

TABLE OF CONTENTS

<i>Preface to the Second Edition</i>	v
<i>Preface to the First Edition</i>	vii
<i>Table of Cases</i>	xvii
<i>Table of Legislation</i>	lv

CHAPTER 1 BACKGROUND AND INTRODUCTION

1. Introduction and Background to Security Transactions	1
1.1 Law merchant	1
1.2 A rule of law	2
1.3 Law merchant as part of common law	2
1.4 Significant commercial developments in the nineteenth century	3
1.5 Usury and interest payments	7
1.6 Early money lenders in Hong Kong	8
1.7 Twentieth century transactions	8
1.8 Terminology	9
1.9 Terminology: The term 'security'	9
1.10 Contractual relief	10

CHAPTER 2 PROPERTY

PART A

BACKGROUND

1. Introduction	13
1.1 Personal property	13
1.2 The basic elements of personal property	14
1.3 The differences between the three types of property	14
1.4 Traditional description of types of property	15
1.5 Ownership of property	15
1.6 Proprietary rights: common law and equity	17
1.7 Invasion of proprietary rights	17
1.8 Chose in action evidenced by a document	18
1.9 The role of equity in property law	18
1.10 Examples of equitable relief	20

PART B

THE CHOSE IN ACTION

2. The Chose in Action	
2.1 Emergence of the chose in action	21
2.2 The chose in action as a contract	22
2.3 Examples of choses in action	23
2.4 The nature of a chose in action	24
2.5 The chose in possession	29
2.6 Chattels real	30

CHAPTER 3 LEGISLATION

1. Introduction	31
2. The Bills of Sale Ordinance (Cap 20)	31

2.1	The purpose of the legislation.....	31
2.2	Hong Kong and bills of sale.....	34
3.	The Chit Fund Businesses (Prohibition) Ordinance (Cap 262).....	35
3.1	Consumer protection legislation.....	37
4.	The Control of Exemption Clauses Ordinance (Cap 71).....	38
4.1	Standard form business contract.....	40
4.2	Third parties and CECCO.....	42
5.	Supply of Services (Implied Terms) Ordinance (Cap 457).....	43
6.	Unconscionable Contracts Ordinance (Cap 458).....	43
6.1	Money lending.....	44
6.2	Interest.....	48
6.3	Forebearance.....	51
7.	The Pawnbrokers Ordinance (Cap 166).....	55
8.	The Sale of Goods Ordinance (Cap 26).....	57

CHAPTER 4 PRINCIPLES AND RULES

1.	Introduction.....	61
2.	Attornment.....	61
3.	'As Beneficial Owner'.....	65
4.	Bona Fide Purchaser for Value.....	66
5.	Clogs on the Equity of Redemption.....	71
6.	Commercial Interpretation.....	74
7.	Feeding the Estoppel.....	77
8.	Freedom of Contract.....	78
9.	Good Faith.....	79
9.1	The concept of good faith.....	79
9.2	Good faith and the contract.....	80
9.3	What is 'good faith'?.....	81
9.4	'Good faith' generally.....	82
9.5	The unconscionable contracts ordinance: The consumer; and shades of 'good faith'.....	85
9.6	'Good faith' in practice.....	85
10.	Mechanics of Payment.....	86

CHAPTER 5 CONTRACT, FORM, AND THE SUBJECT OF SECURITY

1.	Introduction.....	87
2.	The Contract.....	87
2.1	Informal contracts.....	89
2.2	The covenant.....	90
3.	The Subject of Security.....	92
3.1	The use of personal property for security.....	94

CHAPTER 6 THE TRUST - ITS USES AS A SECURITY

1.	Introduction.....	95
2.	The Trust: Fundamentals.....	96
3.	Types of Trusts.....	98
4.	Action by a Trustee.....	101
5.	The Quistclose Trust.....	102
5.1	The role of intention in creating a trust.....	104
6.	Personalty over which a Trust may be Created.....	104
7.	Trust Receipts.....	106

CHAPTER 7 PARTIES

1.	Introduction.....	107
1.1	Legal personality.....	107
1.2	A firm.....	109
2.	Agency.....	110
2.1	General.....	110
2.2	Authority of the agent.....	111
2.3	Apparent or ostensible authority.....	113
2.4	Ratification.....	115
2.5	Revocation.....	117
2.6	Duties and rights of agents.....	118
2.7	Termination.....	119
3.	Specific Agents.....	120
3.1	The attorney under power.....	120
3.2	The powers of the attorney.....	124
3.3	Third parties dealing with the attorney.....	125
3.4	The escrow agent.....	126
3.5	The facility agent.....	127
3.6	The mercantile agent.....	128
3.7	The per pro agent.....	130
4.	The Banker-Customer Relationship.....	130
5.	The Company.....	132
5.1	The effect of incorporation.....	132
5.2	Directors.....	133
6.	Confirmors and Nominees in Conveyancing Transactions.....	135
6.1	Confirmors.....	135
6.2	Nominees.....	136
7.	Independent Contractors.....	137
8.	Joint and Several Liability.....	137
9.	Married Persons Status Ordinance (Cap 182).....	138
10.	Partners.....	139

