§ Law in Context

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Property Law

Commentary and Materials

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Transfer and grant

12.1. Derivative acquisition

In Chapter 11, we looked at the way property interests are acquired by original acquisition, in particular by taking possession of things. In this chapter, we look at the derivative acquisition of property interests, through transfer of interests and through the grant of subsidiary property interests. In most cases, a property interest passes from one person to another, or is carved out of a larger property interest, because the parties intend this to happen and deliberately take steps to achieve it. The transaction may be a gift from one to the other or it may be part of a bargain, with value provided in exchange. We are mostly concerned in this chapter with straightforward intentional dispositions like these.

There are two principal issues is this chapter. The first concerns the way in which property interests pass from one person to another. This is essentially a matter of formalities – the formal requirements that the law imposes for a property interest to pass from one person to another. We look at this in sections 12.2 and 12.3 below. Section 12.2 covers general principles about formalities rules, why we have such rules and what the rules are. Section 12.3 highlights one particular and complex area, which is how and when equitable property rights arise out of contracts to acquire property rights in the future, and out of attempted legal transactions which fail because of a failure to comply with formalities rules.

The second issue considered in this chapter is the point in time at which a property interest passes from one person to another. For reasons outlined in Chapter 5, it is essential that property passes at a fixed and ascertainable point so that everyone knows whether or not, at any point in time, a thing is or is not affected by the interest. This causes problems when people want to deal in things before they have become precisely identified. We look at some of these problems in section 12.4.

12.2. Formalities

12.2.1. Nature and content of formalities rules

If you have a property interest in a thing and you want to transfer that property interest to me, or you want to grant me a derivative interest, the disposition will

not be effective unless it is made in the way required by law for a transaction of that nature. There are formalities prescribed for most property transactions. These formalities may differ depending on the nature of the property (whether it is land, goods, money etc.), whether your title is legal or equitable, whether you are giving this interest to me or selling it to me, and, if it is a gift, whether you are making it during your lifetime or by will so that it will take effect on your death. Mostly (but not necessarily) they involve some kind of writing or other record-making. As Peter Birks says, '[f]ormal requirements require people to do things in particular ways, usually ways which put them to some extra trouble' (Birks, 'Five Keys to Land Law', Extract 12.1 below).

Pollock and Maitland describe a wide variety of symbolic acts that have been necessary over the ages, in this country and across Europe, to achieve a transfer of land from one person to another. It might have involved the physical presence of the parties, either on the land in question or in a church or a court, and the presence of witnesses. In addition to physical presence, some ceremonial acts might have been required signifying delivery of possession of the land from one person to another, such as a perambulation of the boundaries in the presence of witnesses, or a symbolic renunciation of possession by the transferor 'leaping over the encircling hedge', or passing or throwing a ceremonial rod to the transferee, or an elaborate transfer of symbolic totems:

> A knife is produced, a sod of turf is cut, the twig of a tree is broken off; the turf and twig are handed by the donor to the donee; they are the land in miniature, and thus the land passes from hand to hand. Along with them the knife may also be delivered, and it may be kept by the donee as material evidence of the transaction; perhaps its point will be broken off or its blade twisted in order that it may differ from other knives. But before this the donor has taken off from his hand the war glove, gauntlet or thong, which would protect the hand in battle. The donee has assumed it; his hand is vested or invested; it is the vestita manus that will fight in defence of this land against all comers; with that hand he grasps the turf and twig. ('Ownership and Possession', in Pollock and Maitland, *The History of English Law*, Book II, Chapter IV, § 3, p. 85)

As they say, 'One could not be too careful; one could not have too many ceremonies' (*ibid.*, p. 90).

The formalities now required in this country are less elaborate, although not much less diverse. In this chapter, we look only at those relating to goods and land, but even these are formidably complex.

The first thing to say is that there are generally two occasions in a property interest's life when formal requirements must be observed. The first is when the property interest is first created, if it is created by grant of a derivative interest. The second is whenever the interest is subsequently transferred from one person to another. The first source of complexity is that the formalities required at these two stages are not always the same. So, for example, as we see in section 54(2) of the Law of Property Act 1925, a lease of land for a term not exceeding three years can be

created orally (subject to the limitations provided in section 54(2)) but once it has come into existence it cannot be transferred except by deed (confirmed by the Court of Appeal in *Crago* v. *Julian* [1992] 1 WLR 372).

As to the content of the formalities rules for goods and land, in order to make a gift of goods – perhaps you want to give your car to me – you must either use a deed or deliver the goods with the intention of transferring title to them, as we see in *Re Cole* [1964] 1 Ch 175 (extracted at www.cambridge.org/propertylaw/) and in *Glaister-Carlisle* v. *Glaister-Carlisle*, *The Times*, 22 February 1968 (Extract 12.3 below). If, on the other hand, you want to sell the car to me, no formalities are required: legal title to goods passes as and when the parties intend it to pass (sections 17 and 18 of the Sale of Goods Act 1979, as amended) and there is no need for a deed, or writing, or even for you to deliver the car to me. Similarly, no formalities are required to create an equitable interest in goods, but once the equitable interest comes into existence it can only be transferred by signed writing satisfying section 53(1)(c) of the Law of Property Act 1925, whether the transfer is a gift or a sale. So, you can declare that you hold your car on trust for your uncle (so, in effect, granting him an equitable interest in the car) orally and without using any formalities, but if he then wants to sell or give his trust interest to me he can only do so by signed writing.

In the case of land, the grant of a legal interest in land, and outright gifts and sales of legal interests, must be made by deed (section 52(1) of the Law of Property Act 1925: the relatively few exceptions are listed in section 52(2), amplified by section 54(2), and the other exceptional cases discussed in section 12.2.5 below should also be noted). Declarations of trust relating to land do not have to be *made* in writing, but there does have to be written and signed *evidence* of the declaration, as required by section 53(1)(b) of the 1925 Act. Signed writing is, however, required to create any other type of equitable interest in land and also to dispose of any equitable interest, but in some cases the writing must satisfy the requirements of section 53(1)(a) or (c) of the 1925 Act, while in others it must satisfy the rather different requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (a confusion we look at more closely in section 12.3 below). Also, special provision is made for *agreements* to make a future disposition of an interest in land: they too must satisfy the requirements laid down by section 2 of the 1989 Act. This is more significant than might appear at first sight. Sales of fee simple interests in land and also grants and sales of long leases tend to be preceded by protracted negotiations, and it is usual practice for the buyer and seller to enter into a formal contract some days or weeks before the transaction itself takes place. This contract will be entered into as soon as the terms of the transaction are agreed, and once that is done and the parties know that they are now committed to the transaction they can go ahead and make the necessary practical and legal arrangements for the transaction itself to be completed. So, the parties will first enter into a contract complying with section 2 of the 1989 Act and then some time later the transfer or grant itself will be made by deed as required by section 52 of the 1925 Act.

12.2.2. Registration and electronic transactions

There are two additional complicating factors. The first, registration, is not new. Registration of property interests in ships dates back to 1601, and registration of titles to land to the nineteenth century. Registration may operate as a formalities requirement, in the sense that there are registration systems under which the sanction for non-registration is either invalidity or unenforceability of the interest (a distinction we consider further below). However, this is not the only way to run a registration system. As we see in Chapter 15, it is possible to have a registration system where registration is entirely voluntary, as in the British Shipping Registry. In such cases, the incentive to register is not provided by fear of the consequences of non-registration but by the desire to obtain the benefits that registration will provide. In such systems, registration is therefore not a matter of formalities.

Electronic transactions, on the other hand, do pose new questions about the form and function of formalities rules. In order to transfer shares in a company, the traditional procedure is for the transferor to execute a stock transfer form and deliver it and the share certificates to the transferee, who then produces them to the company, which effects the transfer by making the appropriate entry in its register of shares and then sends the stock transfer form to the transferee. However, dealers can now elect to carry out share transactions on the London Stock Exchange using the CREST centralised settlement system, a paperless stock transfer system, instead of following the traditional paper document procedure, and the same is due to happen to land transactions requiring registration at the Land Registry. As far as land is concerned, provision is made for this by Part 8 of the Land Registration Act 2002, and it is currently anticipated that the electronic transfer scheme will be piloted in 2006 and then introduced incrementally from 2007 (Land Registry, *Defining the Service: E-conveyancing* (July 2004), available at www.landreg.gov.uk/assets/library/documents/defining_the_servicev1.pdf). This raises two questions about formalities. The first is whether and if so how to replicate traditional formal acts such as signing, witnessing and reciting agreed terms when the document is in electronic rather than paper form, a question already considered by the Law Commission in *Electronic Commerce: Formal Requirements in Commercial Transactions* (December 2001). The second is whether to shift formal requirements to an earlier stage in the transaction, by formalising the way in which agents can prove that they entered into transactions with the authority of their client. Under the land registration system it is presently envisaged that a registrable property interest will be granted and transferred electronically and not by a document (section 91 of the 2002 Act), and that this will be carried out not by the parties themselves but by their agents. The same applies in the CREST share settlement system: ordinary sharedealers must buy and sell their shares through brokers under this system. But agents, whether brokers acting for sharedealers or solicitors acting for clients buying and selling land, are professionals who need to be able to prove that they are or were indeed authorised by their clients to do what they did. In a

pre-electronic system the client signifies to the other party that he intends to be bound by some face-to-face communication, such as delivery or speech, or more sophisticatedly by signing and handing over the document which effects the transaction, which both records the terms agreed and signifies the intention to be bound by them. In an electronic system where the transaction is carried out physically by the party's agent, other systems of authentication must evolve.

Formalities rules are therefore in a somewhat fluid state at the moment, and consequently it is particularly important that we have a clear idea of why we have formalities rules, and the functions they are intended to perform. Before looking at these questions, however, there are some general points to be made.

12.2.3. Validity and enforceability against third parties

There are two principal ways in which a legal system can 'punish' non-compliance with formality requirements. The strictest punishment is invalidity: the transaction (whether the creation or grant of the interest) does not take effect at all unless and until the formalities are completed. The most lenient is non-enforceability against third parties: the transaction is fully effective between those who were parties to it, but does not confer on the transferee/grantee an interest enforceable against the rest of the world. In between these two extremes there are two sub-species. In some cases, in a variation of the invalidity sanction, compliance with the formal requirement is necessary to make the transaction take effect *in law*, but failure to comply will not of itself prevent the transaction taking effect *in equity*. So, for example, in registered land the grant or transfer of a registrable property interest will not result in the grantee or transferee acquiring a legal interest unless and until it is completed by registration, but up until registration the grantee/transferee will have the equivalent equitable interest, provided all the other formal requirements for granting or transferring that kind of interest have been complied with. Similarly, a legal mortgage of land must be made by deed (because of section 52 of the Law of Property Act 1925) but if the mortgage is *not* made by deed it will still take effect as an *equitable* mortgage, but in this case provided it satisfies the appropriate formalities for equitable mortgages (which, because of the rule in *Walsh* v. *Lonsdale*, are those set out in section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, as we see in section 12.3 below).

In other cases, now deservedly rare, a variation of the enforceability sanction applies and the effect of failure to comply with the formalities rule is that the transaction is valid but not enforceable at all, not even as between the parties. This used to apply to contracts for the disposition of an interest in land. By section 40 of the Law of Property Act 1925 no formalities were necessary for the formation of a valid contract for the disposition of an interest in land, but such a contract was not enforceable unless evidenced either by writing signed by the person against whom enforcement was sought, or by part performance of the contract by the party seeking to enforce it. This problematic concept of a valid but non-enforceable contract could cause problems. In *Morris* v. *Baron* [1918] AC 1, where the contract

was governed by statutory provisions identical to section 40 (section 4 of the Sale of Goods Act 1893), the parties entered into a contract which complied with the statutory provisions but they then superseded that contract with another one, which did not. It was held that neither contract was enforceable: the first because it had been rescinded by the valid second contract, and the second because it did not comply with the statutory provisions and so was not enforceable even though valid. For this and other reasons, section 40 was repealed and replaced by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 in which the sanction for non-compliance is invalidity, not unenforceability.

