable may yet constitute 'tokens of an authority to receive possession' so that dealings in them with *bona fide* purchasers, even if not authorized by the owners of the chattels they represent, have proprietary consequences in favour of those purchasers.[222]

[216] *Lickbarrow v Mason* (1787) 2 TR 63, (1790) 1 H Bl 357.

[217] *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53 (PC).

[218] *The Jag Shakti* [1986] AC 337 (PC).

[219] *Diamond Alkali Export Corpn v Fl Bourgeois* [1923] 3 KB 443; *cf. The Marlborough Hill* [1921] 2 AC 444 (PC).

[220] *Sanders Bros v Maclean & Co* (1883) 11 QBD 327 (CA).

[221] For example, the Port of London Act 1968, s 146(4) (dock warrants).

[222] See chapter 6.

3

THE PROTECTION OF PROPERTY INTERESTS IN CHATTELS

INTRODUCTION

This chapter deals with the protection of legal, not equitable, property interests in chattels.[1] The common law's treatment of this subject differs from that of civil law systems in at least two respects. First,[2] the common law has no notion of ownership in the sense of absolute title. As we shall see, however, certain statutory changes go some way towards defining such an absolute title.[3] Secondly, in consequence of this, the primary remedy at common law for the protection of property interests is not the compulsory return of the property to the claimant but rather damages. Hence the protection of property interests is a category of the law of torts (the so-called property torts) rather than of the law of property. The regrettable tendency in recent years is to drop the property torts from tort syllabuses, as much for their failure to fit in comfortably there as for the tendency of an expanding tort of negligence to crowd them out.

Historically, the most important torts were trespass *de bonis asportatis*, detinue, and conversion. But for the accidents of history and the ingenuity of generations of pleaders, each tort might have occupied its separate share of the field, with trespass concerning itself with unlawful taking, detinue with unlawful detention, and conversion with unlawful disposal. However, trespass grants protection in cases going beyond taking (or asportation) and conversion has also swallowed up unlawful taking.

[1] As symmetrical as it might appear to put equitable protection alongside common law protection in the same chapter, the division between chattels and intangible personalty, together with the greater concern of equity with the latter when it comes to protection, makes this impracticable. Equitable protection taking the form of *in rem* remedies asserted through the tracing process, and personal remedies for dishonest assistance and knowing receipt, are for pragmatic reasons dealt with in chapter 4.

[2] See chapter 2. [3] See below.

Moreover, conversion, easily the most important of these torts, had already assimilated certain instances of unlawful detention before the Torts (Interference with Goods) Act 1977 (hereinafter the 1977 Act) abolished detinue.[4] It is unclear how much of detinue was added to conversion at this time. That Act, besides abolishing detinue, was concerned largely with rationalizing the various remedies associated with the property torts. It did not amount to a codification of the law and did not, despite its title and section 1, which defines a 'wrongful interference with goods', create a new tort of that name. Taken together, the protection afforded by the property torts is so extensive that claimants have little to gain by seeking protection under the European Convention on Human Rights in a case where the deprivation of possessions is not sanctioned by the State.[5]

Trespass is the fountainhead of the law of tort so our treatment of the subject will begin with it, though it is dwarfed by conversion in terms of practical significance.

TRESPASS TO CHATTELS

TYPES OF BEHAVIOUR

Like other forms of trespass, trespass to chattels requires there to be a direct link between the behaviour of the defendant and the chattel: the name of its related tort against the person, trespass *vi et armis*, illustrates graphically the forceful and direct character of the tort. The distinction between direct and indirect is commonly brought out by standard examples of the kind that distinguish between laying down poisoned meat for the claimant's dog to find (indirect) and feeding the meat to the claimant's dog (direct). It would be a trespass if I immobilized your car by removing the rotor arm from the engine but not if I surrounded your car with other items to make it impossible for you to drive it away.

[4] Section 2(1): 'Detinue is abolished'.

[5] See Article 1 of the First Protocol (protection of property) and *Checkprice (UK) Ltd v Commissioners for Her Majesty's Revenue and Customs* [2010] EWHC 682 (Admin) at [18].

As the name trespass *de bonis asportatis* indicates, the tort was originally concerned with interference that involved carrying off the chattel. It was therefore committed when the sister-in-law of the deceased removed jewellery without authority from one room to another;[6] and when tyres were removed from a car in *GWK Ltd v Dunlop Rubber Co Ltd*;[7] it would also be committed if a horse were to be led from one field to another.[8] Trespass subsequently expanded to catch other forms of interference like the infliction of damage, for example, the scratching of a coach panel,[9] and the shooting of the claimant's pigeons.[10] As Latham CJ put it in *Penfolds Wines Pty Ltd v Elliott*:

> Unauthorized use of goods is a trespass; unauthorized acts of riding a horse, driving a motor car, using a bottle, are all equally trespasses, even though the horse may be returned unharmed or the motor car unwrecked or the bottle unbroken. The normal use of a bottle is as a container, and the use of it for this purpose is a trespass if…it is not authorized….[11]

Trespass is therefore committed when, without authorization, a car is clamped[12] and documents are handled.[13]

Despite some authority to the contrary,[14] the better view is that trespass is actionable *per se* and without proof of special damage.[15] In the absence of a proprietary remedy that serves a declaratory function in the settling of disputes between competing claimants, this function can only be performed by the tort of trespass. Despite concerns about whether trespass should lie in cases of trivial contact,[16] there is consequently a practical need for trespass to lie, even in the absence of estimable damage. No

[6] *Kirk v Gregory* (1876) 1 Ex D 55.

[7] (1926) 42 TLR 593. See also *White v Withers LLP* [2009] EWCA Civ 1122, [2010] 1 FLR 859 (removal of documents).

[8] *Fouldes v Willoughby* (1841) 8 M & W 540, 551. [9] Ibid, 549.

[10] *Hamps v Darby* [1948] 2 KB 311.

[11] (1946) 74 CLR 204, 214–15.

[12] *Vine v Waltham Forest LBC* [2000] 1 WLR 2383 (CA).

[13] *White v Withers LLP* [2009] EWCA Civ 1122 at [61], [2010] 1 FLR 859; *Tchenguiz v Imerman* [2010] EWCA Civ 908, [2011] Fam 116.

[14] See *Everitt v Martin* [1953] NZLR 29.

[15] See *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204, 215–16; *William Leitch and Co v Leydon* [1931] AC 90, 106 (HL(Sc)) (citing the 13th edition of *Pollock on Torts*, p 364); *Letang v Cooper* [1965] 1 QB 232, 245 (CA) (trespass to the person).

[16] *White v Withers LLP* [2009] EWCA Civ 1122 at [61], [2010] 1 FLR 859.

good reason exists for treating trespass to chattels differently from trespass to land, which is actionable *per se* and thus able to perform this function of resolving title.[17] Similarly, trespass would be a useful expedient for dealing with irritating antisocial behaviour like the touching of museum exhibits. Actionability *per se* would assist trespass to perform a role in the protection of civil liberties. If the mere handling of another's papers is trespass,[18] then public officials will more readily be called upon to discharge the burden of establishing any available statutory defence of reasonable cause.

Moreover, to return to the example quoted earlier of the horse returned unharmed, such chattels possess earning power for the owner. A borrower would normally be expected to pay hire, so the actionability of trespass *per se* would make it easier to justify the award of damages calculated on this basis.[19] A long line of cases justifies the award of damages against a trespassing defendant measured according to the benefit accruing to the defendant rather than any loss incurred by the plaintiff.[20] Lord Halsbury pointed out in *The Mediana*[21] that it did not avail a wrongdoer depriving the plaintiff of the use of a chair that the plaintiff did not usually sit on it or that there were other chairs in the room.[22]

THE MENTAL ELEMENT

Trespass requires there to be at least a wilful act on the part of the defendant; an involuntary act will not suffice. For that reason, a trespass is not committed by the owner of a mare when it bites the claimant's horse, though the result would probably be otherwise if the defendant trained his dog to remove golf balls.[23]

[17] *Entick v Carrington* (1765) 2 Wils KB 275.

[18] See *Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952, 1011 (HL).

[19] See the example of the unauthorized borrowing of the livery horse in *Watson, Laidlaw & Co v Pott, Cassels & Williamson* 1914 SC (HL) 18, 31.

[20] Eg *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538 (CA); *Strand Electric and Engineering Co v Brisford Enterainments* [1952] 2 QB 246 (CA).

[21] [1900] AC 113, 117 (HL).

[22] *Cf. Stoke on Trent City Council v W&J Wass Ltd (No.1)* [1988] 1 WLR 1406 (CA) (nominal damages).

[23] *Manton v Brocklebank* [1923] 2 KB 212, 229 (CA).

Nor is trespass committed if the defendant is pushed against the claimant's chattel.

Apart from the need for a wilful act, does the defendant have to intend to make contact with the claimant's chattel? Or is it sufficient if the defendant is negligent? Or is a wilful act sufficient without proof of either intention or negligence? Let us take first the question of whether liability is so strict that the tort can be committed even in the absence of an intention to make contact or of negligent contact. In *National Coal Board v Evans*,[24] the defendants were not liable in trespass for damaging the claimant's power cable. When digging a trench on land belonging to a third party, they had no idea at all that there was a buried cable. Though the act of digging was a voluntary one, they could not be said to have made intentional contact with the cable. Furthermore, they were not negligent, for the claimant had trespassed upon the land and buried the cable without the knowledge and consent of the third party occupier. The case demonstrates that the defendant may escape liability by establishing the defence of inevitable accident. Later developments in the area of trespass to the person,[25] if brought over as they should be into the law relating to chattels, would go further and put the burden on the claimant to show that the defendant intended to make contact with the chattel. The tort of negligence, actionable only upon proof of damage, would be the appropriate form of recourse for damage inflicted unintentionally. The burden of proof of establishing negligence would of course fall upon the claimant. Trespass, given also its actionability *per se*, would be well placed to play a title protection role.

Once an intentional act has been shown, it is no defence, to amplify earlier examples, for the defendant in *Kirk v Gregory* to show that she moved the jewellery to what she thought was a safe place because of the revelry taking place in the house of the deceased, or for the man leading the animal (Rolfe B's example in *Fouldes v Willoughby*) to explain his mistaken belief that the animal had strayed. Motive and mistake do not assist the defendant. Again, where a finance company repossesses a car in

[24] [1951] 2 KB 861 (CA).

[25] See *Fowler v Lanning* [1959] 1 QB 426; *Letang v Cooper* [1965] 1 QB 232 (CA).

the mistaken belief that the car belongs to it, and then returns it to another finance company which it discovers to be the true owner, it will have no defence to a trespass action brought by the person from whom the car was seized.[26] It would have been different if the defendant had seized the car in the capacity of agent for the true owner, for then the act of the defendant would have been the act of the owner.

The quality of the defendant's behaviour, if not relevant to the issue of liability, might yet be taken into account in the assessment of damages at the discretionary margins of the tort. A tort that is actionable *per se* will always yield at least nominal damages. The well-meaning defendant in *Kirk v Gregory* was thus required to pay only nominal damages: it is anyway hard to see that her behaviour caused the later loss or theft of the jewellery. But, possibly because of its arbitrary action, the defendant in *Wilson v Lombank* was required to pay for the full value of the car, notwithstanding that the claimant's possessory interest in it was worth very little once the true owner was informed of its whereabouts. This comes close to an award of punitive damages which the court was at pains to say it was not awarding.[27] It is likely that section 8(1) of the Torts (Interference with Goods) Act 1977 would now operate so as to allow the defendant finance company to raise against the claimant the superior title of the true owner. This should serve to reduce the damages recoverable, without as such acquitting the defendant of liability.

WHO MAY SUE IN TRESPASS?

The rule is well established that only claimants in possession of the chattel at the time of the interference may sue,[28] but possession is defined in such a way as to blur the line between possession and the right to immediate possession.[29]

[26] *Wilson v Lombank Ltd* [1963] 1 WLR 1294. [27] Ibid, 1298.

[28] But see the tentative statement that solicitors, receiving confidential papers from someone committing trespass in removing them, independently committed the tort: *White v Withers LLP* [2009] EWCA Civ 1122 at [49], [2010] 1 FLR 859.

[29] The right to immediate possession is discussed below when standing to sue in conversion is considered.

In *Penfolds Wines Pty Ltd v Elliott*,[30] the Australian High Court[31] in an extensive review of the law concluded forcefully that actual possession, not a right to immediate possession, was needed for a trespass action. Otherwise, there would have been no need for a separate action in conversion. Trespass is a tort of forcible and direct interference and it is not easy to see how it can be committed to someone's right to immediate possession as opposed to someone's actual possession.

On the other hand, in *Wilson v Lombank*, a car had been left with a garage for repair when it was repossessed by the defendant finance company and returned to a third party, the true owner. The defendant contended that the claimant did not have actual or constructive possession of the car at the time of the repossession since it was in the hands of the garage, nor did he have a right to immediate possession, since the garage would have been able to exercise a repairer's lien for its charges. The defendant appears to have conceded that a right to immediate possession would suffice to sue in trespass but argued unsuccessfully that that right was lost when the defendant returned the car to the true owner. Moreover, the defendant was unsuccessful with its argument that the garage had a possessory lien for the repair charges: the lien had been given up in return for a monthly settlement of accounts between the claimant and the garage. In reaching the seemingly contradictory conclusion that the claimant had both the right to immediate possession as well as possession itself, the court was spared the task of determining whether a right to immediate possession alone would be sufficient to sue in trespass.

Much of the difficulty in this area stems from the tendency to assume that the right to immediate possession is tantamount to possession itself and indeed a constructive form thereof.[32] If English courts continue to take that fictitious view, which it is submitted they should not, then a right to immediate possession

[30] (1946) 74 CLR 204.

[31] Relying on Pollock, F. and Wright, R, *An Essay on Possession in the Common Law*, Clarendon, 1888.

[32] *See United States of America v Dollfus Mieg et Cie SA* [1952] AC 582, 611 (HL), *per* Lord Porter ('[T]he better opinion is, I think, that where the bailor can at the moment demand the return of the object bailed, he still has possession'); *Wilson v Lombank Ltd* [1963] 1 WLR 1294; *Lotan v Cross* (1810) 2 Camp 464.

masquerading as possession will support a trespass action. But it is hard to see that a bailor at will is in possession when the bailee and the goods might be many miles away. It is also not easy to see how a bailor and bailee at will can both possess a chattel for the purpose of suit, as apparently they can.[33]

There are others apart from bailees at will whose constructive possession is recognized for the purpose of suit; for example, executors and administrators of estates for torts committed before letters of probate are granted, trustees where the beneficiary holds goods under the terms of the trust,[34] and the owners of franchises in wrecks.[35]

LIABILITY IN CONVERSION

DEVELOPMENT

The tort of conversion was developed from the writ of trover, itself a late fifteenth-century offshoot of the writ of trespass on the case. As initially formulated, trover contained the following four averments by the claimant; first, that the claimant was possessed of a chattel; secondly, that the claimant casually (*casualiter et per infortunatem*) lost it; thirdly, that the defendant found it (hence trover); and fourthly, that the defendant converted the chattel to his own use. The second and third requirements were fictitious and non-traversable by the defendant; eventually they were dropped.[36] Over time, the right to sue was extended beyond those who were in actual possession at the time of the conversion. It came to include those with a right to immediate possession, a category including bailors at will and unlawfully dispossessed owners following chattels down a chain of transactions involving their successive transfers. Conversion expanded to embrace certain examples (not all) of unlawful asportation as well as certain examples (again not all) of unlawful detention. The 1977 Act enacted some of the recommendations of the Law Reform Committee,[37] but not

[33] See below. [34] *Barker v Furlong* [1891] 2 Ch 172.

[35] *Bailiffs of Dunwich v Sterry* (1831) 1 B & Ad 831.

[36] Common Law Procedure Act 1852, s 49.

[37] 18th Report on Conversion and Detinue 1971, Cmnd. 4774, hereinafter LRC 18th Report.

the recommendation that trespass, detinue, and conversion all be superseded by a new tort of unlawful interference with goods (or chattels). Instead, the 1977 Act retained conversion, adding to it elements of the abolished tort of detinue and making a number of changes, mainly of a remedial nature.

DEFINITION AND INTENTION

Perhaps the best definition of conversion is given by Atkin J in *Lancashire and Yorkshire Railway Co v MacNicoll*:[38]

> It appears to me plain that dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right.

Baron Bramwell once conceded that no true definition of the tort was possible.[39] Lord Nicholls, asserting that 'a precise definition of universal application is well nigh impossible', laid emphasis upon conduct that had the three properties of being deliberate, inconsistent with the rights of the true owner, and 'so extensive an encroachment on the rights of the owner as to exclude him from use and possession of goods'.[40] Nevertheless, as Prosser once remarked,[41] as difficult as it is to define the tort, judicial decisions on the subject have attained a high degree of consistency. Consequently, the best way to understand the tort is to follow in the steps of the numerous textbook writers and consider various examples of the ways in which it can be committed.[42] There is, of course, no definitive list of examples.

[38] (1918) 88 LJKB 601, approved by Scrutton LJ in *Oakley v Lyster* [1931] 1 KB 148 (CA).

[39] *Burroughes v Bayne* (1860) 5 H & N 296.

[40] *Kuwait Airways Corpn v Iraqi Airways Co* [2002] UKHL 19 at [39], [2002] 2 AC 883. For an extended definition, see *Bunnings Group Ltd v CHEP Australia Ltd* [2011] NSWCA 342 at [115] *et seq*.

[41] (1957) 42 Cornell LQ 168.

[42] See the helpful summary of Dixon J in *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204, 229.

The tort is actionable *per se* but it should be understood that not every interference with chattels will ground an action in conversion. The interference must be so serious as to amount to a denial of the claimant's title. The defendant, it is sometimes said, must have committed an act of 'dominion' over the chattel.[43] Obstructive behaviour by a defendant making it difficult for an owner to recover goods, for example the owner of land who refuses to allow access for the recovery of the claimant's goods, may not involve a sufficiently direct denial of the claimant's title to engender liability.[44] Conversion is a tort of strict liability 'and thus a mental element in knowing that a wrong is being committed is not required'.[45] Yet there is an element of intention required for the commission of the tort, as explained in Atkin J's definition in *Lancashire and Yorkshire Railway Co v MacNicoll*.[46] The key to this apparent inconsistency is to understand that the defendant can be liable without at all being aware of the existence, or the superior entitlement, of the claimant. The element of intention goes only to the nature of the claimant's act: as we shall see in the various examples, the defendant must intend to assert an entitlement of his own or of someone else, which in fact is seriously inconsistent with the claimant's superior entitlement. Cleasby B in *Fowler v Hollins*[47] spoke of the 'salutary rule for the protection of property' by which 'persons deal with the property in chattels or exercise acts of ownership over them at their peril'.[48] Yet the strictness of the tort causes judicial heartache from time to time,[49] though it has appositely been observed that those exercising professional callings are able to insure against this type of liability.[50]

Conversion has been defined as a tort that protects ownership,[51] unlike trespass which protects possession. When we come

[43] Eg *Fouldes v Willoughby* (1841) 8 M & W 540; *Heald v Carey* (1852) 11 CB 977; *Hollins v Fowler* (1875) LR 7 HL 757, 766–67.

[44] *England v Cowley* (1873) LR 8 Ex 126.

[45] *Bunnings Group Ltd v CHEP Australia Ltd* [2011] NSWCA 342 at [125].

[46] (1918) 88 LJKB 601.

[47] (1872) LR 7 QB 616.

[48] Interpreted restrictively as going beyond the mere use of chattels in *Bunnings Group Ltd v CHEP Australia Ltd* [2011] NSWCA 342 at [132].

[49] See *Hollins v Fowler* (1875) LR 7 HL 757, 764–65.

[50] See *R. H. Willis & Son v British Car Auctions* [1978] 1 WLR 438, 442–43 (CA).

[51] See LRC 18th Report.

to look at the range of those entitled to sue, we shall see that this statement cannot be taken quite at face value.

ASPORTATION AS CONVERSION

Whilst a wrongful asportation may suffice for liability in trespass, something more is usually required for conversion. The leading case is *Fouldes v Willoughby*.[52] The defendant, who managed the ferry between Birkenhead and Liverpool, came on board and received complaints about the claimant's behaviour. He put the claimant's two horses ashore, after unsuccessfully asking the claimant to leave the ferry, but this action did not have the intended effect of persuading the claimant to follow them. Because the defendant had no intention of exercising any personal entitlement or dominion over the horses, his action was held not to be a conversion. All he did was to assert his control over the ferry and what he was prepared to carry on it, doing the minimum necessary to remove the horses from the ferry. As in other areas of conversion, liability turns on questions of degree. If, for example, in order to induce the claimant to leave the boat, the defendant had refused to allow the claimant's agent ashore to take the horses in charge, this might well have constituted a conversion. A temporary deprivation of possession may in special circumstances constitute a conversion.[53] Leading the claimant's straying heifer from a railway line to a place of safety has, however, been held not to be a wrongful act, still less a conversion.[54]

DAMAGE, DESTRUCTION, AND LOSS

We saw that scratching the panel of a coach would be a trespass. The conventional view is that minor acts of damage[55] do not

[52] (1841) 8 M & W 540.

[53] *The Playa Larga* [1983] 2 Lloyd's Rep 171.

[54] *Sorrell v Paget* [1950] 1 KB 252; see also *Hollins v Fowler* (1875) LR 7 HL 757, 766.

[55] Or use where the defendant is acting by way of trade under a claim of right according to Latham CJ in *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204, 218–19, with whom *cf.* Dixon J, ibid, 229–30. See also *Calor Gas Ltd v Homebase Ltd* [2007] EWHC 1173 (Ch).

amount to conversion. Cutting a log in two has been said not to be a conversion.[56] It would surely be different if the defendant did this with the intention of demonstrating in as vivid a way as possible an entitlement inconsistent with the claimant's. Altering the nature of the goods, however, is a conversion, as where a miller grinds corn into flour, or oats are made into oatmeal,[57] or water is poured into wine,[58] or the seals cut from a deed.[59] Similarly, to participate in a string of paper transactions, the effect of which is to strip from the claimant's lorries valuable heavy-goods licences, will give rise to liability.[60] Using goods in such a way as to make it impossible to return them to their earlier state may be a conversion, as where the defendant poured a quantity of carbolic acid into his tank in the mistaken belief that it was the creosote that he had ordered.[61] To destroy goods intentionally is a clear act of conversion: we have already seen that it is no defence for the defendant to be unaware of the claimant's interest in them. Suppose, however, that the defendant performs this act at the behest of someone who claims to be the true owner. The defendant is in the same position as the innocent miller (in Blackburn J's example) and is therefore strictly liable in conversion. Liability in conversion exists where the defendant asserts a title inconsistent with the true owner's, whether it be his own title or that of someone else.

It is well settled that, at common law, liability in conversion does not lie for negligent loss or destruction.[62] So a theatrical producer was not liable for the loss of a playwright's script that he had not requested,[63] and a person given charge of a valuable miniature painting was not liable for carelessly leaving it too

[56] *Simmons v Lillystone* (1853) 8 Ex 431, 442.

[57] *Hollins v Fowler* (1875) LR 7 HL 757, 768.

[58] See also *Richardson v Atkinson* (1723) 1 Stra 576.

[59] *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204, 229.

[60] *Douglas Valley Finance Co v S Hughes (Hirers) Ltd* [1969] 1 QB 738.

[61] *Lancashire and Yorkshire Railway Co v MacNicoll* (1918) 88 LJKB 601.

[62] *Williams v Gesse* (1837) 3 Bing NC 849; *The Arpad* [1934] P 189, 232 (CA); *BMW Financial Services (GB) Ltd v Bhagwanani* [2007] EWCA Civ 1230 at [23] ('acts of conversion must be deliberate').

[63] *Howard v Harris* (1884) Cab & El 253.

near the stove.[64] The position was different in the tort of detinue where it was well settled that a negligent bailee could be liable in detinue.[65] With the abolition of detinue in 1977, conversion was explicitly extended by statute to cover this case.[66] In one case at common law, a defendant bailee had already been held liable for the unintentional loss of goods. In *Moorgate Mercantile Credit Co Ltd v Finch*,[67] a hire-purchase car had been sub-bailed to one of the defendants (Read) who used it to smuggle watches into the country. When Read was caught, the car was forfeited under statute. Read was held to have converted the car since, at the time he obtained it, he was minded to use it for the commission of an illegal act. Read had no intention of being caught and thus of having the car confiscated, but this reckless act posed a grave risk to the claimant's interest in the car and he was taken to have intended the natural and probable consequences of his action. Where goods are deliberately left in a place where the claimant has no means of discovering or recovering them, conversion may also be committed.[68]

DETENTION

It is not a conversion to be in possession of someone else's chattel without authority.[69] Suppose, however, that the defendant in possession is faced with a demand by the true owner (or anyone with a superior title). A refusal to deliver in these circumstances would have been treated as an unlawful detention for the purpose of liability in detinue.[70] Although normally necessary for the commission of conversion in cases of mere detention,[71] a refusal to comply with the claimant's demand may not

[64] *Lethbridge v Phillips* (1819) 2 Stark 544 (special assumpsit rather than conversion).

[65] *The Arpad* [1934] P 189 (CA). [66] 1977 Act, s 2(2).

[67] [1962] 1 QB 701 (CA).

[68] *BMW Financial Services (GB) Ltd v Bhagwanani* [2007] EWCA Civ 1230 at [23] ('driving a car into the middle of nowhere and [leaving] it there with no record of where it was').

[69] *Clayton v Le Roy* [1911] 2 KB 1031, 1050 (CA); *Caxton Publishing Co v Sutherland Publishing Co* [1939] AC 178 (HL).

[70] *Alicia Hosiery Ltd v Brown Shipley Ltd* [1970] 1 QB 195.

[71] A demand and refusal will not be required if the defendant is asserting a lien: *Barclays Mercantile Finance Ltd v Sibec Developments Ltd* [1992] 1 WLR 1253,

be sufficient; it is evidence of conversion though not necessarily conversion *per se*.[72] To that extent, the abolition of detinue may have created a small hole in the liability network,[73] capable of being filled nevertheless by an insistent demand and an unconditional refusal to surrender the chattel that can be treated as conversion on the facts. In *Howard E. Perry & Co Ltd v British Railways Board*[74] the defendants refused to allow the claimant company to take delivery of its steel because they feared retaliatory action from their own employees who were supporting certain industrial action taken by steelworkers. This was a serious and unjustified interference with the claimant's right, not excused by the fact that the defendants were not asserting any personal claim to the steel. They were held liable even though it could not at the time of the refusal to surrender the steel be predicted how long the industrial disturbance would last.

More recently, Lord Nicholls has confirmed that detention alone can amount to conversion provided that it is adverse to the owner as where the party in possession intends to keep the chattel. Such an intention may be inferred from a demand and a refusal to deliver up the chattel,[75] which shows the liability hole produced by the abolition of detinue to be more apparent than real.

The defendant is not liable in conversion merely because he delays in order to make inquiries when faced with the demand.[76] Furthermore, the defendant responds adequately to a lawful demand if the goods are made available for the claimant to collect; the defendant does not have to go to the further trouble, in

1257–58. See also *Blue Monkey Gaming Ltd v Hudson* 2014 WL 4355075 at [386] ('overt act of withholding goods').

[72] *Morris v Pugh* (1761) 3 Burr 1242. On demand and refusal generally, see *Bunnings Group Ltd v CHEP Australia Ltd* [2011] NSWCA 342 at [117]–[121].

[73] See Palmer, N.E., *Palmer on Bailment*, 3rd edn, Sweet & Maxwell, 2009, para 1-072 note 440.

[74] [1980] 1 WLR 1375.

[75] *Kuwait Airways Corpn v Iraqi Airways Co* [2002] UKHL 19 at [42], [2002] 2 AC 883.

[76] *Clayton v Le Roy* [1911] 2 KB 1031 (CA); *Alexander* v *Southey* (1821) 5 B & Ald 247.

the absence of a contractual duty to do so, of actively returning the chattel to the claimant.[77]

Liability can arise on the basis of a detention without a demand and refusal;[78] the wilful detention of a chattel, coupled with the intention of denying the true owner, may therefore entail liability.[79]

DISPOSITIONS OF CHATTELS

We shall examine in chapter 6 how the disposition of chattels may occur in circumstances where the disponee acquires a good title by way of exception to the rule of *nemo dat quod non habet*. Where this occurs, the disponee's act in accepting the goods will be a lawful one and, by virtue of acquiring a title superior to that of the earlier owner, the disponee will not be liable in conversion. The action of the disponee prior to the acquisition of a good title does not amount to an assertion of personal title. Even if it could be said to be an assertion of the disponor's title, as opposed to a mere recognition of it, which is doubtful, the claimant would not be in a position to transfer his title to the defendant as the *quid pro quo* of recovering damages based on the value of the chattel. The fulfilment of the *nemo dat* exception means that the claimant has nothing of value to transfer when damages are awarded. The action of the disponor remains wrongful,[80] however, and thus attracts liability for the value of the chattel.[81]

It is well settled that the delivery of a chattel by a seller under a contract of sale is a conversion of it. It would be difficult to imagine a clearer assertion of title. The sale alone without the delivery will not suffice,[82] apart from those cases where a *nemo dat* exception arises even before delivery occurs.[83] Section 11(3) of the 1977 Act accords with this approach in that it reversed

[77] *Capital Finance Co Ltd v Bray* [1964] 1 WLR 323 (CA).
[78] *London Jewellers Ltd v Sutton* (1934) 50 TLR 193.
[79] *Clayton v Le Roy* [1911] 2 KB 1031 (CA).
[80] *Haydon-Baillie v Bank Julius Baer & Co* [2007] EWHC 1609 (Ch) at [243].
[81] For the assessment of damages, see section on Measure of Damages below.
[82] *Lancashire Waggon Co Ltd v Fitzhugh* (1861) 6 H & N 502.
[83] Ibid; LRC 18th Report.

earlier law,[84] whose supposed effect was to impose liability where the defendant simply denied the claimant's title without a physical intermeddling or other behaviour with injurious effects. The receipt of goods by a buyer who is not protected by a *nemo dat* exception will also be a conversion.[85] According to Lord Ellenborough in *McCombie v Davies*,[86] 'Certainly a man is guilty who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect'. This liability remains notwithstanding a subsequent disposal of the chattel by the disponee, which means that a claimant may have a choice amongst a number of converting defendants down a disposition chain.

Where goods are unlawfully pledged, the taking of them by the pledgee is now to be regarded as a conversion,[87] which reversed earlier law ruling that a pledgee was only asserting a limited title for security purposes.[88] Where goods the subject of a pledge are sub-pledged by the pledgee, this will not, in the absence of a prohibition by the pledgor on sub-pledging, amount to a conversion; the pledgee has a transferable interest.[89] Where this is the case, the action of the sub-pledgee in taking delivery of the goods also ought not to be conversion.

Misdelivery by a bailee carrier or warehouse keeper is also a conversion.[90]

AGENTS AND INTERMEDIARIES

Perhaps the most difficult question in the area of conversion lies in determining the liability of those who assist others in denying the claimant's title. Does this act of assistance by agents and intermediaries mean they commit conversion too? Whilst it is sufficient for conversion that the defendant asserts a personal title so as to deny the claimant's title, this is not a necessary

[84] *Oakely v Lyster* [1931] 1 KB 148 (CA).

[85] *Ingram v Little* [1961] 1 QB 31 (CA); *Farrant v Thompson* (1822) 5 B & Ald 826.

[86] (1805) 6 East 538.

[87] 1977 Act, s 11(2).

[88] *Spackman v Foster* (1883) 11 QBD 99.

[89] *Donald v Suckling* (1866) LR 1 QB 585 (detinue).

[90] *Sze Hai Tong Bank v Rambler Cycle Co* [1959] AC 576 (PC). See section on Misdelivery below.

requirement. The defendant may be liable for asserting the title of a third party. Before we turn our attention to individual categories of agent, it is worth noting at the outset that brokers and auctioneers run a considerable liability risk whilst carriers and freight forwarding agents do not. The distinction is brought out in the judgment of Romer J in *Barker v Furlong*[91] and justified on the ground that an agent who is a broker or auctioneer, in some cases at least, 'takes part in transferring the property in a chattel', whereas carriers and packing agents 'merely purport to change the position of the goods, and not the property in them'. Liability in this tort of strict liability may therefore depend, in some cases at least, upon the defendant's knowledge of what is happening.[92]

The leading case on the liability of brokers is *Hollins v Fowler*. A rogue, falsely claiming to be the purchasing agent for a reputable trader, obtained possession of 13 bales of the claimant's cotton. He offered them for sale to the defendant broker who, having found a buyer, sent a delivery order to the rogue requesting delivery to a third party. The cotton was received by the third party and spun into yarn at its factory. The defendant paid the sale price to the rogue and was reimbursed this amount, together with a brokerage commission, by the third party. Although the defendant was found to have acted as agent for the third party principal, he was held liable in conversion.

The following words of Blackburn J, called in to advise the House of Lords on the liability of intermediaries, summarize the principle governing liability:

> [O]ne who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does, if his act is of such a nature as would be excused if done by the authority of the person in possession if he was a finder of the goods, or entrusted with their custody.[93]

Calling the person with actual custody A and the intermediary who deals with the goods B, the test may be rephrased as

[91] [1891] 2 Ch 172.
[92] *Hollins v Fowler* (1875) LR 7 HL 757.
[93] Ibid, 766–67.

follows. Deeming A to be a bailee, B will not be liable in conversion for handling the goods if B's action is consistent with A's duty to return the goods to, or hold them at the disposition of, the true owner (who is the deemed bailor). So if B participates in the sale of the goods to C, B will be liable because this sale is inconsistent with A's duty as bailee to return the goods or hold them pending instructions from the bailor. On the other hand, to use Blackburn J's own illustration, a warehouse keeper is not liable in conversion for returning the goods to the person who deposited them with him because this action is in no way inconsistent with the terms of the deemed bailment by which the depositor acquires the goods.[94]

With a little more difficulty, we can say that a carrier (B) is not liable in conversion merely for accepting goods from a consignor (A) and delivering them to or to the order of a consignee (C). The carrier knows nothing of the relations between consignor and consignee and performs an act that may be quite consistent with the terms of a loan between consignor and consignee, which in turn may be perfectly consistent with the deemed bailment between the consignor/bailee and the owner/bailor. The knowledge of the intermediary (B) is therefore relevant, but only to the extent that it goes to an awareness that ownership of the chattel is being purportedly transferred under the transaction in which the intermediary gets involved. To return to Blackburn J, speaking of a railway company carrying goods from Liverpool to Stockport,

> [M]erely to transfer the custody of goods from a warehouse at Liverpool to one at Stockport, is *prima facie* an act justifiable in any one who has the lawful custody of the goods as a finder, or bailee, and the railway company . . . would be in complete ignorance that more was done. But if the railway company . . . could have been fixed with knowledge that more was done than merely changing the custody, and knew that [its] servants were transferring the property from one who had it in fact to another who was going to use it up, the question would very nearly be the same as in the present case. It would, however, be very difficult, if not impossible, to fix a railway company with such knowledge . . . .[95]

[94] *Marcq v Christie Manson & Woods Ltd* [2003] EWCA Civ 731, [2004] QB 286 (art dealer).

[95] (1875) LR 7 HL 757, 767.

A case commonly considered to be a hard one is *Stephens v Elwall*.[96] The defendant clerk, employed by a London trading house and 'act[ing] under unavoidable ignorance and for his master's benefit', was held liable in conversion merely for the physical act of consigning goods to his master in America. Given the defendant's ignorance of the ownership dimension of what he was doing, the case is impossible to justify in the light of *Hollins v Fowler*, unless the view is taken that the realities of early nineteenth-century shipping meant that the clerk must have known that the goods could not have been returned from America to the true owner as the deemed bailor.

The liability of auctioneers has been considered on a number of occasions. It was held in *Consolidated Co v Curtis & Son*[97] that auctioneers who sold goods on behalf of their principal and delivered them to the buyer were liable to the owner in conversion. Yet the Court of Appeal in *National Mercantile Bank v Rymill*[98] had earlier found in favour of an auctioneer where certain horses, present in the auctioneers' repository and entered in their sale catalogue, were sold by private treaty in their yard before the auction took place. The purchase money was paid to the auctioneers who took their commission and delivered the horses to the buyer. By Blackburn J's test in *Hollins v Fowler*, this should have been a clear case of liability, even though the auctioneers played no part in initiating and negotiating the sale. Lord Denning, in *R. H. Willis & Son v British Car Auctions Ltd*,[99] saw no reason for distinguishing between sales under the hammer and sales following a provisional bid since, in the latter instance, the intervention of the auctioneer 'was an efficient cause of the sale and he got his commission for what he did'. He observed that a well-developed system of insurance served to protect 'men of business' and spread the loss of dishonesty throughout the auction-going public.[100] In the *British Car Auctions* case itself, the sale occurred by private treaty in the office of the auctioneer, who accepted a lower commission on a sale to the earlier highest bidder at the auction, whose bid had fallen below the reserve.

[96] (1815) 4 M & S 259.
[97] [1892] 1 QB 495.
[98] (1881) 144 LT 767 (CA).
[99] [1978] 1 WLR 438 (CA).
[100] See also LRC 18th Report.

The Court of Appeal, in finding the auctioneer liable, left no room for a principled argument that the *Rymill* case was distinguishable on its facts. If the law is to be consistent in this area, the *Rymill* case ought not to be followed.

INVOLUNTARY BAILEES

Suppose that a consumer receives unsolicited goods. Where the Consumer Protection from Unfair Trading Regulations 2008 apply, the consumer recipient is 'exempted from any obligation to provide consideration for products supplied by the trader' and may, as between the trader and himself, 'use, deal with or dispose of [unsolicited goods] as if they were an unconditional gift', in those cases where the trader has engaged in the unfair commercial practice of inertia selling.[101] This practice occurs where the trader 'demand[s] immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer'.[102] In the doubtless unusual case of this practice occurring and the consumer acquiring title under these provisions, the previous owner is in no position to complain about acts that would otherwise be a conversion.

Returning to the general law, the involuntary receipt of unrequested goods is not a conversion[103] and the law has displayed a degree of tenderness to the victims of an ingenious but simple fraud that takes the following form. A rogue orders goods in the name of the recipient and the owner dispatches goods in response. Before the goods arrive, the rogue contacts the recipient to say that a mistake has been made and that unordered goods will be arriving. The rogue (or a confederate) is on hand to take the goods off the recipient's hands and the recipient obliges, believing naturally that only someone acting for the owner could have been so well informed about the movement of the goods. When this happened in *Elvin and Powell Ltd v Plummer Roddis Ltd*,[104] the court found the bailee's behaviour to be reasonable and declined to hold it liable in conversion in view of the jury's finding that

[101] SI 2008/1277, reg 27A (as added by SI 2013/3134).

[102] SI 2008/1277, Sch 1 para 29.

[103] See Burnett, H. (1960) 76 LQR 364.

[104] (1933) 50 TLR 158.

negligence was absent. A different result was reached in *Hiort v Bott*,[105] where the defendant received an invoice and delivery order for a quantity of barley dispatched by rail. The delivery order was made out to consignor or consignee, so the consignee need not have done anything to permit the consignor, or his agent, to recover the goods from the railway company Despite this, the consignee innocently indorsed the delivery order in the name given by the rogue and the rogue was able to obtain the goods and decamp with them. Since this was an unnecessary act of intermeddling, 'assuming a control over the disposition of these goods' (Bramwell B), the defendant consignee was made liable in conversion. His action went beyond the implied authority given by the mistaken consignor (Bramwell B), which the consignor was estopped from denying (Cleasby B), to take reasonable steps with regard to the goods.

The relative tenderness of the law to involuntary bailees has also been in evidence where the bailee is embarrassed by chattels that he does not wish to retain because they might cause expense and inconvenience. In *Robot Arenas Ltd v Waterfield*,[106] a quantity of equipment had been placed on land under licence where it remained even after the vendor, who had granted the licence, had sold the land to the present defendant. The defendant notified the vendor's agent of the presence of the equipment but, having heard nothing for five weeks, then destroyed the chattels. On the facts, the court concluded that he had acted reasonably, even though, given the character of both the land and the equipment, the defendant could hardly have believed that the equipment belonged to the vendor.[107] The decision goes rather against the grain of strict liability in conversion.

MISDELIVERY

We saw earlier that a carrier unable to deliver because of negligence is liable in conversion since the enactment of section 2(2) of the 1977 Act. The delivery by a carrier or other bailee to the

[105] (1874) LR 9 Ex 86. [106] [2010] EWHC 115 (QB).

[107] *Cf. AVX v EGM Soldiers Ltd*, The Times, 7 July 1982 (liability for destruction as an act of dominion where no inquiries were made).

wrong person will also entail liability, even if the misdelivery is unintentional.[108] This may occur where a chattel is released without the presentation of a bill of lading or of a genuine bill of lading. In such cases, it may not always be easy to see an assertion of the recipient's title, as is normally required for liability in conversion, but the rule here is a salutary one that serves the purpose of encouraging care on the part of bailees in a position of responsibility and of minimizing third party fraud. Otherwise, it is hard to see why the matter should not be disposed of under the contract giving rise to the bailment or in the tort of negligence, where appropriate.

CHATTELS

Liability in conversion arises at common law in relation to chattels. With one exception, no appreciable difference exists between chattels and goods for present purposes, so nothing of any real consequence should turn upon the title of the statute that records a number of reforms affecting the tort—the Torts (Interference with Goods) Act 1977—where goods are defined as including 'all chattels personal other than things in action and money'. This definition might be taken, however, to exclude documentary intangibles—for example cheques—which have at common law been assimilated to chattels for the purpose of the tort of conversion.[109] In that case, any statements in this chapter concerning changes brought about by the 1977 Act would be inapplicable so far as they might otherwise be applicable to documentary intangibles.

The long confinement over its history of the tort of conversion to chattels, apart from its pragmatic extension to documentary intangibles, was challenged in the House of Lords in *OBG Ltd v Allan*,[110] where a claim was made in conversion in respect of rights arising under contracts that had been terminated by administrative receivers of the claimant before their

[108] *Sze Hai Tong Bank v Rambler Cycle Co* [1959] AC 576 (PC); *Devereux v Barclay* (1819) 2 B & Ald 702.

[109] The significance of this development in relation to damages is discussed below.

[110] [2007] UKHL 21, [2008] 1 AC 1.

appointment as such had been shown to have been wrongfully made. As stated in an earlier chapter,[111] contract rights are capable of being treated as property rights. By a bare majority, the court concluded that the 'old tort of conversion' should not, with its strict liability, be opened up so as to promote extensive liability for economic loss, since this would run across the grain of modern developments in tort law. The past extension to documentary intangibles had been done for sound pragmatic reasons. The dissenting minority,[112] in favour of extending this strict tort generally to pure intangible personalty, did not explain their reasons for doing so at the same time as they supported intention-based liability for the tort of inducement of breach of contract. Nor did they consider the many complex and indeed unforeseeable consequences that would over time have become apparent if such a structural upheaval of the law were to take place. Given the deep penetration of intangible personalty by equitable principles, and the concomitant long refusal of the common law to recognize property rights therein, not the least consequence of such a development would have been a major recasting of the relationship between law and equity.

ENTITLEMENT TO SUE IN CONVERSION

POSSESSION

We have seen that the common law failed to develop a sophisticated concept of ownership of personalty. The place of ownership was occupied by possession, which had the consequence that the protection of property interests was left to the law of tort.[113] Lord Campbell once said that 'the person who has possession has the property'.[114] Conversion, a tort concerned with the protection of ownership, lay therefore at the behest of those in possession of

[111] Chapter 1.

[112] Lord Nicholls and Lady Hale.

[113] For the weakness of the common law in protecting ownership and the usurpation by possession of the role of ownership, see Pollock, F., and Wright, R., *An Essay on Possession in the Common Law*, Clarendon, 1888, p 5.

[114] *Jeffries v Great Western Railway Co* (1856) 5 E & B 802.

the chattel at the time of the wrongful act and was later extended, because of the limitations of possession, to those with a right to immediate possession. Despite assertions sometimes made to the contrary,[115] it does not as such lie in favour of those with an equitable interest in chattels. Such persons still need to point in addition to possession or a right to immediate possession in order to sue in conversion, for otherwise they would need to join the legal owner as a party to the action.[116] Even where the equitable claimant could sue independently, the claimant would fail against a defendant acquiring a legal interest in the chattel without notice of the claimant's equitable interest,[117] just as any claimant with a legal interest is in narrower circumstances vulnerable to categories of purchasers able to override his legal interest.[118]

An owner out of possession and without the right to immediate possession will not be able to sue in conversion,[119] though the owner may be joined in proceedings brought by someone else with an entitlement to sue.[120] Such will be the position of an owner who has bailed a chattel under a term bailment. If, however, there is a bailment at will, the bailor will be able to maintain a conversion action, since the bailor's right to call for the return of the goods without delay means that the bailor has the right to immediate possession.[121] The bailee at will also has the right to sue.[122] Since the right to sue depends upon possession, it follows that a pledgee,[123] a sheriff,[124] and a lienee[125] may sue in conversion.

[115] *International Factors Ltd v Rodriguez* [1979] QB 351, 359 (CA).

[116] *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All ER 675 (CA). See Tettenborn, A., [1996] CLJ 36; Bridge, M., Gullifer, L., McMeel, G., and Worthington, S., *The Law of Personal Property*, Sweet & Maxwell, 2013, at para 16-041.

[117] *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All ER 675 (CA).

[118] See chapter 6.

[119] *Gordon v Harper* (1796) 7 TR 9.

[120] See section on Bailment and Entitlement to Sue below.

[121] *Kahler v Midland Bank* [1950] AC 24, 53 (HL), *per* Lord Radcliffe.

[122] *Nicolls v Bastard* (1835) 2 Cr M & R 659.

[123] *Swire v Leach* (1865) 18 CB (NS) 479.

[124] *Wilbraham v Snow* (1669) 2 Wms Saund 47.

[125] *Rogers v Kennay* (1846) 9 QB 592—at least in those cases, not all, where the lienee can be said to be in possession of the chattel.

BAILMENT AND ENTITLEMENT TO SUE

The bailee's right to sue was considered at length in the leading case of *The Winkfield*,[126] where the action lay in negligence (the rule here is the same as for conversion) against a ship that collided with another carrying mails from Cape Town to Southampton. The Postmaster-General, as bailee of the letters and parcels in transit, brought an action based upon the claims made against him by the bailors of the mails, though at all stages in the case it was assumed that he was under no liability at all to the various bailors. He was allowed to recover in full, the court taking the view that the matter of his liability to the bailors for the loss was not germane to the claim made against the defendant. It was accepted, however, that the right of the bailee to recover in this way was historically linked to the bailee's former strict liability to the bailor.[127] Furthermore, the Postmaster-General was under a personal obligation to account to the bailors for moneys recovered in excess of his own (surely negligible) loss.

Bailment at will throws up an example with more than one potential plaintiff. So does a term bailment to the extent that, although only the bailee has standing to sue in conversion, the bailor out of possession has an action for damages for any injury done to his reversionary interest.[128] There are other instances outside bailment—for example, finder and true owner—and other possibilities involving parties in a lengthy disposition chain. The existence of more than one claimant, in those cases of separate proceedings that give rise to liability measured by the value of the chattel rather than the claimant's interest in it,[129] creates the risk of unfair prejudice to the defendant. Double liability exceeding the value of the chattel would also concomitantly give rise to unjustified enrichment of those successful claimants retaining damages in excess of the value of their limited interest in the chattel.

[126] [1902] P 42 (CA).
[127] See Pollock, F. and Maitland, F., *The History of English Law*, vol II, p 170.
[128] See section on Reversionary Interests below.
[129] See section on Measure of Damages below.

Various common law mechanisms exist to avoid double liability and unjust enrichment. They are in evidence in proceedings brought by bailor and bailee. Outside bailment, the Torts (Interference with Goods) Act 1977 contains elaborate mechanisms to avoid the twin evils of double liability and unjustified enrichment.

The Winkfield states that a successful bailee has a duty to account to the bailor for that portion of the recovered damages exceeding his, the bailee's, interest, which 'serves to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed'.[130] Furthermore, once the bailee recovers damages from the defendant, the latter has a defence to any action brought by the bailor.[131] Since a term bailor cannot sue a wrongdoer in conversion (except in the case of a bailment terminated by the bailee's wrongdoing[132]), the action barred here is the action for damage done to the bailor's reversionary interest as well as the conversion action of the bailor at will.

It may be that a bailor's action against the wrongdoer is launched before proceedings are brought by the bailee. If so, the same principles apply.[133] A successful action by the bailor will serve to bar recovery by the bailee. The bailor incurs a personal obligation to account to the bailee (to the extent of the bailee's interest) out of the damages award.[134] If the bailment is a gratuitous one, then there will be no duty to account.[135] If the bailor sues only for damage done to his reversionary interest, then in principle the bailee ought to be allowed to sue subsequently in respect of his residual interest. The rules in the 1977 Act[136] could be invoked to prevent excessive recovery by the bailee in such a case.

Where separate proceedings brought by bailor and bailee are running simultaneously against the wrongdoer, it is sensible to

[130] [1902] P 42, 60 (CA).
[131] *Nicolls v Bastard* (1835) 2 Cr M & R 659; *The Winkfield* [1902] P 42 (CA).
[132] See section on The Right to Immediate Possession below.
[133] *Nicolls v Bastard* (1835) 2 Cr M & R 659, *per* Parke B (arguendo).
[134] *O'Sullivan v Williams* [1992] 3 All ER 385.
[135] Ibid. [136] See below.

have these proceedings joined in order to effectuate the settlement of liabilities stated above. The 1977 Act[137] contains provisions for facilitating joinder when these separate proceedings are brought at different court levels.

POSSESSION AND THE *IUS TERTII*

Before the 1977 Act, the emphasis laid upon possession, as the property entitlement grounding a claimant's right to sue, was so strong that it was in general no defence for the wrongdoer to plead that someone else (the *tertius)* had, in relative terms, a better possessory right than the claimant. In the words of Pollock and Wright,

> A possessor may be a mere wrongdoer against the true owner, and a wrongdoer for the very reason that he has got possession; while yet his possession is not only legal but, as against all third persons not claiming under the true owner, fully protected by the law.[138]

Where the defendant invaded the claimant's possession, the defence of *ius tertii* never lay: it was, said Lord Campbell, in society's interests that peaceable possession be protected against wrongdoers.[139] If, however, the claimant was relying upon a right to immediate possession, the above rationalization did not apply. The general rule in this case was that the *ius tertii* could be pleaded.[140] To this second rule, there was nevertheless an exception. A bailee was estopped, when sued by the bailor, from pleading the superior entitlement of a third party,[141] though the bailee had a good defence if actually evicted by title paramount by the true owner.[142] Faced with competing claims, the best course for the bailee would be to interplead; that is, pay the chattel into court to permit the bailor and the other claimant to fight it out between them. A bailee defending the bailor's action in the name of the true owner, or *vice versa*, would take the risk

[137] In s 9.
[138] Pollock, and Wright, *op. cit*., p. 20.
[139] *Jeffries v Great Western Railway Co* (1856) 5 E & B 802.
[140] *Leake v Loveday* (1842) 4 Man & Gr 972.
[141] *Biddle v Bond* (1865) 6 B & S 225.
[142] *Rogers Sons & Co v Lambert & Co* [1891] 1 QB 318 (CA).

of backing the losing side, thus incurring personal liability for resisting the claim.

