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Personal property

- Basic concepts
- Ownership
- Possession
- Transferring possession
- Bailment
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INTRODUCTION

This chapter is intended to provide an introduction to the concepts which underpin the law as it relates to property other than estates and interests in land. Accordingly, the chapter will focus on issues relating to property that must be appreciated in order to understand the discussion in the subsequent chapters. For example, (i) delivery and possession of goods, as well as the passing of title are discussed in Part III of this book; (ii) Chapter 25 deals with the granting of security over property; and (iii) Chapter 26 deals with business financing, which requires an understanding of the nature of business assets. Even such apparently mundane issues as the law relating to the transportation and storage of goods involve a good grasp of what the law treats as property and how it protects interests in property. Finally, agents often have possession of goods when acting on behalf of their principals and this may give rise to property issues.

That is not to say that this chapter is 'light' reading; the issues are complex and there remain numerous troublesome areas where the law is far from clear. The chapter starts by considering some basic principles by outlining the way in which English law categorizes property before moving on to consider how ownership is best thought of as a bundle of rights over something that the law recognizes as something which can be owned (i.e. property). English law recognizes only three types of proprietary claim to personal property, and the chapter then moves to consider two of these: ownership and possession.¹ After noting the key difference between personal and proprietary claims in relation to property, the nature of legal ownership, including co-ownership are discussed, along with the difference between legal and equitable ownership. The concept of possession is given a more extended treatment with focus on circumstances where ownership is separated from possession, so that the importance of possessory title to goods in English law can be appreciated.

1. The third proprietary interest, namely the charge, is a security interest only (i.e. it is an interest granted to a person called a 'chargee' in order to provide him with claims against the property if the owner fails to meet an obligation to the chargee—for example, paying a debt).

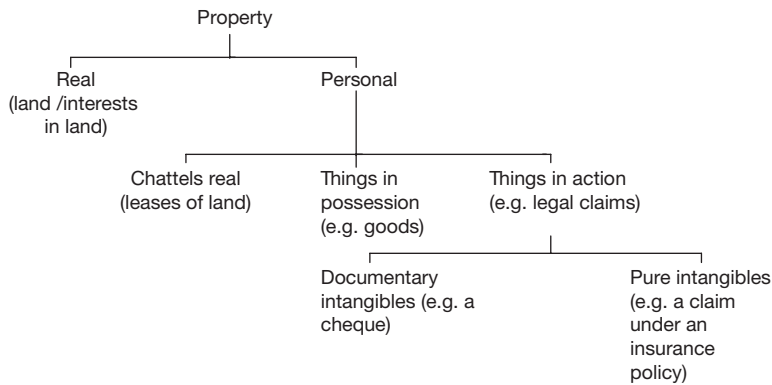


FIGURE 2.1 Types of property

The chapter ends with a brief discussion of how property which cannot be physically possessed can be transferred through assignment.

Basic concepts

Real and personal property

As Figure 2.1 demonstrates, English law draws a sharp distinction between (i) property which is land² or interests in land, known as ‘real property’; and (ii) property which is not, known as personal property. Thus real property consists of property which the law treats as land, and personal property is simply a residual category consisting of all property which is not land. What is treated as real property extends beyond the physical structure of the land itself and includes things attached to it and to incorporeal³ rights, such as rights of way, mortgages and charges over the land. We can see immediately that even in relation to land—that apparently most concrete of things—there exists property which cannot be touched, and indeed, as we shall see, probably the best way of understanding property, whether real or personal, is to treat it as something which the law recognizes can be owned and that ownership as simply a bundle of rights.

Eg

ComCorp Ltd

Several years ago, Comcorp bought a piece of derelict land⁴ from Victor, with the intention of building a factory upon it as soon as the cash became available. Before ComCorp completed

2. Or more accurately ‘estates and interests’ in land.

3. Literally this means something without a body—in other words something that has no three-dimensional existence. As we shall see, many things that can be owned do not have a three-dimensional existence.

4. Technically it bought a fee simple absolute estate in the land holding a tenure of free and common socage, otherwise known as ‘freehold’.

the purchase, its surveyor inspected the land and saw, inside a shed on the site, and a number of apparently dilapidated old cars, which Victor had bought many years before. Peter has land adjoining the site and decided that he would build a fence enclosing both his own and the derelict land. Peter had recognized that the old cars were in fact extremely valuable vintage vehicles, and he removed these from the site and now has them in his workshop, where he is in the process of restoring them. Comcorp has recently discovered what has happened and wishes to take physical possession of both the land and the vehicles.

However, there are substantial differences between real property and personal property, not least in relation to the remedy available for wrongful dispossession. Where a person takes possession of the land of another, then the law provides the title holder with a remedy to recover the land and eject the trespasser, along with recovering damages for any financial loss suffered. However, the position is different in relation to personal property. Assuming that a person wrongfully in possession of goods will not voluntarily surrender them, a person who has a right of immediate possession to them can sue in the **tort of conversion**. However, at common law the remedy in conversion was simply damages, leaving the wrongdoer in possession of the goods but with an obligation to pay compensation.⁵

→ **tort of conversion:** interfering with goods in a manner inconsistent with another's right to possession

Types of personal property

As Figure 2.1 illustrates, English law divides personal property into three main categories: (i) **chattels real**; (ii) **tangible property** (known as 'things⁶ in possession'); and (iii) **intangible property** (known as 'things in action'), which itself can be divided into documentary intangibles and pure intangibles. We will investigate these categories in more detail in this section.

→ **chattel:** any tangible property other than freehold land

Chattels real (or leases of land)

Chattels real are leases of land which initially were simply regarded as personal arrangements between the landlord and tenant. By the sixteenth century (and probably before) it was established that leases of land had the characteristics of land, and consequently leases of land are the subject of works on real property and not of personal property, notwithstanding their classification as personal property.

Things in possession (or goods)

A thing in possession is a tangible object of property, that is to say a three-dimensional item which may range in size from a carbon tube with a diameter of a billionth of a metre to the ship the *Seawise Giant*, an ultra-large crude oil carrier which, until it was scrapped, was nearly 500 metres long and weighed over 500,000 tonnes. Another word for things in possession is 'goods' or alternatively 'chattels'. In this chapter, the word 'goods' will be used, since typically elsewhere in the book, this word is used to designate things in possession.

5. By virtue of s 3 of the Torts (Interference with Goods) Act 1977, an award of specific recovery may be made on a discretionary basis. Normally the award is of damages, unless that provides an inadequate remedy. The right to recover land is as of right.

6. A thing (formerly known as a chose) is a legal term used to describe an asset other than land.

Things in action (or legal claims)

Things in action are intangible property, that is to say property which one cannot touch (and so cannot physically possess) and which consist of claims against another person. So, for example, a debt, a share in a company, a copyright, or a patent are all things in action, since they are all recognized in law as property but are incapable of physical possession. Nowadays,⁷ things in action are typically treated as consisting of two separate sorts of property called ‘documentary intangibles’ and ‘pure intangibles’.

Documentary intangibles are things in action where the documents with which they are associated are so identified with the underlying obligation that transfer of the document effects a transfer of the obligation. For example, in what are called ‘documentary sales’ of goods, the sale goods will be in the physical possession of a carrier in transit to the buyer and consequently inaccessible to either the buyer or the seller. Documents called bills of lading are used, which are regarded as documents of title to the goods identified in them, so that typically the seller has an obligation to tender a bill of lading to the buyer rather than the goods, and the buyer must meet his payment obligation by tendering the purchase price against receipt of the documents. Thus, if it is transferable (known a little misleadingly as ‘negotiable’), a bill of lading can be bought and sold as if it were the goods themselves, since title to the document is recognized as title to the goods.⁸

While a bill of lading is an example (probably the only one) of a document of title to goods, the law also recognizes documents of title to the payment of money, for example cheques and other bills of exchange. Here, typically, the payment obligation of the acceptor to the drawer is transferred to the payee, and where the instrument is negotiable it will pass with the document to future lawful holders of the bill.⁹

Pure intangibles are simply pieces of intangible property which are not embodied in a document. Thus in our example involving a bill of exchange, we have assumed that the drawer and the acceptor have a relationship where the acceptor has a payment obligation to the drawer. That payment obligation—a debt—is a pure intangible but is capable of becoming a documentary intangible if a bill of exchange is drawn upon it. A share in a company, too, is a pure intangible, but does not become a documentary intangible even though there may be a document called a share certificate, which is issued by the company. Title to the share in the company does not generally pass on delivery of the share certificate,¹⁰ but on entry into the share register of the company.