12.2.4. Effect of compliance on passing of title

The common law usually takes an entirely mechanistic view of the passing of legal title. The general principle is that, if the necessary formalities are used, the legal title passes automatically, even if the transaction is one that can be corrected by the operation of some common law or equitable principle such as fraud or misrepresentation or mistake. Leaving aside those cases where formalities affect enforceability only, as far as legal title is concerned compliance with formalities is a necessary and a sufficient condition for validity. If the formalities are not completed legal title does not pass, however much the parties want it to or think it has. As Megarry J said in *Re Vandervell (No. 2)* [1974] Ch 269 at 294: 'To yearn is not to transfer.' If, on the other hand, the formalities *are* completed, legal title will pass, however unintended, or unnoticed, or unjust the result may be. The clearest illustration is provided by the difference in effect of fraud and forgery, as we see in Chapter 16 in the context of registered land. If I trick you into signing a deed transferring your fee simple interest in your house to me, I become the legal owner of the fee simple and will remain so unless and until you can persuade a court to order me to transfer it back to you. If, on the other hand, I forge your signature on the transfer deed, the legal fee simple stays with you. It never passes to me because there has been no deed as required by section 52 of the Law of Property Act 1925, because by section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 a valid deed must be signed by the person making the deed, and you did not sign it.

12.2.5. Transactions excepted from formalities rules

Sometimes interests come into existence in such a way that it would be inappropriate to require formalities to be observed. In these circumstances, formalities are not required. They can be put into three categories:

12.2.5.1. Equitable modification of legal rules

Equity may intervene and require a legal title holder to hold on trust for someone else. This may be because it would be unconscionable for the legal title holder to keep it for herself (in which case a constructive trust would be imposed), or because equity infers an intention that the legal title holder should not benefit (in which case a resulting trust arises). Again, formalities rules would be

self-defeating, and indeed they are expressly excluded by section 53(2) of the Law of Property Act 1925.

12.2.5.2. Implied rights

In certain circumstances, a grant of an interest is implied by law, again without the need for compliance with formalities. Implied easements come within this category, including those implied by necessity, such as a right of way implied over retained land when an area which would otherwise be landlocked is sold off. Such an easement takes effect as a legal easement even though, necessarily, not made by deed and so not complying with section 52 of the Law of Property Act 1925.

12.2.5.3. Rights acquired by possession or prescription

The title to goods and land which is acquired by taking possession of them is a legal title, and again it is acquired without the need to comply with formalities, as we saw in Chapter 11. Similarly, the question of formalities does not arise where rights in land are acquired by long user giving rise to customary rights or by operation of the prescription rules we look at in Chapter 13.

In all three of these categories, however, once the interest has come into existence formalities rules come back into operation, in the sense that they must be complied with on any subsequent dealings with the interest. As far as transfer of interests is concerned, exception from formalities rules is, unsurprisingly and inevitably, given for transfers by operation of law. These include the automatic transfer of title from debtor to trustee in bankruptcy that we considered in Chapter 8.

12.2.6. Deeds and prescribed forms

Two types of formal requirement require some explanation. At the higher end of the formalities scale is a requirement that an action must be done by deed. A deed is now just any piece of signed writing that satisfies the not very stringent requirements of subsections (2) and (3) of section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. The 1989 Act simplified and rationalised the old law about deeds, implementing the recommendations of the Law Commission report, *Deeds and Escrows* (Law Commission Report No. 163, 1987). The most significant change was the abolition of the need for individuals to seal deeds. Sealing originally involved the imprint of a real seal on real wax, but as far as individuals were concerned this had long degenerated into fixing an anonymous mass-produced self-adhesive red sticker on to the document. The sealing requirement was therefore removed by section 1 of the 1989 Act for individuals. Similar provisions were made for companies by the Companies Act 1989 which introduced a new section 36A into the Companies Act 1985 abolishing the former requirement that each company must keep a common seal and permitting companies to execute deeds by the signature of their officers only. However, the new regime for companies has proved less successful than the provisions for individuals, and the Law Commission has recommended further changes (Law Commission, *The Execution*

of Deeds and Documents by or on Behalf of Bodies Corporate (Law Commission Report No. 253, 1998)).

Section 1 of the 1989 Act also removed the restriction that a deed had to be made on paper or parchment. The requirement that it must be signed suggests that it must still be made on some tangible substance, and consequently section 91(4) and (5) of the Land Registration Act 2002 has had to make special provision for documents in the prescribed electronic form 'to be regarded for the purposes of any enactment' as a deed, once electronic transfer of registered land interests comes into operation.

As a result of the changes made in 1989, deeds now require very little formality. Only the party making the deed need sign it, whereas in contracts for the disposition of land, governed by section 2 of the 1989 Act, all parties must sign. So, if I want to sell my fee simple interest in my house to you, only I need sign the transfer deed, whereas you and I would both have to sign a contract that I would sell it to you next week (consider why). The signature must be witnessed by someone who must also sign, if it is to be a deed. There are no requirements about what the deed must actually say, except that it must either describe itself as a deed or state that it is signed as a deed. Again, this is in contrast to section 2 of the 1989 Act which provides that the contract will not be valid at all unless it contains all the terms agreed between the parties.

A much higher level of formality is, however, sometimes required by statute for some particular types of transaction. For example, the document may be required to be in a prescribed form and to contain specified information. Prescribed forms such as those required for pre-computerised land registry and shipping registry transactions were originally required for bureaucratic convenience. Now, however, prescribed forms are most likely to be required for consumer protection reasons. So, for example, there are detailed regulations governing the form and content of agreements covered by the Consumer Credit Act 1974, as we see in *Wilson* v. *First County Trust (No. 2)* [2003] UKHL 40 below, requiring among other things the inclusion of 'health warnings' and prescribing print size and the positioning and prominence given to certain classes of information.

12.2.7. Why have formalities rules

With this proliferation and variety of forms of formality it is easy to lose sight of what it is that formalities rules are seeking to achieve, both in general terms and in relation to any particular type of property transaction.

Like all rights, property rights are invisible, but they differ from most other rights in that they are also generally transferable and inheritable. The fundamental point about formalities, as Peter Birks points out in the extract from 'Five Keys to Land Law' (Extract 12.1) below, is that they are the medium through which these invisible rights are made apparent. He is concerned specifically with grants and transfers of property rights in land – as he says, you cannot see a fee simple, or an easement or a restrictive covenant – but the same applies to all property rights. It is

intangible rights to things that are traded and made the subject of gifts or inheritance, not the things themselves, and even tangible things are not usually able to carry labels telling us whom they belong to. This is something that has to be recorded elsewhere, either on a register, or on a paper record of a transaction, or in people's memories.

Formalities rules are therefore there to tell the world who owns what, but there is more to it than that. The classic analysis of the functions of formalities was provided by Lon Fuller in Extract 12.2 below. He said that formalities could perform three functions: evidentiary, cautionary and 'channelling'.

12.2.7.1. The evidentiary function

Fuller means by this no more than that a formal requirement such as writing or attestation by a witness provides evidence of the happening and meaning of the event (the formation of a contract, or the transfer of an interest in land). This is for the benefit of the parties themselves and their successors, should they later disagree, and also in the interests of justice generally, because it means there will be adequate evidence on which courts can adjudicate disputes. However, as other commentators have pointed out, it goes further than that. Formalities such as witness and signatures can also provide evidence of the identities of the parties (that they were who they said they were, and not impersonators) and that they knew what they were doing and did it intentionally rather than inadvertently. Rules prescribing form and content such as section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, requiring all the terms agreed to be reduced to writing, also ensure that there will be reliable evidence of precisely *what* it was that was agreed.

12.2.7.2. The cautionary function

Again, this is straightforward, though no less important. Many formalities are designed to put people to extra trouble, as Birks says, so that they are made aware of the significance of what it is that they are doing. This will force them to stop and think, and guard against 'rash and ill-considered decisions that they may regret later', as Patricia Critchley puts it in 'Taking Formalities Seriously'. This might explain why it is more difficult to give goods away than it is to sell them, as we see from *Re Cole* below. The unfamiliar formality might also, so Critchley argues, prompt people to seek legal help in completing the documentation, and the lawyer might then be able to give them general advice about the implications of the proposed transaction and 'should be able to detect and prevent the application of external pressure'. This argument, however, should be treated with some caution. It is unrealistic to expect a lawyer paid simply to steer a client through the formalities for completing a transaction to also volunteer advice about the desirability of entering into the transaction, as countless undue influence cases have demonstrated. In *Royal Bank of Scotland plc* v. *Etridge (No. 2)* [2001] 3 WLR 1021, the House of Lords set down guidelines for solicitors retained by banks to advise

wives and others about the implications of mortgaging their homes to secure their husband's business debts. Lord Nicholls emphasised the difference between instructing a lawyer to obtain the wife's execution of the mortgage, and instructing him to advise on the nature and effect of the transaction and ensuring that she is entering into it free from improper pressure or influence. In order to perform the latter function properly, he said, the solicitor would need to be provided by the bank with details of the financial situation of the parties and the proposed arrangements, and then 'as a core minimum' explain and discuss the detailed points he outlined in paragraph 65 of his judgment. The Conveyancing and Land Law Committee of the Law Society, in a guidance note it subsequently issued to solicitors, warned that 'to comply properly' with Lord Nicholls' guidelines 'is likely to take several chargeable hours' (*Undue Influence – Solicitors' Duties Post 'Etridge'* (May 2002)), and in *Greene King plc* v. *Stanley* [2001] EWCA Civ 1966, the court noted that the solicitor who charged £50 for obtaining the wife's execution of the mortgage documentation had a charge-out rate of £80 an hour, 'tending to confirm' the trial judge's findings that he had done just that, and not given her any advice about the desirability of entering into the transaction.

In 'The Statute of Frauds in the Light of the Functions and Dysfunctions of Form', Joseph Perillo also argues that, so far as the warning function is concerned, formalism can sometimes be self-defeating if it requires the provision of too much information. This is a particular problem with take-it-or-leave-it non-negotiable standard form agreements which are rarely read before signature, and if read not easily understood. The government-prescribed form requirements we noted above, which specify not only the information that must be contained in certain agreements, but also the form in which it is presented, are an attempt to address this problem.

12.2.7.3. The channelling function

Fuller sees this as one of the most important functions of formalities. As he puts it, rules stating that transactions will not take legal effect unless put in a legal form offer 'channels for the legally effective expressions of intention'. They tell those who do *not* want transactions to have a particular legal effect how to avoid that happening, and they tell those who *do* want them to have a particular effect how to achieve that end. This message can then be read both by courts who have to adjudicate disputes between them and, most importantly in the case of property rights, by third parties potentially affected by the interest. We see an excellent illustration of the importance of this in the rules that govern the enforceability of equitable interests that we consider in Chapter 14. The general rule is that, in the absence of a registration system, the enforceability of equitable property interests in things is governed by the good faith purchaser rule: they are enforceable against the whole world except a good faith purchaser of a legal interest in the thing who does not have actual, constructive or imputed notice of the interest. The disadvantage of this rule from the point of view of the equitable interest holder is that it

does not give her any channel through which to make known the existence of her interest. The best channel for her would of course be registration. If there is a requirement that her interest is not enforceable against third parties unless registered, this might lead to unfortunate results if she neglects to register the interest and the property is then bought by someone who was well aware of her interest all along, as happened in *Midland Bank Trust Co. Ltd* v. *Green* [1981] AC 513, as we see in Chapter 14. However, it does at least mean that she has some means of ensuring in advance that her interest will be enforceable against all comers: she does not have to worry about how she is going to ensure that prospective purchasers of the property find out about her.