CHAPTER 8 ACQUISITION OF GOODS

1.	Introduction.....	141
2.	Goods.....	141
2.1	By purchase under the Sale of Goods Ordinance ('SOGO') (Cap 26).....	141
2.2	By derivative acquisition by gift.....	143
2.3	By original acquisition through finding.....	144
2.4	By the creation of a new product.....	144
2.5	Chattels (goods) becoming fixtures and thus land.....	144
2.6	Irregular acquisition of goods without the consent of the true owner.....	145
2.7	Abandonment.....	148
2.8	Subrogation.....	148
2.9	Nemo dat quod non habet.....	149
2.10	After-acquired and future property.....	151

CHAPTER 9 PRIORITY, PERFECTION & NOTICE

1.	Introduction.....	157
2.	Background Factors.....	158
3.	Priority.....	162
4.	Land Interests.....	162

5.	Classification of Interests.....	165
5.1	Assignments of choses in action.....	167
5.2	Mortgages and charges over company property	167
6.	Subordination.....	170
7.	Priority and Secured vs Unsecured Creditors	171

CHAPTER 10 THE DEVELOPMENT OF RIGHTS FOR THE PURPOSE OF SECURITY

1.	Introduction.....	175
2.	New Assets and the Courts	175
3.	How is Property Classified?	177
4.	The Debt to Mercantile Law	179
5.	Assets as Items of Security	179
6.	A Modern Example of Environmental Rights and the Kyoto Protocol	182

CHAPTER 11 REAL SECURITIES: THE MORTGAGE

1.	Introduction	185
2.	Charge vs Mortgage.....	186
3.	The Traditional Mortgage.....	188
3.1	The nature of the traditional mortgage	188
3.2	Traditional terms.....	189
3.3	The form and effect of a traditional mortgage.....	190
3.4	The essence of a modern mortgage.....	191
3.5	The clog on the equity of redemption.....	194
4.	Equitable Securities Over Land.....	196
4.1	Equity and the mortgage.....	198
4.2	Remedies for the legal mortgage/charge over land.....	198
4.3	Registration: legal and equitable securities over land.....	202
5.	The Mortgage of Goods	202
6.	Shares.....	203
6.1	Future goods or after-acquired property	204
7.	The Mortgage of the Benefit of a Chose in Action	205

CHAPTER 12 THE CHARGE

1.	Introduction.....	207
2.	Historical Background of the Charge	208
2.1	The purpose behind the charge	208
3.	Problems Facing the Nineteenth Century Commercial Parties.....	211
3.1	Equity and commercial law - without equity there would be no equitable charge	219
3.2	Equity in action.....	220
4.	What Then, is the Charge?.....	222
4.1	The company and the floating charge.....	225
5.	Fixed and Floating Charges	225
5.1	The floating charge	227
5.2	Conversion on crystallisation.....	229
6.	Automatic-Crystallisation.....	230
6.1	Registration of the floating charge.....	233
6.2	The floating charge and the individual.....	234
7.	Fixed Charges	235
7.1	The features of the charge.....	235

8.	The Charge-Back.....	236
9.	The Charging Order	240

CHAPTER 13 REAL SECURITIES: THE PLEDGE

1.	Introduction	243
2.	The Nature of a Pledge	244
3.	How is the Pledge Effected?	244
4.	What Cannot be Pledged?.....	245
4.1	Special property	249
4.2	Can a 'pledgeable' chose in action also be converted?.....	249
5.	The Pledge Compared to Other Securities.....	250

CHAPTER 14 REAL SECURITIES: THE COMMON LAW LIEN

1.	Introduction.....	255
2.	The Nature of a Common Law Lien.....	255
2.1	The elements of the common law lien.....	256
2.2	Comparison with other transactions	258
2.3	Liens over documents	258
2.4	The general common law lien.....	258
2.5	A particular or special lien.....	259
3.	Sub-Bailment and Liens.....	260
4.	The Vendor's and the Purchaser's Liens - The 'Equitable' Lien.....	261

CHAPTER 15 HYBRID QUASI-SECURITIES: CONTRACTUAL AND NON-CONTRACTUAL

1.	Introduction.....	263
1.1	Matters to note	264
1.2	Background	264
1.3	Unconventional or irregular or reverse or quasi-securities	266
1.4	Shams.....	267
2.	Transactions	273
2.1	The use of trusts and similar transactions.....	273
2.2	Quistclose trusts.....	278
2.3	Personalty over which a trust may be created.....	281
2.4	Trust receipts.....	283
2.5	Assignment of the benefit of a chose in action.....	283
2.6	Assignment of land vs assignment of chose in action	293
2.7	Equitable assignment by way of mortgage/charge	294
2.8	Novation.....	295
3.	Goods - Bailment and Other Forms of Dispositions	296
3.1	Bailment.....	296
3.2	The essence of bailment.....	298
4.	The Sale of Goods Ordinance.....	299
4.1	Bill of lading traditionally as the only common law document of title to goods.....	301
4.2	Chattel, equipment and finance leases	302
4.3	Non-traditional sales of goods contracts.....	305

