INTERESTS IN GOODS

Edited by
PROFESSOR NORMAN PALMER
Rowe and Maw Professor of Commercial Law, University College London

AND

PROFESSOR EWAN MCKENDRICK
Professor of English Law, University College, London

SECOND EDITION

LLP
LONDON HONG KONG
1998
CONTENTS

Foreword ..... v
Preface ..... ix
Contributors ..... xxv
Table of Cases ..... xxvii
Table of Legislation, International Conventions, etc. ..... lxxiii

PART I DEFINING PROPERTY

CHAPTER 1 INFORMATION AS PROPERTY PAUL KOHLER and NORMAN PALMER 3
Introduction 3
Authority favouring the proprietary analysis 6
Qualifications upon the proprietary analysis 7
Authority rejecting a proprietary analysis 9
The commercial significance of a proprietary analysis 10
  Priorities, bona fide acquisitions and the nemo dat rule 11
  Bailments of information 15
  Software as goods 17
  Industrial espionage 19
Criteria for a proprietary analysis 21
Conclusion 22

CHAPTER 2 PROPRIETARY RIGHTS IN HUMAN TISSUE ROGERS. MAGNUSSON 25
1. Introduction 25
2. Proprietary rights in human corpses 27
  2.1 English authorities 27
  2.2 Australian decisions 31
  2.3 The American position 32
  2.4 The nature of an executor’s rights in Anglo-Australian law 34
  2.5 The “proprietary” quality of an executor’s rights 35
3. Proprietary rights in cadaveric specimens 38
  3.1 Why the issue is relevant 38
  3.2 The theoretical basis for protection 39
4. Transplants and proprietary rights in living tissue samples 41
  4.1 Human tissue legislation 42
  4.2 Anglo-Australian authorities 44
  4.3 The application of “sales of goods” conditions to donated human tissue 46
5. Proprietary rights in the products of biotechnological engineering 48
  5.1 The broader context 49
  5.2 Biotechnology and human tissue 50
  5.3 Moore v. Regents of the University of California 52
PART II ORIGINATING AND TRANSFORMING PROPERTY

CHAPTER 8 BONA VACANTIA ANDREW BELL

I. The general law relating to bona vacantia
   1. The specific instances of the Crown’s right to bona vacantia
      (a) Intestacy
      (b) Dissolution of a company
      (c) Failure of a trust
      (d) Contested heads of bona vacantia
   2. The rationale of bona vacantia
   3. General principles
      (a) The meaning of “ownerless” property
      (b) Not all ownerless property belongs to the Crown
      (c) The distinction between ownerless property and property whose owner is unknown
      (d) The extent to which real property can be claimed as bona vacantia
      (e) The extent to which intangible property can be claimed as bona vacantia
      (f) Third party rights
   II. The main heads of bona vacantia
      1. Intestacy
         (a) Prior claims under the Administration of Estates Act 1925
         (b) Orders under the Inheritance (Provision for Family and Dependants) Act 1975

II. Abandonment of rights
   2.2 Insurers’ interests
       2.3.1 Notice of abandonment
       2.3.2 Title of underwriter to sue
       2.3.3 Loss of right to take over property
       2.3.4 Reinsurance and war risks

III. Salvors’ rights
    4.1 Salvage principles
    4.2 The salvors’ maritime lien
    4.3 Salvors’ possessory interests
       4.3.1 Possession against owner
       4.3.2 Competing salvors
    4.4 Interests under salvage or raising contracts
    4.5 Salvage conventions and wreck
    4.6 Salvage and funding

IV. Conclusions

V. PART II ORIGINATING AND TRANSFORMING PROPERTY

CHAPTER 8 BONA VACANTIA ANDREW BELL

I. The general law relating to bona vacantia
   1. The specific instances of the Crown’s right to bona vacantia
      (a) Intestacy
      (b) Dissolution of a company
      (c) Failure of a trust
      (d) Contested heads of bona vacantia
   2. The rationale of bona vacantia
   3. General principles
      (a) The meaning of “ownerless” property
      (b) Not all ownerless property belongs to the Crown
      (c) The distinction between ownerless property and property whose owner is unknown
      (d) The extent to which real property can be claimed as bona vacantia
      (e) The extent to which intangible property can be claimed as bona vacantia
      (f) Third party rights
   II. The main heads of bona vacantia
      1. Intestacy
         (a) Prior claims under the Administration of Estates Act 1925
         (b) Orders under the Inheritance (Provision for Family and Dependants) Act 1975