Perillo makes essentially the same point when he says that formalities can have the advantage of 'earmarking' the point at which promise or negotiation changes into obligation:

> When the law provides that clothing a promise with a particular formality will transform the promise into an obligation, the formality has at least two functional consequences. First, the judicial task of determining the parties' intentions is facilitated. Secondly, and of equal importance, it enables the parties to search out and find the appropriate device to accomplish their intent to create an obligation. (Perillo, 'The Statute of Frauds in the Light of the Functions and Dysfunctions of Form', p. 49)

This too provides a justification for the comparatively strict formalities rules for making gifts. As Perillo says:

> [Such transactions] are normally made to, or on behalf of, a close friend, a relative, or a prospective spouse or in-law. In this context, the earmarking function of form requirements is quite important. It is very easy, often years later, to construe words expressing high hopes and favorable omens as words of promise or *vice versa*. Form requirements can serve to sort out promises from expressions of sanguine expectations. (Perillo, 'The Statute of Frauds in the Light of the Functions and Dysfunctions of Form', p. 54)

12.2.7.4. Other functions

Critchley identifies two other advantages that can flow from requiring land transactions to comply with formal requirements, and again these apply with equal force to most types of property transaction.

Clarifying terms

A requirement such as that contained in section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, that all the terms of the transaction must be in writing and signed by the parties, has the advantage of forcing the parties to sort out and come to an agreement on all the detailed terms of the transaction before committing themselves. As Critchley says, the rule helps to clarify the terms of the transaction because 'the very act of reducing the agreement to writing will help to highlight gaps or uncertainties in its terms' (Critchley, 'Taking Formalities

Seriously', p. 515). This not only benefits the parties, it also ensures that a clear record of the terms is available for third parties such as purchasers proposing to buy subject to the interest created. The benefit to the parties may, however, not be so obvious in all legal cultures, as Perillo notes:

> A leading Japanese industrialist has written of the discomfort and apprehension felt by Japanese businessmen when faced with the 'American insistence on spelling out the smallest details in writing' (referring to C. Fujino, 'Get to Know the Japanese Market', *New York Times*, July 8, 1973; Mr Fujino was then president of the Mitsubishi Corporation). His attitude is reflected in the lack of either writing requirements or of a parol evidence rule in the Japanese legal system. There is a genuine possibility, then, that a legal system may not wish to induce parties to thrash out the potential difficulties in advance, but to induce ongoing informal dispute resolution in the course of the contractual relationship. (Perillo, 'The Statute of Frauds in the Light of the Functions and Dysfunctions of Form', p. 54)

Publicity

Some property interests such as mortgages and charges pose such threats to prospective purchasers that it is justifiable to insist that they should be put in such a form that the existence and terms of the interest are made apparent to the whole world. Registration is the ideal solution, but there are other possibilities. Under the Land Charges Act 1972 (now applicable only to the relatively few unregistered land titles in this country) mortgages and charges of land are not enforceable against third parties unless *either* the mortgage or charge is registered *or* the mortgagee holds the borrower's title deeds. This works because in unregistered land the owner is unable to deal with the property without the title deeds, so there is no danger of third parties being misled. The Law Commission nevertheless took the view that even this was insufficient, and recommended that no mortgage or charge over land should be enforceable against third parties unless made in writing (Law Commission, *Transfer of Land – Land Mortgages* (Law Commission Report No. 204, 1991)) and while this was never implemented by Parliament, the courts achieved the same result by a different route in *United Bank of Kuwait* v. *Sahib* [1997] Ch 107, as we see in section 12.3 below.

State functions

Requirements of writing and registration can provide both a paper record of transactions on which tax can be levied, and also data from which statistical evidence can be gathered. The best example in this country of the fiscal role of formalities used to be stamp duty, which until very recently was levied not on property transactions but on the documents by which the transactions were effected. This was changed by the Finance Act 2003, partly because large-scale land developers were increasingly using conveyancing devices to avoid passing value by documents liable to stamp duty, but also because the scheme was clearly not going to be viable once transactions could be effected electronically.

The data collection role, however, continues to be important. National property registers provide the best possible repository of information about the social, economic and demographic distribution and movement of property holdings, and it is significant that current plans for electronic conveyancing envisage links between the Land Registry system and government departments such as the Inland Revenue Stamp Office and Valuation Office Agency (paragraph 1.2 of Land Registry, *Defining the Service: E-conveyancing* (July 2004)).

12.2.8. Disadvantages

12.2.8.1. Hard cases

All these advantages of formalities rules require careful scrutiny because the disadvantages are so unpalatable. The main problem is that strict implementation of formalities rules can lead to unjust outcomes in individual cases. As Lord Nicholls said in *Wilson* v. *First County Trust (No. 2)* [2003] UKHL 40 below, 'The unattractive feature of this approach is that it will sometimes involve punishing the blameless *pour encourager les autres*.' Individuals are made to suffer undeservedly, or are allowed to break promises, defeat legitimate expectations or keep undeserved benefits, solely in order to preserve the integrity of the system. The rule in *Walsh* v. *Lonsdale*, considered in section 12.3 below, and equitable doctrines of estoppel and resulting and constructive trusts can help to avert the unjust consequences of a failure to comply with formalities in some cases, but, as we see in *Lloyds Bank plc* v. *Carrick* [1996] 4 All ER 630 below, there are limits to their effectiveness.

In *Wilson* v. *First County Trust (No. 2)*, the House of Lords had to consider whether this was compatible with the rights guaranteed by the European Convention on Human Rights. The case concerned section 127 of the Consumer Credit Act 1974, which provides, in effect, that, if a loan agreement covered by the 1974 Act does not contain prescribed information, it will be enforceable only on an order of the court. The section also provides that, in most cases, if the lender fails to comply with the formalities requirements by omitting prescribed information, the court has a broad discretion to make whatever order it considers just, having regard to the prejudice caused by the contravention and the degree of culpability for it. However, section 127(3) provides that, in the case of some specified failures, this does not apply, and the court has no discretion: it must refuse to make an enforcement order. The effect of this is that both the credit agreement and any mortgage or charge securing it will be unenforceable, so the lender will be unable to recover the loan at all. In the *Wilson* case, Mrs Wilson had borrowed £5,000 from a pawnbroker for six months, pawning her car to secure repayment of the loan. She was charged a 'document fee' of £250 which was added on to the loan, so that the total amount of credit was specified in the loan agreement as £5,250. One of the terms that has to be included in any loan agreement covered by the 1974 Act is the total amount of credit, and if the lender fails to comply with this, section 127(3)

applies and the loan is wholly unenforceable. The House of Lords held that, by making the honest mistake of specifying £5,250 as the total amount of credit, the lenders mis-stated the total amount of credit and therefore the loan was unenforceable, even though the mistake had not in any way misled or disadvantaged Mrs Wilson. She was therefore entitled to keep both the £5,000 and the car. The House of Lords concluded that this Draconian outcome was not an infringement of the lender's rights guaranteed by Article 6(1) of, and Article 1 of the First Protocol to, the European Convention on Human Rights (guaranteeing rights to a fair hearing and to peaceful enjoyment of possessions), because section 127(3) pursued a legitimate aim of protecting consumer debtors and the statutory bar on enforcement was not disproportionate to this aim.

In other types of transaction, however, the policy aim of formalities rules is not so obviously compelling, although it is doubtful whether the courts would come to any different conclusion, given the longevity and ubiquity of formalities rules in most European legal systems.

12.2.8.2. Costs

The other disadvantage of formalities rules is that they add to the costs of transactions, not so much because they involve direct expenditure but because, as Peter Birks says, they are designed to put people to extra trouble. In high-value transactions this may be easily outweighed by the advantages gained by imposing the formalities, but this will rarely be the case for low-value frequently traded items. This provides some explanation for the lack of formal requirements for the sale of goods.

Extract 12.1 Peter Birks, 'Five Keys to Land Law', in S. Bright and J. Dewar (eds.), *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998), Chapter 18

Formal requirements oblige people to do things in particular ways, usually ways which put them to some slight extra trouble. It might be, for example, that the law would treat a promise as binding only if you made it meekly kneeling upon your knees. In practice, writing and registration are the formalities usually insisted upon. There can be lighter and heavier versions of both.

Land law insists on formality above all at two crucial points in the acquisition of real rights, contract and conveyance. If a landowner decides to make a gift, there will be no contract. Suppose she wants to give her daughter the fee simple in a strip of woodland. She will move straight to the conveyance, for centuries done by deed. The conveyance confers the real right. The sacrosanct formal requirement of a deed is now being made to give way to public registration and, more precisely, to computerized entries on the register. Direct gifts of land, other than by will, are not all that common. Another kind of gratuitous transfer is a conveyance to trustees upon trusts declared by the settlor. The declaration of a trust of land, which accompanies the conveyance, has to be evidenced in writing.

Generally speaking, a conveyance follows a contract, usually a contract of sale. Contracts to convey interests in land are void unless they are made in writing. The usual sequence is, first, an informal agreement 'subject to contract'; secondly, the formal contract made in writing, by which the parties for the first time become bound to make, and take, the conveyance; thirdly, the conveyance, which confers the right. In England there is usually a deplorable delay between the first and second stages, though in Scotland the lawyers manage to move from stage one to stage two in two or three days.

This delay means that parties are forced to rely on each other long before there is any legal tie. The unscrupulous can then exploit the fact that there is no sanction for withdrawal during this long first stage. The result is gazumping and gazundering. A gazumper is a seller who suddenly says that he will withdraw unless the buyer pays more. A gazunderer is a buyer who threatens to pull out unless the seller will take less. These practices are unknown in Scotland. They are not a by-product of formality. They are a by-product of the practice of the professionals who run the housing market and in particular of their practice in not executing the formal contract at the point at which all contracts are normally finalized – namely, the moment from which the parties need to be able to rely on one another.

What does formality facilitate? What ends does it serve? Even though it lies outside the land law, it is convenient to answer by reference to the best-known formality of all. Everyone knows that a last will has to be made in writing and signed before witnesses. It is no use just scribbling it on the back of an envelope or whispering it to one's best friend. There are huge advantages in this formal requirement. It helps the person making the will think hard about the job to be done. Later, it goes a long way towards eliminating doubt and argument at a juncture in human affairs at which strife is all too near the surface. All hell would break out if a deceased's last will were a matter of proving by general evidence, and in the absence of the only person who could really know, what the last wishes really were. The formal will settles the matter.

It is much the same in land law. There is an extra reason too. It derives from the invisibility of real rights. Just as one cannot see a fee simple, so one cannot see an easement or a restrictive covenant. A neighbour's right to pass over a field does not reveal itself in a pink line, nor will even an infra-red camera disclose his right to restrict or forbid building. If one is buying a fee simple from a company, and a firm of solicitors is in daily occupation of the premises doing the business of soliciting, one might reasonably infer that the firm holds a lease. But still a lease is not visible, nor a pyramid of subleases. Real rights have to be made apparent through documents. Acquiring land would otherwise be a nightmare unless the law made really massive erosions of the principle of *nemo dat*. In relation to land, massive erosions of that principle are wholly unacceptable. Some such erosion does indeed have to be tolerated. We have already seen that the price of equity's recognition of real rights created without formality is just such an erosion, the defence of *bona fide* purchase for value without notice. Moreover, the protection of the system of registration involves some inevitable sacrifice of unregistered interests.

There is an inescapable tension. Formality breeds hard cases. What of the person who did not know or was badly advised? She did the job but not in the precise way in which the law required it to be done. In such cases, there is a terrific clash between two simple principles. One is that you cannot have your cake and eat it. You cannot take the advantages of formality and at the same time let off all those who do things in their own informal way.

The other is that pain should not be inflicted except in case of pressing necessity. It is not so easy to send someone away empty-handed who would have taken a fortune if only the right piece of paper had been used. Wherever there are formal requirements, there will be litigation in which these two principles meet head to head.

