

PART I

THE NATURE OF INTANGIBLE PROPERTY

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OVERVIEW OF PART I

Part I is concerned with the nature of intangible property and choses in action. Chapter 2 considers the nature and characteristics of intangible property in general terms. It begins by considering the nature of property interest generally, and where intangible property and choses in action fit in the overall spectrum of property interests recognized by English law. Chapter 2 also considers the defining characteristics of choses in action, their legal and equitable nature, and how and to what extent they can be co-owned.

Part I.01

Chapters 3 to 9 consider specific types of intangible property or chose in action, beginning with rights or causes of action (Chapter 3). The analysis begins with rights or causes of action because the term ‘chose in action’ originally applied only to a right to bring a personal action.¹ This medieval conception of choses in action expanded over time, to embrace the other types of intangible described in this book, and these are successively treated in the chapters following Chapter 3: debts (Chapter 4); rights under a contract (Chapter 5); securities (Chapter 6); intellectual property (Chapter 7); and leases (Chapter 8).

Part I.02

Finally, in this Part, Chapter 9 considers what are somewhat anomalously called ‘documentary intangibles’, which are cases where a document actually embodies a right: the right is considered in law to be ‘locked up’ in the document.²

Part I.03

¹ See para 2.56.

² See para 2.75.

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NATURE AND CHARACTERISTICS OF INTANGIBLES

A. Overview of the Chapter

Intangibles, or choses in action, are a form of property. English law prefers the label ‘choses in action’, but—for reasons that are considered later on in the chapter—that label is not entirely satisfactory. Where possible—and this is not always so¹—the term intangible property (or simply ‘intangibles’) is preferred in this book. **2.01**

Before considering how such property is created, transferred, and protected, it is necessary to consider the nature of property interests generally; to identify where intangibles and choses in action fit in the overall spectrum of property interests recognized by English law; and then to consider the characteristics that define and describe choses in action and intangibles. **2.02**

This chapter considers, in Section B, the fundamentals of property law generally, and in particular: the nature of property interests; and the distinction between rights *in rem* and rights *in personam*. **2.03**

Section C considers the English law classification of things, and the place of choses in action within that classification. As will be seen, this classification derives from the procedural law of the Middle Ages. It is a common law classification, pre-dating (and so not taking into account) the equitable rights developed by the Court of Chancery from the fifteenth century onwards. For that reason the position of equitable rights within this scheme of things is not straightforward, and needs to be considered separately. **2.04**

What is more, as the centuries have passed, the common law understanding of what amounts to a chose in action has undergone a dramatic expansion, from a narrow definition based upon the right to bring an action to the much wider definition that we have today, embracing not merely rights of action, but also rights under a contract, securities, and intellectual property rights. There are signs that this expansion has been too great to be useful in terms of classification. English law now has at least one form of intangible property that is expressly recognized to be ‘personal property’ without being a chose in action.² This difficulty, and use of the label ‘intangible’ which this difficulty invites, are also matters considered in Section C. **2.05**

¹ Thus, the case law will typically refer to a ‘chose in action’ rather than an ‘intangible’. Equally, s 136 of the Law of Property Act 1925 explicitly refers to a ‘debt or other legal thing in action’.

² Patents. See further para 7.11.

- 2.06** Choses in action have a number of defining characteristics. First, they are interests in *intangible* (as opposed to tangible) property. Secondly, they are interests in (intangible) things that are recognized by English law as constituting property. Thirdly, they are *private* (as opposed to public) law rights. Fourthly, choses in action can be either legal or equitable. Fifthly, a chose in action can either be presently subsisting or exist in the future. These characteristics are considered in Section D.
- 2.07** Finally, Section E considers the extent to which ownership in choses in action or intangibles can be shared, divided or otherwise fragmented.

B. The Law of Property

(1) The Nature of Property Interests

- 2.08** The law of property is concerned not with *things*, but rather with *interests* (or *rights*)³ in things.⁴ It is these interests that the law of property describes and defines and which—to a lawyer at least—are to be regarded as ‘property’. The distinction was described by the High Court of Australia in *Yanner v Eaton*:⁵

... ‘property’ does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of property may be elusive. Usually it is treated as a ‘bundle of rights’. But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said, that ‘the ultimate fact about property is that it does not really exist: it is mere illusion’.

- 2.09** A similar point was made by Smith J in *Eaton v Boston, Concord & Montreal Railroad*:⁶

In a strict legal sense, land is not ‘property’, but the subject of property. The term ‘property’, although in common parlance frequently applied to a tract of land or a chattel, in its legal signification ‘means only the rights of the owner in relation to it’. ‘It denotes a right over a determinate thing’. Seldon J, in *Wynehamer v The People*, 13 NY 378, p433; 1 Blackstone Com 138; 2 Austin on Jurisprudence, 3rd ed, 817, 818. If property in land consists in certain essential rights, and a physical interference with land substantially subverts one of those rights, such interference ‘takes’, *pro tanto*, the owner’s ‘property’.

- 2.10** Property rights are not so much illusory as abstract notions given legal force by a particular legal system. Whereas the *thing* itself may be (but is not always) tangible, the *interest* in (or relating to)⁷ the thing is inevitably intangible or abstract. As Gray states,⁸ where there is a transfer of ‘property’, ‘I have transferred to you not a thing but a “bundle of rights”, and it is the “bundle of rights” that comprises the “property”’.

³ The term ‘right’ is generally given a rather more specific meaning in this book: see paras 2.17–2.19. For that reason, the term ‘interest’ is generally preferred.

⁴ Lalive 1955, 5–6; Gray 1991, 252, 257–9; Lawson & Rudden 2002, 4–5, 19; Goode 2009, 27–8; Gray & Gray 2009, [1.5.4]–[1.5.5].

⁵ [1999] HCA 53 (HC Australia) at [17]. This was the judgment of the whole Court, comprising Gaudron, McHugh, Gummow, Kirby, Hayne, and Callinan JJ.

⁶ (1872) 51 NH 504 (SC New Hampshire) at 511, 1872 WL 4329 (NH) at [8].

⁷ For the purposes of this book, an interest *in* a thing is the same as an interest *relating to* a thing.

⁸ Gray 1991, 259.

Thus, what may appear at first to be a solid and concrete thing—land or an object—rapidly becomes much more complex. Whereas there may be only one *thing*, the *interests* in or relating to that thing can be multiple, and subject to a variety of owners. The point is well put by Lawson and Rudden:⁹ **2.11**

If a field is sold, or leased, or given away, or left by will, the field itself does not change at all; looking at it will not tell you whose it is. What changes is the legal relations of persons, changes expressed in the appropriate formalities. The same is true if the object is a house, a car, a cat, a share in a company, or a government bond. So one of the main difficulties the student of property law encounters at the very threshold is the presence of abstractions rather than physical objects.

Goode observes:¹⁰

Most students encountering real property law for the first time go through a period of almost total mystification. What they assumed to be a solid, immovable asset speedily dissolves into abstract tenures and estates, stretched out over an infinity of time, susceptible to peculiar rules and altogether beyond the plane of normal human existence...

Seeing the law of property too much through the prism of the *thing*, and not through the *interests* in the thing, is known as the problem of ‘reification’. ‘Reification’ refers to the description of property interests by reference to a thing, rather than to the interests in the thing.¹¹ Whilst this may be a helpful shorthand (‘that table is *my* table’), there is a risk, as in all cases of shorthand, that it can obscure more than it reveals, simply because of the varied nature of interests in property. The unnuanced assertion that ‘that table is my table’, because it fails to recognize the importance of abstract interests *in* the table, is incapable of dealing with complex matters such as priority disputes and successive interests in the property. **2.12**

What is more, reification obscures the fact that it is for a legal system to define that which it considers to be property and that which it considers not to be property.¹² If a thing is not regarded as property by a particular legal system, then (as far as that legal system is concerned) it is obviously not possible to have a property interest in that thing. If a thing *is* regarded as property in a particular legal system, then it is for that legal system further to articulate what that interest in property actually is. In short, whilst a table will physically be the same table the world over, the nature of the interests in that table will vary according to which legal system is considering the question. **2.13**

Matters are much less obscure when legal rights divorced from things are considered: a right under a contract, or a duty of care (in tort), or a fiduciary duty (in equity) are much more easily seen as incorporeal rights and obligations. It is the law of property, and not the law of obligations, that is conceptually difficult in this regard. **2.14**

(2) *An Analysis of Interests*

If our starting point is that all legal interests—including legal interests in property—are incorporeal, consisting of abstract legal relations, the question arises as to whether such **2.15**

⁹ Lawson & Rudden 2002, 4–5. See also De Soto 2001, 164: ‘The crucial point to understand is that property is not a physical thing that can be photographed or mapped. Property is not a primary quality of assets, but the legal expression of an economically meaningful consensus *about* assets.’

¹⁰ Goode 2009, 27.

¹¹ ‘Reification’ is a term coined in Gray & Gray 2009 at [1.5.4].

¹² See Bell 1989, 3–4, 13–16; Lawson & Rudden 2002, 20.

interests are susceptible of further analysis. Hohfeld recognized that ‘[o]ne of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to “rights” and “duties”, and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests, such as trusts, options, escrows, “future” interests, corporate interests, etc.’¹³

- 2.16** Hohfeld considered that simply regarding *all* legal interests as *rights*, having as their correlative *duties*, was over-simplistic and distortive of the true position. Hohfeld classified legal interests in a fourfold way. He suggested that legal interests (including interests in property) subsisted between *persons* and were capable of a fourfold classification into ‘rights’,¹⁴ ‘privileges’, ‘powers’, and ‘immunities’.¹⁵ Of course, since these interests subsist between persons, there must be a relationship between the holder (or holders) of a ‘right’, ‘privilege’, ‘power’ or ‘immunity’ and the person (or persons) in some way obliged by these interests. In other words, a legal interest will always have a correlative.¹⁶ A legal interest, in Hohfeld’s view, defines a relationship between two persons. As will be seen, in some cases Hohfeld’s emphasis on correlation is a little strained—as in the case of privileges—but for present purposes the analysis will be persisted with. It is necessary to consider the definition of Hohfeld’s fourfold classification of legal interests.

‘Rights’

- 2.17** Hohfeld considered the correlative to a ‘right’ to be a ‘duty’. It is by defining a duty that a right or claim can best be understood. A duty is ‘that which one ought or ought not to do’. A duty involves an obligation to do, or not to do, something. The correlative to a duty is a right or a claim: when a duty is violated, a right is invaded.¹⁷
- 2.18** It is, of course, possible for a right to exist, but be unfringed; or for a duty to exist, but be unbreached. The relationship exists: it is simply that nothing has happened to entitle the holder of the right to proceed legally against the person owing the duty. There is, in short, no cause of action—a concept that is considered further in Chapter 3.
- 2.19** Hohfeld coined the term *no-right* as being the opposite of a *right*. This term is, however, potentially misleading. It suggests that something exists when there is a no-right, which is not accurate. Where there is a no-right, there is *nothing*: no duty, and so no correlative right. No-right is intended to be a description of an *absence*. The concept of no-right is important when it comes to understanding privileges.

‘Privileges’

- 2.20** A privilege is the freedom or right to do something. It is, *pace* Hohfeld,¹⁸ the opposite of a duty. Suppose *A* is the owner of some land. He has the right—against the world, but for present purposes let us say *B*¹⁹—to prevent *B* from entering his property, and *B* has a duty not to enter. But as

¹³ Hohfeld 1964, 35.

¹⁴ Or, perhaps better, ‘claims’: Hohfeld 1964, 38. Here, the term ‘right’ will be used.

¹⁵ Hohfeld 1964, 36.

¹⁶ Hohfeld 1964, 36.

¹⁷ Hohfeld 1964, 38. See also *Lake Shore & MS Ry Co v Kurtz* (1894) 37 NE 303 (App Ct Indiana) at 304: ‘A duty or a legal obligation is that which one ought or ought not to do. “Duty” and “right” are correlative terms. When a right is invaded, a duty is violated’ (*per* Lotz J).

¹⁸ Hohfeld 1964, 38.

¹⁹ The nature of property rights or rights *in rem* is considered further in paras 2.31–2.38.

regards his *own* property, *A* has the privilege of entering his land. He does not have to do so—he has no *duty* to enter the land. But he may do so, without infringing someone else’s right.²⁰

In the context of privileges, it appears artificial to speak of a correlative relationship, as exists in the case of right and duty. Nevertheless, Hohfeld does identify a correlative for a privilege. On Hohfeld’s understanding, the correlative to a privilege is a no-right.²¹ Anyone who does not have the privilege has no right to prevent the privileged person from exercising his privilege. Equally, anyone who does not have the privilege has no right to do what the privileged person can do. **2.21**

It is important to appreciate the inter-relationship that can exist between rights/duties and privileges/no-rights. It may well be that my privilege to go where I please is circumscribed by the rights of others. I do have the privilege to go where I please, *provided* I do not trespass on other people’s land. This point was very well made by Lord Lindley in *Quinn v Leatham*:²² **2.22**

As to the plaintiff’s rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognised by law; its correlative is the general duty of everyone not to prevent the free-exercise of this liberty, except so far as his own liberty of action may justify him in doing so. But a person’s liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress...

Lord Lindley’s ‘liberty’ is plainly Hohfeld’s ‘privilege’.

There can be an interaction between a duty and a privilege. Suppose *A* contracts with *B* to paint the inside of *A*’s house. *B* has the privilege of entering *A*’s property, but also the duty to do so. *A* has no right to stop him and an obligation to allow him. Or, to take another example, suppose *A* grants *B* a right of way over *A*’s land. As against all the world, save *B*, *A* has the right to prevent access over his land (and the world has a duty not to enter *A*’s land). As regards *B*, *B* has the privilege of entering on *A*’s land and the right of doing so—for *A* has a duty to allow him to enter. **2.23**

‘Powers’

A power is a legal power to affect legal relations or to effect a particular change in legal relations.²³ In the words of Hohfeld:²⁴ **2.24**

²⁰ See Cave J in *Allen v Flood* [1898] 1 AC 1 (HL) at 34: ‘... it is said that a man has a perfect right to fire off a gun, when all that was meant, apparently, was that a man has a freedom or a liberty to fire off a gun so long as he does not violate or infringe any one’s rights in doing so, which is a very different thing from a right the violation or disturbance of which can be remedied or prevented by legal process’.

²¹ Hohfeld 1964, 39: ‘Passing now to the question of “correlatives”, it will be remembered, of course, that a duty is the invariable correlative of that legal relation which is most properly called a right or claim. That being so, if further evidence be needed as to the fundamental and important difference between a right (or claim) and a privilege, surely it is found in the fact that the correlative of the latter relation is a “no-right”, there being no single term available to express the latter conception. Thus, the correlative of X’s right that Y shall not enter on the land is Y’s duty not to enter; but the correlative of X’s privilege of entering himself is manifestly Y’s “no-right” that X shall not enter.’

