Land Registry Adjudicator

The Land Registration Act 2002, Part 11 (ss 107–114), which is now in force, sets up the judicial office of Adjudicator to HM Land Registry. The office provides an independent dispute resolution procedure for land registration matters, both in regard to paper conveyancing and the e-conveyancing network. Unfortunately, it does not deal with disputes between applicants and the Land Registry but only with disputes between applicants to the Registry. Disputes with the Registry, e.g. whether a title satisfies the requirements for registration as an absolute title, are still matters for the ordinary courts and the method of proceeding is by judicial review of a Registry decision. The Registry procedure will deal with applicants' disputes regarding such matters as boundaries, squatters and claims to ownership of or rights to land.

Local land charges

Search on a transfer of property will also be made in the local land charges register kept by the local authority. A common example of a local land charge is road charges, i.e. charges against land which the local authority incurs in regard to the cost of making up a road which adjoins that land.

Planning matters also appear, though it should be emphasised that the standard enquiries ask questions which concern the property and not the neighbourhood. They will not, e.g., disclose planning permissions granted on adjoining property. A buyer who needs information outside the standard search should make special enquiries of the planning office or instruct his solicitor to do so.

Mortgages of personal chattels

Just as land can be used as a means of securing debts, so also can personal chattels. There are two principal ways in which this can be done.

(a) By mortgage. In this case the borrower retains possession of his goods but transfers their ownership to the lender to secure the loan.

This raises a problem because, since the borrower retains the chattels, he also retains an appearance of wealth, and this may mislead others into giving him credit. Accordingly the Bills of Sale Acts 1878–82 were passed, and under the statutory provisions, where chattels are retained by the mortgagor, a bill of sale must be made out. Where ownership of the chattel passes to the mortgagee conditionally upon its being reconveyed to the mortgagor on repayment of the loan, the bill of sale is called a 'conditional bill'. An absolute bill of sale is one which transfers completely the ownership in chattels by way of sale, gift or settlement.

All bills of sale must be attested and registered within seven days of execution. Registration is currently in the Central Office of the Supreme Court. Conditional bills of sale must be reregistered every five years if they are still operative.

A conditional bill of sale is totally void if it is not registered, whilst an unregistered absolute bill of sale is void against the trustee in bankruptcy and judgment creditors of the grantor so that the chattels represented by the bill are available to pay the grantor's debts. However, an absolute bill of sale will not be void for want of registration unless the chattels remain in the sole possession, or apparent possession, of the transferor (or grantor) of the bill.

Koppel v *Koppel*, 1966 – What is apparent possession? (502)

(b) By pledge, or 'pawn'. In this case the lender obtains possession of the goods, the borrower retaining ownership. Thus there is no danger that the borrower will obtain credit on the strength of his possession of the chattels, and the law relating to pledges is mainly concerned to protect the interests of the borrower (or pledger) against dishonest pawnbrokers.

Mortgages of choses in action

It is possible to use a chose in action as security for a loan, and mortgagees frequently take life assurance policies as security, e.g. a bank in the case of an overdraft. However, shares in companies are perhaps the commonest chose in action to be used as security.

Shares may be made subject to a legal mortgage, but here the shares must actually be transferred to the mortgagee so that his name is in fact on the company's share register. An agreement is made out in which the mortgagee agrees to retransfer the shares to the mortgagor when the loan is repaid.

It is also possible to have an equitable mortgage of company shares, and this is in fact the usual method adopted. The share certificate is deposited with the mortgagee, together with a blank transfer signed by the registered holder, the name of the transferee being left blank. The shares are not actually transferred, but the agreement accompanying the transaction allows the mortgagee to sell the shares by completing the form of transfer and registering himself as the legal owner or selling the shares to a third party if the mortgagor fails to repay the loan.

Other forms of security

A security is some right or interest in property given to a creditor so that, if the debt is not paid, the creditor can obtain the amount of the debt by exercising certain remedies against the property, rather than by suing the debtor by means of a personal action on his promise to pay. Securities, therefore, create rights over the property of another and since we have already discussed mortgages of land, chattels and choses in action it remains only to consider the lien.

Lien

A lien is a right over the property of another which arises by operation of law and independently of any agreement. It gives a creditor the right (*a*) to retain possession of the debtor's property until he has paid or settled the debt, or (*b*) to sell the property in satisfaction of the debt in those cases where the lien is not possessory. Where the parties agree that a lien shall be created, such agreement will effectively create one.

