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BILLS OF LADING AND THE LOGIC OF POSSESSION

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Abstract: The holder of a bill of lading is, according to orthodoxy, protected from third-party interference with the goods because they are in possession or in constructive possession of the goods. This article challenges that view. It argues that the bill holder is not in possession of the goods, such possession being inconsistent with the carrier's. It also argues that the bill holder is not in constructive possession of the goods. The custom of merchants, the carrier holding the goods to the bill-holder's order, and any personal right of the bill holder do not justify protecting the bill holder against third parties.

I. INTRODUCTION

Suppose A enters into a contract to sell B 100 tonnes of grain, c.i.f. Felixstowe. The contract includes a term that the general property interest in the goods will not pass until payment. A gives the bill of lading to B before B pays for the goods, and before B ever pays, the goods are wrongfully destroyed by C. In those circumstances, it is ordinarily said that B can bring a claim in conversion or negligence against C.[1] This is so even though B has not yet paid for the goods and so has acquired no property interest in the goods from the seller. Rather, B is said to be protected merely because they hold the bill of lading to which the goods relate. The bill of lading is a document of title to the goods, and this is said to confer on B possession or constructive possession of the goods. This allows B to bring claims in the chattel torts against third-party wrongdoers, like C.

Although still orthodoxy, there is a growing tradition questioning this analysis. Michael Bools has argued that the cases suggest that the holder of a bill of lading would not have any claim against third parties in the example outlined above.[2] This analysis has now been adopted in a leading practitioners' text on the subject: *Bills of Lading*.[3] Paul Todd has also argued that there are no cases clearly supporting the existence of a claim in the chattel torts on the facts of the example above.[4]

This article sits firmly within this emergent tradition questioning the orthodoxy that the mere holding of a bill of lading confers on the holder a right to the goods. It does this not by looking directly at cases on bills of lading—as Bools and Todd have comprehensively done—but rather by taking seriously the application of general principles of personal property law to the position of the holder of a bill of lading. Contrary to what those who defend the orthodox position suggest, the application of such general principles of personal property law shows that the holder of a bill of lading is not protected from third-party interference with the goods the bill represents merely by virtue of holding the bill. In the example given above, the holder of the bill, B, would have no claim in tort against the person who destroyed the goods (i.e. C).

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[1] S Dromgoole and Y Baatz, 'The Bill of Lading as a Document of Title' in N Palmer and E McKendrick (eds), *Interests in* Goods, 2nd edn (London, 1998) 552, 557; L Gullifer, 'Constructive Possession After the Sale of Goods (Amendment) Act 1995' [1999] LMCLQ 93; C Debattista, *Bills of Lading in Export Trade*, 3rd edn (Haywards Heath, 2008) 2.7; M Bridge, 'Documents of Title to Goods, Implied Contract and Attornment' [2022] LMCLQ 412, 413–419; A Gelgeç, 'The Mere Receipt Rule and its Anomalous Outcome' [2024] LMCLQ 24, 27–29.

[2] M Bools, *The Bill of Lading: A Document of Title to Goods: An Anglo-American Comparison* (London, 1997) 149–156. However, note the relevance of pledge cases to this argument, addressed, *post*, in text to fns 26–36.

[3] R Aikens et al., *Bills of Lading*, 3rd edn (Abingdon, 2021) paras 5.11–5.30.

[4] P Todd, 'The bill of lading and delivery: the common law actions' [2006] LMCLQ 539.

One important clarification must be made concerning the argument advanced here and the example used above. The argument here is that the holder of a bill of lading is not protected from third-party interference with the goods *merely by virtue of holding the bill itself*. But the bill holder may be protected from third-party interference for other reasons. Take, for example, *The Termagant*.[5] The plaintiff entered into a contract with the defendant shipowners for the transportation of a cargo of whale oil. The defendant supplied an unseaworthy vessel, as a result of which the cargo was damaged. Bargrave Deane J held that the plaintiff was entitled to bring a claim in tort against the defendant.[6] But the reason for which a plaintiff in such circumstances can bring proceedings in tort against a wrongdoer is because they have a pre-existing property right to the goods, and not because they hold a bill of lading relating to the goods.

Going back to the example introduced at the start of this piece, it was, therefore, important that the buyer obtained the bill of lading without paying under a contract containing a reservation of title clause. This meant that the buyer acquired no rights from the seller by way of transfer which might independently have sufficed to protect them from third-party interference. And, in those circumstances, the buyer would have to rely on rights created by the holding of the bill of lading alone in advancing their claim against any third-party wrongdoers. This article is concerned with whether a buyer acquires any rights in those circumstances.

The point made in this article—that the holder of a bill of lading is not protected from third-party interference with the goods—is of great conceptual importance for the law on bills of lading as documents of title. Whether the holder of a bill of lading is protected from third-party interference with the goods merely by holding the bill involves considering whether the holder of the bill is in possession or constructive possession of the goods the bill represents. That the bill gives its holder possession or constructive possession of those goods is said to be the defining feature of the bill of lading as a document of title.[7] But, as the analysis in this article shows, there may be good reasons to resist this view. Analysing the whole set of rules for which the holder of a bill may be in possession or constructive possession of the goods the bill represents is beyond the scope of this article.[8] Nonetheless, showing that the holder is not in possession for the purpose of the rules on the tortious interference with goods and the acquisition of property rights to goods may provide a starting point towards reconsidering what is meant by a document of title more generally. At the very least, it shows that lawyers, judges, and academics ought to be more precise in their use of the term.

Importantly, though, the argument advanced in this article is not merely academic. It has significant practical implications too. It is of particular significance to transactions involving retention of title clauses, as in the example given at the start of this article. The facts of this example are not so unusual. Buyers are often allowed to go into possession of the bill of lading before the property right in the goods is transferred to them from the seller.[9] The argument this article advances demonstrates that buyers under such transactions are less well protected than is commonly thought. Although such buyers may, by taking possession of the bill of lading, acquire rights against the carrier by virtue of the Carriage of Goods by Sea Act 1992, these rights would be of no assistance to a buyer in advancing their claim against a third-party wrongdoer if, for example, the carrier is not worth suing.

The analysis in this article proceeds in three parts. Part II sets out the orthodox account as to how bills of lading work in this context. Parts III and IV then interrogate the two possible lines of reasoning that may lead to the conclusion that the holding of a bill of lading gives the holder a right to sue third parties in the chattel torts. Part III considers whether the holder of a bill of lading is in possession of the goods the bill represents for the purpose of the rules on the original acquisition of rights by possession. It shows that the holder of a bill of lading cannot be said to be in possession of those goods for that purpose.

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[5] (1913–14) 30 TLR 377.

[6] (1913–14) 30 TLR 377, 378.

[7] A Bell, *Modern Law of Personal Property in England and Ireland* (London and Edinburgh, 1989) 59; S Dromgoole and Y Baatz, 'The Bill of Lading as a Document of Title' in N Palmer and E McKendrick (eds), *Interests in Goods*, 2nd edn (London, 1998) 548–550; E McKendrick, *Goode and McKendrick on Commercial Law*, 6th edn (London, 2020) para 32.54; R Aikens et al, *Bills of Lading*, 3rd edn (Abingdon, 2021) para 6.2; F Rose and F Reynolds (eds), *Carver on Bills of Lading*, 5th edn (London, 2022) para 6-002; M Bridge, 'Documents of Title to Goods, Implied Contract and Attornment' [2022] LMCLQ 412, 414; F Rose, 'Overseas Sales in General' in M Bridge (ed), *Benjamin's Sale of Goods*, 12th edn (London, 2023) para 18-161.

[8] For a discussion of the differences between these possession-based rules, and why this article does not address all of them, see III.ii.

[9] F Rose, 'C.I.F. Contracts' in M Bridge (ed), *Benjamin's Sale of Goods*, 12th edn (London, 2024) para 19-173.

Part IV considers whether the holder of a bill of lading is in 'constructive possession' of the goods the bill represents, again for the purpose of the rules on the acquisition of rights by possession. It shows that the holder of the bill of lading is not in 'constructive possession' of the goods for that purpose. The result of this analysis is that the holder of a bill of lading who has not acquired any rights from the seller is not able to bring claims in tort against third parties who interfere with the goods the bill represents.

II. Breaking Down the Arguments

This article is concerned with applying general principles of personal property law to the position of the holder of a bill of lading. Those who defend the orthodox view, that the holder of a bill of lading is protected from third-party interference in respect of the goods, typically advance one of two arguments:

(1) The Possession Argument:[10]

(i) Holding the bill of lading gives the holder possession of the goods to which the bill relates.
(ii) Possession of goods gives the possessor a property right in those goods.
(iii) A property right in the goods is sufficient to ground claims in the chattel torts.