CONTENTS xiii

1.3 The receiver of wreck service 149
2. Proprietary interests 152
   2.1 Ownership 152
      2.1.1 Methods of acquiring ownership 152
      2.1.2 Establishing owner’s identity 153
      2.1.3 Government ownership 155
      2.1.4 Buyers’ rights 158
      2.1.5 Personal possessions and human remains 159
   2.2 Abandonment of rights 162
   2.3 Insurers’ interests 168
      2.3.1 Notice of abandonment 168
      2.3.2 Title of underwriter to sue 170
      2.3.3 Loss of right to take over property 173
      2.3.4 Reinsurance and war risks 176
3. State rights in relation to wreck 178
   3.1 Crown rights to unclaimed wreck 178
      3.1.1 History and development 178
      3.1.2 Statutory basis 180
   3.2 State rights of intervention 183
4. Salvors’ rights 187
   4.1 Salvage principles 187
   4.2 The salvors’ maritime lien 188
   4.3 Salvors’ possessory interests 189
      4.3.1 Possession against owner 190
      4.3.2 Competing salvors 190
   4.4 Interests under salvage or raising contracts 194
   4.5 Salvage conventions and wreck 195
   4.6 Salvage and funding 196
5. Conclusions 202

PART II ORIGINATING AND TRANSFORMING PROPERTY
(c) Ex gratia payments

2. Dissolution of a company or other corporation
   (a) Registered companies
   (b) Unregistered companies
   (c) Building societies and friendly societies

3. Failure of a trust
   (a) In general
   (b) Charitable trusts
   (c) Pension funds
   (d) Unincorporated associations

III. Conclusions

CHAPTER 9 MIXTURES PETER BIRKS
1. Mixtures distinguished from other events
   (1) Accession
   (2) Specification
   (3) Executory division
   (4) Substitution

2. Mixtures: main issues
3. An outline of the Roman solutions
4. English law and the Roman distinctions
5. Consensual mixtures in English law
   (1) Consensual mixing in an irregular deposit
6. Fluid mixtures in English law
7. Granular mixtures in English law
8. Evidential problems
9. Conclusion

CHAPTER 10 JOINT OWNERSHIP OF CHATTELS JUDITH HILL and ELIZABETH BOWES-SMITH
1. Types of joint ownership
   1.1 Joint tenancy
   1.2 Tenancy in common
   1.3 Particular cases
2. Possession of jointly-owed chattels
3. Death of a joint owner
4. Bankruptcy of a joint owner
5. Disposal of an interest in a jointly-owned chattel
6. Disposal of a jointly-owned chattel
7. Rights and remedies between joint owners
   7.1 Conversion
   7.2 Trespass
   7.3 Other torts
   7.4 Remedies
   7.5 Criminal liability
8. Rights and remedies against third parties
9. Section 188 of the Law of Property Act 1925
10. Taxation
   10.1 Inheritance Tax
   10.2 Capital Gains Tax
   10.3 Value Added Tax
### CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Author</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>11</td>
<td>ATTACHMENT OF CHATTELS TO LAND</td>
<td>Howard N. Bennett</td>
<td>267</td>
</tr>
<tr>
<td></td>
<td>What is a fixture?</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>A. Permanent annexation to the land</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>B. Attachment as a fixture</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>C. Attachment so as to leave chattel status unchanged</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Fixtures in selected areas of the law</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>A. Fixtures in the law of landlord and tenant</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>B. Fixtures and the law of succession</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>C. Retention of title to fixtures</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>D. Dispositions of fixtures</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>E. Levying execution of judgment upon fixtures</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>F. Distress and fixtures</td>
<td></td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>THE TITLE OBLIGATIONS OF THE SELLER OF GOODS</td>
<td>Michael G. Bridge</td>
<td>303</td>
</tr>
<tr>
<td></td>
<td>Introduction</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>The right to sell and the nemo dat rule</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>The scope of quiet possession</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Limited title sales and exclusions</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>The Rowland v. Divall problem</td>
<td></td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>SELLER AND BUYER IN POSSESSION</td>
<td>Michael Kershaw</td>
<td>329</td>
</tr>
<tr>
<td></td>
<td>Introduction</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Section 48 rescission</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Resale to second buyer by unpaid seller who has exercised right of lien, etc</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Appendix Sale of Goods Act 1979</td>
<td></td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>MARKET OVERT</td>
<td>Brian Davenport and Anthony Ross</td>
<td>337</td>
</tr>
<tr>
<td></td>
<td>Introduction</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>A brief history of market overt</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>The rationale of the rule of market overt when it was a living rule of the common law</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>The rule, as stated by Coke</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>The exceptions, as stated by Coke</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sales in statutory markets</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Outstanding questions</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sales to shopkeepers</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sales by individuals who are not traders</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>The abolition of the rule</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Conclusion</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>TITLE TO GOODS, MATERIALS AND PLANT UNDER CONSTRUCTION CONTRACTS</td>
<td>Peter Barber</td>
<td>353</td>
</tr>
<tr>
<td></td>
<td>Introduction</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
2. Fixed goods and materials
   (a) General rule as to passing of property 354
   (b) Retention of title by third parties 356
3. Unfixed goods and materials
   (a) General rule as to passing of property 359
   (b) Effect of retention of title clauses 360
   (c) Vesting clauses—general analysis 363
   (d) Vesting clauses—standard forms 369
   (e) Effect of interim payments 371
4. Plant
   (a) General rule as to passing of property 374
   (b) Vesting and forfeiture clauses—general 376
   (c) Vesting and forfeiture clauses—standard forms 378
5. Effect of privity of contract 380