🔗 Documentary sales are discussed at p 487

🔗 Bills of lading are discussed further at p 484

➔ bill of exchange: a document signed by a person (called the ‘drawer’) requiring another person (called the ‘acceptor’) to make a payment to a third party (called the ‘payee’) and who is identified on the document (discussed at p 635)

Ownership as a bundle of rights

When the word ‘property’ is used in normal language, we invariably mean to denote the thing which is owned. However, when we think about property in a legal

7. Following the insightful classification of Roy Goode and Ewan McKendrick, *Goode on Commercial Law* (4th edn, Penguin 2010).

8. In fact this is only a possessory title, since the bill only embodies a right to possess the goods.

9. There are other forms of documentary intangibles. For example, title to some types of investment called ‘bearer bonds’ will pass with the bond document.

10. In other words, the share certificate is not a document of title.

context, we can see that this understanding of property raises two subsidiary questions, namely (i) ‘what is ownership’; and (ii) ‘what things can be owned’? Certainly the most influential analysis of what constitutes ownership in English law is that of Tony Honoré,¹¹ who argues that it is simply a collection of rights recognized by the legal system as corresponding to property rights and exercisable against a person in respect of a particular thing. Consequently, ownership simply consists of the ability to resist competing claims made by another person in respect of property by asserting your own. It is clear, therefore, that when we talk of competing claims we can see that ownership of personal property is relative and not absolute.

The concept of ownership is dealt with in more detail later in this chapter, but Honoré’s understanding of ownership requires that the legal system recognizes the bundle of rights as being exercisable over something which can be owned. For example, I clearly have a range of rights in respect of my body, including, for example, the right not to be physically attacked by you; therefore, we might imagine that this bundle of rights might constitute property, yet it is not so. Traditionally in English law I do not own my own body.¹² A further example of the difficulty in determining what can be owned and what cannot is demonstrated by the Australian decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*.¹³ Here the owners of a racecourse sought to prevent the owners of a neighbouring piece of land that overlooked the racecourse from watching the horse races and broadcasting a radio commentary on them. By a majority of three to two, the High Court of Australia held that there could be no property rights in a spectacle because the racecourse owners had no physical means of excluding their neighbours from spectating. The minority, on the other hand, held that property rights had been infringed on the basis that the defendant had deprived the claimant of the right to commercially exploit the race meetings.¹⁴ Whilst it would be dangerous to see this ‘excludability’ as being a sure way to separate ‘property’ from ‘non-property’, the importance the law places in the ability physically to exclude others from exercising control over goods can be appreciated in a number of the cases referred to in the remainder of this chapter.¹⁵

So what the law is prepared to treat as property is dependent not on some intrinsic character that distinguishes ‘property’ from ‘non-property’.

11. Tony Honoré, ‘Ownership’ in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 108. Honoré was himself heavily influenced by Hohfeld; see WN, Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale Law Journal* 16.

12. However, the law in this area is developing. For example, whilst no one has property rights in a dead body nor in medical samples taken from a dead body (*Dobson v North Tyneside Health Authority and Newcastle Health Authority* [1997] 1 WLR 596 (CA)), property rights can be acquired in an anatomical skeleton prepared for use by medical students; and it has recently been accepted that products from a human body can be the subject of property rights (*Yearworth and Others v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1).


13. [1937] CLR 479 (High Court of Australia).

14. For a fascinating contextual insight into this case see Andrew Kenyon, Megan Richardson, and Sam Ricketson (eds), *Landmarks in Australia Intellectual Property Law* (Cambridge University Press 2009).

15. Kevin Gray, ‘Property in Thin Air’ (1991) 50 CLJ 252, points out that the ability to exclude others from enjoying a thing is a key factor in determining whether the thing can be the subject of property rights or not. For a further example of ‘excludability’ being indicative of the character of property, consider the issue of ‘personality rights’; see G Scanlan and A McGee, ‘Phantom Intellectual Property Rights’ [2000] IPQ 264.

What types of property rights does English law recognize?

In addition to the security interest known as the ‘charge’, the proprietary rights recognized in respect of personal property are ownership and possession.¹⁶ These rights are rights which are said to be *in* the asset itself, sometimes called ‘*jus in re*’, and must be contrasted with personal rights exercisable by one person against another *over* a particular article of property because of an obligation in respect of it, a ‘*jus ad rem*’. Another way of putting this is to say that proprietary rights have the capability of ‘going with the thing’ because they are in or part of it, whilst personal rights in this context are rights as against an individual in respect of a thing. To understand this, consider the following example.

 Charges and other security interests are discussed in Chapter 25 and will not be considered further in this chapter

Eg ComCorp Ltd

Bastion Ltd agrees to sell 100 palettes to ComCorp. Before ownership of the palettes passes to ComCorp, CheckGoods Ltd wrongfully takes possession of the goods and refuses to supply them to ComCorp.

In such a case, ComCorp clearly has a claim in contract against Bastion for non-delivery. This is a personal right against Bastion in respect of the goods, but ComCorp does not have proprietary rights, since it does not have possession of the goods, nor is it their owner. Consequently, ComCorp does not have a right to make a proprietary claim against CheckGoods (for example, to sue CheckGoods in conversion for interference with ComCorp’s right to possession).¹⁷ However, if under the terms of the contract, ComCorp had become the owner of the goods, it would have a claim in conversion against CheckGoods,¹⁸ as CheckGoods had interfered with ComCorp’s proprietary rights.¹⁹


It might appear from this example that, whilst there is a difference between personal rights and proprietary rights, it does not really matter, because ComCorp did have some sort of claim against someone. However, suppose Bastion cannot be found, or suppose it is insolvent so that ComCorp’s personal claim against it for breach of contract will probably not be met in full. The key characteristic of a proprietary right emerges, namely that it will survive the insolvency of a person who infringes it, whereas a merely personal claim in respect of goods will simply become a debt to be proved in the insolvency and will abate along with all the other claims of creditors who do not have proprietary rights. Consider the following example.

16. Roy Goode rightly points out that ‘Real Rights’ might be a preferable description for proprietary rights since a charge consists of rights *over* not *in* a thing. However, ‘proprietary’ is the commonly used name.

17. *Jarvis v Williams* [1955] 1 WLR 71 (CA) established that a mere contractual right to possession is insufficient; see Mark Simpson, Anthony Dugdale, and Michael Jones, *Clerk and Lindsell on Torts* (20th edn, Sweet & Maxwell 2010) 17–62.

18. Assuming ComCorp either had possession or an immediate right to possession of the goods.

19. *Pendragon plc v Walon Ltd* [2005] EWHC 1082 (QB).

 The law on the transfer of property (ownership) in goods under the Sale of Goods Act 1979 is discussed at p 232

Eg

ComCorp Ltd

Harvest Ltd agrees to sell 10,000 tonnes of wheat to ComCorp at \$350 per tonne, with the wheat being currently loaded in an unidentified ship containing 20,000 tonnes of wheat. ComCorp pays the purchase price and under the terms of the contract and by virtue of s 20A of the Sale of Goods Act 1979, ownership of half of the cargo passes to ComCorp. Harvest Ltd becomes insolvent before ComCorp can take delivery, by which time the wheat is worth \$400 per tonne.