²² [1901] AC 495 (HL) at 534.

²³ Hohfeld 1964, 51.

²⁴ Hohfeld 1964, 51–2.

Many examples of legal powers may readily be given. Thus, X, the owner of ordinary personal property 'in a tangible object' has the power to extinguish his own legal interest (rights, powers, immunities, etc) through that totality of operative facts known as abandonment; and—simultaneously and correlatively—to create in other persons privileges and powers relating to the abandoned object—eg the power to acquire title to the latter by appropriating it. *Similarly*, X has the power to transfer his interest to Y—that is, to extinguish his own interest and concomitantly create in Y a new and corresponding interest. So also X has the power to create contractual obligations of various kinds.

2.25 According to Hohfeld, the correlative to a power is a liability. In some cases, this correlation is easily recognized. For instance, *A* may have the power to make *B* bankrupt, because of a debt of £100 owed by *B* to *A*. Whilst it may rightly be said that *A* has a right to £100 from *B*, and *B* has a duty to pay that sum to *A*, *A* only has a power to make *B* bankrupt, and *B* is only under a corresponding liability. Of course, once the power is exercised, rights and duties may come into being as a consequence. To take another example, *A* and *B* may each have the power to contract with others: rights and duties will come into being when, in fact, they exercise this power, and actually enter into a contract.

2.26 However, it is perhaps difficult to press this correlative relationship between powers and liabilities too hard. As will be seen further in para 2.41, the owner of property has the power to extinguish it. In such a case, however, it is extremely difficult to identify the correlative liability that exists.

'Immunities'

2.27 Hohfeld states:²⁵

... a power bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative 'control' over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or 'control' of another as regards some legal relation.

2.28 Thus, an immunity is the opposite of a power. Where someone has an immunity, another has a disability to act in relation to that immunity.

Overview

2.29 By way of summary, Hohfeld's scheme is set out in Figure 2.1:

Interest		Correlative	(Opposite of the Interest)
Right	↔	Duty	(No right)
Privilege	↔	No right	(Duty)
Power	↔	Liability	(Immunity)
Immunity	↔	Disability	(Power)

Figure 2.1 Hohfeld's scheme of interests

²⁵ Hohfeld 1964, 60.

It is probably unwise to take Hohfeldian analyses to extremes; as has been suggested above, some of Hohfeld's correlatives are, at times, more artificial than helpful. Nevertheless, the analysis, when not taken to extremes, provides real insight into property interests. **2.30**

(3) Property Interests

English law, in common with many other legal systems, draws a distinction originally drawn by Roman law between rights *in rem* and rights *in personam* or (to avoid the Latin) between property interests and personal interests. The distinction may be expressed as the difference between *owning* something and *being owed* something. As Nicholas states:²⁶ **2.31**

The difference between owning and being owed is expressed by the Roman lawyer in the distinction between actions *in rem* and actions *in personam*. Any claim is either *in rem* or *in personam*, and there is an unbridgeable division between them. An action *in rem* asserts a relationship between a person and a thing, an action *in personam* a relationship between persons. Thus the typical action *in rem* (*rei vindicatio*) asserts that a physical thing belongs to the plaintiff, and the simplest action *in personam* (*condictio*) asserts that the defendant owes a sum of money or a physical thing to the plaintiff. The Romans think in terms of actions not of rights, but in substance one action asserts a right over a thing, the other a right against a person, and hence comes the modern dichotomy between rights *in rem* and rights *in personam*. Obviously, there cannot be a dispute between a person and a thing, and therefore even in an action *in rem* there must be a defendant, but he is there not because he is alleged to be under any duty to the plaintiff but because by some act he is denying the alleged right of the plaintiff. In a *rei vindicatio* he is denying the plaintiff's ownership by being in possession of the thing claimed. And so, our hypothetical shopkeeper can assert his ownership of his stock-in-trade by bringing an action *in rem* against any person into whose hands it may come. For example, if it is stolen he can claim it from the thief or from anyone who subsequently acquires it, whether in good faith or not. On the other hand, his right to the further supplies which he has ordered, even supposing he can identify them, is *in personam* and can therefore be asserted against no one but the wholesaler. In this way a right *in rem* may be said to be a right available against persons generally, in contrast to a right *in personam* which is available against a particular person or persons.

Hohfeld notes that the distinction between rights *in rem* and rights *in personam* is a difficult one:²⁷ **2.32**

Any person, be he student or lawyer, unless he has contemplated the matter analytically and assiduously, or has been put on notice by books or other means, is likely, first, to translate rights *in personam* as a right *against a person*; and then he is almost sure to interpret right *in rem*, naturally and symmetrically as he thinks, as a right *against a thing*. Assuming that the division represented by *in personam* and *in rem* is intended to be mutually exclusive, it is plausible enough to think also that if a right *in personam* is simply a right against a person, a right *in rem* must be a right that is not *against a person*, but *against a thing*. That is, the expression right *in personam*, standing alone, seems to encourage the impression that there must be rights that are *not* against persons.

Yet that would be incorrect thinking: for, as Nicholas noted in the passage quoted in para 2.31, there cannot be a dispute between a person and a thing: even an action *in rem* must have a defendant. Rather, the difference between rights *in personam* and rights *in rem* lies **2.33**

²⁶ Nicholas 1962, 99–100.

²⁷ Hohfeld 1964, 74–5.

in the fact that the former are against only a narrow and defined class of obligor, whereas the latter are 'against the world' or at least a far broader class of person. As Chief Justice Holmes noted in *Tyler v Court of Registration*,²⁸ '[a]ll proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected.'²⁹

- 2.34** The difference between interests *in rem* and interests *in personam* is simply this. The holder of a property interest has an interest that is capable of enforcement against an extremely broad class of person—in shorthand, 'all the world'. The interest may be said to be multi-lateral. An obligation, an interest *in personam*, is bilateral in nature: the persons affected by the right are a closely defined set of people, not 'all the world'. Essentially, the holder of a property interest has rights (used in the broadest, non-Hohfeldian, sense) against a large number of people. Thus, where *A* is the owner of property, he can assert his interest against persons in general. Of course, in proceedings, *A* will assert his interest against a specific person—the person who is infringing his interest, *B*. But *A*'s interest against *B* is simply one of 'a very large number of fundamentally similar (though separate) rights which *A* has respectively against *B*, *C*, *D*, *E* and *F*, and a great many other persons. A similar interest exists as between *A* and a large number of other persons.'³⁰
- 2.35** Hohfeld's approach has been criticized by Penner as 'a bad, though appealing, characterization of the distinction' between *in rem* and *in personam* interests:³¹

Think of property rights in a piece of land, Blackacre. If Hohfeld's description of rights *in rem* is correct, then whenever Blackacre is transferred from one person to another, everyone else in the world exchanges one duty for another. Since rights correlate with duties, when *A* sells Blackacre to *B*, all persons who previously had a duty to *A* now have a duty to *B*, since *B* now has the bundle of Blackacre rights. The alternative, and I think better, view is that no-one's but *A*'s and *B*'s rights and duties have changed. Everyone else maintains exactly the same duty, which is not to interfere with the use and control of Blackacre.

²⁸ (1900) 175 Mass. 71 (US SC) at 76.

²⁹ The question of how broad an interest must be, in terms of the number of persons affected by it, before it qualifies as an interest *in rem* is a difficult one. It is a difficulty that lies at the heart of the true classification of equitable interests, which began life purely as personal interests, but expanded so as to affect everyone except for 'Equity's darling'. The distinction between legal and equitable choses is considered in paras 2.87–2.89. The rule that an equitable interest binds everyone save for a *bona fide* purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of that prior equitable interest is considered in paras 27.29–27.43. Given the extent to which equitable rights bind third parties, it is suggested that they are properly to be classified as property interests.

³⁰ Hohfeld 1964, 76–7: 'Suppose that *A* is the owner of Blackacre and *X* is the owner of Whitacre. Let it be assumed, further, that, in consideration of \$100 actually paid by *A* to *B*, the latter agrees with *A* never to enter on *X*'s land, Whitacre. It is clear that *A*'s right against *B* concerning Whitacre is a right *in personam*. . . ; for *A* has no similar and separate rights concerning Whitacre availing respectively against other persons in general. On the other hand, *A*'s right against *B* concerning Blackacre is obviously a right *in rem*. . . ; for it is but one of a very large number of fundamentally similar (though separate) rights which *A* has respectively against *B*, *C*, *D*, *E*, *F* and a great many other persons. It must now be evidence, also, that *A*'s Blackacre right against *B* is, *intrinsically considered*, of the same general character as *A*'s Whitacre right against *B*. The Blackacre right differs, so to say, only *extrinsically*, that is, in having many fundamentally similar, though distinct, rights as its "companions". So, in general, we might say that a right *in personam* is one having few, if any, "companions"; whereas a right *in rem* always has many such companions.'

³¹ Penner 1997, 23.

It is suggested that this criticism is unjustified. Whilst Penner's may be a helpful shorthand, Hohfeld's approach—of regarding rights *in rem* as being collections of parallel rights existing between one person (the owner) and a collection of many others, is to be preferred. There are three reasons for this. First, and as has been described, interests need to subsist between people. It may well be that such interests relate to an object or a thing; but nevertheless, the substance of the interest (in terms of enforceability) is always along the lines of 'A may do such-and-such to the thing, and B may not', or 'A may require B to do or abstain from doing such-and-such an act, and B must comply' (to take, respectively, the example of a privilege and a right). **2.36**

Secondly, it must be recognized that Hohfeld's collection of interests are abstract until they are actually infringed. Until B actually walks on A's land without A's consent, A has no claim against anybody. There is simply no cause of action. As was noted earlier,³² an interest can exist, even in circumstances where it is uninfringed. In such circumstances, A may well be able to assert an interest against (eg) B, but will have no cause of action. There is, in this sense, therefore, an oddity (but a necessary oddity) in describing rights *in rem*, which perhaps makes Penner's shorthand more appealing. But the fact is, once an owner's interest has been infringed, it is immediately necessary to look to legal relations between the holder of the interest and the infringer of it. When, in fact, it is B who is infringing A's interest, it matters very little (practically speaking) that A's interest would also bind C, D, and E, who are not infringing. **2.37**

Thirdly, and finally, Penner's analysis assumes that the transfer of Blackacre from A to B occurs seamlessly and without complication. Whilst, of course, that is very much to be hoped from a legal system, the fact of messier transfers of interest must be considered. Suppose there is an imperfect transfer of certain property from A to B. It may very well be that in such a case, both A and B retain interests in that property. Indeed, as will be noted, this is precisely what occurs in the case of imperfect transfers under English law. A may well be left with a bare legal title, holding on trust for B, who has the beneficial interest and an equitable title. In such circumstances, there will be two sets of relations *in rem* between each of A and B and 'the rest of the world',³³ as well as a question of how the rights of A and B relate *inter se*. **2.38**

(4) *The Nature of Ownership*

In an essay published in 1961, Honoré sought to enumerate the various rights that might comprise the highest possible interest in a thing—that is, the 'bundle' of rights in a thing or in property that represents the highest level of interest that can be. This was an interest that he termed 'ownership'.³⁴ Drawing on his list, but without completely adopting it, these rights may be described as follows.³⁵ **2.39**

³² See para 2.18.

³³ As is explained in fn 29 the better view is that an equitable interest is *in rem* and not *in personam*.

³⁴ Honoré, in Guest 1961, ch V ('Ownership').

³⁵ Compare Lawson & Rudden 2002, 14: '... the expression "*real right*" ... is used to describe those interests which, broadly speaking, (a) can be alienated; (b) die when their object perishes or is lost without trace; (c) until then can be asserted against an indefinite number of people; (d) if the holder of the thing itself is bankrupt, enable the holder of the real right to take out of the bankruptcy the interest protected by the real right.'

The right to hold the property and to exclude others from the property

- 2.40** As Honoré notes, ‘the right to possess, *viz* to have exclusive physical control of a thing, or to have such control as the nature of the thing admits, is the foundation on which the whole of the superstructure of ownership rests’.³⁶ In the context of intangibles, it is wrong to speak of a right to possess or physical control. But, it is the essence of ownership that the owner has the right to enjoy his property exclusively; and has the ability to prevent others from enjoying it without his consent; and may recover that property from third parties, absent proper alienation to them. Honoré also suggests that one of the incidents of ownership was absence of term, that is, the right to hold the thing indefinitely.³⁷ This, it is suggested, puts matters a little too highly. For instance, patents and copyright have limited durations: but it would be wrong to say that for that reason, they could not be owned. The fact is that in the case of patents and copyright, the property by definition has a limited duration. It would, perhaps, be more accurate to say that whilst ownership does not necessarily involve rights of indefinite duration, it is a characteristic of ownership that there is no reversion.³⁸

The privilege to dispose of the property

- 2.41** The privilege to dispose of property includes the power to alienate the thing or to waste or destroy the whole or part of the thing. Clearly, since people do not typically destroy their property without reason, it is the power to alienate that is of importance here. Alienation concerns the power to transmit ownership of the thing to another, whether in whole or in part; or to create a security interest in the property so as to secure another obligation. Alienation in part, including the creation of security interests, involves the creation of lesser interests in the thing. The owner remains ‘owner’, but his interest in the thing is, as it were, fragmented, so that it cannot be said that he has the sole interest in the thing. This aspect of property—fractional ownership—will be considered further.³⁹ In essence, however, two forms of fractional ownership need to be considered: first, where separate interests in the same object exist concurrently; and, secondly, where they exist successively.

The power to use

- 2.42** The power to use the property in question is, plainly, a central feature of ownership. To an extent, it overlaps with the previous hallmark of property, since it is perfectly possible for an owner to ‘use’ his property by selling a lesser interest (eg licensing a patent to a third party).⁴⁰

³⁶ Honoré, in Guest 1961, ch V (‘Ownership’) 113.

³⁷ Honoré, in Guest 1961, ch V (‘Ownership’) 121–2 (the incident of absence of term).

³⁸ If ‘ownership’ is defined as the highest possible interest in a thing, then it follows that such an interest cannot be carved out of a greater interest. Thus, whilst leases, patents and copyright are all interests of a definite duration, a lease is carved out of a greater interest—the freehold—whereas patents and copyright are not. A lease is, therefore, properly to be regarded as a lesser interest.

³⁹ See Section E of this chapter. Fractional ownership in English law is so rooted in the nature of English property rights that it makes no sense in discussing this in the abstract. Accordingly, a more concrete discussion takes place, once the nature of English property rights have been considered.

⁴⁰ Honoré, in Guest 1961, ch V (‘Ownership’) 116 (the right to use), 116–17 (the right to manage), 117–18 (the right to the income).