The logical consequence of the identification of possession with property was that the defendant could not object that the claimant's possession was acquired wrongfully in the first place. Thus a jeweller was liable in conversion for refusing to return to a chimney sweep's boy a jewel that the boy handed over for valuation, despite the inference that the boy must have found the jewel in someone else's chimney.[143] Similarly, the finder of a can of money under a poolroom was able to recover from the local municipality when the latter insisted on retaining the money until the true owner appeared.[144] In the latter case, it was said that it did not matter 'whether the taking [by the finder] was with felonious intent or not'.[145]

The matter of unlawful possession was considered at length in *Costello v Chief Constable of Derbyshire*,[146] where the claimant had been found in possession of a stolen car which he was aware had been stolen. Now, the police have statutory powers of confiscation,[147] but have no residual common law power to retain property unlawfully obtained.[148] So far as the police alternatively have the power of temporary detention, the possessory rights of the previous possessor revive once the period of detention expires.[149] In *Costello*, the defendant argued that possession unlawfully obtained did not give the claimant title to sue in conversion. It had previously been asserted by Donaldson LJ that public policy demanded a ruling in favour of the occupier of land if the competing claim of a finder was based upon a trespass on the land.[150] It would not have taken any great extension of public policy to deny a claim manifestly based upon an unlawful taking, but the Court of Appeal refused to take this extra step,

[143] *Armory v Delamirie* (1722) 1 Stra 505.

[144] *Bird v Town of Fort Frances* [1949] 2 DLR 791 (Ontario).

[145] See also *Buckley v Gross* (1863) 3 B & S 566.

[146] [2001] EWCA Civ 381, [2001] 1 WLR 1437.

[147] See the Proceeds of Crime Act 2002 for, *inter alia*, a consolidation of existing powers and the creation of new powers.

[148] *Webb v Chief Constable of Merseyside* [2000] QB 427 (CA).

[149] Ibid.

[150] *Parker v British Airways Board* [1982] QB 1004 (CA).

thereby undermining the logic of Donaldson LJ's earlier dictum. Donaldson LJ himself had conceded that the thief had a 'frail' title, but the court in *Costello* went further in holding that possession, whether lawfully or unlawfully obtained, attracted the same degree of protection in law. The party in possession, further to the relativity of title principle, had a title good against the whole world with the exception of someone who could show a better title. This exception would clearly include the person from whom the chattel was stolen, as well as anyone else with a superior title to the person in possession at the time of the theft.

The meaning of a thief's 'frail' title is uncertain. It seems true to say that it is more difficult to establish on the facts that a possessory title has been acquired where the circumstances surrounding the claimant's claim are suspect: 'hostile or ambiguous occupation must make itself good at every step'.[151] Where the finder's claim is contested by the occupier of the land on which the chattel was found, public policy will dictate a ruling in favour of the occupier where the finder was trespassing on the land at the time.[152]

The subject of competing rights to chattels is dealt with in section 8 of the Torts (Interference with Goods) Act 1977. It provides that any rule of law preventing the defendant from pleading the *ius tertii* is abolished. Rules of court require the claimant in a wrongful interference action to indorse his writ or originating summons with particulars of his title 'identifying any other person who, to his knowledge, has or claims any interest in the goods'. At any time after giving notice of his intention to defend and before judgment, the defendant may apply for directions as to whether any person so named shall be joined[153] 'with a view to establishing whether he has a better right than the claimant, or has a claim as a result of which the defendant might be doubly liable'.[154] This formula probably excludes the great majority of bailor/bailee claims. The common law already prevents double liability in such cases, and the term bailor's right to sue for

[151] Pollock, and Wright, *op. cit.*, p 14.

[152] *Parker v British Airways Board* [1982] QB 1004 (CA).

[153] In the language of s 8(2)(c).

[154] Within s 7 of the 1977 Act.

damage done to his reversionary interest is not so much 'better' than the bailee's right to sue in conversion as different (and *vice versa)*.

Statutory provision for the avoidance of double liability is to be found in section 7 of the 1977 Act. This is achieved in two ways. Let us assume that there are only two claimants, appearing in chronological order as A and B, and no claim for special damages to complicate the issue. First of all, if both A and B are before the court, damages will be awarded (and presumably apportioned between them) in such a way as to avoid the defendant's double liability.[155] Presumptively, the damages that are thus apportioned will not exceed the market value of the converted chattel.

Secondly, if only A is before the court and successful in the action, there will be recovery in full of the value of the chattel, as under the antecedent law. To the extent that the damages recovered exceed the value of A's interest, A has a duty to account to B (as under *The Winkfield*[156] the bailee has to account to the bailor) who has not yet appeared, since A has been overcompensated by the defendant to the extent of B's interest in the chattel.[157] If subsequently B appears with a valuable claim, though one that is inferior to A's, the defendant will have a partial defence,[158] having bought out A's interest on satisfaction of the judgment debt.[159] The defence will be complete if A has already accounted to B[160] for the overcompensation. The defence will again be complete if, in view of the strength of A's claim, B's claim is valueless. If B's claim is so superior to A's that the latter's claim is valueless, recovery in full will in principle take place again, unless A has already accounted to B.[161] The defendant will then have the right to recover all moneys previously paid to A, since A has been unjustly enriched at the defendant's expense.[162] The 1977 Act[163] contemplates A paying B who then pays the defendant, but the

[155] Section 7(2). [156] [1902] P 42 (CA). [157] Section 7(3).

[158] Section 7(2) *(semble),* to avoid invoking the cumbersome machinery in the rest of s 7.

[159] *Brinsmead v Harrison* (1872) LR 6 CP 584; s 5(1) of the 1977 Act.

[160] Section 5(4) of the 1977 Act. [161] Section 5(4) of the 1977 Act.

[162] Section 7(4) of the 1977 Act. [163] See the example in s 7(4).

principle expressed in section 7(4) should permit a direct action by the defendant against A to recover the damages (but presumably not the costs) previously paid. If A has a valuable but inferior interest, the damages liability of the defendant to B in the second action will be reduced to that extent in order to avoid unjust enrichment.[164] Furthermore, the defendant will then have a right to recover from A the amount by which the damages previously awarded to A exceeded the value of A's interest.[165] Justice tends to complicate matters; absolute justice complicates matters absolutely.

The 1977 Act does not deal with separate claimants suing separate defendants, which is improbable but not impossible in the case of a complex disposition chain. The common law,[166] coupled with section 5(1) of the Act, will however cope with the abuse of a single claimant attempting to recover double damages by suing different defendants.

THE RIGHT TO IMMEDIATE POSSESSION

As stated above, the right to immediate possession will support a conversion action. The emergence of this head of entitlement to sue is a little obscure. The right to immediate possession should not be confused with references in some of the older cases to 'an immediate right of possession'. The latter expression was used in *Rogers v Kennay*[167] to underline the legitimacy of a lienee's actual possession when resisting an attempt by a sheriff to levy execution on the goods. A right to immediate possession may be understood for practical purposes as embracing two types of claimant: first, the bailor at will, who in the case of trespass has been treated fictitiously as being in actual possession;[168] and secondly, the true owner (a category that may include a bailor at will) who pursues down a disposition chain successive wrongdoers whose tort was committed at a time when the true owner

[164] See s 7(4) of the 1977 Act.
[165] Ibid.
[166] *Brinsmead v Harrison* (1872) LR 6 CP 584.
[167] (1846) 9 QB 592.
[168] Discussed above.

(or his bailee at will) had already been dispossessed. The holder of an equitable interest in goods does not as such have the right to immediate possession.[169] Neither has someone who is given a permission or a licence to take possession of the goods from someone who has the right to immediate possession. In *Jarvis v Williams*,[170] bathroom fittings, the subject of a contract of sale, were delivered to a third party. When the buyer failed to pay, buyer and seller agreed that the seller should recover the fittings from the third party. There was no revesting of the property in the goods in the seller. Relying upon the buyer's permission, the seller demanded the fittings from the third party, who refused to give them up. The seller was held to lack the necessary standing to sue the third party in detinue. *Jarvis* was considered at length in *Iran v Barakat Galleries Ltd*, where the court ruled that a transfer of the right to immediate possession could, even failing the transfer of the property itself, give the transferee standing to sue in conversion.[171] On facts as informal as those in *Jarvis*, the distinction between the grant of a permission to collect and the transfer of the right to immediate possession may seem so elusive as to be illusory.

An example of a disposition chain should clarify the second category of claimant stated above, the true owner out of possession at the time of the act of conversion, who has no entitlement to sue in trespass. Suppose that the goods of A are bailed at will to B who is dispossessed by C before C is in turn dispossessed by D. Considering now only A's entitlement, A may sue C in either conversion or trespass but may sue D only in conversion. D interfered with C's possession, not with A's, but D's action amounted to a denial of A's title and A had the right to immediate possession at the time of D's wrongful act.

It ought to be possible for there to be more than one person with a right to immediate possession, and not just the true owner. Suppose A loses goods that are found by B. C wrongfully

[169] See above.

[170] [1955] 1 WLR 71 (CA).

[171] [2007] EWCA 1374 at [30], [2009] QB 22. The court's ruling was driven by the difficulty or reconciling *Jarvis* with the judgment of Buckley LJ in *International Factors Ltd v Rodriguez* [1979] QB 351 (CA).

dispossesses B and is wrongfully dispossessed in turn by D. A certainly has the right of immediate possession as against D, but so, surely, has B. Otherwise B, the finder, would have no tortious remedy against D. It may be that B's damages will be insubstantial, where A can be identified, but circumstances might arise in which B is admittedly a finder but it is impossible to locate A.

To return to the first of the above examples, if the bailment between A and B had been for a term, then A would not have had the right to initiate suit against either C or D, subject to the following exception. At the very moment a term bailee commits a wrongful act that amounts to a repudiation of the bailment—for example, a wrongful sale or the wilful destruction of the goods—then the bailor acquires the right to immediate possession and, besides claiming against the bailee, may pursue the buyer as well as anyone else asserting an inconsistent title. It would be quite impracticable to leave litigation in the hands of a bailee whose actions have been unlawful and who would certainly be met with an estoppel or similar plea by the buyer. In *Fenn v Bittleston*,[172] Malpas as security for a loan gave a bill of sale over certain goods to Rhoades. Malpas was to retain possession of the goods unless and until he failed to repay principal and interest within 14 days after a demand by Rhoades. Subsequently, Malpas's assignee in bankruptcy sold the goods (and not merely Malpas's reversionary interest in them) without at any material time Malpas defaulting on the loan. Although Malpas's holding of the goods was not as a bailee at will, Rhoades was entitled to bring trover against the assignee in bankruptcy. The act of selling the goods, 'entirely inconsistent with the terms of the bailment', destroyed the bailment so that the possessory title reverted to Rhoades.

Another example, this time drawn from the field of hire purchase, is *North Central Wagon & Finance Co v Graham*,[173] where the hirer of a car under a hire-purchase agreement placed it with an auctioneer for the purpose of sale in clear breach of the terms of the agreement. The finance company was able to maintain

[172] (1851) 7 Ex 152.
[173] [1950] 2 KB 7 (CA).

a conversion action against the auctioneer whether because of the *Fenn v Bittleston* principle (Cohen LJ) or because the terms of the agreement gave it the right to terminate the agreement for breach of any of the hirer's duties without giving prior notice of an intention to that effect (Asquith and Cohen LJJ).

As convenient as it may be for the property torts to permit the bailor to sue in the above circumstances, it is difficult to reconcile the bailor's entitlement to sue with recent developments in the area of contract law. It has now been firmly established at the highest judicial level that repudiatory breaches do not of themselves terminate a contract. Instead, they give the injured party an election to affirm the contract or to terminate it.[174] The rule in *Fenn v Bittleston*, stated above, has the consequence of making the buyer immediately liable to the bailor at the moment the goods are purchased from the bailee, even before any agreement enshrining the bailment is terminated by the bailor. One response is that the *Fenn v Bittleston* rule is a matter of bailment law rather than contract. This response, however, does not fully meet the contractual arm of the decision in *North Central Wagon & Finance Co v Graham* where the bailor's right to terminate the bailment can be expanded by the terms of the agreement, beyond acts destructive of the bailment, so as to embrace any breach of the hirer's duties (though on the facts of *North Central Wagon* the hirer's act did indeed destroy the bailment). The solution to these difficulties is to assert that the bailor has the right to immediate possession if, whether at common law or under the terms of an agreement, the bailor has the immediate right to terminate a bailment. One can surely have a right to immediate possession without being aware that the right exists or without yet having decided to avail oneself of the right.

REVERSIONARY INTERESTS

Although the owner out of possession and without the right to immediate possession may not sue in conversion, it has long been settled that such an individual may bring a special action on

[174] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL).

the case for any damage done to his reversionary interest in the goods.[175] In so far as the action denies full recovery of the value of the chattel to the claimant owner, it is consistent with changes introduced by the 1977 Act to the level of damages awards in conversion cases where the claimant has only a limited interest in the goods.[176] This head of liability, which is brought within the definition of wrongful interference for the purposes of the 1977 Act (s 1(d)), is therefore close to being swallowed up whole by conversion. Yet not all acts of conversion will necessarily damage the owner's reversionary interest.[177] Damage done to chattels does not necessarily amount to damage done to the reversionary interest, as in the case of the damaged railway rolling stock that had been replaced or repaired in accordance with the terms of an equipment lease by the term bailee.[178] Furthermore, the reversionary action, besides applying as a matter of strict liability,[179] also embraces negligent conduct damaging the reversionary interest.[180] Although the 1977 Act lists as separate heads of wrongful interference 'negligence' and 'any other tort so far as it results in damage to goods or to an interest in goods', a separate mention of negligence is needed for those cases where the claimant is in possession of the goods at the time of the negligent act.[181] It is a pity that the recommendation of the Law Reform Committee,[182] that this relic of forms of action thinking be absorbed in the larger category of wrongful interference liability, was not implemented in the 1977 Act.

REMEDIES ISSUES

MEASURE OF DAMAGES

Liability in conversion entails 'the forced judicial sale of the chattel to the defendant',[183] which in the conventional case defines

[175] *Mears v London & South Western Railway Co* (1862) 11 CB(NS) 850.
[176] See above. [177] LRC 18th Report.
[178] *HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd* [2005] EWCA Civ 1437, [2006] 1 WLR 643 (negligence claim).
[179] *Tancred v Allgood* (1859) 4 H & N 38.
[180] *Mears v London & South Western Railway Co* (1862) 11 CB(NS) 850.
[181] Section 1(c), (d). [182] 18th Report.
[183] Prosser (1957) 42 Cornell LQ 168.

the level of the damages award. It is therefore not any damage done by the defendant to the chattel that defines the damages award but rather the value of the chattel itself, which is the price the defendant has to pay to buy out the claimant's interest. The transfer of the claimant's interest to the defendant takes place, not upon entry of judgment in the claimant's favour, but upon satisfaction of it.[184] The damages awarded generally represent the value of the chattel at the date of the conversion,[185] though the logic of a forced judicial sale would make the date of judgment more appropriate, as it used to be in the case of detinue.[186] The 1977 Act gives no express assistance on the date of assessment of damages and, in particular, does not clarify the position regarding the date of assessment in those cases where formerly the claimant might have maintained an action in detinue. In such a case, nevertheless, it has been held that there is no firm rule that damages should be assessed at either the date of the conversion or the date of judgment. Instead, damages ought fairly to compensate the claimant's loss and so might take account of matters such as whether the claimant might have sold or retained the chattel had no conversion occurred, or whether a loss has arisen because of the claimant's inability to use the chattel.[187]

A reference will be made to the market, if one exists, to calculate the value of the chattel, but if through the wrongdoing of the defendant the value cannot be determined, any doubt will be resolved in the claimant's favour.[188] This will be accomplished, in cases of uncertainty—for example, where the chattel has disappeared—by ascribing to it the highest value that it could possess, provided the other evidence in the case is consistent with this approach.[189]

The conventional assessment of damages thus described suggests that conversion is not a tort like other torts. Lord Nicholls in *Kuwait Airways Corpn v Iraqi Airways Co* stressed, however,

[184] *Brinsmead v Harrison* (1872) LR 6 CP 584; s 5(1) of the 1977 Act.

[185] *General & Finance Facilities v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644 (CA), *per* Diplock LJ.

[186] *Rosenthal v Alderton & Sons Ltd* [1946] KB 374 (CA).

[187] *IBL Ltd v Coussens* [1991] 2 All ER 133 (CA).

[188] *Armory v Delamirie* (1722) 1 Stra 505.

[189] *Colbeck v Diamanta Ltd* [2002] EWHC 616 (QB).

that damages in conversion should perform the same compensatory function as damages performed for other torts. Yet, when the defendant airline in that case sought relief from the normal measure of damages, on the ground that the claimant's title had already been compromised by the wrongful actions of the Iraqi government, the House of Lords nevertheless concluded that the defendant had indeed suffered a loss measured by the value of the aircraft that had been seized. Lord Nicholls, moreover, asserted in axiomatic terms that a wrongdoer's liability in conversion was not to be diminished by the wrongful act of a previous converter.[190]

There remain exceptional cases where the level of damages awarded is less than the value of the converted chattel. In one case, the court made it plain that conversion should be subject to normal rules of causation and damages.[191] It therefore diminished the claimant's recovery, on the ground that the claimant could have mitigated its damages by cooperating with a wrongdoing bank, unlawfully detaining shipping documents, in the sale of the depreciating goods represented by those documents. The bank's action was wholly unjustified so the application of the mitigation rule in this case is hard to justify. In another, unusual case, the claimant recovered damages where a quantity of shares in a company were unlawfully sold, only to be replaced later by the same quantity of shares in the same company. Damages were assessed as the difference between the value of the shares at the conversion date less the value of the repurchased shares in a falling market.[192] The claimant thereby recovered the value of the opportunity to play the market that it had been deprived of by the defendant's actions.[193] In the normal case, if the claimant consents to the return of the chattel before judgment, then nominal

[190] [2002] UKHL 19 at [82], [2002] 2 AC 883.

[191] *Uzinterimpex JSC v Standard Chartered Bank Plc* [2008] EWCA Civ 819, [2008] 2 CLC 80.

[192] *BBMB Finance (Hong Kong) Ltd v Eda Holdings Ltd* [1990] 1 WLR 409 (PC). See also *Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197.

[193] A type of restitutionary recovery (see also below) though presented as a general recovery of damages in conversion less the value of the replacement shares.

damages should be an appropriate measure.[194] Nominal damages might also be appropriate where the chattel would, even without the defendant's conversion, have been lost in any event.[195] As seen above, principles of causation therefore apply when settling damages in the tort of conversion as they do elsewhere, though the forced judicial sale aspect of conversion, where it does occur, tends to cloud one's understanding of this point.

Other examples of limited recovery exist. We saw above when looking at the *ius tertii* reforms that the 1977 Act allows for a reduction in the measure of damages in certain cases where the claimant has only a limited title to the chattel.[196] Again, where the defendant has a property interest in the goods, the claimant's damages will be commensurately reduced.[197] This will be the position, for example, where one co-owner sues the other in those cases where a conversion action will lie.[198] Furthermore, though the law cannot be said to be wholly consistent in its recognition of the underlying commercial logic of hire-purchase when this conflicts with the legal form of the transaction, it is well settled that a finance company suing in conversion will be permitted to recover damages based only upon the sum of unpaid instalments, and not upon the value of the chattel itself.[199] This is so even though the transaction itself purports to deny the hirer any proprietary interest in the chattel until the instalments have been paid in full and the option to purchase has been exercised.

In addition to damages representing the value of the chattel, consequential damages may also be recovered unless they are too remote[200] or might have been mitigated by the claimant. As for the appropriate remoteness test to apply here in conversion cases, the House of Lords in *Kuwait Airways Corpn v Iraqi Airways Co*

[194] *Roberts v Wyatt* (1810) 2 Taunt 268.

[195] *Kuwait Airways Corpn v Iraqi Airways Co* [2002] UKHL 19 at [63], [2002] 2 AC 883, explaining *Hiort v London and North Western Railway Co* (1879) 4 Ex D 188.

[196] See above.

[197] *Belsize Motor Supply Co v Cox* [1914] 1 KB 244.

[198] See s 10 of the 1977 Act: destruction and disposal of the goods.

[199] *Wickham, Holdings Ltd v Brooke House Motors Ltd* [1967] 1 WLR 295 (CA).

[200] As they were in *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 270, where the wrongdoing carrier could not have foreseen the loss caused by the removal of tax seals on whisky bottles.

drew a distinction between cases where the defendant acted in good faith and cases where the defendant acted dishonestly. In the former case, the less stringent test of 'foreseeability' was to be applied to the defendant, while in the latter case the defendant should be visited with the harsher consequences of a test that looked to the direct and natural consequences of the defendant's act.[201] Consequential damages might include the loss of the post-conversion appreciation in value of the converted chattel,[202] if that has not already been accounted for in the general award,[203] so that in substance the claimant would recover damages representing the value of the chattel at the judgment date.

In *Kuwait Airways Corpn v Iraqi Airways Co*, Lord Nicholls also pointed to the possibility of a defendant in the tort of conversion incurring a restitutionary liability, subject to the usual defences such as change of position, in respect of benefits gained from the chattel.[204] Nevertheless, in the conventional case where damages represent a forced judicial sale and are assessed at the date of the conversion, damages representing the capital value of the chattel should also include its income earning power. The power of a chattel to generate benefits is a function of its capital value, with the result that it would be a mistake to make an additional restitutionary award for benefits received by the defendant in such cases.

DOCUMENTARY INTANGIBLES

The tort of conversion developed to protect interests in tangible personalty, namely chattels. Nevertheless, it has also assumed a role in connection with documentary intangibles, where damages are based not upon the intrinsic value of the paper but upon the value of the obligation locked up in it.[205] The documentary intangibles in question include cheques and bills of lading.[206] In

[201] [2002] UKHL 19 at [95]–[104], [2002] 2 AC 883.

[202] *The Playa Larga* [1983] 2 Lloyd's Rep 171 (CA). [203] See above.

[204] *Kuwait Airways Corpn v Iraqi Airways Co* [2002] UKHL 19 at [79], [2002] 2 AC 883.

[205] *Morison v London County and Westminster Bank* [1914] 3 KB 356 (CA).

[206] *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All ER 675 (CA).

the case of a validly drawn cheque, this will be the face value of the cheque unless the cheque has previously been subject to a material alteration. The material alteration of a cheque often renders it a worthless piece of paper. This is because a materially altered cheque is avoided against all parties liable on the cheque with the exception of a party to it who has made the alteration.[207] In *Smith v Lloyds TSB Bank plc*,[208] the alteration—a change in the name of the payee—had been carried out by a thief who was not a party to the cheque. The defendant in this case was the collecting bank, which had presented the cheque for payment. In cases where the cheque has not been materially altered, the business of banks, constantly involved in the collection of cheques for their customers, and in the payment of cheques presented by collecting banks, would be fraught with the risk of strict liability in conversion were it not for certain statutory defences against liability[209] where they have not been guilty of negligence.[210]

IMPROVEMENTS TO CHATTELS

In chapter 4, we shall examine the principles dealing with the expansion of property rights in chattels transformed by accession, commingling, and similar processes. Let us take the example of a chattel which, after its initial conversion, is increased in value by an accession or other improvement, such as servicing or repair. A straightforward application of property principles to a conversion action, based upon a later denial of title by the defendant, would lead to the unjust enrichment of the claimant if damages were based upon the improved value of the chattel. Although the claimant is the owner of the improved chattel, damages in a conversion action against the defendant improver will be reduced to give the latter credit for the improved value.[211] The claimant will not be allowed any practical benefit

[207] Bills of Exchange Act 1882, s 64(1).

[208] [2001] 1 All ER 424 (CA).

[209] Bills of Exchange Act 1882, ss 60 and 82; Cheques Act 1957, s 4.

[210] See *Marfani & Co v Midland Bank Ltd* [1968] 1 WLR 956 (CA).

[211] Section 6(1) of the Torts (Interference with Goods) Act 1977 (the 1977 Act); and see *Munro v Willmott* [1949] 1 KB 295, which gave credit for the expense incurred by the defendant.

from making a tactical choice between acts of conversion occurring before and after the improvement. If, as a result of interpleader proceedings launched by a third party, the chattel is given up to the true owner, then the improver (the unsuccessful party in the interpleader proceedings) will have to be given credit for the improvements made.[212] It has been stressed that the improvements must have been made in the honest belief that the improver is entitled to the chattel.[213]

The 1977 Act also addresses the question of improvements made after the claimant has been dispossessed and before the chattel comes into the hands of the defendant. Even though the defendant has not personally incurred expense in improving the chattel, it is a reasonable inference that the price paid by the defendant to acquire the chattel reflects improvements made to it by an intermediate party. Consequently, section 6(2) of the Act provides for a reduction of damages, on the same principle as that set out above (provided the defendant has acted in good faith), and section 3(7) permits corresponding terms to be imposed by a court when requiring the defendant to surrender the chattel[214] to the claimant.

The 1977 Act has nothing to say about the claim of an improver who is no longer in possession of the chattel, as might occur where the owner has exercised the right of recaption. In *Greenwood v Bennett*, contrasting views were expressed about whether a claim could be maintained in such circumstances by a repairer (*pro* Denning MR; *contra* Cairns LJ). The existence of such a claim by the improver (and what about someone who has paid a previous improver in the chain?), a debatable matter, should be determined methodically in accordance with restitutionary principles.[215]

[212] *Greenwood v Bennett* [1973] QB 195 (CA); s 3(7) of the 1977 Act.

[213] Ibid.

[214] See the section on Recovery of the Chattel below.

[215] See McKendrick, E., 'Restitution and the Misuse of Chattels—The Need for a Principled Approach', in Palmer, N., and McKendrick, E. (eds), *Interests in Goods*, 2nd edn, LLP, 1998.

CONTRIBUTORY NEGLIGENCE

Although some support was given in the antecedent case law for a reduction of damages in conversion for the claimant's contributory negligence, the 1977 Act has now established beyond doubt that there is no such defence to conversion and intentional trespass actions.[216] It is in any case not easy to see upon what principle a division of loss could be effected as between the claimant's negligence and the defendant's strict liability. Despite the confinement of section 11(1) to conversion and intentional trespass, it is most unlikely that, at common law, contributory negligence would be a partial defence to an action for intentional interference with a bailor's reversionary interest.

RECOVERY OF THE CHATTEL

Given the nature of conversion as a forced judicial sale, it is unsurprising that the remedy exclusively took the form of damages. What is remarkable is that no remedy existed in the old tort of detinue by way of specific delivery (or restitution) of the chattel until the Common Law Procedure Act 1854. More than anything, this historical feature highlights the anomaly of the protection of property rights being entrusted to the law of tort.

Before the 1977 Act, a detinue judgment might have taken one of three forms. The defendant might have been required to pay damages or to surrender the chattel or to elect between paying damages or surrendering the chattel.[217] It was rare for a judgment to compel the defendant to surrender the chattel since courts proceeded upon the same basis as that governing the award of specific performance in contract actions. Specific relief did not issue if damages adequately compensated the claimant, which they did in the case of ordinary articles of commerce.[218] The statutory outcome of the abolition of detinue[219] was that the three

[216] Section 11(1).

[217] *General & Finance Facilities v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644 (CA).

[218] *Cohen v Roche* [1927] 1 KB 169, where even Hepplewhite chairs were articles of commerce in the hands of an antiques dealer.

[219] Section 2(1) of the 1977 Act.

forms of judgment outlined above also became available for conversion in its expanded form.[220] Naturally, this blunts the character of conversion as a forced judicial sale. The Act confirms the existence of the court's jurisdiction to award specific relief,[221] but does not affect the way in which the court chooses to exercise it.

Statutory provision is also made in the 1977 Act for the recovery of chattels by way of interlocutory relief,[222] prior to the trial of an action for wrongful interference. In interlocutory proceedings, additional features, relating for example to the strength of the claimant's case and the balance of convenience, complicate the exercise of judicial discretion. As regards the nature of the chattel itself, it remains the case that the claimant must show that it is no mere article of commerce. Thus, in *Howard E. Perry & Co Ltd v British Railways Board*[223] the recovery of a quantity of steel was permitted under section 4 where industrial action had made it impossible to procure steel in the market ('steel is gold'). The defendant was not claiming an interest in the steel but had refused to release it, fearful of the industrial consequences of such an action.

SELF-HELP

Trespass, the fountainhead of the modern law of torts, evolved initially to preserve peace and public order. It is therefore understandable that the law has been somewhat equivocal about whether individuals may exercise self-help as a remedy instead of pursuing their grievances in court. In the area of wrongful interference with chattels, the law on self-help falls significantly short of standards of clarity and consistency.

Self-help taking the form of the extra-judicial recovery of chattels is technically known as recaption. The right of recaption certainly exists but is constrained by the limitation that reasonable means be employed. This may on the facts compel the owner first to notify the wrongful possessor of the chattel of an intention to recover it if the use of force is to be regarded as within the bounds of reasonable means.[224] It seems that reasonable force

[220] Section 3.
[221] Section 3(3)(b).
[222] Section 4.
[223] [1980] 1 WLR 1375.
[224] LRC 18th Report.

may be used, even if the wrongful possessor has not committed a trespass against the owner seeking reception.[225]

More difficult is the question of whether entry upon the land of another is permitted to effect a reception. It is certainly permissible where the occupier of the land is guilty of a trespassory taking as against the owner[226] and there is support for the view that it is permissible in other cases too.[227] In the latter instance, if the right of reception exists, it is likely to be dependent upon the making of a prior demand.[228] It is unlikely that legal advice could confidently be given upon the subject of entry and reception. Any statutory clarification of the right of reception might have increased the chance of the right being exercised. The continuing obscurity of the right may therefore be seen as providing evidence of a desire not to encourage reception. One could, however, offer the practical advice that, if reception is to be exercised, then it had better be done quickly and effectively, without causing a breach of the peace or incidental damage to the property of the occupier. Furthermore, care should be taken to ensure that the amount at stake is unlikely to make the occupier want to litigate and that the occupier is not someone who derives pleasure from the pursuit of uneconomical litigation.

LIMITATION OF ACTIONS

Apart from cases where the act of conversion leads to the destruction of the chattel, it is one of the tort's curious features that it can be committed on a continuous basis. Since the harm done to the owner's interest is quantified financially in terms of the remedy—the forced judicial sale of the chattel—it follows that the value of the chattel for the time being in no way limits the number of occasions on which the tort may be committed. This is far from saying, however, that the owner can sue repeatedly in conversion and recover in gross a sum far exceeding the value of the chattel at any time. The recovery of damages representing the full value of the chattel serves to transfer the claimant's interest in it to the

[225] *Blades v Higgs* (1861) 10 CB (NS) 713, *per* Erle CJ.
[226] *Patrick v Colerick* (1838) 3 M & W 483.
[227] *Anthony v Haney* (1832) 8 Bing 186.
[228] LRC 18th Report

defendant:[229] the claimant cannot sell the same chattel twice to the same defendant. If another tortious intermeddler is selected as the defendant in conversion proceedings, a claimant who has recovered from one tortfeasor is in no position to sell the chattel again to another tortfeasor. This is subject to the possibility that damages in conversion might not take the form of the full value of the chattel.[230] A claimant, having successfully sued a later defendant in the chain, recovering damages according to the depreciated value of the chattel, ought, if later discovering an earlier defendant who converted when the chattel's value was higher, be able to recover from that earlier defendant the difference between the two values.

Consider now the following possible chain of involvement with the disputed chattel. A loses a chattel which is later found by B in 2007. B sells the chattel to C in 2008. C in turn sells it to D in 2011 and A traces the chattel to D's possession in 2014. If the ordinary six-year rule for tort actions (Limitation Act 1980, section 2) were to apply in this case, then, selecting the latest acts of conversion committed by the relevant parties, A would have six years from 2008 (the date of the sale to C) in which to sue B; six years from 2011 (the date of the sale to D) in which to sue C; and six years from the date of each and every refusal by D to return the goods, such refusals being made in response to a theoretically infinite series of demands. No limitation period would ever keep A out of court; A could always manufacture a defendant and time would never cease to run.

To prevent the above situation from occurring, the Limitation Act 1980 starts time running as against all of the defendants from the date of the first act of conversion in the disposition chain,[231] provided A does not resume possession of the chattel in the meantime. If the first act of conversion was committed by B in 2008 (the date of the sale to C), then A would be statute-barred as against all defendants in 2014. Furthermore, the Act implements a form of acquisition of absolute title, which brings personal property law into line with land law on the subject of adverse

[229] See above. [230] Discussed above.

[231] Section 3(1). In the case of the progeny of converted animals, time runs from their birth according to *Grant v YHH Holdings Pty Ltd* [2012] NSWCA 360, subject to time not having expired by then in respect of the parent (at [59]).

possession. Instead of D, the party in possession, being simply immune from suit after 2014, the Act provides that A's title is 'extinguished' upon the expiry of the limitation period.[232]

There is an exception to the above position where the chattel is stolen from A. In effect, the six-year period begins to run not from the date of the original conversion but from the date of acquisition of the chattel by the first good-faith purchaser, as regards that purchaser and his successors in title.[233] Supposing, in the above example, that C did not act in good faith but that D did, then time, as against D and anyone acquiring the goods from D, would run from 2011 (the date of the sale to D). As regards B and C, however, there would appear to be no statutory period of limitation, since both the six-year rule in section 2 and the special rules in section 3 are denied application.[234]

[232] Section 3(2). [233] Section 4. [234] Ibid.

4

FURTHER PROPERTY PROTECTION AND ITS LIMITS

INTRODUCTION

In chapter 3, we looked at the protection given at common law by the property torts in respect of proprietary interests in chattels. The subject matter of that chapter tells less than the full story about proprietary protection. Apart from documentary intangibles, nothing was said about intangible personalty. This is overwhelmingly a matter that falls within the province of equity. Equitable intervention in the area of proprietary protection is far more likely to concern intangible personalty than chattels, though it is certainly capable of embracing the latter. That intervention, moreover, may well take the form of granting proprietary remedies, following upon a process of equitable tracing, but there are also personal remedies available against those who interfere with property rights. These are the wrongs of dishonest assistance and knowing receipt. So far as these wrongs apply to intangible personalty, the space they fill would also be occupied by the tort of conversion if attempts to extend that tort beyond chattels were ever to prove successful.

Chapter 3 was also a less than full account of the protection afforded by the common law to property rights. Whilst demonstrating the extent to which a claimant could follow assets down a distribution chain, that chapter said nothing about the way the common law allows a claimant to switch a claim to a substitute asset in the process of tracing misappropriated chattels. To this we may also add the recovery of misappropriated moneys by way of an action for money had and received. Nor did chapter 3, except in the case of limitations legislation, concern itself with events that cut short a proprietary claim to a chattel.[1] This could happen if that chattel had become

[1] This theme is considered, in the context of competing title claims and the rule of *nemo dat quod non habet*, in chapter 6.

irrevocably attached to another, more dominant chattel, or to land as a fixture, or else had undergone a process of transformation by means of labour, and maybe added ingredients too, to become a new chattel. Nor was the case of mixtures considered, where outright ownership of a fluid or granular chattel could be transformed into a tenancy in common of the larger bulk created by the mixture.

This chapter, therefore, will deal with (1) the tracing of assets at common law; (2) the extinction or transformation of property rights at common law when chattels are altered or mixed; (3) the tracing of assets in equity; and (4) personal remedies in equity for interfering with equitable proprietary rights. The second of these subjects is, of course, the mirror image of someone else's acquisition of proprietary rights. Our discussion centres on the consumption or transformation of chattels, but a similar process of extinction can arise also in the case of intangibles when, for example, a debt is paid. The acceptance of payment may in some instances be wrongful, yet the payee is able to give the payer a good discharge; for example, where a debtor, without notice of an assignment, pays the assignor instead of the assignee.[2] The fourth of these subjects is dealt with here for reasons of convenience because of its proximity to equitable tracing. As this chapter introduction demonstrates, the compression of complex material into a short book sometimes creates difficulties of structure and detail in the presentation of material.

TRACING AT COMMON LAW

For two reasons, common law tracing is best dealt with in combination with equitable tracing, which is discussed below. The two subjects are so closely intertwined that separation would be artificial and there are influential calls being made for their substantive fusion.[3]

[2] See chapter 8.

[3] As will be seen in the section on Tracing in Equity below.

EXTINCTION OF PROPERTY RIGHTS IN CHATTELS

When assets cease to exist, property rights in them necessarily cease. The rules regarding the extinction of property rights when chattels become fixtures or lose their identity when attached to, commingled with, or transformed into a separate chattel will be dealt with under this heading as leading examples of extinctive transfer occurring by operation of law. To say that these transfers occur by operation of law is not to deny any role to party intention. Intention has a part to play in the operation of the fixtures rules. It can also play a part in determining the ownership of new chattels to the extent that the parties agree to displace the presumptive property rule. Apart from intention, consent to dealings in chattels may affect the ownership of new chattels coming into existence as a result of those dealings.[4]

FIXTURES

The question here is in what circumstances a chattel becomes so firmly attached to the land that it passes to the owner of the land or other person (such as a mortgagee) with a relevant interest in the land.[5] To answer this question, a related question must be firmly distinguished. In landlord–tenant relations, certain fixtures, known as trade fixtures, may be severed by the tenant from the land at the end of the tenancy.[6] Other fixtures, known as landlord's fixtures, may not. Our concern is with whether a chattel becomes a fixture in the first place.

A number of the cases canvass Roman law principles and reference is sometimes made to the maxim *quicquid plantatur solo, solo cedit* (literally, whatever is attached to the soil becomes part of the soil). Nevertheless, the Roman law rules do not as such apply and the maxim clearly goes too far. The authoritative approach

[4] Apart from fixtures and new chattels, a process of extinction is also apparent when limitations rules prevent the assertion of proprietary claims in conversion: see chapter 3.

[5] See Bennett, H.N., 'Attachment of Chattels to Land', in Palmer, N., and McKendrick, E. (eds), *Interests in Goods*, 2nd edn, LLP, 1998.

[6] *Bain v Brand* (1876) 1 App Cas 762 (HL).

to the issue of fixtures is expressed in *Hellawell v Eastwood*[7] as dependent upon the following two-stage test:

> [F]irst the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can be easily removed … or not, without injury to itself or the fabric of the building; secondly, … the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling … or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel ….[8]

The two limbs of this test are relative variables. Put simply, strength under one of the limbs—the degree of factual connection, for example—may compensate for a lack of evidence as to intention. Conversely, evidence of a clear intention that a chattel shall not become a fixture despite annexation to the soil may offset to a significant degree a strong attachment thereto. In *Hellawell v Eastwood*, machines had been fixed to the ground in order to make them 'steadier and more capable of convenient use as chattels'. They were no more fixtures 'than a carpet … attached to the floor by nails for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures, and other matters of an ornamental nature, which have been slightly attached to the walls of a dwelling as furniture … '. In the same vein, a houseboat has been held to be a chattel despite connected services, moorage to a pontoon, lines to the river wall, and anchorage in the river bed. It could readily be moved into drydock or even moored somewhere else.[9] It will be unusual for a chattel resting on the ground by its own weight to be a fixture, but even an unattached chattel may exceptionally be a fixture if it is vital to the enjoyment of the land.[10] Furthermore, if a chattel resting upon land can be removed from it only by demolition, as was the case with a chalet resting upon concrete pillars, it will be treated as a fixture.[11] Conversely, chattels firmly attached to the land so that their severance would be very difficult may in an exceptional case be a

[7] (1851) 6 Ex 295.

[8] See also *Holland v Hodgson* (1872) LR 7 CP 328, 334.

[9] *Chelsea Yacht and Boat Co Ltd v Pope* [2000] 1 WLR 1941.

[10] *Elliott v Bishop* (1855) 11 Ex 113: house keys; *cf. Earl of Cardigan v Moore* [2012] EWHC 1204 (Ch) (ancestral paintings not fixtures).

[11] *Elitestone Ltd v Morris* [1997] 1 WLR 687 (HL).

chattel. In *Wake v Hall*,[12] Derbyshire miners exercised customary mining rights, confirmed by statute, on land belonging to others. In order to carry out the mining, they erected on the land machinery and building (engine house, boiler house, etc). When the mining ceased, the House of Lords held they were entitled as against the owners of the land to dismantle the buildings and machinery and sell them. The buildings and machinery were clearly accessory to the mining and could be removed without causing great damage to the land. If there had been significant destruction of the land, this would have afforded strong evidence 'that the property in the materials must have been intended to be irrevocably annexed to the soil'.

Ultimately, the matter of intention bulks very large in the application of the *Hellawell v Eastwood* formula. In two cases involving seats in a cinema, the courts reached contrasting conclusions on the fixtures question.[13] In an exceptional case, intention can overcome the fact of chattels merely resting upon land so as to lead to their characterization as fixtures. In *Holland v Hodgson*,[14] Blackburn J gives the examples of blocks placed on top of each other to form a dry stone wall (a fixture), when those same blocks would be treated as chattels if stacked in the same way for storage purposes in a builder's yard. The burden will be on those asserting that chattels resting on land have become fixtures, and on those asserting that chattels even slightly affixed to land remain chattels, to show an intention that counters the presumptive rule.[15] Nevertheless, there are limits to how far intention can be taken, especially where the rights of third parties are at stake. *Hobson v Gorringe*[16] is a good example of this. Hobson delivered an engine to King under a hire-purchase contract. The engine was bolted to the floor through iron plates set in newly poured concrete. A plate was attached to the engine making it clear that it remained the property of Hobson. At a later date, King gave a mortgage over the land, fixed machinery, and fixtures in favour of Gorringe and then fell into arrears under the

[12] (1883) 8 App Cas 195 (CA).

[13] *Lyon & Co v London City and Midland Bank* [1903] 2 KB 135; *Vaudeville Electric Cinema Ltd v Muriset* [1923] 2 Ch 74.

[14] (1872) LR 7 CP 328. [15] Ibid. [16] [1897] 1 Ch 182 (CA).

hire-purchase contract. Upon the bankruptcy of King, a question arose whether the engine had passed to Gorringe as a fixture under the mortgage. The Court of Appeal held, *inter alia*, that the engine was so firmly fixed to the ground that it had become a fixture. Only where the 'circumstances which shewed the degree of annexation and the object of such annexation . . . were patent for all to see' (the plate being evidently insufficient in this respect) were they germane in determining the issue of intention. So as influential as intention is in settling the fixture question, it cannot be permitted to depart too far from external, observable fact. In a similarly restrictive way, it has been observed that intention can affect the issue only to the extent that it can be presumed from the object and degree of annexation.[17]

ATTACHMENT, COMMINGLING, AND ALTERATION

This area of law is so undeveloped at common law that its vocabulary has been borrowed from Roman law, though it should not be assumed that the same goes for the substantive law. The failure of English law to develop systematic answers to the problems raised in these cases probably owes a great deal to the conceptual underdevelopment of personal property law; problems are dealt with as they arise through the medium of the law of torts.[18]

First, *accessio* is the joining of a subordinate thing to a dominant one, so that the identity of the subordinate becomes submerged in the dominant. The impregnation of an animal with the seed of another is a long-standing example.[19] Others are the replacement panel welded to a car that has suffered crash damage, and the glue used in repairing the damaged spine of a book. Secondly, there is *specificatio* where a raw material is altered by labour to produce something of a different identity. The

[17] *Melluish v B.M.I. (No. 3) Ltd* [1996] AC 454, 473 (HL).

[18] See chapter 3.

[19] Blackstone, *Commentaries on the Laws of England*, 1765, Book II, chapter 25 'Of Property in Things Personal', p 390: '*partus sequitur ventrem* in the brute creation' since the father is often unknown and the mother, whilst pregnant, useless to its owner.

Romans gave examples of grapes converted into wine, and silver fashioned into a jug. We may cite the more recent example of leather that is cut, shaped, and stitched to make handbags.[20] Thirdly, commingling, taking the form of *confusio* (fluid mixtures) or *commixitio* (granular mixtures),[21] occurs where identical (or at least physically compatible) chattels are mixed to produce a volume from which it is impossible to separate the original ingredients.[22] Impossibility here includes impracticability as well as genuine impossibility. Grain may physically be separable in a way that globules of oil are not, but the herculean task of separation means in practice that no distinction can be drawn between fluid and granular mixtures. In neither case is there any prospect of an original contribution being recovered from the mixture in its pristine form. For example, different quantities of Brent crude oil might be poured into the one supertanker (even different qualities whose mixture produces an intermediate quality), or different quantities of amber durum wheat might be poured into the same grain elevator or ship's hold. It is a further characteristic of mixtures, especially fluid ones, that original ingredients of different qualities may be blended to produce a hybrid compound. This process resembles *specificatio* to such a degree as to demand consistency in the rules applicable to the two processes. These various categories of accession, specification, and commingling raise questions of ownership of the final product as well as of tort liability where there has occurred wrongdoing.

For accession, the rule is that the owner of the dominant or superior thing retains the thing in its new and enlarged state. Establishing the separate identities of thing and accessory will in many cases be straightforward. In other cases, matters of size, value, and purpose may have to be applied with some sensitivity. The gold leaf applied to a picture frame may be more valuable than the frame but it functions to enhance the frame. The frame is not merely the setting for the gold leaf. An English court should therefore conclude that the gold leaf accedes to the frame.

[20] *Cf. Re Peachdart Ltd* [1984] Ch 131.

[21] Noting the absence of consistent terminology is *Hill v Reglon Pty Ltd* [2007] NSWCA 295.

[22] See Birks, P., 'Mixtures', in Palmer, and McKendrick (eds), *op. cit*.

Apart from this, the young of animals go with the ownership of the mother,[23] except for swans whose young are divided equally between 'the cock and the hen',[24] since 'the father is well-known by his constant association with the female'.[25] According to Blackburn J in *Appleby v Myers*,[26]

> [M]aterials worked by one into the property of another become part of that property … Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship which is under repair, become part of the coat or ship ….

If, nevertheless, the owner of the coat or ship makes unlawful use of the materials of another, this act will entail liability in the tort of conversion (see chapter 3).

Sometimes, the degree of attachment of one thing to another will be slight enough to allow a reversal of the attachment process without damaging the dominant thing. In this case, the property in the subordinate thing is not transferred to the owner of the dominant. In *Hendy Lennox Ltd v Grahame Puttick Ltd*,[27] a seller supplied diesel engines to a buyer who incorporated them in generator sets in the manufacturing process. The seller retained the general property in the engines but its property right would have been expunged if the accession had been irrevocable. The court held that the seller was entitled to recover the engines under the contract of sale since they remained clearly identifiable and could be removed after several hours' work.[28] It would in many cases defeat commercial expectations to infer too readily that an accession was irreversible. Aircraft engines, for example, are the subject of separate finance leases from the ones governing the airframes in which the engines are incorporated. Similarly, mobile oil-drilling platforms (or floating production

[23] Blackstone, *op. cit*. See *Grant v YHH Holdings Pty Ltd* [2012] NSWCA 360 at [74] for a thought-provoking reluctance to express this outcome in terms of accession: 'Just as it is no longer acceptable to treat people as, in law, chattels … it is neither logical nor morally acceptable to treat animals, though chattels, as in all respects equivalent to inanimate objects'.

[24] *Case of Swans* (1592) 7 Co. Rep 15b.

[25] Blackstone, *op. cit*.

[26] (1867) LR 2 CP 651.

[27] [1984] 1 WLR 485.

[28] *Cf. Akron Tyre Co v Kittson* (1951) 82 CLR 477.

and off-take facilities (FPSOs)) are composed of connected elements in different ownerships.

There is little authority on the specification issue (which is sometimes dealt with as though it gave rise to issues of accession).[29] Taking first the case of an owner of materials who consents to their being worked upon so as to create a new thing, it is a matter of fine judgement whether and when a new thing comes into existence.[30] If such happens, then first of all the ownership of the materials ceases to exist at the point they are consumed in the manufacturing process. Secondly, the ownership of the new thing created by the process of manufacture vests in the manufacturer (or operator),[31] a conclusion that tends to be assumed in the case law rather than justified.[32] Nevertheless, if the owner of the raw materials and the operator agree that the former is to become the owner of the new thing, such agreement will be recognized as having this effect.[33]

Less certain is the case of the operator who unlawfully uses someone else's materials to manufacture a new thing. The operator will certainly incur liability in the tort of conversion for consuming the materials. The question is whether the owner of the materials can go further and claim ownership of the new thing itself so as to ground an action in conversion if the operator refuses to surrender it. On one view, the owner of the materials may not since the operator in this case too becomes the owner of the new thing.[34] The opposite view, consistent with some of the authorities on mixtures,[35] is that the owner of the materials acquires outright ownership of the new thing, at least in cases where the owner's material contribution is the preponderant one

[29] See *Jones v De Marchant* (1916) 28 DLR 561.

[30] *Chaigley Farms Ltd v Crawford, Kaye & Grayshire Ltd* [1996] BCC 957 (slaughtered cattle).

[31] *Borden (U.K.) Ltd v Scottish Timber Products Ltd* [1981] Ch 25 (CA); *Re Peachdart Ltd* [1984] Ch 131.

[32] But it is explained as turning on implied intention in *Glencore International AG v Metro Trading Inc* [2001] 1 Lloyd's Rep 284.

[33] *Clough Mill Ltd v Martin* [1985] 1 WLR 111 (CA) (Robert Goff LJ); *Glencore International AG v Metro Trading Inc* [2001] 1 Lloyd's Rep 284.

[34] Holdsworth, W., *History of English Law,* vol III, pp 501–03.

[35] See *Glencore International AG v Metro Trading Inc* [2001] 1 Lloyd's Rep 284.

and a sharing arrangement is not feasible. This was the outcome in *Jones v De Marchant*,[36] where 18 of the 22 beaver skins used by a man to make a coat which was then given to his mistress had been unlawfully taken from his wife. It was perhaps no accident that the court treated the case as one of accession. An intermediate solution is that the owner of the materials obtains a shared interest in the new thing by way of tenancy in common, along with the operator and the owner of other raw materials used in the process. Similarly to the case of the beaver-skin coat, this solution is unavailable if the owner of the materials cannot trace them into the new thing because of the sheer difficulty in quantifying the owner's contribution.[37] The present law on unlawful specification is thus hard to state but, it is submitted, is consistent with the outcome of the mixture cases discussed below. As against a wrongdoer, the owner of the materials is not in principle entitled to the new thing, for that would be a penal outcome. Rather, the entitlement will be to a divisible interest in the new thing unless for reasons explained the new thing cannot be divided.

Where chattels are commingled, the basic rule is that the owners of the two chattels share the greater whole as tenants in common according to their individual contributions. If A's 60,000 gallons of oil are mixed with B's 40,000 gallons, they share the 100,000 gallons in the ratio 3:2 and suffer any shrinkage occurring through neither party's fault in the bulk in the same proportion.[38]

If, nevertheless, the mixing occurs through the fault of either A or B, it is a different matter. In *F. S. Sandeman & Sons v Tyzack and Branfoot Shipping Co*,[39] certain dicta of Lord Moulton assert that, if the mixing of chattels belonging to A and B occurs through the fault of A (and fault might include negligence), B becomes the owner of the whole. Alive to some of the hardships this rule might cause, and aware that 'the whole matter is far from

[36] (1916) 28 DLR 561. See also *Re Oatway* [1903] 2 Ch 356.

[37] *Borden (U.K.) Ltd v Scottish Timber Products Ltd* [1981] Ch 25 (CA) (Bridge LJ); see the material on tracing below.