(2) The Constructive Possession Argument:[11]

(i) Holding the bill gives the holder constructive possession of the goods to which the bill relates.
(ii) Constructive possession of goods gives the possessor a property right in those goods.
(iii) A property right in the goods is sufficient to ground claims in the chattel torts.

The claims made in the Possession Argument and the Constructive Possession Argument both involve core propositions of personal property law. The underlying difficulty with these arguments is that these claims are often made with insufficient precision and, where they are made precisely, they are often incorrect. To show clearly why these propositions are incorrect, each argument must be considered in turn.

III. The Possession Argument

III.i. The Argument in Outline

The possession argument proceeds in three steps. The argument is that (i) the holder of a bill of lading is in possession of the goods; (ii) possession of the goods generates a property right; and (iii) a property right is sufficient to ground claims in the chattel torts. Steps (ii) and (iii) are uncontroversial and, in any event, have little to do with the law on bills of lading as documents of title. The focus of this section is (i): whether the holder of a bill of lading is in possession of the goods the bill represents. The argument it advances is straightforward: the holder of a bill cannot be in possession of the goods the bill represents because any such possession would be inconsistent with the possession of the actual carrier.

The view that the holder of a bill of lading is in possession of the goods to which the bill relates is more common than appears at first glance.[12] This is because, although it is the view which is often in substance adopted, it is not always put in the language of possession by those advancing the view. The most well-known account of this view is that put forward by Bowen LJ in *Sanders v Maclean*.[13] There, Bowen LJ described the bill of lading as 'a key which in the hands of the rightful owner is intended to unlock the

[10] *Sanders v Maclean* (1883) 11 QBD 327, 341; *J I MacWilliam Company Inc v Mediterranean Shipping Company SA, The Rafaela S* [2005] UKHL 11,]2005] 1 Lloyd's Rep 423, [2005] 2 AC 423 [6]; *J I MacWilliam Company Inc v Mediterranean Shipping Company SA, The Rafaela S* [2003] EWCA Civ 556, [2003] 2 Lloyd's Rep 113, [2004] QB 702 [1]; *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2006] EWCA Civ 1750, [2007] 2 Lloyd's Rep 341, [2006] 2 CLC 1015 [47]; B McFarlane, *The Structure of Property Law* (Oxford, 2008) 156–157; E McKendrick, *Goode and McKendrick on Commercial Law* 6th edn (London, 2020) paras 2.43, 32.54; M Bridge, 'Documentary Intangibles' in M Bridge et al., *The Law of Personal Property*, 3rd edn (London, 2021) para 5-031; G McMeel, 'Possessory Interests' in M Bridge et al., *The Law of Personal Property*, 3rd edn (London, 2021) para 11-010; F Rose and F Reynolds (eds), *Carver on Bills of Lading*, 5th edn (London, 2022) para 6-001.

[11] *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyds Rep 439; *The Future Express* [1992] 2 Lloyds Rep 79, 95; G Treitel, 'The legal status of straight bills of lading' (2003) 119 LQR 608, 611–612; A Bell, *Modern Law of Personal Proeprty in England and Ireland* (London and Edinburgh, 1989) 58–60; F Reynolds and F Rose (eds), *Carver on Bills of Lading*, 5th edn (London, 2022) para 6-015; F Rose, 'Overseas Sales in General' in M Bridge (ed), *Benjamin's Sale of Goods*, 12th edn (London, 2023) para 18-179;

[12] *Ante*, fn 10.

[13] (1883) 11 QBD 327.

door of the warehouse, floating or fixed, in which the goods may chance to be.'[14] Equating the bill of lading with a key has proven popular among judges and commentators.[15]

This analysis is often paired with a description of the handing over of a bill of lading as 'symbolic delivery'.[16] This language implies that the focus of the analysis is not whether the holder of the bill of lading is at any time in actual physical control of the goods.[17] But if the analogy to keys is taken seriously, the view that is in substance adopted is that the bill of lading does confer on its holder the degree of physical control required for actual possession. This is because, as Lord Hardwicke explained in *Ward v Turner*, 'delivery of the key of bulky goods … has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing: and therefore the key is not a symbol, which would not do.'[18] In other words, possession of the key amounts to actual possession of the goods stored in the container which the key unlocks because the key gives its holder the power to exclude others from the goods in question. And accordingly, if the bill of lading is like a key, it too would give its holder actual possession of the goods the bill represents.

III.ii. The Inapplicability of Other Authorities

Given the prominence of this view in judicial statements, it might be thought to be surprising that there are no cases which authoritatively determine that the holder of a bill of lading is in possession of the goods the bill represents so as to bring claims in the chattel torts against third parties who interfere with the goods. But this lack of applicable authorities is because the meaning of possession varies depending on the legal context in which the term is used. And the judicial statements referred to above have consistently been made in contexts that use a different sense of possession.

That possession means different things in different legal contexts is generally well appreciated.[19] So, whereas possession may refer to actual physical control paired with an intention to exclude others in the context of the acquisition of property rights by possession,[20] it has nothing to do with actual physical control in the context of the law on sovereign immunity.[21] The consequence is that one cannot simply reason across from possession in one context to possession in another: just because some person is in possession for the purpose of the rules on sovereign immunity does not mean that they are in possession so as to acquire a property right to the thing in question.

It follows from the above that we cannot determine in the abstract whether the holder of a bill of lading is in possession of the goods the bill represents. Rather, whether they are in possession must always be assessed by reference to specific rules.[22] The focus of this section is whether a bill of lading holder is protected from third-party interference with the goods to which the bill relates. In this context, possession refers to a sufficient degree of physical control paired with an intention to exercise that control on one's own behalf.[23] The degree of physical control must be that which one would expect of an owner of the thing in question.[24] Whether some person is exercising such a sufficient degree of physical control is not

[14] *Sanders v Maclean* (1883) 11 QBD 327, 341.
[15] *The Rafaela S* [2005] UKHL 11 [6]; *The Rafaela S* [2004] EWCA Civ 556 [1]; *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2006] EWCA Civ 1750 [47]; F Reynolds and F Rose (eds), *Carver on Bills of Lading*, 5th edn (London, 2022) para 6-001; M Bridge, 'Documentary Intangibles' in M Bridge et al., *The Law of Personal Property*, 3rd edn (London, 2021) para 5-031; G McMeel, 'Possessory Interests' in M Bridge et al., *The Law of Personal Property*, 3rd edn (London, 2021) para 11-010.
[16] *Sanders v Maclean* (1883) 11 QBD 327, 341; *The Rafaela S* [2004] EWCA Civ 556 [1]; M Bools, *The Bill of Lading: A Document of Title to Goods: An Anglo-American Comparison* (London, 1997) 185; M Bridge, 'Documentary Intangibles' in M Bridge et al., *The Law of Personal Property*, 3rd edn (London, 2021) para 5-031.
[17] *Post*, text to fns 51–62.
[18] (1752) 2 Ves Sen 431, 443; 28 ER 275, 282. See also F Pollock and R Wright, *An Essay on Possession in the Common Law* (Oxford, 1888) 61–67; A Bell, *Modern Law of Personal Property in England and Wales* (London and Edinburgh, 1989) 58; N Curwen, 'The Bill of Lading as a Document of Title at Common Law' [2007] Mountbatten Yearbook of Legal Studies 139, 154.
[19] *United States of America v Dollfus Mieg et Cie SA* [1952] AC 582; L Rostill, *Possession, Relative Title, and Ownership in English Law* (Oxford, 2021) 11–13; F Dawson, 'The Seller's Remedies Affecting the Goods' in M Bridge (ed), *Benjamin's Sale of Goods*, 12th edn (London, 2023) para 15-038.
[20] *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419.
[21] *United States of America v Dollfus Mieg et Cie SA* [1952] AC 582.
[22] D Harris, 'The Concept of Possession in English Law' in A Guest (ed), *Oxford Essays in Jurisprudence*, 1st Series (Oxford, 1961) 78–80.
[23] *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30.
[24] *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30 [41]; *Powell v McFarlane* (1979) 38 P&CR 452, 471; *Purbrick v London Borough of Hackney* [2003] EWHC 1871 (Ch), [2004] 1 P&CR 34 [20].

always easy to determine, but delving into the niceties of what amounts to such a sufficient degree of control is not required for the analysis in this article.

The point made here—that whether the holder of the bill is in possession of the goods must be determined by reference to the rules and authorities on the protection of possessors from third-party interference—is important because it is often overlooked. In making the argument that the mere holder of a bill is protected in this way, commentators often rely on cases that have nothing to do with the chattel torts or the acquisition of property rights by possession. Instead, they refer to cases dealing with possession in other contexts.[25] Without more, this does not work. Just because the holder of a bill might be in possession for some other purpose does not mean that they are in possession for the purposes of the original acquisition of rights by possession.