Conclusion

None of the interests described above are necessarily absolute. They may be qualified in many ways. Thus, for example, the owner of a patent may be compelled to license it to another; an owner of property will be liable to have his interest taken away from him in execution of a judgment debt or on insolvency; an owner of property may be prohibited from using his property in certain ways that are perceived to be harmful to others. This is simply a consequence of the fact that property interests are a legal creation, reflecting social patterns and norms. Their nature and extent is something that is not inevitable, but determined by other, competing, interests.⁴¹ **2.43**

(5) Things Susceptible of Ownership: 'Property'

There are some things which are incapable of ownership or which are not 'propertised'.⁴² Roman lawyers drew a distinction between *res in patrimonio*—those things which were, or at any rate, could be, in the ownership of individuals—and *res extra patrimonium*—things which could not be owned.⁴³ A thing may be incapable of ownership for, it is suggested, two reasons, which may be related: because of the nature of the thing itself—that is, practical grounds; and on what may be termed moral grounds. However, it is for a legal system to define that which it considers to be property and that which it considers not to be property.⁴⁴ For instance, it has long been held that no person can have property in another human being.⁴⁵ Equally, neither the moon nor the deep seabed is property.⁴⁶ If a thing is not regarded as property then it is obviously not possible to have a property interest in that thing. **2.44**

Human bodies, the moon and the deep seabed are far removed from choses in action. Moving closer to the field of intangible property, it may well be asked whether either information or goodwill constitutes property capable of being owned. Confidential information and goodwill are often spoken of as being a form of property. Were this the case then rights in such property—the property being intangible—would (under the present English law classification) be choses in action. However, it must seriously be questioned whether confidential information,⁴⁷ goodwill,⁴⁸ knowledge, or computer programs can rightly be described as property. If they cannot, then property rights in such 'things' cannot exist. **2.45**

As has been noted, it is unlikely that the notion of what constitutes property will remain standing still. What is regarded as property is likely to develop. For instance, given concerns regarding climate change, it seems likely that at some point in the future the atmosphere is going to be propertised, with emissions being licensed (ie the right to emit certain gases into **2.46**

⁴¹ See further Harris 1995 and Harris 2002.

⁴² Gray 1991, 256. Gray notes (at 256) that '[a]lthough property law is intrinsically concerned with the allocation of resources, not all resources are—to use an ugly but effective phrase—"propertised". Contrary to popular perception the vast majority of the world's human and economic resources still stand outside the threshold of property and therefore remain unregulated by any proprietary regime'.

⁴³ Thomas 1976, 127.

⁴⁴ See Bell 1989, 3–4, 13–16; Lawson & Rudden 2002, 20.

⁴⁵ *Somerset v Stewart* (1772) Lofft 1 at 18–19, 98 ER 499 at 510 (*per* Lord Mansfield). Similarly, there is no property in a dead body: Palmer & McKendrick 1998, 27–31.

⁴⁶ See Outer Space Treaty 1967, Art 1 (ratified by all major nations); also the United Nations Convention on the Law of the Sea 1982, Arts 86–87.

⁴⁷ See further paras 7.94–7.99.

⁴⁸ See further para 7.76.

the atmosphere).⁴⁹ This sort of right may well form an important part of what is property in the future.

C. The Place of Intangibles in English Law

(1) Overview

2.47 The classification of things matters because the characteristics of particular things exert an influence on their legal treatment.⁵⁰ In this section, the classification of things (or interests in things) at common law is considered first. Thereafter, the place of choses in action and intangibles within that scheme is considered, followed by an assessment of the place of equitable interests.

(2) *The Classification of Things (or Interests in Things) at Common Law*

2.48 In civilian jurisdictions, the objects of private⁵¹ property rights are subject to the classification depicted in Figure 2.2.⁵²

2.49 Although this is a classification used in most civil law countries, it is not that used in common law countries, except in the context of private international law.⁵³ The civilian classification looks to the substance of the *thing* itself: in other words, the classification is based on the thing, not the rights in the thing. By contrast, the common law classification derives from the procedure (or ‘action’) by which *interests* or *rights* in things were enforced. The procedure in question is not that of the modern law, but that of the Middle Ages.⁵⁴

2.50 According to this procedure, the common law allowed actions for the specific recovery of the thing itself. These actions were called *real actions*.⁵⁵ Not all property could be the subject of a real action. Essentially, a real action could be brought only in respect of freehold land,

⁴⁹ Indeed, a sophisticated carbon emissions trading market has already been established in Europe: see EC Directive 98/70, amended [2009] OJ L140/88.

⁵⁰ See, for instance, Marshall 1950, 2–5.

⁵¹ Civil jurisdictions distinguish between private and non-private things. See Birks & McLeod 1987, [2.1]: ‘[*principium*] After persons in the previous book, we turn to things. They are either in the category of private wealth or not. Things can be: everybody’s by the law of nature; the state’s; a corporation’s; or nobody’s. But most things belong to individuals, who acquire them in a variety of ways, described below’ (Birks & McLeod 1987).

⁵² Lalive 1955, 6; Bell 1989, 19; Birks & McLeod 1987, [2.2]: ‘[*principium*] Some things are corporeal, some incorporeal. 1. Corporeal things can actually be touched—land, a slave, clothes, gold, silver, and of course, countless others. 2. Incorporeal things cannot be touched. They consist of legal rights—inheritance, usufruct, obligations however contracted. It is irrelevant that an inheritance may include corporeal things. What a usufructuary takes from the land will also be corporeal. And what is owed to us by virtue of an obligation is usually corporeal, such as land, a slave or money. The point is that the actual right of inheritance is incorporeal, as is the actual right to the use and fruits of a thing, and the right inherent in an obligation.’

⁵³ *Re Hoyles* [1911] 1 Ch 179 (ChD) at 183: ‘The terms “movables” and “immovables” are not technical terms in English law, though they are often used, and conveniently used, in considering questions arising between our law and foreign systems which differ from our law’ (*per* Cozens-Hardy MR); also at 185: ‘In such cases . . . in order to arrive at a common basis on which to determine questions between the inhabitants of two countries living under two systems of jurisprudence, our Courts recognise and act on a division otherwise unknown to our law into movables and immovables’ (*per* Farwell LJ).

⁵⁴ Bell 1989, 19.

⁵⁵ Deriving from the Latin for thing, *res*. Real actions were abolished in 1833 by s 36 of the Real Property Limitation Act 1833.

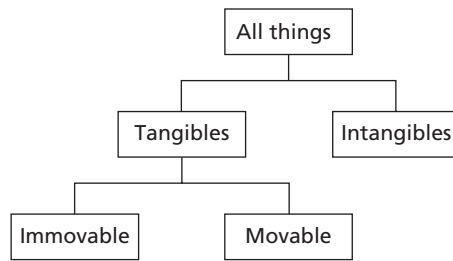


Figure 2.2 The civilian classification of things

and accordingly such land was classified as *real property* or *realty*.⁵⁶ All other actions were *personal*. These actions did not entail the recovery of the thing itself by a successful claimant; instead, the claimant had a remedy against the defendant personally, and not over the specific property in that defendant's hands. Property in relation to which only a personal action could be brought was *personal property*.⁵⁷

The distinction drawn by the English common law between real and personal property is not the same as the distinction between movable and immovable property drawn in civilian jurisdictions. Real property, or realty, describes all common law interests in land other than leases. Leases, for purely historical reasons, were never real property because (as a matter of history) they could not be the subject of a real action. Personal property, or personalty, describing as it does interests in everything that is not real property,⁵⁸ is thus a wider concept than the concept of movable property under the civilian classification.⁵⁹ 2.51

Personalty is itself capable of further sub-classification. In the first place, leases of land (but not leases of other things, like aircraft) are classified (by themselves) as 'chattels real'. All other interests in personal property are divided into two, mutually exclusive, categories: interests in choses in possession and interests in choses in action. In the words of Fry J, in *Colonial Bank v Whinney*, 'all personal things are either in possession or in action. The law knows no *tertium quid* between the two.'⁶⁰ A chose in action thus comprises interests in all personal chattels that are not in possession.⁶¹ Put another way, a chose in action describes all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession.⁶² 2.52

Thus, the common law classification of interests in property is as shown in Figure 2.3. 2.53

⁵⁶ Technically, realty extended beyond interests in land. Chattels within the category of heirlooms, advowsons, tithes, franchises, and offices and dignities were also real property: *English Private Law* 2007, [4.15]. For present purposes, however, these are details that do not need to be gone into.

⁵⁷ Lalive 1955, 7; Bell 1989, 19; *English Private Law* 2007, [4.14]–[4.16].

⁵⁸ Lawson & Rudden 2002, 13; *English Private Law* 2007, [4.15]–[4.16].

⁵⁹ Blackstone (Vol II) 1766, Ch 24, esp 385: 'But things personal, by our law, do not only include things *moveable*, but also something more. The whole of which is comprehended under the general name of *chattels*...'

⁶⁰ Per Fry LJ in *The Colonial Bank v Whinney* (1885) 30 ChD 261 (CA) at 285.

⁶¹ Per Lord Blackburn in *The Colonial Bank v Whinney* (1886) 11 App Cas 426 (HL) at 440.

⁶² Per Channel J in *Torkington v Magee* [1902] 2 KB 427 (KBD) at 439; reiterated in *Munrungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015 (CA) at [44] (*per* Lewison J).

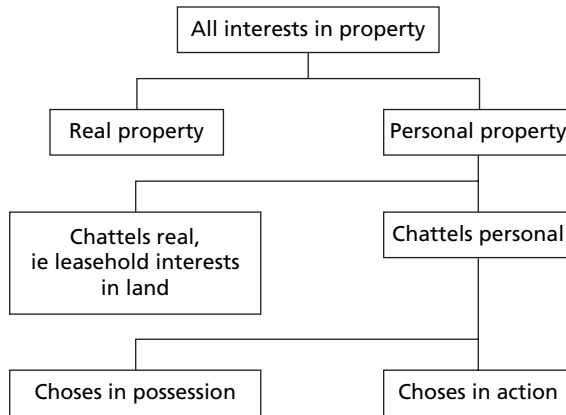


Figure 2.3 The English common law classification of interests in things

2.54 In short, the common law and the civilian methods of organization are fundamentally different. The civilian classification relates to things and not to interests in things; the common law classification is the precise converse. The civilian classification draws a fundamental distinction between tangible and intangible property, and then sub-divides the former into two classes of thing, movable and immovable. The common law classification draws a fundamental distinction between real and personal property, and then sub-divides the latter into two classes of thing, choses in possession (or chattels) and choses in action.

(3) *Definition of a Chose in Action*

2.55 The definition of a chose in action as comprising all rights which can only be claimed or enforced by action is an unhelpfully wide one. It embraces a large number of dissimilar rights—in Holdsworth’s words, a ‘great mass of miscellaneous rights’—which differ from one another in their essential characteristics. The reason for this wide conception of choses in action is historical.

2.56 Within the medieval common law division of actions into real actions and personal actions,⁶³ the term chose in action was originally applied to a right to bring a personal action.⁶⁴ The term referred to a right of action, and nothing more.⁶⁵ Personal actions were regarded as involving the assertion of rights that were personal as between claimant and defendant;⁶⁶ and because of this personal nature, such rights were considered inalienable, forbidding the substitution of any new party in the place of the claimant.⁶⁷

⁶³ See para 2.50.

⁶⁴ Holdsworth (Vol 7) 1925, 519.

⁶⁵ Sweet 1894, 304.

⁶⁶ There is, terminologically, an unfortunate duality in the use of the term ‘personal’: (i) a *personal action* refers to an action that is not a real action; and (ii) such an action can be personal because of the nature of the rights being asserted by the claimant against the defendant. Here, choses in action was the label applied to personal rights of action in the first sense, which were regarded as non-transferable because they were personal in the second sense.

⁶⁷ Holdsworth (Vol 7) 1925, 520–1: ‘... But it is clear that a personal action, brought either on a contract or a tort, is an essentially personal thing...’; Sweet 1894, 306. The bar on alienation was initially so strong that such rights could not even be left by will. It was with difficulty, and only gradually and partially, that personal rights of action were allowed to pass by operation of law to the representatives of a deceased person.

As the common law developed, however, it became apparent that certain actions were, in substance, actions to recover property (eg the actions of detinue and of trespass). The rights being enforced by the claimant against the defendant by way of such actions were not personal as between the claimant and the defendant, and the bar on the alienation of such rights by the claimant was accordingly much less easy to justify.⁶⁸ It might have been expected that such rights would come to be regarded as something more than a mere personal chose in action, and that they would develop into transferable rights of property.⁶⁹ But that did not occur. Instead, such rights of action continued to be regarded as choses in action, and (as such) as incapable of transfer. Thus, the concept of a chose in action expanded from rights which were personal as between claimant and defendant to include rights of action which could not properly be regarded as essentially personal. As a result, rights of action which were incidental to ownership of property, like detinue and trespass, were not treated as transferable (unlike the property to which they were incidental).⁷⁰ In this way, the common law conception of a chose in action came to extend even to rights which depended upon a claim to the ownership of property, even real property.⁷¹ **2.57**

Although a distinction was initially maintained between a right of action incidental to the ownership of a chattel, and a right of action incidental to the ownership of land, the latter being labelled a 'chose in action real',⁷² all these rights of action were treated by the law in a similar manner. This fact, coupled with the disuse of the real actions,⁷³ soon obliterated the distinction between real and personal choses in action. Thus, the common law conception of a chose in action came to include *all* rights of action, whether enforceable by real or personal action, and whatever the nature of the right being asserted.⁷⁴ **2.58**

The concept of a chose in action was still, however, limited to *rights in action*. There are many rights which, whilst they undoubtedly exist, do not give rise to a right of action by a claimant against a defendant.⁷⁵ At this time, a chose in action meant nothing more than a right which a person was entitled to enforce by bringing an action. Thus a present debt was a chose in action, whereas a debt payable *in futuro* was not. Similarly, a claim for breach of contract was a chose in action, whereas a right under a contract was not. As a result, there was a distinction drawn between infringed and uninfringed interests, of the sort articulated in para 2.18. **2.59**

During the sixteenth century, however, the conception of a chose in action underwent another expansion, so as to include not merely the right to bring an action but also the documents which were the necessary evidence of such a right.⁷⁶ This was a significant **2.60**

⁶⁸ That said, *some* justification for a prohibition on the transfer of such rights could still be discerned, and this informed the too-broad common law rule against assignments: see paras 10.04–10.09 and Sweet 1894, 306.

⁶⁹ How this might have occurred is obviously a matter for speculation. Had English law moved along these lines, a new class of property might have evolved; or the bar on the transferability of certain things, still labelled 'choses in action', might have been lifted.

⁷⁰ Holdsworth (Vol 7) 1925, 521–2, 525.

⁷¹ Holdsworth (Vol 7) 1925, 526.

⁷² Holdsworth (Vol 7) 1925, 527.

⁷³ Although abolished in 1833 (see n 55), these actions had been in decline long before this date.

⁷⁴ Holdsworth (Vol 7) 1925, 527.

⁷⁵ The distinction is very clearly explained in Sweet 1894, 303.