[38] *Spence v Union Marine Insurance Co* (1868) LR 3 CP 427.

[39] [1913] AC 680 (HL).

being within the domain of settled law', he sought to exclude this 'fundamental principle' where 'in extreme cases… [it] would lead to substantial injustice', citing this example:

> [I]f a small portion of the goods of 'B' became mixed with the goods of 'A' by a negligent act for which 'A' alone was liable, I think it quite possible that the law would prefer to view it as a conversion by 'A' of this small amount of 'B's' goods rather than do the substantial injustice of treating 'B' as the owner of the whole of the mixed mass.[40]

A further softening of the law's attitude to wrongful mixers is evident in *Indian Oil Corpn v Greenstone Shipping SA*.[41] A consignment of 75,000 tons of Russian crude oil was loaded on a tanker bound for India. Already in the tanker was a quantity of 9,545 barrels of Iranian crude left over from an earlier voyage. The consignees of the Russian oil claimed to be entitled to the Iranian oil on the ground of the carrier's wrongful mixture but the court applied the tenancy in common rule of *Spence v Union Marine Insurance Co*. It was no longer appropriate to have a 'primitive' rule when there were 'modern and sophisticated methods of measurement… available'. The new rule was expressed as follows:

> [W]here B wrongfully mixes the goods of A with goods of his own, which are substantially of the same nature and quality, and they cannot in practice be separated, the mixture is held in common and A is entitled to receive out of it a quantity equal to that of his goods which went into the mixture, any doubt as to that quantity being resolved in favour of A. He is also entitled to claim damages from B in respect of any loss he may have suffered, in respect of quality or otherwise, by reason of the admixture.

The doubt referred to concerned uncertainty as to how much A had before the wrongful mixing. A more difficult problem would concern, for example, the wrongful mixture by B of B's grade 3 wheat with A's grade 1 wheat to produce a grade 2 blend. One possible solution would be to give A his *aliquot* share of the commingled grade 2 wheat together with damages for the difference in value between grade 2 and grade 1. Another solution would be to give A a larger quantity of grade 2 wheat equal in value to A's grade 1 wheat. The passage in *Indian Oil* quoted

[40] Ibid, 695. [41] [1988] QB 345.

above favours the former of these solutions. Nevertheless, the latter solution is the better one since contribution is a matter of both quality and quantity. Moreover, it is consistent with the views of Lord Millett on equitable tracing,[42] where his lordship would give the claimant a choice against a wrongdoer of either a proportionate share of the commingled mass or an equitable lien over that mass to the extent of the claimant's misapplied assets.[43] Again, it is favoured by Moore-Bick J in a similar case involving the blending of oil where a preference was stated for proportions that 'reflect both the quantity and the value of the oil' contributed, with 'any doubts about the quantity or value of the oil [to] be resolved against the wrongdoer'.[44] A final difficulty arising out of the *Indian Oil* case is that of shrinkage, not discussed in the case. If *Union Marine Insurance* were simply applied then there would be a rateable sharing of the loss between A and B. This might be the proper result where the mixing in no way contributes to the risk of shrinkage. Otherwise, it might be preferable to charge any shrinkage to B's share until it is exhausted.

TRACING IN EQUITY

GENERAL

In this chapter, we have been examining the cases in which both legal and equitable interests in personalty may be overridden as a result of subsequent dealings with that personalty. Stepping back from these priority conflicts and dealing with events preceding them, it is convenient at this point to summarize the complex law on tracing, beginning with some general observations. The emphasis will be placed upon tracing in aid of a proprietary remedy. Because of limitations inherent in the common law tracing rules, the subject of tracing has in practice been largely the preserve of equity. The close connection of the two processes, along with calls for their fusion, favours treating the equitable and common law rules together at this juncture.

[42] On tracing, see below.

[43] *Foskett v McKeown* [2001] 1 AC 102 (HL).

[44] *Glencore International AG v Metro Trading Inc* [2001] 1 Lloyd's Rep 284, 330. See also *Re CKE Engineering Ltd* [2007] BCC 975.

Beginning with a very general example of tracing, suppose that assets belonging to A are sold by B to C. The money proceeds of the sale in B's hands are then deposited in a bank account. B later makes a withdrawal from this account which he uses to purchase some shares. As a matter of vocabulary, A may seek to *follow* his original assets into C's hands. A may elect instead to *trace* his assets, or rather their value, into new assets. This latter process, which raises more difficulties than the former, involves identifying the proceeds of (or substitutions for) A's original assets as first the payment received by B, then the credit in B's bank account produced by the payment in, followed by the shares purchased with the fruits of the withdrawal from that account. The two processes of following and tracing are often broadly described as tracing but distinguishing them serves the cause of analytical clarity. Tracing is a physical process and not a remedy.[45] It seeks to locate assets and their substitutes 'as a precursor to a claim'.[46] The remedy will come afterwards when A, upon completing the tracing process, claims a proprietary entitlement in the traced asset, as against the person who either holds or previously held it, and then selects a cause of action in furtherance of that claim. For example, in *Boscawen v Bajwa*[47] moneys were advanced for the purchase of a property, the creditor to take a mortgage over the property on completion of the purchase. Before the mortgage was executed, the moneys were paid over prematurely to the vendor's solicitors; they were then used to discharge a mortgage over the property earlier granted by the vendor. The purchaser's creditor, having traced the moneys through the client accounts of the purchaser's and the vendor's solicitors, was entitled to be subrogated to the security of the vendor's mortgagee. There was no need to follow the moneys through the intricacies of the banking system;[48]

[45] *Boscawen v Bajwa* [1996] 1 WLR 328 (CA) (Millett LJ).

[46] *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd* [2002] SGCA 28 at [53], [2002] 3 SLR 241.

[47] [1996] 1 WLR 328 (CA).

[48] Indeed, nothing is transferred between paying and receiving banks: *R v Preddy* [1996] AC 815 (HL), discussed in chapter 2. Similarly, in *F. C. Jones Sons v Jones* [1997] Ch 159 (CA), the court was content to follow cheques from hand to hand without going 'through the dealings on the London potato futures market'.

it was sufficient that the value provided by the claimant could be identified in the proceeds of the premature payment. Even if the physical process of tracing is successful, however, the claim against the person into whose hands the proceeds come may fail because this person as a *bona fide* purchaser prevails against the claimant in the type of priority conflict discussed in chapter 6.

The process of tracing, together with the claims that arise as a result of it, is for the most part a proprietary one. A person seeking to recover an asset as his own is asserting a property entitlement and is not seeking relief on the ground that the ultimate holder of that asset, or any intermediate person in the holding chain, has been unjustly enriched at his expense.[49] Merely because the law of tracing is of such abiding interest to restitution lawyers is no reason to classify it as a branch of the law of restitution. Over time, the common law and equity have developed different approaches to the tracing process.[50] As with so many other issues, it is hard to justify the continuing existence of separate rules of common law and equity 140 years after the administrative fusion of the courts of equity and common law. Common law and equitable tracing are both processes supported by an evidentiary inquiry. Lord Millett has stated forcefully, 'Given its nature, there is nothing inherently legal or equitable about the tracing exercise. There is thus no sense in maintaining different rules for tracing at law and in equity. One set of tracing rules is enough'.[51] Although Lord Millett's common sense may represent the likely future, account must yet be taken of the present. What currently separates common law and equity is the inability of the common law to trace into mixtures,[52] which hobbles it when moneys become mixed in inter-bank payment systems, and equity's requirement that there be a fiduciary relationship to enable the tracing process.

[49] *Foskett v McKeown* [2001] 1 AC 102, 108, 115, 127 (HL).

[50] For an example of statutory tracing that has its own rules, see the Insolvency Act 1986, Schedule B1, para 70.

[51] *Foskett v McKeown* [2001] 1 AC 102, 128 (HL).

[52] On chattels, mixtures, and tenancy in common, see above.

COMMON LAW

Taking first the common law, the orthodox proposition is that the traced asset must be the direct successor of the claimant's original asset or of an earlier traced asset, itself the successor of the claimant's original asset. An example of this is *Taylor v Plumer*,[53] where money, entrusted to a stockbroker for the purchase of bonds, was used instead to buy American investments and bullion, which were in the hands of the stockbroker when he was apprehended on the point of sailing to America. The need to trace a direct line of succession, evident in the case of so-called clean substitutions, means that the common law cannot trace into a mixed fund.[54] Therefore, according to the orthodox view, if a claimant's widgets are mixed with other widgets so that it is physically impossible to identify them in the commingled fungible mass, the common law tracing claim will fail. This is congruent with the rule that the property in goods may not pass under a contract of sale to the extent that the goods remain unascertained, even within a larger ascertained bulk. Similarly, if money is paid into an account already in surplus, it will be impossible at common law to identify that precise portion of the bank's indebtedness attributable to the payment in of the claimant's money. At common law, the property in money is lost when it is mixed with other money.[55]

Now, this may be the long-established position, entirely in accordance with the absence at common law of a remedy in the nature of a charge or non-possessory lien over the larger whole to the extent of the claimant's interest. Nevertheless, it neglects important developments, fuelled by statute,[56] in the law of tenancy in common by which a claimant might hold assets at law in common with other persons in the proportions of their respective entitlements. This is true enough for granular and fluid mixtures and should equally be true for tangible widgets, so long as the claimant's share can be extracted from the greater mass without

[53] (1815) 3 M & S 562.

[54] *Agip (Africa) Ltd v Jackson* [1991] Ch 547 (CA); *Banque Belge pour L'Etranger v Hambrouck* [1921] 1 KB 321 (CA).

[55] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) (Lord Goff).

[56] Sale of Goods Act 1979, s 20A.

prejudice to the remainder. Furthermore, in non-mixture cases, the rules on accession and specification[57] in effect may allow common law tracing notwithstanding an alteration to the chattel that is being traced. It would nevertheless require an unlikely expansion of the tenancy in common idea for it to be extended at common law to intangible assets, such as an entitlement arising under a bank account.

The importance of common law tracing is dependent to a large extent upon any limitations on equitable tracing. Common law tracing will give the claimant a legal property right, as opposed to a mere equitable property right, which, though no more effective in insolvency distributions than an equitable right, is yet stronger for priority purposes in conflicts with third party purchasers. Identical common law and equitable tracing rules would not necessarily lead to identical proprietary outcomes. Equity allows a *bona fide* purchaser of the legal estate to override a prior, competing equitable interest.[58] Prior legal proprietary interests, with exceptions, cannot be overridden in this way.

CHATTELS

A claimant successfully tracing money at common law will be able to recover a money sum in an action for money had and received. In the case of chattels, an action in conversion may be maintained. Assuming for now a proprietary claim concerning a chattel, a question that is not easy to answer is why the claimant can assert that traceable substitutes for the original chattel belong to him, for the reason must be more than a bald assertion 'They are mine'. The avoidance of unjust enrichment is not the answer: unjust enrichment claims admit the defence of change of position[59] while proprietary claims do not. If this were not so, the entire law of title transfer and its exceptions would be turned upside down.[60] Since there cannot be a simultaneous

[57] Discussed above. [58] See chapter 6.

[59] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) (Lord Goff).

[60] See chapter 6. The defence of change of position is akin to the *bona fide* purchaser defence (*Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 580 (HL) (Lord Goff)): the law of title transfer admits no general *bona fide* purchaser exception that defeats a legal title.

claim for the original chattel and its traceable proceeds,[61] even against different defendants, it surely means that, in surrendering his claim to the chattel, or at least in not further pursuing it, the claimant is adopting the transaction that gives rise to the claimed traceable substitute. As the tracing process goes down a line of transactions, the claimant may be making similar decisions at each stage, which means that it may not altogether be true to say that tracing as a physical process precedes the claim that is made consequent upon it. Lord Goff declined to name this elective process as one of ratification of the action giving rise to the claimed proceeds,[62] but this seems to be a matter of linguistic style rather than substance. In some cases, it might be thought that the claimant is waiving the tort committed when a chattel is dealt with so as to give rise to proceeds and then further proceeds. Nevertheless, not all such dealing will be tortious, especially when they involve the proceeds of proceeds and a claimant who has not yet adopted the transaction that gave rise to them. It is furthermore not clear how much time the claimant has to adopt the transaction giving rise to the traced proceeds, a matter that could have implications for limitation purposes.[63]

The conversion action, though conventionally yielding a personal remedy, is treated as a proprietary action so that the claimant is not to be treated as an unsecured creditor in the defendant's insolvency.[64] Until the forced judicial sale that results from a satisfied judgment in favour of the claimant, the claimant has a good title to the chattel. Consequently, if that title is wrongfully denied by an insolvency office holder who disposes of or refuses to surrender the claimed chattel, that party will in his personal capacity incur liability in conversion to the claimant. The use of conversion at the end of the common law tracing process, whether in insolvency proceedings or otherwise, is somewhat untested but there is no reason why the action should not be maintained, though the rule preventing common law tracing through mixtures will give the action relatively little scope in practice.

[61] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 573 (HL).

[62] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 573 (HL).

[63] See chapter 3.

[64] For the distinction between proprietary claim and personal remedy, see *F. C. Jones & Sons v Jones* [1997] Ch 159, 168 (CA), *per* Millett LJ.

MONEY HAD AND RECEIVED

The action for money had and received was treated as a personal action in *Lipkin Gorman v Karpnale Ltd*[65] although, since the defendant was plainly solvent, no need arose to classify it as personal or proprietary for the usual reason. An analogous equitable action has also been treated as personal in character,[66] the difference between the two actions being that the payment of money under a mistake of law is no bar to the equitable action.[67] In *Lipkin Gorman*, a partner in a firm of solicitors, with the connivance of the firm's cashier, wrongfully withdrew money from a client account and exchanged it with the defendant gambling club for gambling chips.[68] Since the defendant was held not to have provided consideration for the money, it could not claim a good title to the money under the currency rule[69] and so was open to the action for money had and received. The gambling club was nevertheless able to rely upon the change of position defence but only to the extent that it had paid out on winning bets. The classification of the money claim as personal in character led the court to treat the action as a restitutionary one, which was why the change of position defence needed to be considered and applied. Despite *Lipkin Gorman*, however, there is authority for the view that a common law claim for money had and received consequent upon the tracing process is a proprietary claim.[70] Consequently, a recipient of the money resisting the claim would have to seek the application of the currency rule and there would be no place for the change of position defence.

[65] [1991] 2 AC 548 (HL). In the Court of Appeal ([1989] 1 WLR 1340), Nicholls LJ would have treated the gambling club in that case as having converted the stolen money at the point of receipt. This is correct but, according to Lord Goff in the House of Lords ([1991] 2 AC 548, 570), conversion was not open to the claimant in either court since the claim had been framed as money had and received.

[66] *Re Diplock* [1948] 1 Ch 465 (CA).

[67] So far as an equitable proprietary claim can be made against a mixed money fund, there seems no reason to make this personal claim.

[68] [1991] 2 AC 548 (HL).

[69] See *Miller v Race* (1758) 1 Burr 452, discussed in chapter 6.

[70] See *F. C. Jones & Sons v Jones* [1997] Ch 159, 168 (CA), *per* Millett LJ. If the action were proprietary, there would be no change of position defence for the reason stated above.

Lipkin Gorman did not concern an equitable tracing claim, so the question never arose of whether the gambling club, once apprised that the profit accruing to it as a volunteer from the dishonest partner's debts, became liable to account for that sum as a constructive trustee.[71]

EQUITY

The conventional view is that it is easier to trace in equity, the processes of which are not impeded by difficulties with mixtures or with precise substitutes. Moreover, a tracing claim in equity may lead to a proprietary claim for the recovery of money unhampered by difficulties in the nature of following the precise passage of money that becomes mixed as it passes through a bank clearing system.[72] Attempts have been made to broaden the nature of the equitable tracing process. One attempt concerned so-called 'backward' tracing where, prior to feeding his own account or fund with misappropriated assets, the wrongdoer makes a withdrawal to purchase an item of enduring value, the withdrawal and the payment in being connected transactions. The claimant now asserts a proprietary right in the proceeds of the earlier withdrawal since the surviving contents of the fund or account are not sufficient to meet his claim. There is some support for this proposal, provided that a causal connection can be found between the prior withdrawal and the later payment in,[73] but the proposal is by no means established in law.[74] Another attempt, which pays rather less regard to the causal process, is the so-called 'swollen assets' approach. To the extent that it can be shown that the defendant's assets in general have been augmented by the misappropriated moneys, then, even if those moneys cannot be traced to particular assets in the defendant's hands, the claimant will be given an equitable lien over the whole of the defendant's assets. The assault of this approach on

[71] See below.

[72] *F. C. Jones Sons v Jones* [1997] Ch 159, 168 (CA) *per* Millett LJ.

[73] *Shalson v Russo* [2003] EWHC 1637 (Ch) at [141]; [2005] Ch 281.

[74] There was a division of opinion in *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211 (CA) between Dillon LJ (for) and Leggatt LJ (against).

the tracing process is substantial and it would give rise to very significant remedial complications. It has received some support[75] but the weight of authority is against it.[76]

FIDUCIARY RELATIONSHIP

Compared to the common law, equitable tracing does have the apparent drawback that there has to be 'an initial fiduciary relationship in order to start the tracing process in equity'.[77] The fiduciary net, however, can be cast quite broadly in order to impose duties on individuals handling money or other assets.[78] Moreover, the fiduciary relationship may arise even in the absence of a consensual relationship, as where the conscience of a thief is bound so as to make him a constructive trustee of stolen moneys.[79] The existence of a fiduciary relationship has also been found in the fact of receiving mistaken payment,[80] but this conclusion cannot stand in the light of Lord Browne-Wilkinson's assertion in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[81] that the conscience of a recipient of a mistaken payment cannot be bound prior to the recipient retaining the payment with notice of the mistake. From that point on, the claimant will have a proprietary claim after tracing into the proceeds of the payment, even though the making and receipt of payment involved no unlawful act. A fiduciary relationship, therefore, is a precondition of the equitable proprietary claim but need not be present throughout the tracing process.

[75] *Space Investments Ltd v CIBC Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072 (PC).

[76] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC); *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211(CA).

[77] *Agip (Africa) Ltd v Jackson* [1991] Ch 265, 290, *per* Millett J. See also *Re Hallett's Estate* (1880) 13 Ch D 696 (CA); *Re Diplock* [1948] 1 Ch 465 (CA); *Boscawen v Bajwa* [1996] 1 WLR 328 (CA).

[78] For example, in *Agip (Africa) Ltd v Jackson* [1991] Ch 547 (CA), the chief accountant employed by the claimant.

[79] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 715–16 (Lord Browne-Wilkinson). See also *Black v S. Freedman and Co* (1910) 12 CLR 105.

[80] *Chase-Manhattan Bank v Israel British Bank* [1981] 1 Ch 105.

[81] [1996] AC 669 (HL).

CLAIMANT AND TRUSTEE

In the event of tracing into proceeds, the claimant may as against the defaulting trustee (or fiduciary) elect to take the proceeds purchased[82] or take instead an equitable lien[83] over those proceeds to the amount of his assets used for their purchase.[84] Where, however, the proceeds have been traced into a mixed fund that includes the trustee's own assets, and the proceeds are capable of division, the claimant is not entitled to all the proceeds. Instead, he may claim an equitable lien on the fund, electing between the sum of his assets traceable therein and the proportion of the fund attributable to his assets in comparison with the proportion contributed by the trustee. The latter measure is obviously more favourable to the claimant where the fund has appreciated in value since the mixing took place. In *Foskett v McKeown*, the claimants received a share of the defaulting fiduciary's life insurance proceeds that greatly exceeded the amount of premiums paid with their moneys.[85] In respect of the mixed fund or any proceeds thereof, the claimant is entitled, as against a wrongdoing trustee, to charge any depletion in the fund against the trustee's interest in it. The trustee may not say that funds lost in unprofitable investments derived from the claimant's contribution, whereas profitable investments derived from the trustee's.[86] This is because the trustee must not be allowed to make a benefit from his breach of trust. Some degree of leniency is allowed in the case of accidental breaches of trust by non-professional trustees. In one case, the trustee made investments with what she considered her own money after making a withdrawal from an account into which trust moneys had been accidentally paid. She had an overdraft facility and would have made the investment anyway.[87] Subject to that, in extreme cases the claimant will recover as against a wrongdoing trustee the whole fund (or other

[82] The wrongdoer will hold them on the terms of a constructive trust: *Boscawen v Bajwa* [1996] 1 WLR 328, 334–35 (CA).

[83] The cases sometimes speak of an equitable charge but it is better to reserve charges for consensual property rights.

[84] *Re Hallett's Estate* (1880) 13 Ch D 696 (CA).

[85] [2001] 1 AC 102 (HL).

[86] *Re Oatway* [1903] 2 Ch 356.

[87] *Re Tilley's Will Trusts* [1967] Ch 1179.

mixture) even if his assets do not account for the whole, namely, where the fund cannot be divided because the process by which it arose is physically irreversible.[88]

CO-CLAIMANTS

If the contents of a mixed fund belong to more than one innocent claimant, each is entitled to an equitable lien over that fund to the extent of his contribution.[89] Increases and depletions pose a substantial problem concerning the extent of entitlement. Taking the more likely case of a depleted fund, there are broadly three possible ways to charge depletions against the innocent contributors. The first way is to treat the fund as though it were a current account and apply the rule in *Clayton's Case*.[90] Withdrawals from the fund would take place in order of payments into it on a first-in first-out basis, so that earlier contributors would be placed at a disadvantage in relation to later and might receive nothing at all when the final account is taken. This approach has been authoritatively rejected.[91] In any case, the rule is one of implied intention which cannot supply a base for allocating losses between innocent claimants who have not consented to the mixing.

The second approach, which appeals to forensic simplicity, favours the rateable sharing by all contributors of all losses suffered by the fund, regardless of the dates those losses occurred and of the dates when the various contributions to the fund were made. It has authoritative support[92] but in terms of justice it offers a crude solution. Since this approach takes a snapshot view of the fund at the end point, when it is about to be broken up and shared among the various claimants, it means that late contributors suffer the same rateable depletion as early contributors. It means also that late contributors suffer losses that have already occurred before their contributions were made. A further point is that a claim should not survive the account being in deficit or

[88] *Jones v De Marchant* (1916) 28 DLR 561; *Foskett v McKeown* [2001] 1 AC 102 (HL).

[89] *Re Hallett's Estate* (1880) 13 Ch D 696 (CA).

[90] (1816) 1 Mer 572.

[91] *Re Diplock* [1948] 1 Ch 465 (CA).

[92] *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22 (CA).

empty between the payment in and the later taking of the final account. Tracing in equity cannot take place through an overdrawn bank account.[93]

The third approach is to adopt the North American, or so-called rolling charge, solution. The fate of the fund is tracked from day to day and the position of the several contributors computed according to each and every payment in and out, so that the entitlement of each contributor is constantly changing.[94] Early contributors do not suffer the punishing fate of being subjected to the rule in *Clayton's Case*; late contributors do not retrospectively indemnify those suffering earlier losses. As complex as it might seem, this approach, which has so far been rejected by the English courts,[95] is the closest approximation to justice and does not depend upon pencil and reams of paper in a computer age.

BONA FIDE PURCHASERS AND VOLUNTEERS

The right to trace will fail as and when the claimant's assets come into the hands of a *bona fide* purchaser for value without notice of the legal estate. If the assets are paid into an overdrawn bank account, the bank is a *bona fide* purchaser since it is surrendering its debt claim against the depositor to the extent of the payment in.[96] In the hands of a volunteer providing no consideration for the acquisition of the assets, whose conscience becomes bound, however, the right to trace will endure as effectively as against the trustee.[97] Nevertheless, where the claimant's assets have been mixed with assets of the volunteer, then, contrary to the rule that applies to wrongdoers, the contents of the mixed fund will be shared rateably by the claimant and the volunteer.[98] So far as

[93] See below.

[94] As to both the amount and the proportion (as new contributors are brought in).

[95] It was rejected in *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22 (CA).

[96] *Re Diplock* [1948] 1 Ch 465 (CA); *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211 (CA).

[97] *Re Diplock* [1948] 1 Ch 465 (CA). [98] Ibid.

the volunteer has made investments out of the fund, for tracing purposes the rule in *Clayton's Case*[99] is applicable in determining whose moneys have been withdrawn from the account for that purpose. If, nevertheless, the volunteer has first 'unmixed' the received funds and made its purchase from those funds, the claimant will be entitled to the whole of the investment.[100] Finally, if, prior to the volunteer's conscience becoming bound, the value received has been dissipated, even in the cause of paying off a debt, or cannot be extracted from the volunteer's assets, then no remedy will be granted to the claimant.[101]

EQUITABLE PERSONAL REMEDIES

A trustee[102] may be liable for breach of trust when misappropriating trust assets or otherwise dealing with them in a way that infringes his duties as a trustee. This liability, in the case of misappropriation at least, sits alongside any liability that might arise in conversion if those assets are chattels. The liability of trustees is a substantial subject that had best be left to specialist texts. The subject matter of the present discussion is liability on the part of those who are not trustees for dishonest assistance and knowing receipt, both forms of personal liability.[103] These two heads of liability, though not inapplicable to chattels, are most likely to arise in respect of dealings with intangibles. Liability for dishonest assistance comes into play where someone assists in the commission of an equitable wrong, such as a breach of trust or of a fiduciary relationship. There is no requirement that any assets so dealt with be received by the defendant.[104] Liability for knowing receipt is not yet a fully defined head of liability but bears some resemblance to liability for converting chattels. Knowing receipt requires that the defendant receive assets belonging to another.

[99] (1816) 1 Mer 572.

[100] *Re Diplock* [1948] 1 Ch 465 (CA).

[101] Ibid.

[102] References to trustees below include other fiduciaries.

[103] See *Barnes v Addy* (1974) LR 9 Ch App 244, 251–52. The limitation period should be the normal civil one of six years. The Limitations Act 1980, s 21 (breach of trust), does not apply since the defendants are not in breach of trust: *Paragon Finance plc v D.B. Thakrerar & Co* [1999] 1 All ER 625 (CA).

[104] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC).

As with conversion, it is no defence that the defendant has disposed of the chattels before a claim is made against him.

DISHONEST ASSISTANCE

Taking first dishonest assistance, two particular features bring out the character of liability. The first is the causal role that the defendant's conduct plays in the commission of the equitable wrong. A claimant is not put to the proof of showing the precise role played by the defendant in assisting in the commission of the wrong and, in particular, does not have to show that the defendant was a co-conspirator with the trustee. Instead, it is enough to show that the defendant's conduct had causal relevance in the commission of the wrong by the trustee.[105] The second feature is the mental element needed for liability. In contrast with the strict liability that might be incurred by an honest trustee acting in breach of trust, liability for knowing assistance on the part of a defendant who is not a trustee requires dishonesty. Given the propensity of equity to find infinite shades of differentiation on a calibrated scale, it is not easy to define dishonesty. In the leading case of *Royal Brunei Airlines v Tan*, dishonesty, equated to a lack of probity,[106] was based on an objective standard. Liability would arise where the objective honest person, prepared to ask himself awkward questions, or open his eyes and ears to what was going on, would have declined to assist the trustee. An objectively honest person might be prepared to take some risks, even imprudent ones, but would not act recklessly. Nor would he, if acting for a client, so far exalt dutiful compliance with the client's instructions as not to ask himself awkward questions.[107] A significant modification was added to the objective standard of dishonesty

[105] *Grupo-Torras SA v Al-Sabah (No 5)* [2001] CLC 221 at [118] (CA) (defendant was 'a linchpin of the arrangements'). The managing director and principal shareholder of a company that committed a breach of trust was liable because he 'caused or permitted' the company to act in breach of trust: *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 393 (PC).

[106] Negligence was not sufficient and, as a standard, unconscionability was unhelpful.

[107] *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476.

in *Twinsectra Ltd v Yardley*: the defendant had also to be conscious that he was transgressing normal standards of honesty,[108] which pitches the test somewhat between a purely subjective and a purely objective one. The difficulty of defining dishonesty illustrates the tension between the need to protect beneficiaries and related persons and the need to avoid imposing too stringent a liability on the part of those who have not undertaken the responsibilities of trustees.

KNOWING RECEIPT

The basis of liability for knowing receipt is quite different. First of all, the defendant must receive assets or the traceable proceeds thereof[109] beneficially owned by another with the knowledge that they come to him by virtue of a breach of trust. It therefore follows that a *bona fide* purchaser for value of the legal estate will not incur liability for knowing receipt.[110] But to speak only of knowing *receipt* is a misnomer: it is more a case of knowing receipt or retention. Liability may arise even if the necessary knowledge is lacking at the time of receipt provided it comes to light later. If the defendant still has the assets at the time the relevant knowledge is acquired, the defendant may be held liable. If this defendant is a *bona fide* purchaser of an equitable interest, whose claim does not override that of the beneficiary, he may therefore incur liability.[111] Since the defendant's liability is personal and not proprietary, and since that liability is not equated to that of the trustee himself, there is no need to describe the defendant as a constructive trustee, as apt as this expression might be for a proprietary tracing claim. Nor is anything to be gained by labelling liability for knowing receipt as

[108] [2002] UKHL 12 at [20], [35]–[36], [2002] 2 AC 164. *Cf.* Lord Millett dissenting on this point at [118] *et seq* and preferring a purely objective standard, except that he would have taken into consideration the defendant's intelligence, experience and actual knowledge.

[109] *El Ajou v Dollar Land Holdings plc* [1994] BCC 143 (CA).

[110] *Baden v Société Generale Pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509, 572 (CA).

[111] This follows from *Baden*, above.

restitutionary in character;[112] such a label would add nothing to our understanding of another type of wrongful interference with property rights, the tort of conversion.

The type of conduct sufficient to engage liability bears some resemblance to the behaviour of a defendant in the tort of conversion. To begin with, liability is based on dealings with the goods that amount to an assertion of a proprietary right.[113] Even if assets are innocently received, the assertion of a right to retain them when the defendant has sufficient knowledge of the trustee's breach of duty will therefore give rise to liability. It has been said that those dealing with assets in a mere agency capacity, and not asserting a proprietary right to them, are free from liability for knowing receipt.[114] Banks are sometimes cited as an example of agents acting in this way. Nevertheless, a bank receiving funds, whether it uses the funds to pay down an overdraft or merely to exchange them for its own undertaking to pay if the account is in credit, is thus in effect asserting a proprietary right[115] even if it is also carrying out a customer's mandate. Unless, in this fluid area of law, it is thought necessary to carve out an exemption for banks,[116] they should be liable if other requirements of the equitable wrong are present.[117]

The degree of knowledge necessary to incur liability is a contentious matter. A finely graduated scale inserts, between actual knowledge and knowledge that would put an honest and reasonable person on inquiry, three intermediate points, namely, wilful

[112] See *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, 456 (CA), referring to Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark', in Cornish, W.E., and others, *Restitution Past, Present and Future—Essays in Honour of Gareth Jones*, Hart, 1998.

[113] See *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276 (CA) (receipt for the defendant's own benefit.

[114] Their conduct may amount to dishonest assistance.

[115] *Foley v Hill* (1848) 2 HLC 28.

[116] *Cf. Hollicourt (Contracts) Ltd v Bank of Ireland* [2001] Ch 555 (CA) (concerning the lenient application of a provision in the Insolvency Act 1986, driven by the practical difficulties facing banks).

[117] See *Uzinterimpex JSC v Standard Bank plc* [2008] EWCA Civ 819 at [38]–[40], [2008] 2 CLC 80, casting doubt on the distinction drawn between a bank paying down an overdraft (liable) and a bank adding to an account already in credit (not liable) in *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 291–92 (CA).

blindness; a wilful and reckless failure to make the inquiries that an honest and reasonable person would make; and knowledge of circumstances that would indicate the facts to a reasonable and honest person.[118] Although the matter is far from settled, it is submitted that liability should arise under all five points on the scale. Consequently, liability would arise if the defendant failed to make the inquiries that a reasonable and honest person would make. The particular character of the defendant, whether professional or private, commercial or non-commercial, will of course have a part to play in informing liability in a particular case, especially when it comes to being put on inquiry or inferring facts from known circumstances. An attempt has been made to depart from fine-grained tests based upon degrees of knowledge in favour of a broader test of unconscionability, but this approach supplies no greater precision and therefore adds nothing to the inquiry.[119]

[118] *Baden v Société Generale Pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509, 575 *et seq* (CA). See also the discussion of the authorities in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, 450–55 (CA).

[119] *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, 455 (CA).

5

THE CONVEYANCE

INTRODUCTION

We have examined the nature of ownership at common law and the means by which ownership rights are protected. In this chapter, we shall see how ownership rights are transferred (or conveyed). Our primary concern will be with chattels, though from time to time reference will be made to documentary intangibles. Pure intangibles will be dealt with in chapter 6. For the most part, the material in this chapter is devoted to consensual transfers between willing parties to a bilateral transaction, but some attention must be paid to rules of law by which ownership rights pass from one party to another.

The most dominant category of consensual transfers is the passing of property under a contract of sale of goods.[1] Other transactions include gift and the quasi-testamentary transfer known as *donatio mortis causa*. A study of testamentary transfers (bequests by will) goes beyond the scope of this work. The assignment of things in action has its own dedicated chapter.[2] The chapter concludes with what might broadly be called failed transfers, as where transferred assets are held under the terms of a constructive or resulting trust, typically as the result of the voidness or avoidance of a contract.

CONSENSUAL TRANSFERS: SALE

GENERAL

The modern rules on the subject were first codified in the Sale of Goods Act 1893 and are now to be found in a modern consolidating statute, the Sale of Goods Act 1979.[3] The Act applies only to chattels and not to documentary intangibles.[4] The underlying

[1] For the meaning of 'goods', see chapter 1.
[2] See chapter 7.
[3] Hereinafter SGA 1979.
[4] SGA 1979, s 61(1).

rule is that the transfer is based upon the intention of the contracting parties, namely, the seller and the buyer. According to the classic judgment of Fry LJ in *Cochrane v Moore*,[5] this was not always so, for the law in its earlier stages required the observance of forms or the performance of manual delivery before the seller's property rights became vested in the buyer. Until 1954,[6] moreover, the conveyance had to take place under a contract of sale that itself satisfied the writing requirement (to which there were exceptions) contained in the former Sale of Goods Act.[7] There is no longer a writing requirement for sale of goods contracts. Nevertheless, the validity of the conveyance is not inexorably tied to the validity of the contract. Whilst a proprietary transfer takes place pursuant to a contract of sale, it is well settled that the illegality or voidness of the contract will not necessarily undo the transfer.[8] The claimant will succeed who is able to rely upon his property rights rather than upon any illegal contract giving rise to the property right.[9] In this respect, no distinction is to be drawn between legal and equitable property rights since 'English law has one single law of property made up of legal and equitable interests'.[10]

For various reasons, it is important to know at what point the seller's property interest (or ownership) in the goods is transferred to the buyer. The seller's property interest is called the 'general property' (commonly abbreviated to 'property')[11] to distinguish it from the possessory interest of a mere bailee,[12] which is often referred to as a 'special property'. Its transfer affects the performance of the parties' contractual rights and duties. A buyer to

[5] (1890) 25 QBD 57 (CA).

[6] Law Reform (Enforcement of Contracts) Act 1954, s 1.

[7] SGA 1893, s 4.

[8] *Singh v Ali* [1960] AC 167 (PC); *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 (CA); *Westdeutsche Landesbank Girocentrale v Islington London Borough Council* [1996] AC 669, 689 (HL), *per* Lord Goff ('there is no general rule that the property in money paid under a void contract does not pass to the payee'); McKendrick, E. (ed.), *Goode on Commercial Law*, 4th edn, Penguin, 2010, pp 147–48.

[9] *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 (CA); *Tinsley v Milligan* [1995] 1 AC 340 (HL).

[10] *Tinsley v Milligan* [1995] 1 AC 340, 371 (HL), *per* Lord Browne-Wilkinson.

[11] See chapter 2.

[12] SGA 1979, s 62(1).

whom the property has passed presumptively also carries the risk of loss and so must still pay the seller even if, through an act of God, the goods are destroyed before possession is transferred.[13] If the buyer defaults, the seller may sue for the agreed price, and not just for damages, where the property has passed.[14] Outside the contractual relationship, the passing of property may have various repercussions in connection, for example, with tax and licensing requirements, the law of theft, and the law of insolvency.

DEFINITIONS IN THE SALE OF GOODS ACT

To understand the effect of the property rules, it is first necessary to look at the statutory definitions on which they are based. All goods are divided by the Act into specific and unascertained goods. Specific goods are those that are identified by the parties at or before the time of the contract[15] as the very goods to be used by the seller in performance of the contract. No substitution, even with goods that are in other respects identical to the contract goods, is permissible. Specific goods may be, for example, a particular self-binder reaper,[16] or the seller's own car which is being sold second-hand.[17]

Unascertained goods, not defined by the Act, are the residuum. The contract goods may, for example, be a stated quantity of Number 1 Oregon winter wheat, the seller being responsible for selecting that quantity from any stocks. Or they may be widgets to be later manufactured by the seller. They may even be an undifferentiated part of a specific bulk, such as a stated quantity of the widgets that the seller currently has in stock, or 500 tons out of the 1,000 tons of grain that the seller has in the hold of a ship. If the goods have no physical existence (such as widgets not yet manufactured) or have not been acquired by the

[13] SGA 1979, s 20. The presumption does not apply in consumer sales: Consumer Rights Act 2014, s 29.

[14] SGA 1979, s 49.

[15] SGA 1979, s 61(1).

[16] *Varley v Whipp* [1900] 2 QB 513.

[17] *Beale v Taylor* [1967] 1 WLR 1193 (CA).

seller at the contract date (such as a cargo not yet bought), they may also be described as 'future goods'.[18] Very occasionally, specific goods may also be future goods, as where the seller is going to acquire a particular object before selling it on to the buyer.[19]

PASSING OF PROPERTY IN SPECIFIC GOODS

The starting point is the clear statement that it is up to the parties to determine when the property passes.[20] They may do this by express or by implied choice. If it is the latter, a court may be called upon to interpret the language of a complex commercial document in its search for the parties' intention.[21] Apart from certain contracts where goods are sold on credit,[22] it is relatively rare for parties to stipulate for the passing of property.[23] Consequently, the Act lays down a series of presumptive rules to fill the intention gap, each applicable to a different case involving specific goods. The contracting parties have an unfettered right to depart from the presumptive rules, a right reinforced by SGA 1979, section 19, which has a particular application to the export trade. When the passing of property is held up, the usual reason is that the buyer has not yet paid for the goods supplied,[24] but the property may be held back until the buyer, for example, pays the seller for all other sums owed, including the price of goods supplied on a previous occasion.[25]

GENERAL PRESUMPTIVE RULE

According to SGA 1979, section 18 *Rule 1*, the presumptive rule is that the property in specific goods passes at the date the contract is made 'and it is immaterial that the time of payment or

[18] SGA 1979, s 5(1).

[19] *Varley v Whipp* [1900] 2 QB 513.

[20] SGA 1979, s 17.

[21] *Re Anchor Line Ltd* [1937] Ch 1.

[22] For example, *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676 (CA).

[23] But a passing of property clause is a common feature of bulk oil contracts.

[24] *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676 (CA).

[25] *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339 (HL).

the time of delivery or both is postponed'. This rule is expressed as applying only where the goods are in a 'deliverable state', such that[26] the buyer is contractually bound to take delivery of them. This would be the case if, for example, the seller had performed final adjustments or alterations or had packed the goods pursuant to the contract.

This presumptive rule has attracted a great deal of criticism over the years, largely because it leads to the treatment of divergent issues, such as the risk of loss and insolvency, in the same way. It was once applied to the auction sale of a car, so that the contract was formed and the property conveyed at the fall of the auctioneer's hammer, even though the successful bidder was someone of unknown reputation.[27] It should be appreciated, however, that an unpaid seller may exercise a possessory lien[28] to prevent the new owner taking away the goods before payment. Furthermore, in modern times, there is a discernible tendency to find an inconsistent implied intention ousting *Rule 1*, despite the strength of language in the rule.[29] The underlying rule, it should not be forgotten, is that the intention of the parties governs.[30]

SECTION 18 *RULES 2–3*

These presumptive rules complement the deliverable state requirement in *Rule 1*. According to *Rule 2*, the property in specific goods does not pass before the seller has put them in a deliverable state if so obliged by the contract. Where it is the buyer who has to do something to the goods before they can be delivered, *Rule 2* does not stand in the way of the property passing,[31] though in most cases a court looking for the parties' implied intention would reach the same conclusion. *Rule 2* was applied in a case where a condensing engine had to be detached from the concrete block on which it was bolted prior to its shipment by rail. Property did not pass before the completion of the act of removal.[32] A further requirement of *Rule 2* is that the buyer

[26] See SGA 1979, s 61(5).
[27] *Dennant v Skinner* [1948] 2 KB 164.
[28] See chapter 8.
[29] *R. V. Ward Ltd v Bignall* [1967] 2 QB 534, 545 (CA), *per* Diplock LJ.
[30] SGA 1979, s 17.
[31] *Rugg v Minett* (1809) 11 East 210.
[32] *Underwood Ltd v Burgh Castle Brick* [1922] 1 KB 343 (CA).

must receive actual notice once the goods have been put into a deliverable state.

According to *Rule 3*, the property in specific goods will not pass if the seller has to 'weigh, measure, test or do some other act or thing…to the goods…for the purpose of ascertaining the price'. Notice to the buyer that this has been done is again required. So the property in two lots of turpentine sold at auction did not pass where it remained for the seller to remove a quantity of turpentine (to fill up other lots) before settling the price the buyer had to pay.[33] Where the relevant act was to be performed by a sub-buyer and not the seller, *Rule 3* did not prevent the property passing.[34]

SALE OR RETURN AND SALE ON APPROVAL

As a matter of terminology, sale or return is a bailment transaction by which goods are delivered to a potential buyer with a view to their eventual resale by that buyer. It is a common transaction in the bookselling trade. The potential seller, by dispatching the goods, is offering to sell them to the buyer who may purchase them, when accomplishing a successful resale, or return them, thus rejecting the seller's offer, as the case may be. A sale on approval is the same type of transaction, except that the goods are delivered to a potential consumer buyer, who may retain and then pay for them, if satisfied, or return them to the seller, if deciding instead to reject the offer. Where *Rule 4* applies, not having been excluded by the parties, the formation of the contract of sale and the passing of property occur at the same time. Since the goods will be in the hands of the buyer at the moment of acceptance, they are necessarily specific and not unascertained goods. Prior to the conclusion of the contact of sale, the goods may be held by the buyer on the terms of a contractual bailment,[35] especially in those cases where there is a standing arrangement for the supply of goods in this way.

[33] *Rugg v Minett* (1809) 11 East 210

[34] *Nanka-Bruce v Commonwealth Trust* [1926] AC 77 (PC).

[35] *Atari Corpn (UK) Ltd v Electronic Boutique Stores Ltd* [1998] QB 539 (CA).

According to *Rule 4*, the property passes when the buyer accepts the seller's offer by words or conduct[36] or retains the goods beyond the stated period or (if no period is stated) beyond a reasonable time.[37] Under *Rule 4(a)*, a number of cases deal with conduct of the buyer that evinces an objective intention to accept the seller's offer. They arose out of the Hatton Garden jewellery trade at the turn of the century when it was the practice for jewellery to be sent out with travelling salesmen for resale in the provinces. To limit the risk of dishonesty on the part of the salesmen, they were not employed as agents with a limited mandate[38] but were instead in receipt of the jewellery on sale or return terms. Since they were not agents, they could not bind the Hatton Garden jewellers by their statements or actions. The problem raised in these cases was who bore the risk of a salesman's dishonesty in the following circumstances: A entrusts goods to B on sale or return terms and B, having negotiated a sale to C, disappears with the proceeds of sale without paying A.

In *Kirkham v Attenborough*,[39] the act of the salesman in pledging the jewellery with a pawnbroker was an 'act adopting the transaction' within the wording of the rule. Having to repay the pawnbroker before recovering the goods, the salesman had performed an act inconsistent with his free power to return them, which was an assertion of a personal entitlement to the goods and thus an acceptance of the seller's offer. Consequently, the property passed to the salesman at the same time and he was able, again simultaneously, to pass a special property[40] to the pawnbroker. This special property could therefore be asserted by the pawnbroker against the seller, who would have to redeem the pledge to recover the jewellery.

In *Weiner v Gill*,[41] the seller excluded *Rule 4(a)* by the simple expedient of inserting in the sale or return agreement the words, '[G]oods had on . . . sale or return remain the property of Samuel Weiner until such goods are settled for . . . '. This prevented the property passing to the salesman and thus too a special property to the pawnbroker. We shall see in the next chapter, however,

[36] *Rule 4(a)*.
[37] *Rule 4(b)*.
[38] See chapter 6 for the reasons.
[39] [1897] 1 QB 201 (CA).
[40] See chapter 2.
[41] [1906] 2 KB 574 (CA).

that an attempt to control closely the behaviour of a sale or return buyer could lead to the conclusion that the buyer is in reality an agent, with a statutory power even in the absence of an authority to pass good title to a *bona fide* third party, with disastrous results for the seller.

An acceptance, and thus a passing of property, can occur under *Rule 4(b)* by effluxion of time. The notion of a reasonable time was explored in *Poole v Smith's Cars (Balham) Ltd*,[42] where a second-hand car was received by one dealer from another on sale or return terms. In concluding that after two months a reasonable time had expired, the court took account of the seasonal nature of the market in second-hand cars, the rapid depreciation of the car, the 'holiday' character of the arrangement, and the failure of the buyer to respond to repeated requests by the seller for the return of the car.

Since the delivery of goods on sale or return, or sale on approval, terms constitutes an offer to sell them, the offer can be rejected before the events occur or time passes that under *Rule 4* are deemed to amount to acceptance of the goods. In a case involving the bulk delivery of computer games, distributed by the buyer to its various shops, the rejection of the seller's offer before the stated deadline was effective when it gave a generic description of the goods that were being rejected.[43] It was not required of the buyer that it first assemble all of the goods in one place and have them physically ready there and then to be surrendered to the seller. Nor was it necessary to reject all of the goods. The sale or return transaction was on severable terms, so that the seller's offer to sell them could be partly accepted by reference to that quantity of goods actually sold on to sub-buyers. The amount sold on did not have to be quantified at the date the rest of the goods were rejected by the buyer. The ascertainment of quantities could come later.

UNASCERTAINED GOODS: GENERAL

Although the dominant rule is that the intention of the parties governs, this is subject to a rule of law that the property in unascertained

[42] [1962] 2 All ER 482 (CA).

[43] *Atari Corpn (UK) Ltd v Electronic Boutique Stores Ltd* [1998] QB 539 (CA).

goods cannot pass until they have become ascertained.[44] The same goes for the almost identical case of future goods, which must similarly become existing goods before property is allowed to pass.[45] These rules do not apply to the sale of a share of defined goods, for example, a quarter of the contents of a grain silo, as opposed to 1,000 tons from a silo containing 4,000 tons. The property in a share can pass before ascertainment of the goods comprising that share.[46] The share might be a proportion of a racehorse or an ocean-going vessel which in a physical sense cannot be ascertained by separation without destroying the whole.[47] Furthermore, the rule of ascertainment[48] has been overridden in certain cases by the Sale of Goods (Amendment) Act 1995, implementing changes to the Sale of Goods Act 1979.[49]

Ascertainment means simply the identification of goods by a seller minded to use them in performance of the contract. It does not occur simply because the seller warrants or represents to the buyer that it has taken place when this is not the case.[50] Thus the setting aside of the contractual quantity of widgets in the seller's storeroom, or the manufacture of a special order of widgets, for example, would amount to an ascertainment if accompanied by the necessary intention. Likewise, if the seller is bound to sell 500 tons of grain from a ship's hold containing 1,000 tons, ascertainment could not take place before 500 tons were physically isolated.[51] It has nevertheless been held that ascertainment occurs when only the contract quantity remains from a specific bulk after all other orders have been separated out.[52] In a similar case, the remaining goods after a number of other contracts had been performed were the commingled sum of two separate sub-cargoes due to the buyer

[44] SGA 1979, s 16. [45] SGA 1979, s 5(3).

[46] Law Commission, *Sale of Goods Forming Part of a Bulk*, 1993 (Law Com No. 215), paras 2.5–2.6. A share that is a fraction or percentage of goods identified and agreed on at the time of the contract is specific goods so that the presumptive rule for the property passing at the date of the contract would apply: SGA 1979, s 61(1).

[47] And it might take place between co-owners: SGA 1979, s 2(2).

[48] SGA 1979, s 16. [49] See below.

[50] See *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC).

[51] *Cf. Re Wait* [1927] 1 Ch 606 (CA).

[52] *Wait and James v Midland Bank* (1926) 31 Com Cas 172.

from different sellers.[53] The ascertainment requirement in SGA 1979, section 16 was held to have been satisfied. This result has now been confirmed by statute.[54]

ASCERTAINED GOODS

Ascertainment (or the process of future goods becoming existing goods) is not in itself[55] enough to make the property pass. It simply removes an inhibition that prevents a conveyance from taking place. If it cannot be known which goods might be used under the contract, or if the seller does not yet have a property interest in the intended contract goods, it is a simple statement of the possible to say that property can only pass in ascertained, existing goods. Yet this area of law has caused acute difficulty where the buyer has already paid for the goods and the seller then becomes insolvent prior to ascertainment.

In *Re Wait*,[56] the buyer agreed to purchase a cargo of 500 tons of wheat shipped on board the m.v. *Challenger*. The seller held a bill of lading representing 1,000 tons aboard this vessel, all unseparated in one of the ship's holds. Now, the seller did not in fact undertake to supply the 500 tons from this particular batch of wheat; the wheat could have been supplied from any hold on the *Challenger*, though the clear likelihood was that it would come from the wheat covered by the bill of lading. In return for a provisional invoice, the buyer paid for the wheat and the seller became bankrupt before the 500 tons became ascertained. The buyer argued that an equitable proprietary interest had been transferred, encumbering the 1,000 ton bulk to the extent of a 500 ton interest in the buyer. While the court recognized that contracting parties could transfer such an interest if they clearly intended, it refused to accept that this had occurred merely because the buyer had paid in advance and because there had been a delay in breaking up the cargo. In Atkin LJ's view, the Sale of Goods Act 1893 had codified the passing of property

[53] *The Elafi* [1982] 1 All ER 208.
[54] SGA 1979, s 18 *Rule 5(3), (4),* as amended.
[55] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, 92 (PC).
[56] [1927] 1 Ch 606 (CA).

and, moreover, commercial uncertainty would arise from the creation of additional rules relating to the passing of equitable proprietary interests. In addition, the court declined to exercise its discretion to order specific performance[57] of the sale contract so as to reach the same result by an indirect route. (Although rejected in sales law, equitable proprietary principles have had a major role to play in the law of security, the subject of chapter 8.)

An alternative approach to the problem would involve the use of the common law concept of tenancy in common.[58] As applied in the context of *Re Wait*, tenancy in common would take on the form of the buyer owning the 1,000 tons covered by the bill of lading in common with the seller (or with anyone else to whom the seller had contracted to sell a portion of that same cargo), rateably according to their contributions to the overall quantity. Prior to changes to the Sale of Goods Act introduced in 1995[59] the subject of tenancy in common as it applied to personalty was somewhat undeveloped. The tenancy in common argument was advanced unsuccessfully in one Court of Appeal decision without being explicitly rejected in the reported judgments.[60] On the eve of the 1995 changes, it was applied in *Re Stapylton Fletcher Ltd*,[61] where stored wines, the subject matter of a contract of sale and separated by the seller from its trading stocks, were then mingled with otherwise identical wines in its warehouse stocks following a warehousing agreement with the buyer. The court found a common intention of seller and buyer that the buyer should be a co-tenant of the warehouse stocks (together with other buyers in a similar position). Tenancy in common is one way of dealing with the problem posed by bulk cargo consignments,[62] which had been particularly troublesome in the export trade, especially in view of the modern practice of shipping huge quantities of commodities in bulk. The United States Uniform

[57] SGA 1893, s 52. [58] See chapter 2.