One area of law which is particularly commonly relied on is the law on pledges. These cases are seen as relevant because, on one view, the reason for which a pledgee is protected against third parties is because they are in possession of the goods.[26] In other words, it is said that it is the pledgee's possession which creates the property right in the goods and explains the pledgee's protection against third parties, rather than some grant from the pledgor. If this is right, the cases which show that holding a bill of lading is sufficient to constitute a pledge would show that the holder of a bill of lading is protected from third-party interference merely by holding the bill.[27]

The better view is that this view is mistaken. The reason for which a pledgee is protected from third party interference is not because of their possession of the goods, but rather because they have been granted a property right in the goods by some person with a general property interest in the goods, or the 'owner' of the goods. This view has sometimes been characterised as suggesting that a pledge derives from ownership, rather than possession.[28] Properly understood, this means that a general property interest in, or ownership of, the goods entails a power to create property rights, like pledges, in respect of the goods in others. On this view, it is the grant by the pledgor which explains why the pledgee is protected against third parties, rather than the pledgee's possession of the goods.

That this is the better view is shown by cases in which pledges are created and persist without the pledgee exercising any physical control over the goods or having any intention to exclude the rest of the world from them. In respect of the latter—that a pledge can persist even once the pledgee is no longer in possession—the law is uncontroversial. As Popplewell J summarised in *Bassano v Toft*, 'the pledgee's special interest is not lost by parting with possession of the chattel unless he does so in circumstances which constitute a voluntary surrender of his interest.'[29]

There are also cases which support the view that a pledge can be created without the pledgee acquiring possession of the goods. The clearest example of this is *Kum v Wah Tat Bank Ltd.*[30] The shippers agreed to pledge some goods to the bank in exchange for financing the purchase of the goods from a merchant. The goods were eventually shipped in Sibu, headed for Singapore, but all that was given to the bank to constitute the pledge was a mate's receipt. Although the Privy Council held that there was a sufficient custom between the two ports for the mate's receipt to amount to a document of title,[31] the mate's receipt in question did not amount to such a document because it was marked 'not negotiable'.[32] The consequence of this was that the bank could not establish that the pledge had been constituted by reference to its possession of some documents of title.

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[25] E.g. E McKendrick, *Goode and McKendrick on Commercial Law*, 6th edn (London, 2020) para 32.54; M Bridge, 'Documentary Intangibles' in M Bridge et al, *The Law of Personal Property*, 3rd edn (London, 2021) para 5-031; M Bridge, 'Documents of Title to Goods, Implied Contract and Attornment' [2022] LMCLQ 412, 413–419.

[26] B McFarlane, *The Structure of Property Law* (Oxford 2008), 590–591, 616; L Gullifer, M Bridge, and E Lomnicka, *The Law of Security and Title-Based Financing*, 4th edn (Oxford, 2024) paras 5.03–5.065.

[27] *Barber v Meyerstein* (1869–70) LR 4 HL 317; *Sewell v Burdick* (1884) 10 App Cas 74; *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53, 59.

[28] N Curwen, 'General and Special Property in Goods' (2000) 20 Legal Studies 181; S Douglas, *Liability for Wrongful Interference With Chattels* (Oxford 2011), 37; L Gullifer, M Bridge, and E Lomnicka, *The Law of Security and Title-Based Financing*, 4th edn (Oxford, 2024) para 5.05.

[29] *Bassano v Toft* [2014] EWHC 377 (QB), [2014] ECC 14 [57].

[30] [1971] 1 Lloyd's Rep 439.

[31] *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, 444–445.

[32] *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, 445–446.

Nonetheless, the Privy Council held that the pledge had been validly constituted. As Lord Devlin explained, although the creation of a pledge requires a delivery, '[t]he parties are free … to make what terms they like about delivery'.[33] On the facts, 'shipment would seem to be the most convenient place and time for delivery',[34] so that the pledge was validly constituted on shipment.[35] But it cannot plausibly be said that the bank acquired any degree of physical control over the goods at the time of shipment, nor was any evidence introduced to suggest that the bank was intending to exclude the rest of the world from the goods at the time of shipment.[36] As such, the bank cannot be said to have ever acquired possession of the goods being pledged. Such cases cannot be explained on the view that a pledgee is protected against third parties because of their possession of the goods. The better view is that the pledgee is protected because they have been granted a property right by the pledgor.

Developing this argument in greater detail would require us to stray too far from the core question considered here, being whether the holder of a bill of lading can bring claims in the chattel torts against third parties who interfere with the goods. In any event, the arguments which follow should nonetheless be of interest to readers who take the opposing view, that pledgees are protected against third parties because they are in possession of the goods. If one takes this view, there are cases showing that the holder of a bill of lading can sue third parties in the chattel torts, but these cases must still be reconciled with the general principles of personal property law with which this article is concerned. That exercise would still run into the problems highlighted in the rest of this article.

III.iii. The Possession of the Bill Holder and the Carrier

The argument which is advanced in this section is that the supposed possession of the holder of the bill of lading is inconsistent with the possession of the carrier of the goods. There is little doubt that the actual carrier of the goods, usually the shipowner, is in possession of the goods on the ship.[37] They exercise physical control over the goods and, typically, they intend to exercise that control on their own behalf. This is the basis for which the carrier can sue third parties in negligence and conversion.[38]

That the carrier is in possession of the goods on the ship is not controversial.[39] However, an important consequence follows from this which is generally unacknowledged. As Lord Browne-Wikinson explained in *JA Pye (Oxford) Ltd v Graham*, 'possession is single and exclusive'.[40] Only one person, or one group of persons acting jointly, can be in possession of goods at any one point in time. Consequently, as long as the carrier is in possession of the goods, no other person, including the holder of the bill of lading, can be.[41] This is, at first glance, fatal to the Possession Argument. If the holder of the bill of lading is not in possession of the goods to which the bill relates, the first premise of the Possession Argument is false.

The most commonly endorsed way of circumventing the carrier's possession is by showing that the carrier and the holder of the bill are acting jointly in possessing the goods.[42] This is the view taken by Professor Sir Roy Goode and Professor Ewan McKendrick, who argue that 'if the term "constructive possession" is to be used, it is as well to confine it to cases where the bailee holds possession to the bailor's order, so that possession is shared.'[43] Goode and McKendrick go on to say that 'the [bill of lading] holder

[33] *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, 448.
[34] *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, 448.
[35] Whether there was some attornment in the mate's receipt was considered irrelevant: *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, 442.
[36] See, further, J Atmaz Al-Sibaie, *Delivery as a Means of Transfer* (DPhil thesis, University of Oxford 2025), 192–202.
[37] *The Winkfield* [1902] P 42; *Owners of Cargo Laden on Board the Albacruz v Owners of the Albazero, The Albazero* [1977] AC 774, 846; [1976] 2 Lloyds Rep 467; G McMeel, 'Storage and Carriage' in M Bridge et al, *The Law of Personal Property*, 3rd edn (London, 2021) paras 13-013–13-015; S Girvin 'Cargo Claims' in H Bennett (ed), *Carver on Charterparties*, 3rd edn (London, 2024) paras 5-294–5-295.
[38] *Ante*, fn 37.
[39] *Ante*, fn 37.
[40] *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30 [38], [70]. See also *Hills (Patents) Ltd v University College Hospital Board of Governors* [1956] 1 QB 90, 99; *Treloar v Nute* [1976] 1 WLR 1295, 1300; *Powell v McFarlane* (1979) 38 P&CR 452, 470; L Rostill, *Possession, Relative Title, and Ownership in English Law* (Oxford, 2021) 22; M Dixon, J Bignell, and N Hopkins, *Megarry & Wade The Law of Real Property*, 10th edn (London, 2024) para 7-007.
[41] N Curwen, 'The Bill of Lading as a Document of Title at Common Law' [2007] Mountbatten Yearbook of Legal Studies 139, 145.
[42] B McFarlane, *The Structure of Property Law* (Oxford 2008) 156–157; E McKendrick (ed), *Goode and McKendrick on Commercial Law*, 6th edn (London, 2020) paras 2.43, 32.54.
[43] E McKendrick (ed), *Goode and McKendrick on Commercial Law*, 6th edn (London, 2020) para 2.43.