⁷⁶ In 1535, a bond was said to be a chose in action: Holdsworth (Vol 7) 1925, 527. In 1584 it was said that charters and evidences concerning freehold or inheritance, obligations, and other deeds and specialities all came under this head: *Calve's Case* (1572–1616) 8 Co Rep 32 at 33a, 77 ER 520 at 523.

conceptual change in the understanding of a chose. When the law had reached this point, it was inevitable that the many new documents, which the growth of the commercial jurisdiction of the common law courts was bringing to the notice of the common lawyers, should be classed in this category. Thus, documents such as stock, shares, policies of insurance, and bills of lading came to be regarded as choses in action.⁷⁷ Clearly, there was a tendency in the sixteenth century to regard almost any right to an intangible as a chose in action.⁷⁸ As a result, rights that were neither rights of action nor the documentary evidence of rights—such as contractual rights or debts *in futuro*—came to be regarded as choses in action too.⁷⁹

- 2.61** When, in the eighteenth century, incorporeal property such as patents and copyrights came to be considered, it was almost inevitable that they too came to be classed as choses in action. They were clearly not choses in possession; and they were analogous to other things already classed as choses in action.⁸⁰ Thus, English law came to the position that choses in action embraced a wide-ranging and diverse set of interests.

(4) ‘Choses in Action’ and ‘Intangibles’

- 2.62** There is a tension between the original meaning of the label ‘chose in action’, and the property that now falls under that classification. The term chose in action, with its emphasis on enforcement, is perfectly apposite to describe the right to bring a claim, or a cause of action. It is rather less apposite to describe the wide range of other rights that are also known as choses in action. In particular, it is inappropriate when the right in question exists, but does not give rise to a cause of action, as where a right under a contract has not been breached, or where a patent is not infringed. This inappropriateness appears to have been recognized, in the case of patents, by s 30 of the Patents Act 1977, which provides that a patent, and an application for a patent, whilst amounting to personal property, are not choses in action.
- 2.63** The approach of s 30 raises the difficult question—presently unanswered by English law—as to what, exactly, a patent is.⁸¹ It was suggested above that the classification of things matters because the characteristics of particular things exert an influence on their legal treatment. Unless one has a ‘map’ of the law of property, it is difficult properly to understand it. Clearly, it is unsatisfactory for an important class of property, like patents, simply to float as a *sui generis* class of property.

⁷⁷ How stock and shares came to be regarded as choses is obscure, and is considered in Sweet 1894, 311–14.

⁷⁸ Holdsworth (Vol 7) 1925, 527–8.

⁷⁹ Sweet 1894, 303–4.

⁸⁰ Holdsworth (Vol 7) 1925, 529–30. On intellectual property rights as choses in action, see: Sweet 1894, 316–17; Williams 1895; Sweet 1895. Elphinstone 1893, 314 denies that intellectual property rights amount to choses in action on the grounds that unless infringed, the owner has no right of action. This approach, whilst no doubt sound in the sixteenth century, fails to take account of the expansion in the conception of choses in action described in para 2.60. Brodhurst 1895 concludes that intellectual property rights are choses in possession, but this is based on a distinction between rights of action and chattels that is difficult to defend: see Brodhurst 1895, 69, where it is contended that because a right of action claiming a horse is a chose in action, so must the horse be.

⁸¹ See para 2.62.

There is much to be said, therefore, for assuming a civilian classification, and referring to ‘intangibles’ rather than ‘choses in action’. Of course, English law has developed as it has, and the label ‘choses in action’ cannot simply be jettisoned. But in terms of analysis, the civilian classification and the ‘intangible’ label are worth bearing in mind. **2.64**

(5) Equity and the Classification of Things

So far, only the common law classification of things (or, more precisely, interests in things) has been considered. Equitable rights add a further layer of complexity to the picture. Maitland considered that:⁸² **2.65**

we ought to think of equity as a supplementary law, a sort of appendix added on to our code, or a sort of gloss written round our code, an appendix, a gloss, which used to be administered by courts specially designed for that purpose, but which is now administered by the High Court of Justice as part of the code. The language which equity held to law, if we may personify the two, was not ‘No, that is not so, you make a mistake, your rule is an absurd one, an obsolete one’; but ‘Yes, of course that is so, but it is not the whole truth. You say that A is the owner of this land; no doubt that is so, but I must add that he is bound by one of those obligations which are known as trusts.’

A consequence of Maitland’s point is that it is actually rare for there to be a conflict between the rules of equity and the rules of common law.⁸³ One instance where an apparent conflict resolves itself on analysis is the notion of concurrent common law and equitable ownership in a thing:⁸⁴ **2.66**

Let me take an instance or two in which something that may for one moment look like a conflict becomes no conflict at all when it is examined. Take the case of a trust. An examiner will sometimes be told that whereas the common law said that the trustee was the owner of the land, equity said that the *cestui qui trust* was the owner. Well here in all conscience there seems to be conflict enough. Think what this would mean were it really true. There are two courts of co-ordinate jurisdiction—one says that A is the owner, the other says that B is the owner of Blackacre. That means civil war and utter anarchy. Of course the statement is an extremely crude one, it is a misleading and a dangerous statement—how misleading, how dangerous, we shall see when we come to examine the nature of equitable estates. Equity did not say that the *cestui qui trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui qui trust*. There was no conflict here. Had there been a conflict here the clause of the Judicature Act which I have lately read would have abolished the whole law of trusts. Common law says that A is the owner, equity says that B is the owner, but equity is to prevail, therefore B is the owner and A has no right or duty of any sort or kind in or about the land. Of course the Judicature Act has not acted in this way; it has left the law of trusts just where it stood, because it found no conflict, no variance even, between the rules of common law and the rules of equity.

⁸² Maitland 1936, 18; Snell 2010, [1–003] and [1–012]; note that the words ‘gloss’ and ‘appendix’ should not obscure equity’s capacity to develop sophisticated doctrines of its own. See also the analysis of the inter-relationship between legal and equitable rules in Worthington 2006, 3–7.

⁸³ Section 25 of the Judicature Act 1873 identified and dealt with only nine specific instances of divergence between the rules of law and the rules of equity. The section concludes: ‘Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail.’ There are remarkably few instances of such variance: Maitland 1936, 16.

⁸⁴ Maitland 1936, 17–18.

In other words, the equitable rules do not alter the common law rights of property; rather, they determine for whose benefit these rights are to be exercised. As Greene LJ stated in *Lever Bros Ltd v Kneale and Bagnall*,⁸⁵ ‘the remedies which the Courts of Equity gave were specific remedies which were enforced *in personam*’. That ‘equity acts *in personam*’ is one of the maxims of equity, and it is reflected in the manner in which judgments are enforced.⁸⁶

2.67 How are equitable rights to be classified?⁸⁷ Clearly, equitable rights cannot be real property—even if they relate to land—because (as a matter of history) they were never enforceable by way of a real action. They must, therefore, be classified as personalty. What is more, because equity acts *in personam*, an equitable right cannot be enforced by taking physical possession; it can be claimed or enforced only by action. It follows that all equitable rights are most appropriately classified as choses in action.⁸⁸ In the eyes of the common law, equitable rights were always regarded as choses in action. Thus, Coke states:⁸⁹

Secondly, it was resolved by all the justices, that admitting that Sir Thomas Heneage had a trust, yet could he not assign that same over to the plaintiff, because it was a matter in privity between them, and was in the nature of a chose in action... and if a bare trust and confidence might be assigned over great inconvenience might thereof follow by granting of the same to great men &c.

This passage is cited by Holdsworth, who concludes:⁹⁰

... the common lawyers of that period had no hesitation in ascertaining that at common law an equitable trust consisted only ‘in privity’, was unassignable on account of the risk of encouraging maintenance, and was therefore in the nature of a chose in action. But inasmuch as the incidents of such interests are shaped by equity, the fact that they are at law classed as choses in action has had very little influence on their development.⁹¹

D. The Nature and Characteristics of Choses in Action

(1) Overview

2.68 The fact that the definition of a chose in action has evolved over the centuries to embrace a wide range of miscellaneous interests makes a rational and coherent classification difficult.⁹² An historical approach, commencing with causes of action, and then moving on to consider in turn the other interests that subsequently came to be classified as choses

⁸⁵ [1937] 2 KB 87 (CA) at 94.

⁸⁶ See eg Snell 2010, [5–33]. ‘A judgment of the common law courts was enforced by one of the ordinary writs of execution by means of which the claimant was forcibly put into possession of the property to which he was entitled under the judgment. But the Court of Chancery, originally at any rate, did not interfere with the defendant’s property, but merely made an order against the defendant personally...’. Equitable rights in property came to have the appearance of rights *in rem*, enforceable against all third parties except for ‘equity’s darling’: see n 29.

⁸⁷ It is, inevitably, odd to apply a common law classification of property to rights arising out of a different jurisdiction. But that is a consequence of the duality of legal systems that characterizes English law.

⁸⁸ See Holdsworth (Vol 7) 1925, 516.

⁸⁹ Coke 1809, 85. See also Holdsworth (Vol 7) 1925, 516: ‘Uses, trusts and other equitable interests in property, though regarded by equity as conferring proprietary rights analogous to the rights recognized by law in hereditaments or in chattels, were regarded by the common law as being merely choses in action.’

⁹⁰ Holdsworth (Vol 7) 1925, 531.

⁹¹ See also *Pigott v Stewart* [1875] WN 69.

⁹² The historical development of the concept is traced in paras 2.55–2.61.

in action, is not only unhelpful, but also raises extremely difficult (and, in many cases, unresolved) questions of legal history.⁹³

Choses in action can most satisfactorily be classified under six heads:

2.69

- (1) Rights or causes of action.
- (2) Debts.
- (3) Rights under a contract.
- (4) Securities.
- (5) Intellectual property.
- (6) Leases.

These heads reflect the range and diversity of interests that comprise choses in action. They are considered in detail in Chapters 3 to 8.

Identifying the different types of chose in action or intangible in existence matters. Different issues arise in relation to different types of chose. Thus, by way of example, the rules of champerty and maintenance really only apply to the assignment of causes of action.⁹⁴ Equally, the rule that only benefits and not burdens can be transferred is principally of importance in the context of rights under contracts.⁹⁵

2.70

Nevertheless, choses in action have a number of common defining characteristics which are explored in the following paragraphs:

2.71

- (1) Choses in action are interests in intangible things.
- (2) Choses in action are interests in things recognized by the law as property.
- (3) Choses in action are private law rights.
- (4) Choses in action can be either legal or equitable.
- (5) Choses in action can be either present or future.

(2) *Choses in Action are Interests in Intangibles*

It is possible to describe a chose in action in a single sentence: a chose in action ‘describes all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession.’⁹⁶ It follows that because the rights in a chose cannot be enforced by taking physical possession, the essence of a chose in action is that it is a right or interest in an intangible.⁹⁷

2.72

Rights in intangibles are themselves capable of further classification, into rights in ‘pure’ intangibles and rights in ‘documentary’ intangibles.

2.73

⁹³ For instance, the process by which shares came to be regarded as choses in action.

⁹⁴ See Chapter 23.

⁹⁵ See Chapter 21.

⁹⁶ *Per* Channell J in *Torkington v Magee* [1902] 2 KB 427 (KBD) at 439; cited in *Munrungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015 at [44] (*per* Lewison J). See also Lawson & Rudden 2002, 30: “The older books use the phrase as one of a pair: there are “choses in possession” which you can touch; and “choses in action” which are yours but which you cannot take hold of”. Elphinstone 1893, 311–12 and Marshall 1950, 6–7 set out a number of definitions from various sources, but the definition of Channell J has come to be accepted as authoritative. Given the evolution in the meaning of the concept, it is dangerous to rely on older definitions of the term chose in action. See also Elphinstone 1893 and Sweet 1894 on the meaning of the term.

⁹⁷ There was, at one time, a suggestion that the right of an owner of a tangible thing out of possession was a chose in action: Elphinstone 1893, 312–13; Marshall 1950, 8–16. But that view, if it ever was right, has long since ceased to be accepted.

Pure intangibles

- 2.74** A right in a pure intangible is just that: a right in a thing that is intangible.⁹⁸ Even if such right had a documentary embodiment (eg because the interest had been recorded in writing), the right is not in law represented by the document. Instances of pure intangibles are ‘receivables’ (ie money obligations) and rights under a contract.

Documentary intangibles⁹⁹

- 2.75** Documentary intangibles are conceptually more difficult, and present problems in terms of classification. Documentary intangibles are instances where the document *embodies* a right. The feature characterizing a documentary intangible is that a right is considered in law to be locked up in the document.¹⁰⁰ Thus, for example, the transfer of a bill of exchange—which occurs by delivery of the bill¹⁰¹—causes a change in the obligations of the parties to the bill: in particular, the new holder of the bill becomes entitled to demand payment from the drawee.¹⁰² Similarly, shares can be made transferable to bearer by way of a share warrant. The share warrant entitles the bearer to the shares specified in it.¹⁰³ Thus, in the case of documentary intangibles, the *document* is essential to the right, and it is the transfer of the document that is critical to the transfer of the right.
- 2.76** Documentary intangibles must be distinguished from documents which do not embody actionable rights but which merely control the giving of constructive possession. A bill of lading provides a good example of this distinction. A bill of lading evidences¹⁰⁴ the contract of carriage between a carrier of goods and (typically) the owner of the goods being carried. By s 2(1) of the Carriage of Goods by Sea Act 1924, a person who becomes a lawful holder of the bill of lading ‘shall (by virtue of becoming the holder of the bill . . .) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract’. Thus, the transfer of the bill of lading effects a transfer of an intangible (the rights of action under the contract of carriage) from the original holder to the new holder. This is a good example of a documentary intangible.
- 2.77** Another function of a bill of lading is to ‘represent’ the goods on board the ship. Bowen LJ described this function in *Sanders v Maclean*:¹⁰⁵

A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading, by the law merchant, is universally recognised as its symbol and the indorsement and delivery of the bill of lading operates as a symbolic delivery of the cargo.

⁹⁸ Goode 2009, 51; Lawson & Rudden 2002, 36.

⁹⁹ Documentary intangibles are considered in detail in Chapter 9.

¹⁰⁰ Bell 1989, 384; Lawson & Rudden 2002, 31–2; Goode 2009, 52.

¹⁰¹ With or without indorsement.

¹⁰² Bills of exchange are considered in paras 9.16–9.24.

¹⁰³ ‘Bearer’ shares are considered in paras 9.30–9.31.

¹⁰⁴ A bill of lading is not the contract but only the evidence of the contract: *Crooks v Allen* (1879) 5 QBD 38 (QBD) at 40–1 (*per* Lush J); *The Ardennes* [1951] 1 KB 55 (KBD) at 59–60 (*per* Goddard CJ); *Cho Yang Shipping Co Ltd v Coral (UK) Ltd* [1997] 2 Lloyd’s Rep 641 (CA) at 643 (*per* Hobhouse LJ).