As ComCorp has ownership of half the wheat, by virtue of s 283 of the Insolvency Act 1986, ownership of it will not vest in ComCorp's trustee in bankruptcy (though the \$3.5million purchase price will). ComCorp will therefore be able to assert its proprietary right to the wheat as against Harvest and take possession of it. However, suppose Harvest became insolvent before ownership of the wheat passed to ComCorp. Ownership of the wheat will vest in Harvest's trustee in bankruptcy and ComCorp will be left with pursuing its personal claim for breach of contract along with all of Harvest's other creditors.²⁰

Equities occupy the middle ground between personal rights and proprietary rights, examples being the right to rescind a contract for misrepresentation, or to have a transaction set aside for undue influence. In respect of the person making the misrepresentation or effecting the undue influence, the effect of an equity is purely personal—the contract is voidable at the instance of the innocent party, but this personal right does not 'go with the property'—so that the effect of the right to rescind will not affect a third party merely by virtue of their acquiring the relevant goods. However, if the third party acquired the goods with notice of the circumstances giving rise to the right to rescind, or was not a purchaser, then the equity will bind them also. Consequently, where the sale of goods has been induced by the tender of a dishonoured cheque, the 'rogue' will nevertheless be able to give good legal title to an honest purchaser of the goods from him, notwithstanding the fact that the seller, having discovered the misrepresentation, has avoided original contract of sale.

Having established that both ownership and possession create proprietary interests in goods, each of these concepts needs to be discussed in more detail.

Ownership

What is ownership?

Ownership is a remarkably difficult concept to define, but Honoré insists that it consists of the legal rights, being the 'standard incidents of ownership', that are left after specific rights have been granted to others.²¹ Included amongst these 'standard incidents' Honoré lists the right to possess, the right to use, the right to income from the

20. This example is based on the facts of *Re Wair* [1927] 1Ch 606 (CA), which pre-dates s 20A of the Sale of Goods Act 1979.

21. See Tony Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 126–8. The list of 'incidents' is at 113.

asset, and the right to transfer it. Yet, *X* might pass possession of some machinery to *Y* for ten years for *Y* to use in his business.²² In this case *X* no longer has possession or use of the machinery, nor does he have an immediate right to possess, yet it would be correct to say that *X* remains the owner of it, as he still has the residual rights once we strip away those he has granted to *Y*. Indeed *X* will still be the owner, even if he does not have an indefeasible title to the goods, for example where he bought the machinery under a contract which for some reason can be rescinded.

The bundle of rights that make up 'ownership' and indeed the bundle of rights which make up 'possession' may properly be described as being interests in the object of those rights. To say that someone has an interest in goods is to denote the *sort* of rights they have over the object, for example the type of use to which they are entitled to put it and what rights they have to exclude others from exercising control over it.

Eg

ComCorp Ltd

Returning to ComCorp's claim to the cars (as set out on p 21), it can now be said that in order to succeed in its claim against Peter, it would have to show that it had an *interest* in the cars which entitles it to possession. It could do this perhaps by showing that the contract of sale of the land from Victor also included a sale of the shed and its contents; that is to say, it has ownership of the cars. Since the right to possession is amongst the 'standard incidents of ownership', this is a right which ComCorp can assert against Peter.

Legal ownership of personal property is indivisible

In relation to personal property, it is not possible to create successive legal interests in the same thing. Suppose that *X*, the owner of a piece of machinery, leases it to *Y*. We have seen that *X* still remains the owner of it; he has simply parted with possession. *Y* also has an interest in the goods, not as owner, but by virtue of having possession of the machine. What *X* has done is to create an interest, not by carving it out of his own, but creating a new one derived from possession.²³ Consequently, in the case of the lease of goods, the lessee obtains simply a right to possess as against the lessor, which will not bind a purchaser of the machinery even with notice of the leasing contract unless the lessee is in possession of the goods.²⁴ In the absence of possession, the lessee is left with a personal claim in tort for damages against the purchaser for inducing a breach of contract.²⁵ Similarly a person can, in effect, only grant one legal

22. This would be a bailment, on which see later in this chapter. Leasing of goods is common.

23. The position is different in relation to land where a tenant has an estate in land which, subject to statute, will bind purchasers whether the tenant is in possession of the land or not.

24. Though see William Swadling, 'The Proprietary Effect of the Hire of Goods' in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (2nd edn, Informa Law 1998), who argues that the lessee has no proprietary rights.

25. But see Roy Goode and Ewan McKendrick, *Goode on Commercial Law* (4th edn, Penguin 2010) 38, who argue that the lessee could alternatively formulate a claim in conversion, providing a possible remedy to recover the goods.

mortgage over goods, since a legal mortgage requires a transfer of legal title from mortgagor to mortgagee.²⁶

Co-ownership of goods

A key issue with ownership of goods is that it is dependent on the ability to identify the goods owned. Consequently, for example, ownership of unidentified goods cannot pass under a sale of goods from the seller to the buyer. Similarly, where goods belonging to two different owners are mixed so that neither can distinguish his goods from the other's, then *prima facie* neither has ownership of the goods; neither can point to an item and claim, say, the right to possess it. This can be illustrated by considering the following case.



Indian Oil Corporation Ltd v Greenstone Shipping SA (Panama) (The Ypatianna) [1981] QB 345 (QB)

FACTS: Oil belonging to the claimant was pumped into a ship to be carried to India from Russia. It was mixed in the ship with oil belonging to the carrier, so that it could not be said which oil belonged to whom. The claimant argued that it was therefore entitled to all of the oil, as the carrier could not identify his oil so as to claim possession of it.²⁷

HELD: Where goods become mixed so that they become indistinguishable from one another, the only sensible rule, at least where the person who mixed the goods was not motivated by fraud, was that the owners of the goods making up the mixture become co-owners in common of the mixture in proportion to their contributions to it.²⁸

★ See Peter Stein, 'Roman Law in the Commercial Court' (1987) 46 CLJ 369

Co-ownership exists where two (or more) people contemporaneously have the right to possess the whole of some goods so that, by virtue of that relationship, neither can exclude possession of the other(s). Thus in *The Ypatianna* both the claimant and the carrier owned all of the oil and so collectively had a claim to it and individually were entitled to a share of the whole. Thus, since in co-ownership neither co-owner can exclude the possession of the other, a co-owner who destroys any part of the asset which they collectively own without the consent of all commits a tort.²⁹

Two forms of co-ownership exist, namely ownership in common and joint ownership, and either can exist at law or in equity in relation to goods.³⁰ As we have seen

26. Of course, if possession of the goods was held by a person with possessory title, then both he and the owner could grant legal mortgages.

27. In reality a rather illogical claim since it, too, was in the same position, and in fact the carrier had possession of the mixture so that the claimant would have needed to have identified its goods in order to claim them from the carrier.


28. See also *Spence v Union Marine Insurance Co* (1868) LR 3 CP 427. The situation will be different where the separate goods of the parties have never been identifiable—see, for example, *Re London Wine (Shippers) Ltd* [1986] PCC 21 (QB).

29. Torts (Interference with Goods) Act 1977, s 10(1)(a).

30. Though probably there can be no legal ownership in common of things in action and a legal tenancy in common in land cannot be created after 1925 by virtue of the Law of Property Act 1925, s 34(1).

in ownership in common, each co-owner owns a share of the whole which as yet has not been divided (for this reason, ownership in common is often called 'ownership in undivided shares'). In joint ownership the co-owners also have collective ownership of the whole, but individually they own nothing. As a result, if a joint owner dies his interest ends and the whole of the asset falls into the hands of the survivor (this is known as 'the right of survivorship'). A joint owner may convert his collective ownership into ownership in common by giving notice of severance to the other, and any attempt by him to sell either the whole or any part of the asset will be treated as severance and operate only on his undivided share.³¹

Whether a state of co-ownership exists is normally dependent on the intention of the co-owners, but in cases like *Re Stapylton Fletcher*,³² where a number of purchasers' cases of wine were stored together, but segregated from the seller's trading stock, and *Mercer v Craven Grain Storage Ltd*,³³ where farmers' grain became part of a fluctuating bulk, the courts were prepared to find a state of co-ownership so that ownership (and, in the case of *Mercer* at least, possession) was not lost by virtue of the inability of the owners to identify their own specific goods. However, in the case of a pre-paying buyer of goods held in bulk, it is only if the parties agree to the contrary that such a buyer does not become a co-owner by virtue of s 20A of the Sale of Goods Act 1979.³⁴

 Sections 20A and 20B of the Sale of Goods Act 1979 are discussed at p 253

Legal and equitable ownership

Prior to 1875 England had two parallel systems of law, one developed in the Court of Chancery (known as 'equity') and the other developed in the courts of common law. The administration of the two systems was combined in 1875, but the rules developed by each have, in the main, remained distinct.