… has constructive possession'.[44] Combining these propositions, it would seem that, on their view, the carrier and the bill of lading holder are in shared or joint possession of the goods to which the bill relates. This view is also endorsed, albeit in a slightly different form, by Professor Ben McFarlane, who suggests that the bill holder has the acts of the carrier attributed to him.[45] The consequence of this is that the acts of control are those of the carrier *and* those of the bill holder, so that they are jointly in possession of the goods in question.[46]

The difficulty with both attempts is that, if the carrier and the bill holder are jointly in possession of the goods, this would have consequences for the rights they acquire and how these rights can be enforced against third parties. If two or more persons are in joint possession of goods, the property rights generated by their possession vest in them jointly, not individually.[47] This would have consequences for how these rights are enforced against third parties. It would mean that the carrier and the bill holder would both have to join each other as parties to any claims based on interferences with the property right acquired by possession. Rule 19.3(1) of the Civil Procedure Rules requires that '[a]ll persons jointly entitled to the remedy claimed by a claimant must be parties unless the court orders otherwise.' And while the court does have a power to order otherwise, it 'cannot "order otherwise" without a proper reason.'[48] If the parties are not joined and there is no proper reason for the court to 'order otherwise' the claim cannot proceed.[49] Applying this to the context with which we are concerned, it would mean that the carrier and the holder of the bill of lading would have to join each other to the proceedings when bringing claims in tort against third parties. However, where such claims have succeeded, they have done so without joining the holder(s) of any bills of lading.[50]

It follows from the above that the suggestion that the holder of the bill is jointly in possession with the carrier is inconsistent with the results in the cases in which the carrier has relied on their possession to bring claims against third parties. The consequence is that the possession of the carrier simply excludes the possibility of possession by the bill holder and the rest of the world. If the holder of the bill of lading cannot be said to be in possession of the goods the bill represents, the Possession Argument must fail.

IV. THE CONSTRUCTIVE POSSESSION ARGUMENT

The Constructive Possession Argument appears to follow the same line of reasoning as the Possession Argument: the holder of the bill of lading is in constructive possession; constructive possession generates a property right in the goods; and that property right is sufficient to ground a claim in the chattel torts. However, to understand how adding 'constructive' before 'possession' changes the substance of the argument being advanced, the meaning of that word, and the meaning of the compound phrase it creates, must be clearly articulated.

IV.i. What is Constructive Possession?

The term 'constructive' is commonly used in private law to indicate a fiction.[51] This is the way in which the term is used in formulating the remedy against dishonest assistants of breaches of trust. Those persons were held liable to account as 'constructive' trustees.[52] The form of this remedy is not meant to indicate that dishonest assistants are in fact trustees. They cannot be, as they have no rights to hold on trust.[53]

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[44] E McKendrick (ed), *Goode and McKendrick on Commercial Law*, 6th edn (London, 2020) para 32.54.
[45] B McFarlane, *The Structure of Property Law* (Oxford, 2008) 156–157.
[46] This is seen to be the ordinary consequence of attribution: *Lifestyle Equities CV v Ahmed* [2024] UKSC 17, [2024] 2 WLR 1297 [34]–[35]; c.f. J Atmaz Al-Sibaie, 'Disattribution in Private Law: Not a Heresy' (2025) 141 LQR 635. If one takes the view that the effect of attribution is that the bill holder alone is in possession of the goods, this is inconsistent with the continued possession of the carrier: *ante*, text to fns 37–40.
[47] *Ward v Ward* (1870-71) LR 6 Ch App 789; *Churcher v Martin* (1889) 42 Ch D 312, 318; *Re Brown, Coyle v M'Fadden* [1901] 1 IR 298, 300; *Smith v Savage* [1906] 1 IR 469, 472; *Afton Band of Indians v Attorney General of Nova Scotia* (1978) 85 DLR (3d) 454, 462–464; D Ohrenstein, 'Limitation Periods' in Lord Mackay (ed), *Halsbury's Laws of England*, 5th edn (London, 2023) Vol 68, para 1202.
[48] *Genius Sports Technologies Ltd v Soft Construct (Malta) Ltd* [2021] EWHC 3200 (Ch) [33].
[49] *Holterman v Electrium Sales Limited* [2020] EWHC 3915 (TCC) [42]–[45].
[50] E.g. *The Winkfield* [1902] P 42.
[51] W Swadling, 'The Fiction of the Constructive Trust' (2011) 64 CLP 399, 399–400.
[52] *Williams v Central Bank of Nigeria* [2014] AC 1189 [9].
[53] B McFarlane, *The Structure of Property Law* (Oxford, 2008) 279.

Rather, the label 'constructive trustee' indicates that the dishonest assistant is held liable to account in the same way that a trustee is held to account, even though the dishonest assistant is not a trustee.

If we apply this understanding of 'constructive' to the context with which this article is concerned, it should be clear that constructive possession refers to those persons who, although they are not in possession, are treated as though they are in possession.[54] Understood in this way, possession and constructive possession are mutually exclusive. Possession refers to a factual relationship between a person and a thing; constructive possession refers to the legal conclusion that a person is to be treated as though they are in possession although they are not in fact in possession.

The label 'constructive possession', by denoting a legal conclusion, does not identify the reason for which the person is treated the same way as they would be if they were in actual possession. Two reasons often appear in the cases and literature, although more exist and are discussed below. The first is that the person in question has a property right in the goods.[55] Consider the position of a bailor under a bailment determinable at will seeking to bring a claim against a third party in trespass. Trespass has traditionally been said to require an interference with possession.[56] However, because the bailor under a bailment determinable at will has an immediate right to possession, they are said to be in constructive possession of the goods, and therefore able to bring claims in trespass.[57] In such circumstances, the claimant is in constructive possession in the sense that they are treated in the same way as if they were in possession, i.e. they will succeed in their trespass claim. But this is simply because their right to the goods is sufficient to invoke the relevant cause of action.[58]

A second, and perhaps more common, reason which appears in the cases and literature is that the possessor is holding the goods to the order of the 'constructive possessor'.[59] Again, identifying this state of affairs as 'constructive possession' merely tells us that the relevant person is, for the purposes of some specific legal rule, treated the same way as a person in possession of the goods. But, in substance, this is because holding the goods for another is sufficient for the purposes of that rule.

The important upshot of all this is that, for it to be said that some person is in constructive possession, it must be shown that they occupy some position which justifies them being treated the same way the law treats a possessor. This can only be done by looking to the cases and determining whether the relevant position generates the same legal consequences as possession in the context with which one is concerned. It follows that, if we are seeking to determine whether the holder of a bill of lading is in 'constructive possession' of the goods for the rules on the bringing of claims in the chattel torts, we must identify some set of facts which justifies treating the holder of a bill of lading the same way as if they were in possession for the purpose of those rules.

It is important to note that some commentators have adopted the language of 'symbolic possession', instead of constructive possession.[60] On this view, the holder of a bill of lading is only in symbolic possession, and not in constructive possession, of the goods the bill represents. This, again, is said to alter the content of the argument. However, if constructive possession is understood in the manner suggested above, as expressing a legal conclusion in the absence of the fact of possession, there is no conceptual room for 'symbolic possession' alongside the categories of possession and constructive

[54] S Douglas, 'Is Possession Factual or Legal?' in E Descheemaeker (ed), *The Consequences of Possession* (Edinburgh, 2014) 71–75; L Rostill, *Possession, Relative Title, and Ownership in English Law* (Oxford 2021) 10.
[55] *Smith v Milles* (1786) 1 Term Rep 475, 480; 99 ER 1205, 1208; *Dunwich (Bailiffs) v Sterry* (1831) 1 B & Ad 831, 842; 109 ER 995, 1000; F Pollock and R Wright, *An Essay on Possession in the Common Law* (Oxford Press 1888) 25, 27; A Bell, *Modern Law of Personal Property in England and Ireland* (London and Edinburgh 1989) 53; S Douglas, 'Is Possession Factual or Legal?' in E Descheemaeker (ed), *The Consequences of Possession* (Edinburgh, 2014) 71–75; M Bridge, 'Documents of Title to Goods, Implied Contract and Attornment' [2022] LMCLQ 412, 414.
[56] *Ward v Macauley* (1791) 4 TR 489; A Tettenborn, 'Wrongful Interference with Goods' in A Tettenborn (ed), *Clerk & Lindsell on Torts*, 24th edn (London, 2023) para 16-139.
[57] *Nicolls v Bastard* (1835) 2 CM&R 659; A Tettenborn, 'Wrongful Interference with Goods' in A Tettenborn (ed), *Clerk & Lindsell on Torts*, 24th edn (London, 2023) para 16-139.
[58] S Douglas, 'Is Possession Factual or Legal?' in E Descheemaeker (ed), *The Consequences of Possession* (Edinburgh, 2014) 71–75.
[59] M Bools, *The Bill of Lading: A Document of Title to Goods: An Anglo-American Comparison* (London, 1997) 180; E McKendrick (ed), *Goode and McKendrick on Commercial Law*, 6th edn (London, 2020) paras 2.42–2.43; G McMeel, 'Possessory Interests' in M Bridge et al, *The Law of Personal Property*, 3rd edn (London, 2021) para 11-010.
[60] M Bools, *The Bill of Lading: A Document of Title to Goods: An Anglo-American Comparison* (London, 1997) 180–184; R Aikens et al, *Bills of Lading*, 3rd edn (Abingdon, 2021) paras 6.2–6.8.

possession.[61] Symbolic possession, being possession of some symbol which is legally related to the goods in question,[62] is just another reason for which someone who is not actually in possession of goods might be treated in the same way as if they were in possession. Understood this way, symbolic possession is a species of constructive possession.