¹⁰⁵ (1883) 11 QBD 327 (CA) at 341.

Thus, whilst the transfer of the bill serves to operate as a symbolic transfer of possession, the bill of lading does not embody actionable rights to the goods. Such documents are not documentary intangibles,¹⁰⁶ and cannot be regarded as choses in action.¹⁰⁷

Is a documentary intangible a chose in action? Documentary intangibles undoubtedly embody rights that would otherwise be regarded as choses—namely, rights to personal chattels not in possession and enforceable only by action. The difficulty is that these rights are embodied in a *physical thing* which, as has been described, is critical to the enforcement and transfer of such rights. The predominant view is that documentary intangibles *are* choses in action,¹⁰⁸ but it certainly cannot be said that the question has been conclusively resolved one way or the other. In principle, the better view is that the legal fiction that the document actually embodies the rights in question compels the conclusion that the rights represented by documentary intangibles are choses in possession and not choses in action. The fiction that the physical piece of paper itself embodies the rights is one that is so entrenched in English law that it must be accepted as determinative.¹⁰⁹ The physical piece of paper can undoubtedly be claimed or enforced by taking physical possession,¹¹⁰ with the result that it may be pledged.¹¹¹ The manner in which the rights embodied in the documentary intangible are transferred is by way of delivery (with any necessary indorsement). The person entitled to possession of the document is protected by the same tort remedies (eg conversion)¹¹² as are available to protect

2.78

¹⁰⁶ In the sense defined in para 2.75. Usage of the term varies. Goode, for instance, whilst acknowledging the point, does describe documents which merely evidence possession as 'documentary intangibles': Goode 2009, 52.

¹⁰⁷ This is because a right to a thing is not transferred. At most, what is transferred is the ability to demonstrate such a right (ie possession). But even if such documents were capable of transferring a right in goods, they would not amount to choses in action. This is because a chose in action describes personal rights of property which can *only* be claimed or enforced by action, and not by taking physical possession: see para 2.55. Clearly, a right over goods *can* be enforced by taking physical possession.

¹⁰⁸ eg Richardson 1991, [2.11]–[2.12]; Holdsworth (Vol 7) 1925, 516, 527–8. The case law does not expressly consider the point, but a number of authorities appear to have proceeded on the assumption that a bill of exchange (a typical documentary intangible) is a chose in action. See, for instance, *Hornblower v Proud* (1819) 2 B&A 327 at 331–2, 106 ER 386 at 388: 'It has been held, that debts are within that statute; if so, *a fortiori* bills of exchange must be so' (per Abbott CJ), at 374, 389: 'Now bills of exchange as it appears to me, are goods and chattels within the meaning of the statute of James. It has been decided that debts are within it, and if so, no good reason can be assigned why the statute should not apply generally to all choses in action' (per Bayley J); *Cumming v Baily* (1830) 6 Bing 363 at 371, 130 ER 1320 at 1323: 'Undoubtedly, in some of the old books, and previously to the decision in *Slade's case*, bills of exchange seem not to have been considered as goods and chattels. But in modern times, a different opinion has prevailed; and goods and chattels have been deemed to include not only things that pass by delivery, but also choses in action; an instance of which is presented by the form of this action, which is trover for the bill' (per Tindal CJ). The minority view is expressed in Benjamin 2000, [3.24]–[3.25].

¹⁰⁹ The point is well put in Bell 1989, 24: 'In the interests of commercial convenience, to provide an easy method of transferring valuable rights, the law accepted that the transfer of such a document transferred the right embodied in it. Becoming tangible in this way, these documentary intangibles are assimilated to goods, so that, for example, they can be pledged.'

¹¹⁰ Byles 2007, [26–002].

¹¹¹ A critical difference between the creation of security over tangible property and the creation of security over intangible property is that possessory securities (ie pledges and liens) may only be taken over tangibles, since only they can be reduced to possession: Goode 2003, [1–07]–[1–08]. Documentary intangibles can be pledged: Goode 2003, [1–44].

¹¹² In *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 (HL), the House of Lords held, by a bare majority, that strict liability for conversion applied only to an interest in chattels and not to choses in action: [94]–[107] (per Lord Hoffmann); [271] (per Lord Walker); [321]–[322] (per Lord Brown). Lord Nicholls and Lady Hale dissented: [219]–[241] (per Lord Nicholls); [308]–[318] (per Lady Hale). See also Byles 2007, [26–008].

possession of ordinary chattels; and this protection is a real one, because damages are measured not according to the value of the document (ie the piece of paper) but by reference to the rights embodied in the document (eg the right to the payment of the sum of money).¹¹³

(3) *A Chose in Action is an Interest in a Thing Recognized by the Law as Property*

- 2.79** As was noted above, it is for a legal system to define that which it considers to be property and that which it considers not to be property.¹¹⁴ The attributes of a property interest were considered in paras 2.31 to 2.38. Essentially, a good working definition is that a property interest comprises a bundle of rights that are exerciseable ‘against the world’ or are rights *in rem* rather than rights *in personam*.
- 2.80** One of the complexities of the law of assignment lies in the fact that whereas all choses in action are property rights, some choses in action are more proprietary in nature than others. This distinction between bilateral intangible property (or bilateral choses) and multilateral intangible property (or multilateral choses) was considered in paras 1.08 to 1.15.

(4) *Choses in Action are Private Law Rights*

- 2.81** The distinction between private and public rights is one well recognized in Roman law¹¹⁵ and civilian jurisdictions.¹¹⁶ It is a distinction that is also gradually being recognized in English law. In *O’Reilly v Mackman*,¹¹⁷ Lord Diplock noted that ‘the appreciation of the distinction in substantive law between what is private law and what is public law has itself been a latecomer to the English legal system’.
- 2.82** Whether this public law/private law distinction gives rise to a distinction between *private* rights and *public* rights is, for the English lawyer, a difficult question, as may be seen from the judgment of Buxton LJ in *Link Organisation plc v North Derbyshire Tertiary College*.¹¹⁸ Referring to the judgment by the lower court, Buxton LJ stated:

That passage, I have to say, confuses the nature of a ‘right’ in public and in private law. All that is established by saying that a party has locus to proceed by judicial review is that he has a

¹¹³ See: *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356 (CA) at 365 (*per* Reading CJ), 375 (*per* Buckley LJ), and 379 (*per* Phillimore LJ); *International Factors v Rodriguez* [1979] 1 QB 351 (CA) at 358–9 (*per* Sir David Cairns, with whom Bridge and Buckley LJJ agreed); note that, while the face value of the document is the best prima facie guide to its worth, this is not always accurate (eg where a pauper writes a cheque for £1 million): see Brindle & Cox 2010, 7–111.

¹¹⁴ See para 2.13.

¹¹⁵ See The Institutes of Justinian, Title I, Book I, §4, Thomas 1976, 3–4, Lee 1956, [54].

¹¹⁶ See Allison 1996, Ch 1.

¹¹⁷ [1983] 2 AC 237 (HL) at 277. See also *Davy v Spelthorne Borough Council* [1984] AC 262 (HL) at 276: ‘... by an extension of remedies and a flexible procedure it can be said that something resembling a system of public law is being developed...’ (*per* Lord Wilberforce); *Re State of Norway’s Application* [1987] QB 433 (CA) at 475: ‘... the common law does not – or at any rate not yet – recognise any clear distinction between public and private law. But the division is beginning to be recognised’ (*per* Kerr LJ).

¹¹⁸ [1999] ELR 20 (CA) at 29. See also *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) at 495–6, where Viscount Dilhorne expressed ‘considerable doubt whether it would be in the public interest that private individuals such as Mr Gouriet should be enabled to make such applications in cases where such interest as they have is in common with all other members of the public and when the object is the enforcement of public rights’; also *Hampshire CC v Supportways Community Services Ltd* [2006] EWCA Civ 1035 at paras 34–47 (*per* Neuberger LJ) and paras 51–61 (*per* Mummery LJ). In the context of real property, Gray & Gray 2009, Ch 10.7, provides a series of instances of public rights in land.

right to move the court to give discretionary relief in respect of a breach of public law obligation on the part of the [defendant]. That is quite different from saying that he has a personal right in respect of which the court will be obliged to grant relief in a private law action.

Public law rights, as will be seen, tend to describe a right to *apply* to the court for an order which the court may or may not make, and not a right against another person which the court will enforce if the elements of the cause of action are found, which is the essence of a private law right. A chose in action is a right or interest recognized by English *private* law.

A number of cases concern the distinction between public law 'rights' in this sense and choses in action. In *WA Sherratt Ltd v John Bromley (Church Stretton) Ltd*,¹¹⁹ the Court of Appeal considered the status of a payment into court under RSC Order 22, now CPR Part 36. Money had been paid into court by the defendant, but during the course of the litigation the defendant went into liquidation and made an application to withdraw the money in court. In support of this application,¹²⁰ it was submitted that in exercising its discretion as to payment out, the court was to have regard to matters having no connection with the litigation (here, that the defendant was in liquidation, and that a failure to order a payment out effectively rendered the claimant a secured creditor to the extent of the payment in) and that the money in court remained an asset of the defendant which, on his bankruptcy, formed part of his property available for distribution. Oliver LJ was of the opinion that money paid into court ceased altogether to be an asset of the party making the payment in:¹²¹

2.83

... in my judgment a defendant paying into court ... parts outright with his money. I doubt whether it can be said that the Accountant-General is a trustee in whose hands his money can be traced. Nor is there a 'debt' or chose in action in the accepted sense of the word. The money becomes subject entirely to whatever order the court may see fit to make and to treat it as the defendant's property available for distribution in his bankruptcy is to assume, for the purpose of exercising the court's discretion, the very situation which will only arise if the court exercises its discretion in a particular way.

Similarly, the right to make an application for costs is not a chose in action. In *Re Marley Laboratory Ltd*,¹²² Marley Laboratory applied to register its trade mark in proceedings before a hearing officer acting on behalf of the Comptroller-General of Trade Marks. The proceedings were conducted on behalf of Marley Laboratory by its managing director. The application was successful, and the opponents of the application appealed. So as to have right of audience on appeal (instead of having to appear by counsel), the managing director of Marley Laboratory had the trade mark and all choses in action relating to it assigned to him, and he was added as a party to the proceedings. The opponents' appeal was unsuccessful, and the managing director was awarded his costs. However, by a slip, the order for costs contained no reference to the costs of Marley Laboratory on the original application. The managing director applied to have the order varied, and at first instance failed in his application because (*per* Lloyd-Jacob J) there was no jurisdiction to amend the order making provision for the costs of Marley Laboratory unless Marley Laboratory itself (by counsel)

2.84

¹¹⁹ [1985] QB 1038 (CA).

¹²⁰ Relying upon the decision in *Peal Furniture Co Ltd v Adrian Share (Interiors) Ltd* [1977] 1 WLR 464 (CA).

¹²¹ [1985] QB 1038 (CA) at 1056–7. The decision in *Peal Furniture Co Ltd v Adrian Share (Interiors) Ltd* was not followed.

¹²² [1952] 1 All ER 1057 (CA).

applied for the amendment. On appeal, the managing director claimed that the proper costs incurred by Marley Laboratory ought to be part of his costs because of the assignment to him. Although the appeal was successful, the argument based on the assignment was rejected in the following terms:¹²³

...I think that the applicant's argument is erroneous and that it rests on the hypothesis (which is also erroneous) that a chose in action includes the right of a party to an action to make an application to the judge for an order for costs which the judge may or may not direct, and, therefore, I do not think that the applicant's application was correctly made.

2.85 *Attorney-General of Hong Kong v Nai-Keung*¹²⁴ concerned the theft of a company's textile export quotas. As is clear from the description of Lord Bridge,¹²⁵ these quotas did not involve the creation of private law rights, but rather consisted of an administrative system of quota allocations (leading to the grant of export licences) operated by the Department of Trade and Industry. The defendant, who was a director of the company, without the knowledge of his co-director, sold a large quantity of the company's quotas, permanently transferring them to another textile company at a gross undervalue. The defendant was charged with the theft of the textile export quotas. One of the points raised was whether the quotas so transferred constituted 'property' within the meaning of s 5 of the Hong Kong Theft Ordinance. As in the Theft Act 1968, 'property' was defined as including 'things in action and other intangible property'. The Privy Council held that the quotas, 'although not "things in action" are a form of "other intangible property"'. The quota conferred 'an expectation that, in the ordinary course, a corresponding [export] licence will be granted, though not an enforceable legal right'.¹²⁶ No doubt, although an export quota did not give rise to an enforceable legal right, a failure by the Department of Trade and Industry to grant an export licence to an exporter holding an appropriate quota, could be the subject of a judicial review.

2.86 A further example of a right that is not considered to give rise to an enforceable property right is an airport slot. These slots represent the particular time allocated to an aircraft to take off or land at an airport, and are routinely traded by airlines or transferred as part of an air carrier's acquisition.¹²⁷ Nonetheless, the better view is that these slots do not give rise to proprietary rights, notwithstanding the tendency for airline operators to treat them as such.¹²⁸

(5) Choses Can be Either Legal or Equitable

The distinction between legal and equitable rights

2.87 Choses in action can be either legal or equitable. Legal choses in action are those which, before the Supreme Court of Judicature Act 1873 came into operation, could be recovered or enforced by an action at law.¹²⁹ Equitable choses are those which were enforceable only by what was formerly called a suit in equity.¹³⁰ There remains a question as to the treatment

¹²³ [1952] 1 All ER 1057 (CA) at 1058 (*per* Evershed MR).

¹²⁴ [1987] 1 WLR 1339 (PC).

¹²⁵ [1987] 1 WLR 1339 (PC) at 1341–2.

¹²⁶ [1987] 1 WLR 1339 (PC) at 1342 (*per* Lord Bridge).

¹²⁷ Shawcross & Beaumont, Binder 1, Division III, [139].

¹²⁸ Shawcross & Beaumont, Binder 1, Division III, [138].

¹²⁹ Halsbury (Vol 13) 2009, [3].

¹³⁰ Halsbury (Vol 13) 2009, [7].

of choses created or regulated by statute. Clearly, much turns on the statutory provisions in question, but the choses that are so regulated—for instance, shares, patents, and other intellectual property rights—are best regarded as legal choses in action, for the relevant statutes concern themselves with the legal and not the equitable title in these things.

Since the Supreme Court of Judicature Act 1873, the practical significance of the distinction between legal and equitable choses is much reduced. However, it does still matter. For example, where the assignment of a chose falls outside the ambit of s 136 of the Law of Property Act 1925,¹³¹ the assignor ought to be made a party to the proceedings where the chose in question is a legal one, but not where the assignment is an absolute assignment of an equitable chose:¹³² **2.88**

It was said that, as these proceedings were instituted by the assignee, the assignor ought to have been made a party to the suit. It is quite clear that, where the assignor has a legal title and he assigns his interest, and any proceedings are taken by the assignee with respect to the property so assigned, the assignor must be a party to the suit, because, by his assignment, he does not part with the legal estate, and the person having the legal estate must be before the Court. But the principle clearly does not apply to the facts of this case. There was no sum awarded specifically to this gentleman, Mr Scott. All that he had was an equitable interest—an equitable title to be paid the sum of money if he made out his title to the land. That equitable interest and right he assigned before the suit; he parted, therefore, with all interest, and, having parted with all interest of every description, of course it was not necessary that he should have been a party to these proceedings.