CHAPTER 16 THE PASSING OF PROPERTY IN PART OF A BULK
   EWAN McKENDRICK 385
1. Introduction 385
2. The general rule—property cannot pass 386
3. The exceptions 387
4. Why was the law thought to be unsatisfactory? 393
6. Conclusion 400

CHAPTER 17 GOOD FAITH AND DUE DILIGENCE JANET ULPH 403
1. Introduction 403
2. The common law and statute
   Nemo dat quod non habet 404
   Onus of proof in relation to nemo dat 406
   The development of the good faith concept 407
   Relationship between good faith and ordinary course of business 409
   Relationship between good faith and without notice 410
   Constructive notice from documents 412
   Notice and registration of an interest 413
   Commercial loans and guarantees 415
   Agency 418
   Payment to an agent 419
   Imputed knowledge 419
3. In equity 420
4. Defences and the burden of proof 424
5. Conclusions 426

CHAPTER 18 CONDITIONAL GIFTS ROBERT CHAMBERS 429
1. Property interests created by conditional gifts
   Conditional ownership 429
   Bailment 430
   Money had and received 431
   Conditional gifts in equity 432
2. Construction of conditions
   Motive or condition 433
   Condition precedent or subsequent 437
# CONTENTS

3. Limits on conditional giving  
   Perpetuities  
   Restraint on alienation  
   Interference with donees’ lives  
   Other illegal conditions  
4. Conditions on the use of the gift  
   Trust or gift  
   Quistclose trust  
5. Conditions unrelated to the use of the gift  
   Benefits to third parties  
   Performance within a specified time  
   Mode of living  
   Engagement presents  
   Donationes mortis causa  
   Other events  
6. Failure of conditions  

## CHAPTER 19 THE PLACE OF BAILMENT IN THE MODERN LAW OF OBLIGATIONS  
ANDREW BELL

A. Definition  
   1. The consensual model of bailment  
   2. Assimilation to contract?  
   3. The deficiencies of the consensual model  
   4. The modern definition: The Pioneer Container  
   5. Assimilation to tort?  
B. Bailment as an independent source of obligations  
   1. The meaning of the claim  
   2. The obligations of the bailee  
   3. The obligations of the bailor  
C. Conclusions  

## CHAPTER 20 THE PROPRIETARY EFFECT OF A HIRE OF GOODS  
WILLIAM SWADLING

I. Introduction  
II. Covenants generally  
   (a) Non-possessory covenants over land  
   (b) Non-possessory covenants over chattels  
III. The relevance of specific enforceability  
IV. Possessory covenants  
   (a) Possessory covenants over land  
   (b) Possessory covenants over chattels  
   (c) The possessory covenantee’s remedies in tort  
V. Conclusion  

## CHAPTER 21 ART LOANS  
NORMAN PALMER

1. Introduction  
2. The legal character of art loans  
3. Universality of the loan concept  
4. Matters of common provision  
   (i) Security and the duty of care
5. Matters not commonly provided for
   (i) Title 537
   (ii) Duty to exhibit 540
   (iii) Authenticity and attribution 541
   (iv) Choice of governing law 542
6. Further incentives to art loans: should lawyers interfere? 544