[59] By the Sale of Goods (Amendment) Act 1995.

[60] *Laurie and Morewood v Dudin and Sons* [1926] 1 KB 223 (CA).

[61] [1994] 1 WLR 1181. See also *Mercer v Craven Grain Storage Ltd* [1994] CLC 328 (HL).

[62] Law Commission, *Rights to Goods in Bulk*, Working Paper No. 112, 1989, para. 4.7.

Commercial Code[63] solves problems of this kind with the aid of the tenancy in common notion.

STATUTORY TENANCY IN COMMON

The Sale of Goods (Amendment) Act 1995 was passed in response to recommendations made by the Law Commission[64] designed to accommodate the modern practice of bulk transportation and storage. Prior to the Act, it was common for a buyer to be the agreed purchaser of a stated quantity of goods in a defined bulk (for example, 20,000 tonnes of wheat on a named ship carrying 80,000 tonnes) and to pay against shipping documents representing the contract quantity and yet acquire no property rights at all until the contract quantity was separated at the port of unloading. These were essentially cash on delivery transactions, with documents standing in for the goods themselves, and the security that buyers might have thought they were getting when retaining payment until they received shipping documents was illusory. A buyer of goods from a bulk will, under the terms of the legislation, acquire an 'undivided interest' in that bulk provided that the bulk is 'identified', whether in the contract itself or by a subsequent agreement, to the extent that the buyer makes payment for the goods.[65] The bulk itself is a mass or collection of fungible goods of the same kind in a defined space or area.[66]

The requirement of an identified bulk would not assist the buyers of bullion in *Re Goldcorp Exchange Ltd*.[67] The seller's promise to hold the agreed quantity of bullion for the buyers would not suffice to identify as a bulk any bullion that happened from time to time to be in the seller's possession. At any one time, a very large sum of prepaid moneys is held by sellers in respect of consumer orders, in circumstances where buyers are unable to benefit from these new provisions in the Sale of Goods Act.[68]

[63] See Article 2-105(4).

[64] *Sale of Goods Forming Part of a Bulk*, Law Com No.215, 1993.

[65] SGA 1979, s 20A. [66] SGA 1979, s 61(1).

[67] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC).

[68] This issue is on the agenda of the Law Commission: see the 12th Programme of Law Reform at <http://lawcommission.justice.gov.uk> (Protecting Consumer Prepayments on Retailer Insolvency).

These provisions do nothing to give buyers a retained interest in any moneys that have been prepaid.[69] Where, nevertheless, these statutory changes are applicable, the undivided interest of a buyer qualifying for protection amounts to a tenancy in common right in the bulk to the extent of any payment that has been made. This is a legal and not an equitable right. A buyer of 20,000 tonnes in a bulk consisting of 80,000 tonnes, who has paid for 10,000 tonnes, will therefore be a tenant in common only to the extent of those 10,000 tonnes. Any goods removed by the buyer from the bulk will be deemed first to be those paid for, in which the part-paying buyer has an undivided interest. Any shrinkage in the bulk will be borne rateably by the various co-tenants according to their respective shares.[70] The rules as set out in the Act refer only to buyers, but it is quite possible for a seller to retain a share of the bulk as co-tenant. The Act does not express any clear intention that the losses in a bulk should be ascribed first to the seller before the various buyers' shares begin to abate. Consequently, common law principles of rateable sharing[71] should be brought in to supplement the Act in those cases where the seller has a retained interest so that all interested parties bear their share of any losses. Despite the principle of rateable sharing of losses, nevertheless, the shrinkage principle is not applied so as to permit co-tenants to recover an excess delivery from one of their number who has received in full his contractual share though this falls short of his proprietary entitlement as determined by the principle of rateable sharing of losses.[72]

SECTION 18 *RULE 5*

Assuming that there are no difficulties concerning the ascertainment of the goods, the presumptive rule for the passing of property under a contract for unascertained goods is to be found in *Rule 5*. A general statement of the rule is found in pararaph (1),

[69] For the possibility that these moneys might in certain circumstances be burdened with a trust so as to revert to buyers if delivery of the goods is not made, see *Re Kayford Ltd* [1975] 1 All ER 604.

[70] SGA 1979, s 20A(3), (4).

[71] See chapter 4.

[72] SGA 1979, s 20B. For a fuller discussion of these provisions, see Bridge, M.G., *The Sale of Goods*, 3rd edn, Oxford, 2014, paras 3.51–3.63.

whilst a particular application of it where a carrier is used to transport the goods is set out in paragraph (2).

According to the rule, property presumptively passes when goods in a deliverable state[73] are unconditionally appropriated to the contract by one party, usually the seller but sometimes the buyer (for example, a supermarket sale), with the assent of the other. The assent is usually implied and may be given in advance by the buyer to the seller. It will be implied at the moment goods are delivered to a carrier to be transported to the buyer, since the carrier (if not an employee of the seller) is presumptively the buyer's agent.[74]

Unconditional appropriation has been said to occur at the time the seller performs his last major contractual responsibility.[75] For practical purposes, this is delivery, though delivery within the context of sale carries the presumptive meaning of the seller making the goods available for the buyer to collect.[76] If an independent carrier is employed, delivery occurs when the carrier is permitted to collect the goods.[77] The word 'unconditional' has been interpreted in modern times in a way that is synonymous with 'physically irrevocable'. This is demonstrated by *Carlos Federspiel*, where the contract was for a quantity of bicycles and tricycles to be sold by a Welsh manufacturer to a Costa Rican buyer. The seller required payment before the goods were shipped to the buyer. It had packed the goods in crates with the buyer's address, awaiting the call of a ship bound for Costa Rica, not a well-travelled route, when its unpaid creditors lost patience and sent in a receiver. The receiver's entitlement to refuse to deliver the goods to the buyer depended upon whether the property had passed. Pearson J held that it had not. The goods had not yet been delivered to the carrier. It did not matter that the seller had reached a clear decision to use the particular goods in the crate in fulfilment of the contract since there was nothing to stop the seller changing its mind and breaking open the crates. The goods had been earmarked for the contract but not in an

[73] See above.

[74] *Wait v Baker* (1848) 2 Ex 1.

[75] *Carlos Federspiel & Co v Charles Twigg & Co* [1957] 1 Lloyd's Rep 240.

[76] SGA 1979, s 29(2).

[77] SGA 1979, s 32(1).

irrevocable way. Ascertainment was not tantamount to unconditional appropriation.

Some decisions do not quite accord with such a strict view of unconditional appropriation. For example, the property has been held to pass as soon as goods have been packed in containers supplied by the buyer, even though delivery has not yet taken place.[78] Moreover, in one case where the buyer was to collect a quantity of rice from the seller's premises, the property was held to pass even before the buyer took delivery of the rice, though it remained for the seller to allow the buyer to enter the premises and to cooperate in the removal of the rice.[79] The seller had notified the buyer that the goods were ready for collection.

The delivery test for the passing of property has also been applied where, at the time of the contract, the goods are held by a third party, such as a warehouse company. In accordance with the bailment rules, delivery occurs when the bailee, the warehouse company, attorns to the buyer,[80] thus effecting a constructive transfer of possession. In one case,[81] attornment took place when, after the seller had contracted to sell 600 out of 1,500 cartons of frozen kidneys, the warehouse company accepted a delivery order[82] and indicated to the carrier (the buyer's agent) the 600 separated cartons standing on the pavement that the carrier was to take away.

Where the buyer acquires an undivided share in an identified bulk pursuant to changes brought about by SGA 1979 section 20A, the buyer's property entitlement should survive the separation of the buyer's share from the bulk by the seller, though the buyer's undivided share in the bulk is transformed into a general property in the separated goods. To require the buyer to go further and show that the unconditional appropriation test in section 18 *Rule 5*, as applied in *Carlos Federspiel*, has been satisfied would be tantamount to allowing the seller unilaterally and in his own favour to divest the buyer of a vested property right by

[78] *Aldridge v Johnson* (1857) 7 E & B 885; *Langton v Higgins* (1859) 4 H & N 402.
[79] *Pignataro v Gilroy* [1919] 1 KB 459.
[80] See chapter 2.
[81] *Wardar's (Import and Export) Co v W. Norwood and Sons* [1968] 2 QB 663 (CA).
[82] See chapter 2.

the act of separation, which would infringe the very principle of a proprietary right.

RESERVING THE RIGHT OF DISPOSAL

Reference was made earlier to the role of SGA 1979, section 19 in reinforcing the rule[83] that the intention of the contracting parties is the primary determinant of the passing of property. Section 19 is sometimes referred to in support of the conclusion that trade sellers of goods are entitled, by means of reservation of title clauses, to delay the passing of property until a stipulated condition, usually payment of the agreed price, has been satisfied. After some initial success, reservation of title clauses have proved ineffectual in protecting trade sellers whose goods have been worked into the manufacture of new goods or have been sold off to give rise to money proceeds. Attempts to protect the seller in such an event by means of a property reservation clause have been treated as giving rise to a charge over the newly manufactured goods or the money proceeds as the case may be.[84] The fundamental reason for this outcome is that any attempt to treat the manufacturing or reselling buyer as a fiduciary or agent of the seller does not fit the commercial sense of the relationship, which treats the buyer as an independent entity, taking its own commercial risks and working for its own commercial gains. Whilst charges of this kind may lawfully be created, they need to be perfected by registration[85] to be asserted against the buyer's other creditors or the buyer's liquidator or trustee-in-bankruptcy. It is not the practice of trade sellers to go through the complex motions that this necessitates.

The part usually played by SGA 1979, section 19 is to demonstrate the application of the passing of property rules in export sales where a bill of lading is employed. Section 19(1) makes it plain that the right of disposal may be retained even if otherwise

[83] See SGA 1979, s 17.

[84] *Re Peachdart Ltd* [1984] Ch 131; *E. Pfeiffer Weinkellerei-Weineinkauf GmbH v Arbuthnot Factors* [1988] 1 WLR 150. *Cf.* the outrider decision in *Caterpillar (NI) v John Holt & Co (Liverpool) Ltd* [2014] EWCA Civ 1232, [2014] 1 Lloyd's Rep. 180.

[85] Companies Act 2006, ss 859A *et seq*.

there would have been an assented to, unconditional, appropriation of the goods sufficient to pass the property under section 18 *Rule* 5. Whilst the use by section 19 of the expression 'right of disposal' instead of 'property' seems odd to modern eyes, it is well settled now that a seller who reserves under section 19 does indeed retain the general property and not some unnamed security.

Section 19(2) enacts a *prima facie* rule that a seller reserves the right of disposal when shipping goods and receiving a bill of lading from the carrier showing the consignee of the goods to be either the seller or an agent of the seller.[86] The normal reason for this is to protect the seller against the risk of future non-payment by the buyer but there are other reasons, such as the desire of oil companies to maintain as long as possible strategic freedom in designating the port of discharge and the eventual recipient of the cargo.[87] The seller may also wish to pledge[88] the bill of lading in order to obtain bridging finance pending payment by the buyer.[89] Instead of the property passing when the seller delivers the goods to the carrier, it will pass at a later date when the section 19 inhibition is lifted, which will occur when the bill of lading is exchanged with the buyer for the price of the goods, in accordance with the underlying intention of the parties.[90] In this way, the seller gets cash (or its equivalent) upon delivery of the bill of lading, which has been described as the 'key' to the floating warehouse.[91]

Commonly, a seller will receive from the carrier a bill of lading naming the buyer as the consignee but will retain possession of the bill of lading until payment, thus making it impossible for the buyer to deal with the cargo. The case law is not clear as to whether the seller is thus retaining the right of disposal or exercising a possessory lien[92] over the bill of lading.[93] For practical

[86] See also *Wait v Baker* (1848) 2 Ex 1; *Mirabita v Imperial Ottoman Bank* (1878) 3 Ex D 164 (CA).

[87] *The Albazero* [1974] AC 774 (HL).

[88] See chapter 7.

[89] *The Albazero* [1974] AC 774 (HL).

[90] SGA 1979, s 17.

[91] *Sanders Bros v Maclean & Co* (1888) 111 QBD 327 (CA). See chapter 2.

[92] See chapter 7.

[93] Contrast *Ladenburg & Co v Goodwin, Ferreira & Co* [1912] 3 KB 275 with *The Kronprinsessan Margareta* [1921] 1 AC 486 (PC).

purposes, the distinction seems not to matter since the seller is protected against non-payment and the buyer's insolvency in either event.

The effect of section 19(3) is that a seller who dispatches to the buyer the bill of lading together with a draft bill of exchange[94] for the price does not thereby transfer the property in the goods if the buyer refuses to accept the payment obligation set out in the draft. This is consistent with the rule that the transfer of a bill of lading does not necessarily effect a passing of the property: it all depends upon the accompanying intention (a restatement of the rule in SGA 1979, section 17). Thus the transferor may wish merely to confer a special property by way of pledge on the transferee[95] or to give the transferee only the physical freedom to have the goods warehoused upon their arrival at the port of discharge.[96] This practice reflects more nineteenth-century commercial usage than current usage.

GRATUITOUS CONSENSUAL TRANSFERS

GENERAL

This heading is concerned with gratuitous transactions involving the outright transfer of the general property in chattels. We shall deal with gift, as well as with its quasi-testamentary relation, the *donatio mortis causa*. As regards inheritance, it is enough to note the existence of a law of succession by which testators have freedom, when of sound mind and when observing the required forms, to bequeath by will their personal estate. Intestate succession is properly a matter of transfer by operation of law, as is the rule that personalty, even if bequeathed by will, first vests in the testator's personal representatives prior to its distribution among the named legatees.

[94] See chapter 6.
[95] *Sewell v Burdick* (1884) 10 App Cas 74 (HL).
[96] *The Aliakmon* [1986] AC 785 (HL).

GIFT AND CONTRACT

In certain continental legal systems, gift is seen as a species of contract. The requirement of consideration in contract prevents us from classifying gift in the same way, though the permissibility of establishing a nominal consideration means that the substance of gift can be concealed in the form of contract. The distinction between gift and contract is not of great significance in the general law once a transaction is executed, whichever of the two it may be, but since an executory promise to give may not be enforced, while an executory promise to perform a contractual duty may, the distinction is of major significance at the executory level. A promise to give is not binding unless it is contained in the form of a deed.[97] If a deed is not executed, a gift promise must be accompanied by physical delivery before the gift becomes a binding legal transaction.[98] In *Re Ridgway*,[99] delivery was not satisfied when a pipe of port was laid by a father in a cellar and known over the years as the son's port.

Contracts for a nominal consideration are usually cast in the form of a unilateral contract. You may have my Rolls Royce if and when you pay me (not promise to pay me) the sum of £1. Since in principle unilateral promises are revocable before acceptance, an executory promise of this kind is no more significant for the purpose of becoming binding than a gratuitous promise. Nevertheless, the form of the contractual exchange may serve a valuable evidentiary purpose, after its execution, in establishing beyond doubt the intention of the promisor and in rebutting the presumption of a resulting trust[100] in favour of the promisor.

REQUIREMENTS OF GIFT OF CHATTELS

An effective gift between a donor and a donee requires that the donor display a clear intention to transfer to the donee his interest in the object that is being given. This intention will be effective even if the donee considers the transaction to be a loan and

[97] See below.

[98] *Irons v Smallpiece* (1819) 2 B & Aid 551; *Cochrane v Moore* (1890) 25 QBD 57 (CA).

[99] (1885) 15 QBD 447.

[100] See below.

not a gift.[101] This alone, however, is not sufficient. There must also occur either physical delivery or the execution and delivery of a deed or an effective declaration of trust. Of these three items, physical delivery is the means most commonly employed in the case of personalty. To a significant extent, the problems raised by gift are of an evidentiary character, namely, were clear words of gift uttered and was there in fact a transfer of possession?

A gift transaction may subsequently be challenged in a variety of circumstances. For example, the donor may later regret an earlier display of generosity, possibly having gone too far in the quest for social and emotional effect. Or the donor's residuary legatee may be seeking to augment the estate available for testamentary distribution by clawing back the subject matter of a disputed gift. Or the donor's trustee in bankruptcy or creditors may be on the alert to discover property placed by the donor in the name of a spouse to put it beyond the reach of the donor's creditors.[102] An estate may also be augmented if there has not occurred the delivery necessary to complete a gift.

DELIVERY

Delivery means the transfer of possession from the donor to the donee.[103] Courts have not been prepared to let the meaning of delivery be diluted in the context of gift: 'The English law of the transfer of property, dominated as it has always been by the doctrine of consideration, has always been chary of the recognition of gifts'.[104] For delivery to take place, there has to be a clear, unequivocal transfer of possession, even clear words of gift not making up for imprecision in the act of delivery. In this regard, delivery has posed problems in cases where one spouse seeks to make a gift of something to the other whilst retaining some measure of use and enjoyment of the object. In *Re Cole*, a husband introduced his wife to their new home and, after covering her eyes, removed his hands and said 'Look'. She was then taken around the house, handling

[101] *Dewar v Dewar* [1975] 1 WLR 1532 (where the gift is received and not disclaimed by the donee).

[102] Insolvency Act 1986, ss 423–25.

[103] See chapter 2.

[104] *Re Cole* [1964] Ch 175, 185 (CA), *per* Harman LJ.

certain items in the process, and then informed 'It's all yours'. Her claim that she had been effectively given the contents of the home was successfully challenged by her husband's trustee in bankruptcy. No allowance was made for the fact that her husband had brought her to the contents of the home, that these were too many and too bulky to deal with by a physical handing over, and that she had touched some of them on her first visit to the new home.

DELIVERY: SPECIAL CASES

Physical delivery is obviously difficult to accomplish with bulky chattels. In *Lock v Heath*,[105] a so-called 'symbolical' delivery was recognized when a chair was delivered to the donee wife coupled with the words of the husband: 'I give you all the goods mentioned in the inventory'. The delivery of the chair, a very real act, might more accurately be seen as representative (rather than symbolical) of the list contained in the inventory. The same approach is evident in *Rawlinson v Mort*,[106] where the owner of an organ had it installed in a church on terms contained in a letter from the vicar that it was only lent. The owner decided to make a gift of it to the church organist and handed him the vicar's letter together with evidence of the organ's purchase. He also placed the organist's hand on the organ and declared that he was giving it to him. This was held to be an effective delivery; it was the nearest thing to a physical transfer of possession that the nature of the case permitted.

In *Rawlinson v Mort*, it was strictly the bailor's reversionary entitlement that was being transferred by a process that mimicked a transfer of possession itself. If the goods are held by a bailee at the time the donor displays a gift intention, the needed transfer of possession can be accomplished by constructive means as and when the bailee attorns to the donee.[107] Where the donee is already in possession,[108] or has the custody of the thing as an employee in effective occupation of it,[109] the donor's intention is all that is needed to consummate the gift. If words of gift are uttered and the donor, having lost the thing, also gives directions

[105] (1892) 8 TLR 295.
[106] (1905) 93 LT 555.
[107] See chapter 2.
[108] *Re Stoneham* [1919] 1 Ch 149.
[109] *Winter v Winter* (1861) 4 LT 639.

or suggestions as to its recovery, the subsequent discovery of the thing will complete the transaction. This happened in *Thomas v Times Book Co*,[110] where the playwright Dylan Thomas lost the manuscript of 'Under Milk Wood' on a taxi-tour of a string of London public houses. The donee, a BBC producer, provided him with copies of the manuscript made on a previous occasion and was told he could have the manuscript itself if he could find it. The producer followed up leads suggested by the playwright and so discovered the manuscript, which was held to complete the gift.

In unusual circumstances, a purported gift that fails for want of delivery may subsequently be completed if the donee obtains possession of the subject-matter of the gift in another capacity. According to the rule in *Strong v Bird*,[111] an intended donee who subsequently obtains possession as executor of the estate of the deceased donor thereby acquires a perfected title to the thing. The case itself concerned an ineffectual attempt to forgive a debt but the rule is of broader application. The subject-matter vests in the donee in his capacity of executor, but the donor's intention serves to free the title of the donee from the limitations on enjoying the thing that the executorship would otherwise impose.

DEED

As an alternative to physical delivery, the donor may sign and deliver a document called a deed indicating a donative intention. Until the enactment of the Law of Property (Miscellaneous Provisions) Act 1989, a deed had to be executed under seal which, unlike the molten wax impression of old, had latterly taken the form of a red paper disc. Instead of the seal, it is now required that a document be expressed on its face to be a deed.[112] Furthermore, it has become necessary for a witness to attest by signature that the maker of the deed has signed in the witness's presence, or for two witnesses to attest by signature that the deed was drawn up and signed according to the direction and in the presence of its maker.[113]

[110] [1966] 2 All ER 241.

[111] (1874) LR 18 Eq 315.

[112] Section 1(2)(a).

[113] Section 1(3), needed for the case of a maker physically unable to sign for himself.

Although a deed has to be delivered to become effective, delivery in the case of deeds has acquired the very loose meaning of any act that connotes the intention of the maker of the deed to be bound by it, though it would presumably have to mean more than merely signing the deed since the statute differentiates between signing and delivery.

DOCUMENTS AND INTANGIBLES

The gift of intangible assets contained or evidenced in documents such as share certificates, debt instruments, bills of exchange, and bills of lading, must comply with a transfer procedure laid down by the contract giving birth to the asset or by statute.[114] This should be read subject to the case of *Re Rose*,[115] which qualifies the maxim that equity will not perfect an imperfect gift. In that case, a question arose as to the effect of a transaction where the owner of shares completed a share transfer form, pursuant to a gift, and was awaiting the registration of the transfer by the company. Although the transfer was only complete upon registration, the owner had done everything in his power to effect a transfer. He had used the proper form and so was to be regarded as a trustee of the shares for the benefit of the donee pending the actual registration of the change of ownership. The *Re Rose* approach to the perfection of a gift will not work where the donor cannot locate the share certificate so as to deliver it to the donee or has in any case only an equitable title to the shares.[116]

An important relaxation of the *Re Rose* principle[117] is evident in *Pennington v Waine*,[118] where the Court of Appeal held that *Re Rose* did not preclude the conclusion that a gift of shares might be completed in equity even before the donor had done everything in his power to effect a transfer.[119] Mindful of the need to protect donors from intemperate benevolence and their creditors

[114] See further chapter 6.

[115] [1952] Ch 499 (CA).

[116] *Zeital v Kaye* [2010] EWCA Civ 159, [2010] 2 BCLC 1.

[117] Applied in *Trustees of the Property of Pehrsson v Von Greyerz* (PC, unreported 16 June 1999).

[118] [2002] EWCA Civ 227, [2002] 1 WLR 2075.

[119] Ibid, at [66] (Arden LJ) and [110] (Clarke LJ).

from a dissipation of the donor's estate, the Court of Appeal nevertheless concluded that an effective equitable assignment of the shares had occurred when a stock transfer form relating to shares in a family company was handed over by the donor to the company auditor. He received the form as her agent, and not as the agent of the company itself, and took no further steps to complete the transfer prior to the donor's death. For the majority, Arden LJ was prepared to hold that the auditor, when writing to the intended donee about the gift of the shares and informing him there was nothing further that the donee needed to do, had the effect of rendering the donor and the auditor himself agents of the donee for the purpose of effecting the transfer by the company. This bold view of the matter was reinforced by the added reason that in the circumstances it would have been unconscionable of the donor's personal representatives to refuse to hand over the share transfers to the donee,[120] just as, it seems, it would have been unconscionable for the donor herself to change her mind. It would have been unconscionable because the donee had been informed of the gift and advised that there was no need for him to do anything, and had taken the necessary steps to become a director of the company, for which position he needed a shareholding qualification.[121] Clarke LJ preferred to rest his decision upon the simple view that the execution of a stock transfer form was, even without delivery of the form, an effective equitable assignment of the shares, given the wording of the stock transfer form ('I/We *hereby* transfer').[122]

Lord Browne-Wilkinson has drawn attention to the limits of the maxim that equity will not perfect an imperfect gift: this does not mean that equity will strive officiously to defeat a gift.[123] The decision in *Pennington v Waine*, however, especially for the way it introduces unconscionability into the inference of an equitable assignment, goes some way beyond abstaining from

[120] Ibid, at [67].

[121] Ibid, at [64]. The case was treated as one of detrimental reliance in *Curtis v Pulbrook* [2011] EWHC 167 (Ch) at [43], [2011] 1 BCLC 638.

[122] Original emphasis.

[123] *T. Choithram International SA v Pagarini* [2001] 1 WLR 1 (PC).

officious interference and blurs the dividing line between gift and trust.[124]

An interesting feature of gift in the case of documentary intangibles is revealed by *Standing v Bowring*.[125] That case, concerning a transfer of consols into the name of the donee, supports the proposition that the consent of the donee is not needed to effectuate a gift,[126] though an unwanted gift may always be repudiated by the donee upon its discovery. If the absence of any requirement of the donee's consent is of general application, then gift is far removed from contract in the common law tradition. Nevertheless, this point ought not to be overstated. In very many instances, the consent of the donee will necessarily be given by the circumstances of the case: a physical delivery involving a change of possession cannot be accomplished without consent (except possibly if the donee is an infant of very tender years). However, the consent of an intended beneficiary is not required for a valid trust and the absence of consent does therefore appear to be of general application, justifiable perhaps by the fact that the transaction can only be of benefit to the donee.

DISPOSITIONS AND FORMALITIES

A disposition, such as a gift, of personalty need not in general follow a particular form or be in, or evidenced in, writing. Certain dispositions of 'personal chattels', however, may under the Bills of Sale Act 1878[127] be avoided if they are not compliant with very detailed formal and registration requirements. The Act defines 'bill of sale' in tortuous terms but the expression covers a wide variety of instruments with very significant exceptions, notably 'transfers of goods in the ordinary course of business of any trade or calling' and a wide variety of established documents such as

[124] See below. [125] (1885) 31 Ch D 282 (CA).

[126] See also *Shepherd v Cartwright* [1955] AC 432 (HL).

[127] As modified by the Bills of Sale Act (1878) Amendment Act 1882. The combined legislation deals with both outright and security dispositions. Certain provisions, not all, are common to both types of disposition. Our concern at this juncture is with non-security dispositions.

bills of lading, delivery warrants, and delivery orders.[128] The effect of non-compliance with the Act is that the bill of sale is 'deemed fraudulent and void' as against trustees in bankruptcy and liquidators and against sheriffs executing legal process if the chattel in question is still in the possession or apparent possession of the maker of the bill of sale after seven days.[129] Personal chattels includes goods, furniture, trade machinery, and other items capable of physical delivery, as well as fixtures and growing crops if assigned separately from the land.[130] The legislation has been extended to include also general assignments of book debts executed by individuals.[131] It is unlikely to strike down many dispositions in the modern age but it is a statutory peril to avoid in the marginal cases in which it applies.

A further formal requirement is laid down by section 53(1)(c) of the Law of Property Act 1925, according to which 'a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will'. Since the interest must be a subsisting one, the provision does not apply to declarations of trust that give birth to a beneficial interest.[132] Nor does it apply to the transfer of the bare legal interest or to the transfer of both legal and beneficial interest.[133] Consequently, the provision was held inapplicable where the holder of the entire beneficial interest was able to give directions to the bare trustee to transfer both legal and beneficial title to a designated charity.[134] The process by which the legal and beneficial titles were reunited prior to the transfer was not explained.

The purpose of section 53(1)(c) is to prevent secret and deceptive dealings with the beneficial interest.[135] It is nevertheless capable of catching an honest transaction that, structured slightly differently, would have escaped its reach. In *Grey v Inland Revenue Commissioners*, Hunter transferred shares to trustees on trusts

[128] Section 4. [129] Section 8.
[130] Section 4. [131] Insolvency Act 1986, s 344.
[132] *Re Vandervell's Trusts (No. 2)* [1974] Ch 269 (CA).
[133] *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291 (HL).
[134] Ibid.
[135] *Grey v Inland Revenue Commissioners* [1960] AC 1 (HL).

later to be declared. Seventeen days later, he gave irrevocable oral directions to the trustees to hold the shares for his grandchildren. The trustees duly executed declarations of trust[136] in favour of the grandchildren and the question now was whether the beneficial interest of the grandchildren arose by virtue of Hunter's oral directions or of the instrument executed by the trustees. In the latter case only would substantial stamp duty have to be paid. The House of Lords ruled in favour of the latter, finding that Hunter's oral directions to the trustees amounted to a 'disposition' under section 53(1)(c),[137] so as to fail for want of compliance. This was not a declaration of trust since Hunter was disposing of the beneficial interest he retained under the resulting trust that arose in his favour when he failed to identify the beneficiaries at the time the shares were transferred to the trustees.[138] Had Hunter declared the trusts at the time of that transfer, there would have been no need to comply with section 53(1)(c).

The resemblance of the transaction in *Grey* to a staggered declaration of trust rather than a disposition comes out in a comparison with *Re Vandervell's Trusts (No. 2)*.[139] In this case, V transferred shares to the Royal College of Surgeons to fund a chair in pharmacology, subject to a buy-back option in favour of trustees when sufficient dividend income had been accumulated to fund the chair. The option was held by the trustees on trusts later to be declared by V. In order to avoid a gap in the beneficial ownership of the option, the trustees held the option on trust for V. When V declared those trusts, this extinguished his own beneficial interest in the option, which event was followed by a declaration of trust of the option in favour of the identified beneficiaries. Splitting the transaction in two in this way, instead of compounding the two stages to produce a disposition, meant that section 53(1)(c) did not apply. The failure of the court to tackle head on the reasoning in the very similar case of *Grey* is remarkable.

[136] Signed also by Hunter, though he was not a party to the instrument.

[137] The court rejected arguments that 'disposition' should be read to mean a grant or assignment, the language used under the predecessor provision, s 9 of the Statute of Frauds 1677. Lord Radcliffe inclined to the view that a declaration of trust could also be a grant or assignment under the section: [1960] AC 1, 16 (HL).

[138] On resulting trusts, see below.

[139] [1974] Ch 269 (CA).

Returning to *Grey*, suppose that Hunter had simply declared himself trustee of his own beneficial interest in the trusts instead of later giving directions to the trustees. If Hunter as a bare trustee were simply to drop out of the picture, leaving only the link between trustee and sub-beneficiary, this would have to be treated as a section 53(1)(c) disposition. If, however, Hunter remained as an active trustee, this would be a sub-trust declaration falling outside the statute.[140] It is certainly arguable that, regardless of the extent of Hunter's continuing involvement, trust and sub-trust should continue to subsist until the beneficiaries took steps to wind up the sub-trust.[141]

Section 53(1)(c) has no application to 'the creation or operation of resulting, implied or constructive trusts'.[142] As with a sale of land, a contract to transfer shares is susceptible to specific performance, with the purchaser acquiring a beneficial interest by way of a constructive trust in the subject matter of the contract prior to the completion of the sale. The subject matter of the contract in question in *Oughtred v Inland Revenue Commissioners* was 72,500 shares to be transferred in return for the purchaser's reversionary interest in certain other shares in which the vendor of the 72,500 shares had a life interest. The case concerned stamp duty, so section 53 received only a limited treatment. The contract in this case was concluded orally, later being followed by various written instruments. On the question whether the purchaser of the 72,500 shares obtained a beneficial in the shares once the oral contract was concluded, two judges were of the view that section 53(2) did not excuse the need for writing and one of the view that it did. The majority view here seems impossible to reconcile with section 53(2),[143] but it may have been actuated by concerns that the device of an oral contract might too readily permit the avoidance of the writing rule for dispositions in section 53(1)(c).

[140] See *Nelson v Greening & Sykes (Builders) Ltd* [2007] EWCA Civ 1358.

[141] Under the rule in *Saunders v Vautier* (1841) 4 Beav 115.

[142] Law of Property Act 1925, s 53(2).

[143] See *Neville v Wilson* [1997] Ch 144 (CA).

INEFFECTIVE GIFTS

The presence of a vitiating factor, such as mistake, duress, and undue influence, may vitiate a gift (and other dispositions) in the same way as it does a contract.[144] Furthermore, some gifts (and one-sided contracts akin to gifts) may be challenged by insolvency office holders representing the donor to the extent that they diminish the content of an insolvent's estate in the period leading up to the bankruptcy (individuals) or liquidation (companies) of the donor.[145] If the gift is set aside, the subject matter is made available for distribution among the donor's unpaid creditors. These provisions protect the estate in order to make its contents available for distribution in accordance with the legislative distribution scheme. They are complemented by further provisions that require the permission of the court for dispositions of property once insolvency proceedings have commenced.[146] Over and above these statutory provisions, much attention has in recent times been paid to the common law anti-deprivation principle, which avoids contractual and other provisions the effect of which is to withdraw contract rights and other assets from an insolvent's estate at the point when insolvency proceedings commence. As the law stands, deprivations serving a *bona fide* commercial purpose, for example, where the person withdrawing the asset will not receive the expected *quid pro quo* for it, are effective,[147] but it remains difficult to chart the extent of operation of the principle.

In addition, though the point normally arises under testamentary dispositions, a gift may be expressed to be subject to restraints (conditions) that are too vague to be enforced or else are invalid because they offend against public policy. If the conditions operate so as to qualify entitlement to the gift, the effect of their unenforceability or invalidity is that the donee may not

[144] See the standard contract texts.

[145] See the provisions dealing with transactions at an undervalue in the Insolvency Act 1986, ss 238, 240, 339, 341. The provisions relating to fraudulent conveyances (ibid, ss 423–25) may be invoked by individual creditors.

[146] Insolvency Act 1986, ss 127, 284.

[147] *Belmont Park Investments PTY Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38, [2012] 1 AC 383.

enforce the gift on any terms. Sometimes, however, conditions are imposed that would divest the donee of a gift that has already vested. The effect of unenforceability or invalidity here is that the gift takes full effect unfettered by the condition.

In *Re Macleay,*[148] a gift 'to my brother John . . . on the condition that he never sells out of the family' was held to be subject to a valid restraint. A general prohibition upon alienation would have been bad, but John had the choice of his family members when it came to sale and could select other means of disposition, such as gift, mortgage, or lease, if choosing to go outside the family. On the other hand, a restraint forfeiting a legacy to the testator's daughter if she should marry someone 'not of Jewish parentage and of the Jewish faith' was held to be too uncertain (disjunctive or conjunctive conditions? one or both parents? etc), so the legacy could be enjoyed unimpaired by the restraint.[149] Again, a divesting condition was held to be too uncertain when it permitted the testator's daughter to receive payments from the estate 'only so long as she should reside in Canada'.[150] She was entitled to a precise answer to the question, 'How long may I safely spend outside Canada before I lose my legacy?' and the restraint as formulated did not give it.

PRESUMPTIONS OF A RESULTING TRUST AND OF ADVANCEMENT

Apart from cases where a presumption of advancement arises, the delivery of a thing (or the transfer of a documentary intangible) raises a presumption that it was not intended by way of gift. This accords with the law's reluctance, arising from its commitment to the doctrine of consideration, to recognize gift.[151] If documentary intangibles are transferred, for example company shares on the company register, there is a rebuttable presumption that the transferee holds the shares on a presumed, resulting trust in favour of the transferor. This presumption, a substantial

[148] (1875) LR 20 Eq 186.
[149] *Clayton v Ramsden* [1943] AC 320 (HL).
[150] *Sifton v Sifton* [1938] AC 656 (PC).
[151] *Re Cole* [1964] Ch 175, 185 (CA), *per* Harman LJ.

one, is also evident where debt instruments such as consols and loan stock are transferred into the joint names of transferor and transferee.[152] As far as chattels go, the physical delivery alone of a thing does not in general appear to be quite so suggestive of an intention to give as to require the obstacle of a presumption of resulting trust to inhibit intemperate benevolence. It is difficult to see what purpose a resulting trust presumption serves here: the recipient will have to prove an intention to give and this will not lightly be established just because delivery has occurred. Delivery, after all, is quite consistent with a short-term loan; the transfer of shares in a company is not.

In certain relations, far from a resulting trust arising to make it difficult to establish a donative intention, a reverse presumption arises that the delivery or transfer of a thing was made with such an intention. This is the presumption of advancement and it occurs where the delivery or transfer operates from father to child[153] or to some other person to whom he stands *in loco parentis*. A weaker presumption arises in other close family relationships where the transfer or delivery moves from the stronger to the weaker individual. Clearly, the presumption of advancement is consistent with hierarchical family units whose junior members do not have the personal autonomy that one finds in the modern, dispersed, and emancipated family. In modern times, it is questionable that the presumption of advancement from husband to wife has any real force.[154] Similarly, it has been said that the presumption of advancement between father and son may be rebutted by 'comparatively slight evidence'.[155]

The question of illegality arose in *Tinsley v Milligan*,[156] where A and B made contributions to property conveyed into B's name alone. This was done to facilitate a fraud perpetrated on the Department of Social Security by both A and B. A was nevertheless permitted to claim her share of the property with the aid of the presumption of resulting trust. Far from A relying upon

[152] *Re Vinogradoff* [1935] WN 68; *Standing v Bowring* (1885) 31 Ch D 282 (CA).
[153] *Shepherd v Cartwright* [1955] AC 432 (HL).
[154] *Pettitt v Pettitt* [1970] AC 777 (HL).
[155] *McGrath v Wallis* [1995] 2 FLR 114 (CA).
[156] [1995] 1 AC 340 (HL).

the illegal contract, it was B who sought to do this in defending the action. The presumption of resulting trust was vital in preventing A from having to rely upon the illegal contract.[157] That presumption was held to have been rebutted in a case where the claimant authorized the mixing of money by making payments into the defendant's bank account.[158] Had there been in *Tinsley v Milligan* a presumption of advancement in favour of B, then A might have been constrained to rely upon the illegal contract in order to rebut this presumption, which would not have been allowed.[159] In cases where the illegal purpose lying behind the conveyance of the property has not in fact been carried out, the transferor will have a *locus poenitentiae* and thus will be at liberty to rebut the presumption of advancement. In *Tribe v Tribe*,[160] a father transferred shares to his son in order to avoid paying a bill for dilapidations presented by his landlords. He was able to negotiate a settlement with the landlords without relying upon the transfer of shares, and so was held entitled to rebut the presumption of advancement and recover the shares from his son.

TRUST

As an alternative to delivery, a donor may declare a trust of the thing in favour of the donee, which will serve to transfer the beneficial interest in it to the donee. Alternatively, the donor may settle a thing on a trustee for the benefit of a donee. Equity, however, will not assist a volunteer or perfect an imperfect gift, which means that a trust will not freely be discovered in the ruins of a failed gift by delivery or a failed contract. A gift intended to be effected by one mode will not be carried into effect by another,[161] so, for example, a trust will not be spelled out of a

[157] *Allen v Hounga* [2014] UKSC 47, at [30], [2014] 1 WLR 1389. See also Law Commission, *The Illegality Defence*, Law Com No 320, 2010, Part 2.

[158] *Patel v Mirza* [2014] EWCA Civ 1047.

[159] See also *Chettiar v Chettiar* [1962] AC 294 (PC). On the difficult question whether a claimant is relying upon an illegal contract when seeking recovery of moneys paid, see the partial dissent of Gloster LJ in *Patel v Mirza* [2014] EWCA Civ 1047.

[160] [1996] Ch 107 (CA). See also *Patel v Mirza* [2014] EWCA Civ 1047.

[161] *Milroy v Lord* (1862) 4 De GF & J 264, *per* Turner LJ.

failed attempt to convey by deed. Explicit trust language is not needed to constitute a trust,[162] so there is scope for a degree of inconsistency in the judicial inference of one. Just as the trust is not easily inferred to solve problems presented in contract by the doctrine of privity,[163] so a trust was not recognized in *Jones v Lock*,[164] where a father, after a lengthy journey, briefly placed a cheque for £900 in a baby's hands saying 'I give this to baby for himself'.

A declaration of trust and a gift are two very different transactions. In the former, which is 'far rarer' than gift, the settlor 'intends to retain his rights but to come under an onerous obligation' whereas a 'giver means to get rid of his rights'.[165] This is one reason why equity has long resisted a movement from the conclusion that a gift has failed to the conclusion that a trust has instead been declared by a settlor. A person who does 'his incompetent best to transfer both legal and beneficial title' but is unsuccessful does not thereby become a trustee.[166] The decision of the Court of Appeal in *Pennington v Waine*,[167] however, shows a modern willingness to leap the gap in exceptional circumstances where a benevolent construction of language is appropriate in order that the wind will temper to the shorn lamb (the donee).[168] The same can also be said of the Privy Council in a decision where a donor orally declared a gift of all his wealth to a foundation that he had established by trust deed.[169] He did this on the occasion of his also executing a foundation trust deed between himself as settlor and himself and others as trustees of the foundation. The gift to the foundation was not to be regarded as an outright gift, but rather as a gift for the purposes set out in the foundation trust deed, since the foundation had no other existence apart from that in the deed. Furthermore, the settlor himself was bound by the trust and had to give effect to it by

[162] *Richards v Delbridge* (1874) LR 18 Eq 11.
[163] See for example *Re Schebsmann* [1944] Ch 83 (CA).
[164] (1865) 1 Ch App 25.
[165] Maitland, F.W., *Equity*, Cambridge, 1909, p 74.
[166] *Curtis v Pulbrook* [2011] EWHC 167 (Ch) at [44], [2011] 1 BCLC 638.
[167] [2002] EWCA Civ 227, [2002] 1 WLR 2075.
[168] Discussed above.
[169] *T. Choithram International SA v Pagarini* [2001] 1 WLR 1 (PC).

transferring the trust property into the names of all the trustees. These cases cast doubt on whether equity will resolutely continue refusing to effect an imperfect gift and justify doubts about whether 'any clearly identifiable or rational policy objective' is currently served by the law.[170]

No particular form is required for the creation of a trust of personalty but it should be noted that, if the donor's interest in the thing that is being given is an equitable rather than a legal one, the trust will concern a subsisting equitable interest and so will have to be in writing to satisfy section 53(1)(c) of the Law of Property Act 1925. No such requirement exists when the declaration of trust splits the legal and beneficial interests in the thing for the first time.

DONATIO MORTIS CAUSA

This is a transaction that falls short of the conventional requirements of a gift but is binding because of the circumstances in which it occurs. There must be a delivery of the subject-matter of the gift.[171] A constructive delivery will also suffice where the donee receives the means by which possession can later be taken (such as the key to a bank safety deposit box). In *Woodard v Woodard*,[172] the delivery of car keys was enough, even though the donee already had a set and was in possession of the car as bailee. Giving a power of attorney to deal with shares, however, is not tantamount to delivery or constructive delivery of the share certificates themselves.[173]

Instead of an intention to make an outright present gift, the law is satisfied if the donor, in contemplation of death,[174] delivers with the intention that a gift will take full effect as from the death of the donor. Those charged with administering the estate of the deceased are conscience bound to give effect to the donor's intentions. But there must be some element of present intention

[170] *Curtis v Pulbrook* [2011] EWHC 167 (Ch) at [47], [2011] 1 BCLC 638.
[171] *Ward v Turner* (1752) 1 Dick 170; *Delgoffe v Fader* [1939] Ch 922.
[172] [1995] 3 All ER 980 (CA).
[173] *Re Craven's Estate (No. 1)* [1937] Ch 423.
[174] *Cain v Moon* [1896] 2 QB 283.

to benefit the recipient for otherwise the transaction would be indistinguishable from a testamentary bequest and so would fail for non-compliance with the formal requirements of the Wills Act 1837.[175] In the event of the contemplated death not occurring because the donor makes a happy recovery, the *donatio mortis causa* is not properly constituted[176] and the donee is merely a bailee of the intended gift. Nevertheless, since the donor need not be *in extremis* at the time of the transaction, the gift will be effective if death follows at not too long a time afterwards.[177]

Donatio mortis causa applies not only to chattels and documentary intangibles but also to pure intangibles, such as the indebtedness of a banker to a client with a credit balance in a deposit or other account.[178] The requirements of proprietary transfer in the case of pure intangibles are set out in chapter 7. A transaction effective as a *donatio mortis causa* would fail as an effective assignment because the donor does not fully intend to vest a property interest in the donee. On the face of it, is difficult to see how the requirement of delivery can be satisfied in the case of a species of property with no physical existence such as a debt. Nevertheless, drawing on the idea of *indicia* of title, the courts have recognized a *donatio mortis causa* where documents have been delivered that are sufficiently suggestive of the recipient's entitlement to the pure intangible that they evidence. In *Birch v Treasury Solicitor*, the delivery of various savings account and deposit account passbooks was held to satisfy the requirements of a *donatio mortis causa*.

FAILED TRANSFERS AND RESULTING TRUSTS

There is considerable doubt about when a resulting trust arises and when it operates to negative the transfer of a proprietary interest. To the extent that a resulting trust does the latter, it includes some of the cases previously examined in which a gift

[175] *Birch v Treasury Solicitor* [1951] Ch 298 (CA).

[176] See *Delgoffe v Fader* [1939] Ch 922, 927, *per* Luxmoore J: '[T]he title of the donee is never complete until the donor is dead'.

[177] *Vallee v Birchwood* [2013] EWHC 1449 (Ch); [2014] Ch 271 (four months).

[178] It has been extended to land in a case involving the delivery of a key to a safety box containing title deeds: *Sen v Headley* [1991] Ch 425 (CA).

has been held to be incompletely constituted or ineffectual. An increasing awareness that proprietary rights have implications for insolvency distribution[179] and affect third parties, suggests a degree of future judicial conservatism in inferring resulting (as well as constructive) trusts.

Resulting trusts are divided into automatic resulting trusts and presumed resulting trusts.[180] An automatic resulting trust arises where property is transferred to a trustee on a trust basis that is ineffectual because either the transfer fails to comply with the requirements of the law or the trusts themselves are never stated.[181] It does not depend for its inference on party intention but arises purely by operation of law.[182] The transferor has in effect failed to divest himself of his property. For this reason, the property subject to the failed transfer should not revert to the Crown as *bona vacantia*.[183] Plowman J once observed that 'a man does not cease to own property simply by saying "I don't want it". If he tries to give it away the question must always be, has he succeeded in doing so or not'.[184] The second type of resulting trust, a presumed resulting trust, arises where the legal interest in property is transferred to another in circumstances where any intent of the transferor to alienate his beneficial interest in the property cannot be sufficiently determined and where there is no presumption of advancement to displace.[185] It also arises where property is transferred for a purpose on trust terms and subsists until that purpose is carried out.[186] It is not clear whether the intentional element takes the form of an

[179] *Westdeutsche Landesbank Zentrale v Islington London Borough Council* [1996] AC 669 (HL).

[180] Purchase money resulting trusts are a species of the latter.

[181] *Re Vandervell's Trusts (No. 2)* [1974] Ch 269; *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, 313 (HL) (Lord Upjohn).

[182] *Cf.* Lord Browne-Wilkinson in *Westdeutsche Landesbank Zentrale v Islington London Borough Council* [1996] AC 669, 708 (HL), regarding the automatic resulting trust as intention-based.

[183] *Pace* Lord Browne-Wilkinson, ibid.

[184] *Inland Revenue Commissioners v Vandervell* [1966] Ch 261, 275.

[185] *Re Vandervell's Trusts (No. 2)* [1974] Ch 269.

[186] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164; Bridge, M., 'The *Quistclose* Trust in a World of Secured Transactions' (1992) 12 Oxford Journal of Legal Studies 333.

unstated intention of the transferor that the property will revert if the transfer fails. It may, alternatively, be simply the absence of an intention to benefit the transferee.[187] The former approach is too artificial to be acceptable but has the merit of retaining strict judicial control over the recognition of resulting trusts. The danger with the latter approach is that it may be too prolific in giving rise to proprietary rights. Nevertheless, one way of containing its proprietary potential is to demand evidence that rebuts any intention at all to benefit rather than the more easily gathered evidence that rebuts an intention to enter into a specific type of transaction such as a gift.[188]

The role accorded to intention in the case of a presumed resulting trust is of critical importance in determining the number of *in rem* claims that might arise from mistaken gifts, and payments and moneys paid under void contracts. In *Chase Manhattan Bank v Israel-British Bank,*[189] the court found that a party mistakenly duplicating a payment retained a continuing equitable interest in the funds. The reasoning was sparse and no explicit reference was made to a resulting trust. The American authorities cited in support tended towards a constructive trust analysis of the problem. Since it does not treat the constructive trust as a remedial vehicle for the reversal of an unjust enrichment, English law would require the conscience of the payee to be bound in order for a constructive trust solution to be adopted. The *Chase Manhattan* decision came in for stern criticism from Lord Browne-Wilkinson in *Westdeutsche Landesbank Zentrale v Islington London Borough Council*,[190] where his Lordship stressed that an equitable interest, separated from the legal interest, cannot be 'retained',[191] and that *Chase Manhattan* should have required knowledge by

[187] Chambers, R., *Resulting Trusts*, Clarendon, 1997.

[188] *Westdeutsche Landesbank Zentrale v Islington London Borough Council* [1996] AC 669 (HL) (Lord Goff) and Swadling, W., 'A New Role for Resulting Trusts?' (1996) 16 Legal Studies 110, both critical of Birks, 'Restitution and Resulting Trusts', in Goldstein, S. (ed.), *Equity: Contemporary Legal Developments*, Hamaccabi Press, 1992.

[189] [1981] 1 Ch 105.

[190] [1996] AC 669 (HL).

[191] See to similar effect Slade J in *Re Bond Worth Ltd* [1980] 1 Ch 228.

the payee of the mistaken payment for its conscience to be bound as a constructive trustee (though such knowledge on the facts arose some time after receipt of payment).

As the above reference to Lord Browne-Wilkinson's speech shows, the *Westdeutsche* case shows how the line between resulting and constructive trusts is still somewhat unstable. Nevertheless, an intention-driven resulting trust arising at the point of transfer should not require the conscience of a transferee to be bound in order for the transferor to retain a proprietary interest in the subject matter of the trust.[192] If conceptual difficulties concerning the one-step transfer of a bare legal interest can be overcome, then the conscience of the transferee becomes irrelevant because there is no need to require the transferee to do anything with a beneficial interest that he never acquired in the first place. Resulting trusts therefore often arise more quickly than constructive trusts:[193] the latter may have to attend upon the receipt of information serving to bind the transferee's conscience.

The most important feature of *Westdeutsche* is that it stands as authority for the view that property transferred pursuant to a void contract does not thereby become the subject of a resulting trust. Lord Browne-Wilkinson in particular was not prepared to recognize a resulting trust stemming from the fact of the payer's mistake or of the total failure of consideration under a contract.[194] The case therefore gives great comfort to those who criticize the proliferation of property rights that comes from the reflex application of equitable maxims, such as 'equity looks on that as done which ought to be done', without thought being given to the competing claims of the transferee's other creditors.[195] Lord Goff in *Westdeutsche* asks 'why should the plaintiff bank be given the additional benefits which flow from a proprietary claim, for example the benefit of

[192] *Cf.* Lord Browne-Wilkinson's introduction of the payee's conscience when referring to a resulting trust: [1996] AC 669, 705–06 (HL).

[193] An attraction for claimants seeking compound interest on the sum claimed.