What is more, even though the practical distinction between legal and equitable choses is, by virtue of the Judicature Act, much reduced, it is a distinction that is fundamental to an understanding of how assignment operates as a mechanism for transferring choses in action.¹³³ The law of assignment is one area of English law where the different approaches of law and equity remain acutely relevant to its operation and to its understanding.¹³⁴ **2.89**

‘Mere’ equities

Snell defines a ‘mere’ equity as a procedural right ancillary to some right of property.¹³⁵ **2.90** Whereas an equitable interest—such as an interest under a trust—is an actual right of property,¹³⁶ a mere equity is not. It is a right, usually of a procedural nature, which is ancillary to some right of property, and which limits or qualifies it in some way.¹³⁷

Mere equities can be classed into two categories. First, there are equities which serve as defences to the creditor’s claim and which relate directly to the chose.¹³⁸ Such equities include: **2.91** the right to rectify a contract;¹³⁹ the right to rescind a contract for misrepresentation;¹⁴⁰ the

¹³¹ Section 136 allows the assignee to sue the debtor in his own name, without joining the assignor as a party. Section 136 is considered in detail in Chapter 16.

¹³² *Cator v Croydon Canal Co* (1843) 4 Y&C Ex 593 at 593–4, 160 ER 1149 at 1149–50. This point is considered in greater detail in paras 11.19–11.35.

¹³³ See Chapter 13.

¹³⁴ See the interesting discussion in Burrows 2002 and Worthington 2006, 19 and Ch 10, on the potential mischief of such a ‘two jurisdictions’ approach.

¹³⁵ Snell 2010, [2–006].

¹³⁶ See eg *Cave v Cave* (1880) 15 ChD 639 (ChD) at 647–8 (per Fry J).

¹³⁷ Snell 2010, [2–006].

¹³⁸ See Marshall 1950, 181.

¹³⁹ *Smith v Jones* [1954] 1 WLR 1089 (ChD) at 1091.

¹⁴⁰ *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at 22.

right to rescind a contract for undue influence;¹⁴¹ the right to avoid a contract of insurance for non-disclosure.¹⁴² Secondly, there are cross-claims connected with the chose.¹⁴³

2.92 The latter type of mere equity—cross-claims—is relatively easy to understand. Such cross-claims relate not to the chose in action itself, but to the state of an account between a debtor and his creditor. Under certain conditions, the debtor can rely on the state of this account as a defence to a claim advanced against him by the creditor. The crucial question is what happens when the creditor assigns his right to another: under what circumstances can the debtor advance cross-claims that he could have advanced against the assignor against the assignee? The rules on this point are complex, and are considered in Chapter 26. However, there is nothing intrinsically complex in the nature of the debtor's cross-claim, which will be a chose in action of one sort or another.

2.93 The first type of mere equity is conceptually more difficult. These equities are in some respects the equitable equivalent of 'bare' rights or causes of action described above, and considered in detail in paras 26.28 to 26.40. This analogy would suggest that equities such as these ought to be regarded as choses in action, albeit—because of the doctrines of champerty and maintenance—choses that are generally not assignable. The fact that a chose is generally not assignable, does not mean to say that it is not a chose at all. In *Fitzroy v Cave*,¹⁴⁴ Cozens-Hardy LJ stated:

There are undoubtedly many choses in action which are not and never were assignable either at law or in equity. A right to set aside a deed on the ground of fraud is a typical instance.

2.94 This view of a mere equity is well illustrated by the decision in *Dickinson v Burrell*.¹⁴⁵ In this case, the owner of property (Dickinson) conveyed it to another (Edens), but subsequently considered that this conveyance was fraudulent and capable of being set aside. He did not set it aside himself, but conveyed the property to trustees, together with the right to sue to set aside the original conveyance. It was contended that the transfer of this right to sue was champertous. Romilly MR rejected this argument in the following terms:¹⁴⁶

Assuming the deed of April, 1864, to have been executed for value, then the right of suing is incidental to the conveyance of the property, and passes with it; that is, if James Dickinson had thought fit, after the sale to Edens in December, 1860, to sell the same property to AB, saying the previous sale was a fraudulent one, and that though he himself would not take any steps to set it aside, if AB thought fit to do so he might, and that he would sell all his interest in the property to AB for a sum of money then *bona fide* agreed upon, in such a case, in my opinion, AB could have maintained this suit.

The distinction is this: if James Dickinson had sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the

¹⁴¹ *Bainbrigge v Browne* (1880) 18 ChD 188 (ChD) at 196–7.

¹⁴² *William Pickersgill & Sons Ltd v London and Provincial Marine and General Insurance Co Ltd* [1912] 3 KB 614 (KBD) at 620–2.

¹⁴³ *Young v Kitchin* (1877–1878) LR 3 ExD 127 (ExchD); *The Government of Newfoundland v The Newfoundland Railway Co* (1881) 13 App Cas 199 (PC). See Marshall 1950, 181.

¹⁴⁴ [1905] 2 KB 364 (CA) at 371.

¹⁴⁵ (1866) LR 1 Eq 337.

¹⁴⁶ (1866) LR 1 Eq 337 at 342.

grantee, AB, to maintain this bill; but if AB had bought the whole of the interest of James Dickinson in the property, then it would. The right of suit is a right incidental to the property conveyed; nor is it, in my opinion, a right which is only incidental to the property when conveyed as a whole, but it is incidental to each interest carved out of it; for instance, if the property had been conveyed by James Dickinson to three persons as tenants in common, each one might have instituted this suit, making the other two tenants in common Defendants if they refused to concur as Plaintiffs: Provided that the case was so brought before the Court that the whole matter might be determined in one suit, so as to bind all parties to the transactions, and so that Edens would have had only to contest the question once; then, in my opinion, the suit might be instituted by a person having only a limited interest in the property conveyed...

In other words, here were two, rival, conveyances, of the same property. The only way in which the second conveyance could effectively transfer the property was if the first conveyance was set aside. Suppose the first conveyance had been induced by misrepresentation, and was susceptible to rescission on that ground. The analysis of Cozens-Hardy LJ in *Fitzroy v Cave* and of Romilly MR in *Dickinson v Burrell* would suggest that the right to set aside the first conveyance was, in the first place, a cause of action, and, secondly, one that could be assigned together with the property to which it related. **2.95**

A contrary analysis was taken by the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society*.¹⁴⁷ The House of Lords considered whether a right to rescind a contract was capable of assignment as a separate chose in action. In doing so, their Lordships considered whether the right to rescind could itself be a chose in action. Evans-Lombe J and the Court of Appeal considered that it was not possible to separate rescission from the chose in action to which it related. Lord Hoffmann agreed.¹⁴⁸ **2.96**

My Lords, I agree that a chose in action is property, something capable of being turned into money. *Snell's Equity*, 29th ed (1990), p 71, defines choses in action as 'all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession.' At common law... choses in action could not be assigned. In equity they could. Assignment of a 'debt or other legal thing in action' was made possible at law by s 136 of the Law of Property Act 1925. In each case, however, what was assignable is the debt or other personal right of property. It is recoverable by action, but what is assigned is the chose, the thing, the debt or damages to which the assignor is entitled. The existence of a remedy or remedies is an essential condition for the existence of the chose in action but that does not mean that the remedies are property in themselves, capable of assignment separately from the chose... The assignee either acquires the right to the money (or part of the money) or he does not. If he does, he necessarily acquires whatever remedies are available to recover the money or the part which has been assigned to him.

In other words, an equity is simply a facet or aspect of a chose in action. Suppose A owns various rights under a contract he has entered into with B, but suppose also that that contract was procured by A's misrepresentation. If A assigns one of his rights under the contract to a third party, C, then when C makes his claim against B, that claim contains within it (like a flaw within a diamond) the equity that could constitute B's defence to the claim: namely, the **2.97**

¹⁴⁷ [1998] 1 WLR 896 (HL).

¹⁴⁸ [1998] 1 WLR 896 (HL) at 915.

contention that *C*'s right (together with the rest of the contract) is susceptible of rescission because of *A*'s misrepresentation.

- 2.98** The attraction of this approach is demonstrated if it is assumed that *A* assigns various of his rights under the contract with *B* to *C*, *D* and *E*. *C*, *D* and *E* then separately sue *B*. *B* ought to be able to raise his equity in each one of these actions. The fact that the same point can arise in the context of distinct claims based upon distinct choses in action suggests that *B*'s equity is not a distinct chose in action, but an attribute of the rights being advanced against him.
- 2.99** Again, varying the facts of *Dickinson v Burrell*, suppose that there was an initial (flawed) conveyance of property, followed by *two* conveyances, each of half that property, to *A* and to *B* respectively. Just as before, the only way in which these later conveyances could effectively transfer the property is if the first conveyance is set aside. The question that must be asked is whether *A* and *B* will only successfully be able to contend that the first conveyance is to be set aside if the right to set aside for misrepresentation is assigned to them. Is an assignment a pre-condition to asserting the equity? Does this mean that if there is an assignment to *A* alone of the equity, *B* is unable to assert it? And were the original owner minded to attempt to assign the equity to both *A* and *B*, would that assignment be possible? This last question raises issues of co-ownership, which are considered in Section E. But it is suggested that the conceptually correct view is that expressed by the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society*.

(6) Present and Future Choses

Significance of the distinction

- 2.100** English law draws a distinction between a present or existing chose in action and a future chose or 'mere expectancy'. The former can be assigned. The latter cannot be assigned, since there is no existing property right to assign. However, as will be seen,¹⁴⁹ equity will enforce a promise to assign a future chose in action, provided this promise is supported by consideration. In such a case, there will be an assignment of the property the moment it comes into the hands of the assignee.

The nature of the distinction

- 2.101** The distinction between a present and a future chose can be a difficult and an elusive one. A right to an intangible that is *presently* enforceable against the debtor is, clearly, a present chose in action and can be assigned. At the other extreme, there can be no right over an intangible that does not presently exist, even if it may do so in the future, and such a future right cannot be assigned.
- 2.102** The problem case is where a right of action exists but is not presently enforceable—for instance, where there is a contractual right that will or may mature in the future under a presently existing contract. Under English law, save in cases of insolvency,¹⁵⁰ a future right

¹⁴⁹ See Chapter 15.

¹⁵⁰ This exception is considered in paras 2.112 and 32.27–32.38.

of this sort is assignable as a present chose.¹⁵¹ In the words of Mustill LJ in *Colonial Bank Ltd v European Grain & Shipping Ltd*:¹⁵²

All contractual rights are vested from the moment when the contract is made, even though they may not presently be enforceable, either because the promisee must first perform his own part, or because some condition independent of the will of either party (such as the elapsing of time) has yet to be satisfied. Equally, all unperformed obligations to pay money are in one sense *debitum in praesenti solvendum in futuro*.

An excellent example is *Brice v Bannister*.¹⁵³ This case concerned the assignment of all monies due or to become due under a contract to build a ship. At the time of the assignment, all instalments that were due had in fact been paid to the assignor. The debtor's present obligations under the contract had all been discharged. The assignment could only relate to the debtor's future obligations under the contract. Coleridge CJ held at first instance that these future obligations constituted a present chose in action,¹⁵⁴ and this holding was upheld on appeal.¹⁵⁵ **2.103**

*Walker v The Bradford Old Bank Ltd*¹⁵⁶ concerned an assignment of all monies then or thereafter to be standing to the credit of the assignor at the bank. As at the date of the assignment, the balance at the bank was £48. At the assignor's death, it was £217. It was contended that as at the date of the assignment, the £217 was not a chose in action because the ultimate balance in the account was not an existing debt. This contention failed and it was held that the £217 constituted a present chose in action: **2.104**

... before and at the date of assignment, and as long as the relation of customer and banker continued between the assignor and the bank, the ordinary relation of debtor and creditor existed between them... and that consequently there existed a contract on the bank's part to pay over on demand to the assignor all monies then or thereafter standing to his credit.¹⁵⁷

The distinction between present and future choses thus resolves itself into a threefold classification: (i) presently enforceable rights; (ii) rights presently existing but enforceable only in the future; (iii) rights which do not exist at all (but may do so in the future). Choses falling into the first two categories are present choses; the third category describes things that are **2.105**

¹⁵¹ *Brice v Bannister* (1878) 3 QBD 569 (QBD); *Walker v The Bradford Old Bank Ltd* (1884) 12 QBD 511 (QBD); *Re Davis & Co, ex p Rawlings* (1888) 22 QBD 193 (CA) at 197–8 and 199; *G & T Earle Ltd v Hensworth RDC* (1928) 44 Times LR 758 (CA); *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 (HC Australia) at para 7 of the judgment of Windeyer J: 'The distinction between a chose in action, which is an existing legal right, and a mere expectancy or possibility of a future right... does not, in my view, depend on whether or not there is a debt presently recoverable by action because presently due and payable. A legal right to be paid at a future date is, I consider, a present chose in action, at all events when it depends upon an existing contract on the repudiation of which an action could be brought for anticipatory breach'; *Colonial Bank Ltd v European Grain & Shipping Ltd, The Dominique* [1988] 3 WLR 60 (CA) at 67; *Kwok Chi Leung Karl (Exor of Lamson Kwok) v Commissioner of Estate Duty* [1988] 1 WLR 1035 (PC) at 1040: 'A debt which is payable in futuro is no less a debt... It is simply a chose in action...' (per Lord Oliver); *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] QB 825 (CA) at [75]: '... present claims (which category includes rights that may mature in future under a presently existing contract)...' (per Mance LJ); *Oditah* 1991, [2.6].

¹⁵² [1988] 3 WLR 60 (CA) at 67. The decision was reversed on appeal to the House of Lords ([1989] AC 1056), but not on this ground.

¹⁵³ (1878) 3 QBD 569 (QBD, CA).

¹⁵⁴ (1878) 3 QBD 569 (QBD, CA) at 573: 'Now that a debt to become due is a chose in action is clear.'

¹⁵⁵ (1878) 3 QBD 569 (QBD, CA) at 576–7, 580.

¹⁵⁶ (1884) 12 QBD 511 (QBD).

¹⁵⁷ (1884) 12 QBD 511 (QBD) at 516–17.

not rights or choses at all.¹⁵⁸ Choses falling into the first category of presently enforceable rights are in practice straightforward to identify. It is the distinction between rights presently existing but enforceable only in the future and future rights that presents difficulties and that needs to be considered in greater detail.