IV.ii. The Reasons for Constructive Possession

Pursuant to the Constructive Possession Argument, the holder of a bill of lading can bring claims in the chattel torts against third parties because the law treats them the same way it treats a possessor for the purpose of bringing claims in the chattel torts, although the holder of the bill is not in fact in possession. To support this argument, reference is typically made to three different reasons which justify treating the holder of a bill of lading the same way as a possessor, although they are not: (i) that there is a custom of merchants to this effect; (ii) that the carrier holds the goods for the holder of the bill of lading; and (iii) that the holder of the bill of lading has a personal right to possession of the goods. The following analysis shows that none of these reasons justify treating the holder of a bill of lading the same way as a possessor for the purposes of the rules on the chattel torts.

IV.ii.a. Custom of merchants

The first reason which is sometimes said to justify treating the holder of a bill the same way as a possessor of goods is that there is a custom of merchants to that effect.[63] But it is not self-explanatory that customs as between persons can have the effect of creating rights and duties between those persons. Indeed, courts have been reluctant to allow for customs to change the rights and duties of persons.[64] It has been said that allowing customs to create rights would amount to '[giving] laws to Westminster Hall'.[65]

Nonetheless, two ways have emerged by which customs, to use that word in its lay sense, can affect the rights and duties of parties to that custom.[66] Where there is a custom among a particular trade, that custom will inform what a reasonable person from that trade would do or understand parties to have agreed.[67] This is what is known as a 'usage'.[68] So, for example, in *National Bank of Greece v Pinios Shipping Co (No 1)*,[69] the House of Lords had to determine 'whether there was an implied agreement [by a borrower] to pay compound interest which continued after the date of the demand.'[70] Lord Goff, with whom the other judges agreed, held that their contract 'included the term, implied by the usage of bankers, that the bank was entitled to capitalise interest.'[71] Here, the usage affected what a reasonable person would have understood the parties' agreement to mean.[72]

Similarly, in the tort context, a usage might influence whether a person acted as a reasonable member of that industry would have done.[73] In *Bolam v Friern Hospital Management Committee*,[74] the question for the jury was whether a doctor acted negligently in treating a patient with electro-convulsive therapy, in the course of which the patient suffered serious injuries. In considering whether the doctor had been

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[61] C.f. M Bools, *The Bill of Lading: A Document of Title to Goods: An Anglo-American Comparison* (London, 1997) 180.
[62] A Bell, *Modern Law of Personal Property in England and Ireland* (London and Edinburgh, 1989) 57; M Bools, *The Bill of Lading: A Document of Title to Goods: An Anglo-American Comparison* (London, 1997) 180–181.
[63] G Treitel, 'The legal status of straight bills of lading' (2003) 119 LQR 608, 611–612; S Dromgoole and Y Baatz, 'The Bill of Lading as a Document of Title' in N Palmer and E McKendrick (eds), *Interests in Goods,* 2nd edn (London, 1998) 549.
[64] *Robinson v Mollett* (1875) LR 7 HL 802, 818; *Anderson v Sutherland* (1897) 13 TLR 163, 165; J Baker, 'Custom and Usage' in Lord Mackay (ed), *Halsbury's Laws of England*, 5th edn (London, 2023) Volume 32, para 51.
[65] *Clerke v Martin* (1702) 2 Ld Raym 757, 758; 92 ER 6, 6.
[66] For further detail, see J Baker, 'Custom and Usage' in Lord Mackay (ed), *Halsbury's Laws of England*, 5th edn (London, 2023) Volume 32,.
[67] *Goodwin v Robarts* (1874-75) LR 10 Ex 337, 357; *Dashwood v Magniac* [1891] 3 Ch 306, 370–371; *Crouch v The Credit Foncier of England Ltd* (1872-73) LR 8 QB 374, 386–387; J Baker, 'Custom and Usage' in Lord Mackay (ed), *Halsbury's Laws of England*, 5th edn (London, 2023) Volume 32, paras 50–51.
[68] J Baker, 'Custom and Usage' in Lord Mackay (ed), *Halsbury's Laws of England*, 5th edn (London, 2023) Volume 32, paras 50–51.
[69] [1990] 1 AC 637, [1990] 1 Lloyd's Rep 225.
[70] [1990] 1 AC 637, 674.
[71] [1990] 1 AC 637, 685.
[72] K Lewison, *The Interpretation of Contracts*, 8th edn (London, 2023) paras 6.117–6.124; E McKendrick, 'Implied Terms' in H Beale (ed), *Chitty on Contracts*, 35th edn (London, 2024) Volume I, para 17-036.
[73] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; J Baker, 'Custom and Usage' in Lord Mackay (ed), *Halsbury's Laws of England*, 5th edn (London, 2023) Volume 32, paras 51.
[74] [1957] 1 WLR 582.

negligent, the jury had to determine whether the doctor had acted 'in accordance with the standards of reasonably competent medical men at the time.'[75] The usages of medical professionals were relevant to determining the standards of reasonably competent medical men.[76]

However, in neither context is the usage itself a source of rights and duties between the parties. Indeed, it is well established that a usage cannot create rights and duties where there otherwise are none.[77] So, in *National Bank of Greece v Pinios Shipping Co (No 1)*,[78] the reason for which rights and duties sprung up between the parties to the dispute was because they had entered into a contract with one another. The usage was only relevant to the interpretation of that contract. As Sir WM James VC held in *Daun v City of London Brewery Co*,[79] 'it is difficult to apply such a custom to persons who are entering into no contract between themselves.'[80] This is because the usage is not itself the source of the parties' rights; the contract is. Similarly, in *Bolam v Friern Hospital Management Committee*,[81] the question to which the usage was relevant was whether the doctor's duty of care had been breached, but there was no doubt that the doctor owed such a duty of care; whether they did could not have been affected by a usage. In both the contractual and tortious contexts the effect of usages is not to create rights where there otherwise would be none. Rather, the usage merely informs what a reasonable person would have done or understand an agreement to mean.

It follows that if a custom of merchants is to have the effect of creating property rights in the holder of the bill of lading, this cannot be because the custom of merchants amounts to a usage. The effect of the custom of merchants is said to be the creation of property rights, and, as pointed out above, usages cannot have the effect of creating rights where there otherwise are none. If the custom of merchants is to have the desired effect, it must be understood in some different way.

The second way in which a custom can affect the rights and duties of persons is by actually creating such rights and duties between members in a locality to which a local custom applies.[82] Unlike a trade usage, a local custom can have this effect. But because a local custom can have this powerful effect, there are strict rules that a local custom must comply with in order for it to be able to generate rights and duties.[83] The two most important for the purposes of this article are that a local custom must be 'taken with reference to some defined limit or space'[84] and 'must in [its] nature be confined to individuals of a particular description'.[85] As Buller J explained in *Fitch v Rawling*, 'what is common to all mankind, can never be claimed as a custom.'[86]

The custom of merchants which is said to generate a property right in the holder of a bill of lading is neither limited in space or in the persons to whom it is said to apply. First, it is not local to some place because it applies whenever English law is the applicable law. This is evident from the variety of localities involved in the classic authorities on the bill of lading as a document of title. For example, *Lickbarrow v Mason*[87] involved a voyage between Middlebourg, in modern-day Netherlands, and Liverpool, *Barber v Meyerstein*[88] involved a voyage between Madras and London, and *Sanders v Maclean*[89] involved a voyage from Sebastopol in Crimea and Philadelphia in the United States of America.