Possessory or common-law lien

To exercise this type of lien the creditor must have actual possession of the debtor's property, in which case he can retain it until the debt is paid or settled. It should be noted that the creditor cannot ask for possession of the debtor's goods in order to exercise a lien.

A common-law lien may be particular or general:

(a) Particular lien. This gives the possessor the right to retain goods until a debt arising in connection with those goods is paid.

(b) General lien. This gives the possessor the right to retain goods not only for debts specifically connected with them, but also for all debts due from the owner of the goods however arising.

The law favours particular rather than general liens.

If X sends a clock to R to be repaired at a cost of £5, R may retain the clock under a particular lien until the £5 is paid. If, however, X owed R £10 for the earlier repair of a watch, R cannot retain the clock to enforce payment of £15 unless, as is unlikely, he can claim a general lien.

The following are cases of *particular lien*:

(i) A carrier can retain goods entrusted to him for carriage until his charges are paid.
(ii) An innkeeper has a lien over the property brought into the inn by a guest and also over property sent to him while there, even if it does not belong to him. The lien does not extend to motor cars or other vehicles, or to horses or other animals.

Robins v *Gray*, 1895 – An innkeeper's lien (**503**)

(iii) A shipowner has a lien on the cargo for freight due.
(iv) In a sale of goods, the unpaid seller has a lien on the goods, if still in his possession, to recover the price.
(v) Where a chattel is bailed in order that work may be done on it or labour and skill expended in connection with it, it may be retained until the charge is paid. Such liens may arise, e.g., in favour of a car repairer over the car repaired, by an arbitrator on an award and by an architect over plans he has prepared.

A *general lien* may arise out of contract or custom, and the following classes of persons have a general lien over the property of their customers or clients – factors, bankers, solicitors, stockbrokers, and in some cases insurance brokers.

Caldwell v *Sumpters*, 1971 – A solicitor's lien (**504**)

In the course of their professional work accountants have at least a particular lien for unpaid fees over any books, files and papers delivered to them by clients and also over any other documents which come into their possession while acting for clients. The documents must be the client's property (see *Woodworth* v *Conroy* [1976] 1 All ER 107), but not the statutory books of a registered company since these are in many cases open to inspection by members and in some cases by the public. This rule derives from the decision of the High Court in *DTC (CNC) Ltd* v *Gary Sargeant & Co* [1996] 2 All ER 369, where it was held that an accountant could not exercise a lien over the accounting records of a company for unpaid fees since the records were required by statute (i.e. the Companies Act 1985) to be kept in specific places, e.g. the registered office, for certain periods for inspection.

Again, in *Harrison* v *Festus* [1998] CLY 4 the High Court doubted whether an accountant's lien could extend to a client's VAT records as they were statutory records to be preserved at the taxpayer's principal place of business.

Although a common-law lien normally gives no power of sale, there are some exceptional cases in which a right of sale is given by statute. Such a right is given to innkeepers (Innkeepers Act 1878), unpaid sellers of goods (Sale of Goods Act 1979) and bailees who accept goods for repair or other treatment for reward (Torts (Interference with Goods) Act 1977). Briefly, the

latter Act provides for the sale of goods accepted for repair or other treatment or for valuation or appraisal or for storage and warehousing provided the bailee gives notice to the bailor specifying the date on or after which he proposes to sell the goods. The period between the notice and the date specifying sale must be such as will afford the bailor a reasonable opportunity of taking delivery of the goods. However, if he does not do so, the bailee may sell them but must account to the bailor for the balance of the proceeds of sale after deduction of charges and expenses.

It should also be noted that the High Court has a discretion to order the sale of goods if it is just to do so, e.g. where the goods are perishable.

Larner v *Fawcett*, 1950 – Power of court to order a sale (**505**) 

A common law lien is discharged:

(*a*) by payment of the sum owing;
(*b*) by parting with the possession of the goods or other property upon which the lien is being exercised (but see *Caldwell* v *Sumpters* (1971), above);
(*c*) by an agreement to give credit for the amount due;
(*d*) by accepting an alternative security for the debt owing.