The distinction between future choses and rights enforceable in the future

2.106 The distinction between future choses and rights enforceable in the future turns on *existence* and not *enforceability*. Rights enforceable in the future exist in the present. They grow out of a present legal relationship. They exist as future rights, even if they are contingent and not certain to occur. The nature of the contingent right—or the circumstances that will transform a potential right into a presently enforceable right—is defined by the presently existing legal relationship. Thus, a retirement annuity policy maturing in the future is a present chose in action.¹⁵⁹

2.107 By contrast, a future chose does not exist at all. There is no present legal relationship out of which an enforceable right can grow. A good example of a future chose is an interest under the will of a person still living.¹⁶⁰ In *Re Parsons*, Kay J held:¹⁶¹

It is indisputable law that no one can have any estate or interest, at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir at law or next of kin of such living person. During the life of such person no one can have more than a *spes successionis*, an expectation or hope of succeeding to his property.¹⁶²

The point about a will is that it has no legal effect until the testator dies. A will is ambulatory until the testator's death; even a declaration in a will that it is irrevocable does not prevent subsequent revocation.¹⁶³ Similarly, the copyright of a book yet to be written is a future chose,¹⁶⁴ as is the copyright in a song to be written.¹⁶⁵ A future 'book debt' is a future chose.¹⁶⁶

2.108 Even so, the line can be extraordinarily difficult to draw.¹⁶⁷ For example, there is Court of Appeal authority that a potential future claim under a contract of insurance is a

¹⁵⁸ English law thus takes quite a wide view of what constitutes a present chose. This can have dangerous implications for the assignor. See further para 26.06 and Section E of Chapter 26.

¹⁵⁹ *Re Landau* [1938] Ch 223 (ChD) at 232.

¹⁶⁰ Also often referred to as a (mere) expectancy, *spes*, or *spes successionis*.

¹⁶¹ (1890) 45 ChD 51 (ChD).

¹⁶² See also *Re Ellenborough* [1903] 1 Ch 697 (ChD) at 699 (*per* Buckley J): 'On December 22, 1893, there were living Charles, Lord Ellenborough, and Gertrude Edith Towry Law, brother and sister of the applicant upon this summons. They were entitled respectively to certain property absolutely. In their property the applicant had no property or interest of any kind. She had an expectation arising from the fact that, owing to the relationship between them and herself and to their state of health, she might be (as was subsequently the case) the survivor, and might under their respective wills or intestacies become entitled to their property... She had only a *spes successionis*, and that is not a title to property by English law...'

¹⁶³ *English Private Law* 2007, [7.36] and [7.97].

¹⁶⁴ *Ward, Lock & Co Ltd v Long* [1906] 2 Ch 550 (ChD).

¹⁶⁵ *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 (HL).

¹⁶⁶ See *Oditah* 1991, [2.6]. This is obvious when the definition of a future book debt is considered: future book debts are debts expected under contracts having no present existence, but which every going concern expects to result from future contracts into which it might enter.

¹⁶⁷ One instance where a chose was clearly mischaracterized is the decision of the High Court of Australia in *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 (HC Australia). The case concerned an assignment of all interest derived from various monies which the assignor had lent to a third party. Dixon CJ, Menzies J, and Owen J held (McTiernan and Windeyer JJ dissenting) that the interest was a mere expectancy and not a present chose in action. What seems to have swayed the majority was that, because the borrower

future chose. In *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC*, Mance LJ held:¹⁶⁸

There may under section 136 be an absolute assignment of a claim or claims, but only of a *present* claim or claims. At the date of Five Star's assignment to RZB, any insurance claim(s) were merely an unwished-for future possibility dependent upon some future casualty. The distinction between present claims (which category includes rights that may mature in future under a presently existing contract) and future claims is not always easy. But future insurance claims which depend on future casualties which may never occur appear to me to fall clearly into the latter category and not to be assignable under section 136.

By contrast, it was held in *Glegg v Bromley*¹⁶⁹ that the damages recoverable at the end of a cause of action—the so-called 'fruits' of the action, as opposed to the right of action itself—constitute a present and not a future chose. In *Glegg v Bromley*, Mrs Glegg was the claimant in two actions, against a Mr Hay for false representation and against Lady Bromley for slander. Before judgment in either action, she assigned all her rights in the action against Lady Bromley to her husband. Mrs Glegg lost the first action (with an order for costs against her) and won the second (winning an award of damages and an order for costs). Mr Hay attempted to garnish the damages awarded to Mrs Glegg in the second action in satisfaction of the costs order in the first action. The Court of Appeal held that an attempt to garnish must fail. After debating whether the assignment was supported by consideration, and concluding that it was¹⁷⁰—consideration was required because this was an assignment by way of security and also (depending on whether the property was future or not) to allow the assignment of future property—the Court of Appeal debated the question of whether this was an assignment of a bare cause of action (not capable of assignment by virtue of the doctrine of maintenance and champerty) or merely an assignment of the 'fruits' of the action. If the latter was the case, then a further question arose—were the 'fruits' of an action a present or a future chose? Vaughan Williams LJ held that this was an assignment not of the action, but of its fruits, and that such fruits represented a present and not a future chose.¹⁷¹

... it is said that the consideration for the assignment was a cause of action, and that the cause of action was a tort, namely, a slander. I think that all that was assigned was the fruits of an action. I know no rule of law which prevents the assignment of the fruits of an action.

had the perfect right to repay the loan at any time, the right to interest was contingent upon the loan *not* being repaid. Since there could be no guarantee of this, there was no assignable right and merely an expectancy. The decision is wrong because the interest was a future entitlement arising out of a present legal relationship, namely the loans made by the assignor to the third party. Taken to extremes, the consequence of this decision would be that rights enforceable in the future would constitute present choses only where they were wholly unconditional. Since it is clear that contingent future enforceable rights can be assigned, the decision is inconsistent with English authority. The decision was distinguished in *Shepherd v Federal Commissioner of Taxation* (1965) 113 CLR 385 (HC Australia).

¹⁶⁸ [2001] QB 825 (CA) at [75].

¹⁶⁹ *Glegg v Bromley* [1912] 3 KB 474 (CA). The case is considered further in paras 23.29–23.61. See also *Sears Tooth v Payne Hicks Beach* [1997] 2 FLR 116 (FamD) at 124–5, where Wilson J followed *Glegg v Bromley*; and *Ruttle Plant Ltd v Sec of State for the Environment* [2008] EWHC 238 TCC (QBD) at [20]–[25] (*per* Ramsey J).

¹⁷⁰ [1912] 3 KB 474 (CA), at 479–84 (*per* Vaughan Williams LJ), 486–7 (*per* Fletcher Moulton LJ), and 491–2 (*per* Parker J).

¹⁷¹ [1912] 3 KB 474 (CA), at 484. Fletcher Moulton LJ reached a similar conclusion at 488–9. Parker J agreed that the assignment was of the fruits of the action and not of the action, but (unlike Vaughan Williams and Fletcher Moulton LJ) considered the fruits to be a future chose or mere expectancy, assignable only where there is an agreement to assign supported by consideration.

Such an assignment does not give the assignee any right to interfere in the proceedings in the action. The assignee has no right to insist on the action being carried on; in fact, the result of a compromise is actually included as a subject of the assignment. There is in my opinion nothing resembling maintenance or champerty in the deed of assignment. The second point is this. It has been said that this is an assignment of an expectancy within the meaning of the rule laid down in *In re Ellenborough*. I think this was an assignment of property, and not of an expectancy. It is the assignment of property in the shape of the fruits of an action.

In each of these cases, it would appear that the existence of the future right turned on the same sort of contingency: the occurrence of a casualty in the former; and a judgment in the claimant's favour in the latter. How are these two outcomes to be reconciled? The answer is that in the insurance case, there may never be a casualty at all, whereas in the fruits of the action case, there will be judgment¹⁷²—even if it is against the claimant, so that the 'fruits' are nil.¹⁷³

2.109 This approach receives support from the decision of the High Court of Australia in *Shepherd v Federal Commissioner of Taxation*.¹⁷⁴ In that case, Mr Shepherd was the grantee of certain letters patent relating to castors. He granted a licence to a third party, Mr Cowen, to manufacture such castors. In return, Mr Cowen agreed to pay him royalties directly in proportion to the number of castors manufactured. By deed, Mr Shepherd then purported to assign by way of gift absolutely and unconditionally to certain named persons, all his 'right title and interest in and to an amount equal to ninety per cent of the income which' might accrue during a period of three years under the licence agreement. The question arose whether this constituted an assignment of an existing chose in action, or whether the chose was a future chose and hence not assignable. The High Court held that this was an assignment of a present and not a future chose, and rejected the argument that the assignment of 90 per cent of the future income was a mere spes. Barwick CJ held:¹⁷⁵

The basis of this submission is that in the event there may not be any amount payable for royalties because no sales of castors may be made. But this misconceives the matter. That a promise may not be fruitful does not make it incapable of assignment.

Mr Shepherd's right to receive royalties in the future arose out of a presently existing legal relationship (the agreement by the third party to pay royalties on the sale of castors), and

¹⁷² Of course, many cases will not proceed to judgment but will be compromised. Where proceedings have begun, the compromise agreement will generally procure that the proceedings come to an end. The law will not allow those proceedings to be resurrected or proceedings to be commenced (apart from in accordance with the compromise agreement) unless the compromise is successfully impeached. Clearly, where a compromise disposes of a cause of action, any attempt to assign the fruits of the action will either be a confusing reference to rights under the compromise agreement or else a reference to the fruits of a non-existent cause of action. As to the effects of a compromise, see further Foskett 2010, Ch 6.

¹⁷³ A hint of this reasoning appears in Fletcher Moulton LJ's judgment in *Glegg v Bromley* [1912] 3 KB 474 (CA) at 488–9: 'It is clearly intended to assign the fruits of the action, so that whatever benefit comes from the action shall go to Mr Glegg by way of further security, but there is nothing which gives him the right to interfere in the action or which is in any way against public policy... What I find is that there are words which do clearly assign whatever sum of money comes as the fruit of the action. They therefore purport to assign property defined by the source from which it comes as and when it becomes property, and that being so, I can see no valid legal reason why an assignment of property so defined should not be valid...'. Vaughan Williams LJ, reaching the same conclusion, expressly held (at 484) that this was a present and not a future chose: 'I think this was an assignment of property, and not of an expectancy. It is an assignment of property in the shape of the fruits of an action.' By contrast, Parker J (at 490) considered the fruits of an action to be a future chose, only assignable in equity where there was an agreement to assign supported by consideration.

¹⁷⁴ (1965) 113 CLR 385 (HC Australia).

¹⁷⁵ At [20] of his judgment.

so was assignable as a present chose. The fact that the future income stream was unknown, and that there was a possibility (if no castors were sold) of no royalties being earned at all, made no difference to this analysis. Since it is perfectly possible to assign a part of a chose in action, an assignment of 90 per cent of the future income stream (whatever it might be) was unexceptionable.¹⁷⁶

Had Mr Shepherd sought to assign the first £500 of any royalties he received under the agreement with Mr Cowen, the result is likely to have been different. *Williams v Commissioner of Inland Revenue*¹⁷⁷ concerned a purported assignment without consideration of the first £500 out of the net income to accrue to the assignor in each year for a limited period under a certain trust. Turner J was quite prepared to hold that the assignor's life interest in the trust was a present chose in action: there was an existing legal relationship, and it was simply that the fruits of that relationship lay in the future. However, the assignor had not sought to assign his right under this legal relationship, nor even a part of that right. Rather, he had purported to assign the fruits of the right, which might or might not accrue.¹⁷⁸

2.110

The simple question is therefore—was that which it purported to assign (viz 'the first five hundred pounds of the net income which shall accrue') an existing property right, or was it a mere expectancy, a future right not yet in existence? . . .

What then was it that the assignor purported to assign? What he had was the life interest of a *cestui qui trust* in a property or partnership adventure vested or carried on by trustees for his benefit. Such a life interest exists in equity as soon as the deed of trust creating it is executed and delivered. Existing, it is capable of immediate assignment. We do not doubt that where it is possible to assign a right completely it is possible to assign an undivided interest in it. . . . [I]f here, instead of purporting to assign 'the first £500 of the income', the assignor had purported to assign (say) an undivided one-fourth share in his life estate, he would have assigned an existing right, and in the circumstances effectively.

But in our view, as soon as he quantified the sum in the way here attempted, the assignment became one not of a share or a part of his right, but of moneys which should arise from it. Whether the sums mentioned were ever to come into existence in whole or in part could not at the date of assignment be certain. In any or all of the years designated the net income might conceivably be less than five hundred pounds; in some or all of them the operations of the trust might indeed result in a loss. The first £500 of the net income, then, might or might not (judging the matter on the date of execution of the deed) in fact have any existence.

In short, this was an assignment not of a present right but of future money, which the assignor had no more than a hope or expectation of receiving.

¹⁷⁶ See also [3]–[4] of the judgment of Kitto J. At [4], Kitto J stated: 'There existed at that time a contractual relationship between the appellant and Cowen which by its terms must continue throughout the ensuing three years, whether Cowen should wish it to continue or not. The appellant therefore had a vested right in respect of those three years. It might indeed become divested, for the licence agreement provided for cesser of Cowen's liability to pay royalties if the letters patent should not be maintained or should be declared void; but the right existed, though it was thus subject to defeasance by events not within the control of Cowen. It is true also that what the appellant's right under the licence agreement would yield in royalties in those years—indeed, whether it would yield any royalties at all in those years—no doubt depended upon contingencies partly within the control of Cowen. It was for him to decide how many castors, if any, he would manufacture in accordance with the appellant's inventions and try to sell. Market conditions would then determine how successful his efforts to sell would be. But whatever he might do or desire to do, the existence of the appellant's contractual right would be unaffected, though the quantum of its product might be.'

¹⁷⁷ [1965] NZLR 395 (New Zealand CA).

¹⁷⁸ [1965] NZLR 395 (New Zealand CA) at 398–400.

2.111 In *Shepherd v Federal Commissioner of Taxation*,¹⁷⁹ Kitto J sought to compare rights enforceable in the future and future choses to a tree and its fruits.¹⁸⁰ According to this analogy, the tree represents the presently existing legal relationship, which may (or may not, depending on contingencies) give rise to an enforceable legal right in the future. This future legal right is the fruit of the tree. It is possible to assign the tree (because it exists at the time of the assignment), but not the fruit (because it does not exist at the time of the assignment).

The insolvency exception

2.112 There is an exception to the rule that future rights are assignable, which applies in cases of insolvency. An assignment of rights which cannot be earned by the assignor until after he has become bankrupt (in the case of an individual) or insolvent (in the case of a company) is ineffective against the trustee in bankruptcy or liquidator.¹⁸¹ The nature of the insolvency exception is considered in greater detail in paras 32.27–32.38.