4.4	Bailment plan.....	306
4.5	Factoring.....	307
4.6	The hire-purchase transaction.....	309
5.	Retention of Title: Romalpa Clauses: the Conditions Sale.....	316
5.1	Why is the retention of title transaction referred to as a quasi-security? ...	316
5.2	The company and the retention of title clause.....	320
5.3	Retention of title vs hire-purchase.....	321
5.4	Remedies of the supplier (if any).....	322

CHAPTER 16 QUASI-SECURITIES

1.	The Use of Contract Law to Imitate Securities.....	325
2.	Introduction.....	327
2.1	Privity.....	329
3.	Transactions.....	337
3.1	Covenants: Personal – restrictive – positive.....	337
4.	Types of Covenants.....	339
4.1	The personal covenant.....	339
4.2	Restrictive or negative covenant over land.....	342
5.	General Forms of Covenants.....	345
5.1	General covenants.....	348
6.	Restrictive Covenants in Commercial Documents: Negative Pledge.....	349
6.1	The <i>De Mattos v Gibson</i> covenant – a chose in action.....	349
6.2	Control of the secured assets.....	355
7.	Negative Pledges.....	356
7.1	Negative pledge agreement.....	358
7.2	Remedies for breach of the negative pledge.....	359
7.3	Drafting the negative pledge.....	363
7.4	The nature of a negative pledge.....	364
7.5	Ranking of the negative pledge.....	364
7.6	The nature and function of a negative pledge.....	365
7.7	The purpose of the negative pledge as a quasi-security.....	365
7.8	Action in tort.....	366
7.9	A negative pledge in a floating charge.....	366
8.	A Charge over Bank Deposits and Flawed Assets.....	367

CHAPTER 17 THIRD PARTY CONTRACTUAL QUASI-SECURITIES

1.	Introduction.....	371
2.	Terminology for the Guarantee and the Indemnity.....	372
3.	Background.....	372
3.1	The guarantee.....	372
3.2	The indemnity.....	376
3.3	Confusing terminology: Is it a guarantee or an indemnity?.....	376
3.4	Classifying as an indemnity or a guarantee.....	378
3.5	The underlying transaction and the guarantor.....	379
3.6	The form of the quasi-security transaction.....	380
3.7	Is the transaction a performance bond?.....	381
4.	Guarantees.....	383
4.1	The nature of this quasi-security.....	383
4.2	The underlying contract between debtor and creditor.....	385
4.3	Different forms of guarantees.....	386
5.	The Guarantor/Surety.....	395

5.1	The parties.....	395
5.2	By reference to co-sureties.....	398
5.3	By reference to corporate matters.....	399
6.	The Guarantee as a Contract.....	402
6.1	Disclosure.....	402
6.2	Good faith.....	405
6.3	Construction of the terms of the guarantee or indemnity.....	406
6.4	Alteration of the guarantee.....	409
6.5	Bank guarantees and loan facilities contrasted to non-banking guarantees.....	412
6.6	Enforcement/avoidance of the guarantee.....	415
7.	Rights of the Guarantor.....	417
7.1	Against the creditor.....	417
7.2	The suspense account.....	420
7.3	Determination of the guarantee.....	421
8.	Indemnities.....	421
8.1	Types.....	421
8.2	Extent of the protection – to include third parties.....	424
8.3	The indemnity contrasted to the guarantee.....	425
8.4	The nature of the indemnity.....	426
8.5	General principles.....	426
8.6	Indemnification covenants on assignment.....	427
8.7	Equity of indemnification.....	428
8.8	The nature of the indemnity.....	429
8.9	Discharge of the debtor.....	430
8.10	The debt and subrogation.....	430
9.	Third Party Securities.....	431
9.1	The nature of the third party security.....	432
9.2	Form of the security.....	433
10.	Look Alike Transactions.....	433
10.1	Bank guarantees and performance bonds.....	433
10.2	The performance bond.....	436
10.3	A documentary letter of credit.....	440
10.4	Fraud for performance bonds and letter of credit.....	441
10.5	A letter of comfort.....	442
11.	Conclusion.....	443

CHAPTER 18 DAMAGES IN CONTRACT AND IN TORT

1.	Breach of Contract as a Source of Relief.....	447
2.	Common Law Damages for Breach of a Contract.....	451
3.	Damages in Tort.....	454
	<i>Index</i>	457