The approach of the Court of Chancery to personal property differed in a number of ways from that of the Common Law Courts. First, it recognized trusts, so that where *A* transferred an asset to *X* to hold on trust for *B*, *B* was regarded as having proprietary rights (an equitable interest) as a beneficiary, though *X* still had legal title as a 'trustee'. Any variety of rights could exist under trusts, so that it was (and is) possible to have life, determinable, and other interests in assets held in trust. At common law, while similar results to life tenancies and so forth could sometimes be achieved, it was only by virtue of creating two titles, one deriving from ownership, the other from possession. The fact that it is possible for property to be owned at law by one person, but in equity by another, raises the question whether a person with an equitable proprietary right to possession which is recognized only as a contractual right at law can maintain an action in conversion. In *International Factors Ltd v Rodriguez*,³⁵ the Court of Appeal seemed to suggest that they could. Here a company agreed to

31. So far as possible, the common law avoided finding joint ownership in commercial situations, primarily because it is unlikely that the co-owners intended to be in effect gambling on who would die first. It might well be different in a family situation.

32. [1994] 1 WLR 1181 (Ch).

33. [1994] CLC 328 (HL), discussed further later in this chapter.

34. Section 20B makes provision for ensuring co-owners in such circumstances can withdraw their aliquot share without a potential tort claim from the other co-owners.

35. [1979] QB 351 (CA).

hold all cheques it received from customers on trust for the person to whom it had assigned debts owing to it by those customers. One of its directors was held liable in conversion when he paid some cheques into the company's bank account, since the assignee's title under the trust coupled with the right to immediate possession was sufficient. This analysis seems doubtful,³⁶ and Clerk and Lindsell treat this as a case where the assignee had possession through the agency of the company.³⁷ Similarly, the Court of Appeal in *MCC Proceeds Inc v Lehman Brothers International (Europe)*³⁸ held that a beneficiary under a trust could not sue a third party for conversion of bearer shares: the claim for the tort of conversion lay only with the legal owner, the trustee. Hobhouse LJ explained that the reason why a claim by a beneficiary must fail 'is not a quirk of history... Equitable rights are of a different character' from legal rights.³⁹

Second, equity would treat an agreement to transfer an asset for value as equivalent to actually transferring it, once the consideration was paid, though with the one exception—sales of goods.⁴⁰ Thus by virtue of the maxim 'Equity looks on as done those things that ought to have been done', a specifically enforceable agreement to transfer a thing in action resulted in equitable title vesting in the intended transferee, though legal title remained in the intended transferor. Similarly, a contract to create a mortgage became an equitable mortgage, though it should be noted that equitable titles to interests may be defeated by the intervention of a bona fide purchaser of a legal interest in the asset.⁴¹

Possession

While English law has 'never worked out a completely logical and exhaustive definition of possession',⁴² nevertheless it is clear that it requires two elements: (i) the exercise of control over the object, known as *de facto* possession; and (ii) an intention to possess the object, known as (amongst other things) *animus possidendi*. It is worth noting at the outset that possession is only possible in relation to tangible objects, so that what follows cannot apply to things in action.

→ *animus possidendi*: 'the intention of possessing'

The exercise of control

Clearly it is quite possible to exercise control over goods without physically holding them in one's hands. If this were not so, then one could never possess a car, let alone an aircraft or a ship. What is required for possession to exist is the ability to control the access of others to the item. Thus, physical possession of a key to a warehouse

36. See *The Future Express* [1993] 2 Lloyd's Rep 542 (CA).

37. Mark Simpson, Anthony Dugdale, and Michael Jones, *Clerk and Lindsell on Torts* (20th edn, Sweet & Maxwell 2010) [17–62].

38. [1998] 4 All ER 675 (CA)

39. *ibid* 701. Though the Court of Appeal found no difficulty in allowing a claim in negligence by a beneficiary under a trust in *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] 1 QB 86.

40. See *Re Wait* [1927] 1 Ch 606 (CA).

41. For more see Roy Goode 'Ownership and Obligations in Commercial Transactions' [1987] LQR 433.

42. *Dolfus Mieg et Cie SA v Bank of England* [1952] AC 582 (HL) 605 (Earl Jowett). See D Harris, 'The Concept of Possession in English Law' in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1963).

where goods are stored is treated as a form of possession, though clearly in this case possession is more symbolic than actual. The degree of control required will vary according to the nature of the goods, as the following case demonstrates.



The *Tubantia* (No 2) [1924] P 78 (CA)

FACTS: A ship sank in over 100 feet of water and expert evidence was given that salvaging such a vessel would be very difficult. Major Sippe had marked the position of the wreck with buoys and lines and sent down divers to recover some of the cargo. Due to bad weather, they had to suspend diving operations and spent only around twenty-five days during the course of a year using divers on the wreck. Also, because of the depth the divers could only spend two hours per working day in the ship.

HELD: Major Sippe had possession of the wreck, bearing in mind its character.

COMMENT: The key to understanding this case, and indeed the whole idea of the mental element in possession is that Major Sippe was exercising as much control over the wreck as the circumstances would allow, and was also physically able to prevent the competitors from exercising control.

The Tubantia (No 2) also illustrates an important point, namely that once control has been exercised over goods along with the necessary intention to possess, the law resists arguments that possession has been abandoned without clear evidence of such an intent, primarily in order to avoid legitimizing a ‘free-for-all’ scramble for property.⁴³ A further demonstration of this point is provided by Pollock and Wright,⁴⁴ who insist that even where a careless banker leaves his doors and windows open, he still remains in possession of the cash and securities until the property is actually taken by a thief, notwithstanding the fact that this is the inevitable consequence of his action.⁴⁵

The intention to possess

The intention to possess consists primarily of an intention to exclude others from possession, and this is a matter of fact, but it is important to note that this does not necessarily amount to an intention to own. Take, for example, the person who finds a valuable object, which he takes home and keeps safely. Clearly this person recognizes that he does not own the object, but, equally clearly, he intends to exclude others from exercising control over it, even though he recognizes that were the owner to assert rights over the property, he could not lawfully resist them, and indeed he may even take steps to find the owner. Nevertheless, he still has an intention to possess.

43. For an example of a case of such a free-for-all, see *Young v Hitchens* (1844) 6 QB 606, where on the facts the court held that a trawlerman was not in sufficient control of a shoal of fish in order to obtain possession until the net was completely closed around them.

44. Frederick Pollock and Robert Wright, *An Essay on Possession in the Common Law* (OUP 1888) [15]. Available at <<http://free-law-books.troy.rollo.name/possession.pdf>>.

45. Note, were the law to have been otherwise, the thief would not have committed larceny.

Even if he hands the item to the occupier of the area in which he found it, on the basis he should have it back if no one claims it, he still has an intention to possess.⁴⁶

There are some instances where a person is said to have control over an object, but not possession of it, and this is typically explained because of the lack of the necessary intent to possess. Thus an employee may have control over his employer's goods, but so far as the law is concerned, possession is still in the employer. Similarly, a guest in a hotel or in the house of a friend may have control over the hotelier's/friend's goods in his room, but nevertheless is not legally in possession of them. In such cases, the employee/guest is said to have 'custody', but by virtue of the lack of the necessary intent does not have possession. Bridge⁴⁷ suggests that this analysis became necessary in order to prevent wrongdoers from avoiding convictions for larceny,⁴⁸ which required an unlawful deprivation of possession. If an employee had been held to have been in lawful possession of his employer's goods, his subsequent appropriation of them, for his own benefit, would not have amounted to larceny. Now under s 1 of the Theft Act 1968, the distinction between custody and possession is irrelevant for the purposes of the criminal law, but the distinction remains so far as the law of personal property is concerned. Thus, a hotel guest with custody of a bathrobe may be liable under the tort of conversion if he packs it in his suitcase.