CHAPTER 22  THE BILL OF LADING AS A DOCUMENT OF TITLE
SARAH DROMGOOLE and YVONNE BAATZ 547
Introduction 547
1. Why, and how, does the bill of lading give control?
   1.1 Recognition of the bill of lading as a document of title 548
   1.2 The bill of lading distinguished from other documents 558
2. What are the benefits of the control provided?
   2.1 The sale contract 569
   2.2 Financing the sale contract 571
   2.3 The carriage contract 574
3. How can the control be undermined?
   3.1 Holder \textit{vis-à-vis} true owner 577
   3.2 Right of stoppage in transitu 578
   3.3 Delivery without production of the bill of lading 580
   3.4 Bills of lading given gratuitously 590
4. When does the control function come to an end? 591
5. Conclusion 593

CHAPTER 23  ABANDONMENT  ANTHONY HUDSON 595
Divesting abandonment 596
Criminal law 602
Wreck 606
Trespass to goods and trover or conversion 612
Miscellaneous cases of abandonment 614
   Maritime law 615
   Waifs 616
   Estrays or strays 617
   Property in an abandoned state 617
   An open question 617
Conclusions 618

CHAPTER 24  PLEDGE  NORMAN PALMER and ANTHONY HUDSON 621
Introduction 621
Disadvantages of pledges 623
Basic incidents of pledge 624
The central role of possession 625
   Subject matter of pledge 625
   Further functions and aspects of possession in pledge 628
   Identifying the change of possession 629
   Elasticity of the modern requirement of possession 629
Special property 631
   Problems and implications 631
   Registration 634
Pledge of intangibles 635
CONTENTS

Pledge distinguished from other forms of security 635
  Some problems 635
  Redemption 637
  Sale 638
  Survival of the debt 639
  Right to surplus 639
  Implied terms as to title, quality and fitness for purpose 639
  Deviation, delegation, detention and misuse 640
  Contractual designations 641
  The role of equity and conscience 642
Conclusion 646

CHAPTER 25 SOLICITORS' LIENS  ANTHONY HUDSON 649
  The retaining lien 649
  The particular liens or charges
    The common law lien 653
    The statutory lien or charging order 656

PART IV SECURITY AND PAYMENT

CHAPTER 26 SHIP MORTGAGES  ALISON CLARKE 663
  Introduction 663
  I. Nature of the ship mortgage
    Property interests in British ships 665
    The present registration system 667
    Fully registered ships 670
    Effect of full registration on the nature of property interests 671
    Effect of full registration on ship mortgages 672
    Ship mortgages: the traditional view 673
    Questioning the traditional view 674
    Evolution of the mortgage 675
    The modern statutory provisions 681
    Priority mortgages of fully registered ships 684
    Property in unregistered ships 684
    Property in ships registered with simple registration 686
  II. Rights and remedies of the mortgagee
    Possession and freight 688
    Control and management 688
    Sale 689
    Foreclosure 690
  III Exercise of the mortgagee’s rights and remedies
    Effect of paragraph 10 on exercise of rights and remedies 690
    Action by charterer to restrain exercise of the mortgagee’s rights and remedies 693
  IV. Conclusion 695

CHAPTER 27 AIRCRAFT MORTGAGES  PETER THORNE 697
  Introduction 697
  Types of security interest in aircraft
    (a) Mortgage 698
    (b) Charge 699
    (c) Pledge 699
    (d) Liens, statutory liens and statutory charges 700
Contents of an aircraft mortgage

(a) Description of an aircraft
(b) Security
(c) Covenants and undertakings (general)
(d) Engines and parts
(e) Registration
(f) Maintenance
(g) Encumbrances
(h) Sub-leasing etc
(i) Nameplates
(j) Total loss and insurances
(k) Indemnities
(l) Enforcement
(m) Governing law and jurisdiction

Choice of law
Practical steps to ensure validity/priority of mortgage security interest
Perfection of security and priority
Recognition of rights
Enforcement

(a) Will there be a “political” problem in repossessing, etc. the aircraft and/or in obtaining remittance of enforcement proceeds?
(b) Is self-help available? If it is not, how can a mortgagee enforce its security?
(c) What is the impact upon enforcement of a mortgagee’s security interest if a lien exists over a mortgaged aircraft?
(d) Will a lessee of a mortgaged aircraft be entitled to continue to lease that aircraft notwithstanding enforcement by a mortgagee?
(e) How will a mortgagor’s insolvency impact upon the enforcement of a mortgagee’s rights