Whether the rigour of the one will yield ground to the merciful other will depend on several factors, most obviously on the value attached to the formality in question, also on the scale of the exception likely to be created by a concession. If the formality is thought to be really valuable (like the formal requirements of wills), concessions are unlikely to be made, unless perhaps it can be shown that the facts in question will recur infrequently or for some other reason pose no substantial threat to the policy of certainty through formality. One crucially important factor is whether the interests of any third party are involved, in such a way as to be threatened if effect is given to the informal transaction. And has that third party given value? The defence of *bona fide* purchaser for value without notice, which we have already met, illustrates the respect due to the interests of a stranger who has given value. And, where the sanctity and efficacy of a register are at stake, that stranger is likely to prevail even without proof of good faith.

Suppose that you have dealt informally with me, in circumstances in which a decent argument can be made that, but for failure to satisfy formal requirements, you would have an interest in my house. If it is just a matter between you and me, with no stranger involved, it may be possible for you to make some headway. It will be more difficult if I have already sold my legal fee simple in the house to some stranger. You will have a much harder time against that stranger who has given value. Suppose the law untouched by the requirement of registration. Your informally created equitable interest, even if you succeed in establishing that you acquired one, will be vulnerable to the defence of *bona fide* purchase without notice. If we add back the requirement of registration, that still fiercer hurdle stands in your way. It is highly unlikely that you will have registered your interest, which in the absence of special circumstances will be void against the buyer from me.

Some interests override the register. They bind even without registration. This represents the attempt of the legislator to anticipate the most obvious instances of the problem endemic in formality. One category of overriding interest is the interest of a person in actual occupation [see Chapter 15 below]. In *Hodgson* v. *Marks* [1971] Ch 892 an elderly lady conveyed her house to her lodger in a thoroughly ill-advised attempt to protect him from her nephew. The nephew was hostile to the lodger's influence. She had no real intent that the lodger should have the substance of ownership of the house. But, so far as the formal requirements of the law were concerned, she had reserved no interest for herself. The lodger sold and conveyed the land to a third party. The old lady found herself in danger of losing her house. It was not so very difficult to find that on these facts she had obtained an equitable interest under a non-express trust. But she had, of course,

not registered that equitable interest. The purchaser from the lodger maintained that he was not bound by it. She was saved by the fact that she had been in actual occupation at the time of the sale. The underlying idea is that a buyer can see to his own protection from adverse interests held by those in occupation. Questions can be put. However, the interest of a person in occupation overrides the register simply because its owner is in occupation. It is not necessary to prove that the buyer was at fault in failing to make reasonable enquiries: 'If there is actual occupation, and the occupier has rights, the purchaser takes subject to them. If not, he does not. No further element is material' (Lord Wilberforce in *Williams & Glyn's Bank Ltd* v. *Boland* [1981] AC 487 at 504) ...

The value of legal certainty, which the equitable jurisdiction seems on occasion to undermine, is in general reinforced by insistence on the rigour of formality, especially as against strangers who have given value. Formality has meant writing in one form or another, but nowadays it means above all the public registration of real rights in land. The legislator, in providing that some interests override the register, has attempted to foresee the cases in which, even against strangers, the destruction of unregistered interests would give rise to screams of pain.

Notes and Questions 12.1

1 Overriding interests are interests that, in registered land, are enforceable against third parties even if not mentioned anywhere on the register. We come back to this justification for overriding interests in Chapter 15.

2 Peter Birks says that prospective sellers and buyers should become contractually bound to proceed at the point at which they 'need to be able to rely on each other'. Is that the same point as the point at which they wish to be put under a binding obligation to proceed?

3 Compare the formalities requirements imposed by section 52 of the Law of Property Act 1925 and those imposed by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Which are the more onerous? How far are the differences between the two justifiable?

4 Which of the provisions of section 53 apply to land only, and which apply to other kinds of property as well? In the light of the justifications given in this chapter for formalities rules, should it be possible for declarations of trust to be made orally?

Extract 12.2 Lon Fuller, 'Form and Consideration' (1941) 41 *Columbia Law Review* 799

§ 2. THE EVIDENTIARY FUNCTION

The most obvious function of a legal formality is, to use Austin's words, that of providing 'evidence of the existence and purport of the contract, in case of

controversy'. The need for evidentiary security may be satisfied in a variety of ways: by requiring a writing, or attestation, or the certification of a notary. It may even be satisfied, to some extent, by such a device as the Roman stipulatio, which compelled an oral spelling out of the promise in a manner sufficiently ceremonious to impress its terms on participants and possible bystanders.

§ 3. THE CAUTIONARY FUNCTION

A formality may also perform a cautionary or deterrent function by acting as a check against inconsiderate action. The seal in its original form fulfilled this purpose remarkably well. The affixing and impressing of a wax wafer – symbol in the popular mind of legalism and weightiness – was an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future. To a lesser extent any requirement of a writing, of course, serves the same purpose, as do requirements of attestation, notarization, etc.

§ 4. THE CHANNELING FUNCTION

Though most discussions of the purposes served by formalities go no further than the analysis just presented, this analysis stops short of recognizing one of the most important functions of form. That a legal formality may perform a function not yet described can be shown by the seal. The seal not only insures a satisfactory memorial of the promise and induces deliberation in the making of it. It serves also to mark or signalize the enforceable promise; it furnishes a simple and external test of enforceability. This function of form Ihering described as 'the facilitation of judicial diagnosis', and he employed the analogy of coinage in explaining it.

> Form is for a legal transaction what the stamp is for a coin: just as the stamp of the coin relieves us from the necessity of testing the metallic content and weight in short, the value of the coin (a test which we could not avoid if uncoined metal were offered to us in payment), in the same way legal formalities relieve the judge of an inquiry whether a legal transaction was intended, and – in case different forms are fixed for different legal transactions – which was intended.

In this passage it is apparent that Ihering has placed an undue emphasis on the utility of form for the judge, to the neglect of its significance for those transacting business out of court. If we look at the matter purely from the standpoint of the convenience of the judge, there is nothing to distinguish the forms used in legal transactions from the 'formal' element which to some degree permeates all legal thinking. Even in the field of criminal law 'judicial diagnosis' is 'facilitated' by formal definitions, presumptions, and artificial constructions of fact. The thing which characterizes the law of contracts and conveyances is that in this field forms are deliberately used, and are intended to be so used, by the parties whose acts are to be judged by the law. To the business man who wishes to make his own or another's promise binding, the seal was at common law available as a device for the accomplishment of his objective. In this aspect form offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective

expression of intention. It is with this aspect of form in mind that I have described the third function of legal formalities as 'the channeling function'.

In seeking to understand this channeling function of form, perhaps the most useful analogy is that of language, which illustrates both the advantages and dangers of form in the aspect we are now considering. One who wishes to communicate his thoughts to others must force the raw material of meaning into defined and recognizable channels; he must reduce the fleeting entities of wordless thought to the patterns of conventional speech. One planning to enter a legal transaction faces a similar problem. His mind first conceives an economic or sentimental objective, or, more usually, a set of overlapping objectives. He must then, with or without the aid of a lawyer, cast about for the legal transaction (written memorandum, sealed contract, lease, conveyance of the fee, etc.) which will most nearly accomplish these objectives. Just as the use of language contains dangers for the uninitiated, so legal forms are safe only in the hands of those who are familiar with their effects. Ihering explains that the extreme formalism of Roman law was supportable in practice only because of the constant availability of legal advice, gratis.

The ideal of language would be the word whose significance remained constant and unaffected by the context in which it was used. Actually, there are few words, even in scientific language, which are not capable of taking on a nuance of meaning because of the context in which they occur. So in the law, the ideal type of formal transaction would be the transaction described on the Continent as 'abstract', that is, the transaction which is abstracted from the causes which gave rise to it and which has the same legal effect no matter what the context of motives and lay practices in which it occurs. The seal in its original form represented an approach to this ideal, for it will be recalled that extra-formal factors, including even fraud and mistake, were originally without effect on the sealed promise. Most of the formal transactions familiar to modern law, however, fall short of the 'abstract' transaction; the channels they cut are not sharply and simply defined . . .

§ 5. INTERRELATIONS OF THE THREE FUNCTIONS

Though I have stated the three functions of legal form separately, it is obvious that there is an intimate connection between them. Generally speaking, whatever tends to accomplish one of these purposes will also tend to accomplish the other two. He who is compelled to do something which will furnish a satisfactory memorial of his intention will be induced to deliberate. Conversely, devices which induce deliberation will usually have an evidentiary value. Devices which insure evidence or prevent inconsiderateness will normally advance the *desideratum* of channeling, in two different ways. In the first place, he who is compelled to formulate his intention carefully will tend to fit it into legal and business categories. In this way the party is induced to canalize his own intention. In the second place, wherever the requirement of a formality is backed by the sanction of the invalidity of the informal transaction (and this is the means by which requirements of form are normally made effective), a degree of channeling results automatically. Whatever may be its legislative motive, the formality in such a case tends to effect a categorization of transactions into legal and non-legal.

Just as channeling may result unintentionally from formalities directed towards other ends, so these other ends tend to be satisfied by any device which accomplishes a channeling of expression. There is an evidentiary value in the clarity and definiteness of contour which such a device accomplishes. Anything which effects a neat division between the legal and the non-legal, or between different kinds of legal transactions, will tend also to make apparent to the party the consequences of his action and will suggest deliberation where deliberation is needed. Indeed, we may go further and say that some minimum satisfaction of the *desideratum* of channeling is necessary before measures designed to prevent inconsiderateness can be effective. This may be illustrated in the holographic will. The necessity of reducing the testator's intention to his own handwriting would seem superficially to offer, not only evidentiary safeguards, but excellent protection against inconsiderateness as well. Where the holographic will fails, however, is as a device for separating the legal wheat from the legally irrelevant chaff. The courts are frequently faced with the difficulty of determining whether a particular document – it may be an informal family letter which happens to be entirely in the handwriting of the sender – reveals the requisite 'testamentary intention'. This difficulty can only be eliminated by a formality which performs adequately the channeling function, by some external mark which will signalize the testament and distinguish it from non-testamentary expressions of intention. It is obvious that by a kind of reflex action the deficiency of the holographic will from the standpoint of channeling operates to impair its efficacy as a device for inducing deliberation.

Despite the close interrelationship of the three functions of form, it is necessary to keep the distinctions between them in mind since the disposition of borderline cases of compliance may turn on our assumptions as to the end primarily sought by a particular formality. Much of the discussion about the parol evidence rule, for example, hinges on the question whether its primary objective is channeling or evidentiary ...

§ 6. WHEN ARE FORMALITIES NEEDED? THE EFFECT OF AN INFORMAL SATISFACTION OF THE *DESIDERATA* UNDERLYING THE USE OF FORMALITIES

The analysis of the functions of legal form which has just been presented is useful in answering a question which will assume importance in the later portion of this discussion when a detailed treatment of consideration is undertaken. That question is: In what situations does good legislative policy demand the use of a legal formality? One part of the answer to the question is clear at the outset. Forms must be reserved for relatively important transactions. We must preserve a proportion between means and end; it will scarcely do to require a sealed and witnessed document for the effective sale of a loaf of bread.

But assuming that the transaction in question is of sufficient importance to support the use of a form if a form is needed, how is the existence of this need to be determined? A general answer would run somewhat as follows: The need for investing a particular transaction with some legal formality will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by

forces native to the situation out of which the transaction arises – including in these 'forces' the habits and conceptions of the transacting parties.

Whether there is any need, for example, to set up a formality designed to induce deliberation will depend upon the degree to which the factual situation, innocent of any legal remolding, tends to bring about the desired circumspective frame of mind. An example from the law of gifts will make this point clear. To accomplish an effective gift of a chattel without resort to the use of documents, delivery of the chattel is ordinarily required and mere donative words are ineffective. It is thought, among other things, that mere words do not sufficiently impress on the donor the significance and seriousness of his act. In an Oregon case, however, the donor declared his intention to give a sum of money to the donee and at the same time disclosed to the donee the secret hiding place where he had placed the money. Though the whole donative act consisted merely of words, the court held the gift to be effective. The words which gave access to the money which the donor had so carefully concealed would presumably be accompanied by the same sense of present deprivation which the act of handing over the money would have produced. The situation contained its own guaranty against inconsiderateness.