Two illustrations of possession as a proprietary interest

Possession is a proprietary right, and thus is stronger than a personal right to call for delivery. A person with possession has a title to and interest in the goods. This, perhaps, can be illustrated by reference to two cases.



Wilson v Lombank Ltd [1963] 1 WLR 1294

FACTS: Wilson bought a car from a person who turned out to be a rogue, and took it to a garage for repairs. After the repairs were completed, the car was left on the forecourt of the garage, but before Wilson could collect it, the garage permitted Lombank Ltd to remove the car. The car had been stolen and Lombank honestly believed that it owned the car. Subsequently, Lombank discovered that it did not own the car and so it delivered it to the true owner. Wilson sued Lombank for **trespass to goods**. Trespass to goods requires the claimant to have had possession of the goods and that the defendant interfered with that possession, so the issue was did Wilson have possession of the car?

HELD: When Wilson left the car with the garage, he still retained possession of the car, since the garage was holding it to his order at all times.⁴⁹ Consequently, Lombank was liable in trespass to Wilson for the full value of the car, together with the cost of the repairs.

→ **trespass to goods:** Any direct physical interference with goods that are in the possession of another person, without the consent of the person in possession, unless there is lawful justification for the interference

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

47. Michael Bridge, *Personal Property Law* (3rd edn, Clarendon Press 2002) 20–1.

48. Note that the crime of larceny has now been largely replaced by the crime of theft and theft-related offences under the Theft Act 1968.

49. Note that the garage did not have a lien on the car, since Wilson had a monthly credit account with it.

COMMENT: This case illustrates two important points. First, Wilson was able to protect his right to possession against Lombank, even though there was someone who had a better title to the car than him. This reminds us that property rights are simply relative and a title which is less than absolute is still protected by the law. Second, the law may treat a person as being in possession even where the goods are physically controlled by someone else. In this case, Wilson had what is called 'constructive possession', something to which we shall return shortly (see p 37).

In *Wilson*, the person claiming to enforce his rights in relation to the property was entirely innocent. The same cannot be said for the claimant in the next case, but nevertheless the law protected his right to possession even though the goods had been stolen.



Costello v Chief Constable of Derbyshire [2001] EWCA Civ 381

FACTS: Derbyshire Constabulary seized a car that was in the possession of Costello. The police believed that the car was stolen and had evidence indicating that Costello actually knew that the car was stolen. The police were unable to locate the car's true owner, but refused to return the car to Costello. Costello commenced proceedings against the police force.

HELD: Although Costello knew that the car had been stolen, it was held that his rights as a person with possessory title were entitled to legal protection, even though that title had not been obtained by legal means, and that consequently the car must be returned to him after the police had completed their enquiries.

COMMENT: It is worth noting that the Court of Appeal did not believe that public policy grounds were sufficient to remove that protection, and that it would not have mattered if Wilson had stolen the car.

★ See Joshua Getzler, 'Unclean Hands and the Doctrine of Jus Tertii' (2001) 117 LQR 565

It is, however, important to note that in both of these cases the possessory title is fragile. In both *Costello* and *Wilson*, s 8 of the Torts (Interference with Goods) Act 1977 would have altered the situation had the defendant been able to identify a person with a better title, for example the true owner. Additionally, in *Wilson*, had the garage refused to return the car to Wilson before releasing it to Lombank, then Wilson would have had neither possession nor ownership when Lombank took the car and could not have sustained an action in negligence, conversion, or trespass against it.⁵⁰

50. This is assuming that the case involved constructive possession, on which see p 37.

Eg

ComCorp Ltd

The previous ComCorp example (see p 21) illustrates how possessory title might assist ComCorp Ltd. Suppose that ComCorp did not acquire ownership of the cars along with title to the land from Victor. If ComCorp could show it had possession of the cars before Peter took them, then ComCorp would have a prior possessory title to them, so that as against Peter it has an immediate right to possess the goods. Consequently, ComCorp could protect this right by bringing an action for conversion against Peter. If, however, we suppose that ComCorp never had possession or ownership of the cars, then it has no claim, even though Peter had wrongfully taken the cars from the shed. In these circumstances only Victor (presumably the owner) has title to an interest which can successfully compete with Peter's possessory title.

Transferring possession

→ **transferee:** a person to whom something is transferred

The most obvious way of transferring possession of goods is to physically hand them to the **transferee**. However, in some instances this is impossible or impractical, either because of the size of the object or its location. Similarly, in a contract of sale, it might be expedient that delivery of the goods takes place long before the buyer obtains physical possession. However, even if there is no physical delivery, the law provides mechanisms for what is called constructive and symbolic delivery. Thus transfer of possession can be effected symbolically, for example by passing over a key to a warehouse or perhaps transferring possession of a document of title,⁵¹ while s 32(1) of the Sale of Goods Act 1979 provides that delivery to a buyer's carrier effects delivery of possession.

🔗 **Sale of Goods Act 1979, s 32(1)** is discussed at p 234

However, a commercially important way in which possession of goods can be passed occurs when a third party who has physical possession of the goods on behalf of the transferor undertakes to hold them for another person. This process is called **attornment** and we will consider this in more detail later; but before this, it is important that we discuss the concept of **bailment**.

Bailment

What is bailment?

Bailment is a relationship under which a person (known as the **bailor**) transfers possession of goods to another person (known as the **bailee**). If you lend goods to a friend, you have both entered into a relationship of bailment, with you as the bailor and your friend as the bailee. Leaving goods with someone to be repaired is another example of a relationship of bailment. A typical commercial example is where a person, having agreed to sell and deliver goods to the buyer's premises, uses a carrier to

51. Possession of a document of title to goods is sometimes called 'constructive possession', though probably symbolic possession might be a preferable description.

transport them to the buyer. In this case, the seller is the bailor, the carrier the bailee. Other examples would include cases where possession of goods is transferred to the owner of a warehouse for safekeeping, or where the owner of a photocopier leases it to a business, while hire purchase also involves bailment. The essence of bailment is the transfer of possession where the bailee acquires only a limited possessory interest in the goods such that he must either redeliver the goods to, or effect delivery as instructed by, the bailor, though in cases such as leasing of goods, such obligations may be long postponed.

Whether possession has been transferred is always a matter of fact, depending on the degree of control transferred, as demonstrated by the following case.



Ashby v Tolhurst [1937] 2 KB 242 (CA)

FACTS: The claimant parked his car in a car park operated by the defendant. An employee of the defendant allowed a thief to take the claimant's car, even though the thief could not produce a parking ticket and did not have the key to the car. Whether the defendant was liable for breach of contract depended upon whether the car had been bailed to the defendant.

HELD: The Court of Appeal held that possession of the car had not passed to the defendant; the relationship between them was therefore not that of bailor and bailee but of licensee and licensor.

COMMENT: Compare this case to *Mendelssohn v Normand Ltd.*⁵² In *Mendelssohn*, the motorist handed the key of the car to the employee of the operator of the car park. The Court held that there was a bailment, since possession of the keys of the car gave control of the vehicle to the car park operator.

The need for the bailee to have only a limited possessory interest does not mean that a bailee cannot have rights to retain the chattel even as against the bailor. For example, where the goods are leased to the bailee or where, as is typical in cases of contracts of carriage of goods, warehousing, or for repair, the bailee retains a lien in respect of his charges. However, until the decision of the House of Lords in *Mercer v Craven Grain Storage Ltd.*,⁵³ it was believed that for a bailment to exist, the bailee's duty of delivery had to relate to the chattel which had been bailed to him. In *Mercer*, a number of farmers deposited their grain in a grain store operated by the defendant. There was no segregation of each farmer's grain and the operator's duty was simply to return grain of equivalent weight and description from the fluctuating mass, yet the House of Lords held that the operator could be a bailee in these circumstances.⁵⁴

52. [1970] 1 QB 177 (CA).

53. [1994] CLC 328 (HL).

54. This may be explained by treating the farmers as being co-owners in undivided shares of the mass, so that it was in their collective constructive possession while each owned a share in the whole. See Roy Goode and Ewan McKendrick, *Goode on Commercial Law* (4th edn, Penguin 2010) 241.