[194] *Westdeutsche Landesbank Zentrale v Islington London Borough Council* [1996] AC 669, 709 (HL).

[195] Goode, 'Proprietary Restitutionary Claims', in Cornish, W.R., Nolan, R., O'Sullivan, J., and Virgo, G. (eds), *Restitution: Past, Present and Future*, Hart Publishing, 1998.

achieving priority in the defendant's insolvency', when it already has a personal action for the recovery of money paid under a void contract? If the decision in *Chase Manhattan* is still sound as an authority on resulting trusts, which to say the least is doubtful, it would have to be because of a presumed intention of the parties at the time of the transfer of the money that the payee was not to acquire property rights in it in consequence of the payer's fundamental mistake. Lord Goff in *Westdeutsche* was prepared to recognize a resulting trust in the case of a fundamental mistake.[196]

The role played in the modern law of resulting trusts by the intention of the transferor, coupled with the conclusion that the transfer of property under a void contract does not as such give rise to a resulting trust, invites an appraisal of the rule that assets transferred under a voidable contract revert upon rescission to the transferor.[197] This proposition has been challenged and, more particularly, it has been forcefully asserted that no such revesting in the transferor occurs where money has been transferred.[198] Taking first the money point, this is inconsistent with authorities that, where the claimant seeks to trace in equity, he can rescind the transaction and then trace moneys transferred by the payee prior to the rescission.[199] As for the general point, it is well established that a contract voidable for fraudulent or innocent misrepresentation, as well as for breach of fiduciary duty and for other vitiating factors such as undue influence and duress, gives rise to at least an equity of rescission and, according to one view, a retained equitable interest in the assets transferred. The difference between a retained equitable interest, as from the time of

[196] [1996] AC 669, 690 (HL), though he was otherwise of the view that 'the temperature of the water must be regarded as decidedly cold' in respect of the more expansive argument based on mistake and total failure of consideration (ibid, 669).

[197] *Re Eastgate* [1905] 1 KB 465; *Tilley v Bowman* [1910] 1 KB 745. So far as this is permitted once insolvency proceedings have commenced, this seems wrong for the reason stated below.

[198] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC).

[199] *Shalson v Russo* [2003] EWHC 1637 (Ch) at [124]–[126], [2005] Ch 281 (where this matter is fully discussed); *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321, 332 (CA). On tracing in general, see chapter 4.

the transfer, and an equity of rescission is that in the latter case the transferor has only a personal right to rescind the transaction prior to a revesting taking place upon rescission.[200] This latter view is to be preferred as a matter of principle. Authority for the view that, upon rescission, the revesting relates back to the date of the transfer[201] should be read as imposing the duties of a constructive trustee from that time on the transferee and not as defeating interests that arise between the date of the transfer and the date of the rescission.[202] Furthermore, where the transfer takes place under a contract, it would be decidedly odd for the transferor to have a full legal interest in assets received from the transferee whilst retaining an equitable interest in assets transferred, especially if the transferor never took steps to rescind the transaction or was unable to do because the right to rescind had become barred.

Rescission can be barred for various reasons,[203] the relevant reason here being the acquisition by a third party of property rights in the subject matter of the transaction prior to the act of rescission.[204] So, if the transferor has a retained equitable interest that interest will be defeated by a *bona fide* purchaser for value of the legal estate. That same purchaser will also defeat a transferor claiming an equity of rescission. But there is a practical difference in property matters between a retained equitable interest and an equity of rescission and it is twofold: first, an equity of rescission can be defeated by a later equitable interest acquired by a *bona fide* purchaser;[205] and secondly, the insolvency of the transferee does not erase a retained equitable interest, though it bars an equity of rescission. In the case of insolvency, from the

[200] *Phillips v Phillips* (1861) 4 De GF & J 208; *El-Ajou v Dollar Land Holdings Plc* [1993] BCC 698, 713.

[201] *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 387–90; *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265, 290.

[202] See below.

[203] The bars are affirmation, delay, inability to restore the subject matter, and the acquisition of third party rights in the subject matter, on which see the standard contract texts.

[204] *Babcock v Lawson* (1880) 5 QBD 284 (CA). See also the discussion below of insolvency.

[205] *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265.

commencement of insolvency proceedings a 'statutory' trust settles on the property of the insolvent in favour of the creditors, even though, prior to the proving of claims, their precise identity cannot at that point be ascertained.[206] Third party rights thus having been acquired, the right of the transferor to rescind is barred.[207] Although the conscience of an insolvency office holder is bound by the conduct of the insolvent,[208] by the time the office holder is apprised of the conduct giving rise to the equity of rescission, as trustee of the insolvent's property for the general creditors he will already be bound by the creditors' superior claim. Where the equity of rescission is not barred and rescission takes place, any property in the hands of a person with notice of the equity thereupon becomes subject to a constructive trust in favour of the claimant.[209]

The notion of a retained equitable interest, discussed above, is consistent with the transferee holding property under the terms of a resulting trust. There is support for this notion[210] but it seems inconsistent with the defined circumstances in which a resulting trust arises since there was an intention at the time to transfer the disputed assets to the transferee.[211] Furthermore, this notion gives rise to the decidedly odd outcome that, whereas legal and beneficial title can pass under a void transaction,[212] only the bare legal title passes where the transaction is voidable. If only for this reason, the resulting trust analysis should be rejected.

[206] *Ayerst v C & K (Construction) Ltd* [1976] AC 167 (HL).

[207] See *Shalson v Russo* [2003 EWHC 1637 (Ch) at [126], [2005] Ch 281, explaining *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC).

[208] *Madell v Thomas* [1891] 1 QB 230 (CA).

[209] See *Lonrho plc v Fayed (No. 2)* [1992] 1 WLR 1. The constructive trust is in response to the wrong of denying the transferor his assets: ibid, 9–10.

[210] *El-Ajou v Dollar Land Holdings Plc* [1993] BCC 698, 713, *per* Millett J ('an old-fashioned institutional resulting trust').

[211] See *Re Vandervell's Trusts (No. 2)* [1974] Ch 269, discussed above.

[212] *Westdeutsche Landesbank Zentrale v Islington London Borough Council* [1996] AC 669 (HL).

6

TRANSFER OF TITLE

INTRODUCTION

In the last chapter we examined the ways in which sellers and donors were able to pass (or convey) to buyers and donees their property interests in chattels. The relationships were bilateral and the property interest was merely transferred from one side of the relationship to the other. We are now going to consider a range of transactions with a tripartite or triangular dimension. The issue here is whether a transferor, seeking to pass a property interest to a transferee, is able to transfer a property interest superior to the one vested in the transferor. When able to do this, the transferor succeeds in derogating from (or overriding) the property interest of the true owner because the transferee is able to oppose that owner's property claim.

For the most part, this chapter will be concerned with the transfer of legal title, usually by way of sale or pledge (see chapter 7), at the expense of the true owner's legal property in the chattel. For the sake of completeness, however, we shall consider also the transfer of legal title at the expense of an equitable property interest. In this instance, many of the issues that could be raised, relating to the doctrine of equitable tracing, are more dealt with in more detail in specialist books and courses on trusts.

OVERRIDING LEGAL PROPERTY INTERESTS

GENERAL

All title disputes can be simplified to involve three parties, O, R, and T. O, the owner, is unlawfully dispossessed of a chattel by, or is deceived into surrendering possession of it to, R, a rogue. R later enters into a transaction purporting to confer a legal interest on T, an innocent third party. Having obtained value from T, R then disappears leaving O and T to fight over entitlement to the chattel, commonly by means of an action in conversion

brought by O against T.[1] R can either not be found or else has dissipated his ill-gotten gains and is not worth suing. The chattel may pass through a series of innocent hands before reaching T, but this is just a further detail of the O–R–T triangle. R may not be a rogue in the true sense (though this is usually the case), but instead someone with mistaken assumptions of personal entitlement or of authority to act. This issue in no way complicates the above simplification of the title chain.

In title disputes, either O or T will lose; there can only be one winner. Furthermore, the law has declined to take losses of this kind and divide them down the middle between O and T.[2] Because of the difficulty this has caused, it is a commonplace observation in title dispute cases for the court to stress how invidious it is to visit a loss caused by a rogue upon one of two innocent parties. Furthermore, the tug of O's and T's competing interests is a particular embodiment of the irreconcilable conflict between two fundamental legal policies. First, there is the protection of private property, essential in any peaceful society. The unrestrained pursuit of this policy would favour O in all title disputes. On the other hand, there is the promotion of security in contractual dealings, essential in any society that has an exchange-driven economy and wishes to encourage the maximization of wealth through exchange. The unrestrained pursuit of this policy would favour T in any title dispute. This clash of opposites was stated as follows by Denning LJ in *Bishopsgate Motor Finance Corpn v Transport Brakes Ltd*:[3]

> In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.

[1] See chapter 3.

[2] Law Reform Committee, *Transfer of Title to Chattels*, 12th Report 1966, Cmnd. 2958; *cf. Ingram v Little* [1961] 1 QB 31 (CA), *per* Devlin LJ.

[3] [1949] I KB 322 (CA).

Irreconcilable interests and policies often produce law that is difficult to justify in purely logical terms. This is particularly true of the body of law under present consideration. The law has started from the policy of property protection, expressed in the Latin principle *nemo dat quod non habet*. According to this, a transferor is able to transfer only such property interest as he himself has. Upon this general rule there has been grafted a series of exceptions designed to create a pragmatic balance with the policy of commercial security. As a coherent whole, the law leaves, as we shall see, a great deal to be desired. The rule and exceptions are to be found at common law and in various statutes (notably the Factors Act 1889 and the Sale of Goods Act 1979). The provisions of the Sale of Goods Act 1979[4] cover much of the ground but only apply where at least one of the O–R and R–T transactions is a contract of sale. The common law remains applicable to transactions not explicitly covered in the Sale of Goods Act 1979 and other statutes. This chapter will deal with a selective number of the various exceptions to the *nemo dat* rule.

The legal property interest at risk of being eclipsed by the rogue's dealings is usually ownership, but it is possible for the person duped or dispossessed by the rogue to be a bailee. The bailee (as we saw in chapter 3) is able to rely upon his possession or right to immediate possession in maintaining an action in conversion. The rule of *nemo dat quod non habet*, with its various exceptions, will qualify the success of such an action.

Suppose now that the bailor is the rogue. If, contrary to earlier argument,[5] a bailee's possessory interest does not survive the transfer of ownership by the bailor, the position is as follows. The transferee will obtain ownership of the chattel unencumbered by any right of the bailee to the possession of the chattel. The bailee should look to the bailor for redress, either in contract or in the tort of conversion.[6] Even on this assumption, the bailee may in some cases have a property right that survives the transfer of ownership by the bailor, though it may be imperilled by one or more exceptions to the rule of *nemo dat*. One example is the interest of a pledgee[7] whose common law power of sale

[4] Sections 21–26.

[5] See chapter 2.

[6] See *Roberts v Wyatt* (1810) 2 Taunt 268.

[7] See chapter 7.

makes him more than a simple bailee, which interest survives the temporary release of pledged shipping documents to the pledgor under the terms of a trust.[8]

COMMON LAW EXCEPTIONS TO THE RULE OF *NEMO DAT*

CURRENCY

The rule of *nemo dat* does not apply in cases where money, in the form either of coin or bank notes, passes in currency. In *Miller v Race*, a mail coach was robbed and a bank note stolen. Subsequently, this note came into the hands of an inn-keeper who provided valuable consideration for it and took without notice of the robbery. The bank that refused payment and detained the note was consequently liable in conversion to the inn-keeper presenting it for payment. The note was considered by the court to be a small denomination note, whereas a large note 'might have been suspicious'.[9] The case is significant for recognizing that bank notes, clearly at that time a true promissory note,[10] were 'as much money, as guineas themselves are; or any other current coin, that is used in common payments, as money or cash'.[11] The currency rule favours the promotion of trade and the avoidance of disruptive title inquiries. Had the note been received as a gift it would not have passed in currency and the donee would have been susceptible to the tracing process and consequent remedy.[12]

CODIFIED EXCEPTIONS

The Sale of Goods Act 1979 codifies a number of exceptions to the *nemo dat* rule whose origin lies in the common law. Section 21 refers to agency, not an exception at all, since the act of the authorized agent is the act of the principal, who owns the chattel. But agency by estoppel (or apparent authority) is a different matter. The same provision restates in brief form the common

[8] See chapter 7.

[9] (1758) 1 Burr 452, 458. It was for £21–10 shillings, not a trivial amount at the time.

[10] See chapter 7. [11] (1758) 1 Burr 452, 457. [12] See chapter 4.

law rule that the owner will be estopped from denying the title of a third party where the owner allows an unauthorized individual, who may be exceeding a limited authority or purporting to exercise a non-existent authority, to appear to be acting with authority. An extension of this rule binds the owner who permits someone else to appear as the true owner in dealings with third parties.

The second common law exception, to be found in section 23 provides that, if title is transferred to a rogue under a voidable contract, the rogue has the power to transmit a good title at any time until the owner avoids the contract. Because of its proximity to the case of contracts void for mistake, section 23 is further discussed below.

Until its abolition by the Sale of Goods (Amendment) Act 1995, a third common law exception, codified as section 22(1) of the Sale of Goods Act 1979, existed to protect purchasers of goods in market overt. A market overt was a market incorporated by charter, custom, or local statute. When this exception applied to protect a purchaser, the circumstances by which the goods came to be in the market were irrelevant. This exception, like the currency exception, created the closest thing possible to an absolute title.

Apparent authority

The appearance of authority referred to above must be created by the owner and not by the supposed agent, the rogue.[13] It is not in practice an easy exception for the third party, who carries the burden of establishing it, to make out. It may consist of a representation made by the owner to the third party[14] or to the world at large. Most often, it will consist of the owner's conduct in placing an agent in a position that in the experience of the commercial world carries a certain authority, without making it outwardly clear that the agent's authority has in the particular case been limited. The variant of apparent ownership is not so susceptible to a standard fact pattern. For convenience, apparent authority below includes apparent ownership.

[13] *Colonial Bank v Cady* (1890) 15 App Cas 257 (HL).
[14] *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600.

Apparent authority is best understood by looking at a number of case law examples. In *Eastern Distributors Ltd v Goldring*, the owner of a van wished to acquire a car but did not have sufficient money to put down a hire-purchase deposit. Responding to the dealer's suggestion that the van be used to provide the deposit, the owner colluded with the dealer to create a sham transaction. This involved deceiving the finance company into believing that the owner wished to acquire, on hire-purchase terms, both the van and the car. The finance company would then buy both vehicles from the dealer before leasing them on hire-purchase terms to the owner. As between owner and dealer, the value of the van would serve as the required deposit for both van and car hire–purchase transactions. The owner signed hire-purchase proposal forms that represented the dealer to be the owner of the van. The finance company accepted the proposal for the van but turned down the one for the car. It paid the dealer for the van but the dealer failed to inform the owner of this awkward turn of events. When a title dispute erupted between the finance company and the owner of the van, the former succeeded since the owner was estopped by his representation from denying that the dealer owned the van. In the opinion of Devlin J, the finance company's title was a real one. It could subsequently be transferred by the finance company in the normal way and was not merely a procedural defence that the finance company alone, as opposed to a later transferee from the finance company not privy to the estoppel, could raise against the original owner. A similar decision would have been reached if the owner had represented that someone had an authority to act on his behalf when no such authority in fact existed. For estoppel by representation to succeed, the statement of the owner must be unequivocal. A statement by an agent for the finance company owner of a car, that it has on its books no record of a hire-purchase agreement in respect of the car, will not be inflated into a statement that no such hire-purchase agreement exists.[15]

Estoppel by conduct generates more problems in practice than estoppel by representation. The basic point here is that an estoppel does not arise merely because the owner permits someone

[15] See *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 (HL).

else to possess a chattel so as to take advantage of the practical opportunity thus acquired to deceive others. The law has long been sensitive to the undesirability of finding an estoppel in the simple entrustment of a chattel by an employer to an employee.[16] There must be something more on the part of the owner than the fact of transferring possession to raise the estoppel. In the Saskatchewan case of *McVicar v Herman*,[17] an owner permitted an employee to keep possession of his car, without taking effective steps to recover it, long after the employment relationship had been terminated. In the meantime, the former employee renewed the car registration in his own name and traded it in with a garage, which verified the registration and found no encumbrances against the car when it conducted a search. All that the owner had done was to put the former employee into a position whereby he was able to deceive others, which was insufficient to constitute an estoppel. This case shows how difficult it is to infer an unequivocal representation from conduct.[18]

Similarly, in *Farquharson Bros and Co v King*[19] the estoppel plea failed. A firm of timber merchants gave their confidential clerk authority to complete sales with their established customers and informed the warehouse where the timber was stored that the clerk's delivery orders were to be honoured, but the warehouse was not informed that the clerk's authority was a limited one. Assuming the identity of 'a phantom broker [with] the plain and unpretentious name of Brown', the rogue ordered the warehouse to transfer a quantity into the name of Brown by issuing a delivery order in Brown's favour. Using the name of Brown, the clerk then sold the timber to the defendant company and endorsed the delivery order, using his fictitious name of Brown, in favour of the defendant. There was nothing said or done by the claimant firm of timber merchants amounting to a representation that the clerk or someone called Brown had authority to transfer

[16] See Lord Macnaghten in *Farquharson Bros and Co v King and Co* [1902] 1 AC 325 (HL).

[17] (1958) 13 DLR (2d) 419.

[18] See also *Jerome v Bentley* [1952] 2 All ER 114

[19] *Cf.* the Canadian Supreme Court decision in *Canadian Laboratory Supplies Ltd v Englehard Industries Ltd* [1980] 2 SCR 450 and *Henderson & Co v Williams* [1895] 1 QB 521 (CA).

the timber to the defendant so the latter's estoppel plea failed. The owner's instructions to the warehouse facilitated the fraud, but no more than the transfer of physical possession would have done so.

Indicia of title

Attempts have been made to bolster the estoppel plea by asserting that the owner has not merely delivered the chattel to the rogue but has also surrendered possession of an indefinable documentary extra called an *indicium* of title. We saw earlier[20] that only a very limited number of documents passed the common law test of a document of title in order for their delivery to be tantamount to delivery of the chattel itself. We shall see later that various statutory exceptions to the *nemo dat* rule have extended the meaning of document of title for this purpose, but only within the limits of those statutory exceptions. In whichever sense we mean a document of title, we are treating a document as a substitute for the chattel itself. If delivery of the chattel is not sufficiently suggestive of ownership or authority of the person to whom it is delivered, the delivery of a document instead will be no more effective to create an estoppel.[21]

When it comes to *indicia* of title, however, we are concerned with documents that pass neither the common law nor the extended statutory test of a document of title, yet are so suggestive of ownership that their transfer, along with the chattel itself, is considered by some to create an appearance of ownership or authority that a bare delivery of the chattel itself would not produce. In *Central Newbury Car Auctions Ltd v Unity Finance Ltd*[22] a rogue obtained possession from the claimant garage of a car, along with its logbook, when he traded in his own vehicle as the deposit on a proposed hire purchase of the car. The finance company declined the hire-purchase proposal for the car and the garage subsequently discovered that the rogue's own vehicle was stolen. The rogue later sold the car to a dealer who in turn

[20] See chapter 2.

[21] *Mercantile Bank of India v Central Bank of India* [1938] AC 287 (PC); *cf. Commonwealth Trust Ltd v Akotey* [1926] AC 72 (PC).

[22] [1957] 1 QB 371 (CA).

sold it to the defendant finance company in connection with a hire-purchase agreement. The rogue's actions were undoubtedly assisted by the fact that the logbook contained the name of the previous owner, who had supplied the car to the garage. This previous owner had not signed his name in the logbook, so it was a simple matter for the rogue to sign on his behalf and later pass himself off as this previous owner. By a majority decision, the Court of Appeal ruled that the garage was not estopped from denying the authority of the rogue to sell the car. The logbook, though often associated in the lay mind with ownership, was not in any sense a document of title and its delivery to the rogue, along with the car, made no difference. In dissent, Denning LJ was of the view that the behaviour of the claimant garage, in delivering this *indicium* of title at the same time as it intended to divest itself of the car (though in favour of a finance company under the first abortive hire-purchase agreement), created a sufficient appearance of authority to give rise to an estoppel.

Estoppel by negligence

In the past, unavailing attempts have been made to assert that the negligence of an owner is so peculiarly suggestive of apparent ownership or authority as to tip the balance in favour of the innocent purchaser. Sometimes reliance has been placed in vain on a worn *dictum* of Ashhurst J in *Lickbarrow v Mason*[23] that 'whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it'. This is too serious a threat to private property to be tolerated in a legal system that creates rather circumscribed exceptions to a strong *nemo dat* rule. In any case, it is not easy to see what the negligence of the owner adds to the appearance created by the delivery of the chattel.

In *Moorgate Mercantile Co Ltd v Twitchings*,[24] the House of Lords, by a bare majority, held that a failure to register a hire-purchase agreement under a voluntary trade registration scheme did not involve a breach of duty on the part of the finance company

[23] (1787) 2 TR 63.

[24] [1977] AC 890 (HL); see also *Mercantile Credit Ltd v Hamblin* [1965] 2 QB 242 (CA).

owner of a car towards persons dealing with the rogue in possession. The great majority (though not quite all) of hire-purchase agreements were registered, since most finance companies belonged to the registration scheme. Developments in the tort of negligence occurring in recent decades, striking at the heart of economic loss liability, make the innocent purchaser's prospects for a change in the law look exceedingly bleak. Estoppel has proved to be a rather weak source of protection for such purchasers. It should also be noted that the claimant's own contributory negligence is no defence to an action for conversion.[25]

Voidable title

If a rogue fraudulently assumes the identity of someone else when buying a chattel, it is a question of some importance to know if the contract thus concluded is void for unilateral mistake or merely voidable for misrepresentation (see the standard contract texts). If the contract is void, it is wholly ineffective to transfer title to the rogue and thence to the innocent third party.[26] If the contract is voidable, the rogue will have title to the chattel (assuming the owner's general property passed under the contract of sale to the rogue).[27] This title is voidable, yet the rogue will have power to pass clear title to a purchaser within the terms of section 23.[28] A factor vitiating consent renders the contract voidable, the most common instance for present purposes being the case of a contract induced by a fraudulent misrepresentation as to identity or creditworthiness.

The case law on the distinction between void and voidable contracts displays the drawing of fine distinctions against the background of an irreconcilable conflict between the interests of owners and *bona fide* purchasers. Over many decades, courts have been impaled on the fence separating contract and property law, with numerous references to the predicament of the third party whose proprietary rights are determined by a contract between

[25] Torts (Interference with Goods) Act 1977, s 11 (1).

[26] *Cundy v Lindsay* (1878) 3 App Cas 459 (HL); *Hudson v Shogun Finance Ltd* [2003] UKHL 62, [2004] 1 AC 919. But it has been accepted that property rights can be transferred under certain, non-identity, void contracts: see chapter 5.

[27] *Lewis v Averay* [1972] 1 QB 198 (CA).

[28] Discussed below.

two persons of whose contents and circumstances the third party knows nothing. The distinction drawn in the case law between void and voidable maps the division between a mistake as to the identity of the other contracting party and a lesser mistake as to that party's attributes. A critical factor has proven to be whether parties have contracted face to face or at a distance. Taking first face-to-face contracts, there has emerged a rebuttable presumption of an intention to deal with the person opposite, so that any mistake as to his person is treated as a mistake as to his attributes.[29] It has even been asserted that mistakes as to identity in face-to-face contracts always render a contract voidable,[30] but this goes too far.

Where the contract between owner and rogue has been concluded at a distance, courts have been readier to find a mistake as to identity rendering a contract void. The House of Lords in *Cundy v Lindsay* reached this conclusion when the rogue's assumed identity and address merely resembled the name and address of the party with whom the owner thought it was contracting.[31] The rogue was treated metaphorically as someone intercepting the goods on their way to the true destination.[32] Any conclusion, from contracts dealing with face-to-face dealings, that the law in contracts of this kind was moving decisively towards voidability in all cases was rudely shaken by the House of Lords decision in *Shogun Finance*.[33] In that case, a hire-purchase proposal form concerning a car was filled in by a rogue in the name of another person whose driver's licence he was holding. The signature on the form was forged to match that on the licence. When the finance company accepted the offer in the form, it did so after checking the credit rating of the person named therein as well as

[29] *Ingram v Little* [1961] QB 31 (CA), drawing on cases like *Phillips v Brooks* [1919] 2 KB 253. The presumption was rebutted in *Ingram* for reasons amounting to little more than compassion for the predicament of the owners.

[30] *Lewis v Averay* [1972] 1 QB 198, 207 (CA), *per* Lord Denning MR ('presumption in law').

[31] (1878) 3 App Cas 459 (HL).

[32] The opposite conclusion was reached in *King's Norton Metal Co Ltd v Edridge, Merrett & Co Ltd* (1897) 14 TLR 98 (CA), where the supposed contractual counterparty was a mere figment of the rogue's imagination.

[33] [2003] UKHL 62, [2004] 1 AC 919.

the electoral register and the register of county court judgments; otherwise, it had no reason to contract with the particular person named. In order for the innocent third party purchasing the car from the rogue to obtain good title,[34] the rogue had to be the 'hirer' for the purpose of the relevant legislation, which presupposed the existence of a hire-purchase contract, which meant that the finance company prevailed over the third party. The contract of hire-purchase was held by a bare majority to be void, even though the finance company's concern was with the settled and trustworthy attributes of the person with whom it thought it was dealing. In the words of Lord Phillips, the finance company's intention was to deal with 'an individual . . . unequivocally identifiable from the description' contained in the form.[35]

The position we have arrived at in identity cases is as follows. In face-to-face dealings, necessarily somewhat informal, it will be hard for the owner to rebut the presumption of an intention to deal with the person opposite, whoever he might be. In distance cases, careful drafting of the kind displayed in *Shogun Finance*, an impractical matter in many business dealings leading to a contract, will preserve the owner's proprietary interest.

Where a contract is voidable, the effect of rescission is that title transferred to the rogue will revest in the owner. Nevertheless, it is one of the conventional bars to rescission that it will not be permitted if, in the meantime, a third party has acquired an interest in the subject matter of the contract. This position is expressed in section 23 of the Sale of Goods Act 1979:

> When the seller of goods has a voidable title to them, but this title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Apart from the distinction between voidness and voidability, the most troublesome issue arising from this *nemo dat* exception concerns the steps that the defrauded owner must take to demonstrate an intention to rescind the contract. On the one hand, anything that falls short of notifying third parties, coming into

[34] Under the Hire Purchase Act 1964, Part III.

[35] [2003] UKHL 62 at [161], [2004] 1 AC 919.

contact with the rogue, of the rescission deprives them of the effective means of protecting themselves. On the other hand, the rogue will usually have disappeared without leaving a forwarding address, thus making it impossible to inform those who deal with the rogue and even the rogue himself. Furthermore, third parties dealing with the rogue will be unaware of the circumstances in which the rogue acquired possession of the chattel: it is not easy to see how they have been any more deceived by outward appearances than those third parties who claim that surrendering possession to a rogue raises an estoppel.

The authoritative view is that any outward act by the third party that reveals an intention to disavow the contract with the rogue will suffice to rescind the contract. Apart from the general judicial discretion in the Misrepresentation Act 1967[36] to order damages in lieu of rescission, rescission is a self-executing remedy. It certainly does not depend upon the consent of the rogue. If the owner is able to confront the rogue, anything that suggests the rogue is being given a second chance to pay will negative rescission. This happened in an Albertan case where the owner told the rogue at a police station that all he wanted was his money.[37]

A clear intention to rescind the contract will be shown if the owner succeeds in recovering the goods.[38] The owner, however, was unable to do this in *Car and Universal Finance Co v Caldwell*.[39] In that case,[40] as soon as the rogue's worthless cheque was dishonoured, the owner sought the help of the police and a motoring organization in finding the car. This behaviour was seen, with little discussion, as evidencing the owner's election to rescind the contract. Although the court accepted the rule that an election to rescind should normally be communicated to the other contracting party, this requirement of communication was dispensed with when a rogue put it out of the owner's power to communicate. This appears to be a type of estoppel. What is perhaps curious, although it is entirely consistent with other strands

[36] See s 2(2).
[37] *Jim Spicer Chev Olds Inc v Kinniburgh* [1978] 1 WWR 253.
[38] *Re Eastgate* [1905] 1 KB 465. [39] [1965] 1 QB 525.
[40] See also *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560 (CA).

of *nemo dat* law, is that the rights of the third party are defined in terms of the contractual rights and duties of owner and rogue.[41]

The Law Reform Committee[42] was of the view that the protection given to purchasers by the voidable title exception to *nemo dat* had largely been destroyed by the decision in *Car and Universal Finance Co v Caldwell*. It recommended that the owner should have to communicate an election to rescind to the rogue, which would for practical purposes convert the rogue's voidable title into a fully effective one. Once again, this recommendation was not enacted.

A final point concerns the third party's good faith. The Court of Appeal in *Whitehorn Brothers v Davison*[43] held that the burden of demonstrating the absence of good faith should, in accordance with the normal forensic rules of proof, fall on the owner as claimant. This justification might not work if the police, in possession of the goods, interplead when faced with competing claims, and may not work if the owner has already repossessed the goods so as to be the defendant in an action brought by the third party purchaser. Apart from this, the allocation of the burden of proof is on its face inconsistent with the general law on *nemo dat* which would put the burden on the third party of proving his own good faith and showing why the owner's title ought in the special circumstances to be displaced. The third party, moreover, has the information relating to his dealings with the rogue and so is in the better position to provide the evidence. The fact that the rogue has a real title to transfer until the contract is avoided may be the best reason for the incidence of the burden of proof: the burden of showing bad faith on the part of the purchaser is put on the owner since he is seeking to 'displace' the purchaser's title.[44] Nevertheless, why, apart from public policy considerations, there should be a requirement of good faith at all needs to be asked. Section 23 of the Sale of Goods Act 1979 expressly requires it (though that provision applies only

[41] See also *Lewis v Averay* [1972] 1 QB 198 (CA), *per* Megaw LJ.

[42] 12th Report, *Transfer of Title to Chattels*, Cmnd 2958, 1966.

[43] [1911] 1 KB 463 (CA); see also *Thomas v Heelas* (CA), Unreported 27 November 1986.

[44] *Whitehorn Bros v Davison* [1911] 1 KB 463 (CA).

to cases where the transaction between rogue and third party is one of sale, as opposed to pledge). The rogue's title, while liable to be avoided, is a real, common law title. It may be argued, for reasons stated in chapter 5, that a person acquiring the legal title with notice of the circumstances of the owner's deprivation is bound by the owner's equity of rescission. If this is the case, then we are looking at an extension of the clean hands doctrine to someone who, claiming the legal title, is not coming to equity.

SPECIAL STATUTORY EXCEPTIONS TO THE RULE OF *NEMO DAT*

A number of exceptions that had to be created by statute, having no prior common law existence, need to be considered. The major general exceptions are mercantile agency,[45] the seller in possession[46] and the buyer in possession.[47] Specialist texts on commercial law may be consulted for a number of other statutory exceptions to the *nemo dat* rule.[48]

MERCANTILE AGENCY

Introduction

In the nineteenth century, legislation was passed which had the practical consequence of providing a statutory extension to the common law estoppel exception. The present text is section 2(1) of the Factors Act 1889 which provides:

> Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person

[45] Factors Act 1889, s 2.

[46] Factors Act 1889, s 8; Sale of Goods Act 1979, s 24.

[47] Factors Act 1889, s 9; Sale of Goods Act 1979, s 25.

[48] For example, the Hire Purchase Act 1964, Part III, to which a brief reference is made below. For further detail on the various exceptions to the *nemo dat* rule, see Bridge, M. G., *The Sale of Goods*, 3rd edn, Oxford, 2014, chapter 5.

taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

A number of points in this provision (for example, good faith) are common to all the *nemo dat* exceptions; others (such as 'documents of title' and 'disposition') are common to a number of the special statutory exceptions. Each element that is relevant to more than one *nemo dat* exception will be discussed under the most convenient exception for this purpose. The nub of section 2(1) is that a transaction entered into by the mercantile agent will, where the requirements of the provision have been satisfied, be deemed to have been authorized by the owner of the goods who has entrusted them to the mercantile agent's possession. Where the agent acts in accordance with the principal's mandate there is of course no need to invoke a *nemo dat* exception at all.

Definition of mercantile agent

A mercantile agent is 'a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods'.[49] The word 'factor', a type of nineteenth-century purchasing agent who has in the twentieth century been transmuted into a financier, appears only in the title of the Act. Instead, the Act attempts to encompass, under the broad heading of 'mercantile agent', a number of different commercial intermediaries in established positions whose possession of goods is suggestive of authority or ownership. The category comprises for the most part established selling agents like brokers and auctioneers. It excludes carriers[50] and warehousemen[51] since, although both take possession of goods in a commercial capacity, they do not perform any of the functions listed in section 1(1). It also excludes employees.[52]

The definition of mercantile agent includes retail sellers and car dealers,[53] provided they do not make it a practice to sell

[49] Factors Act 1889, s 1(1).
[50] *Monk v Whittenbury* (1831) 2 B & Ad 484.
[51] *Cole v North Western Bank* (1875) LR 10 CP 354.
[52] *Lamb v Attenborough* (1862) 1 B & S 831.
[53] *Folkes v King* [1923] 1 KB 282 (CA).

exclusively their own goods.[54] It has also been held that someone can be a mercantile agent who is acting as such for the first time.[55] Thus in *Lowther v Harris*,[56] an established antiques dealer took on a special commission to show potential purchasers antique furniture and tapestry belonging to his principal and displayed in his principal's home. In so acting, he was a mercantile agent. Nevertheless, a person with no settled commercial occupation is not a mercantile agent merely because he is entrusted with jewellery to solicit offers from people in his social circle.[57]

It is not enough that a mercantile agent be given possession of goods. A well-established judicial gloss requires that the goods be possessed by the mercantile agent in his capacity as a mercantile agent.[58] Thus a car-hire company receiving a car for the purpose of hiring it out does not receive it as a mercantile agent:[59] receipt for the purpose of hiring out is not one of the functions of a mercantile agent listed in section 1(1). This qualification is designed to protect owners entrusting goods to someone with a dual capacity, only one of which fits the definition of a mercantile agent. An owner is therefore not at risk in entrusting a car for repair to a car repairer, or a watch to a watch repairer, just because the car repairer and the watch repairer are also dealers in second-hand cars and watches, whether the owner knows this or not.[60]

Consent to mercantile agent's possession

The owner must consent to the mercantile agent's possession of the goods. Fraud on the part of the agent will not destroy the validity of the consent.[61] Consent was not even destroyed for the purpose of the Factors Act 1889 when the agent committed the old offence of larceny by a trick[62] since it was not the owner's

[54] *Belvoir Finance Co v Harold G. Cole & Co* [1969] 1 WLR 1877 (CA).
[55] *Heyman v Flewker* (1863) 15 CB(NS) 519.
[56] [1927] 1 KB 393.
[57] *Jerome v Bentley* [1952] 2 All ER 114.
[58] *Cole v North Western Bank* (1875) LR 10 CP 354.
[59] *Astley Industrial Trust v Miller* [1968] 2 All ER 36.
[60] *Cole v North Western Bank* (1875) LR 10 CP 354, 371–72, *per* Blackburn J.
[61] *Cahn v Pockett's Bristol Channel Co* [1899] 1 QB 643, 658–61 (CA), *per* Collins LJ.
[62] *Folkes v King* [1923] 1 KB 282 (CA).

intention to pass the property in the goods to the agent.[63] The same was true for other exceptions to *nemo dat* based upon the possession of the rogue.[64]

In establishing the owner's consent for the purpose of section 2 of the Factors Act 1889, the third party is assisted by a number of statutory presumpions: first, that a mercantile agent with the actual custody of goods is in possession of them;[65] and secondly, that the possession of the mercantile agent is with the owner's consent.[66] In addition, the consent once given is irrebuttably deemed to continue despite the owner's retraction of it, provided that the third party dealing with the rogue does so in good faith and without notice of the retraction.[67] Thus mercantile agency departs significantly from voidable title.[68] It is not easy to make actual contact with the third party once the rogue disappears.

Mercantile agent's dealing with the goods

The third party dealing with the mercantile agent obtains good title under any 'sale, pledge, or other disposition of the goods' if the agent was 'acting in the ordinary course of business of a mercantile agent'. The nature of the disposition or other transaction will be discussed under a later *nemo dat* exception. The issue for the moment is the nature of an ordinary course disposition.

The expansion of mercantile agency to cover a wide range of commercial activities and occupations has made it difficult to apply this test. This difficulty has been compounded by the application of the test to certain categories of agent who transact business, sometimes on their own account and sometimes for a principal, named, unnamed, or even undisclosed. It follows that a third party may be protected who believes that he is dealing with the owner of the goods. This aspect of the matter, and the interpretation of section 2 of the Factors Act 1889 that it compelled the court to adopt, is brought out in the leading case of *Oppenheimer v Attenborough & Son*.[69] The owner of

[63] *Cf.* voidable title under s 23 of the Sale of Goods Act 1979.
[64] Buyers and sellers in possession: *Du Jardin v Beadman Bros* [1952] 2 QB 712.
[65] Section 1(2). [66] Section 2(4). [67] Section 2(2).
[68] See *Car and Universal Finance Co v Caldwell* [1965] 1 QB 525 (CA).
[69] [1908] 1 KB 221 (CA).

certain diamonds entrusted them, for the purpose of showing to potential purchasers, to a diamond broker who had in the past conducted business on his own account as a diamond merchant. The broker fraudulently pledged the diamonds with the defendant pawnbroker, who had had prior dealings with the broker in his earlier capacity of merchant and believed that he was dealing with a merchant. It was well known that diamond brokers did not in normal cases possess authority to pledge their principals' goods for advances; this was, however, a common enough practice for diamond merchants seeking short-term finance. The question was whether 'acting in the normal course of business of a mercantile agent' referred to the business of that type of mercantile agent who was a diamond broker. If this were so, the owner would win in his title dispute with the third party since the latter could not reasonably expect the broker to have authority to act in the way he did. The Court of Appeal, faced with this intractable problem, decided that the ordinary course of business referred in a non-specific way to business-like behaviour common to agents in general, such as attendance at places of business and the observance of normal business hours. The transaction in the present case satisfied this very bland test.

The ordinary course requirement, however, will not be satisfied if the agent sends a friend into the pawnbroker's premises,[70] for commercial agents do not behave like this. Similarly, the third party failed in one case[71] where the agent allowed the price paid by the purchaser to be set off against a debt owed personally by the agent to the purchaser.

Documents of title

We saw earlier[72] that the common law took a rather narrow view of documents of title, limiting the concept to certain bills of lading. For the purposes of mercantile agency (and of the seller and buyer in possession exceptions to *nemo dat*), the expression 'documents of title' is more broadly understood to include a wide array of documents whose possession is suggestive of authority

[70] *De Gorter v Attenborough and Son* (1904) 19 TLR 19.

[71] *Lloyds and Scottish Finance v Williamson* [1965] 1 All ER 641 (CA).

[72] See chapter 2.

or ownership. Thus section 1(4) of the Factors Act 1889 defines the expression as including:

> any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and . . . any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

There would appear to be no need that the document be made out in negotiable form;[73] the question whether any particular document passed the test would appear to depend heavily upon commercial usage and context. Once a mercantile agent is entrusted with the document of title, this entrustment will continue even if the agent surrenders the document of title to the bailee for a fresh document—as where a delivery order is handed in for a delivery warrant[74]—or obtains the goods from the bailee. Similarly, an agent has consent to the possession of a document of title if possession of goods was given and thus the means of depositing the goods with a bailee in return for a document of title.[75]

Good faith and notice

The Factors Act 1889 does not define good faith but it would be most strange if it did not attract the Sale of Goods Act 1979 definition of honesty in fact. It is likely that good faith is the same thing as the absence of notice that the mercantile agent is exceeding the authority conferred by the owner, since in commercial matters the law has resisted the bringing in of equitable doctrines of constructive notice.[76] Notice, however, may exist where there had been wilful blindness and might arise where an unusually low price is paid for a car.[77] Care should be taken

[73] *Cf. Mercantile Bank of India v Central Bank of India* [1938] AC 287 (PC).

[74] For the difference between the two, see chapter 2.

[75] Section 2(3).

[76] *Manchester Trust v Furness* [1895] 2 QB 39 (CA); *cf. Macmillan Inc. v Bishopsgate Trust (No. 3)* [1995] 1 WLR 978, 1000.

[77] *Heap v Motorists' Advisory Agency* [1923] 1 KB 577.

in applying this approach to goods whose value is notoriously imprecise, such as second-hand cars.

SELLER IN POSSESSION

Introduction

When it was held that the mercantile agency exception did not include the seller left in possession of goods after the sale,[78] Parliament was prompt in responding with a new *nemo dat* exception to fit the case. This new provision later became section 8 of the Factors Act 1889 as well as, coincidentally, the almost identical section 24 of the Sale of Goods Act 1979.

According to section 24 of the Sale of Goods Act 1979, a seller who 'continues or is' in possession of goods or documents of title to goods, after selling them to the buyer, is able to deliver or transfer them to a third party, as though authorized by the owner to do so. The goods have to be sold, which means that the seller's property will have passed to the first buyer under the sale contract.[79] If the transaction with the first buyer is only an agreement to sell, the seller will be able to transmit title to the second buyer in accordance with the *nemo dat* rule itself for no exception to the rule is needed where the seller is still the owner. The reference to owner in section 24 itself means that first buyer, who has become the owner.[80] Although the provision merely deems the authorization of delivery of the goods or transfer of documents of title by the owner (the first buyer), the better view is that these actions have to be read as pursuant to the transactions under which they occur. A second buyer would get very little relief under section 24 if it only amounted to immunity from liability in conversion for receipt of the goods. This would fall well short of the acquisition of title; the second buyer would be vulnerable to a demand for the return of the goods made by the first buyer.

Consequently, the second buyer taking delivery under a sale acquires full title to the goods at the expense of the first buyer (but not of course at the expense of the true owner if the seller had no right to sell in the first place). Going beyond section 24 of

[78] *Johnson v Credit Lyonnais* (1877) 3 CPD 32 (CA).
[79] Sale of Goods Act 1979, s 1.
[80] See below.

the Sale of Goods Act 1979, section 8 of the Factors Act 1889 protects this second buyer if the goods are received under an agreement to sell. If, subsequently, the property passes to the second buyer under the contract with the seller, then a sale has occurred to the second buyer who therefore is protected by section 8. But what if the second buyer is paying for the goods on an instalment basis, the property being retained by the seller until payment in full, when the first buyer appears? If this instalment contract is deemed to be authorized by the first buyer, as it should be, then the second buyer may continue paying the instalments to the seller in the normal way. Nevertheless, the result of proceedings brought by the first buyer against the seller for converting the goods may well include a third party debt order directing the second buyer to make the payments to the first buyer.

The seller's possession

Apart from actual possession, the seller is deemed to be in possession of the goods for the purpose of section 8 of the Factors Act 1889 when they are held by a third party 'subject to his [ie the seller's] control, or for him or on his behalf'.[81] In one case,[82] the second transaction was a pledge of certain furs, accomplished when the warehouse in possession of the goods surrendered them directly to the pledgee at the seller's direction. The court upheld the pledgee's title at the expense of the first buyer. In many such instances, the seller will make use of a document of title (as defined by section 1(4)), such as a delivery warrant.

The leading case on section 24 of the Sale of Goods Act 1979 is *Pacific Motor Auctions Ltd v Motor Credits Ltd*,[83] which makes two critical points about the seller's possession. Under the terms of a 'floor plan', a car dealer sold its stock-in-trade to a finance company, repaying the finance company the price of individual cars when these were sold to consumer buyers, as the dealer was at liberty to do under the plan. The cars did not leave the dealer's possession until delivery was taken by the consumer buyers. The dealer got into financial difficulties and its licence to dispose of

[81] Factors Act 1889, s 1(2).

[82] *City Fur Manufacturing Co v Fureenbond Ltd* [1937] 1 All ER 799.

[83] [1965] AC 867 (PC).

the cars was revoked by the finance company. Before the cars were repossessed, however, the dealer sold a number of the cars to one of its creditors, an auction company. The cars were paid for by cheque, which was then indorsed back to the auction company in settlement of the debt owed to it. The Privy Council held that the auction company had acquired a good title to the disputed cars. First of all, the Board rejected the finance company's argument that the seller had to hold in the capacity of seller in order to transmit title under section 24 (declining to follow the earlier case of *Staffs Motor Guarantee Ltd v British Wagon Co*).[84] It had been the finance company's contention that the dealer was holding the cars as bailee under a financing plan. As Lord Pearson expressed it: 'The object of the section is to protect an innocent purchaser who is deceived by the vendor's physical possession of goods or documents and who is inevitably unaware of legal rights which fetter the apparent power to dispose'. The mercantile agency authorities, requiring the mercantile agent to hold in his capacity as such,[85] were not followed.

The second major point about possession concerned the continuity of the seller's possession. The Privy Council, in contrast with its holding that the nature of the seller's possession did not matter, held that the seller had to remain continuously in possession in order to be able to transmit title under section 24. Consequently, the buyer of a car taking it back to the dealer for servicing or warranty repairs does not run a risk under section 24. Yet, since the section refers to a seller who 'continues *or is* in possession' (emphasis added), the words 'or is' had to be explained away as referring to a case where the first sale occurred at a time when the seller was not yet in possession,[86] for it could not be said there that the seller 'continues' in possession after that sale and up to the date of the second transaction.

Sale, pledge, or other disposition

If the second transaction is a pledge[87] then the pledgee acquires against the first buyer the special property of a pledgee since

[84] [1934] 2 KB 305. See also *Michael Gerson (Leasing) Ltd v Wilkinson* [2001] QB 514 (CA).

[85] See above.

[86] See also *Mitchell v Jones* (1905) 24 NZLR 932.

[87] See chapter 8.

that is all that the seller purportedly transfers. The real difficulty here is the meaning of 'other disposition'. At first glance, it could include a gift, an almost unimaginable conclusion given the conservative way that the law has allowed exceptions to *nemo dat*. Furthermore, section 5 of the Factors Act 1889, although contained in a part of the legislation headed 'Dispositions by Mercantile Agents', and not in the part headed 'Dispositions by Sellers and Buyers of Goods', defines, in accordance with normal contractual principles, the 'consideration [that is] necessary for the validity of a sale, pledge, or other disposition'. One way or another, there will be a need for consideration under the second transaction.

The meaning of 'other disposition' was considered on the unusual facts of *Worcester Works Finance v Cooden Engineering Co.*[88] A car was sold by the respondent company to a rogue who paid for it with a cheque that was later dishonoured. Before the respondent could avoid the transaction, the rogue sold the car to the appellant finance company in pursuance of a transaction by which a confederate of the rogue was supposed to receive the car from the appellant on the usual hire-purchase terms. Unknown to the appellant, however, the transaction was a sham; the car never left the possession of the rogue, who for a time kept up the confederate's hire-purchase payments before defaulting. Before the appellant could repossess the car, a representative of the respondent traced the car and, with the rogue's consent, repossessed it in return for an undertaking not to pursue the rogue on the cheque. The Court of Appeal held that the second transaction between the respondent and the rogue was a Sale of Goods Act 1979, section 24 disposition that overrode the appellant's title acquired on the sale to it by the rogue. According to Megaw LJ, a disposition occurred where there was 'some transfer of an interest in property, in the technical sense of the word "property", as contrasted with mere possession'. Lord Denning would have found a section 24 disposition ('a very wide word') whenever 'a new interest (legal or equitable) in the property is effectually created'. The reference to equitable interests is controversial, since it

[88] [1972] 1 QB 210 (CA).

is a fundamental principle of title transfer (see below) that equitable interests do not override legal interests.

BUYER IN POSSESSION

INTRODUCTION

As in the case of the seller in possession, there are parallel, although slightly different, *nemo dat* exceptions in the Factors Act 1889[89] and the Sale of Goods Act 1979.[90] Where the seller permits someone who has bought or agreed to buy goods to take possession of them, then any sale, pledge, or other disposition of the goods entered into by the buyer in possession will be treated as authorized by the seller. Where the transaction entered into by the buyer is itself only an agreement to sell, the sub-buyer receiving the goods on reservation of title terms until payment is made, then the sub-buyer will not obtain title as against the seller.[91] The party dealing with the buyer must do so in good faith and without notice of the seller's interest and, besides actually providing value,[92] must take delivery of the goods (a transfer in the case of documents of title, which includes their delivery). At first sight it is not easy to see why the section should apply if the buyer has 'bought' the goods, for surely the buyer ought to be able to transfer title under the normal *nemo dat* rule. It is possible, however, for an unpaid seller's lien to persist despite a temporary release of the goods[93] and section 25 would defeat this lien. Furthermore, a buyer would be able to transmit title under section 25 even if the seller has avoided a sale for fraudulent misrepresentation. The consequences of this distinction between sections 23 and 25 will be considered below.

Delivery by the buyer

For a third party dealing with the buyer to be protected, the buyer must voluntarily[94] deliver the goods or transfer the documents of

[89] Section 9. [90] Section 25.

[91] *Re Highway Foods International Ltd* [1995] BCC 271.

[92] See *Shaw v Commissioner of Police of the Metropolis* [1987] 1 WLR 1332 (CA), a case of apparent ownership.

[93] *Cf. Langmead v Thyer Rubber Co* [1947] SASR 29 and see chapter 8.

[94] See *Forsyth International (UK) Ltd v Silver Shipping Co Ltd (The Saetta)* [1994] 1 WLR 1334.

title, as the case may be, to a transferee receiving the same. The question here is whether a delivery and receipt of the goods may take place by constructive means. Suppose that the buyer warehouses the goods and the warehouseman attorns to a third party purchasing the goods from the buyer in possession. In *Nicholson v Harper*,[95] a seller in possession case, the second transaction was a pledge of the goods to the warehouse that was already holding them to the seller's order. The court held that a delivery for the purpose of section 24 had not taken place. A different and, it is submitted, preferable view is taken in the Australian buyer in possession case of *Gamer's Motor Centre Ltd v Natwest Whole Australia Ltd*.[96] It concerned a floor plan for financing cars already in a dealer's possession under an agreement to sell. The question was whether the dealer, the buyer in possession, transmitted a good title to a floor-plan financier that bought the goods from the dealer and bailed them back to him. The cars did not leave the dealer's possession under the floor plan. The Australian High Court held that in these circumstances a constructive transfer of possession to the financier, sufficient to satisfy section 25, had taken place. The same approach has recently been adopted by an English court.[97] The requirements of section 25(1) were also held to be satisfied in a case where goods were delivered directly by seller to sub-buyer without passing through the hands of the buyer.[98] There had been a constructive delivery to the buyer.

Acting as a mercantile agent

In order for the transferee from the buyer in possession to obtain a good title under a sale, pledge or other disposition, the transfer must take place in the ordinary course of business of a mercantile agent. Since the buyer in possession does not have to be a mercantile agent, it has to be asked what this can possibly mean. The argument has been advanced in the past that the transfer is to be given the same effect as though it had taken place in the ordinary course of business as a mercantile agent.[99] This so-called

[95] [1895] 2 Ch 415. [96] (1987) 163 CLR 236.

[97] See *Forsyth International (UK) Ltd v Silver Shipping Co Ltd (The Saetta)* [1994] 1 WLR 1334.

[98] See *Four Point Garage Ltd v Carter* [1985] 3 All ER 12.