Implications of the rule that rights presently existing but enforceable only in the future are present choses

2.113 Since even a future chose can be transferred by way of a promise to assign,¹⁸² it may be asked whether the distinction between future choses and rights enforceable in the future is really one of such importance. The question whether a given ‘right’ is present or future has two practical consequences:

- (1) It is not possible to effect a gratuitous transfer of future property: equity will give effect to such a transfer only if it is supported by consideration.¹⁸³ In cases of gifts, therefore, the distinction is critical to the transaction.
- (2) The present assignment of a right enforceable only in the future has *immediate* practical consequences for the assignor. Where a chose has been assigned, the assignor is not permitted to deal with the chose to the assignee’s detriment.¹⁸⁴ In the context of contractual rights, this means that the assignor loses the right to vary the contract by mutual consent with his contractual counter-party. This may have far-reaching consequences. *Walker v The Bradford Old Bank Ltd*,¹⁸⁵ which concerned the assignment of all monies then or thereafter standing to the credit of the assignor at the bank, is authority for the proposition that *increases* to the balance at the bank constitute a present and not a future chose, because the right being assigned is the assignor’s right to demand that the bank pay over the balance standing as at the time. The consequence of this must be that the assignor is not entitled to cause the balance in the account to diminish.

¹⁷⁹ (1965) 113 CLR 385 (HC Australia).

¹⁸⁰ See para 4 of the judgment of Kitto J.

¹⁸¹ *Ex p Nicholls* (1883) 22 ChD 782 (CA); *Wilmot v Alton* (1897) 1 QB 17 (CA); *Re De Marnay* [1943] 1 Ch 126 (ChD); *Re Trytel* (1952) 2 TLR 32 (ChD); *Re Tout and Finch Ltd* [1954] 1 All ER 127 (ChD).

¹⁸² As to which, see Chapter 15.

¹⁸³ As to this rule, see paras 15.09–15.16.

¹⁸⁴ As to this rule, see Section E of Chapter 26.

¹⁸⁵ (1884) 12 QBD 511 (QBD). The facts of this case are described in para 2.104.

E. Co-ownership and the Fragmentation of Ownership

(1) Overview

In contrast with real property, where the concept of ownership is best eschewed in favour of reference to the various estates that can exist in real property,¹⁸⁶ chattels can be owned. That ownership is said to be indivisible, save that it is possible to have concurrent legal ownership of personal property.¹⁸⁷ Successive interests can only exist in equity.¹⁸⁸ **2.114**

This monolithic concept of ownership is, however, misleading. As has been described, ‘ownership’ is best understood as a ‘bundle of rights’.¹⁸⁹ English law *does* permit the splitting up of these constituent rights, so that they can be held by different persons. This is the way—in the context of chattels—that both pledge and lien work.¹⁹⁰ In the context of intangibles, another example would be where the owner of a patent grants a third party a licence to use the invention that is claimed by the patent. Often, ‘ownership’ is referred to as the ‘general property’ in a thing, whilst the particular interests that are divested by the owner to a third party are referred to as the ‘special property’ in the thing.¹⁹¹ **2.115**

Questions of co-ownership and the fragmentation of ownership are additionally complicated by the fact that it is often uncertain, in the case of some choses in action, precisely what that chose actually comprises. This is best illustrated by example. Take rights under a contract. The traditional view is that rights under contracts, not contracts, are assignable. The ‘burden’ of a contract cannot be assigned; the ‘benefits’ can be. Since it is not the contract that is the chose in action, but the right under the contract, it follows (according to this view) that a contract may contain a number of discrete choses in action—as many as there are obligations.¹⁹² **2.116**

If this is right, it follows that, when the beneficiary of a contractual obligation seeks to assign that right, an entire chose in action is assigned, and questions of co-ownership simply do not arise. It is, on this approach, perfectly possible for the owner of several rights under a contract, to assign one right to *A* and another to *B*. **2.117**

However, there is an alternative view as to the nature of rights under a contract, which is that all rights constitute a single chose in action. If this alternative view is correct, then clearly the question arises as to whether a single chose in action can be assigned in part. **2.118**

¹⁸⁶ See, for instance, *Walsingham's Case* (1573) 2 Plow 547 at 555, 75 ER 805 at 816–17: ‘... the land itself is one thing and the estate in land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time’. Section 1(1) of the Law of Property Act 1925 restricted the number of estates in land capable of subsisting or of being conveyed or created at law to two—the ‘fee simple absolute in possession’ and the ‘term of years absolute’.

¹⁸⁷ *George Attenborough & Son v Solomon* [1913] 1 AC 76 (HL) at 84: ‘By the law of England the property in a chattel must always be in one person or body of persons’ (*per* Lord Haldane LC); *The Odessa* [1916] 1 AC 145 (HL) at 154, 159 (*per* Lord Mersey); Crossley Vaines 1967, 41.

¹⁸⁸ Crossley Vaines 1967, 41; Smith 2005, 211–15.

¹⁸⁹ See paras 2.39–2.43.

¹⁹⁰ See paras 34.05–34.09.

¹⁹¹ *The Odessa* [1916] 1 AC 145 (PC) at 159 (*per* Lord Mersey); Crossley Vaines 1967, 41.

¹⁹² See further paras 5.10–5.12.

- 2.119** Similarly difficult questions arise in the context of ‘mere’ equities. Is, for example, a right to rescind a separate chose in action or simply a facet of a larger right? This difficult question was considered in paras 2.90 to 2.99.
- 2.120** In short, it is necessary to be very precise about the nature of the property in question, before even considering questions of co-ownership and fragmentation of ownership. That question is considered in greater detail when the nature of the various choses in action is considered in Chapters 3 to 8.
- 2.121** Moving on to questions of co-ownership and fragmentation of ownership, three different cases need to be considered:
- (1) *Concurrent ownership*. This arises where two (or more) persons contemporaneously own the same interest in property.
 - (2) *Successive ownership*. This arises where two or more persons own the same interest in property in succession to one another.
 - (3) *Fragmented ownership*. In this case, there is no question of ownership being shared, whether concurrently or successively. Rather, the primary interest—ownership—is divided into the ‘general property’ and the ‘special property’, the latter being carved out of the former. Essentially, the bundle of rights that comprise ownership is parceled out amongst a number of persons.
- 2.122** In the analysis below, it will be suggested that it is only concurrent ownership that involves co-ownership.¹⁹³ The other two cases both involve, not the sharing of ownership, but the division of the bundle of rights that comprise ownership amongst a number of persons by the creation of *new* interests in property.

(2) Concurrent Ownership

Forms of concurrent ownership

- 2.123** Concurrent ownership can take one of two forms: the ‘joint tenancy’ or the ‘tenancy in common’. The term ‘tenancy’ in fact adds nothing; the word ‘ownership’ would provide greater clarity, but the use of the term ‘tenancy’ is entrenched. The essence of joint tenancy is that each joint tenant is entitled to the whole of the interest which is the subject of co-ownership.¹⁹⁴ In other words, no joint tenant holds any specific or distinct *share* in the property; rather, each joint tenant (together with the other joint tenant or tenants) is invested with the totality of the co-owned interest.¹⁹⁵ The distinguishing feature of joint ownership is

¹⁹³ Gray & Gray 2009, define co-ownership as ‘the form of ownership in which two or more persons are simultaneously entitled in possession to an interest or interests in the same asset’: [7.4.1].

¹⁹⁴ See, for instance, Lord Millett in *Burton v Camden London Borough Council* [2000] 2 AC 399 (HL) at 408: ‘... the word “assignment” is not a term of art. It denotes any conveyance, transfer, assurance or other disposition of property from one party to another. The essence of an assignment is that it operates to transfer its subject matter from the ownership of the assignor to that of the assignee. A lease is not an assignment, because it does not transfer any pre-existing property from the lessor to the lessee, but creates a new interest and vests it for the first time in the lessee. A purported assignment of the interest of one joint tenant to the other joint tenant does not constitute an assignment, because each of the joint tenants is already the owner of the whole. The so-called assignor has no separate interest of his own which is capable of being transferred to the other and which the other does not already own. None of this, of course, applies to a tenant in common, because he has a separate and distinct interest of his own which he can assign either to a third party or to his co-owner.’

¹⁹⁵ As to the nature of joint tenancies, see further Gray & Gray 2009, [7.4.4]–[7.4.27].

survivorship (*ius accrescendi*): when one joint owner dies, the property is owned by the surviving joint owners, and the estate of the deceased joint owner gets nothing. By contrast, a tenancy in common is a form of co-ownership in which the co-owners hold distinct shares. In other words, it can be said that *A* holds three-quarters of the thing, whereas *B* holds one-quarter. Such a division is impossible in the case of a joint tenancy. The *sharing* of a *single* thing in defined proportions is the essence of a tenancy in common—and gives rise to the phrase that tenants in common hold a thing in ‘undivided shares’.¹⁹⁶

Concurrent ownership of intangibles

There is a distinct dearth of case law regarding concurrent ownership of intangibles. Smith asserts that it has long been the position that there cannot be a legal tenancy in common over choses in action and that the only form of legal co-ownership is joint tenancy.¹⁹⁷ However, there is no reason why the equitable or beneficial interest in the intangible may not be held either on a joint tenancy or on a tenancy in common.¹⁹⁸ **2.124**

Thus, where the chose in question is a legal chose in action, the legal title must be held on a joint tenancy, whereas the equitable or beneficial interest in that chose can be held either on a joint tenancy or on a tenancy in common. Where the chose in action is an equitable chose in action, then it would again follow that that chose can be held either on a joint tenancy or on a tenancy in common. **2.125**

Analysis in the context of assignment

As Tolhurst notes, ‘[g]enerally it is not possible to divide up a single right and then separately assign the parts. A debt is often described as being indivisible so that an assignment by way of division of a debt is not possible. If it were possible to break up that debt the result would be to create two debts which would increase the legal burden of the debtor’.¹⁹⁹ Thus, where there is a ‘partial assignment’ of a chose in action which is not divisible into smaller units that are legally recognized, the chose in action is not divided but co-owned. Take, for example, a debt, where *A* purports to assign to *B* £90 of the £100 that is owed to *A* by *C*. By this transaction, there is not created two separate and distinct rights of action against *C*, whereby *A* can claim £10 and *B* can separately claim £90. There remains a single chose in action—the debt—and the real question is whether *A* and *B* are (i) co-owners at law only,²⁰⁰ **2.126**

¹⁹⁶ See further Gray & Gray 2009, [11.29]–[11.54].

¹⁹⁷ Smith 2005, 209; *Re McKerrell* [1912] 2 Ch 648 (ChD) at 653: ‘... I am not at all satisfied that the assignment made by the husband transfers or conveys any interest whatever, legal or equitable, in this policy or the moneys secured thereby. Certainly, it conveys nothing at law. That is quite clear. There is no assignment under the Judicature Act, and before the Act it is clear that there could not have been a tenancy in common of a legal chose in action, although I need not decide upon that ground...’ (*per Joyce* J).

¹⁹⁸ Smith 2005, 210.

¹⁹⁹ Tolhurst & Peden 2008, ch 4 (‘Assignment of Contractual Rights: Some Reflections on *Pacific Brands Sport and Leisure Pty Ltd v Underworks Pty Ltd*’) 53. See also Goode 2003, 37–9: ‘This article re-examines the concept of fungibility in regard to intangible property. It argues that since fungibility involves a choice between legally interchangeable units, an interest in a particular issue of shares, a particular debt or a particular managed fund which is not divisible by transfer into separate units capable in law of being separately owned is simply a co-ownership right in a single asset’.

²⁰⁰ This would be the case where a joint tenancy was intended. On that basis, there would be no need for separate division of the equitable interest.

(ii) co-owners at law and in equity²⁰¹ or (iii) co-owners only in equity.²⁰² The first case (i) involves a change in ownership of an existing chose in action (from the ownership of *A* to the co-ownership of *A* and *B*); the third case (iii) does not involve any change in the ownership of an existing chose in action, but rather the creation of new equitable interests in the chose.²⁰³ Case (ii) involves both a change in the ownership of an existing chose in action, and the creation of new equitable interests in the chose.

(3) Successive Ownership

- 2.127** It is common to seek to create successive rights to chattels, analogous to leases of land. In the context of choses in possession or tangibles, the traditional approach has been to create possessory rights by way of bailment.²⁰⁴ Bailment, however, given the emphasis on possession, cannot apply in the case of intangibles. There is also the vital question of whether bailment can, in fact, amount to a property right, that is, whether successors in title are bound.²⁰⁵
- 2.128** In the context of intangibles, the best analysis is that whereas the legal estate in the chose continues to be held by the owner (or co-owners), the beneficial interest is partitioned, so that beneficiaries hold successively.²⁰⁶ This involves the creation of new choses in action—the equitable interests reflecting the intended successive ownership—rather than the partition of an existing chose in action.

(4) Fragmented Ownership

- 2.129** Finally, it is necessary to consider the case where the primary interest—ownership—is divided into the ‘general property’ and the ‘special property’, the latter being carved out of the former. As stated above, this is not a case of co-ownership, but rather a case of fragmentation of ownership.
- 2.130** Fragmentation occurs where the owner of an interest in property does not transfer the entirety of that interest to a third party, depriving himself of the right *in toto* and conferring it on another, but where he retains his interest and instead creates a new interest in the property, different from but inevitably less than the interest he himself holds. A paradigm example is the licensing of intellectual property rights. In such a case, the right held by the owner (the intellectual property right) is undoubtedly a piece of intangible property. The licence, however, exists essentially as a contract.

²⁰¹ This would be the case where a tenancy in common was intended. Given that the legal interest could only be held on a joint tenancy, the intention of the parties to create a tenancy in common would have to be reflected in the division of the equitable interest.

²⁰² This would be the case where either the legal interest cannot be transferred (something that is considered in paras 11.09–11.18) or where the parties did not intend to transfer the legal interest, but instead intended their co-ownership to take effect in equity alone.

²⁰³ See *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) at 706 *per* Lord Browne-Wilkinson. *Deposit Protection Board & Another v Barclays Bank Plc* [1994] 2 AC 367 at 380–1 *per* Simon Brown LJ (decision reversed by the House of Lords on different grounds).

²⁰⁴ Smith 2005, 211. For a criticism of the concept of bailment, both in this context and generally, see McMeel 2003.

²⁰⁵ See Smith 2005, 212, and the authorities there cited.

²⁰⁶ In the context of interests created by will, this analysis appears to hold good: *Re Swan* [1915] 1 Ch 829 (ChD) at 834 (*per* Sargant J). See also Smith 2005, 214.

The concurrent and successive interests described in paras 2.123 to 2.128 clearly do give rise to property interests in their own right. That is not necessarily the case here. A crucial question will always be whether the 'special property' in fact amounts to a right *in rem*, capable of binding third parties. Where the special property is merely a contractual right (as in the case of a licence, considered above), the orthodox view is that there is no right *in rem*, but merely a right *in personam*.²⁰⁷ **2.131**

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²⁰⁷ This is considered further in Section D of Chapter 27.

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