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[75] [1957] 1 WLR 582, 586.
[76] [1957] 1 WLR 582, 587.
[77] *Goodwin v Robarts* (1874-75) LR 10 Ex 337, 357; *Dashwood v Magniac* [1891] 3 Ch 306, 370–371; *Daun v City of London Brewery Co* (1869) LR 8 Eq 155, 162; *Crouch v The Credit Foncier of England Ltd* (1872-73) LR 8 QB 374, 386–387; J Baker, 'Custom and Usage' in Lord Mackay (ed), *Halsbury's Laws of England*, 5th edn (London, 2023) Volume 32, paras 51.
[78] [1990] 1 AC 637.
[79] (1869) LR 8 Eq 155.
[80] (1869) LR 8 Eq 155, 162.
[81] [1957] 1 WLR 582.
[82] J Baker, 'Custom and Usage' in Lord Mackay (ed), *Halsbury's Laws of England*, 5th edn (London, 2023) Volume 32, para 1.
[83] J Baker, 'Custom and Usage' in Lord Mackay (ed), *Halsbury's Laws of England*, 5th edn (London, 2023) Volume 32, para 6.
[84] *Legh v Hewitt* (1803) 4 East 154, 159; 102 ER 789, 791. See also J Baker, 'Custom and Usage' in Lord Mackay (ed), *Halsbury's Laws of England*, 5th edn (London, 2023) Volume 32, para 16.
[85] *Fitch v Rawling* (1795) 2 H Bl 393, 398; 126 ER 614, 616. See also J Baker, 'Custom and Usage' in Lord Mackay (ed), *Halsbury's Laws of England*, 5th edn (London, 2023) Volume 32, para 17.
[86] *Fitch v Rawling* (1795) 2 H Bl 393, 398; 126 ER 614, 616–617.
[87] (1787) 2 Term Rep 63, 100 ER 25.
[88] (1869–70) LR 4 HL 317.
[89] (1883) 11 QBD 327.

Secondly, because the supposed effect of the custom is to create a property right in the goods, the custom is not restricted to a particular group or class of persons. Rather, by generating a property right the custom has the effect of imposing immediate duties of non-interference on everyone in the world. It follows from this that, if the custom of merchants is to have the desired effect, this cannot be because it amounts to a local custom, given it does not comply with the requirements for such a local custom.

The final way in which references to a custom of merchants can be understood is just as references to what English law on the relevant issue is.[90] That the 'custom of merchants' is sometimes used in this way has been most clearly demonstrated by Professor Sir John Baker and Professor James Rogers in relation to the law on negotiable documents.[91] As Rogers put it in the course of an investigation into early pleadings making use of a 'custom of merchants', 'although the pleadings purported to base liability upon a "custom", the rule in question was actually treated as a rule of law, to which the principles governing pleading and proof of [local] customs were not applicable.'[92]

If the reference to a custom of merchants in the context with which we are concerned, being the argument that such a custom of merchants justifies treating the holder of a bill the same way a possessor is treated, is no more than a reference to what English law on the matter is, the argument also falls apart. This is because it asserts exactly what it seeks to prove and, accordingly, is circular. Those who adopt the view that the holder of the bill is in constructive possession because of a custom of merchants to that effect invoke the custom of merchants as an explanation for *why* the law treats the holder of the bill the same way as a possessor.[93] But if the reference to a custom of merchants is merely understood as a reference to English law on the relevant issue, the invocation of the custom of merchants amounts to no more than an assertion that English law does treat the holder of the bill the same way as a possessor. It offers no explanation or reason for why the law does so.

The result, then, is that, however the reference to a 'custom of merchants' might be construed, it provides no reason for why the law treats or ought to treat the holder of a bill of lading the same way as a possessor of goods for the purposes of the rules on the acquisition of property rights by possession. Rather, a thorough investigation into the different ways in which such a 'custom of merchants' may be understood suggests that a mere custom cannot have the effect of generating property rights in goods. It follows that a custom of merchants is not a good reason for the holder of a bill of lading to acquire a property right to the goods the bill represents.

IV.ii.b Holdings Goods for Another

The second reason which some have suggested justifies treating the holder of a bill of lading the same way as a possessor of goods is that the carrier is holding the goods to the order of the holder of the bill. This argument is based on the view that, if some person, A, who is in possession of goods holds those goods to the order of some other person, B, the law treats B the same way it would treat B if B were actually in possession of the goods themselves.[94] It does this by generating a property right to the goods in B. Applying this in the context with which this article is concerned, when a bill of lading is issued on shipment of goods, the carrier holds those goods to the order of the lawful holder of the bill, whomever that might be, such that that person is in constructive possession of the goods.[95]

This argument turns on whether it is true that a person who has goods held to their order is treated the same way as a person in possession of the goods as far as the law on the original acquisition of property rights by possession is concerned. But the cases on attornment, where one person undertakes to hold goods for another, suggest that the mere holding of goods for another is not sufficient to generate a property

[90] J Baker, 'Custom and Usage' in Lord Mackay (ed), *Halsbury's Laws of England*, 5th edn (London, 2023) Volume 32, para 62.
[91] J Baker, 'The Law Merchant and the Common Law Before 1700' (1979) 38 CLJ 295; J Rogers, *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law* (Cambridge, 1995) Ch 6; J Baker, 'Custom and Usage' in Lord Mackay (ed), *Halsbury's Laws of England*, 5th edn (London, 2023) Volume 32, para 62.
[92] J Rogers, *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law* (Cambridge 1995) 142.
[93] E.g. G Treitel, 'The legal status of straight bills of lading' (2003) 119 LQR 608, 611–612.
[94] N Curwen, 'The Bill of Lading as a Document of Title at Common Law' [2007] Mountbatten Yearbook of Legal Studies 139, 143; S Mills (ed), *Goode on Proprietary Rights and Insolvency in Sales Transactions*, 3rd edn (London, 2010) paras 1.19, 4.02.
[95] E McKendrick (ed), *Goode and McKendrick on Commercial Law*, 6th edn (London, 2020) 32.54.

right in that other.[96] If an executed undertaking to hold goods for another is insufficient to generate a property right in that other, a mere holding of goods for another itself must also be insufficient to generate such a property right. It follows that the cases on attornment are directly relevant to the present enquiry.

The cases on attornment suggest that the mere holding of goods to another's order is insufficient to generate a property right in the person to whose order they are held. They have held that such an attornment merely raises an estoppel in favour of the person to whom the attornment is made.[97] This is apparent from, for example, the way in which *Henderson v Williams*[98] was argued and decided. In that case, a warehouseman held some bags of sugar for Grey. In 1894, Grey was fraudulently induced by Fletcher to authorise the warehouseman to hold the sugar for Fletcher. Fletcher agreed to sell title to the sugar to the plaintiffs and the plaintiffs obtained an attornment from the warehouseman in relation to the sugar. Once Grey found out about the fraud, he instructed the warehouseman not to deliver the sugar to the plaintiffs. As a result, the plaintiffs brought claims against the warehouseman.

Lord Halsbury dealt with the case as though the plaintiff had sued Grey directly.[99] He held that, because Grey had authorised the warehouseman to hold the sugar for Fletcher, Grey had 'allowed another person to hold himself out as the owner in such a way as to make an innocent person enter into a contract, which contract being performed cannot be set aside.'[100] The case has often been understood as standing primarily for this proposition.[101] However, both Lindley LJ and AL Smith LJ dealt with the claims on the basis that they were being advanced against the warehouseman; they were not concerned with the position of the plaintiff as against Grey. Lindley LJ held that the plaintiff ought to succeed in their claim because '[t]he distinct attornment by the defendant to the plaintiffs … estopped the defendant from denying the plaintiff's title.'[102] Similarly, AL Smith LJ held that 'in the circumstances of this case the defendant is estopped from denying the plaintiff's right to the possession of the 150 bags of sugar.'[103]

The language employed in *Henderson v Williams* shows that an attornment does not give rise to a title in the person to whom the attornment is made. An estoppel prevents the estopped person from denying something which is false. In *Henderson v Williams*, the relevant falsity which the warehouseman was prevented from denying was that the plaintiff had a property right to the goods. In other words, it is an essential part of the logic of *Henderson v Williams* that the attornment did not give rise to a property right in the plaintiff. The estoppel 'only creates a cause of action between the person in whose favour the estoppel exists and the person who is estopped',[104] but it 'gives no title to that which is the subject-matter of estoppel.'[105]

Two challenges have been made to the view that an attornment merely gives rise to an estoppel (rather than a property right) in favour of the person to whom the representation is made. The first is that put forward by Professor Sir Roy Goode and Simon Mills in *Goode on Proprietary Rights and Insolvency in Sales Transactions*.[106] They argue that 'a true attornment … can only occur in relation to identified goods.'[107] Such a true attornment puts the person to whom the attornment is made in possession of the goods and generates a property right in them.[108] However, 'a bailee who purports to attorn without having earmarked goods to the claim of his new bailor is [merely] estopped from disputing that he holds goods identified to

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[96] *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188, 206; *Re London Wine* [1986] PCC 121, 159–165; *Re Goldcorp* [1995] 1 AC 74, 94–95; N Palmer (ed), *Palmer on Bailment*, 3rd edn (London, 2009) para 25-005.