[99] *Langmead v Thyer Rubber Co* [1947] SASR 29—s 25 is an 'as if' provision.

'as if' approach, however, was decisively rejected by the Court of Appeal in *Newtons of Wembley Ltd v Williams*.[100]

In that case, a rogue obtained possession of a car with the aid of a cheque. Property was not to pass until the buyer's cheque had been cleared but the cheque was subsequently dishonoured. The seller publicized his avoidance of the sale, for the purpose of the voidable title exception in section 23, but the rogue was subsequently able to sell the car in a London street market (Warren Street) to an innocent purchaser to whom the defendant in the present action traced his title. The sale by the rogue was held to take place in the ordinary course of business of a mercantile agent because the street market in question was one where cars were regularly sold. Consequently, the formal test for business behaviour, laid down for section 2 of the Factors Act 1889, in *Oppenheimer v Attenborough & Son*,[101] was satisfied. Furthermore, the bringing in of mercantile agency imported also the rule in section 2(2) of the Factors Act 1889 that the owner's consent to a mercantile agent's possession was deemed to continue if the relevant third party had not been notified of its revocation. Since the purchaser in the street market was not in fact aware of the revocation of consent, it followed that the rogue was still in possession of the goods with the consent of the owner notwithstanding the latter's avoidance of the contract. Although at first glance the requirement that the rogue in fact had to act like a mercantile agent might seem to restrict the third party purchaser's rights, the incorporation of the Factors Act proved to be beneficial to the purchaser.

A–B–C–D transactions

Apart from the currency rule, all existing *nemo dat* exceptions under consideration require the owner's consent to the rogue's possession. Where that consent is absent, all subsequent transactions are in principle defective. This is subject to the special limitations rule,[102] barring all conversion actions six years after the commission of the first 'innocent' conversion in the chain,[103]

[100] [1965] 1 QB 560 (CA) (followed reluctantly in *Forsyth International (UK) Ltd v Silver Shipping Co Ltd Ltd (The Saetta)* [1994] 1 WLR 1334, 1351).

[101] [1908] 1 KB 221 (CA). [102] See chapter 3. [103] See chapter 3.

which would apply if the goods were lost by the owner but not if they were stolen. The orthodox position that the rogue must have the owner's consent has, however, been challenged on the ground that section 25 of the Sale of Goods Act 1979 carefully differentiates the owner and the seller and deals with them as though they were separate entities. Applying this argument to a chain of transactions, it reads as follows. Where a buyer (C) is in possession of goods with the consent of the seller (B), any sale etc by the buyer to a transferee (D) is deemed to have occurred with the consent of the owner (A). This reasoning ignores altogether the incidents of the relationship between A and B, which might be based upon theft; it assumes that even a thief might be the seller for the purpose of section 25.

If this reasoning were adopted, the law would provide a laundering facility for defective titles once the requisite number of actors was involved. The *nemo dat* rule would lie in ruins because the same type of argument could be made under section 24 of the Sale of Goods Act 1979. Somewhat surprisingly, the argument, which owes a lot to a literal reading of section 25 and absolutely nothing to an informed understanding of the law's development, made its way as far as the House of Lords in *National Employers' Assurance v Jones*,[104] where it was roundly rejected.[105]

Bought or agreed to buy

One hundred years ago, the Court of Appeal held in *Lee v Butler*[106] that a buyer under a conditional sale, to whom the property in the goods would automatically pass once all the instalments had been paid, was someone who had agreed to buy the goods for the purpose of section 9 of the Factors Act 1889. Two years later, however, the House of Lords in *Helby v Matthews*[107] held this provision to be inapplicable to a genuine hire-purchase transaction where the property would only pass if the hirer in possession exercised an option to purchase after paying all the instalments. It did not matter that, when the option matured, it could be

[104] [1990] 1 AC 24 (HL).

[105] See also *Brandon v Leckie* (1972) 29 DLR (3d) 633 (Alberta) and *Elwin v O'Regan* [1971] NZLR 1124.

[106] [1893] 2 QB 318 (CA).

[107] [1895] AC 471 (HL).

exercised for a nominal sum and that it made overwhelming economic sense to do so. The hirer never gave a commitment to exercise the option and so could not be said to have 'agreed' to buy. On similar grounds, the potential buyer who receives goods on the terms of a sale or return or sale on approval, and is thus not at the time committed to their purchase, lacks the power to transmit title under section 25 of the Sale of Goods Act 1979.[108] The same applies to someone who receives equipment under the terms of a finance lease.

The emergence of hire purchase created a rift between it and conditional sale, section 25 being applicable only to the latter. The current law has now approximated consumer conditional sales to hire purchase in that the relevant conditional buyer is not empowered to transmit a good title under section 25.[109] The agreements in question are conditional sales as defined by the Consumer Credit Act 1974. A conditional sale that does not pass the consumer credit test continues to carry the buyer's power to transmit title under section 25. This piecemeal approach is hard to justify in rational terms, but the law of *nemo dat* and its exceptions is replete with irrationality and pragmatic, incremental reform in the cause of establishing an acceptable balance between warring principles. It has to be added that the bulk of *nemo dat* problems arising out of hire purchase and conditional sale are created by motor vehicles. Since the Hire Purchase Act 1964 (Part III), there has been a special *nemo dat* exception in the case of unlawful dispositions of motor vehicles covered by hire-purchase and conditional sale agreements (but not leases). According to this exception,[110] a good title is transmitted to the first *bona fide* private purchaser—provided he is the first private purchaser in the chain extending from the rogue—and, in accordance with familiar principle, to all his successors in title (including subsequent trade or finance purchasers). An earlier trade or finance purchaser, denied protection under the Act,

[108] *Percy Edwards Ltd v Vaughan* (1910) 26 TLR 545; see also *Shaw v Commissioner of Police of the Metropolis* [1987] 1 WLR 1322 (CA).

[109] Section 25(2); Factors Act 1889, s 9(2) as added by the Consumer Credit Act 1974, Sch 4.

[110] See further commercial law texts.

may be driven to argue that what looks like a hire purchase contract is in truth a non-consumer conditional sale with the result that the 'hirer' is in fact a buyer in possession with the power under section 25 of the Sale of Goods Act to transmit a good title to *bona fide* purchasers whether or not they are engaged in trade or finance.[111]

OVERRIDING EQUITABLE PROPERTY INTERESTS

The rule of *nemo dat* should be seen as just part of a complex rule structure that, in title disputes, prefers the first in time. Indeed, it would be difficult to see any substance in a property entitlement if its holder were generally vulnerable to the subsequent claims of others. Nevertheless, there are circumstances in which an equitable interest in personalty is liable to be displaced in favour of a subsequent transferee thereof. This successful transferee may sometimes acquire a legal interest in the personalty; in other cases, it may even be an equitable interest.

CONFLICTING EQUITABLE AND LEGAL INTERESTS

It is a maxim of equity that, where the equities are equal, the law prevails. The maxim achieves concrete form in the rule that the *bona fide* purchaser of the legal estate, for value and without notice, takes clear of earlier equitable interests (*a fortiori* defeats later equitable interests) in the same item.[112] Equity fastens on the conscience of the purchaser taking with notice and, acting *in personam*, it does not 'create titles to rival those of the common law world'.[113] The administrative fusion in the nineteenth century of

[111] *Forthright Finance Ltd v Carlyle Finance Ltd* [1997] 4 All ER 90 (CA). See chapter 2.

[112] *Pilcher v Rawlins* (1872) 7 Ch App 259; *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675 (CA).

[113] *R. Griggs Group Ltd v Evans (No. 2)* [2004] EWHC 1088 (Ch) at [40], [2005] Ch 153.

common law and equity, moreover, did not bring about a substantive fusion of legal and equitable proprietary interests.[114]

The legal purchaser must have provided valuable consideration and so may not be a donee.[115] Actual notice has the same meaning here as it does for the *nemo dat* exceptions.[116] In principle, the purchaser ought not to have constructive notice of the earlier equitable interest. Constructive notice arises where there is a failure to make those inquiries, which would have revealed the earlier interest, that a prudent purchaser would have made. Yet there is a considerable reluctance to import the doctrine of constructive notice into commercial dealings[117] and thus into dealings with personal property, where it is not a practical matter to investigate title in fast-moving transactions. Hence, the registration of an interest as a bill of sale[118] will not amount to constructive notice of it to subsequent transferees of the property.[119] Similarly, it is no bar to the attainment of the status of holder in due course of a negotiable instrument that the holder might on inquiry have discovered the transferor's title to be defective.[120]

SUCCESSIVE EQUITABLE INTERESTS

Successive equitable interests are most likely to arise in the case of realty than personalty. In addition, whereas two competing claims to the legal interest cannot co-exist in the same thing, two successive equitable interests can in so far as an equitable interest, for example by way of charge, may not exhaust the whole of the beneficial interest in a thing.[121] A mere equity falling short of an equitable interest, such as a right to have a conveyance rescinded or rectified,[122] is liable to be defeated by a later equitable interest.[123] There is one marked

[114] *Joseph v Lyons* (1884) 15 QBD 280 (CA).

[115] *Re Diplock* [1948] Ch 465 (CA), affirmed [1951] AC 251 (HL).

[116] See above.

[117] *Manchester Trust v Furness* [1895] 2 QB 39 (CA); *Greer v Downs Supply Co* [1927] 2 KB 28 (CA).

[118] See chapter 8.

[119] *Joseph v Lyons* (1884) 15 QBD 280 (CA).

[120] *London Joint Stock Bank v Simmons* [1892] AC 201 (HL).

[121] *Re Monolithic Building Co* [1915] 1 Ch 643, 669 (CA).

[122] *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL), *per* Lord Wilberforce.

[123] *National Provincial Bank v Ainsworth* [1965] AC 1175 (HL). See also chapter 5 on equities.

exception: the assignee of a thing in action takes subject to earlier equities whether the assignee has notice of them or not.[124]

Apart from the special priority rule for competing assignments of the same chose in action,[125] the rule for competing equitable interests in personal property is that the first in time prevails.[126] Nevertheless, this first-in-time rule is not a mechanical rule but instead is based on the notion that the merits of the case support the first in time. This is not invariably the case. Exceptions do exist. If, for example, 'conduct on the part of the owner of the earlier interest has led the other to acquire his interest on the supposition that the earlier did not exist', equity will come down in favour of the latter party.[127] There are, accordingly, numerous occasions where the equity of the case calls for a departure from the first-in-time rule. The breadth and far-ranging discretion of a court of equity renders impossible a definitive census of those occasions. Apart from the case of intentionally misleading conduct by the prior claimant, equity will favour the later claimant if he was negligently misled by the earlier one.[128] Other cases disturbing the first in time rule include fraud, misrepresentation, and waiver.[129] Furthermore, there will be many instances involving personalty where the first interest is postponed to the second, particularly where the first interest is taken on terms permitting the owner of the legal interest to carry on dealing with the property in the ordinary course of business. This occurs, for example, where a floating chargee[130] impliedly authorizes the chargor company to grant a prior-ranking fixed charge[131] or even a floating[132] charge over a narrower range of assets than are covered by the earlier floating charge. Finally, it has even been asserted that 'priority of time is the ground of preference last resorted to', in the sense that only when the equities are equal will the

[124] See chapter 7.

[125] *Dearle v Hall* (1828) 3 Russ 1: see chapter 7.

[126] *Phillips v Phillips* (1862) 4 De GF & J 208.

[127] *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265, 276, *per* Kitto J.

[128] *Walker v Linom* [1907] 2 Ch 104.

[129] See eg *Rimmer v Webster* [1902] 2 Ch 163.

[130] See chapter 8 for the floating charge.

[131] *Re Castell & Brown Ltd* [1898] 1 Ch 315 (CA).

[132] *Re Automatic Bottle Makers Ltd* [1926] Ch 412.

first in time prevail.[133] At that point, *qui prior est tempore potior est jure*—the first in time is the first in entitlement. This formulation appears to invest temporal priority with less significance than it merits. The above exceptions remain exceptions to a basic rule. In certain cases, a second equitable interest holder will be able to vault ahead of the first. This will occur if the second holder, after acquiring an equitable interest in property without notice of the first, is able to purchase the legal interest. It will not matter that, at the time the legal interest is purchased, the second holder is fixed with notice of the first holder's equitable interest.[134] This is the so-called *tabula in naufragio*, or plank in a shipwreck, where the acquisition of the legal estate represents the plank that rescues the second holder. Its survival in the modern law of personal property is a matter of some debate, at least in its application to competing equitable mortgages.[135]

[133] *Rice v Rice* (1853) 2 Drew 73, 78.

[134] *Taylor v Russell* [1892] AC 244 (HL); *Bailey v Barnes* [1894] 1 Ch 25 (CA).

[135] It has been said to have been abolished by s 94 of the Law of Property Act 1925: *Macmillan Inc v Bishopsgate Investment Trust plc (No. 3)* [1995] 1 WLR 978, 1002, *per* Millett J. But it is not easy to tell from s 94, like certain other provisions in that statute, whether it applies to personalty as well as to realty. Millett J considered, however, that a version of the *tabula* doctrine continued to apply to stocks and shares: ibid, 1003–04.

7

TRANSFER OF INTANGIBLE PROPERTY

INTRODUCTION

We saw in chapter 5 how ownership rights in tangible personal property were transferred (or conveyed). In the case of intangible property (or things in action), simple physical delivery and a consensual intention to effect a conveyance have never been feasible methods of transfer. Furthermore, the influence of equity, rather insubstantial where personalty is tangible, has been more pronounced for intangible property. Consequently, the transfer of ownership rights in intangible property merits a separate chapter. In this same chapter, we shall also consider priority conflicts between two or more persons claiming an entitlement to the thing, which was dealt with in chapter 6 in the case of tangible personal property.

As its alternative name, or at least its dominant component,[1] 'things (or choses) in action', plainly indicates, intangible property cannot be physically enjoyed in and of itself. A thing in action consists of an entitlement arising from obligations that are enforceable by legal action. As an item of value, intangible property commands a certain price when it is sold to a purchaser. Take the example of a debt (or receivable). The creditor has the right to receive payment from the debtor. Payment will take the form of legal tender (coin and banknotes). Where the debtor is unwilling or unable to pay, or there is a risk of this occurring, the value of the debt in the marketplace obviously has to be discounted when it is sold on to a purchaser. To take another example, a shareholder in a company has the right to participate as a member of that company in its profits. The corresponding shares will command a price commensurate with the value of that right.

[1] See chapter 2.

Intangible property must for present purposes be divided into pure intangibles and documentary intangibles.[2] Where it is pure intangible property whose ownership is to be transferred, the rules are to be found in the law relating to the assignment of things in action, largely a matter of case law but with a statutory addition, namely, the Law of Property Act 1925, section 136. As we shall see, the common law was resistant to the notion that such rights could be transferred, so it was left to equity to repair this deficiency. The best example of a pure intangible for our purposes is a debt. It will be commonly used throughout this chapter in examples, but it should be remembered that many other types of intangible exist, such as patent rights, shares in a company, shares in a partnership, intellectual property rights, and contract rights. Before the rules on assignment laid out in this chapter are applied, it should first be asked whether they are subject to their own statutory rules for transfer, as for example is the case with company shares.[3] In certain circumstances, nevertheless, it is possible to transfer equitable rights in such intangibles by means falling short of those required to transfer legal rights therein. A trust might be created over a number of shares. The procedures required for legal transfer not having occurred, no notice of any type of trust is to be entered on the register of members.[4]

The rules for documentary intangibles, a mixture of common law and statute, recognize that the intangible right is so firmly locked up in the document embodying it that it can be dealt with at common law only through the medium of that document. In consequence, the transfer in due form of the document is necessary if the legal property right that it embodies is to be transferred. Good examples of documentary intangibles are bills of lading and bills of exchange. The bulk of this chapter is concerned with the transfer of pure intangibles. When this has been dealt with, brief consideration will be given to the transfer of documentary intangibles, a subject that can be left to more detailed texts for a fuller treatment.

[2] A division propounded in McKendrick, E. (ed.), *Goode on Commercial Law*, 4th edn, Penguin 2010, pp 51–53.

[3] Companies Act 2006, ss 770 *et seq*.

[4] Ibid, s 126.

ASSIGNMENT OF THINGS (OR CHOSES) IN ACTION

GENERAL

Under this heading we shall consider the equitable rules that were developed to deal with the transfer of rights in intangible property, together with the statutory overlay (now the Law of Property Act 1925, section 136) that was first introduced in 1873 (Supreme Court of Judicature Act 1873, section 25(6)) with the fusion of the courts of common law and equity. These rules apply to pure intangibles. In the case of rights embodied in documentary intangibles, or subject to separate statutory rules of transfer, the rules on assignment will not normally have a part to play. This is because contract (bills of lading) or statute (company share certificates) prescribes a different method of transfer of rights than that required for an assignment. In the case of bills of exchange, there is a statutory method of transferring the document that gives the transferee more extensive rights than those flowing from an assignment of the debt embodied in the bill.

DEFINITION OF ASSIGNMENT

Suppose that A, a householder, owes money to B, a department store, for furniture supplied. The householder may have been given a period of credit so that the price of the furniture may not be due for some time. Meanwhile, B, needing finance, decides to assign A's debt to C, in return for payment from C. When payment from A falls due, A pays C instead of B. In this example, A is the debtor, B the assignor, and C the assignee. Assignment means that B may transfer the debt, owed by A, to C without obtaining the prior permission of A; C may then call upon A to pay him instead of B; and C may then give A a good discharge for payment of the debt initially owed to B. The effect of assignment is to transfer B's payment entitlement to C. In consequence, a relationship of debtor and creditor between A and C is substituted for the earlier debt relationship between A and B. The debt owed previously by A to B has been transferred by B to C in the same way as B might have sold to C an antique clock or a second-hand car earlier acquired from A. The debt is just

as much a piece of property as the clock or the car. Once paid, however, the debt ceases to exist.

The treatment of assignment as a proprietary transfer represents the modern orthodoxy, superseding any notion that assignment, at least outside section 136, is tantamount to a declaration of trust. This accords with financing practice. It is common for debts to be sold (or discounted) to a factor, either *en bloc* (whole turnover) or selectively (facultative). The assignment may involve payment to the factor (direct financing) or the assignor may collect and account for the proceeds to the factor (indirect financing). The assignment may be notified to the debtor (notification financing) or it may not (non-notification financing).

The relationship of assignment to contract is not straightforward. The subject of non-assignment clauses in the contract will be dealt with below, but the point to note now is that a contractual obligation of A to pay B is superseded by the assignment, when it is notified to A, so that A must now pay C. By any standard, this looks like a unilateral variation of the contract by B or the imposition by B and C of a burden on A under a contract (the contract of assignment between B and C) to which A is a stranger. One might say, in the absence of a non-assignment clause in the contract prohibiting the assignment of A's debt, that it is an implied term of a contract between A and B under which the debt arises that B might assign the debt to C. This rationalization, though artificial, provides a better basis for an orderly exposition of the law than the robust assertion that, in a conflict between contract and assignment as property, property trumps contract.[5]

Another feature of the contractual landscape needs to be considered. The effect of the assignment is not to make C a party to the contract between A and B. In any case, B might not assign contractual burdens to C. Moreover, the assignment of a debt does not altogether eradicate B's contractual rights in respect of the debt. If A fails to pay C as required by the assignment, so as

[5] In *Ellis v Torrington* [1920] 1 KB 399, 410–11 (CA), Scrutton LJ explained the common law's historic resistance to assignment as founded on the principle that debts were regarded as obligations, whereas in equity they were treated as property rights.

to leave B vulnerable to a claim by C under the terms of a recourse provision in the B–C contract, B should have a claim over against A for breach of contract for A's failure to pay C.[6]

DEVELOPMENT OF ASSIGNMENT

The common law set its face against assignment, principally because debts and similar things in action were regarded as personal obligations.[7] Allowing C to sue on a debt incurred by A to B was regarded as a form of champerty or maintenance; it was seen as contrary to public policy to allow C to press, or interfere in the assertion of, B's claim against A. Even today, the assignment of a cause of action may fail, on the ground that it is tantamount to maintenance,[8] if it cannot be seen as part of a larger transaction such as the sale of a business together with its assets. The assignment of causes of action by company liquidators to individuals eligible for legal aid has been upheld despite the opportunistic motive,[9] but certain actions, because of their penal or public character, on public policy grounds may not be assigned.[10] When the common law incorporated from the law merchant jurisdiction over bills of exchange, and other negotiable instruments, it came to recognize exceptionally an assignment taking the particular form of a negotiation of the instrument, which has consequences going beyond those flowing from ordinary assignment.

Equity, however, gave effect to assignments in two ways. First of all, if the thing in action assigned was enforceable only in, or was subject to the exclusive jurisdiction of, courts of equity, then the assignee could initiate proceedings directly against the debtor in a court of equity. Examples of such items include legacies and the interests of beneficiaries in trust funds.[11] Secondly, if the thing

[6] B will also have to be subrogated to C's debt claim against A.

[7] *Fitzroy v Cave* [1905] 2 KB 364 (CA); *Ellis v Torrington* [1920] 1 KB 399, 410–11 (CA), *per* Scrutton LJ (noting that in equity debts were treated as property rights).

[8] *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (HL).

[9] See *Norglen Ltd v Reeds Rains Prudential Ltd* [1999] 2 AC 1 (HL).

[10] *Re Oasis Merchandising Services Ltd* [1998] Ch 170 (CA) (liquidator's action against directors for wrongful trading).

[11] For other cases where the equitable assignee might proceed alone, see *Kapoor v National Westminster Bank Plc* [2011] EWCA Civ 1083 at [30] *et seq*, [2012] 1 All ER 1201.

in action was enforceable at common law, for example a debt, the assignee could bring proceedings in a court of common law against the debtor in the name of the assignor. An assignor unwilling to cooperate in this way could be compelled in equity to permit the assignee to use his name.[12] This joinder of the assignor in the proceedings, either as a willing co-plaintiff, or as an unwilling co-defendant, which occurs 'save in special circumstances',[13] ensured that all relevant parties were before the court and that the details of each relationship (A–B, B–C, A–C) in the A–B–C triangle could be worked out in an harmonious way. For example, the debtor (A) might be able to assert that the assignor (B) had already been paid at the same time as the assignor disputed as against the assignee (C) the validity of the assignment. The form of legal entitlement was thus preserved at the same time as the conscience of the assignor was bound in the time-honoured way in equity. Just as an equitable assignee could not proceed without joining the assignor to the action, so too the assignor wishing to sue (a rare case) had to join the assignee.[14]

The fusion of the courts of common law and equity brought with it a new form of statutory assignment. In respect of certain things in action, and provided certain formalities were observed, an assignee could bring an action directly against the debtor without having to join or use the name of the assignor. This new procedure did not supersede equitable assignment. The latter remained and was procedurally accomplished in the same way as it had been prior to fusion. Equitable assignment was wider than the statute in that it covered a greater range of assignments. It also continued to be relevant to those assignments falling within the purview of the statutory procedure. When the parties to an assignment failed to obey the statutory forms, the assignment might yet take effect as a valid equitable assignment. Finally, procedural matters apart, the rights derived from a statutory assignment were essentially the same rights as accrued from an equitable assignment.[15]

[12] *Re Westover* [1919] 2 Ch 104.

[13] *Three Rivers District Council v Bank of England* [1996] QB 292, 313 (CA).

[14] Ibid.

[15] *Walker v Bradford Old Bank* (1884) 12 Ch D 511, 515 (CA) (statutory assignment 'does not…give new rights, but only affords a new mode of enforcing old rights').

REQUIREMENTS OF EQUITABLE ASSIGNMENT

We shall see what constitutes a valid equitable assignment before we turn our attention to the further requirements needed for the assignment to qualify as a statutory assignment.

Equitable assignment and form

The first point to note is that no particular form of words is required for there to be an effective assignment, merely sufficient to establish a clear intention to transfer an item of intangible property to the assignee. In a well-known passage in *Brandt's Sons & Co v Dunlop Rubber Co*,[16] Lord Macnaghten said of an assignment:

> It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain.

This passage elliptically accepts that an assignment may take place without the assignee being informed of the matter, but the consent of the assignee is relevant in that an assignee may later repudiate an assignment previously concluded in his favour.[17] Instead of the words of assignment being addressed to the debtor, they may instead be addressed to the assignee. There is no need for the account debtor to be informed of the assignment, though it may make business sense, however, for the assignee to ensure that this is done. First, if the assignor has assigned the debt to more than one assignee, we shall see that the rights of the competing assignees may depend upon which is the first to notify the account debtor. Secondly, until notified of the assignment, the debtor is able to pay the assignor and receive a good discharge for the debt. The assignee would then have to recover the payment from the assignor. It has been held, nevertheless, that the debtor need not do anything so onerous as stop a cheque that has already been sent

[16] [1905] AC 454 (HL).

[17] *Standing v Bowring* (1885) 31 Ch D 282 (CA). *Cf. Standard Chartered Bank v Dorchester LNG (2) Ltd* [2014] EWCA Civ 1382 at [17]: 'Unless he is under a specifically enforceable obligation to do so, a person cannot be forced to accept a transfer of property or rights against his will'.

or given to the assignor by the time notification of the assignment is received.[18] When payment reaches the assignor and the cheque is honoured and collected, the debtor is discharged.

If an equitable assignment is to be constituted by words expressed to the debtor, care must be taken, however informal the language may permissibly be, to state that a transfer has taken place.[19] It is not enough for the debtor merely to be directed that he is permitted to pay a named third party, for that direction may be interpreted as a revocable mandate to pay the third party.[20] In addition, either assignor or assignee may notify the debtor in order to achieve the above-stated purposes. Any notice of assignment, whether to whom and for what purpose it is given, should sufficiently identify the debt that is being or has been assigned.[21] For the protection of the debtor, however, a strict standard of accuracy as to the information supplied, probably too strict a standard, has been demanded.[22]

The case of *Gorringe v Irwell India Rubber Works*[23] illustrates when an equitable assignment is complete. The assignor, B, was indebted to the assignee, C, for a bill of exchange for £660 drawn by C on B and accepted by B. On 11 January, B wrote to C in these terms: '[W]e hold at your disposal the sum of about £425 due to us from [A] for certain goods supplied…until balance of our acceptance…in your favour…has been paid'. C notified A of the assignment on 5 February. Meanwhile, B had gone into liquidation with effect from 2 February. It was important therefore to know whether the equitable assignment had been completed before notification to A, for, if it had not been, the debt could have been taken over by B's liquidator for the benefit of B's general creditors. The Court of Appeal held that the letter of 11 January effected an

[18] *Bence v Shearman* [1898] 2 Ch 582 (CA).

[19] *James Talcott Ltd v John Lewis & Co Ltd* [1940] 3 All ER 592 (CA).

[20] *Timpson's Executors v Yerbury* [1936] 1 KB 645, 658 (CA) ('I hereby request and direct').

[21] It should accord with the contents of any writing requirement for a sub-assignment under the Law of Property Act 1925, s 53(1)(c).

[22] *W. F. Harrison & Co Ltd v Burke* [1956] 1 WLR 419 (CA) (the true amount of the accrued debt and the date of the assignment); *cf. Van Lynn Developments v Pelias Construction Co* [1969] 1 QB 607 (CA).

[23] (1886) 34 Ch D 128 (CA).

immediate equitable assignment. Consequently, the debt was no longer the property of B and did not therefore vest in B's liquidator.

Writing

An equitable assignment need not be in or evidenced by writing. Purely informal means will suffice. Nevertheless, it will not often make business sense for an assignee to be content with an oral assignment. Prudence would dictate something in writing for evidential purposes. Furthermore, while there is no legal requirement for an equitable assignment to be in writing, suppose that the assignee, C, sub-assigns A's debt to D. According to section 53(1)(c) of the Law of Property Act 1925, dispositions of 'subsisting' equitable interests in personalty 'must be in writing signed by the person disposing of the same or by his agent thereunto lawfully authorised'. The assignment from B creates C's equitable interest in the debt owed by A to B, so there is no need for writing here. That interest, however, is a subsisting one by the time C comes to sub-assign it to D. As regards satisfying the writing requirement, it should be enough if C defines the property to be assigned, which will involve identifying A as the debtor (if the assignment is of an individual debt) and B as the creditor, and names himself and D in language showing an intention to transfer the debt to D.

Absolute, conditional, or by way of charge

We saw earlier that an equitable assignment of an equitable thing in action permitted the assignee to take proceedings against the debtor without using the name of the assignor. It would be more accurate to say that this is true of absolute assignments and not of conditional assignments or assignments by way of charge. The definitions of these differing types of assignment, however, are more important in the context of statutory assignment and will therefore be treated later.

Consideration

Although the matter has not in the past been free from doubt,[24] the starting point in the modern law is that consideration is not

[24] See Bridge, M., Gullifer, L., McMeel, G., and Worthington, S., *The Law of Personal Property*, Sweet & Maxwell, 2014, para 27–042.

necessary to support a valid equitable assignment. Although equity will not perfect an imperfect gift, there is nothing imperfect about a gratuitous assignment that complies with the simple and undemanding requirements of an equitable assignment, any more than a trust of the same intangible asset can be constituted in the absence of consideration. The common law, moreover, withdrew from the field of assignment to an extent that left equity with no need to appease the common law, short of the procedural requirements of joinder.[25] If an interest in intangible property can be created under a trust, there is no reason why it may not be transferred by an equitable assignment. Once completed, the assignment is as effective in divesting the assignor of the debt as the gift of a chattel is in transferring the donor's property rights to the donee. Thus, in *Holt v Heatherfield Trust*,[26] there was a question as to whether consideration had been given for the assignment of a debt. A garnishee creditor of the assignor claimed an entitlement to charge the debt and was refused on the ground that the assignor could no longer honestly deal with the debt, which had become the property of the assignee. Consideration was not necessary to complete the equitable assignment.

Re McArdle[27] carries the consideration theme further. The trustees of a residuary estate promised the wife of one of them a sum of money '[i]n consideration of your carrying out certain improvements to the property'. This money was to come from the estate upon its distribution and therefore concerned an equitable thing in action. The wife's action to recover the money failed in contract because she had already performed the work before the promise was made: past consideration is no consideration.[28] Moreover, the promise could not be regarded as a valid equitable assignment because its language was consistent with something to be done in the future and not with a present transfer. Similarly, a promise to convey a future thing, such as a debt that has not yet come into existence, cannot constitute an effective present assignment. Even if expressed as a purported present assignment, it will

[25] See above.

[26] [1942] 2 KB 1. See also *Richardson v Richardson* (1867) LR 3 Eq 687, 692.

[27] [1951] 1 Ch 669 (CA).

[28] *Roscorla v Thomas* (1842) 3 QB 234.

be treated as a promise to assign when the debt arises.[29] Because equity will not perfect an imperfect gift, the Court of Appeal in *Re McArdle* refused in the absence of consideration to enforce the promise to make a future assignment. The wife therefore had the misfortune to fall between the two stools of contract and equitable assignment. Evershed MR expressed his attitude to executed assignments by way of gift in these terms:

> [I]f what is done amounts to a gift, complete and perfect of a subject-matter which is an equitable chose in action, there is no reason in principle and in authority why the donee should not take the benefit just as much as he will if the donor gives him a pound note and puts it in his hand. Since the transaction is thus perfect, the question of consideration becomes irrelevant, for consideration is only necessary to support the assertion of a right to have made perfect something which is not yet perfect—for example, a contractual right.

If Evershed MR meant that consideration was dispensed with only in the case of equitable assignments of equitable choses in action, no such limitation is present in the words of Jenkins LJ in the same case.[30] Certainly, there is no stated need for consideration in the case of statutory assignments and therefore no justification for importing it into the statute. There seems no good reason to restrict equitable assignment in the way that Evershed MR's dictum would impliedly suggest. The important thing is that the assignor has done everything required of him for an effective assignment: it is not a case of equity perfecting an imperfect gift because consideration has nothing to do with gift and the assignment is as complete as an executed gift.

RIGHTS TRANSFERRED BY EQUITABLE ASSIGNMENT

Contract rights as well as debts fall under the heading of pure intangibles transferable in equity. The rule that an assignee, C, does not succeed to the position of the assignor, B, under the contract made between A and B,[31] calls for the development

[29] *Tailby v Official Receiver* (1888) 13 App Cas 523 (HL).

[30] And see to similar effect *Holt v Heatherfield Trust* [1942] 2 KB 1.

[31] Stated above.

of two further aspects. First, there is the issue of the extent of contractual rights transferred by B to C. Secondly, there is the related issue concerning any continuing contractual burdens that qualify B's rights.

Extent of contractual rights

This issue can be developed by means of a short example. A, a tomato grower, contracts to supply B, a supermarket chain, with all of its Isle of Wight tomatoes requirements for the calendar year 2015. Towards the end of 2014, B sells all of its 500 outlets to C, another supermarket chain, which already has 1,000 of its own stores. B assigns its rights under the supply contract to C. Two principal problems arise for consideration. First, personal contractual rights may not be assigned. Secondly, the rights to which C might succeed are only those that could have been enjoyed by B. The rights enjoyed by B are not enhanced by the assignment so as to leave C with greater rights.

Both problems present themselves in the leading case of *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*.[32] A concluded a long-term contract with B for the supply of all the chalk that B might need for cement-manufacturing operations on B's adjoining land. It was A's responsibility to provide track and rolling stock to transport the chalk to B's land. The price was fixed and B undertook for each year that the contract ran to take a stated minimum offtake. As part of a corporate restructure, B sold its assets, including the benefit of this contract, to C, which was substantially more capitalized than B and therefore possessed of a greater appetite for chalk. It was A's unsuccessful contention that it was not bound to continue supplying to C. The essential reason that C prevailed was that the extent of the chalk that A had to supply was defined by the appetite of the business being conducted on the adjoining land, now occupied by C. As a matter of contractual interpretation, a cap was thus placed on the quantity of chalk that A was committed to supplying. There was nothing particular about B's personality that rendered the contract capable of being performed by A only in favour of B. It might just as easily have occurred that B, instead of selling out to C, had

[32] [1902] 2 KB 660 (CA), affd [1903] AC 414 (HL).

raised additional capital and extended its business on the same plot of land. The amount of chalk then required by B might have matched the amount that later C did require.

To revert to the tomato example, suppose that B, instead of selling its stores to C had instead purchased C's stores. Unless the contract provided otherwise, C should be able to demand more tomatoes.[33] The *ex ante* advice that A ought to have received was that the contract should define the extent of both A's minimum and maximum supply obligations. The supplier in *Tolhurst* did the former but failed to do the latter (or to include a price escalation clause in the long-term contract).

It would have been more sensible for the *Tolhurst* transaction to have been structured as a novation, so that all three parties would have had to acquiesce in the supersession of an A–B contract by an A–C contract. B's obligations would therefore descend to C along with B's rights. B's minimum offtake obligation was not transferred to C because the transaction in question was an assignment and an assignment transfers only rights and not obligations. A was therefore left with a potential contract claim at some distant date against a company, B, that by that time would have been wound up.

Burdens qualifying rights

To revert to the tomato example, C, though not bound to pay for the tomatoes, cannot insist on A supplying those tomatoes whether A is paid for the tomatoes or not. In that sense, C's entitlement to the tomatoes is burdened by the requirement that payment be made. Either B must pay and continue to pay, or, more likely, B's duty to pay is delegated to C who then performs on A's behalf. The contract between A and B remains subsisting, with B paying A in a delegated manner and A delivering the tomatoes to C. It is not the case that all B's contractual obligations have to be performed in order for C to receive the tomatoes. The right and the burden must arise in the same transaction and the enjoyment of the right must be 'relevant'[34] to the

[33] *Cf. Kemp v Baerselman* [1906] 2 KB 604 (CA).

[34] *Rhone v Stephens* [1994] 2 AC 310, 324 (HL). See also *Werderman v Société Générale d'Electricité* (1881) 19 Ch D 246 (CA).

burden.[35] This is subject to any set-off or defence that A might assert against C.[36]

STATUTORY ASSIGNMENT

The scope and requirements of the statute are contained in the opening words of section 136(1) of the Law of Property Act 1925:

> Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice:
>
> (a) the legal right to such debt or thing in action;
> (b) the legal and other remedies for the same; and
> (c) the power to give a good discharge for the same without the concurrence of the assignor . . . .

The meaning of this provision is best brought out by analysing some of the key words and phrases therein. In contrast with equitable assignment, an assignment that fits the statutory provision enables the assignee to bring an action directly against the debtor without involving the assignor in the proceedings.

Absolute assignments

The first point to note here is that absolute assignments have to be contrasted with assignments by way of charge[37] and conditional assignments.[38] The latter two types do not come within the statute. In the case of an assignment by way of charge, the thing in action is subjected to a security taking the form of an encumbrance. No actual transfer of the property in the thing takes place. For example, suppose B owes C £1,000 to be paid by a certain date. B in turn is owed £5,000 by A and charges

[35] *Davies v Jones* [2009] EWCA Civ 1164, [2010] 2 All ER (Comm) 755.
[36] See the section on Equitable set-off below.
[37] See chapter 8 for the meaning of a charge.
[38] See *Durham Bros v Robertson* [1898] 1 QB 765 (CA).

this debt in favour of C as security for the £1,000 owed to C. If in due course C is paid by B, the charge over the A–B debt is released. But if B fails to pay C, C may enforce the charge by seeking payment of the £1,000 from the £5,000 owed by A to B. C having been satisfied, A will then pay the balance of the £5,000 to B.

Suppose, however, that B is owed £5,000 at a future date and does not wish to wait for payment. B may decide to sell or discount that debt to C. This will involve an absolute assignment of the debt and the payment by C to B of an amount equivalent to the debt but reduced to take account of two matters: first, the risk of default by A when payment falls due; and secondly, the value to B of getting in early the money owed by A, which corresponds broadly to the burden borne by C in paying B and then having to wait for payment from A. This latter item approximates to interest on the amount advanced by C to B, though the law classifies such transactions, not as loans, but as sales of intangible property.[39] Absolute assignments of this kind are a common form of financing arrangement. The role of B may be taken by a company, which needs cash flow to keep its business going, and that of C by a factor, which is also in the business of debt management. A may or may not be aware that the debt has been assigned to C: this is the difference between notification and non-notification financing. Where A is not aware, then one of the requirements of section 136(1) of the Law of Property Act 1925 (written notice to the debtor) has not been met so the transaction between B and C will have to be treated as an equitable assignment only. The assignment to C may involve a guarantee by B that A will pay (recourse financing) or it may not (non-recourse financing).

We have seen that the granting of a charge over a debt does not involve an absolute assignment. What about other forms of security, for example a mortgage[40] given by B to C over a debt owed by A to B? The issue is explored in *Tancred v Delagoa Bay Railway Co*[41] where a mortgage of certain debts owed by A to

[39] *Re Charge Card Services Ltd* [1987] Ch 150.

[40] See chapter 8 for the meaning of a mortgage.

[41] (1889) 23 QBD 239.

B, as security for an advance made by C to B, provided that the mortgage would be redeemed and the debts reassigned back to B in the event of the advance being repaid. Denman J held that the mortgage was an absolute assignment, in contrast with a charge which 'only given a right to payment out of a particular fund or particular property, without transferring that fund or property'. Prior to their reassignment to B, the debts in question had been transferred in their entirety to C.

An example showing the need to distinguish a mortgage from a charge on the facts is *Hughes v Pump House Hotel Co*.[42] B, a builder, assigned to C 'all moneys due, or to become due,... from [A, a hotel] by virtue of a [particular] contract'. C was also empowered to manage the account arising from that contract, which included the giving of 'effectual receipts' to A. Even though B's indebtedness to C was for an uncertain amount, and even though the assignment was expressed to be 'by way of continuing security', the Court of Appeal held the assignment to be absolute. As a result of the assignment, A could pay C without concerning itself with the state of the underlying account between B and C and could also resist a claim by B for payment under the building contract. According to Mathew LJ, '[T]hough a mortgage is only a security for the amount which may be due, it is nevertheless an absolute assignment because the whole right of the mortgagor in the estate passes to the mortgagee'. The absence of an express provision for reassignment of the debt, in the event of payment by B to C of the sum owed, did not affect the position, since such a provision would be implied in any event. Until notified of the redemption of the mortgage, itself an assignment of the debt back to the original assignor, the debtor could safely pay the mortgagee and obtain a good discharge.

In *Durham Bros v Robertson*,[43] one of the reasons the assignment was not regarded as absolute was that it was expressed to endure only 'until' the sum owed by assignor to assignee had been paid off. The assignment was therefore a conditional one, the assignor retaining an interest of a contingent nature in the debt. The court stressed the need for the account debtor to know

[42] [1902] 2 KB 190 (CA). [43] [1898] 1 QB 765 (CA).

the precise state of affairs between the assignor and assignee for an assignment to be regarded as absolute. If the assignment was clearly absolute, the debtor could go on paying the assignee until notified that the debt had been reassigned, otherwise the debtor needed the assurance of all relevant parties appearing before the court for a true balance to be struck amongst the three of them.

A similar need for certainty in the mind of the debtor explains why the law has settled on the view that the assignment of only part of a debt does not amount to an absolute assignment.[44]

Writing

To qualify under section 136(1) of the Law of Property Act 1925, the assignment must be 'by writing under the hand of the assignor'. This is the same for practical purposes as the writing requirement for disposition of subsisting equitable interest under section 53(1)(c) of the Law of Property Act 1925,[45] minus the complicating element of the sub-assignment.

The notice given to the debtor must be written notice: no particular form of words is prescribed. It need not be given by the assignor; notice from the assignee will suffice.[46] We shall examine later other aspects of notice to the debtor.

Legal thing in action

Section 136(1) of the Law of Property Act 1925 is confined to assignments of 'any debt or other legal thing an action'. On the face of it this would exclude equitable things in action, such as the interests of trust beneficiaries, and would significantly reduce the reach of the statutory provision. In *Torkington v Magee*,[47] the defendant agreed to sell his reversionary interest in certain property to a purchaser who assigned it to the claimant. Despite having received written notice of the assignment, the defendant refused to perform. Channell J held that the section applied equally to legal and equitable things in action:

[44] See *Hughes v Pump House Hotel Co* [1902] 2 KB 190 (CA); *Williams v Atlantic Assurance Co* [1933] 1 KB 81 (CA).

[45] See above.

[46] *Re Westover* [1919] 2 Ch 104; *Holt v Heatherfield Trust* [1942] 2 KB 1.

[47] [1902] 2 KB 427.

I think the words 'debt or other legal chose in action' mean 'debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable'.

By watering down the meaning of 'legal' to 'lawfully assignable', Channell J made the section workable at the expense of rendering the word 'legal' redundant. Other aspects of the section made it plain that the equitable rule of assignment was in substance being adopted by statute, so the result in *Torkington* is in harmony with the statute. It should also be observed that the section refers to written notice of the assignment, where relevant, being given to trustees, which supports the view taken by Channell J.

SUBJECT TO EQUITIES

The statutory assignment in section 136(1) of the Law of Property Act 1925 is a procedurally simplified form of equitable assignment.[48] It does not create a legal title in the hands of a *bona fide* purchaser of the sort that overrides prior equitable interests. Section 136(1) is stated to be effectual 'subject to equities having priority over the right of the assignee'. The same rule applies in the case of equitable assignments falling outside the statute. Equities might include, for example, the right of the debtor to rescind the contract for mistake or for misrepresentation. The assignment rule is therefore less generous to the assignee than the corresponding rules for things in possession. If A sells goods to B who then transfers them to C, a *bona fide* purchaser for value without notice, before A is able to rescind the contract for misrepresentation, then title to the goods passes to C and A is unable to recover them or their value from C.[49] But if B sells goods to A and then assigns the benefit of A's payment obligation to C before A discovers B's misrepresentation about the goods, A will be able to oppose against C the same misrepresentation claim that could have been opposed against B.

[48] See above. [49] See chapter 6.

Equitable set-off

Although section 136(1) states that the assignee takes subject to 'equities', the assignee's vulnerability extends beyond equities in the narrow sense to include certain cross-claims of the debtor against the assignor that fall within the limits of the rules concerning equitable set-off, regardless of whether the assignee has or has not notice of these at the time of the assignment. As the Privy Council observed in *Government of Newfoundland v Newfoundland Railway Co*:[50]

> It would be a lamentable thing if it was found to be the law that a party to a contract may assign a part of it, perhaps a beneficial portion of it, so that the assignee should take the benefit, wholly discharged of any counter-claim by the other party in respect of the contract, which may be burdensome.

If B is engaged to perform work for A and assigns the right to payment to C, C has no greater right to payment from A than B would have had. The equitable rule that applies here allows set-off even if one or both of the claim and counterclaim is for unliquidated damages, but it requires there to be such a close connection between the two that it would be inequitable not to grant relief to the defendant.[51] Any equitable set-off that A could have claimed from B by way of defence to B's claim for the agreed sum may also be asserted against C seeking payment as assignee. C's claim is abated to the extent of any damages that might have been recoverable by A from B, assuming that B had done sufficient work to recover the agreed sum subject to damages.[52] In *Young v Kitchin*,[53] a builder assigned to the claimant assignee a sum owed under a building contract by the defendant. When sued by the claimant for the sum owed, the defendant pleaded certain breaches of contract by the assignor builder in failing to complete the work on time. To the extent that the sum claimed

[50] (1881) 13 App Cas 199 (PC).

[51] *Bim Kemi v Blackburn Chemicals Ltd* [2001] EWCA Civ 457, [2001] 2 Lloyd's Rep 93 (CA); *Government of Newfoundland v Newfoundland Railway Co* (1881) 13 App Cas 199 (PC); *Hanak v Green* [1958] 2 QB 9 (CA).

[52] See *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL).

[53] (1878) 3 Ex D 127.

did not exceed the amount of the debt, the defendant was held entitled to deduct the damages claim from the debt. (Since the debtor's rights are defensive, an assignee cannot be subjected to a counterclaim to the extent that it exceeds the debt.) It should be emphasized that the position of the assignee would not have been improved if notice of the assignment had been given before the building work had been done or before any damage attributable to the work already done had manifested itself. The debtor's defence to the builder's claim for payment is immanent in the building contract itself, even though it may not then be known how much damage has been caused or even if any damage will be caused at all. The only right that the builder can assign to the claimant is the right to such net sum as the builder in fact has earned or will earn under the contract.

A controversial case is *Stoddart v Union Trust Ltd*.[54] The defendant debtors agreed to buy a newspaper ('Football Chat') from its owner. A portion of the price, made payable in instalments at future dates, was assigned by the owner to the claimant. Later, the defendants discovered that the sale had been induced by fraudulent misrepresentations, although the claimant assignee had no notice of the fraud at the time of the assignment. Whilst the Court of Appeal would have been prepared to recognize the defendant's equity in the form of a rescission of the contract of sale, which the defendant was not seeking, it refused to allow damages for the owner's fraud to be set off against the claimant's claim for the sums due under the assignment. According to Vaughan Williams LJ, the fraud was not something 'flowing out of, and inseparably connected with, the contract which gave rise to the cause of action',[55] which seems to put the matter rather narrowly. The fraud claim was inseparably connected with the purchase of the newspaper since it induced that purchase. It seems anomalous not to permit a set-off against the assignee based upon fraud when there would have been a set-off if the fraudulent statements had become contractual warranties, or a defence if the contract of sale had been rescinded.

[54] [1912] 1 KB 181 (CA). [55] [1912] 1 KB 181, 189 (CA).

Legal set-off

A further defence that the debtor might have to the assignee's claim takes the form of legal set-off. This is available to the debtor whenever the claim and counterclaim are for debts or liquidated sums, regardless of whether there is a contractual or other material connection between the two. Unlike the case of equitable set-off, no material connection is required for legal set-off between claim and cross-claim. Legal set-off is merely a matter of accounting so that if both sums are at least liquidated, it will be permitted in order to avoid circuity of litigation. An example of legal set-off in assignment is *Roxburghe v Cox*.[56] Ker assigned by mortgage to the Duke of Roxburghe all moneys that should be realized at a future date on the sale of his army commission. When Ker later resigned, the moneys in question were lodged by the Army Commissioners in a special account with Cox & Co, who also happened to be Ker's bankers. Ker was overdrawn on his personal account and Cox then took the decision to combine the two accounts into one, as bankers are entitled to do.[57] Consequently, the debt that Cox owed to Ker for the commission moneys was reduced by the amount of Ker's indebtedness on his personal account. This was done after the mortgage to the duke but before Cox was given notice thereof. The court held that Cox's cross-claim, for the overdrawn amount of Ker's personal account, could be offset against the duke's claim, since it had come into existence before notice of the assignment had been received by Cox. James LJ went on to say that 'after notice of an assignment of a chose in action the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice'. Thus a later advance by Cox to Ker could not have been offset against the duke's claim.[58] Nevertheless, for legal set-off to apply in assignment cases, the account debtor's claim against the assignor must have fallen due at the time notice of the assignment is received if it is to be opposed to the assignee. This is illustrated by *Business Computers Ltd v Anglo-African Leasing Co*.[59]

[56] (1881) 17 Ch D 520 (CA).
[57] *Garnett v M'Kean* (1872) LR 8 Ex 10.
[58] See also *N.W. Robbie & Co v Witney Warehouse Co* [1963] 3 All ER 613 (CA).
[59] [1977] 2 All ER 241.

The debtor, A, owed money to the assignor, B, for computers that it had purchased from B. Under a quite separate contract between the same two parties, A supplied B with a computer on hire-purchase terms, B to pay hire-purchase instalments in the usual way. When B got into financial difficulties, C, a secured creditor of B, sent in a receiver under a floating charge.[60] This action had the effect of assigning to C property of B embraced by the floating charge. This property included B's right to payment for the computers that it had supplied to A. Furthermore, A had notice of the appointment of the receiver and thus of the assignment of its indebtedness to C. At a later date, A decided to terminate its hire-purchase contract with B as a result of B's failure to keep up payment of the instalments. Under the hire-purchase contract this action had the effect of collapsing all future instalments into one presently owed and liquidated lump sum. The question, in proceedings brought by C against A, was whether A could set off against C's claim the amount that B owed it under the hire-purchase contract. If it not been for the lack of a material connection between the sale and the hire-purchase contracts, this could have been done by means of equitable set-off. The Court of Appeal held that legal set-off could not assist A since notice of the assignment to C had occurred before B's obligation to pay the lump sum had fallen due.

A final point to note about the debtor's defences is that they may be excluded by contract. This is commonly done in company debenture instruments to facilitate sales by holders (assignors) to buyers (assignees) who are freed from the burden of inquiring into the underlying relations between the holder and the company debtor.[61] The ease of transfer this produces obviously encourages investors to take up company debenture issues.

NON-ASSIGNMENT CLAUSES

It was earlier stated that the consent of the debtor was not needed to effect an assignment. Where A, B, and C combine by contract to transfer the debt, the transaction is more appropriately

[60] See chapter 8 for the meaning of a floating charge.

[61] *Palmer's Company Law,* 25th edn, Sweet & Maxwell, looseleaf, chapter 13.049.

termed a novation and C has a direct contractual right against A to receive payment, rather than a right transferred from B. Novation is the appropriate transaction to employ if burdens under the A–B contract are to be transferred to C[62] since the rule of privity of contract prevents burdens from being imposed on strangers to a contract.