So far as the channeling function of a formality is concerned it has no place where men's activities are already divided into definite, clear-cut business categories. Where life has already organized itself effectively, there is no need for the law to intervene. It is for this reason that important transactions on the stock and produce markets can safely be carried on in the most 'informal' manner. At the other extreme we may cite the negotiations between a house-to-house book salesman and the housewife. Here the situation may be such that the housewife is not certain whether she is being presented with a set of books as a gift, whether she is being asked to trade her letter of recommendation for the books, whether the books are being offered to her on approval, or whether – what is, alas, the fact – a simple sale of the books is being proposed. The ambiguity of the situation is, of course, carefully cultivated and exploited by the canvasser. Some 'channeling' here would be highly desirable, though whether a legal form is the most practicable means of bringing it about is, of course, another question.

Extract 12.3 ***Glaister-Carlisle* v. *Glaister-Carlisle*, *The Times*, 22 February 1968, CA**

When a husband, vexed with his wife because he believed she had carelessly allowed his white miniature poodle bitch to mate with her black poodle, threw the bitch at her, saying 'She is your responsibility now', the conduct and words were so equivocal that English law would not regard it as a perfected gift of the poodle by him to her.

The Court of Appeal (the Master of the Rolls, Edmund Davies LJ and Cairns J) so held in allowing an appeal by Mr Thomas Glaister-Carlisle from the decision of Judge Glanville-Smith declaring in proceedings under section 17 Married Women's Property Act 1882 that the poodle was the property of his wife, Mrs Phyllis Mary Glaister-Carlisle. The Court of Appeal declared that the bitch was the husband's property and ordered that it be handed over to him within seven days.

The Master of the Rolls said that the bitch had lived up to her name, Springtime Ballyhoo. She had had an illicit love affair with a black pedigree poodle, Alexis, who lived in the same house. One expected consequence of this was that she had puppies. Other unexpected consequences were that on one occasion the police were called in; lawyers had been consulted; the magistrates had heard about it; the county court judge had decided it; and now the Court of Appeal had to consider it.

Her dam was owned by the husband and she was born in 1960. The husband registered her in his name with the Kennel Club. He was clearly her owner. He wanted her to have puppies and took her by arrangement to a Miss Evans, who owned Alexis. The dogs mated; the bitch had puppies; and in 1962 her owner married Miss Evans. They set up house and had the dog and bitch with them.

In September 1964, the wife had a broken leg. As they did not want the bitch to have puppies again, the wife had apparently asked the husband to take her to a Mrs Boon to get her out of the way, but it was not done in time. One afternoon when the wife was in a room unable to get out of her chair she heard skirmishing in the next room and a little squeak. She thought the dogs had probably mated and told her husband. There seemed to have been a row, each blaming the other.

Much of the case depended on what then happened. There were two versions. The husband's version was that he said: 'I say they have mated. This time you can bear the responsibility and expense ... If there is a litter you win; if no litter you lose', and that the wife seemed to agree. The wife said that the husband had picked up the bitch, had thrown it at her, and had said that 'She is your responsibility now', that he had wanted to put the bitch down but instead had given it to her.

After the row the husband took the bitch to Mrs Boon for three weeks and paid the bill. Later, when it was plain she was going to have puppies, they both took her to Mrs Boon and the wife paid. The wife took the puppies. During that time the parties had been at arm's length and in February 1965 the husband left the house.

About May there was an uproar when he tried to claim the bitch, and he was bound over. From that time he said he kept watch, trying to see the bitch. Lawyers' letters were exchanged; and eventually the husband began proceedings under section 17 of the Married Women's Property Act 1882 to determine to whom the animal belonged. On Christmas Day 1966 he kidnapped the bitch and again there were proceedings. Eventually, the matter came before the county court judge on the one question: Did the bitch belong to wife or husband?

The judge found there had been a gift by the husband to the wife. The husband now appealed, saying there was no evidence on which he could so find and that he made the wrong inference from the facts he found. Accepting that the appeal from the county court in regard to property under £200 in value, like the bitch, was only on points of law, was the judge justified in the inference he drew?

Under the common law, in order that there should be a gift, there must be a delivery of possession by the one to the other, an acceptance, and above all a manifest intention by words or conduct to transfer the property absolutely from one to the other.

As between husband and wife it was often very difficult, because, as was said in *Bashall* v. *Bashall* (1894) 11 TLR 152, a husband might often deliver a thing to his

wife not so that it should be her property but so that she should have its use and enjoyment. There it was a pony and trap, a saddle, and a dog; and the court held that she must show that the husband had done that which amounted to delivery and that, if the facts proved were equivocal, she must fail. And, in *Re Cole* [1964] 1 Ch 175 at 192 Lord Justice Harman said that if the act in itself was equivocal it did not constitute delivery.

The same must apply to the conduct or words which manifested intention. They must be clear and unequivocal; if they were not, the gift was not established.

In the present case there was no suggestion that it was an ordinary kind of gift made out of natural love and affection. The conduct was equivocal. Therefore, the property remained where it started, in the husband. The appeal should be allowed.

Lord Edmund Davies, concurring, said that the case sprang from the passions aroused by pedigree poodles. Why dogs should inspire strong emotions was not far to seek. Aldous Huxley said that 'To his dog, every man is a Napoleon – hence the popularity of dogs.' Despite her amorous activities, so popular was Springtime Ballyhoo that the rival claimants had, doubtless at considerable expense, brought the dispute about her ownership right up to the Court [of Appeal].

The present case was the direct converse of *Re Cole* in which Lord Justice Harman had observed that the English law had always been chary of the recognition of gifts. Here there had been a clear act of delivery of his poodle by the husband to the wife. The question was: What intention accompanied the act? In his Lordship's view, on the proved facts, no gift was intended or effected. It was most improbable that in the autumn of 1964 the husband would be animated by any sort of generous impulse towards his wife. The dispute was symptomatic of deeper and graver issues; but the wife had not established the gift.

Mr Justice Cairns concurred in allowing the appeal.

Notes and Questions 12.2

1 Read *Re Cole* [1964] 1 Ch 675, either in full or as extracted at www.cambridge.org/propertylaw/. What is the difference between constructive delivery and symbolic delivery? What sort of things may be delivered in these ways, and how?

2 If you share a house with a friend and you own all the furniture in the house, and you want to give it to her, how would you do it? Why is it so difficult?

3 In *Re Cole*, Pearson LJ appears to suggest that a gift of goods is not validly made unless and until it is accepted. Is this correct? See Hill, 'The Role of the Donee's Consent'.

4 Read *Lloyds Bank plc* v. *Carrick* [1996] 2 All ER 630, CA, and *Wilson* v. *First County Trust (No. 2)* [2003] UKHL 40, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

(a) Explain why there was a contract between Mrs Carrick and her brother in law.

(b) What does *Carrick* tell us about the proprietary interests acquired when a prospective purchaser enters into a contract to purchase an interest in land? (See further section 12.3 below.)
(c) Is it accurate to describe a person who has an estate contract in land as a beneficiary under a trust? How does the relationship between seller and estate contract holder differ from the trustee–beneficiary relationship?
(d) What does a claimant have to prove to demonstrate that she is entitled to an interest in land under a constructive trust? Was Mrs Carrick able to prove the necessary elements? Why did her claim based on constructive trust fail?
(e) What does a claimant have to prove to demonstrate that she is entitled to an interest in land by virtue of proprietary estoppel? Was Mrs Carrick able to prove the necessary elements? Why did her claim based on proprietary estoppel fail?
(f) Would the outcome have been different if the events had taken place after section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 had come into force?
(g) After you have read Chapter 15 below, consider whether the outcome would have been different if Mr Carrick's title had been registered at the Land Registry.
(h) Write a letter to Mrs Carrick explaining the policy considerations which justified the Court of Appeal in coming to its decision, and why the Human Rights Act will not help her.

12.3. Contractual rights to property interests

12.3.1. Estate contracts and the rule in *Walsh* v. *Lonsdale*

If you and I enter into an agreement today that I will sell my fee simple interest in my land to you on 1 January next year for £100,000, this has two proprietary consequences. The first is that the right you acquire today (i.e. the legally enforceable right to acquire the fee simple on 1 January) is itself an equitable proprietary interest, usually called an estate contract. We can call this the 'estate contract rule'. The second is that from the moment when you have performed your part of the contract (suppose for example you pay me the money as agreed on 1 January but I refuse to transfer the fee simple to you) you acquire in equity the interest you have contracted to buy: from that point you hold the equitable fee simple in my land, and I have only the bare legal title. We can call this the 'rule in *Walsh* v. *Lonsdale*', this being the case which established the rule.

Both of these rules result from the operation of the equitable principle that 'equity treats as done that which ought to be done'. As far as the estate contract rule is concerned, the point is that, as a result of entering into a contract to buy an interest in land, you acquire a contract right that equity will enforce by an order of specific performance. You have a present right to a property interest in the future, contingent only on matters within your own control (i.e. your paying over the money), and if the contingency is satisfied equity will order completion of the transaction by ordering me to transfer the legal title to you. As we saw in Chapter 8,

in these circumstances equity treats that present right to acquire a property interest in the future as a present property right. It is a *sui generis* right, consisting only of a right to call for the future property interest when the time comes, but it is proprietary in the sense that it is enforceable against third parties.

As far as the rule in *Walsh* v. *Lonsdale* is concerned, it comes into operation at the later stage when you satisfy the contingency by performing your part of the bargain. At this point you are entitled to specific performance of the agreement: equity will now order it as soon as you ask for it. Equity treats as done that which you are entitled to ask it to do – it treats you as already having what it will order me to give you. Hence you have the equitable fee simple from that point.

This was the principle established in the case of *Walsh* v. *Lonsdale* (1882) 21 ChD 9 (Extract 12.4 below). A mill owner agreed to let a weaving shed to a tenant for seven years at a fixed rent payable annually in advance, to be calculated according to the number of looms run by the tenant. The lease was never actually granted, but the tenant did go into possession of the weaving shed and started paying a rent at the agreed level, but he paid it in arrears rather than in advance. This continued for about three years until disagreements arose and the mill owner started proceedings for distress for rent. The issue was whether the rent was payable in advance or in arrears. It was (and is) a general principle of landlord and tenant law that, if a landowner allows someone into possession of her land and accepts rent without formally granting a lease, a legal periodic tenancy arises by implication of law, the terms of which are dictated by the way in which the rent is in fact paid. So, if as in *Walsh* v. *Lonsdale* itself the rent was actually paid annually in arrears, the tenancy implied will be a yearly tenancy at a rent paid annually in arrears. We see this rule in operation in *Prudential Assurance Co. Ltd* v. *London Residuary Body* [1992] 2 AC 386, discussed in Chapter 17. The question the court had to decide in *Walsh* v. *Lonsdale* was therefore whether the tenant was in possession under this rule (in which case the rent was payable in arrears) or whether he was in possession under the terms of the lease he had agreed to take but never in fact had taken (where the rent was payable in advance). The court said it was the latter, because in equity the tenant acquired the lease he contracted to take as soon as he performed his part of the contract by taking possession and paying rent. In other words, he had an equitable lease on the agreed terms as soon as he moved in, so there was no question of a legal yearly tenancy arising by implication of law.

12.3.2. Application to property other than land

Neither the estate contract rule nor the rule in *Walsh* v. *Lonsdale* appears to apply to interests in goods. This has never been established as a matter of decision by the courts, but it was strongly stated by Atkin J in *Re Wait* [1927] 1 Ch 606, and endorsed (but again not as a matter of decision) by Lord Brandon in the House of Lords in *The Aliakmon* [1986] 2 WLR 902 at 910–11 (see Extract 12.5 below). The reason given for the exception is important and perhaps surprising. Since the estate contract rule and the rule in *Walsh* v. *Lonsdale* depend on the availability of specific

performance, and specific performance is not generally available as a remedy to enforce contracts for the sale of goods, it might be thought that this would be given as the reason for excluding such contracts from these rules, but it is not. Instead, it is said that these rules should not apply because it is contrary to the policy of the Sale of Goods Act 1893 (and its successors) to allow equitable interests in goods to arise out of sale contracts.