[97] *Stonard v Dunkin* (1810) 2 Camp 344, 170 ER 1178; *Hawes v Watson* (1824) 2 B&C 540, 107 ER 484; *Gillet v Hill* (1834) 2 Cr & M 530; *Gosling v Birnie* (1831) 7 Bing 339, 131 ER 131; *Knights v Wiffen* (1869–70) LR 5 QB 660; *Henderson v Williams* [1895] 1 QB 521; N Palmer (ed), *Palmer on Bailment*, 3rd edn (London, 2009) para 25-005.

[98] [1895] 1 QB 521.

[99] *Henderson v Williams* [1895] 1 QB 521, 525.

[100] *Henderson v Williams* [1895] 1 QB 521, 525.

[101] *Farquharson Brothers & Co Ltd v King & Co* [1902] AC 325, 331; *Mercantile Bank of India v Central Bank of India* [1938] AC 287, 302; *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 QB 371, 390.

[102] *Henderson v Williams* [1895] 1 QB 521, 530–531.

[103] *Henderson v Williams* [1895] 1 QB 521, 534.

[104] *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188, 207.

[105] *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188, 206. See also *Re London Wine* [1986] PCC 121, 159–165; *Re Goldcorp* [1995] 1 AC 74, 94–95; N Palmer (ed), *Palmer on Bailment*, 3rd edn (London, 2009) para 25-005.

[106] S Mills (ed), *Goode on Proprietary Rights and Insolvency in Sales Transactions*, 3rd edn (London, 2009).

[107] S Mills (ed), *Goode on Proprietary Rights and Insolvency in Sales Transactions*, 3rd edn (London, 2009) para 1.26.

[108] Although this is, in their view, a shared possession with the person exercising actual physical control: S Mills (ed), *Goode on Proprietary Rights and Insolvency in Sales Transactions*, 3rd edn (London, 2009) para 1.22.

the new bailor's interest'.[109] The difficulty with this view, however, is that it is inconsistent with the judgments of Lindley LJ and AL Smith LJ in *Henderson v Williams*,[110] outlined above.[111] That case involved an actual attornment, for it involved an agreement by the warehouseman to hold sugar which they actually had and which was earmarked to the plaintiff's order. But as Lindley LJ and AL Smith LJ explained, the attornment only gave rise to an estoppel in the plaintiff's favour.[112] It follows that even an actual attornment only gives rise to an estoppel in favour of the person to whom the representation is made.

The second challenge that might be mounted against the view advanced here—namely, that an attornment merely gives rise to an estoppel (and no property right) in favour of the representee—is that sometimes an estoppel might itself give rise to an actual property right in favour of the person estopped. That was the view taken by Devlin J in *Eastern Distributors Ltd v Goldring*.[113] There, Devlin J said that 'the effect of [the estoppel] is to transfer a real title and not merely a metaphorical title by estoppel.'[114] But that was said in the context of a principal holding out their supposed agent as authorised to sell the goods on their behalf, i.e. the context which Lord Halsbury addressed in *Henderson v Williams*, but which did not form the ratio of that case.[115] While it may be that the effect of an 'estoppel' in that context is to convey to the representee the property right of the person estopped, Devlin J recognised that this effect was rather exceptional, and that it did not apply when we are 'not in fact concerned with an agent's authority to transfer'.[116] Given in *Henderson v Williams* neither AL Smith LJ or Lindley LJ were concerned with Fletcher's authority to transfer, the estoppel with which they were concerned cannot have had the effect of conferring on the plaintiffs an actual property right in the bags of sugar. Neither can it result in an attornment conferring a property right on the person to whom the attornment is made.

We are now in a position to apply this analysis to the argument with which this section is concerned. It will be recalled that the argument being considered was that the holding of goods on another's behalf amounts to a circumstance that the law treats the same way as possession by generating a property right to the goods in the person for whom the goods are being held. But as *Henderson v Williams* shows, a performed agreement to hold goods for another person, and so *a fortiori* the mere holding of those goods for another person, merely gives rise to an estoppel in favour of that person. It follows from this that the holder of the bill of lading does not acquire a property right to the goods that the bill represents by virtue of the goods being held for them.

IV.ii.c. A Personal Right to Possession

The final reason which it may be suggested justifies treating the holder of a bill of lading the same way the law treats a possessor is that the holder of a bill has a personal right to possession of the goods. On this view, a merely personal right to possession of goods is sufficient to bring claims in the chattel torts.[117] If the holder of the bill of lading has acquired some personal right to possession of the goods as against the carrier, the holder of the bill would be entitled to bring claims in the chattel torts against third parties.

There are two difficulties with this argument. The first difficulty is that the personal rights to possession which this argument relies on are typically contractual.[118] However, at common law, the holding a bill of lading did not confer on the holder of the bill any contractual rights against the carrier.[119] In *Thompson v Dominy*,[120] Parke B held that a bill of lading 'transfers no more than the property in the goods;

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[109] S Mills (ed), *Goode on Proprietary Rights and Insolvency in Sales Transactions*, 3rd edn (London, 2009) para 1.26.
[110] [1895] 1 QB 521.
[111] *Ante*, text to fns 98–105.
[112] *Henderson v Williams* [1895] 1 QB 521, 530–531, 534.
[113] [1957] 2 QB 600.
[114] *Eastern Distibutors Ltd v Goldring* [1957] 2 QB 600, 611.
[115] *Ante*, text to fns 99–100.
[116] *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600, 611.
[117] *Government of the Islamic Republic of Iran v The Barakat Galleries* [2007] EWCA Civ 1374, [2009] QB 22, [12]–[31]; *Brink's Global Services Inc v Igrox Ltd* [2009] EWHC 1817 (Comm) [28]; N Palmer (ed), *Palmer on Bailment*, 3rd edn (London, 2009), 150–161; D Nolan and J Goudkamp (eds), *Winfield and Jolowicz on Tort*, 20th edn (London, 2020) para 18-026.
[118] *Ante*, fn 117.
[119] *Thompson v Dominy* (1845) 14 M&W 403, 153 ER 532; F Rose and F Reynolds (eds), *Carver on Bills of Lading*, 5th edn (London, 2022) paras 5-001–5-006; P Bugden, *Goods in Transit*, 5th edn (London, 2023) para 12-010; D Foxton et al. (eds), *Scrutton on Charterparties*, 25th edn (London, 2024) para 3-002; F Rose, 'Overseas Sales in General' in M Bridge (ed), *Benjamin's Sale of Goods*, 12th edn (London, 2024) paras 18-255–18-260.
[120] (1845) 14 M&W 403.

it does not transfer the contract.'[121] It was not until the Carriage of Goods by Sea Act 1992 that a buyer who had not acquired any property from the seller could acquire contractual rights against the carrier by taking up the bill of lading.[122] If one were to rely on this contractual right to explain the effect of a bill of lading against third parties, one would have to concede that the bill of lading only acquired this third-party effect in 1992. That is something which no defender of the orthodox view would accept.

The second difficulty with this line of reasoning is that the authorities indicate that a personal right to possession is not, in the absence of some proprietary interest in the goods, sufficient to bring a claim in conversion against a third party.[123] That was the *ratio* of the decision of the Court of Appeal in *Jarvis v Williams*.[124] In *Jarvis*, Paterson entered into a contract to buy from the plaintiff, Jarvis, some bathroom fittings, to be delivered to Williams, the defendant. The bathroom fittings were duly delivered and the property right to the fittings was transferred from Jarvis to Paterson. Over a year later, the goods had still not been paid for and were still lying unused on Williams' premises. Jarvis made an offer to Paterson to take the fittings back, to which Paterson agreed. Williams refused to give the fittings back to Jarvis and Jarvis brought proceedings against Williams in detinue.[125]

Lord Evershed MR, with whom Birkett LJ and Romer LJ agreed, held that Jarvis could not bring a claim for wrongful interference with the fittings against Williams. The agreement for the return of the fittings to Jarvis did not transfer back to Jarvis any property right to the goods[126] and a mere contractual right to possession was not sufficient to bring a claim for wrongful interference with the fittings. As Lord Evershed held, '[e]ven though … the plaintiff may have had a right which … could form the subject matter of an action for breach of contract … there was in him … no proprietary interest in the goods'.[127] As a result, Jarvis did not have 'the necessary foundation on which to sustain an action for detinue against the defendants.'[128] *Jarvis* is clear authority rejecting the view that a contractual right to possession can ground a claim in the chattel torts.