Maritime lien

A maritime lien does not depend on possession. It is a right which attaches to a ship in connection with a maritime liability. It travels with the ship and may be enforced by the arrest and the sale of the ship through the medium of a court having Admiralty jurisdiction. Examples of such liens are:

(*a*) liens of salvors;
(*b*) the lien of a master for his outgoings;
(*c*) liens which arise from damage due to collision;
(*d*) liens of bottomry bond holders. A bottomry bond is a form of security under which a ship and/or its cargo is pledged for the repayment of money borrowed for the purposes of a voyage.

The order of attachment is important and depends on circumstances.

Successive salvage liens attach in inverse order, later ones being preferred to earlier ones, since the earlier lien would be useless if the later salvage had not preserved the ship from loss. Claims for collision damage are treated as of equal rank. Liens for wages, in the absence of salvage liens, have priority over other liens; however, liens for wages earned before a salvage operation are postponed to the lien for salvage, since the value of such a lien has been preserved by the salvage operation.

If a ship which is subject to lien is sold, the purchaser takes it subject to the lien and is responsible for discharging it.

Equitable lien

An equitable lien is an equitable right, conferred by law, whereby one person acquires a charge on the property of another until certain claims have been met. It differs from a common-law lien which is founded on possession and does not confer a power of sale. An equitable lien is independent of possession and may be enforced by a judicial sale.

An equitable lien may arise out of an express provision in a contract or from the relationship between parties. Thus a partner has an equitable lien upon the partnership assets for the purpose of ensuring that they are applied, on dissolution, to paying partnership debts. Furthermore, an *unpaid* vendor of land has an equitable lien on the property even after conveyance of ownership to the purchaser, or a third party who has taken it with notice of the lien, under which he may ask the court for an order to sell the property so that he may obtain the purchase money owing to him.

An equitable lien can, like all equitable rights, be extinguished by the owner selling the property to a *bona fide* purchaser for value who has no notice of the lien.

An equitable lien differs from a mortgage. A mortgage, as we have seen, is always created by the act of parties, and an equitable lien may arise by operation of law.

Banker's lien

At common law a banker has a general possessory lien on all securities, and, e.g., bills of exchange, promissory notes and bonds, deposited with him by customers in the ordinary course of business unless there is an agreement, express or implied, to the contrary. The lien does not extend to property or securities deposited for safe custody. However, a customer may deposit a security as collateral for a loan, in which case the banker has rights over it, but the transaction is an equitable mortgage rather than a lien.

A banker's lien gives a right of sale, at least of negotiable securities subject to the lien, because s 27 of the Bills of Exchange Act 1882 provides that a person having a possessory lien over a bill is deemed a holder for value to the extent of the lien, and can, therefore, sell and transfer the bill.

Assignments of choses in action

The common law does not recognise assignments of choses in action, but equity does and so does statute.

Assignment by act of parties

There are four possible categories.

A legal assignment of a legal chose under s 136 of the Law of Property Act 1925

To be effective such an assignment, e.g. to the debtors of a business, must be absolute and not partial; must be in writing signed by the assignor; and must be notified in writing to the debtor, generally by the assignee. If the above requirements are complied with, the assignee can sue the debtor without making the assignor a party to the action. Failure to give notice to the debtor means that there is no legal assignment; the debtor can validly pay the assignor, and the assignee is liable to be postponed to a later assignee for value who notifies the debtor. However, it is not necessary for the date of the assignment to be given in the notice of assignment as long as the letter, or other form of written notice, states clearly that there has been an assignment and identifies the assignee (*Van Lynn Developments Ltd* v *Pelias Construction Co Ltd* [1968] 3 All ER 824).

Equitable assignments of legal choses

Equitable assignments of equitable choses

The difference between a legal and an equitable chose is historical in that an equitable chose is a right which, before 1875, could only be enforced in the Court of Chancery, e.g. the interest of a beneficiary under a trust fund.

In equitable assignments of legal choses the assignor must be made a party in any action against the debtor, but if the chose is equitable this is not necessary. No particular form is required; all that is necessary is evidence of intention to assign. Notice should be given to the debtor or the trustees, as the case may be, in order to preserve priority as outlined above.

Thus the transfer of a debt by word of mouth, although invalid under statute, may nevertheless be good and enforceable in equity.