This justification does not of course apply to interests in property other than goods, which suggests that the exception to these two rules should be limited to goods and not extend to other property such as shares and other intangibles.

12.3.3. The failed formalities rule

12.3.3.1. The general rule

If the contract to which the estate contract rule and the rule in *Walsh* v. *Lonsdale* apply is an agreement for the future disposition of an interest in land (as it is in the example given above), then section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 applies, and the contract must be made in writing signed by the parties and containing all the agreed terms. Suppose, however, there is no preliminary contract stage. What is to happen if I just sell you my fee simple interest in my land for £100,000 without our first having entered into a contract to do so, but I fail to use the correct formality (perhaps I confuse sections 52 and 53 of the Law of Property Act 1925 and sign a statement written on the back of an envelope that I transfer the fee simple to you, but do not make it into a deed by adding that I sign it as a deed and getting someone to sign as a witness). The result will be that I will have your £100,000 but you will not have the legal fee simple – the legal title will not have been passed to you by deed, so I still have it. Can the rule in *Walsh* v. *Lonsdale* help you here and give you the equitable fee simple?

Before the Court of Appeal decision in *United Bank of Kuwait plc* v. *Sahib* [1997] Ch 107, the answer was unequivocally yes. Failed transactions that fail only because of a failure to use the correct formalities take effect in equity provided value has been given. Equity treats your payment of the money as performance of your part of an agreement it deemed us to have made for the sale and purchase of my fee simple for £100,000, and therefore as entitling you to specific performance of the obligation to transfer the fee simple that such an agreement would have imposed on me. Since you have an equitable right to call for the fee simple now, equity treats you as already having it, on the principle of treating as done that which ought to be done. In other words, you have the equitable fee simple and I have only a bare legal title. So, the general rule is that, whenever a transfer or grant of a property interest fails because of a failure to use the correct formalities, equity treats the transfer or grant as effective in equity provided the transferee/grantee has paid consideration. Even if there has been no prior contract to enter into the transaction, equity acts on the basis that there had been, provided the transferee/grantee has done what he would have been obliged to do if there had been such a contract.

12.3.3.2. The failed formalities rule as it applies to land

As a result of the decision in *United Bank of Kuwait plc* v. *Sahib* [1997] Ch 107, CA, however, this general rule is modified in relation to interests in land. This, the court said, is a consequence of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

The *Sahib* case concerned an attempt by Mr Sahib to mortgage the house he owned jointly with his wife to a bank to secure various business borrowings. He made it clear to the bank that he was offering them the legal fee simple interest in the house as security, but he did not succeed in executing the deed that would have been required to create a legal mortgage (not least because his wife did not appear to know anything about it). He did, however, arrange for the title deeds to be held on behalf of the bank as security. It had long been established that a deposit of title documents with the intention of granting security over the property to which the title documents relate creates an equitable mortgage or charge over that property. This is taken to have been established or at least confirmed by the decision in *Russel* v. *Russel* (1783) 1 Bro CC 269 in relation to land and by *Harrold* v. *Plenty* [1901] 2 Ch 314 in relation to shares in a company. However, it was not clear whether this was a *sui generis* mortgage rule, or just an application of the failed formalities rule. There are problems with both analyses which need not concern us here, but the significant point for present purposes is that in *Sahib* the Court of Appeal held, first, that the principle that an equitable mortgage arises when title documents are deposited with intent to create security was an application of the failed formalities rule, but secondly that the failed formalities rule could no longer apply to land transactions unless the failed transaction satisfied the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Consequently, it was held, a deposit of title deeds could no longer create an equitable mortgage.

This is not particularly important as far as mortgage law is concerned. The Law Commission had already recommended that it should no longer be possible to create any kind of security interest without signed writing, for the reasons we discussed earlier in this chapter. However, the reasoning adopted by the Court of Appeal is equally applicable to all failed formality land transactions, and consequently the decision has had the effect of modifying the failed formality rule for land transactions.

The modified rule is that an attempted transfer or grant of an interest in land which fails because of a failure to comply with the required formalities will take effect in equity but only if it satisfies section 2 of the 1989 Act, that is if it is made in writing signed by all the parties and containing all the agreed terms. This is an unsatisfactory outcome. It is, to say the least, unlikely that someone who out of ignorance or carelessness fails to use the correct formalities will nevertheless happen to adopt these section 2 formalities. The failed formality rule has therefore been robbed of most of its effectiveness in land transactions. Secondly, the section 2 formalities were intended to apply to the very specific circumstance of a prior

contract to enter into a land transaction in the future: they were never intended to act as a minimum level of formality that had to be observed before a failed legal transaction could be allowed to take effect in equity. Not surprisingly, they are wholly inappropriate for this purpose.

As we see in Notes and Questions 12.3 below, the reasoning adopted by the Court of Appeal in coming to this decision is as unsatisfactory as the outcome. Nevertheless, it must be taken to represent the state of the law as it now is, and as the law stands the modified rule applies to land transactions.

12.3.3.3. Failed formalities rule as it applies to other property

The reasoning that led Atkin J to conclude in *Re Wait* that contracts for the sale of goods do not confer property rights on the buyer, would also exclude the failed formalities rule from application to outright sales of goods. However, since no formalities are required for the sale of goods, the question does not arise. It does, however, arise in the case of other types of property where there are formal requirements for a transfer or grant of a legal interest. In such cases, there is no reason why the failed formalities rule should not apply in the general form described in section 12.3.3.1 above, so that, if the correct formalities for transferring or granting a legal title are not used, the transaction will nevertheless take effect in equity provided the buyer has given value or otherwise started to perform its part of the bargain. Section 2 of the 1989 Act is of course not relevant, and the goods exception should not apply since its rationale appears firmly grounded in the policy of the Sale of Goods Acts, as noted above.

Extract 12.4 ***Walsh* v. *Lonsdale* (1882) 21 ChD 9**

By an agreement dated 29 May 1879, between the Plaintiff and Defendant it was agreed that the Defendant should grant and the Plaintiff accept a lease of a weaving-shed known as Providence Mill with the engine-house and other buildings belonging thereto (except cottages) and the steam-engine and other machinery thereon for a term of seven years from the time when the shed should be put in working order by the Defendant; the lessee at his own expense to find sufficient steam power for driving the looms and other machinery. The rent was to be £2 10s per loom per annum for so many looms as the lessee shall run. The lessee shall not run less than 300 looms during the said first year, and he shall in every year afterwards run not less than 540 looms ... The rent was to be payable in advance. The lease was never granted but the Plaintiff was let into possession on 1 July 1879 and continued to operate the looms there until 1882, paying rent in arrears. The Defendant issued a distress for rent which he claimed was due on the basis that the rent was payable in advance. The Plaintiff brought this action for damages for improper distress.

JESSEL MR: It is not necessary on the present occasion to decide finally what the rights of the parties are. If the Court sees that there is a fair question to be decided it will take security so that the party who ultimately succeeds may be in the right

position. The question is one of some nicety. There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say, 'I have a lease in equity, and you can only re-enter if I have committed such a breach of covenant as would if a lease had been granted have entitled you to re-enter according to the terms of a proper proviso for re-entry.' That being so, it appears to me that being a lessee in equity he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed.

Notes and Questions 12.3

Read *United Bank of Kuwait plc* v. *Sahib* [1997] Ch 107, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following questions.

1 Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 is intended to apply to contracts to transfer or grant an interest in land *at a future date*. When Mr Sahib deposited the title deeds of the house with the bank as security for the various loans they had made to his business, did he and the bank intend that he *would* mortgage the house to them at some future date, or that he *was thereby* mortgaging it to them?

2 Why might the formalities appropriate for entering into an agreement with your bank to mortgage your house to them at a future date be different from those appropriate for mortgaging it to them now to secure repayment of money they have already lent you?

3 In the failed formality cases up until *Sahib*, it was assumed that the failed formality rule depended on equity *deeming* there to have been a prior contract to enter into the transaction, in circumstances when in fact there had been no such contract. In cases where there *was in fact* a prior contract, there was no need to have a failed formality rule. The contract itself (made enforceable by the grantee/transferee's acts of, for example, paying over the money in the case of a failed transfer on sale, or moving into possession and paying rent in the case of a failed lease, which were sufficient under section 40 of the Law of Property Act 1925) would have given the grantee/transferee the appropriate equitable interest anyway

under the rules discussed in section 12.3.1 above. In other words, the failed formality rule depended on equity assuming the existence of a contract that they knew either did not exist or could not be proved to have existed. In *Sahib*, the Court of Appeal accepted this to the extent that they said that, before 1989, the action of depositing the title deeds with intention to create security was *presumed* to have been done in part performance of a prior contract. In other words, they accepted that, before 1989, courts were not concerned to enquire whether there actually had been such a contract – when and where it was made, and what it said – once they were satisfied that the title deeds were deposited with the intention of granting security, nor would they have refused to accept that the deposit of title deeds created an equitable mortgage if presented with positive proof that there had been no prior contract, as Peter Gibson LJ accepted in response to the fourth of counsel for the bank's seven numbered points. The difficulty felt by the Court of Appeal in *Sahib* was that, under section 40 of the Law of Property Act 1925, a valid contract could have been made in any form, but would not have been enforceable unless recorded in a written memorandum or evidenced by part performance, so there was no great difficulty in equity assuming the *existence* of the prior contract. Under section 2 of the 1989 Act, on the other hand, there is no contract at all unless a piece of writing satisfying the requirements of section 2 is brought into existence. The Court of Appeal appeared to take the view that, if there is no such writing in existence, equity cannot presume that a prior contract existed because they know it did not. Are they right? If you do not regard yourself as bound to enquire whether there actually was a prior contract or not, is it any more difficult to presume the existence of a written contract than it is to presume the existence of an oral contract? Does it make any sense to say that you will presume that a contract existed, but only if there is evidence that it did exist? After the 1989 Act, as before it, if there is a valid prior contract to enter into a transaction, followed by a botched attempt to carry out the transaction, we have no need of a failed formality rule to rescue the prospective transferee: she already has the appropriate equitable interest by virtue of the contract. It is only in cases where there was no prior contract that we need the failed formality rule.

4 Neither the Law Commission nor Parliament intended section 2 of the 1989 Act to affect *immediate* dispositions of interests in land, such as the creation of a mortgage having immediate effect by depositing title documents. This is the second of the seven numbered points made by counsel for the bank. What was the Court of Appeal's response? Is it convincing?

Extract 12.5 ***Leigh and Sillivan Ltd* v. *Aliakmon Shipping Co. Ltd (The Aliakmon)*** **[1986] 2 WLR 902 at 910–11**

[Buyers of steel coils sought to recover damages in tort in respect of damage caused to the goods during shipment at a time when (under the terms of that particular sale

contract) risk had passed from the sellers to the buyers but property in the goods had not. The House of Lords confirmed the long-established principle that a plaintiff has no claim in negligence for loss suffered by him by reason of damage caused to goods, unless he had either legal ownership or a possessory title to the goods at the time when the loss or damage occurred; the House of Lords approved a long line of cases concerning claims by contractors, insurers, tug owners and time charterers which established that contractual rights in relation to the goods were not sufficient to found a claim in negligence, and also approved the decision of Roskill J in *The Wear Breeze* [1969] 1 QB 219 to the effect that the same applied where the contractual right the plaintiff had was a contractual right to purchase the goods.

The buyers argued, *inter alia*, that (a) equitable ownership was sufficient to found a claim in negligence and (b) a contractual right to purchase confers equitable ownership on a buyer once ascertained goods have been appropriated to the contract. The House of Lords rejected (a) as contrary to principle and authority, as follows:]

[Where a person] is the equitable owner of goods and no more, then he must join the legal owner as a party to the action [in tort for negligence], either as co-plaintiff if he is willing or as co-defendant if he is not. This has always been the law in the field of equitable ownership of land and I see no reason why it should not also be so in the field of equitable ownership of goods.