Although the debtor's consent may not be needed for an assignment, suppose that the contract giving rise to the debt prescribes the method of assignment or even prohibits it altogether. The most common way of prescribing the method is to require the assignor first to secure the consent of the debtor to the assignment. Sometimes, the clause will go on to say that consent may not unreasonably be refused. The consequences of a debtor refusing to respond at all or unreasonably refusing to give consent are not settled in English law.[63] On one view, this is merely a breach of the loan agreement (or other contract).[64] On another, the assignment is effective because the consent is deemed to have been given. English law being reluctant to deeming events to have occurred when they have not,[65] the former view is to be preferred. Instead of a prescribed method, a clause may limit the range of possible assignees by stipulating that the assignee may be a company in the same corporate group as the assignor, or, in the case of sovereign debt, by requiring that the assignee be a 'bank'. The object of the latter type of clause is to prevent the debt from being assigned to a so-called 'vulture fund', which is likely to take a more aggressive approach to the enforcement of a debt than a more conventional financial institution.

As for outright non-assignment clauses, it is a standard condition of hire-purchase agreements that the hirer shall not assign the benefit of the option (though the finance company will regularly waive this provision by agreeing a settlement figure with,

[62] *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 (CA), *per* Collins MR*; Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL).

[63] *Hendry v Chartsearch Ltd* [1998] CLC 1382 at [43] (CA), *per* Evans LJ.

[64] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, 106 (HL).

[65] *Cf. Colley v Overseas Exporters* [1921] 3 KB 302.

for example, a car dealer taking a hire-purchase vehicle as a trade-in). Such clauses are recognized as effective.[66] Large organizations, such as universities and local authorities, commonly incorporate non-assignment clauses in their standard terms of trading. The reasons for this are not hard to find. The organization wishes to guard against the possibility of a junior employee inadvertently paying the assignor, despite having received notice of the assignment, with the result that a good discharge for payment is not given. Furthermore, notice of an assignment prevents the debtor from raising fresh equities and defences against the assignee. In the absence of an assignment, the debtor could raise them against the assignor in their continuing mutual dealings.

The effectiveness of a non-assignment clause was recognized in *Helstan Securities Ltd v Hertfordshire County Council,*[67] A contract for road works stipulated that the contractor should not 'assign the contract or any part thereof or any benefit or interest therein or thereunder' without the local authority's written consent. An assignment of the moneys due having been made without this consent, the claimant assignee brought an action against the authority for payment. The action was unsuccessful despite the claimant's argument that the debt was not caught by the language of the prohibition. If the court had stopped there, the result would have been unexceptionable.[68] Croom-Johnson J, however, went beyond holding that the debtor had a complete defence to the assignee's action; he stated that the assignment itself was invalid.

The significance of this distinction is as follows. Suppose that the assignor becomes insolvent after the assignment. It is one thing to say that an assignment that flouts a non-assignment clause is ineffective as between debtor and assignee; it is another to go on and say that it is also ineffective as between assignor and assignee, which is a consequence that one would expect to flow from invalidity. Although the invalidity of an assignment

[66] *United Dominion Trust Ltd v Parkway Motors Ltd* [1955] 1 WLR 719.

[67] [1978] 3 All ER 262.

[68] See the similar dictum of Bramwell LJ in *Bruce v Bannister* (1878) 3 QBD 569 (CA), expressing a common lawyer's hostility to the equitable rule in the immediate post-fusion years.

between an assignor and an assignee should not affect any assignment *agreement* between them, any claim arising under that agreement could only be a personal, contractual claim. That claim would be based on the assignor's failure to secure direct payment from the debtor, or the failure to turn over any payment received to the assignee, in either case, as an unsecured claim, worth very little against an insolvent assignor. If, however, the assignment is effective as between assignor and assignee to transfer the property interest in the debt, even though the assignee might not collect the debt directly from the debtor, the assignee's proprietary interest will prevail against an insolvency office holder representing the unsecured creditors of the insolvent assignor. Any moneys coming into the hands of the assignor or the liquidator or trustee will then be impressed with a trust in favour of the assignee.[69]

The reasoning of Croom-Johnson J would deny effect to the assignment between assignor and assignee on the ground that the contract decides whether a right to payment may be treated as an item of property. This is inconsistent with the decision of the Court of Appeal in *Re Turcan*.[70] In view of the importance of trade debts in the raising of finance, the width of language in the decision is regrettable. More regrettable still is Lord Browne-Wilkinson's observation in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* that 'there is no public need for a market in choses in action'.[71] Given the importance of discounting, or granting security over, book debts in the financing of commerce and industry, a very persuasive argument could be mounted to the contrary. The financing of small to medium-size companies in particular has been a major problem for more than 50 years. It is not practicable for a factor or mortgagee to make inquiries about each individual debt when blocks of debts are being assigned, so the liquidity of book debts *en bloc* is compromised by the position taken on non-assignment clauses. Hence, certain

[69] See *Barclays Bank Plc v Willowbrook International Ltd* [1987] 1 FTLR 386 (CA); *International Factors Ltd v Rodriguez* [1979] QB 351 (CA) (where there was an express clause in the assignment to that effect).

[70] (1880) 40 Ch D 5 (CA).

[71] [1994] 1 AC 85, 107 (HL).

international instruments, faced with the conflicting demands of finance and of freedom of contract, have overridden freedom of contract to provide for the assignment of debt claims notwithstanding a non-assignment clause.[72] Even if the debtor's right to deal only with the assignor is protected in pursuance of freedom of contract, no hardship as between debtor and assignee arises from the assignee having a property entitlement against the assignor.

The House of Lords in *Linden Gardens Trust v Lenesta Sludge Disposals Ltd* affirmed the ruling in *Helstan Securities Ltd v Hertfordshire County Council* that a debtor could invoke a non-assignment clause against the assignee, but affirmed too that 'in the absence of the clearest words' the clause would not invalidate the contract between assignor and assignee.[73] For the reasons stated above, there seems no good reason to allow a non-assignment clause in the underlying contract between debtor and assignor to affect the contractual relations of assignor and assignee at all, for that would impose on the assignee the burden of a contract to which he was a stranger. If notwithstanding a non-assignment clause the assignor undertakes to effect an assignment, the assignor should be contractually bound to do so, just as a seller of goods who contracts to transfer a full title to the buyer is in breach of contract when failing to bring this about.[74] The House of Lords also noted without disapproval the possibility of the assignor's conduct amounting to a declaration of trust of the proceeds of the debt in favour of the assignee.[75]

Non-assignment clauses together with trusts arising from assignments were given an extended treatment in *Don King Productions Inc v Warren*.[76] The case arose out of a contractual undertaking on the part of a boxing promoter to assign to a partnership 'the full benefit and burden of all existing promotional

[72] For example, the Unidroit Principles of International Commercial Contracts (2010), art 9.1.9(1); United Nations Convention on the Assignment of Receivables in International Trade (2001), art 9.

[73] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, 108 (HL).

[74] Sale of Goods Act 1979, s 12.

[75] [1994] 1 AC 85,106 (HL). Discussed further below.

[76] [2000] Ch 291 (Lightman J and CA). The judgment of Lightman J was affirmed on appeal.

and management contracts'. Because the contracts concerned personal services, they could not be assigned. Some of them, furthermore, contained non-assignment clauses. Nevertheless, Lightman J held that the agreement, though not effective in giving rise to an assignment, took effect as a 'declaration of trust'. This is an unfortunate expression given its connotation of express trust. The promoter became a trustee not only of the contracts but also of the benefit of being a contracting party. This latter extension meant that both the fruits of these non-assignable contracts and the right to renew them upon expiry were both the subject matter of the trust. In reaching this conclusion, Lightman J was of the opinion that an assignment of a contractual benefit differed in substance from a trust of a contractual benefit: contractual language apt to prevent the former might not as such extend to the latter. It was nevertheless possible in the underlying contract to prohibit effectively not merely assignment but also a declaration of trust of the benefit of a contract, but a court would not lightly construe the contract to this effect.[77] The trust device also emerged in *Barbados Trust Co v Bank of Zambia*,[78] where an express declaration of trust of a repayment obligation under an oil import facility agreement was executed some years after an assignment that breached a non-assignment clause. The non-assignment clause was held to be ineffective to negative the express trust.

The debtor, nevertheless, may have legitimate concerns about being drawn into contact with the assignee, a possibility that might arise in the case of an assignee rebadged as a beneficiary where that beneficiary takes so-called Vandepitte proceedings in respect of trust property in default of action by the trustee.[79] A response to this comes from the Court of Appeal in the form of an assurance that '[r]ules and procedures designed to enable a beneficiary to sue in respect of a contract held in trust for him would not be applied so as to jeopardise trust property'.[80] The

[77] [2000] Ch 291, 317–22 (Lightman J).

[78] [2007] EWCA Civ 148, [2007] 1 Lloyd's Rep 495.

[79] *Vandepitte v Preferred Accident Insurance Corpn* [1933] AC 70 (PC). See Tettenborn, A., [1998] LMCLQ 498.

[80] [2000] Ch 291, 336.

meaning of this is that traditional trust rules of a specialist and non-fundamental kind ought not to be applied in commercial matters if this would be inappropriate. That said, it has to be wondered whether collection by the beneficiary in lieu of action by an inert trustee really amounts to an unwonted invasion of the commercial world by a procedure that had best be retained in traditional family trusts. Vandepitte proceedings, nevertheless, are very similar to proceedings brought by an equitable assignee who has to join an unwilling assignor as co-defendant. For that reason, the inference from a failed assignment of a trust of the benefit of a contract, as opposed to a trust of the proceeds of a contract in the hands of the assignor, is nothing more than a collateral subversion of the rule that non-assignment clauses are effective to seal off the debtor from the assignee. An express trust is a less blatant subversion of that rule. If, however, non-assignment clauses are in drafting practice expanded to become also non-trust clauses, and are effective in doing so, this should prevent the inference of a trust from the ruins of a failed assignment.

To conclude the above discussion, a non-assignment clause will prevent the assignee from suing the debtor, who has a defence or an equity based upon that clause. It will not, however, prevent the assignee from claiming the proceeds of the debt in the hands of the assignor under the terms of an express trust, if there is one, or on the terms of a constructive trust if there is no express trust. The non-assignment clause may or may not, according to its construction, prevent also a 'declaration of trust' of the benefit of a contract. Either way, a fair conclusion would be that there is little real difference between an assignment of a contractual benefit and an express declaration of trust of a contractual benefit. If the debtor has a legitimate interest in being insulated from the assignee, that same interest extends to insulation from a trust beneficiary. The protection of the assignee/beneficiary, if it extends only to the proceeds of the contract in the hands of the assignor/trustee, leaves one question unanswered. What if the assignor/trustee is insolvent and will not collect an unpaid debt? One robust response is that a debtor who wishes not to deal with third parties had better pay its debts in order to avoid dealing. Hence, in this extreme case, where an

insolvency office holder has no practical interest in enforcing the debt, room might properly be made for the Vandepitte procedure. The opposite robust response is that a constructive trust of the proceeds of a debt in the hands of an insolvency office holder does not include the claim itself if the debt has not yet been paid. The position is uncertain, but if office holders are permitted to sell causes of action,[81] as they might be prepared to do if an assignee/beneficiary has a recourse claim against the estate of the assignor/trustee that it is willing to surrender, then the assignee/beneficiary would be able to claim against the debtor without invoking the Vandepitte procedure.

Finally, there is a curious, but potentially significant, decision of the Court of Appeal to consider.[82] This case concerned a debenture creating security over future contract rights, which was followed by a contract containing a no-assignment clause. The court held that the decision in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*[83] on non-assignment clauses extended only to assignments in breach of such clauses and not to antecedent assignments which could not infringe a clause not yet in existence. If this is correct, which must be doubted, non-assignment clauses will be largely ineffective against banks providing medium- to long-term finance, though they will still be effective against factors purchasing existing accounts. The reason for doubt is that a non-assignment clause, if effective, should prevent the contractual right from acquiring the character of property and so should never be captured by the floating charge.

PRIORITIES

Suppose that the same debt or other thing in action is assigned to two or more assignees. Which of them has priority? The basic priority rule where there are successive transfers of either legal or equitable property, real or personal, is that the first in time prevails, but an exception is made to this in the case of assignment

[81] See above.

[82] *Foamcrete (UK) Ltd v Thrust Engineering Ltd* [2002] 2 BCC 221 (CA).

[83] [1994] 1 AC 85, 108 (HL).

of things in action. According to the rule in *Dearle v Hall*,[84] the first of two or more assignees for value to give notice of the assignment to the debtor will have priority. This rule of priority includes an assignment by way of charge,[85] even though the assignment in such a case is suspended until enforcement of the charge is sought. A proviso to the rule is that the assignee did not have notice (which may be the constructive notice that comes from being put on inquiry[86]) of an earlier assignment. Notice may be given to the debtor, trustee (if the property is equitable), or other person whose duty it is to make payment in respect of the assigned property.[87] When given to trustees, it need not be given again merely because those trustees are subsequently replaced by others.[88] If the competing assignees give notice on the same day, priority between them will depend upon the date of creation of the assignments.[89]

Although the notice that has to be given may generally be informal for present purposes,[90] a special statutory provision requires written notice to the trustee in the case of dealings in equitable property.[91] This same section[92] extends the rule in *Dearle v Hall* to successive dealings in equitable interests in land.

The priority rule in *Dearle v Hall* appears to have been influenced by the companion rule that the debtor is discharged on payment to the assignor unless notified of the assignee's superior entitlement. Nevertheless, a review of the authorities shows that the reasoning behind the rule is hard to find and may not now be the same as that supporting its initial formulation in the early nineteenth century. As stated by Lord Macnaghten in *Ward v Duncombe*[93] (see also the summary of his reasons by Buckley J in *Re Dallas*),[94] the rule stemmed from early bankruptcy authorities

[84] (1828) 3 Russ 1.

[85] *Colonial Central Mutual Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd* [1995] 3 All ER 987 (PC).

[86] *Spencer v Clarke* (1878) 9 Ch D 137.

[87] *Stephens v Green* [1895] 2 Ch 148 (CA).

[88] *Ward v Duncombe sub nom. Re Wyatt* [1892] 1 Ch 188 (CA).

[89] *Re Dallas* [1904] 2 Ch 385 (CA).

[90] *Ex p Agra Bank* (1868) LR 3 Ch App 555.

[91] Law of Property Act 1925, s 137 (3).

[92] See subsection (1).

[93] [1893] AC 369 (HL).

[94] [1904] 2 Ch 385 (CA).

laying down the steps that had to be taken by an assignee if the property in question was not to be regarded as within the order and distribution of a (subsequently) bankrupt assignor and thus available for distribution to the bankrupt's general creditors. The giving of notice was seen as removing the appearance of the assignor's continuing ownership of the property, though it is hard to see why, and as amounting to the nearest thing to the taking of possession as was possible in the case of intangible property. The modern view is that notice is not needed in order to complete or perfect the assignment.[95] Furthermore, the requirement that notice be given is not based upon the idea that an assignee who fails to give notice is in neglect of a duty to do so, or upon a comparative evaluation of the conduct of the competing assignees.[96] Hence, the rule in *Dearle v Hall* was held applicable even though one of the assignees of an expectant interest in a legacy was unable at the relevant time to give notice, because no qualified trustee had been appointed to receive it.[97]

Lord Macnaghten[98] has roundly criticized the rule in *Dearle v Hall*, claiming that it has caused as much injustice as it has prevented. There has been a modern tendency not to extend the rule. Thus it was not applied between competing creditors, each with a floating charge over property of the debtor company covering debts owed to it by the Crown.[99] It was also excluded where a landlord, exercising a statutory right akin to distress, and the receiver of the tenant company each claimed an entitlement to sub-rental income owed to the tenant.[100] The rule has no application to successive dealings in company shares. The company itself is not the owner of the shares[101] and in any event would be prevented by statute from entering notice of assignments on the company register.[102]

[95] Ibid; *Gorringe v Irwell India Rubber Works* (1886) 34 Ch D 128 (CA).
[96] *Ward v Duncombe* [1893] AC 369 (HL).
[97] *Re Dallas* [1904] 2 Ch 385 (CA).
[98] In *Ward v Duncombe* [1893] AC 369 (HL).
[99] *Re Ind Coope & Co* [1911] 2 Ch 223.
[100] *Rhodes v Allied Dunbar Pension Services Ltd* [1989] 1 WLR 800 (CA).
[101] *Société Générale de Paris v Walker* (1885) 11 App Cas 20 (HL).
[102] Companies Act 2006, s 126.

The view has been taken that the rule in *Dearle v Hall* applies to competing assignments even if one (or more) of them is a legal, in the sense of statutory, assignment. In *E. Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors*,[103] a contract for the sale of a quantity of German wine contained a clause that was held to amount to an assignment by way of charge over the proceeds of resale of the wine by the buyer. Those same proceeds were the subject of an assignment of book debts made by the buyer in favour of a factor. Although the case went in favour of the factor on another ground, Phillips J rejected the factor's argument that its later assignment prevailed because, in complying with the formal requirements of section 136 of the Law of Property Act 1925, it had acquired a legal title to the proceeds of resale overriding the seller's mere equitable title. The section 136 statutory assignment was a matter of machinery;[104] it only altered the procedure by which the assignee could take proceedings against the debtor. Furthermore, the rule subjecting the assignee to defences and equities that the debtor could have raised against the assignor showed that the equitable rules of assignment served as the model for the statutory assignment. Consequently, the rule in *Dearle v Hall* applied. It is likely too that the rule would also apply as between an assignment, on the one hand, and an equitable right to trace, on the other.[105] Such a conflict would have arisen in *Pfeiffer* if the contest had been between the factor's assignment and the seller's retained equitable interest in the wine without a further assignment of the proceeds of its resale in the seller's favour.

NEGOTIABILITY

MEANING OF NEGOTIABILITY

The word 'negotiability' is a very misleading one. It means one thing for bills of exchange and quite another for bills of lading. These two instruments may be taken as illustrative examples

[103] [1988] 1 WLR 150.

[104] See also *Torkington v Magee* [1902] 2 KB 427; *Compaq Computers Ltd v Abercorn Group Ltd* [1991] BCC 484.

[105] See Gullifer, L. (ed.), *Goode on Legal Problems of Credit and Security*, 5th edn, Sweet & Maxwell, 2013, para 5–37; *cf.* McLauchlan, D., (1980) 96 LQR 90.

of the different meanings of 'negotiability'. Their negotiation, moreover, may also be compared with the assignment of things in action.

BILLS OF EXCHANGE

In chapter 6, we saw that the rule of title transfer in the case of currency (cash and banknotes) was more generous to the transferee than the rule of *nemo dat quod non habet* together with its various exceptions. A transferee for value and without notice obtains title to currency even at the expense of a previous owner from whom it was stolen.[106] Briefly, the *bona fide* purchaser for value without notice of a bill of exchange, known as the holder in due course, gets the protection of the currency rule and is not subjected to equities and defences arising out of the transaction that gave birth to the bill of exchange.[107] (For the protection of borrowers acquiring, for example, goods on hire-purchase terms, the use of bills of exchange (and promissory notes) is severely curtailed in regulated consumer credit agreements.)[108] According to Denning LJ in *Arab Bank v Ross*,[109] 'A bill of exchange is like currency. It should be above suspicion'. The holder in due course is therefore better off than an assignee, who takes subject to equities and defences arising under the contract between the debtor and the assignor even if unaware of them.

The law relating to bills of exchange, as well as to other negotiable instruments known as promissory notes, is laid down in a codifying statute, the Bills of Exchange Act 1882. In the case of those bills of exchange that are cheques, there is also the Cheques Act 1957 and the Cheques Act 1992, which fall outside the scope of this work. There also categories of negotiable instruments recognized at common law and not codified.[110] Given the flight from paper, as well as the diminished use in practice of bills of exchange, this body of law is of rapidly diminishing importance.

[106] *Miller v Race* (1758) 1 Burr 452.

[107] Bills of Exchange Act 1882 (hereinafter BEA 1882), ss 29, 38(2).

[108] Consumer Credit Act 1974, s 123.

[109] [1952] 2 QB 216, 227 (CA).

[110] See further Bridge, M., Gullifer, L., McMeel, G., and Worthington, S., *The Law of Personal Property*, Sweet & Maxwell, 2013, paras 22-010–22-016.

A bill of exchange is an unconditional order in writing addressed (and signed) by a drawer to a drawee to pay a sum of money to a named person or to bearer.[111] The sum must be payable on demand or at a fixed or determinable future time.[112] The named person may even be the drawer or the drawee.[113] The bearer is anyone who happens to be in possession of a bill of exchange,[114] so a bill made out in this form can be informally circulated by being passed from hand to hand. To take a simple case, suppose that B wishes to sell goods to A for £1,000. B may draw on A for the price by ordering A to pay C, B's banker. B may already have received advances from C and have incurred a commitment to draw on A in favour of C. A unilateral order of this sort will not bind A. For A to become liable on the bill, A must accept the bill by writing on it that it has been accepted and then must sign the bill.[115]

The sum payable by the bill must be a sum certain.[116] This, together with the requirement that it must be an unconditional order,[117] emphasizes that the bill is a financial instrument as divorced (so far as is practicable) as a banknote from an underlying contract for the sale of goods, to name one example. According to Ashhurst J in *Carlos v Fancourt*,[118] 'Certainty is the great object in negotiable instruments, and unless they carry their own validity on the face of them they are not negotiable'. Furthermore, the bill must be payable either 'on demand' or 'at a fixed or determinable future time'.[119] A demand bill drawn on a bank is a cheque.[120] It is common for future bills to be drawn at intervals (or usances) of 30 days and larger denominations of 30-day periods. In this way, the drawee, the buyer of goods in our example, obtains credit before being called upon to pay.

Once a bill has been drawn, and even before it has been accepted, it may be negotiated, in the sense of being transferred,

[111] BEA 1882, s 3(1).

[112] Ibid. See *Claydon v Bradley* [1987] 1 WLR 521 (CA): 'by' a stated date did not suffice.

[113] BEA 1882, s 5(1).

[114] BEA 1882, s 2.

[115] BEA 1882, s 17(2).

[116] BEA 1882, ss 3(1) and 9(1).

[117] BEA 1882, ss 3(1) and 11.

[118] (1794) 5 TR 482.

[119] BEA 1882, s 31(3).

[120] BEA 1882, s 73.

down a chain of holders.[121] This process is started by the payee, if a named person, indorsing the bill in favour of and delivering it to another named person,[122] who may then subsequently do the same for another and so on. At any time in the process, the bill can become a bearer bill by being made out to bearer in the first place, or by being indorsed in favour of bearer or simply by being signed in blank by the holder,[123] whereupon it passes from hand to hand.[124] Each person signing the bill (this excludes a person acting only as a bearer) undertakes that payment will be duly made by the drawee and may be sued by the holder if payment is not forthcoming.[125] The negotiable character of the bill can be removed by its being restrictively indorsed so as to prevent further transfer or allow it only within certain limits.[126]

To return to our example of the sale of goods, suppose that eventual holder presents the bill to the drawee/buyer, who has previously accepted it. The buyer argues that the goods sold were defective. If this were simply a case of an assigned debt, the assignee would be subject to the buyer's equities and defences against the seller. But if the holder of the bill is a holder in due course, the buyer will be required to pay on the bill. The holder in due course is one who takes it in good faith and for value without notice of any defect of title on the part of the person who negotiated it.[127] A defect of title arises when the bill or its acceptance was obtained 'by fraud, duress, or force and fear, or other unlawful means etc', which is all very broad. A forged or unauthorized signature on the bill, however, is wholly

[121] There is no requirement in the life of a bill that the sequence of events follow a prescribed order. A bill may be 'inchoate', for example, signed before the details are later filled in: see BEA 1882, s 20; *Glenie v Bruce Smith* [1904] 1 KB 263, 267–68 (CA).

[122] BEA 1882, s 31(3). [123] BEA 1882, s 34(1).

[124] BEA 1882, s 31(2). [125] BEA 1882, s 23.

[126] BEA 1882, s 35(1).

[127] BEA 1882, s 29(1). Other categories of holder are a holder for value, who takes with notice of equities and defences, and a mere holder, who does not provide consideration. Their rights are limited and depend upon the identity of the party in the chain of signatories against whom they are making a claim: see Bridge, M., Gullifer, L., McMeel, G., and Worthington, S., *The Law of Personal Property*, Sweet & Maxwell, 2103, paras 31-007–31-08.

inoperative[128] and results in an absence of title rather than a mere defect. A drawee paying out on a stolen bearer cheque, however, without notice of its theft, is discharged from further liability on the instrument,[129] which illustrates the risk involved in carrying bearer bills. If a bill is materially altered, for example, as to the amount or the date payable, it binds only those parties to the bill who consented to the alteration. This includes the party making the material alteration. Otherwise, the bill is avoided[130] any anyone thereafter converting it is liable only for the value of a worthless piece of paper.[131] Nevertheless, if the material alteration is not apparent, and the bill comes into the hands of a holder in due course, the holder can enforce the bill as it was prior to the alteration. If the holder in due course takes the bill unaware that it has been paid, and therefore discharged, before its due date, he may still sue on the bill.[132]

The other type of negotiable instrument in the Bills of Exchange Act 1882 is a promissory note, defined as an unconditional promise in writing signed by the maker of the note in favour of a named person or bearer.[133] The provisions in the Act concerning bills of exchange apply also to promissory notes with any necessary modifications.[134] It is quite hard to produce a bill of exchange by accident, but potentially easier to do in the case of a promissory note. Given that lay persons may not understand the significance of what they are signing, courts have demanded promissory language and have declined to recognize as promissory notes mere receipts and IOUs and similar informal documents.[135]

[128] BEA 1882, s 24. See *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356 (CA): an agent signing for an unauthorized purpose does not thereby forge his principal's signature.

[129] *Charles v Blackwell* (1877) 2 CPD 151 (CA).

[130] BEA 1882, s 64.

[131] *Smith v Lloyds TSB Group plc* [2001] QB 541 (CA).

[132] *Glasscock v Balls* (1889) 24 QBD 13, 15 (CA).

[133] BEA 1882, s 83(1). Where drawer and drawee are the same person, or where the drawee is a fictitious person, the holder of the bill may elect to treat it as either a bill of exchange or as a promissory note: s 5(2).

[134] BEA 1882, s 89(1).

[135] *Akbar Khan v Attar Singh* [1936] 1 All ER 545 (PC); *Claydon v Bradley* [1987] 1 WLR 521 (CA).

BILLS OF LADING AND OTHER CARRIAGE DOCUMENTS

In international sales the carrier of goods bridges the gap between the seller and the buyer. It is common for the seller to contract with an ocean-going carrier for delivery to the buyer. Since the buyer has a practical interest in the successful outcome of the carriage, it is commercially necessary to devise a means of substituting the buyer for the seller in the contract with the carrier. This involves not merely transferring the seller's contractual rights to the buyer, as would be so for a simple assignment; the seller's contractual liabilities (for example, for unpaid freight charges) need to be transferred too.

The classical method for transferring such rights and liabilities may be seen in the following example. Suppose that a seller of goods has them loaded on an ocean-going vessel and makes a contract for their carriage to an overseas port with the carrier (an owner or charterer of the vessel). The carrier issues a document called a bill of lading attesting to the fact that the goods have been shipped on board the vessel and naming either the seller of the goods or some other person as consignee to collect the goods at the port of discharge. During the voyage the goods are damaged in circumstances engaging the contractual responsibility of the carrier. Suppose further that the current holder of the bill of lading (to whom the bill has been negotiated in a way similar to that employed for bills of exchange) is the buyer. Does the buyer have the benefit of the carrier's delivery obligation undertaken to the seller?

The answer is not quite straightforward. The common law rule was that the negotiation of the bill did not transfer to the new holder the carrier's contractual obligation to deliver.[136] Starting from the position that 'by the Custom of Merchants . . . all Rights in respect of the Contract contained in the Bill of Lading continue in the original Shipper or Owner' (preamble), the now repealed Bills of Lading Act 1855 (in section 1) went on to state, by way of exception, a statutory procedure for the transfer of rights and liabilities. This provision was replete with problems because it

[136] *Thompson v Dominy* (1845) 14 M & W 403.

referred only to bills of lading and because it tied the negotiation of the bill to the contemporaneous passing of property in the cargo. Particular difficulties arose in the case of bulk cargoes.[137] A holder obtaining the bill of lading in circumstances outside the section, or someone relying on an equivalent carriage document, such as a sea waybill, did not acquire contractual rights or incur contractual liabilities under the statute. The effects of such a transfer, however, were sometimes produced outside the statute by inferring artificial contracts between the holder of the bill of lading and the carrier on the basis of behaviour like the payment of freight by the holder and the delivery of the goods by the carrier.[138] Such contracts had read into them the terms of the original contract of carriage set out in the bill of lading. As a result of the Carriage of Goods by Sea Act 1992, the position is now much simpler. The use of a number of specified documents—namely, sea waybills, received for shipment bills of lading and ship's delivery orders, and not just the on-board bill of lading—may serve to transfer rights and liabilities under a marine carriage contract. Furthermore, the process of transfer no longer depends upon the passing of property.

Apart from the transfer of contractual rights and duties under the terms of the Carriage of Goods by Sea Act 1992, the marine bill of lading is a negotiable document in that its indorsement and delivery—or just delivery, as the case may be—serves to transfer constructive possession of the underlying goods to the new holder; the holder is the only person to whom the carrier may deliver the goods covered by the bill of lading.[139] As for the property rights in the underlying goods acquired by the holder on transfer, this depends upon the intention of the transferor to surrender the general property or merely a special property.[140] It also depends upon the extent of the rights that the transferor of the bill has in those goods.[141] It is the common practice for bills

[137] See for example *The Aramis* [1989] 1 Lloyd's Rep 213; Law Commission (No. 196) Rights of Suit in Respect Of Carriage of Goods By Sea (1991).

[138] *Brandt v Liverpool Brazil and River Plate Steam Navigation Co* [1924] 1 KB 575 (CA); *Cremer v General Carriers* [1973] 2 Lloyd's Rep 366. This was not always successful: see *The Gudermes* [1993] 1 Lloyd's Rep 311 (CA).

[139] See chapter 2.

[140] *Sewell v Burdick* (1884) 10 App Cas 74 (HL).

[141] See chapter 6: someone who is not the owner of the goods may transfer only what he has, subject to the *nemo dat* exceptions.

of lading to be issued in sets of three or more originals. Although they are often negotiated as a set, sometimes the set is split and a determination has to be made when different originals are negotiated to different holders, which holder succeeds to the rights embodied in and accompanying the bill. It is clearly settled, on the basis of hallowed language in bills of lading ('the first of which being accomplished the others to stand void'), that this holder is the first to whom one of the originals is negotiated and not the first to present the bill to the carrier.[142]

[142] *Barber v Meyerstein* (1870) LR 4 HL 317.

8

SECURITY INTERESTS IN PERSONAL PROPERTY

INTRODUCTION

In this chapter we shall be looking at the use of property concepts, discussed in earlier chapters, to perform a security function. The security function will exist to reinforce the performance of a personal obligation, typically but not invariably the payment of a sum of money. If A owes B £500 and A defaults, B has a personal action on the debt but may also have recourse to any property that secures payment of the debt. When A gives security in this way, A's incentive to repay is heightened, especially if the property secured is worth more than the amount of the debt, or has a value to A in excess of its market value or would, if disposed of by B, seriously inconvenience the conduct of A's affairs. Besides the incentive given to A to perform, B has a further advantage whose importance can scarcely be overestimated in troubled economic times. As someone with a security interest, B may be able to resort to the secured property in order to seek payment without having to join all of A's unsecured creditors in the queue for a dividend payable upon A's liquidation (if A is a company) or upon A's bankruptcy (if A is an individual).

The above example is only one of many different types in which security is granted. For present purposes, security in the case of chattels may take one of four different forms. It may take the possessory form of a lien or a pledge (or pawn). The former is a security that arises at common law in defined circumstances and the second is one whose usefulness is strictly limited. In addition to lien and pledge, there are the (usually) non-possessory securities of mortgage and charge, both of which may exist in either a fixed or a floating form. Lien and pledge are based purely upon the common law idea of possession,[1] though there is such a

[1] See chapter 2.

thing as an equitable lien, to which reference will later be made. Mortgage, driven by the idea that ownership is transferred, may be either legal or equitable. A charge, recognized only in equity, is a type of encumbrance on property that is much more common than a mortgage in the case of personalty.

Property concepts may also be used in a way that does not, in the eyes of the law, involve the grant of security rights. We saw in chapter 2 the nature of a hire-purchase contract by which a finance company could retain the general property in goods pending the payment of all the agreed instalments and the (usually nominal) option fee. It has been held at the highest level that such a transaction does not involve the grant of security by the hirer but rather the reservation of ownership by the finance company.[2] Consequently, the finance company would not have to register its interest under bills of sale (individuals and partnerships) and company charges legislation since these provisions apply only to mortgages and charges and not to title-based financing schemes. Moreover, the finance company would be able to invoke the general rule of *nemo dat quod non habet* to repel the claims of transferees from the hirer, whether this occurs absolutely or by way of security (subject to the *nemo dat* exception for motor vehicles contained in Part III of the Hire Purchase Act 1964). In a similar fashion, it has become common in recent years for trade suppliers of goods to avail themselves of their rights to retain the general property in goods supplied when an application of the presumptive rules in section 18 of the Sale of Goods Act 1979 would otherwise have recognized the passing of property to the buyer.[3]

POSSESSORY SECURITY

LIEN

Lien may be defined in general terms as a passive right to retain a chattel (in certain cases, documentary intangibles and papers)

[2] *Helby v Matthews* [1895] AC 471 (HL) and *McEntire v Crossley Bros* [1895] AC 457 (HL) (conditional sale).

[3] See further chapter 5.

conferred by law. The party entitled to assert the lien may be called the lienee and the party surrendering the possession, which gives rise to the lien, the lienor. Lien is therefore not consensual, is not conferred by the lienor and is confined to cases where the right has historically been established. It seems fair to say that the modern law is content to leave the existence of a lien to legal history without making any real attempt to rationalize its existence in modern conditions. According to Diplock LJ in *Tappenden v Artus*,[4] a lien is a 'self-help remedy' like 'other primitive remedies such as abatement of nuisance, self-defence, or ejection of trespassers to land'. There is a general confluence between the conferment of a lien and the exercise of a common calling (although liens are not confined to the common callings). In mediaeval times, the exiguous nature of services in an underdeveloped economy led to the imposition of a duty to render them to members of the public on demand in defined circumstances, such as the common callings of innkeepers, ferrymen, and common carriers, who were entitled in return to a lien for their services. It is hard to imagine this common law entitlement being extended to new relationships. Nevertheless, statute from time to time creates similar rights. The Civil Aviation Act 1982[5] permits an airport to detain an aircraft for unpaid airport charges and aviation fuel supplied. This was treated as a lien for the purpose of insolvency legislation in *Bristol Airport plc v Powdrill*.[6]

Possession and the lienee

The lien will usually involve a possessory relationship between the lienee and the object in question. Thus a garage exercising the repairer's lien can retain a vehicle in its possession pending payment of its repair charges. The lien may be exercised in such cases only in so far as the chattel is improved; it may not extend to the cost of servicing or maintenance,[7] which is perhaps an artificial line to draw. Sometimes, the lienee will not have possession as such, but rather the right to impede the party

[4] [1964] 2 QB 185 (CA). [5] Section 88.

[6] [1990] Ch 744 (CA). See also *The Freightline One* [1986] 1 Lloyd's Rep 266 (detention of ship under Port of London Act 1968, s 39).

[7] *Hatton v Car Maintenance Co Ltd* [1915] 1 Ch 621.

in possession from exercising in full the rights that normally accompany possession. One example of this is the right of detention, as opposed to seizure and detention, of an aircraft in *Bristol Airport plc v Powdrill*. Another is the innkeeper's right to detain the luggage of a guest[8] against unpaid charges. The personal baggage of a guest in a hotel bedroom can hardly be said to be possessed by the hotel.[9]

General and special liens

Liens may be divided into general and special (or particular) liens. The former is the rarer case. It is to be found, for example, in the case of solicitors (bankers, accountants, and stockbrokers too) who have a lien over their clients' papers for all sums owing for professional services rendered. The effectiveness of the lien will depend upon the extent to which the retention of papers impedes the client's personal or business dealings.[10] The lien may not, however, be exercised in circumstances where statute requires the papers to be kept in a particular place or surrendered to an insolvency office-holder.[11] The lien is general in the sense that it is not confined to services connected with the papers in question. A special lien, on the other hand, requires a close connection between the chattel and the services rendered. The repairer's lien, for example, can only be exercised in respect of charges arising out of the instant transaction. If the repairer has performed work in the past and released the chattel to the owner, the lien thereby lost cannot be revived by attaching the unpaid bill to a later lien arising as a result of future services.[12] A special lien, however, may be expanded by contract so as to amount to a general lien. This is common in the case of carriers.[13] It appears to be uncontroversial that a general lien thus created is not an equitable charge.

[8] But not vehicles or horses: Hotel Proprietors Act 1956, s 2(2).

[9] See Fletcher Moulton LJ in *Lord's Trustee v Great Eastern Railway Co* [1908] 2 KB 54 (CA).

[10] *Eide UK Ltd v Lowndes Lambert Group Ltd* [1999] QB 199 (CA).

[11] See *Re Anglo-Maltese Dry Dock Co Ltd* (1885) 54 LJ Ch 730; *Re Aveling Barford Ltd* [1989] 1 WLR 360; *DTC (CNC) Ltd v Gary Sargent & Co* [1996] 1 WLR 797.

[12] *Hatton v Car Maintenance Co Ltd* [1915] 1 Ch 621.

[13] *George Barker (Transport) Ltd v Eynon* [1974] 1 WLR 462 (CA).

Limitations of lien

A lien cannot be transferred;[14] in this respect it is weaker than a pledge interest.[15] It cannot be asserted by a third party to whom possession of the goods is given, without the bailor's authority, by a bailee to perform services that should by agreement have been performed by the bailee.[16] If the chattel is surrendered to the lienor, the lien entitlement is lost[17] unless, by agreement with the lienor, the lien is to persist despite a temporary release of possession by the lienee.[18] A lienee who releases possession of a chattel without authority thereby surrenders any lien entitlement.[19] A lien does not carry with it a power of sale at common law,[20] a matter of some embarrassment to the lienee if the chattel is awkward or expensive to maintain. A lienee who unlawfully sells the chattel commits the tort of conversion and also surrenders the lien.[21] In certain cases, however, a power of sale is explicitly conferred by statute.[22]

In the case of an unpaid seller of goods, the exercise of a lien,[23] or the essentially similar right of retention where the property has not yet passed to the buyer,[24] is often the prelude to the termination of the contract and resale of the goods for the seller's own account in the way prescribed by the Act.[25] A power of sale may arise as a result of a contractual provision. It may also be permitted by statute in the case of a statutorily conferred lien.[26]

There is long-standing authority that a repairer's (or artificer's) lien may not be expanded to cover also the cost of its exercise, given that the lienee would be paying for his own deprivation of use of the chattel.[27] But there is no general rule to this

[14] *Legg v Evans* (1840) 6 M & W 36.
[15] *Donald v Suckling* (1866) LR 1 QB 585.
[16] *Pennington v Reliance Motors Ltd* [1923] 1 KB 127.
[17] *Hatton v Car Maintenance Co Ltd* [1915] 1 Ch 621.
[18] *Albemarle Supply Co v Hind* [1928] 1 KB 307 (CA) (car released 'in pawn').
[19] Ibid.
[20] *Thames Iron Works Co v Patent Derrick Co* (1860) 1 J & H 93.
[21] *Mulliner v Florence* (1878) 3 QBD 484 (CA).
[22] For example, the Innkeepers Act 1878; Torts (Interference with Goods) Act 1977, Sch 1, Part II (uncollected goods).
[23] Sale of Goods Act 1979, s 39(1)(a).
[24] Section 39(2).
[25] Section 48.
[26] Civil Aviation Act 1982, s 88.
[27] *Somes v British Empire Shipping Co* (1860) 8 HLC 338.

effect. In shipping cases in particular, a lien may be exercised to recover expenses reasonably incurred in exercising the lien itself.[28] Otherwise, in a case where the lien is necessarily expensive to exercise, the lienor might be in a position to 'blackmail' the lienee by standing back and allowing costs to mount when otherwise it could have taken steps to obtain the release of the chattel.[29] A lien will be surrendered if execution is levied against the chattel to enforce a judgment against the lienor.[30] In this, and in the absence of a power of sale, a lien is shown to be a passive right of retention.

Lienor, lienee, and owner

Suppose the lienor granting the lienee possession of the chattel is not its owner. May a lien be asserted against the true owner? Certain statutes amplify the right of a lienee at the expense of the owner (a particularly striking example being the Civil Aviation Act 1982, section 88). The position at common law is best dealt with by considering separately the cases of repairers and innkeepers, since they raise different considerations. Of the two, only the repairer adds value to the chattel, while only the innkeeper has a duty to deal with members of the public.

It would not be a practicable requirement for a repairer to inquire into the ownership of each and every chattel presented for repair. A number of cases have involved cars, the leading one being *Tappenden v Artus*.[31] This case responds to the thorny question of why a repairer's lien binds an owner who has not specifically consented to the repair transaction. The owner of a van allowed a prospective purchaser (the lienor) to use it on condition that he licensed and insured it. When the van was being driven by the lienor in connection with his work, it broke down. The lienor called in a repairer who took possession of the van imagining the lienor to be its owner and making no inquiries to that effect. When the owner tracked down the repairer, the repair

[28] *Metall Market OOO v Vitorio Shipping Co Ltd* [2013] EWCA Civ 650, [2014] QB 760.

[29] Ibid, at [123].

[30] *Thames Iron Works Co v Patent Derrick Co* (1860) 1 J & H 93.

[31] [1964] 2 QB 185 (CA).

work had already been done. The owner refused to pay and the repairer's lien was upheld by the Court of Appeal. The lien was a 'right to continue an existing actual possession of goods' and was thus dependent on that possession (*viz*, the repairer's possession) being 'lawful at the time at which the lien first attached' rather than when the repairs were later done. The lienor had an implied authority, defined by the terms of the contract and the purposes of the bailment, to give possession of the car to the garage for repairs 'necessary to render [the van] roadworthy' since this was 'reasonably incidental' to his use of it. The question was not whether the lienor had authority to confer a lien: liens are conferred by operation of law once a particular relationship has arisen between the parties.

Tappenden v Artus supports a lien where the lienee has added value to the chattel. It does not state the position where the lienor has repairs done that go beyond roadworthiness, or otherwise acts beyond the authority conferred by the owner, as might happen where the owner forbids the lienor to give possession of the chattel to a repairer. (If the owner forbids the granting of a lien, this would not be sufficient to withdraw the lienor's implied authority to give possession.) It is well settled, however, that if the lienor has apparent authority to surrender possession for repair, this will be sufficient to permit the repairer to assert the lien.[32] A restrictive clause not drawn to the attention of the repairer (how could it have been?) by the owner will not detract from this apparent authority.[33]

An innkeeper's lien extends to all chattels brought as baggage to the inn by the guest and is not confined to chattels that are the subject of the innkeeper's services.[34] Where the chattel comes later—for example, a courtesy piano supplied by a manufacturer for the use of a travelling virtuoso[35]—it falls outside the lien since it is 'not brought to the inn by a traveller as his goods' but rather, is sent later for a defined purpose. The principle of the matter

[32] *Albemarle Supply Co v Hind* [1928] 1 KB 307 (CA); *Bowmaker Ltd v Wycombe Motors Ltd* [1946] KB 505 (CA).

[33] *Albemarle Supply Co v Hind* [1928] 1 KB 307 (CA).

[34] *Mulliner v Florence* (1878) 3 QBD 484 (CA).

[35] *Broadwood v Granara* (1854) 10 Ex 417.

was expressed by Parke B who put it in terms of the duty owed by innkeepers, engaged in a common calling, to those travelling the roads of the realm. An innkeeper would not be bound to accept a piano as part of his guest's baggage any more than an innkeeper, with space in his stable only for a horse, would have to accept a carriage. No clear guidance is given by the court as to what the position would be if the guest had brought the piano with him and the hotel had willingly received it. Nor is a clear response given to the rather more important question of whether the lien could be asserted even if the innkeeper knew that his guest did not own the goods in question, whether at the time the guest arrived in the inn or at some later date. If the innkeeper does not extend credit on the faith of the guest's apparent ownership of the baggage and does not add value to it, this is an argument for construing narrowly the lien right if it conflicts with the right of a third party owner.

The difficult issue of the third party owner is carried further in *Robins & Co v Gray*.[36] An innkeeper had advance notice that sewing machines, the baggage of a commercial traveller, belonged to his employer. The court held that the innkeeper had a lien upon the machines which, in accordance with the custom of the realm, he had to receive as his guest's baggage, when the salesman left without paying his bill for board and lodging. The innkeeper is under no obligation to inquire as to the ownership of such baggage but he need not accept 'something exceptional' (Lord Esher: 'a tiger or a package of dynamite').[37] If he does accept such goods, then the lien would extend to them. According to Lord Esher, 'the question of whose property they are, or of the innkeeper's knowledge as to whose property they are, is immaterial'.[38] This very wide reading of the innkeeper's rights is justified by reference to the strict liability of the innkeeper under the custom of the realm, which goes beyond the ordinary negligence standard. At common law, the innkeeper guarantees the safety of the goods against thieves, except where the goods are lost through the fault of the traveller and the innkeeper proves that this is the case. Nevertheless, where this common law liability is

[36] [1895] 2 QB 501 (CA). [37] Ibid, 504. [38] Ibid, 505.

routinely limited in accordance with legislation,[39] it is questionable how strong the liability argument is today.

PLEDGE

Pledge is an ancient form of security that takes the form of the pledgor, a debtor, transferring possession of the pledge (the property serving as security) to the pledgee creditor. It is therefore a type of bailment.[40] Since pledge involves the pledgee retaining possession of the pledge whilst the loan remains outstanding, it is not at all a suitable security to use in connection with productive assets. A manufacturer cannot pledge machinery needed on the production line. As we shall later see, however, a variant of pledge can be used in a flexible way in connection with shipping documents used in the export trade. By and large, it would be accurate to substitute indifferently the words pawn, pawnor, and pawnee for pledge, pledgor, and pledgee. The word pawnbroker, nevertheless, connotes someone who carries on the business of making small advances against pledges. Formerly regulated by pawnbroker legislation (the Pawnbrokers Acts of 1872 and 1960) and now by the Consumer Credit Act 1974,[41] the occupation of pawnbroker is very much associated with consumer as opposed to trade credit, and moreover with debtors who are unable to obtain advances from conventional sources of lending.

Security aspects of pledge

Unlike a lienee, a pledgee is considered as acquiring a special property in the pledge.[42] For practical purposes, the pledgee's interest is therefore capable of being transferred[43] and the pledgee is also invested with a common law power of sale in the event of default by the pledgor in repaying the loan.[44] Pledge is considered as a security of intermediate strength between a lien and a mortgage.[45]

[39] Hotel Proprietors Act 1956.
[40] See *Coggs v Bernard* (1703) 2 Ld Raym 909.
[41] Sections 114, 116–21.
[42] *Carter v Wake* (1877) 4 Ch D 605; *Sewell v Burdick* (1884) 10 App Cas 74 (HL).
[43] *Donald v Suckling* (1866) LR 1 QB 585.
[44] *Ex p Hubbard* (1886) 17 QBD 699 (CA).
[45] *Halliday v Holgate* (1868) LR 3 Ex 299.

A pledgor has an absolute entitlement to redeem the pledge unless this is constrained by the contract giving rise to the pledge. In the absence of a stated time for repayment, the pledgee may give the pledgor reasonable notice of repayment (but a pawnee has a minimum six months to redeem under the Consumer Credit Act 1974)[46] in default of which the pledgee may sell the pledge. This power of sale[47] is considered to turn upon an implied authority granted by the pledgor. The pledgor therefore retains the general property in the pledge and may transfer it during the currency of the pledge agreement, with the result that the pledgee is liable in conversion for refusing to permit the pledgor's transferee to redeem the pledge.[48] Furthermore, the pledgee must account to the pledgor for any surplus realized after the debt (for pawn see the Consumer Credit Act 1974)[49] and the costs of selling have been reimbursed.[50] It has been held that the pledgee is a trustee of the surplus for the pledgor[51] so that, if this surplus is not paid to the pledgor, the pledgee will be bound in equity to pay interest to the pledgor.[52] Where a deficiency has been realized, despite the sale being a provident one, the pledgor can be sued by the pledgee for this balance.[53]

Wrongful disposition by pledgee

It is certainly the case that a pledgee who sub-pledges the chattel without the authority of the pledgor,[54] or who disposes of the pledge without giving the bankrupt pledgor notice of the intention to sell,[55] may commit a wrong in the nature of a breach of contract in so doing and so be liable in damages based on the cost of redeeming or recovering the pledge as the case may be. The courts, however, have been reluctant to treat such behaviour as repudiating the bailment underlying the pledge,[56] given that the

[46] Section 116.
[47] See Consumer Credit Act 1974, s 121, for the case of pawn.
[48] *Franklin v Neate* (1844) 13 M & W 481.
[49] Section 121(3).
[50] *Halliday v Holgate* (1868) LR 3 Ex 299.
[51] *Donald v Suckling* (1866) LR 1 QB 585, 604.
[52] *Mathew v T. M. Sutton Ltd* [1994] 1 WLR 1455.
[53] *Jones v Marshall* (1889) 24 QBD 269.
[54] *Donald v Suckling* (1866) LR 1 QB 585.
[55] *Halliday v Holgate* (1868) LR 3 Ex 299.
[56] *Cf. Fenn v Bittleston* (1851) 7 Ex 152: see chapter 2.

pledgee has a property right that is capable of being transferred. They have thus avoided the imposition on the pledgee (or on the transferee, for that matter) of liability for the full value of the chattel in the tort of conversion.[57] It should be understood that the pledgee will be successful in transferring the special property in the chattel; the pledgor can always recover the pledge from a sub-pledgee by tendering the amount owed under the sub-pledge agreement.[58] In *Halliday v Holgate*, the pledgor's assignee in bankruptcy tried unsuccessfully to maintain a conversion action without tendering the balance of the debt[59] secured by the pledge, failing because he did not have the requisite entitlement to immediate possession. It is unlikely that the pledgee will be able to transfer outright title to a *bona fide* transferee under one of the exceptions to the rule of *nemo dat quod non habet*.[60]

Pledge or mortgage

It sometimes happens that a documentary intangible is deposited with a creditor as security for the repayment of a debt without the parties to the transaction characterizing the nature of the security. In such a case, the question is whether a pledge agreement or an equitable mortgage by deposit of the document has been concluded. In the case of a mortgage, the mortgagee has a drastic remedy available which may not be exercised by a pledgee: the mortgagee may foreclose,[61] thus treating the security as his outright property and retaining any surplus realized on a subsequent sale of the security. It seems that, where a transaction of this nature can be reasonably interpreted as a pledge, a sense of judicial minimalism will result in the agreement being so characterized. In *Carter v Wake*, the documents in question were Canada railway bonds in bearer form. Since they could be manually transferred, the pledgee's power of sale adequately protected

[57] *Halliday v Holgate* (1868) LR 3 Ex 299; *Donald v Suckling* (1866) LR 1 QB 585.

[58] *Sewell v Burdick* (1884) 10 App Cas 74 (HL).

[59] Similarly, see *Donald v Suckling* (1866) LR 1 QB 585.

[60] See the exceptions discussed in chapter 6, notably mercantile agency (the pledgee does not receive as a mercantile agent) and apparent ownership (the transfer of possession is not a representation of ownership).