Equitable assignments of mere expectancies

These are mere hopes of future entitlement, e.g. a legacy under the will of a living testator. The rules regarding such assignments are the same as those set out under the previous two sub-headings, but no notice to the debtor can be given because there is none. Value is not needed for assignments within s 136 of the Law of Property Act 1925, or for equitable assignments of equitable choses in action. It is probably not needed for an equitable assignment of a legal chose, though the position is not clear. Value is needed for the assignment of mere expectancies; a document by deed is not enough. Value is also needed to support an agreement to assign an equitable chose, but if the assignee lawfully takes delivery of the property assigned, the assignor cannot recover it.

Assignments are said to be 'subject to equities'; the person to whom the right is assigned takes it subject to any right of set off which was available against the original assignor. So if X assigns to Z a debt of £10 due from Y, and X also owes Y £5, then in any action brought by Z for the money, Y can set off the debt of £5. But the assignee is not subject to purely personal claims which would have been available against the assignor, e.g. damages for fraud, though the remedy of rescission is available against the assignee where the assignor obtained the contract by fraud.

Assignments of certain choses in action are governed by special statutes so that the rules outlined above do not apply. In such cases the special statute must be complied with. Examples are:

(*a*) *bills of exchange, cheques and promissory notes* – Bills of Exchange Act 1882;
(*b*) *shares in companies* registered under the Companies Act 2006 and previous Acts – Companies Act 2006;
(*c*) *policies of life assurance* – Policies of Assurance Act 1867.

Rights of a personal nature under a contract cannot be assigned. If X contracts to write newspaper articles for a certain newspaper, it cannot assign its rights under the contract to another. The right to recover damages in litigation cannot be assigned, for reasons of public policy. Liabilities under a contract cannot be assigned; the party to benefit cannot be compelled by mere notice to accept the performance of another, though a liability can be transferred by a novation (a new contract), if the party to benefit agrees.

Assignment by operation of law

The involuntary assignment of rights and liabilities arises in the case of death and bankruptcy.

Death

The personal representatives of the deceased acquire his rights and liabilities, the latter to the extent of the estate. Contracts of personal service are discharged.

Bankruptcy

The trustee in bankruptcy has vested in him all the rights of the bankrupt, except for actions of a purely personal nature which in no way affect the value of the estate, e.g. actions for defamation. The trustee is liable to the extent of the estate for the bankrupt's liabilities, though the trustee has a right to disclaim onerous or unprofitable contracts.

Part 5

CRIMINAL LAW

23

CRIMINAL LAW: GENERAL PRINCIPLES

Crime and civil wrongs distinguished

As we have indicated in Chapter 1 the distinction does not lie in the *nature of the act* itself. For example, if a railway porter is offered a reward to carry A's case and runs off with it, then the porter has committed one crime, that of theft, and two civil wrongs, i.e. the tort of wrongful interference and a breach of his contract with A. Again, a signalman who carelessly fails to operate signals so that a fatal accident occurs will have committed one crime, i.e. manslaughter, because persons are killed, and two civil wrongs, the tort of negligence in respect of those who died and those who are merely injured, and a breach of his contract of service with the employing rail company in which there is an implied term to take due care. It should also be noted that in this case the right of action in tort and the right of action in contract are vested in different persons.

The distinction does depend on the *legal consequences* which follow the act. If the wrongful act is capable of being followed by what are called criminal proceedings, that means that it is regarded as a crime. If it is capable of being followed by civil proceedings, that means that it is regarded as a civil wrong. If it is capable of being followed by both, it is both a crime and a civil wrong. Criminal and civil proceedings are usually easily distinguishable, they are generally brought in different courts, the procedure is different, the outcome is different and the terminology is different. A major consequence of classifying proceedings as criminal is that the burden of proof is on the Crown.

Terminology and outcome of criminal and civil proceedings

In criminal proceedings a prosecutor prosecutes a defendant. If the prosecution is successful, it results in the conviction of the defendant. After the conviction the court may deal with the defendant by giving him a custodial sentence, e.g. prison or some other form of detention (see Chapter 4) or a non-custodial sentence, e.g. a supervision order under a probation officer or a community order imposing e.g. an unpaid work requirement. In rare cases the court may discharge the defendant without sentence.

As regards *civil proceedings*, a claimant *sues* (brings an action against) a defendant. If the claimant is successful, this leads to the court entering judgment ordering, for example, that the defendant pay a debt owed to the claimant or damages. Alternatively, it may require the