Bailee's duties to the bailor

Except as outlined later in this paragraph, a bailee owes the bailor a duty to take reasonable care of the chattel. Traditionally a distinction has been drawn between gratuitous bailments and bailments for reward, with a liability in the former case only lying for what was termed 'gross negligence'. However, in *Houghland v RR Low (Luxury Coaches) Ltd*,⁵⁵ the Court of Appeal rejected this approach and imposed in effect the common duty of care, though clearly it may be that what is reasonable in relation to a gratuitous bailment may not be reasonable where the bailee is being rewarded for his services. That said, the position is not entirely clear.⁵⁶ Once the bailor has shown that the bailee had possession of the chattel, it will be for the bailee to show he was not negligent if he cannot deliver up the goods⁵⁷ and presumably if they are damaged in his keeping. However, where the bailee is a 'common carrier'—that is a person who advertises to the public that he carries goods for a fee—strict liability is imposed, subject only to loss caused by a limited number of perils.

The same is true where there is a 'deviation' from the conduct of the bailment so that, for example, it has been held there is an absolute liability for mis-delivery by a bailee other than in the case of an involuntary bailment.⁵⁸ For example, in *Devereux v Barclay*,⁵⁹ a warehouseman was held liable for failure to deliver up barrels of oil to a purchaser, even though he had innocently delivered them to a third party who had bought apparently identical barrels of oil but of an inferior quality from the same vendor, who had also entrusted them to the defendant for safekeeping.

Typically, in a contractual bailment, the bailee will seek to limit liability. This ability is subject to restrictions both by statute and at common law. Thus deviation from the terms of the bailment, for example by not storing the chattel in accordance with the contractual agreement, where a carrier unreasonably deviates from an agreed route, or where there is an unauthorized sub-bailment, may result in the bailee losing the benefit of any contractual limitation clause, as the following case demonstrates.

→ involuntary bailment: occurs when a person accidentally, leaves personal property in another's possession, for example, a vendor of a house leaving goods behind when he vacates it



Gibaud v Great Eastern Rly Co [1921] 2 KB 426 (CA)

FACTS: Gibaud deposited his bicycle for safekeeping with the Great Eastern Railway Co at one of its stations. The company promised to store the bike in a cloakroom, but in fact left it in an area open to the general public, from where it was stolen. The contract contained a clause which stated that 'The company will not be in any way responsible in respect of any article deposited the value whereof exceeds £5 ...' unless the passenger paid a higher fee. Gibaud commenced proceedings against the company.

55. [1962] 1 QB 694 (CA).

56. On this see A Bell, 'The Place of Bailment in the Modern Law of Obligations' in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (2nd edn, Informa Law 1998). See also *Port Swettenham Authority v TG Wu & Co Sdn Bhd* [1979] AC 580 (PC).

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

58. *MB Pyramid Sound NV v Briesse Schiffahrts GmbH & Co KG MS Sina, (The Ines)* (No 2) [1995] 2 Lloyd's Rep 144 (QB) 153.


59. (1819) 106 ER 521.

HELD: The company could not rely on the exclusion clause but had committed no breach of the contract of bailment. It would have been different had the company agreed to store the bicycle in the cloakroom. As Scrutton LJ stated:

If you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain condition protecting it, and have broken the contract by not doing the thing contracted for, or not keeping the article in the place where you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it.⁶⁰

COMMENT: This observation by Scrutton LJ was recently applied in the High Court,⁶¹ but to the extent that it suggests that failure to store goods as agreed automatically renders exclusion clauses void, it must be taken with caution. It was established in *Photo Production Ltd v Securicor Transport Ltd*⁶² that it is a matter of construction of the relevant clause whether it covers the breach in question. However, drafting a clause which is intended to absolve a party from liability for carrying out his duties in a totally different way from that contracted for may prove difficult. See, for example, *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd*,⁶³ a case of mis-delivery.⁶⁴ Perhaps a solution would be for the clause to ensure that improper storage or mis-delivery was not a breach of contract.⁶⁵

Statute has also intervened to limit the capability of a bailee to limit his liability, particularly under the Carriage of Goods By Sea Act 1971, the Unfair Contract Terms Act 1977, and, where the bailor is a consumer, the Unfair Terms in Consumer Contracts Regulations 1999.

 The Carriage of Goods By Sea Act 1971 is considered at p 558

Constructive possession

While a bailee remains in physical possession of a chattel and asserts no right of his own to retain it as against the bailor, the bailor is said to have 'constructive possession' by virtue of this bailment at will. In such circumstances, a bailor who is not himself the owner not only acquires a right to sue in negligence,⁶⁶ he also has a proprietary interest based on possession. Consequently, if a warehouseman becomes bankrupt, the bailor does not have to rely on his *personal* claim in contract against the warehouseman, which will become a money claim in the insolvency, but, on paying any claims in respect of which the warehouse may have a lien, he comes into constructive possession, which proprietary right is good as against the liquidator or trustee in bankruptcy.⁶⁷ However, if a bailee at will asserts rights as against the bailor

60. [1921] 2 KB 426 (CA) 435.

61. *Future Publishing Ltd v Edge Interactive Media Inc and Others* [2011] EWHC 1489 (Ch), [2011] ETMR 50.

62. [1980] AC 827 (HL). 63. [1959] 3 All ER 182 (PC).

64. See also Andrew Bell, *Modern Law of Personal Property in England and Ireland* (Butterworths 1989) 115–19.

65. See Rix J in *Motis Exports v Dampskibsselskabet AF* [1999] 1 Lloyd's Rep 837 (QB) 847.

66. *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785 (HL). Even if he is not in constructive possession of the goods, a bailor with a proprietary right to immediate possession has an action in conversion.

67. See Simon Mills (ed), *Goode on Property Rights in Insolvency and Sales* (3rd edn, Sweet & Maxwell 2009) 13–14.

(for example, he attempts an unauthorized sale of the asset), then constructive possession ends.

Attornment

→ In relation to the sale of goods, attornment is discussed at p 323

→ sale and lease back: the owner of goods sells them to a finance company but does not lose physical possession. In order to effect delivery the seller attorns that the chattel is now held to the order of the purchaser. The purchaser immediately leases the chattel back to the seller.

Attornment is a process whereby constructive possession can be passed from one person to another. A typical example occurs where a seller of goods which are in the possession of a third party effects delivery of them to the buyer by instructing the third party to hold them to the buyer's order. However, as established in the case of *Godts v Rose*,⁶⁸ the complete assent of all three parties in such a situation is necessary for the attornment and for constructive possession to pass. Attornment also effects a momentary transfer of possession to the purchaser/lessor in sale and lease back arrangements.⁶⁹



Godts v Rose (1855) 17 CB 229

FACTS: Godts agreed to sell five tonnes of rape oil to Rose. The oil was stored in a warehouse and Godts sent an order to the warehouseman to hold the oil to the order of Rose. The warehouseman made out an order to this effect and gave it to Godts, who in turn tendered it to Rose in return for payment. Rose refused to pay, but wrongfully took possession of the order. Godts immediately instructed the warehouseman not to deliver the oil to Rose but the warehouseman did so. Godts sued Rose for interference with his (Godts') possession of the goods.

HELD: The warehouseman, as attornor, had to give his undertaking to Rose as attornee on the instructions of Godts and Rose had to accept it. On the facts it was clear to Rose that when he took possession of the order, Godts did not consent to the attornor giving the undertaking.

COMMENT: The court concluded that under the terms of the contract of sale, ownership of the goods would pass only once Godts had been paid. Perhaps it would not have mattered if ownership had passed, since the action which was a predecessor of conversion depended on interference with possession and, like conversion, could be maintained by a person with possessory title only.

Godts v Rose concerned the sale of unidentified goods out of bulk, since the seller had more than five tonnes of rape oil stored in the warehouse. It now seems clear that, in order to transfer constructive possession, the attornment must relate to specific goods and that where the goods are in bulk, the effect of a purported attornment is simply to give the 'attornee' a personal claim against the 'attornor'.⁷⁰ The effect of the purported attornment is to estop the 'attornor' from denying that he holds


→ estop: to deny the assertion of a right

68. (1855) 17 CB 229.