[61] But note that the pawnee may foreclose where the credit amount does not exceed £75: Consumer Credit Act 1974, s 120(1)(a).

the interests of the creditor. Similarly, the deposit of a bill of lading with a bank as security for an advance will, in accordance with normal commercial understanding, be treated as a pledge, though there is nothing to stop the parties from structuring the transaction as a mortgage.[62] In contrast, the deposit of share certificates that are not in bearer form, and thus less easy to dispose of without the cooperation of the depositor, will be interpreted as an equitable mortgage by deposit of title deeds giving rise to the remedies of a mortgagee rather than a pledgee.[63]

Trust receipt

Although fundamentally different from a lien, pledge is similar to it in another respect in addition to its being possession-based: it can be expressed to endure despite a temporary transfer of possession back to the pledgor. *North Western Bank Ltd v Poynter*[64] deals with a transaction common in the export trade. Goods in transit are dealt with through the medium of a bill of lading, which serves as a document of title to the underlying goods. This bill is sometimes pledged by the buyer with a bank as security for the bank's payment of the seller on the buyer's behalf. In order to obtain the goods from the carrier when the cargo is discharged, the buyer needs possession of the bill of lading and, to effect this, the bank releases the bill of lading to the buyer under the terms of a 'trust receipt'. The pledge of the bill is considered, in the light of the terms of the trust receipt, as continuing despite the release. Consequently, the bank can defeat an arresting creditor of the pledgor.[65] The buyer takes delivery of the goods from the carrier as agent for the bank and has in that capacity to account to the bank for the amount of the advance out of the proceeds of sale of the goods. The nature of the bank's interest in the proceeds is not clearly settled. It has been said to derive from a 'trust agency' and not from a charge,[66] but this conclusion seems to have been inspired by the desirability of avoiding registration provisions

[62] *Burdick v Sewell* (1884) 13 QBD 159, 173–74 (CA), *per* Bowen LJ.

[63] *Harrold v Plenty* [1901] 2 Ch 314.

[64] [1895] AC 56 (HL). See also *Lloyds Bank v Bank of America National Trust* [1938] 2 KB 147 (CA) and *Re David Allester Ltd* [1922] 2 Ch 211.

[65] *North Western Bank Ltd v Poynter* [1895] AC 56 (HL).

[66] *Re David Allester Ltd* [1922] 2 Ch 211.

impracticable in the case of a short-term transaction. It is not easily reconciled with modern reservation of title authorities. The pledgee has also been said to be the 'owner' of the goods represented by the documents, for the purpose of treating the pledgor as a mercantile agent in possession under section 2 of the Factors Act 1889,[67] but this characterization of the pledgee's interest serves only a limited purpose.

NON-POSSESSORY SECURITY

Many of the authorities on charges and mortgages involve land. They may usefully be considered in dealing with personalty apart from certain instances where the rules of personalty and realty diverge.

MORTGAGE

A mortgage is the conveyance or assignment of property by a mortgagor to a mortgagee as security for the repayment of a debt or the performance of some other obligation.[68] Whilst the mortgagor will normally remain in possession, there is no requirement that this should be so. The security may be redeemed once the debt has been paid or the obligation performed as the case may be.[69] This entitlement to redeem, or equity of redemption, may not be prevented by any term or condition in the mortgage agreement, for 'once a mortgage always a mortgage'.[70] Such an impediment to the right of redemption is known as a 'clog' on the equity of redemption.[71] The rule against clogs, nevertheless, does not give the mortgagee the right to an early redemption.[72]

[67] *Lloyds Bank v Bank of America National Trust* [1938] 2 KB 147 (CA).

[68] *Keith v Burrows* (1876) 1 CPD 722, 731.

[69] *Santley v Wilde* [1899] 2 Ch 474 (CA); *Carter v Wake* (1877) 4 Ch D 605 (payment puts a 'stop' on the conveyance).

[70] *G. and C. Kreglinger v New Patagonia Meat & Cold Storage Ltd* [1914] AC 25 (HL).

[71] A clog may also be a provision amounting to an unconscionable or penal collateral advantage accruing to the mortgagee: *Santley v Wilde* [1899] 2 Ch 474 (CA). The advantage may be permissible even if it continues beyond the mortgage term: *G. and C. Kreglinger v New Patagonia Meat & Cold Storage Ltd* [1914] AC 25 (HL).

[72] *Knightsbridge Estates Ltd v Byrne* [1940] AC 613 (HL).

A clog will be struck down even if it is part of a perfectly fair bargain between two parties who knew what they were doing, for example, where the lender was given an option to purchase debenture stock serving as security for the loan at 40 per cent within 12 months.[73]

The clogs doctrine also applies to charges, fixed or floating.[74] It has been markedly relaxed in the case of companies raising loan capital. Companies are permitted to issue debentures that are perpetual or are postponed for a very lengthy period, or made subject to a remote contingency.[75] Indeed, the doctrine of clogs on the equity of redemption has always been a more potent force in the case of land than of personalty.

It follows that the law will be astute to see that the mortgagee does not introduce artificial terms into the agreement to deny its character as a mortgage, but there is a fine line to be drawn between freedom of contract, which involves the right to be legally creative and to choose legal forms that best advance one's interests, and the enforcement of paramount legal policy, whether it be the compulsory registration of security granted by a company[76] or the particular tenderness extended by equity to mortgagors and expressed in the form of the equity of redemption. That equity intervenes notwithstanding form is borne out by the classical way in which the mortgage is drafted: an outright conveyance or assignment with a provision that this proprietary transfer will become null and void once the debt or obligation has been paid or performed.

Personalty and land

This way of expressing a mortgage is still perfectly proper and common in the case of personalty but it has not been possible in the case of land since 1925,[77] where the mortgage of an estate in fee simple can only take effect as 'a demise for a term of years

[73] *Samuel v Jarrah Timber & Wood Paving Corp Ltd* [1904] AC 323 (HL).

[74] *G. and C. Kreglinger v New Patagonia Meat & Cold Storage Ltd* [1914] AC 25 (HL).

[75] Companies Act 2006, s 739.

[76] Companies Act 2006, ss 859A *et seq*.

[77] Law of Property Act 1925, ss 85–86.

absolute subject to a provision for cesser on redemption' or as 'a charge by deed expressed by way of legal mortgage'. Since the form of an outright legal conveyance or assignment is prohibited, these statutory provisions reflect equity's maxim 'once a mortgage always a mortgage' in a way that is not the case with personalty.

Legal and equitable mortgages

Mortgages may be either legal or equitable. An equitable mortgage arises in two different forms. First of all, it may be the conveyance or assignment of property recognized only in equity, such as the interest of a beneficiary in a trust. Secondly, it may arise as a result of a failure to comply with the forms of a legal mortgage—for example, not using a deed where the law demands that a deed be executed (as it does with a mortgage of land; Law of Property Act 1925).[78] A similar case is where the parties agree by contract that a valid legal mortgage will be executed at a future time. In the case of both the defective execution and the binding agreement, equity looks on that as done which ought to be done and decrees that a valid equitable mortgage has been granted which, by the equitable remedy of specific performance, is capable of being inflated into a legal mortgage. It makes a difference, of course, whether the mortgagee's interest is legal or equitable; the interest of an equitable mortgagee is liable to be defeated by the *bona fide* purchaser of the legal estate without notice. Sometimes, a mortgagee may not be greatly concerned to exact a legal mortgage. Where there is an equitable mortgage by deposit of title deeds, it must of course be treated as equitable if the relevant legal form (for example, the registration of a transfer of shares in a company) has not been used, but it will be difficult for the mortgagor to enter into dealings with a subsequent purchaser if not in possession of the title deeds.

Future property

Returning to the equitable mortgage that arises where the property in question is equitable, an important case to consider is future property. It is not so much that equity and not

[78] Sections 52 and 85.

the common law will recognize future property; rather, only equity will give effect (eventually) to conveyances (by mortgage or otherwise) of future property. The common law refuses to recognize a conveyance of future property executed *ex ante* and demands that a fresh conveyance be executed once the property comes into existence.[79] Equity, on the other hand, will treat a purported present conveyance as a binding contract to convey, if consideration has been given for the promise,[80] and (invoking in an instrumental fashion the doctrine of specific performance)[81] will automatically convey in equity the property to the transferee once it comes into existence. The importance of this approach cannot be overemphasized for it represents the bedrock upon which companies are able to raise general finance on the security of fluctuating assets like stock-in-trade and book debts.[82] Like the waters of a river, they change constantly though the river itself remains. A landmark case is the House of Lords decision in *Holroyd v Marshall*.[83] This case concerned the mortgaging of mill machinery, including machinery brought into the mill at a future date in substitution for machinery already there. The question was whether the interest of the mortgagees in respect of that future property prevailed over subsequent execution creditors of the mortgagor. The House of Lords held that it did since, as soon as the new machinery came into the mill, it became encumbered with the mortgagee's floating equitable interest and the mortgagor held it on the terms of a trust for the mortgagee.

Charge

Like a mortgage, a charge will usually permit the grantor to remain in possession of the charged property but, unlike a mortgage, a charge involves no conveyance or assignment of an interest in the property to the grantee.[84] A charge amounts to an appropriation of property by the chargor in favour of the chargee

[79] *Lunn v Thornton* (1845) 1 CB 379.

[80] *Re Clarke* (1887) 36 Ch D 348 (CA): 'Equity does not assist a volunteer'.

[81] The usual restrictions, such as the inadequacy of damages, are not invoked.

[82] *Tailby v Official Receiver* (1888) 13 App Cas 523 (HL).

[83] (1862) 10 HLC 191.

[84] *Re Bond Worth Ltd* [1980] Ch 228*; Carreras Rothman v Freeman Mathews Treasure Ltd* [1985] Ch 207.

as security for the payment of a debt or performance of another obligation.[85] Salmond writes of a charge casting a shadow over the property in question.[86] Although the debt or obligation need not as such be paid or performed out of the charged property, given that not all charged property generates an income stream to service a debt, the chargee has the right of recourse to it in the event of a default by the chargor. If I charge my collection of law books as security for a loan, I am not bound to liquidate that collection when repaying the capital sum of the loan. There is nevertheless substantial authority that on its face requires repayment of capital out of a charged fund or identified assets in all cases, but it is best confined to the case where the chargor as a matter of contract has undertaken to do this.[87] A direction in a loan instrument to repay a loan from a particular fund or source is substantial though not conclusive evidence of a charge. A negative direction, with or without a court order to back it up, not to dispose of the contents of a fund or bank account, will not be a charge since the fund or account is not positively appropriated to the claim that is supposedly secured.[88] There is no such thing as a legal charge properly so called (except in the case of the statutory creation concerning land, a charge by way of legal mortgage)[89] for the common law has always had difficulty carving proprietary interests out of an undifferentiated bulk,[90] and property is charged, that is encumbered, only so far as is necessary to support the relevant obligation.

Evidence of charge

As a matter of evidence, it is more difficult to establish that property has been appropriated by way of charge than to show it has been conveyed by way of mortgage. Difficult issues of

[85] See *National Provincial Bank v Charnley* [1924] 1 KB 431, 449–50 (CA), *per* Atkin LJ.

[86] Fitzgerald, P., *Salmond on Jurisprudence*, 14th edn, Sweet & Maxwell, 1966, pp 428–33.

[87] *Cf. Swiss Bank Corp v Lloyds Bank Ltd* [1982] AC 584 (CA and HL); *Rodick v Gandell* (1852) 1 D M & G 763; *Palmer v Carey* [1926] AC 703 (PC).

[88] *Flightline Ltd v Edwards* [2003] EWCA Civ 63, [2003] 1 WLR 1200.

[89] Law of Property Act 1925, ss 85–86.

[90] See *Laurie and Morewood v Dudin and Sons* [1926] 1 KB 223 (CA).

construction sometimes arise in the case law. The most important case of this type is the decision of the House of Lords in *Swiss Bank Corp v Lloyds Bank Ltd*. Under now repealed exchange control legislation, a company, IFT, needed the permission of the Bank of England to borrow a sum of Swiss francs required to purchase securities in FIBI, an Israeli company. The Bank of England consent laid down detailed requirements for the loan to be serviced out of the income, and repaid from the eventual resale price, of the FIBI securities. One of the covenants in the agreement between IFT and Swiss Bank, the lender of the Swiss francs, was that IFT should observe all the conditions laid down by the Bank of England. At a later date, IFT granted a charge over its FIBI securities in favour of Lloyds Bank, in order to support a loan made by the bank to IFT's parent company. When IFT got into financial difficulties, a question arose whether IFT had granted a charge over the securities in favour of Swiss Bank, for if it had done, this charge would rank ahead of the charge given to Lloyds Bank. It was clear that the agreement between Swiss Bank and IFT, incorporating as it did the Bank of England conditions, imposed a considerable measure of control over the FIBI securities. But did that add up to a charge? The House of Lords held that it did not. Swiss Bank was concerned above all that its agreement with IFT remained lawful under UK exchange control legislation; it was stipulating for lawful as opposed to secured repayment of the loan. The clearest way to take a charge is to mention the word charge, which the loan agreement did not do in the case of the shares. Swiss Bank, moreover, had insisted that IFT maintain a substantial sum on deposit with it and had clearly taken a charge over that account. Consequently, the priority battle was won by Lloyds Bank.

In the Court of Appeal, Buckley LJ put his finger on one vital point relevant in the construction of the agreement for the purpose of discerning a charge:[91]

> [I]f upon the true construction of the relevant documents in the light of any admissible evidence as to surrounding circumstances the parties have entered into a transaction the legal effect of which is to give rise

[91] [1982] AC 584, 595, 596 (CA).

to an equitable charge in favour of one of them over property of the other, the fact that they may not have realised this consequence will not mean that there is no charge. They must be presumed to intend the consequence of their acts.

In construing an agreement, a court may be assisted by evidentiary presumptions. The deposit of documents of title by someone incurring an obligation creates a presumption that a charge was intended (at least in the case of land,[92] and pledges of bills of lading). Even if the advance is given in favour of a third party, the presumption of a charge will be drawn where there is cause and effect between the deposit of the title documents and the making of the advance to the third party.[93] If the parties create a consensual security, it will still be treated as a charge even if they call it an equitable lien, a term associated with securities arising by operation of law and usually seen in the case of sale of land. Thus, in *Re Welsh Irish Ferries Ltd*,[94] a shipowner who took from a time charterer a 'lien upon all cargoes, and upon all sub-freights for any amounts due under this charter…' was held to have acquired a charge. This decision has, however, been cogently criticized on the ground that the lien confers merely a right to step in and intercept payment without being able to follow payment into the hands of payees, hence it is akin to a seller's right of stoppage in transit and is not a property right.[95]

A contractual right to step in and take possession of defined assets does not as such give rise to a charge. It is common for construction contracts to give the employer the right to take over plant on stated events of default committed by the contractor. In *Re Cosslett (Contractors) Ltd*,[96] this right was held not to amount to a charge since the employer was not as such looking to the plant to discharge the contractor's liability. Moreover, the right to take over the plant did not secure the contractor's obligation but

[92] *Thames Guaranty Ltd v Campbell* [1985] QB 210 (CA); *cf. Burdick v Sewell* (1884) 13 QBD 159 (CA).

[93] *Re Wallis & Simmonds (Builders) Ltd* [1974] 1 WLR 391.

[94] [1986] Ch 471.

[95] See Lord Millett in *Agnew v Commissioner of Inland Revenue* [2001] UKPC 28, [2001] 2 AC 710.

[96] [1998] Ch 495 (CA).

rather enabled the employer to carry out performance itself instead of the contractor. In fact, the employer was seeking to minimize a loss flowing from the contractor's breach of contract. In the present case, however, the employer also had the right to sell the plant and apply the proceeds towards discharge of debts owed to it by the contractor. This right was held to be an equitable charge and not a possessory lien coupled with a contractual power of sale. The employer's rights were derived exclusively from the contract and not from the transfer to it of possession of the plant.

In a number of cases, charges have been inferred despite the chargee's attempt to have the relevant contractual clause drafted as a reservation of the property in goods supplied under a sale contract. Where the clause applies to the very goods supplied by the seller, the courts have generally seen no difficulty in giving effect to it in accordance with conventional sale principles,[97] even where the clause reserves the property in the goods until all sums owed to the seller are paid, and not just the contractual price of the goods themselves.[98] Where the seller, however, purports to reserve the property in the money or other proceeds of the original goods, they have in practice interpreted these clauses as creating a charge,[99] though lip service has been paid to the possibility of such clauses satisfying the drafting standard of genuine property reservation clauses.[100]

In characterizing transactions that are designed to avoid the label of a charge,[101] courts are guided by the substance of the matter. Substance here is not a matter of economic or functional impressionism. It means that the draftsman must accurately lay out the steps to be taken that are consistent with the transaction not being a charge. It is for the parties to the transaction to lay out its legal incidents but it is for the court to attach the appropriate label of charge, sale, or whatever other form is used.[102] In

[97] Sale of Goods Act 1979, s 17; see chapter 5.

[98] *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339 (HL).

[99] *Re Peachdart Ltd* [1984] Ch 131; *E. Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors* [1988] 1 WLR 150.

[100] *Clough Mill Ltd v Martin* [1985] 1 WLR 111 (CA).

[101] In order, for example, to avoid having to register under company charges legislation.

[102] *Agnew v Commissioner of Inland Revenue* [2001] UKPC 28 at [32], [2001] 2 AC 710 (referring to the difference between fixed and floating charges but of general application).

this way, highly artificial transactions, of a type that might raise the eyebrows of even a seasoned tax inspector,[103] have survived recharacterization as a charge.[104] If the draftsman, seeking to present a loan in the form instead of a sale and resale, uses the language of loan, and in addition is unable to obscure the appearance of an equity of redemption in the 'seller', the court will recharacterize the transaction as a loan secured by a charge.[105]

Mortgage and charge

The line between mortgage and charge is sometimes blurred by statute. Section 205(1)(xvi) of the Law of Property Act 1925, part of the general definition section, gives the following definition of a mortgage:

> 'Mortgage' includes any charge or lien on any property for securing money or money's worth; 'legal mortgage' means a mortgage by demise or sub-demise or a charge by way of legal mortgage....

Section 859A(7)(a) of the Companies Act 2006 defines a charge as including a mortgage.

It is common too for the line between mortgages and charges to be blurred in the case law,[106] even where the security is granted over legal as opposed to equitable property. In *Re Bank of Credit and Commerce International SA (No. 8)*,[107] the terminology of mortgage, and especially equity of redemption, is consistently applied to a charge. Some awareness of this overlap of mortgage and charge is to be seen in the judgment of Buckley LJ in *Swiss Bank Corp v Lloyds Bank Ltd* ('an equitable charge may, it is said, take the form either of an equitable mortgage or of an equitable charge not by way of mortgage'). In the case of a binding contract to mortgage property, he asserts that its specific enforceability *(scil.* to convey the legal estate) 'will give rise to an equitable

[103] The techniques used in our case closely resemble those used in tax avoidance schemes.

[104] The scheme in *Welsh Development Agency v Export Finance Co Ltd* [1992] BCC 270 (CA) is a thing of almost repellent beauty.

[105] *Curtain Dream Plc v Churchill Merchandising Ltd* [1990] BCC 341. *Cf. Re George Inglefield Ltd* [1933] Ch 1 (CA).

[106] For example, *Garfitt v Allen* (1887) 37 Ch D 48.

[107] [1998] AC 214 (HL).

charge on the property by way of mortgage'. Although the remedies differ according to whether the security is a mortgage or a charge, there is a tendency for a blurring of the two to occur where nothing really turns on the difference (as in the judgment of Buckley LJ, above). Nevertheless, a court had to face the difference squarely in *London Country and Westminster Bank v Tompkins*.[108]

The case concerned restrictions contained in a First World War statute (the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915) on the enforcement of the rights of a mortgagee under a mortgage.[109] The statute went on to provide in section 2(4) that it did not apply to 'an equitable charge by deposit of title deeds or otherwise'. In 1912, the defendant had deposited with the claimant bank the title deeds of a number of houses as security for an overdraft. The agreement stated, 'I charge all my present and future estate and interest, both legal and equitable, in all the hereditaments and other property comprised in the said deposited deeds and documents…'. The agreement went on to provide that the bank 'shall…be deemed mortgagees under this deed' and should be entitled to call for 'such further valid legal or other mortgage or mortgages by deed or otherwise…as you may require…'. It also conferred upon the bank the rights of a mortgagee in respect of the properties charged. The court concluded that the transaction fell outside the statute. One of the judges (Pickford LJ) concluded that it was a charge. The others (Bankes and Scrutton LJJ) concluded that it was an equitable mortgage that amounted to an excluded charge. According to Pickford LJ, '[T]he elaborate and drastic documents by which bankers seek to protect themselves may pass the line between mortgages and charges unintentionally'. He nevertheless concluded that the agreement did not amount to a mortgage for the purpose of the statute, since there had not yet occurred an out-and-out conveyance of the property, although he was troubled by the rather exorbitant language in the agreement. There was therefore no need, in his view, to look to section 2(4). According to Scrutton LJ, the transaction was a mortgage but the excluding words in section 2(4) meant equitable securities in the wide sense (charges and equitable mortgages). There had to

[108] [1918] 1 KB 515 (CA). [109] Section 1(4).

be 'some reason why the legislature should stay the enforcement of mortgages during the war and leave unfettered the enforcement of equitable charges'. It probably lay in the desire of the legislature not to hinder borrowers from obtaining temporary loans (such as the overdraft in the present case) from banks on deposit of security. This was reason enough for reading 'equitable charge' in section 2(4) of the statute in the wide sense to mean 'a security not intended to be of a permanent character [*viz*, an equitable mortgage or a charge] and therefore made in an informal way which needs equitable assistance to enforce it in most cases and in most respects'. This degree of judicial control over temporary security complemented the more stringent control laid down by the Act for security of a more permanent character.

Form

In general, no particular form or writing requirement is exacted in the case of a mortgage or charge of personalty.[110] Indeed, the possibility of an unwritten mortgage or charge is implicitly recognized in legislation dealing with the registration of company charges (and mortgages).[111] Bills of sale legislation, however, is replete with complexity, not least in the matter of the interplay between registration and form. It is discussed below. In one particular case, however, a mortgage of personalty will always have to be in writing, namely where it is a disposition of a subsisting equitable interest. If, however, the transaction creating the mortgage itself severs the equitable from the legal estate, then the equitable interest will not be a subsisting one and section 53(1)(c) of the Law of Property Act 1925 will not apply. A mortgage of an interest in a trust fund will obviously have to comply with the statutory form since the interest exists already as an equitable one at the time of the mortgage.

Fixed and floating charges

So far, no attempt has been made to distinguish fixed and floating charges. The above discussion is in fact predicated upon the charge being a fixed one that encumbers the assets falling within its grasp. It is in the nature of a fixed charge that the chargor

[110] *Flory v Denny* (1852) 7 Ex 581.
[111] Companies Act 2006, s 859D(1), (3).

is not at liberty to deal beneficially with the charged asset but must seek the chargee's permission if the asset is to be disposed of or transferred. An unfettered freedom to deal with assets in the ordinary course of business free from the charge is inconsistent with the charge being a fixed one.[112] Lord Millett has vividly demonstrated the limitations of fixed charges:

> [The company chargor] could not give its customers a good title to the goods it sold to them, or make any use of the money they paid for the goods. It could not use such money or the money in its bank account to buy more goods or meet its other commitments. It could not use borrowed money either, not even . . . the money advanced to it by the charge holder. In short, a fixed charge would deprive the company of access to its cash flow, which is the life blood of a business.[113]

Control of the assets by the chargee is therefore the defining feature of a fixed charge. For reasons that will be explained, however, it is possible to create a charge that in one sense is suspended but is ready to settle in a fixed way upon the assets in the event of this being necessary for the protection of the chargee's interests. This type of charge is known as a floating charge and is regarded as a present security interest,[114] although its full force may not—indeed in most cases will not—be fully felt until a future date. There is a certain vagueness about the attachment of even a fixed charge to the assets it includes; this vagueness is necessarily more pronounced in the case of a floating charge.

A floating charge is a 'dormant' security[115] that permits the company debtor to trade beneficially with the charged assets, without having to account to the chargee, until the occurrence of a default or other prescribed event that causes the charge to 'crystallize'. As Lord Macnaghten put it in *Illingworth v Houldsworth*,[116]

> A specific [or fixed] charge . . . is one that without more fastens on ascertained and definite property or property capable of being ascertained

[112] *Re Cosslett (Contractors) Ltd* [1998] Ch 495, 509–10 (CA), *per* Millett LJ.

[113] *Agnew v Commissioner of Inland Revenue* [2001] UKPC 28, [2001] 2 AC 710.

[114] *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979; *Smith v Bridgend Borough Council* [2001] UKHL 58 at [61], [2002] 1 AC 336, *per* Lord Hoffmann.

[115] *Government Stock Investment Co v Manila Railway Co* [1897] AC 81,86 (HL), *per* Lord Macnaghten.

[116] [1904] AC 355, 358 (HL).

and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

In a famous passage, Romer LJ once ascribed to a charge three attributes that would give it the character of a floating charge, though he was careful to say that some floating charges would not possess all three attributes. The charge would cover a class of assets present and future; the contents of that class would change from time to time in the ordinary course of business; and the chargor would be at liberty to carry on its business in the ordinary way until the chargee stepped in to prevent it.[117] Of these, the third attribute is the most important;[118] floating charges have been held to exist even in the case of assets that do not fluctuate at all in the ordinary course of business,[119] even a consignment of raw materials with a very short commercial life.[120]

As a matter of construction, if the charge is not clearly expressed to be fixed or floating, there is a tendency for it to be interpreted as a floating one if it covers an extensive range of assets, like the charge on 'all [the] estate, property, and effects' of the chargor.[121] The permission of the chargor is not required for ordinary course dealings with floating charge assets and would not in any case be a practical matter in relation to the trading assets and circulating capital of a company. Any attempt to comply with the requirement of permission which exists in the case of a fixed charge would paralyse the company in its day-to-day activity.[122]

The freedom given to the chargor company to deal with charged assets in the ordinary course of business is presumptively a very broad one, though as a matter of contract chargor and chargee are free to agree on an abridgement of that freedom. An ordinary course transaction has even been found in a

[117] *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch D 284, 295 (CA).
[118] *Agnew v Commissioner of Inland Revenue* [2001] UKPC 28, [2001] 2 AC 710.
[119] *Re Atlantic Computers Ltd* [1992] Ch 505 (CA).
[120] *Re Bond Worth Ltd* [1980] Ch 228.
[121] *Re Florence Land and Public Works Co* (1878) 10 Ch D 530 (CA).
[122] *Agnew v Commissioner of Inland Revenue* [2001] UKPC 28, [2001] 2 AC 710.

case where a mining company transferred its assets in a corporate restructure, leaving it as a mere financial vehicle with liquid, and therefore highly disposable, assets.[123] Contract is also central to the withdrawal of a company's freedom to deal. An event crystallizing the charge so as to remove that freedom may be one that passes the test of an implied term, such as the chargor's entry into liquidation, but it may be any event as agreed between the parties.[124]

Latterly, the limits of freedom of contract in drawing the boundary line between fixed and floating charges have been sharply demonstrated in the case of book debts and their money proceeds.[125] A fixed chargee has a priority advantage over a floating chargee in two major respects. First, a later fixed charge ranks ahead of an earlier floating charge over the same assets, provided that the fixed chargee does not have actual notice of restrictions in the debenture creating the floating charge on the creation of subsequent fixed charges.[126] The presence of some restrictions on dealing with assets is not inconsistent with the nature of a floating charge.[127] Secondly, certain unsecured creditors with a preferential ranking—namely, pension funds and employees for back wages—are given a special statutory priority that places them in front of floating chargees but not fixed chargees.[128] The same relegation of the floating chargee applies also to general creditors claiming under a limited fund carved out of floating charge assets.[129] Further relegation applies in the

[123] *Re Borax Ltd* [1901] 1 Ch 326 (CA). Another striking case is *Willmott v London Celluloid Co* (1886) 34 Ch D 147 (CA) (quorate directors authorized company to instruct its solicitors that it would submit to judgment in a debt claim brought against the company by those directors).

[124] *Re Brightlife Ltd* [1987] Ch 200.

[125] The same difficulty applies in the case of raw materials, work in progress and stock-in-trade, also assets that can be seen as part of a company's circulating capital.

[126] Provision is now made for such restrictions to be entered on the company charges register (Companies Act 2006, s 859D(2)(c)), with the distinct possibility that those who should examine the register but do not will have constructive notice.

[127] *Re Cosslett (Contractors) Ltd* [1998] Ch 495, 510 (CA), *per* Millett LJ.

[128] Insolvency Act 1986, s 386 and Sch 6.

[129] Insolvency Act 1986, s 176A.

case of the expenses incurred in the administration or liquidation of a company.[130] Since the mid-1980s, a floating charge has been characterized as such at the date of its creation,[131] so that a later crystallization, which converts the floating charge into a fixed charge, does not alter the order of priority in insolvency.

These factors have induced banks so far as possible to create fixed charges over as many assets as they can when in earlier times they would have been content to take a floating charge. After the dust has settled on numerous litigated disputes, it is now clear that a charge over book debts will be a fixed charge only if the chargee exercises control over dealings in both the book debts and their money proceeds, such as the contents of the bank account into which they are paid. It is not enough for the chargee to arrogate to itself powers of intervention that it does not in fact exercise.[132] Any attempt to separate the book debt, over which control is exercised, from its money proceeds, over which it is not, so as to take a fixed charge over just the former, will fail.[133] A book debt is only on technical grounds different from its money proceeds: 'the latter are merely the traceable proceeds of the former and represent its entire value'.[134] The book debt will therefore be treated as the subject of a floating charge in view of the freedom given to deal with its money proceeds. Since the controls needed for a lender to take a fixed charge are inconsistent with the commercial need to let a company run its business with its hands untied, this has spurred an increase in a form of asset financing, whereby a company's book debts are discounted (that is sold) to a purchasing factor, who is not subject to the above priority disadvantages.

The character of a charge as a floating one, important for priority purposes, is interesting too in conceptual terms. If a fixed charge is a shadow cast on property,[135] what are we to make of

[130] Insolvency Act 1986, ss 175 and 176ZA, Sch B1 paras 65(2), 70, and 99(3)(b).

[131] Insolvency Act 1986, s 251 (definition of floating charge).

[132] *Agnew v Commissioner of Inland Revenue* [2001] UKPC 28, [2001] 2 AC 710; *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680.

[133] Ibid.

[134] *Agnew v Commissioner of Inland Revenue* [2001] UKPC 28, [2001] 2 AC 710.

[135] Salmond, *op. cit*.

the hovering, ambulatory floating charge? The intrusion of metaphor is some evidence of a legal inability to pin down the essence of an idea that has proved very effective in organizing a security base upon which a company can both provide security to a long-term lender and carry on a normal business activity.

Charge-backs

Floating charges are not the only charges that present conceptual difficulties. These can arise from the practice of banks, indebted to customers holding deposit accounts with them, in taking a fixed charge over their own indebtedness to those customers. This is usually done to secure guarantees given by the customers in respect of advances made by the banks to third-party companies in which the customers have an interest. There are sound practical reasons for banks doing this, but it does seem odd for a bank to take a security over its own obligations, although it might well be said that this is only the mirror image of taking security over the customer's rights. Conceptual difficulties abound. For example, how can the bank enforce the charge when the usual method of enforcement of a charge, over debts owed by third parties to the chargor, involves a demand for payment on the third party? And if the charge is a mortgage rather than a charge, does not the transfer by mortgage to the mortgagee erase by merger the mortgagee's own obligation to the mortgagor? Displaying a certain impatience with theoretical problems of this nature, seen to impede commercial practicalities, the House of Lords has firmly ruled that banks may take a valid charge over their indebtedness to customers.[136]

Remedies

Both mortgagees and chargees may, where appropriate, sue on the personal covenant of the debtor to pay the agreed sum. Besides this *in personam* action in debt, however, they have certain *in rem* remedies where the debtor is in default. In the case of mortgages, these remedies are four in number. First, there is the remedy of foreclosure. Simply put, this is the lifting of the

[136] *Re Bank of Credit and Commerce International SA (No. 8)* [1998] AC 214 (HL), disapproving on this point *Re Charge Card Services Ltd* [1987] Ch 150.

mortgagor's equity of redemption, the effect of this being that the conveyance or assignment of the property in favour of the mortgagee is given full effect. This remedy is subject to various stringent controls, since it plainly works as a forfeiture. It is significant mainly in the case of mortgages of land and is here noted only in outline. Foreclosure is not a remedy for chargees: a charge involves no conveyance to the chargee so there is no outright transfer held in suspense while the chargor remains in good standing.[137]

The second remedy is to take possession of the property. In principle, a mortgage gives the mortgagee the right to enter immediately upon the property once the mortgage is executed. In practice, an invariable exercise of this right would make the mortgage largely useless as a security device so mortgage agreements will permit the mortgagor to remain in possession. The mortgagor's continuing right to stay, however, will depend upon his remaining in good standing under the mortgage agreement. It therefore follows that a mortgagor who defaults is liable to surrender this right to remain in possession. Where the mortgage is a security bill of sale for the purposes of the Bills of Sale Act 1878 (Amendment) Act 1882,[138] there arises an implied remedy of seizure (and sale) which is required by the Act to be exercised within certain limits.[139] These require the personal chattels to be held on the mortgagee's premises for five days before they are sold,[140] in order to give the mortgagor the opportunity to reinstate himself under the bill of sale. The remedy of taking possession is also denied to chargees, again for the reason that there is no conveyance or assignment of property to the chargee. Of course, it is always possible that an agreement will confer on the chargee such additional remedies. It will then become a nice question[141] whether the secured creditor is a chargee with enhanced remedies or a mortgagee by another name.

The third remedy of the mortgagee, available also to a chargee, is to sell the property. A mortgagee may take possession

[137] *Re Owen* [1894] 3 Ch 220. [138] See below.
[139] *Re Morritt* (1886) 18 QBD 222 (CA).
[140] Bills of Sale Act (1878) Amendment Act 1882, ss 7 and 13.
[141] See *London County and Westminster Bank v Tompkins* [1918] 1 KB 515 (CA).

prior to sale; a chargee, unable to take possession, will have to apply to court to sell the charged property. An application to the court will also be necessary in all cases where the assistance of the court is needed to effectuate the sale, for example, where the cooperation of the mortgagor is needed for a legal transfer of share certificates made out in the name of the mortgagor. Even if the mortgage is not contained in a deed (where the Law of Property Act 1925, section 101 confers a power of sale), there will be an implied power of sale in the mortgage instrument, exercisable on default.[142] Where the mortgage is a security bill of sale for the purpose of the Bills of Sale Act 1878 (Amendment) Act 1882, we have already seen that a right to sell may be implied under the Act. Any surplus remaining will go to the mortgagor; any deficit may be recouped, if the mortgagor has the assets to do so, by a personal action on the covenant.

The fourth remedy, again available to a chargee too, is to apply to the court for the appointment of a receiver[143] to take possession of the property, though it is almost invariably the case for the agreement giving rise to the mortgage or charge to permit the mortgagee or chargee to appoint a receiver in the name of the mortgagor without having to make a court application (oddly missing in *Cryne v Barclays Bank*).[144] Where the mortgage[145] is in the form of a deed, there is a statutory right in the Law of Property Act 1925 to appoint a receiver,[146] whose powers are set out in section 109 of that Act.

In the case of companies, a receiver, when acting in respect of at least substantially the whole of the company's assets encumbered by a floating charge or by a number of securities that include a floating charge, is known as an administrative receiver.[147] The administrative receiver, though the agent of the company debtor,[148] acts in the material interests of the secured creditor and pursuant to a mandate that requires the company's indebtedness to be discharged. The process has in the past been

[142] *Deverges v Sandeman Clark & Co* [1902] 1 Ch 579 (CA).
[143] Senior Courts Act 1981, s 37(1).
[144] [1987] BCLC 548.
[145] Or charge: see Law of Property Act 1925, s 205(1)(xvi).
[146] Section 101.
[147] Insolvency Act 1986, s 29(2).
[148] Insolvency Act 1986, s 44.

credited with preserving valuable business assets for the benefit of all creditors, though this was very much a by-product of a process designed to serve the interests of the dominant secured creditor. Because of concerns that the process gave other creditors short shrift and was less than transparent, the Enterprise Actl 2002 deprived secured creditors of the power in future to procure the appointment of administrative receivers in new cases falling outside certain statutory exceptions dealing with capital and investment market and project finance transactions.

In lieu of administrative receivership, where this was no longer permitted, a modified version of the law on administration was inserted in its place. A creditor with a qualifying charge may appoint an administrator out of court. A qualifying charge, like the one that underpinned the appointment of an administrative receiver, is a charge or charges (there must be at least one floating charge) over the whole or substantially the whole of the company's assets. There must also be consent by the chargor to an appointment by the chargee.[149] Although weak in terms of according a chargee priority, a floating charge thus remains important for the control it grants the chargee over the process of administration. It is common, however, for the company or its directors to appoint the administrator,[150] which will be done with at least the tacit compliance of the chargee.

The administrator is charged with a number of functions in hierarchical order: first, rescuing the company as a going concern; secondly, if that is not possible, achieving a better result for the creditors as a whole than would be achieved in a liquidation; and thirdly, realizing the company's property in order to make a distribution to secured and preferential creditors.[151] In the performance of those functions, the administrator has wide-ranging powers to take proceedings and conduct investigations, as well as to deal with and dispose of the company's assets.[152] The ability of secured creditors to recover outstanding moneys from the company's assets is constrained in two respects. First, it is subordinated

[149] Insolvency Act 1986, Sch B1 para 14.
[150] Insolvency Act 1986, Sch B1 para 22.
[151] Insolvency Act 1986, Sch B1 para 3(1).
[152] Insolvency Act 1986, Sch 1.

to the performance of the administrator's statutory functions, a matter that affects a fixed chargee significantly less than a floating chargee. Secondly, in order to make space for the administrator to perform those statutory functions, a statutory moratorium is introduced, the effect of which is to prevent enforcement of their property rights by secured creditors and title claimants during the conduct of the administration.[153] The administrator may seek the approval of the court to dispose of assets subject to a fixed charge or reservation of title, provided that the proceeds are made over to the chargee or owner, with any additional amount needed to bring the sum up to the value of the asset as set by the court.[154] An administrator needs no permission to dispose of floating charge assets, but the rights of the chargee automatically extend to the proceeds of that disposition.[155]

Company charges legislation

The registration of company charges was introduced in 1900 in the wake of *Salomon v A Salomon & Co Ltd*,[156] where the director of a one-man company was able to enforce a secured debenture granted to him by his company to the consternation of his unsecured creditors who had no knowledge of its existence. In the beginning, the legislation was confined to a short list of charges, which expanded over the years but until a recent modification of the Companies Act 2006[157] remained confined to a finite list. The position now is that all charges have to be registered, subject to very limited exceptions.[158]

The legislation requires that particulars of a registrable charge have to be presented to the registrar within 21 days of the creation of a charge,[159] or else it is void against a liquidator, administrator, or creditor of the company.[160] The word 'creditor' should not be taken at face value for it is only secured creditors who may individually challenge a charge for non-registration prior

[153] Insolvency Act 1986, Sch B1 para 43.
[154] Insolvency Act 1986, Sch B1 paras 72–73.
[155] Insolvency Act 1986, Sch B1 para 70.
[156] [1897] AC 22 (HL).
[157] Companies Act 2006 (Amendment of Part 25) Regulations 2013, SI 2013/600.
[158] Companies Act 2006, s 859A(1), (6).
[159] Companies Act 2006, s 859A(4).
[160] Companies Act 2006, s 859H(3).

to the chargor's entry into administration or liquidation, whereupon the insolvency office holder represents the collectivity of unsecured creditors. Permission may be granted for registration out of time,[161] but it is well settled that this should be on terms that do not prejudice intervening creditors[162] and should not be given once winding-up has commenced.[163] Actual notice of an unregistered charge, say, on the part of a competing secured creditor will not preserve the charge as against that creditor: the legislation means what it says and the integrity of the register should not be compromised by inquiries being conducted behind it.[164]

The particulars in question are essentially the names of chargor company and chargee, the date of creation of the charge, the existence and extent of any floating charge, any restriction preventing the company from granting prior ranking or equal security, and whether property entered also on a separate asset register, such as intellectual property rights and ships, is subject to the charge.[165] Since 2013, the charge instrument itself has been made available for inspection and may be consulted for details of the property charged.[166]

Difficulties sometimes arise concerning whether a transaction gives rise to a charge. Some instances have already been explored but our attention now focuses on charges that affect future property or contingently affect property. A charge has long been effective over future assets in the sense that it automatically captures them when they fall in.[167] Although it cannot be said that a charge at the time of its execution then captures future assets, it is deemed to do so for the purpose of compliance with the 21-day rule.[168] Therefore, no new 21-day period will begin to run as and when each new item of property included in the terms of the charge

[161] Companies Act 2006, s 859F.

[162] *Watson v Duff Morgan and Vermont Holdings Ltd* [1974] 1 WLR 450.

[163] *Re Ashpurton Estates Ltd* [1983] Ch 110 (CA). Or where administration with a winding-up in sight has commenced: *Re Barrow Borough Transport Ltd* [1990] Ch 227.

[164] *Re Monolithic Building Co* [1915] 1 Ch 643 (CA).

[165] Companies Act 2006, s 859D (1), (2).

[166] Companies Act 2006, s 859A(3).

[167] *Tailby v Official Receiver* (1888) 13 App Cas 523 (HL).

[168] See *Independent Automatic Sales Ltd v Knowles & Foster* [1962] 1 WLR 974. 984–85.

comes into existence. A future asset (as opposed to a contingent one) for present purposes may be described as one of a continuing class that arises regularly and predictably in the normal conduct of business. An example is a contract debt arising under a contract not yet concluded. But if an asset has a contingent rather than a future character, the charge will become registrable later, as of the date when the contingent bar is lifted and the asset is then captured by the charge. An example of a charge that has a contingent rather than a mere future character is a charge over moneys received if and when the promisor falls to be indemnified against a loss under an insurance policy.[169] Again, in a case where a director had guaranteed a bank loan to the company, and the company had undertaken to grant him a floating charge in the event of the bank calling in the guarantee, this promise by the company was contingent and therefore did not itself give rise to a charge.[170] The result was that the charge arose only when the call was made and the document executed, whereupon it fell within a legislative provision invalidating floating charges granted on the eve of insolvency.[171]

Bills of sale legislation

The principal statutes are the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882. The former statute was enacted to protect creditors misled by the apparent wealth of a debtor in possession of chattels that in reality were owned by or encumbered in favour of someone else.[172] Creditors are protected by a system of registration of bills of sale recording these transactions. The above idea of reputed ownership, extirpated from modern insolvency legislation,[173] seems quite anachronistic in the present credit-based economy. The later statute, driven by the desire to protect needy debtors from being trapped by intricate documents, deals with those documents (security bills of sale) that record security taken for the repayment of a loan. The creditor must ensure the due observance of certain forms designed to

[169] *Paul & Frank Ltd v Discount Bank (Overseas) Ltd* [1967] Ch 348.

[170] *Re Gregory Love & Co* [1916] 1 Ch 203.

[171] Now Insolvency Act 1986, s 245.

[172] *Manchester, Sheffield and Lincolnshire Railway v North Central Wagon Co* (1888) 13 App Cas 554, 560 (HL), per Lord Herschell.

[173] See the Insolvency Act 1986 and chapter 2.

protect the debtor.[174] The later statute, to the extent of its application (only security bills and not all bills), repeals *pro tanto* the earlier statute.[175] It applies to a wide range of security transactions, including mortgages and charges, but does not extend to title-reservation schemes, such as hire purchase.[176]

Scope of legislation

The definition of a bill of sale is to be found in section 4 of the Bill of Sale Act 1878 and covers a wide range of documents, many of whose names no longer possess the currency that they had in Victorian times. Bills of sale of 'personal chattels' can be summarized as either conferring a right of seizure, or conveying or granting legal or equitable interests in such chattels. For our present purposes, such documents have to serve a security function. It is important to stress that the legislation does not apply to the transaction as such but only to the document.[177] In consequence, if the transaction exists in an unwritten form, the legislation does not apply.[178] Hence if an oral agreement has already and effectively been reached, and presumably not merged in a later document, the oral agreement will stand, though it seems that the document may not be adduced as evidence of the oral agreement if it does not comply with the legislation.[179] Similarly, if the only function of a document is to record after the event a transaction fully consummated by conduct, such as a pledge,[180] it will not be struck down simply because the later document does not comply with the legislation. For practical purposes, therefore, bills of sale legislation does not extend to possessory security and would not catch an equitable mortgage arising from the deposit of documentary intangibles. In such a case, possession is given to the mortgagee. Furthermore, the legislation applies only to 'personal chattels'.

[174] *Manchester, Sheffield and Lincolnshire Railway v North Central Wagon Co* (1888) 13 App Cas 554, 560–61 (HL), *per* Lord Herschell.

[175] Bills of Sale Act (1878) Amendment Act 1882, s 15.

[176] *McEntire v Crossley Bros* [1895] AC 457 (HL).

[177] *Charlesworth v Mills* [1892] AC 231 (HL).

[178] *Newlove v Shrewsbury* (1888) 21 QBD 41 (CA).

[179] Ibid.

[180] *Ex p Hubbard* (1886) 17 QBD 699 (CA); *Johnson v Diprose* [1893] 1 QB 512, 515 (CA), *per* Lord Esher MR.

Formal requirements

The formal requirements of security bills of sale are as follows. A security bill must be attested and registered in compliance with the Bills of Sale Act 1878 within seven days of its execution or else it is void for all purposes.[181] Attestation has to be made by at least one credible witness.[182] The bill, together with an affidavit of its due execution and attestation and certain personal details concerning the maker of the bill and the witnesses, has to be filed with the registrar.[183] There must be attached to the bill a schedule listing the personal chattels comprised in it.[184] The bill itself is void if it is not made out in the form set out in the Schedule to the Bills of Sale Act (1878) Amendment Act 1882,[185] which includes a statement of the consideration for which the bill is granted, though the case law tolerates minor departures from the prescribed form.[186]

Future property

The formal requirements of security bills of sale make it difficult, indeed probably impossible, to comply with the legislation in the case of future property,[187] for it is not easy to see how such items can be listed in the schedule to the bill. For practical purposes, individuals and partnerships cannot therefore give floating charges: the legislation does not extend to security given by a company.[188]

Exceptions

It is as well that the legislation does not apply to certain forms of short-term security commonly used in the import–export trade

[181] Bills of Sale Act (1878) Amendment Act 1882, s 8.

[182] 1882 Act, s 10.

[183] 1878 Act, s 11. The registration provisions are cumbersome. In the case of security bills, they call for local registration by county court registrars, in the district where the grantor is resident, after receiving an abstract transmitted by a master of the Queen's Bench Division, where the principal register is held: 1878 Act, s 11 and 1882 Act, s 11.

[184] 1882 Act, s 4. [185] 1882 Act, s 9.

[186] For example, *Re Morritt* (1886) 18 QBD 222 (CA); *Thomas v Kelly* (1888) 13 App Cas 506 (HL).

[187] *Thomas v Kelly* (1888) 13 App Cas 506 (HL).

[188] Bills of Sale Act (1878) Amendment Act 1882, s 17.

(for example, letters of lien or of hypothecation).[189] The legislation also excludes from the definition of 'bill of sale' certain documents used in the 'ordinary course of business' to represent goods, such as bills of lading and delivery warrants.[190]

Equitable lien

An equitable lien is a non-possessory security conferred by operation of law, the legal incidents of which are similar to a charge. It differs from a charge to the extent that it is non-consensual. It is conferred in limited circumstances. By far the most common case is that of sale of land. The equitable lien of the unpaid vendor for the purchase price continues notwithstanding the purchaser moving into possession of the land. It also acts as a counterpoise to the beneficial interest in the land acquired by the purchaser as soon as contracts are exchanged to conclude a binding contract.

The principal difficulty with equitable liens lies in estimating how far they extend beyond sale of land agreements. Equitable liens have been enforced in a number of cases involving choses in action, but not in cases involving chattels.[191] It is noteworthy that, in sale of goods agreements, there has been strong resistance to the introduction of equitable proprietary ideas.[192] Less resistant to equitable proprietary ideas, Australian courts are more receptive to the role of equitable liens in personal property law.[193] A review of the cases does not indicate very clearly the principles upon which such liens will be imposed.

In *Re Stucley,*[194] a son sold to his father, the sole trustee of a trust fund, his reversionary interest in that fund. The Court of Appeal held that the son had an equitable lien for the unpaid price even though the subject matter was personalty and not

[189] Bills of Sale Act 1890, s 1; *Re Hamilton Young & Co* [1905] 2 KB 772 (CA).

[190] Bills of Sale Act 1878, s 4.

[191] *Transport and General Credit v Morgan* [1939] 2 All ER 17. But see *International Finance Corp v DSNL Offshore Ltd* [2005] EWHC 1844 (Comm), [2007] 2 All ER (Comm) 305, which is difficult to reconcile with the resistance shown to equitable proprietary rights in *Re Wait* [1927] 1 Ch 606 (CA).

[192] *Re Wait* [1927] 1 Ch 606 (CA).

[193] See *Hewett v Court* (1983) 57 ALJR 211; Phillips, J., 'Equitable Liens—A Search for a Unifying Principle', in Palmer, N., and McKendrick, E. (eds), *Interests in Goods*, 2nd edn, LLP, 1998.

[194] [1906] 1 Ch 67 (CA).

realty. Cozens Hardy LJ thought the lien should apply 'to every case of personal property in which the Court of Equity assumes jurisdiction over the subject-matter of the sale'. Thus where the purchaser of property included in a matrimonial settlement paid the price in advance to one of the trustees, he was allowed a lien over the investments purchased with the money when the other trustee later refused to consent to the sale.[195] In another case,[196] a managing director's service agreement required him to assign his shares in the company to certain individuals in the event of his contract being terminated. The price of the shares was to be calculated and paid at a later date when certain accounts were published. He was allowed an equitable lien over the transferred shares so as to secure the eventual payment of the price.

On occasion, a lien has been found where this accorded with the 'intention' of the parties, which comes close to confusing equitable liens and charges. The significance of the distinction is that certain charges (as opposed to liens) granted by companies have to be registered if the chargee's security is to be asserted against creditors of the company or their representatives.[197] The theme of intention was strongly presented in *Dansk Syndikat v Snell*,[198] where the claimants agreed to sell to Snell certain patent rights in return for a cash sum and future royalty payments. Snell sold the patent rights to a company which took them with notice of the agreement with the claimants. When Snell later repudiated his agreement with the claimants, the latter were held to have a lien (or rather an 'analogous right') over the patents for the unpaid royalties as unpaid purchase money.

Finally, an equitable lien may be imposed to give better effect to other equitable rights. In the case of loss insurance, the insurer is subrogated to the rights of the insured against wrongdoers causing the loss. The insurer's right of subrogation is reinforced by an equitable lien over damages payable by the wrongdoer to the insured, which prevents the insured from having the benefit of sums recovered by action without recouping the insurer.[199]

[195] *Barker v Cox* (1876) 4 Ch D 464.
[196] *Langen and Wind Ltd v Bell* [1972] Ch 685.
[197] Companies Act 2006, s 859H(3).
[198] [1908] 2 Ch 127.
[199] *Lord Napier and Ettrick v Hunter* [1993] AC 713 (HL).

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