[It was therefore unnecessary to deal with (b). Lord Brandon nevertheless said:]

With regard to the second proposition, I do not doubt that it is possible, in accordance with established equitable principles, for equitable interests in goods to be created and to exist. It seems to me, however, extremely doubtful whether equitable interests in goods can be created or exist within the confines of an ordinary contract of sale. The Sale of Goods Act 1893 ... is a complete code of law in respect of contracts for the sale of goods. The passing of the property in goods the subject-matter of such a contract is fully dealt with in sections 16 to 19 of the Act. Those sections draw no distinction between the legal and the equitable property in goods, but appear to have been framed on the basis that the expression 'property', as used in them, is intended to comprise both the legal and the equitable title. In this connection I consider that there is much force in the observations of Atkin J in *Re Wait* [1927] 1 Ch 606, 635–6, from which I quote only this short passage:

> It would have been futile in a code intended for commercial men to have created an elaborate structure of rules dealing with rights at law, if at the same time it was intended to leave, subsisting with the legal rights, equitable rights inconsistent with, more extensive, and coming into existence earlier than the rights so carefully set out in the various sections of the code.

These observations of Atkin J were not necessary to the decision of the case before him and represented a minority view not shared by the other two members of the Court of Appeal. Moreover, Atkin J expressly stated that he was not deciding the point. If my view on the first proposition of law [i.e. (a) above] is correct, it is again unnecessary to decide the point on this appeal. I shall, therefore, say no more than that my provisional view accords with that expressed by Atkin J in *Re Wait*.

Notes and Questions 12.4

1 What did Atkin J mean when he said it would have been *futile* to create an elaborate structure of rules to govern the transfer of legal property interests on sale, if it was intended also to allow equitable interests to arise out of a sale contract? Is he right?

2 What are the disadvantages of not allowing equitable property interests to arise out of contracts for the sale of goods? Do different considerations apply to fungible and non-fungible goods (see section 2.4.4.1 above for the distinction between the two)?

12.3.4. Options to purchase, rights of pre-emption and rights of first refusal

In Chapter 8, we saw how present entitlements to acquire a property interest in the future can range from more or less absolute rights to 'rights' that are subject to so many contingencies that they amount to no more than mere hopes or expectancies. The law is not prepared to treat 'rights' at this latter end of the scale as property rights, but inevitably there are difficulties in deciding precisely where to draw the line. This problem is particularly acute in the case of contractual rights to acquire property interests. In the preceding paragraphs we have been concentrating on rights arising out of unconditional contracts, but not all contracts are unconditional, and indeed a contract to acquire a property interest may be asymmetrical, giving the purchaser an option but not an obligation to purchase, or conversely only a right of pre-emption or a right of first refusal rather than an absolute right to purchase.

Two problems arise here. The first is whether all these rights are property rights. After considerable uncertainty the Court of Appeal in *Pritchard* v. *Briggs* [1980] Ch 338 (extracted at www.cambridge.org/propertylaw/) decided that rights of pre-emption fell on the wrong side of the line and were not property interests. However, this decision was made entirely on doctrinal rather than on policy grounds and it has been greatly criticised. The Law Commission and Land Registry recommended that it should be reversed in so far as it affected registered land (Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Commission Report No. 271, 2001), paragraphs 5.26–5.28 (Extract 12.6 below)), and section 115 of the Land Registration Act 2002 was enacted with the intention of implementing this, although how far it has been successful is debatable, as we see below. Meanwhile, in any event, the Court of Appeal in *Dear* v. *Reeves* [2001] EWCA Civ 277 (extracted at www.cambridge.org/propertylaw/), declined to follow *Pritchard* v. *Briggs* and held that a right of pre-emption is a property interest within the Insolvency Act 1986, and therefore a right of pre-emption held by a bankrupt will pass to his trustee in bankruptcy to be sold for the benefit of his creditors. Almost simultaneously, in *Bircham & Co. Nominees (No. 2) Ltd* v. *Worrell Holdings Ltd* [2001] EWCA Civ 775 (extracted at www.cambridge.org/propertylaw/),

a different division of the Court of Appeal, proceeding on the basis that *Pritchard* v. *Briggs* was correctly decided, pointed out that there were at least three different things that could loosely be referred to as rights of pre-emption. First, a distinction has to be drawn between what is usually referred to as a right of first refusal (where, if the grantor decides to sell, the grantee has the first right to refuse an offer to purchase at the price at which the grantor is willing to sell) and a right of pre-emption (where, if the grantor decides to sell, the grantee has a right to purchase at a fixed price, or a price not chosen by the grantor). Secondly, some rights of pre-emption and rights of first refusal become options to purchase as soon as the grantor offers to sell to the grantee: these are those where the grantee has a fixed period within which it may accept the offer, and the grantor cannot withdraw the offer during that period. The right of pre-emption in *Pritchard* v. *Briggs* fell within this category. On the other hand, other rights of pre-emption and rights of first refusal do not become options to purchase until the grantee accepts the offer: these are the ones where the grantor is still given a fixed period within which it may accept the offer, but the offer may be withdrawn at any time before acceptance. This was the position in *Bircham & Co. Nominees (No. 2) Ltd* v. *Worrell Holdings Ltd*.

This brings us to the second problem. At what point must an option to purchase and a right of pre-emption satisfy section 2 of the Law of Property (Miscellaneous Provisions) Act 1989? If it is at the time when the interest is first created, this should cause no difficulties, because most options to purchase and rights of pre-emption are made in writing and signed by both parties. If, however, it is at the stage in the procedure when *both parties would (apart from section 2) have become contractually bound to the sale*, this is likely to mean that no contract will ever come into existence, because that stage is usually triggered by writing signed by only one of the parties. In *Spiro* v. *Glencrown Properties Ltd* [1991] Ch 537 (extracted at www.cambridge.org/propertylaw/), Hoffmann J decided that, in the case of options to purchase, it is the document that creates the option to purchase that must satisfy section 2 of the 1989 Act. In *Bircham & Co. Nominees (No. 2) Ltd* v. *Worrell Holdings Ltd*, however, the Court of Appeal expressed agreement with this but then held that the position was different in the case of rights of pre-emption (hence the importance of pinpointing exactly the point at which both parties became bound to proceed with the sale). The effect on this of the subsequent enactment of section 115 of the Land Registration Act 2002 is not at all clear, as we see below.

What is apparent from all these cases is that the differences between the rights that inhabit the spectrum from unconditional right to mere expectancy are analytically differences of degree rather than differences of kind. This does not mean that it is wrong to treat some as property rights and others not, but it does mean that if a line is to be drawn somewhere policy reasons ought to dictate where the line falls. As the following extracts demonstrate, however, this is not the approach that the courts (or indeed Parliament) have always adopted.

Notes and Questions 12.5

1 Read *Pritchard* v. *Briggs* [1980] Ch 338, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:
   (a) According to the Court of Appeal, how does a right of pre-emption differ analytically from (i) a right to purchase under an unconditional contract and (ii) an option to purchase? What reasons do they give for concluding that these differences justify their conclusion that a right of pre-emption is not a property interest, whereas the other two are? How convincing are these reasons?
   (b) How does a right of pre-emption differ from a right to purchase under a *conditional* contract for sale? Does it make any difference whether the fulfilment of the condition in the conditional sale contract is dependent on the volition of the seller, or the volition of the buyer, or outside the control of both of them? Should it?
   (c) According to each of the members of the Court of Appeal in *Pritchard* v. *Briggs* at what stage, if any, does a right of pre-emption become a property interest? Consider what problems are caused by each of their analyses.
   (d) Is the Court of Appeal right to equate a right of pre-emption with the hope of a person who is a beneficiary in the will of a living testator? Consider what Mummery LJ says about this in *Dear* v. *Reeves* below.

2 Read *Dear* v. *Reeves* [2001] EWCA Civ 277, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:
   (a) What would Mr Reeves' trustee in bankruptcy gain by exercising the right of pre-emption? What was the likelihood of his being given the opportunity to do so?
   (b) Is the reason given in paragraph 31 for distinguishing *Pritchard* v. *Briggs* compelling? *Pritchard* v. *Briggs* concerned *enforceability* of the interest, whereas *Dear* v. *Reeves* concerned the *alienability* of it: does this throw any light on whether it might be justifiable to treat a right of pre-emption as a purely contract right for the purposes of registering interests in land, but as a property interest for bankruptcy purposes, so as to ensure that it passes to the trustee in bankruptcy and does not remain in the bankrupt's own hands? See in particular what Mummery LJ says at paragraph 40: would these factors be relevant to the issues that arose in *Pritchard* v. *Briggs*?

3 Read *Spiro* v. *Glencrown Properties Ltd* [1991] Ch 537 and *Bircham & Co. Nominees (No. 2) Ltd* v. *Worrell Holdings Ltd* [2001] EWCA Civ 775, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:
   (a) Is the Court of Appeal decision in *Bircham* consistent with the reasoning of Hoffmann J in *Spiro*? Is it consistent with the objectives of section 2 of the 1989 Act?
   (b) Consider the practical effects of the decision in *Bircham*: is it likely that writing satisfying section 2 will ever come into existence when a right of pre-emption is exercised? If not, does this matter?

(c) What is the effect of section 115 of the Land Registration Act 2002 on this decision? (see above).
(d) Examine the reasons Hoffmann J gave in *Spiro* for regarding himself as justified in departing from the 'irrevocable offer' analysis of options to purchase. Are they valid reasons?

Extract 12.6 Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Commission Report No. 271, 2001)

RIGHTS OF PRE-EMPTION

5.26. In the Consultative Document we gave the following critical explanation of the present legal position of rights of pre-emption:

> A right of pre-emption is a right of first refusal. The grantor undertakes that he or she will not sell the land without first offering it to the grantee. It is similar to but not the same as an option, because the grantee can purchase the property only if the grantor decides that he or she wants to sell it.
>
> The precise status of a right of pre-emption was uncertain until the decision of the Court of Appeal in *Pritchard* v. *Briggs*, an uncertainty that that decision has not wholly dispelled. In some cases, it had been held that it was merely a contractual right and could never be an equitable proprietary interest. In others, the right was held to create an equitable interest in land from its inception. There are also a number of statutory provisions which were enacted on the assumption that rights of pre-emption created interests in land.
>
> In *Pritchard* v. *Briggs* a majority of the Court of Appeal expressed the view that a right of pre-emption did not confer on the grantee any interest in land. However, when the grantor chose to sell the property, the right of pre-emption became an option and, as such, an equitable interest in land. It should be noted that the remarks of the Court of Appeal were only *obiter* and have been recognised as such. They have been much criticised, and this criticism has not escaped judicial attention. Not only was there no previous authority for 'this strange doctrine of delayed effectiveness', but if it is correct its effects can be unfortunate:
>
> (1) It can lead to something 'which a sound system of property law ought to strive at all costs to avoid: the defeat of a prior interest by a later purchaser taking with notice of the conflicting interest', as indeed happened in *Pritchard* v. *Briggs* itself. For example, if A grants B a right of pre-emption which B immediately registers, and A then mortgages the land to C, it seems likely that C will not be bound by the right of pre-emption because the execution of the mortgage probably does not cause the pre-emption to crystallise into an equitable interest. C could therefore, in exercise of his paramount powers as mortgagee, sell the land free from B's right of pre-emption.
> (2) Although the person having the benefit of a right of pre-emption may register it at the time it is created ... the right is effective for the purposes of priority

only from the moment when the grantor demonstrates an animus to sell the land, not from the date of registration.

5.27. In the Consultative Document, we recommended that a right of pre-emption in registered land should take effect from the time when it was created and not, as *Pritchard* v. *Briggs* suggested, only from the time when the grantor decided to sell. This recommendation was supported by 96 per cent of those who responded to the point. It was clear from the tenor of the responses that the result in *Pritchard* v. *Briggs* was not well regarded because of the practical difficulties to which it gave rise.