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

70. This situation has been labelled 'quasi attornment'; see Simon Mills (ed), *Goode on Property Rights in Insolvency and Sales* (3rd edn, Sweet & Maxwell 2009) 290 and Appendix.

property of that description for the order of the ‘attorney’,⁷¹ but it does not give the ‘attorney’ proprietary rights in the goods which can be asserted in an insolvency.⁷² It is unclear whether s 20A of the Sale of Goods Act 1979 affects this analysis where a bailee for a seller attorns in favour of a pre-paying buyer having an interest in common in the bulk, though the better view perhaps is that it does.⁷³

 Section 20A of the Sale of Goods Act 1979 is discussed at p 253

Bailees, bailors, and third parties

On taking possession, the bailee obtains a possessory interest in the chattel, which is protected against interference by third parties. In *The Winkfield*,⁷⁴ a ship, the *Winkfield*, collided with another ship which was carrying mail, and some of the mail was lost. The case proceeded on the basis that the Postmaster General was the bailee of the letters and he successfully brought an action against the *Winkfield* in the tort of conversion for the full market value of the mail, even though he had no liability to the bailors for the loss.

By virtue of the decision in *The Winkfield*, although a successful claim by either bailor or bailee bars a claim by the other (as discussed later), circumstances can arise where a wrongdoer may potentially be faced with actions from two or more persons whose aggregate claims far exceed the value of the goods, for example where a finder of goods with possessory title and the owner each brings an action in conversion. This situation has been addressed by statute, and ss 7 and 8 of the Torts (Interference with Goods) Act 1977 now allow the wrongdoer to join all claimants into one action so that they can recover according to their actual loss. If the actions are not joined, s 7(3) imposes a duty on a claimant with possessory title to ‘account over’ to the other potential claimant ‘to such extent as shall avoid double liability’. This seems partially to adopt the position at common law, as in *The Winkfield* the Court of Appeal held that the bailee must account to the bailors for the damages received over and above his own loss. It should be noted that account is a personal remedy—though it has been suggested that the successful claimant must hold any surplus on trust, which provides the bailor with a proprietary claim in the fund.⁷⁵ Finally, s 8 now permits a plea of *jus tertii*, so that, for example, a wrongdoer who is sued by a person with possessory title only (for example, a person in possession of stolen goods) can set up the superior title of the owner as a defence. However, it seems that he can do this only if the owner is joined as a party.⁷⁶

➔ *jus tertii*: ‘the right of a third person’

71. Rather surprisingly, this estoppel does not require detrimental reliance: see *Maynegrain Ltd v Campafina Bank* [1982] 2 NSWLR 141 (NSWCA). Norman Palmer, *Bailment* (3rd edn, Sweet & Maxwell 2007) 16.80, note 9.

72. *Re London Wine (Shippers) Ltd* [1986] PCC 121 (QB). See also *Re Goldcorp Exchange* [1995] 1 AC 74 (PC).

73. For differing views see Len S Sealy and Richard JA Hooley, *Commercial Law Text Cases and Materials* (4th edn, OUP 2009) 75; Roy Goode and Ewan McKendrick, *Goode on Commercial Law* (4th edn, Penguin 2010) 290; Louise Gullifer ‘Constructive Possession after the Sale of Goods (Amendment) Act 1995’ [1999] LMCLQ 93.

74. [1902] P 42 (CA).

75. Norman Palmer, ‘Possessory Title’ in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (2nd edn, Sweet & Maxwell 1998) 67–8 by analogy with the position of a pledgee, who apparently holds the surplus proceeds of sale after his security has been satisfied on trust for the pledgor.

76. *De Franco v Commissioner of Police of the Metropolis* *The Times* 8 May 1987 (CA). See also Lightman J in *Costello v Chief Constable of Derbyshire* [2001] EWCA Civ 381, [2001] 1 WLR 1437 [15].

This right by a bailee to protect his right to possession appears to apply not only in cases of physical possession, but where the bailee simply has an immediate right to possession by way of a security interest, as the following case demonstrates.

★ See Norman Palmer, 'Possessory Title' in Norman Palmer and Ewan McKendrick (eds), *Interests in the Goods* (2nd edn, Informa Press 1998) 68–71

→ **pledge**: a transfer of possession but not ownership of a chattel as security for the payment of a debt. Since a bill of lading is a document of title to the goods which are identified on it, pledging the bill of lading is treated as pledging the goods



Chabbra Corp PTE Ltd v Owners of the Jag Shakti (The Jag Shakti) [1986] AC 337 (PC)

FACTS: Chabbra Corp PTE Ltd (the seller) shipped a cargo of salt on board the *Jag Shakti* (a ship belonging to the defendants). The buyers of the cargo had pledged the bills of lading to Chabbra in order to finance the transaction. The buyers persuaded the defendants to release the goods to them, without presentation of the bills of lading, by providing them with an indemnity and then refused to redeem the **pledge** when the bills of lading were tendered to them by Chabbra. Chabbra sued the ship owners for conversion.

FACTS: Chabbra was entitled in principle to recover the full market value of the goods at unloading from the carrier, though owing to a lack of evidence as to that value, it must be content with the sum it had advanced to the buyers.

By virtue of the existence of the concept of 'constructive possession', it is possible for both bailor and bailee to bring actions in tort to protect their possessory interests. It was held in *Nicolls v Bastard*⁷⁷ that full recovery by a bailee precluded a further action by the bailor and vice versa. This position was reaffirmed by the Court of Appeal in *O'Sullivan v Williams*,⁷⁸ where the owner of a car lent it to his girlfriend whilst he was on holiday. The defendant third party negligently damaged the car and the action with the owner was settled without prejudice to the claims of the girlfriend/bailee who failed in her subsequent claim for damages for among other things the inconvenience in not having the use of the car to get to work.

If the bailor does not have possession or an immediate right to possession, then he has no claim in either trespass or conversion. Generally, where goods are consigned to a carrier, the bailment will be terminable at will, subject perhaps to meeting the charge for freight and so, too, presumably where goods are stored in a warehouse. However, in the case of a lease of goods, the bailor is only entitled to possession either at the expiry of the term or if the bailee commits a breach which entitles the bailor to terminate the lease. The implications of this are well illustrated in the following case.



HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd [2005] EWCA Civ 1437

FACTS: HSBC Rail (UK) Ltd owned rolling stock, which it bailed to a train operating company (GNER). The rolling stock was damaged due to a derailment that was caused by a fault in the track owned by Network Rail Infrastructure Ltd. GNER claimed on its

77. (1835–42) All ER Rep 429.

78. [1992] 3 All ER 385 (CA).


insurance, repaired some of the damaged carriages, and paid sums to HSBC Rail in respect of those carriages which could not be repaired. The insurance company, acting in the name of HSBC Rail, then sought to recover from Network Rail the sums paid out to GNER.

HELD: The claim failed. Since HSBC Rail was neither in possession, nor did it have a right to immediate possession, of the rolling stock, it could only claim in tort for damage to its reversionary interest, and due to the actions of GNER, it had suffered no loss.

Passing possession through documents of title

Lawful possession of a document of title to goods carries with it constructive, or perhaps symbolic, possession of the goods. The only document of title to goods recognized at English law is probably the bill of lading,⁷⁹ though in mercantile practice a number of documents are treated as documents of title and may become so recognized in law in due course. The holder of a bill of lading who is either the shipper or has had the bill transferred to him either by endorsement (in the case of an 'Order Bill') or by delivery (in the case of a 'Bearer Bill'), has at least a possessory title to the goods and may obtain ownership of them if, as is often the case, the parties intended title to the goods to pass when the buyer pays against tender of the bill of lading by the seller.

It is not entirely clear how transfer of possession is effected through the bill of lading, but in the *Berge Sisar*,⁸⁰ it was suggested that the transfer of a bill of lading effected a transfer of the carrier's attornment to the shipper.