Conclusion

CHAPTER 28 TITLE RETENTION AND THE COMPANY CHARGE REGISTRATION SYSTEM GERARD MCCORMACK

Terminology
Types of reservation of title clause
Reasons for the use of reservation of title clauses
Company charge registration—some general observations
Part IV of the Companies Act 1989 and the Diamond Report
Defects in the existing registration scheme
“Simple” clauses
Current account clauses
Proceeds of sale clauses
Some conclusions on tracing clauses
Aggregation clauses
Mixture or “manufacture” of goods without loss of physical identity
Conclusion—a brief résumé

CHAPTER 29 RETENTION MONIES IN UK BUILDING CONTRACTS A. J. M. BLACKLER

1. Introduction
2. The present position
3. Deficiencies in the standard contracts?
   (a) Retention too vulnerable?
   (b) Employer's rights of deduction uncertain
   (c) Rights of deduction under JCT 81 denied
   (d) Dangers of amending the standard forms
   (e) The fundamental flaw—the defective trust

4. Are there any alternatives to the retention trust?
   (a) Retention bonds
   (b) Statutory reform?
   (c) The way forward?

Appendix 1 Form of guarantee
Appendix 2 Trust fund

CHAPTER 30 GOODS LEASING AND INSOLVENCY NIGEL FUREY 787
Terminology relevant to insolvency procedures
Effect of insolvency on the continuation of goods leases
Disclaimer of leases in liquidation and bankruptcy
Termination of leases on the insolvency of lessee
Recovering rentals and/or repossession during insolvency
   Liquidation or bankruptcy
   Administrative receivership
   Administration
   Voluntary arrangements
Power of administrator to dispose of leased goods
   Automatic termination on administration
Effect of a charge over sub-rentals
   Registration requirements
   Fixed or floating charge
   Enforcement of security during insolvency procedures
Recovery of insurance proceeds where leased goods are lost or damaged
   Goods insured against loss or damage
   Lessee insured against liability for loss or damage

PART V CLAIMS, INDEMNITIES, REMEDIES AND WRONGS

CHAPTER 31 TRESPASS TO GOODS ANTHONY HUDSON 809
Introduction
Elements of trespass to goods
Possession
Actionability per se
Reconciliations and possible developments
Defences and justifications
Remedies
Torts (Interference with Goods) Act 1977
Conclusion

CHAPTER 32 CONVERSION, TORT AND RESTITUTION ANDREW TETTENBORN 825
Tort
   (a) The level of fault
   (b) The measure of damages
Restitution
Conclusion
CHAPTER 36 IMPROVING STOLEN CHATTELS

NORMAN PALMER

and ANTHONY HUDSON

General matters
Dividing the benefit
The concept of uniqueness in relation to chattels
Drawing the distinction
The equivalent question on sales
The practical difference for improvers
The position regarding ordinary articles of commerce
Where conversion precedes improvement
Where conversion either follows improvement or (exceptionally) precedes improvement but damages fall to be assessed at the date of judgment or at some other post-conversion date
Special articles repossessed by or judicially restored to their owner
Accession, specification, mixtures and fixtures
Accession
Specification
Mixtures
Fixtures

CHAPTER 37 TIME LIMITS IN ACTIONS TO RECOVER CHATTELS

RUTH REDMOND-COOPER

Introduction
The English law of limitations
Protection of the possessor at the expense of the owner
Protection of the owner at the expense of the possessor
Balancing the relative merits of the parties
Adverse possession
Due diligence
Rejection of due diligence in New York
Legal nature of the due diligence rule
Fraud, concealment and mistake
Actions in contract or bailment

CHAPTER 38 LIQUIDATED DAMAGES AND RELATED CLAUSES IN CLAIMS INVOLVING CHATTELS

EWAN M. KENDRICK

Distinguishing between a liquidated damages clause and a penalty clause
The importance of the label used by the parties
A genuine covenanted pre-estimate of damage
Assessment at the date of formation
Guides in the process of construction
Evading the penalty clause rule
Acceleration clauses
Sums payable other than on breach 966
Creation of conditions 968
Relief against forfeiture 970
Forfeiture of instalments 970
Forfeiture of chattels 972

CHAPTER 39  EQUITABLE LIENS—A SEARCH FOR A UNIFYING PRINCIPLE  JOHN PHILLIPS 975
(1) Some general characteristics 975
(2) Problems of classification 977
(3) Hewett v. Court 980
(4) Special performance—a necessary requirement? 983
(5) Is the equitable lien applicable to all types of contract? 984
(6) The relationship between the indebtedness and property 986
(7) The issue of identification 987
(8) Unconscientious or unfair dealing 989
(9) “Equitable” liens—or are they? 991

Index 995