5.28. The Bill provides that a right of pre-emption in relation to registered land has effect from the time of creation as an interest capable of binding successors in title . . . In other words, it takes its priority from the date of its creation. If the *dicta* in *Pritchard* v. *Briggs* do represent the present law, then the Bill changes the law in its application to registered land. The change is therefore prospective only. It applies to rights of pre-emption created on or after the Bill comes into force.

Notes and Questions 12.6

1 What precisely was *obiter dicta* in *Pritchard* v. *Briggs*: the unanimous conclusion that the right of pre-emption was not a property interest, or the majority conclusion that it becomes a property interest at the time when the grantor decides to sell?

2 The Law Commission and Land Registry report gives, in effect, two grounds for criticising the decision in *Pritchard* v. *Briggs* (i.e. the two numbered points in paragraph 5.26). The first is question-begging: it is only contrary to property law principles for a right of pre-emption to be defeated by a subsequent property interest if a right of pre-emption is itself a property interest. This is the question at issue here, not something that can be assumed in an argument seeking to convince us that it *should be* a property interest. The second requires closer scrutiny: consider what practical ill-effects would follow if an interest is registered before it becomes a property interest, and will only become a property interest on the happening of a future event.

3 A better test for deciding whether rights of pre-emption ought to be classified as property interests might be to consider whether people might have good commercial and/or social reasons for wanting them to be enforceable not only against the original parties but also against anyone who subsequently acquires an interest in the land. If we apply this test, should rights of pre-emption be classified as property interests?

4 The wording of section 115(1) of the Land Registration Act 2002 which implements this recommendation closely follows the wording of the recommendation itself:

> A right of pre-emption in relation to registered land has effect from the time of creation as an interest capable of binding successors in title ...

It is not clear whether the courts are going to be prepared to read this as meaning that for all purposes a right of pre-emption affecting a registered title is to be treated as a property interest. If they are not, section 115 will not necessarily help to resolve questions such as those raised (before it came into force) in *Dear* v. *Reeves* and in *Bircham & Co. Nominees (No. 2) Ltd* v. *Worrell Holdings Ltd*.

5 Section 115 does not define 'right of pre-emption'. Does it cover rights of first refusal?

12.4. Unascertained property

12.4.1. The problem of identification

We said in Chapter 5 that a property right cannot attach to a thing until the thing has been identified, and the same applies if the thing has not yet come into existence. As we saw in Chapter 5, this does not prevent the law recognising property rights in fluctuating bodies of assets, such as trust funds and the assets covered by a floating charge. In this section, we look at the other ways in which the law deals with the difficulties arising when people want to deal with not yet ascertained or not yet existing assets.

12.4.2. Unascertained goods

When it comes to buying and selling unascertained goods, there are statutory rules to regulate the position. The basic rule in sale of goods is that property in the goods passes when the parties intend it to pass – usually when the goods are paid for or delivered (section 17 of the Sale of Goods Act 1979). However, this basic rule is modified in the case of unascertained goods: by section 16 of the 1979 Act the *earliest* point at which property in unascertained goods can pass is the point when the goods are ascertained. This means that, when unascertained goods are sold, property passes at the time they are ascertained or at the time when the parties intend it to pass, whichever is the later. So, if you go into a book shop and order a book which is not yet published, paying for it in advance, and a copy is subsequently sent to you, the *earliest* point at which you can become owner of the book is the point when a specific copy has been earmarked for your order – perhaps when the bookseller picks a copy out of the pile and puts your order form in it, or, if they are sending out several copies to different people, when they address one of the packages to you. You may of course have agreed with the bookseller that it will not become yours until a later date – perhaps when they post it to you, or until you receive it – but no matter what you and the bookseller agree, you could not have acquired property rights in any book at the point when you paid for it, because at that stage no one had identified which copy was yours.

In practice, however, people do sometimes pay for goods before they have been ascertained, and sometimes even deal in unascertained goods. The Law Commission considered some of the problems that can arise when this happens in its report, *Sale of Goods Forming Part of a Bulk* (Law Commission Report No. 215, 1993), including the situation that arose in *Re London Wine Co. (Shippers) Ltd* [1986] PCC 121. There a company sold wine to customers on terms that the wine would be paid for immediately but left in storage with the company, for which the customers also paid storage charges. The company issued customers with 'certificates of title' but never actually earmarked any particular bottles for any specific customer. When the company went insolvent, it was held that none of the customers had any property rights in any of the bottles in the company's warehouse. The court followed the majority Court of Appeal decision in *Re Wait* [1927] 1 Ch 606, where a similar conclusion was reached when sub-purchasers bought and paid for 500 tons of wheat out of a cargo of '1,000 tons ... ex *Challenger*' and their seller then went bankrupt before the wheat could be delivered to them. Both decisions were approved by the Privy Council in *Re Goldcorp Exchange Ltd* [1995] AC 74, where mail order customers who thought they had bought gold bullion from a bullion dealer were held to have no proprietary rights in the bullion left in stock when the dealer went into liquidation. In *Re Stapylton Fletcher* [1994] 1 WLR 1181, on facts very similar to those in *Re London Wine Co. (Shippers)*, the court was able to find that cases of wine which had been separately stored and all of which had been sold to identified customers in identified amounts, had become the property of all those customers as co-owners, but the conditions necessary for this co-ownership solution to apply at common law did not often arise. Accordingly, the Law Commission recommended that the Sale of Goods Act 1979 should be amended to provide a similar solution whenever there were sales of unascertained goods, provided they formed part of an ascertained bulk. This recommendation was implemented by the Sale of Goods (Amendment) Act 1995, which added new sections 20A and 20B to the 1979 Act. Under these new provisions, when there is such a sale the buyer becomes co-owner of the bulk as soon as she has paid any part of the purchase price, and then becomes full owner of her own items as soon as they are earmarked as hers.

12.4.3. Other unascertained property

A more difficult question is whether the general rule about dispositions of unascertained property applies to property other than land and goods. The reasons for not allowing property to pass by a sale or gift of 'five of my sheep in that field' or 'one of the flats in my apartment block' are not so compelling where the property is intangible. In *Hunter* v. *Moss* [1993] 1 WLR 934 (extracted at www.cambridge.org/propertylaw/), the Court of Appeal had to consider whether Mr Moss' declaration that he held 5 per cent of the shares in his company on trust for his employee Mr Hunter gave Mr Hunter an equitable interest in the appropriate number of shares. It was decided that it did, even though there was no identification of the

shares to be held on trust, because the shares were all identical and, as Dillon LJ said, the case was 'a long way' from cases such as *Re London Wine Co. (Shippers) Ltd* which were 'concerned with the appropriation of chattels and when the property in chattels passes'.

This decision has been heavily criticised, as Neuberger J notes in *Re Harvard Securities Ltd* [1998] BCC 567, extracted at www.cambridge.org/propertylaw/. However, the House of Lords refused leave to appeal from the decision ([1994] 1 WLR 614) and Neuberger J himself felt bound to follow it in *Re Harvard Securities Ltd*. He accordingly decided that under English law where a broker's nominee company held a large shareholding on behalf of an identified list of customers who had each paid for a specific number of shares, each customer was entitled in equity to the appropriate number of shares, even though the broker had not earmarked which shares were held for which customer. In the case of identical intangible property such as shares or a debt or a fund, it therefore appears established that a transfer or grant of a property interest in a specified portion or specified number of items out of a bulk is effective in equity even though the part of the bulk affected has not been identified.

As can be seen from Neuberger J's judgment in *Re Harvard Securities*, academic critics of this position have argued that the reasoning in *Hunter* v. *Moss* is not supportable. The conclusion itself has also been attacked, but perhaps with less justification. There are at least two grounds on which it can be supported. The first is that the risk of identification problems arising is greater for goods than it is for intangibles. There are practical reasons why, if I hold 100 sheep, 100 £1 coins and 100 grains of sand, and either sell ten of each to you or declare I hold ten of each on trust for you, we need to know which are mine and which are yours. A sheep might die or have lambs, a coin might be lost, and a few grains of sand might blow away: were these mine or yours? This is not such a problem with shares and other intangibles. Most of the things that can happen to some but not all of a collection of identical chattels cannot happen to some but not all of a collection of identical intangibles. As a matter of company law, all shares of the same class must be treated in the same way by the company: it is not possible to declare dividends or make rights issues on some but not others. And shares and other intangibles cannot die or be destroyed or get lost.

The only real problem that can arise is if the holder of the as yet undivided up collection of intangibles creates inconsistent rights in part of it in favour of a third party, but even here the scope for ambiguity is small. In the simple situation in which I own 100 shares of the same class and either sell 50 to you or declare I hold 50 of them on trust for you, but remain registered owner of all of them, there can be no doubt as to whose shares are affected if I make any disposition of them as if still beneficially entitled to them. As a matter of general principle any purported disposition of a property interest will operate to pass whatever interest the disponor actually has (via either section 63 of the Law of Property Act 1925, not confined to land, or the doctrine of partial performance confirmed by the Court of

Appeal in *Thames Guaranty* v. *Campbell* [1985] QB 210). So, any sale or mortgage of shares by me will automatically bite on my shares first: if I sell or mortgage 50 or fewer of them, it will be mine that are sold or mortgaged, and, if more than 50, the first 50 will be mine and the remainder will be yours. It is only in more complex cases that prior identification could matter. For example, if a thief manages to acquire legal title to some of the shares (for example, by stealing some of the share certificates and forging my signature on a share transfer form) and so succeeds in selling them to an innocent purchaser, it would become necessary to know whether he had stolen my shares or yours. Similarly, if, after I had sold you 50 shares or declared I held them on trust for you, I then sold the rest to your brother or declared I held them on trust for him, still keeping all the shares in my name and unallocated to either of you, there would be an identification problem if I sold ten of them to an innocent purchaser and disappeared with the money. There would be no way of telling whether the innocent purchaser had acquired 'your' shares or your brother's.

However, in both these cases co-ownership in equity is clearly the best solution, and there seems no reason why the courts should not adopt it, as they did in *Re Stapylton Fletcher* [1994] 1 WLR 1181. In other words, both the lost shares and the remaining ones are treated as co-owned so that, in effect, losses are shared proportionately. This is what is done in the analogous situation in which identical goods belonging to different people become mixed (as in *Spence* v. *Union Marine Insurance Co. Ltd* (1868) LR 3 CP 427) and where funds of different beneficiaries are used to acquire a single asset (as in *Foskett* v. *McKeown* [2001] 1 AC 102), and there seems no reason in principle why it should not be done here. It certainly produces a better and fairer outcome for the innocent participants than the goods rule, which says that, because we cannot identify which of two possible claimants owns which item, neither of them can have it. Also, it causes no hardship to innocent third parties: since the co-ownership interest is equitable only, it will not be enforceable against a good faith purchaser without notice of the interest, as we see in Chapter 14.

In other words, the other principled reason for supporting the conclusion in *Hunter* v. *Moss* is that it produces a fairer outcome than the goods rule. This is of course an argument against the goods rule rather than an argument for distinguishing between goods and intangibles, but there is something to be said for putting a limit on the scope of a bad rule, even if the limit is logically not entirely sustainable.

Notes and Questions 12.7

Read *Hunter* v. *Moss* [1994] 1 WLR 452 and *Re Harvard Securities Ltd* [1998] BCC 567, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

1 What criticisms have textbook writers made of the reasoning in *Hunter* v. *Moss*, according to Neuberger J in *Re Harvard Securities*? Are they convincing?

2 What reasons does Neuberger J give for distinguishing shares from chattels? He describes himself as 'not particularly convinced' by the distinction. Are you?

3 If shareholding and sharedealing become wholly electronic, so that shares are no longer numbered and share certificates are no longer issued, would this give added support to the Court of Appeal decision in *Hunter* v. *Moss*?

4 Write the leading judgment in the House of Lords on appeal from the Court of Appeal decision in *Hunter* v. *Moss* (heard after *Re Harvard Securities*).