 Bills of lading are discussed in Chapter 19

Indivisibility of possession

Since possession entails exercising physical control along with the intention to exclude others from control, it seems self-evident that possession cannot be shared even in the case of co-ownership, since possession in such a case is collective.⁸¹ The problems appear to arise when we consider constructive possession. The key, however, is that in a case of constructive possession, the bailor and the bailee are not asserting competing claims. As has been discussed, constructive possession ceases if the bailee asserts rights in respect of the property against the bailor. In cases of competing claims to possession, the law will determine whose claim is paramount and, as the following case demonstrates, in difficult cases pragmatism may play a significant role.

79. *Official Assignee of Madras v Mercantile Bank of India* [1935] AC 53 (PC) 59 (Lord Wright).

80. *Borealis AB v Stargas Ltd and Others* [2001] UKHL 17, [2002] 2 AC 205 [18] (Lord Hobhouse). The matter is not settled. For a further discussion on this, see the judgment of Mance LJ in *East West Corporation v Dampskibsselskabet AF 1912* [2003] EWCA Civ 83, [2003] QB 1509.

81. At least while the co-owners are not in dispute with one another. Though see Michael Bridge, *Personal Property Law* (3rd edn, Clarendon Press 2002) 19.



Great Eastern Railway Company v Lord's Trustee [1909] AC 109 (HL)


FACTS: Great Eastern Railway Co (GER) extended credit to Lord for freight charges in respect of the carriage of Lord's coal. The parties agreed that GER had a lien upon Lord's coal stored on a yard belonging to GER and leased to Lord. GER had the keys to the yard gates and kept them locked out of business hours. When Lord defaulted on the credit agreement, GER locked the gates, and detained the coal. Lord was subsequently declared bankrupt and his trustee in bankruptcy commenced proceedings against GER, alleging, *inter alia*, that GER had no right to detain the goods.

HELD: The House of Lords concluded that, although Lord could enter the premises during normal business hours and remove as much coal as he liked without GER's permission, the goods were nevertheless in the possession and under the control of GER. Accordingly, GER could enforce its legal lien.

COMMENT: Without possession of the coal GER's lien would have taken effect as an equitable interest which would have been void for want of registration under the Bills of Sale Acts, which invalidity the majority of the House clearly wished to avoid. Although the outcome of the case may appear to be driven by policy considerations, the conclusion seems correct: the ultimate control over the coal was in GER, which had the key and could have locked the gates at any time. It is interesting to wonder, though, how it could be that Lord had a lease of the land (which carries with it the right of exclusive possession over the land) and yet not have exclusive possession as against the landlord of goods stored on the land. Perhaps a better question might be whether there can be a lease of land where the landlord can and does exclude the tenant from possession every night.

Dealings in things in action

As with goods, things in action can be dealt with, for example, on sale or by gift, or by way of security; and indeed a key form of business financing is through the sale of, or grant of security over, debts owed to a business known as 'receivable financing'. Consensual transfers of things in action are of two types: (i) those concerning pure intangibles; and (ii) those concerning documentary intangibles.

 Receivable financing is discussed at p 712

Pure intangibles

Historically the common law did not recognize the transfer of the benefit of a contract or of a debt, though the Court of Chancery did and also recognized that a contract to assign effected an assignment. Now s 136 of the Law of Property Act 1925 enables the assignment at law of things in action whether by way of gift, sale, or mortgage. However, it does not apply to charges over things in action which do not operate by transferring a proprietary interest, and these can still only take effect in equity.

Under s 136 of the Law of Property Act 1925, a legal assignment must be in writing, signed by the assignor, and notice of the assignment must be given to the debtor or other obligee. So, for example, if a customer owes *X* a debt, *X* can assign this payment obligation to a financier. The financier will pay *X* the discounted value of

the sum owing and will receive in return the right to pursue the claim against the customer.

An agreement to assign or an assignment that fails to meet the requirements of s 136 will nevertheless take effect as an equitable assignment, which has the same economic effect as a legal assignment, and it would appear that an assignment complying with s 136 has no legal advantage over an equitable assignment.⁸²

Documentary intangibles

As has been noted, certain types of intangible property have been recognized by the law as being embodied in a document so that they may be transferred by transfer of the document rather than by assignment proper. As noted earlier, documents such as cheques and bills of exchange represent title to payment of money, while the bill of lading represents title to goods.⁸³

If a thing in action is recognized as a documentary intangible, then delivery of the document, endorsed if necessary, will transfer legal title to the underlying rights which it embodies. Clearly the act of delivery must be accompanied by an intention to pass title and not, for example, be just for safe keeping; but just as the transferee obtains the rights, so the transferor loses them. Consequently, the obligor will obtain a good discharge if he pays the transferee, but not if he pays the transferor. Finally, the document itself is a chattel so that it can be pledged,⁸⁴ and the possessor of it may protect it through the normal tortious actions, for example trespass or conversion.⁸⁵

Conclusion

English law has recognized only three proprietary interests in personal property: (i) ownership; (ii) possession; and (iii) the charge. This chapter has focussed on possession and ownership, and has shown that these interests are primarily protected through the tortious actions for conversion and trespass, both of which protect possession or a proprietary right to immediate possession. Consequently, these remedies are not available to a person who has ownership of a chattel without possession. On the other hand, even unlawful possession grants the possessor title to an interest which is protected from interference save by a person with a better title. The focus, therefore, in English personal property law is on possession, whether physical or constructive, so that bailment, the passing of possession without ownership, is both a key concept and a key way in which possession of goods can be transferred from sellers to buyers through attornment.

82. *E Pfeifer Weinkellerei-Weineinkauf GmbH & Co v Arbutnot Factors Ltd* [1988] 1 WLR 150 (QB).

83. In fact, the bill of lading only transfers constructive possession to the goods, not their ownership.

84. As in *The Jag Shakti* [1986] AC 337 (PC)—a bill of lading.

85. As in *International Factors Ltd v Rodriguez* [1979] QB 351 (CA), which involved dealings in cheques to which the claimant only had equitable title.

Practice questions

1. Explain and give examples of the following terms:
 - thing in action;
 - possessory title;
 - bailment;
 - attornment;
 - equitable title;
 - assignment.
2. Explain why possession of goods is so important in English law.
3. Carol decided to set up business as a three-dimensional printer and wanted to acquire an RDX3 machine. These were normally made to order and consequently rare, but she located one and wanted to acquire it. She entered into an agreement with Lesley under which Lesley agreed to buy the machine from the manufacturers and to lease it to Carol for ten years, which was its expected working life. Lesley bought the machine but decided to sell it to Pete, who now has possession of it.

Carol also sold one of her two-dimensional printers, an RDX2, to Jim and delivered it to him on the basis that Jim would hold the machine on trust for Carol until he paid for it. Jim has subsequently sold the RDX2 also to Pete.

Carol agreed to buy 100 gallons of plastic polymer to use in the RDX3 from Andy. The polymer was stored in a warehouse belonging to Brenda, and Andy told Brenda to hold it to Carol's instructions. Pete persuaded Brenda to release the polymer to him and he now has possession of it.

Andy, Brenda, Lesley, and Pete are all insolvent and Carol wants to know whether she can recover the RDX2, the RDX3, and the polymer from Pete.

Further reading

Michael Bridge, *Personal Property Law* (3rd edn, Clarendon Press 2002)

- In the usual Clarendon Law series style, comparatively short but written by a recognized expert in the field.

Roy Goode 'Ownership and Obligations in Commercial Transactions' (1987) 103 LQR 433

- Goode is at his insightful best in drawing our attention to the differences between proprietary and personal rights and how easily they can be confused.

Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (2nd edn, Informa Law 1998)

- Although fifteen years old, the essays in this collection are all worth reading. For example, William Swadling is quite controversial in his chapter 'The Proprietary Effect of the Hire of Goods', when he argues that a lessee of a chattel acquire no proprietary rights, while Magnusson, in 'Proprietary Rights in Human Tissue', provides a fascinating example of how the law determines what is property.

Duncan Sheehan, *The Principles of Personal Property Law* (Hart Publishing 2011)

- Comprehensive, scholarly, and up to date.

Sarah Worthington, *Personal Property Law: Text and Materials* (Hart Publishing 2000)

- Although now a little out of date, has a wonderful selection of materials, while the text is both accessible and thought-provoking.