The decision of the Court of Appeal in *Jarvis* was explained differently by Lord Phillips CJ, giving the judgment of the Court of Appeal in *Government of the Islamic Republic of Iran v The Barakat Galleries*.[129] The Iranian Government brought proceedings against Barakat Galleries in respect of antiquities it claimed it had acquired rights to by virtue of Iranian legislation. In bringing its claim, the Iranian Government argued that the rights it had acquired under the legislation amounted to 'ownership' and so were proprietary or, failing that, that any right to possession, even if not proprietary, was sufficient to ground a claim in the chattel torts. Lord Phillips CJ, giving the judgment of the Court of Appeal, held that the Iranian legislation conferred on the Government 'ownership', a fully-fledged property right, in respect of the goods.

In considering the Iranian Government's alternative submission, that a non-proprietary right should be sufficient to ground a claim in the chattel torts, Lord Phillips CJ re-explained *Jarvis*. In his Lordship's view, *Jarvis* did not hold that a contractual right to possession was insufficient to ground a claim in the chattel torts. Rather, the contract in *Jarvis* 'was not a contract under which Paterson purported to transfer to the plaintiff his immediate right to the possession of the goods.'[130] Because, on this construction, the facts in *Jarvis* did not involve a contractual right to possession, the case could not 'safely be treated as binding precedent for the proposition that a contractual right to immediate possession can never found a claim in conversion.'[131] As a result, Lord Phillips CJ said that, had the Court not concluded that Iran acquired property rights to the antiquities, 'we would have concluded that Iran enjoyed an

[121] *Thompson v Dominy* (1845) 14 M&W 403, 407.
[122] Carriage of Goods by Sea Act 1992, s 2.
[123] N Curwen, 'Title to sue in conversion' [2004] Conv 208; M Bridge, 'Protecting and Enforcing Interests at Common Law: the Property Torts' in M Bridge et al., *The Law of Personal Property*, 3rd edn (London, 2021) para 33-039; A Tettenborn, 'Wrongful Interference with Goods' in A Tettenborn (ed), *Clerk & Lindsell on Torts*, 24th edn (London, 2023) para 16-62.
[124] [1955] 1 WLR 71.
[125] There is no suggestion that the entitlement required to bring detinue differs from the entitlement required to bring a claim in conversion after the Torts (Interference with Goods) Act 1977.
[126] *Jarvis v Williams* [1955] 1 WLR 71, 73–74.
[127] *Jarvis v Williams* [1955] 1 WLR 71, 75.
[128] *Jarvis v Williams* [1955] 1 WLR 71, 75.
[129] [2007] EWCA Civ 1374.
[130] *Iran v Barakat Galleries* [2009] QB 22 [26].
[131] *Iran v Barakat Galleries* [2009] QB 22 [26].

immediate right to their possession under the law of Iran which would itself suffice to found a claim in conversion',[132] irrespective of whether this right was proprietary.

Whether the contract in *Jarvis* involved such a contractual right to possession is, it is submitted, besides the point. The reason for which the Court of Appeal reached its conclusion in *Jarvis* was that a proprietary interest in the goods was necessary for bringing a claim in the chattel torts; a personal right would not do.[133] It was this reason which was 'treated by the judge as [the] necessary step in reaching his conclusion'[134] and forms the ratio of *Jarvis*. The Court of Appeal in *Iran v Barakat Galleries* was not free to depart from it.[135]

In any event, that a non-proprietary right to possession could ground a claim in the chattel torts was not the Court's preferred reasoning in *Iran v Barakat Galleries*. It will be recalled that Lord Phillips CJ held that the relevant statute conferred on the Iranian Government rights 'so extensive and exclusive that Iran was properly to be considered the owner of the properties found.'[136] Such ownership clearly was a property right capable of grounding a claim in the chattel torts. It was only in the alternative that the Court held that a personal right to possession would have been sufficient to ground its claim in the chattel torts.[137] This alternative conclusion has subsequently been described as *obiter*.[138] The inconsistency between this alternative ground and *Jarvis* means that the primary ground on which the Court in *Iran v Barakat Galleries* based its conclusion, that the Islamic Republic of Iran had acquired ownership of the goods, ought to be preferred.

The above authorities concern whether a contractual right to possession is sufficient to bring a claim in the chattel torts against a third-party wrongdoer. But the reasoning in those cases ought to apply equally to any personal right to possession, irrespective of the source of that right. A personal right against a bailee, generated by a bailment, ought similarly to be insufficient to ground a claim in the chattel torts against a third-party wrongdoer. The important distinction is between rights against the rest of the world, which are property rights, and rights against certain individuals, which are not.[139]

What are the implications of this analysis for the Constructive Possession Argument? The argument being considered here was that a bill of lading holder is to be treated the same way the law treats a possessor for the purposes of bringing claims in the chattel torts because the bill of lading has a personal right to possession and this is sufficient for bringing the chattel torts. The analysis in this part showed that a personal right to possession is not sufficient to bring a claim in the chattel torts. It follows that, even if the holder of a bill of lading acquires a personal right to possession of the goods by holding the bill of lading, this does not justify treating them the same way as a possessor for the purposes of the bringing claims in the chattel torts.

IV.iii. Summary

This Part showed that the three reasons that are typically advanced in favour of treating the holder of a bill of lading the same way the law treats a possessor do not justify treating the holder of the bill in this way. The first reason, that there is a custom of merchants to this effect, cannot justify the creation of property rights to goods, in the absence of that custom being limited in space and in the people to which it applies. The second reason, that the goods are being held to the order of the holder of the bill, merely shows that, at most, the carrier should be estopped from denying the bill-holder's title. It does not suggest that the holder of the bill should acquire some property right to the goods. The third reason, that the holder of the

[132] *Iran v Barakat Galleries* [2009] QB 22 [86].
[133] *Jarvis v Williams* [1955] 1 WLR 71, 74–75.
[134] R Cross and J Harris, *Precedent in English Law*, 4th edn (Oxford, 1991) 72, approved in *R (Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955 [16] and *R (Youngsam) v Parole Board* [2019] EWCA Civ 229, [2020] QB 387 [21], [22], [39].
[135] For the narrow grounds on which an intermediate court is free to depart from a binding decision of another intermediate court, see *Young v Bristol Aeroplane Co Ltd* [1944] KB 718.
[136] *Iran v Barakat Galleries* [2009] QB 22 [80].
[137] *Iran v Barakat Galleries* [2009] QB 22 [84].
[138] *Brink's Global Services Inc v Igrox Ltd* [2009] EWHC 1817 (Comm) [28].
[139] *Jarvis v Williams* [1955] 1 WLR 71, 75.

bill has a personal right to possession and that this personal right is sufficient to ground claims in conversion and negligence against third parties, is inconsistent with the *ratio* of *Jarvis v Williams*.[140]

The first step in the Constructive Possession Argument was that the holder of the bill is in constructive possession of the goods. For this to be the case, it has to be shown that the holder of the bill occupies some position which justifies treating them the same way the law treats a possessor for the rules on the chattel torts. The above has shown that the holder of the bill occupies no such position. There is nothing about the position of the holder of the bill which suggests that they are to be treated the same way the law treats a possessor for the rules on the chattel torts. It follows that the Constructive Possession Argument must also fail.

V. Conclusion

This article has sought to show that a holder of a bill of lading who has not acquired rights derivatively cannot sue third parties for wrongfully interfering with the goods. It has done so by showing that the two arguments which are typically advanced in favour of such a bill holder's ability to sue third-party wrongdoers (the Possession Argument and the Constructive Possession Argument) are unconvincing. The bill does not confer on its holder any actual possession over the goods, any such possession being inconsistent with the possession of the carrier. Neither are the carrier and bill holder jointly in possession, given that they do not acquire any rights jointly. Further, there are no reasons that apply to the holder of a bill which justify treating the holder of the bill of lading the same way the law treats a possessor for bringing such claims against third-party wrongdoers. First, the acquisition of property rights by holding a bill cannot be explained by reference to some custom, the requirements of such a custom not being made out in this context. Secondly, were a bill of lading to work analogously to an attornment, this would at best confer on its holder an estoppel, rather than a property right in the goods. Thirdly, the bill of lading conferring on its holder a personal right to possession is not sufficient to ground a claim in the chattel torts.

Professor Michael Bridge has recently suggested that it is the bill of lading's 'magical properties [which] invest the new holder with constructive possession of the goods.'[141] This article has sought to dispel some of this magic, not by showing how the bill of lading confers on its holder 'constructive possession', but rather by showing that, at least in the contexts of bringing claims in the chattel torts against third parties, it does no such thing. The supposed magic of the bill of lading is, as is always the case with magic, mere illusion.

[140] [1955] 1 WLR 71.
[141] M Bridge, 'Documents of Title to Goods, Implied Contract and Attornment' [2022] LMCLQ 412, 427, 428.