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TERMINOLOGY AND TITLE TO CHATTELS: A CASE AGAINST "POSSESSORY TITLE"

A.V. Dicey maintained in his inaugural lecture that "the technical terms of law are as bad as any technicalities can be; they are technical without being precise, or, when apparently popular, are full of latent ambiguity."[1] Dicey provided three examples of defective legal terms: "chose in action", "personal property", and "void contract".[2] Dicey could have mentioned "possessory title", for it is neither precise nor unambiguous. Like many terms, "possessory title" is used in various ways.[3] This article is concerned with the use of the term to denominate the interest[4] that is acquired by a person, *B*, when (and because) *B* takes possession of another person's (*A*'s) tangible chattel.[5] This usage is not uncommon. Palmer, for instance, has asserted that possession of a chattel gives rise to a "possessory title".[6] Battersby and Preston maintained in an influential article that, if *A* is the "true owner" of a chattel and *B* unlawfully takes possession of it, *B* acquires, upon obtaining possession, a "possessory title to an absolute interest" in the chattel.[7] Goode and McKendrick have drawn a similar contrast. According to their account of the law, *A*, in such circumstances, has the "best title to the ownership interest" and *B* has a "possessory title to the ownership interest" in the chattel.[8] Green and Randall have asserted that a possessor, such as *B*, acquires a "possessory right" over the chattel;[9] and it is notable that this formulation avoids the ambiguity of "title".[10]

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[1] A.V. Dicey, *Can English Law be Taught at the Universities?* (London: Macmillan and Co, 1883), p.12.

[2] Dicey, *Can English Law be Taught at the Universities?* (1883), p.13.

[3] In addition to the usage described in the text, "possessory title" is used to refer to possession amounting to evidence, or giving rise to a presumption, that a certain person has (or had) an interest in land or chattels.

[4] An "interest", for present purposes, is a set of legal rights, legal liberties, legal powers, and/or legal immunities.

[5] It is not possible to consider land in this article, but an argument similar to the one put forward here can be advanced in connection with land: see L.D. Rostill, *Fundamentals of Property Law: Possession, Title and Relativity* (DPhil thesis, University of Oxford, 2016), Ch. 4.

[6] *Palmer on Bailment*, edited by N. Palmer, 3rd edn (London: Sweet & Maxwell, 2009), paras 4–001–4–005.

[7] G. Battersby and A.D. Preston, "The Concepts of 'Property', 'Title' and 'Owner' Used in the Sale of Goods Act 1893" (1972) 35 M.L.R. 268 at 271–273.

[8] *Goode on Commercial Law*, edited by E. McKendrick, 5th edn (London: Penguin, 2016), paras 2.21–2.24. Cf. *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785 at 809; [1986] 2 All E.R. 145 at 149 per Lord Brandon of Oakbrook.

[9] S. Green and J. Randall, *The Tort of Conversion* (Oxford: Hart 2009), p.88.

[10] For discussion of the ambiguity of "title", see: A.M. Honoré, "Ownership" in A.G. Guest (ed), *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press 1961), p.134; B. Rudden, "The Terminology of Title" (1964) 80 L.Q.R. 63 at 65; R. Hickey, *Property and the Law of Finders* (Oxford: Hart 2010), p.165–166.

This article contends, however, that when "possessory title" or "possessory right" is used to denominate the interest that is acquired by obtaining possession of a chattel, the term is, depending on the exact meaning ascribed to "possessory", either misleading or a misnomer. Accordingly, it is submitted that the law of property would benefit from the adoption of a terminology that possesses greater accuracy and less ambiguity, in much the same way as the law of unjust enrichment has benefited from the development of an improved vocabulary. Hence, this article has both a critical and a constructive dimension: it argues that terms such as "possessory title" and "possessory right" are deficient; and it proposes a superior terminology. Since a sound evaluation of legal terms of art must be based on a proper understanding of the legal phenomena to which the terms refer, our approach will have something in common with J. L. Austin's approach to philosophy: we, too, will look "not *merely* at words … but also at the realities we use the words to talk about."[11] Indeed, it is intended that this article will not only evaluate some of the law of property's most important terms; it will also elucidate the nature of the interest that is acquired by a person when he or she obtains possession of a chattel.

I. Four Senses of "Possessory Title"

We have seen that a number of distinguished legal scholars have maintained that, if *B* were to take possession of *A*'s chattel, *B* would thereby acquire a right or interest that is "possessory". Since *A* has a better title to the chattel than *B*, *B*'s title—that is, *B*'s right or interest—is not the best title to the chattel. Accordingly, one may say that *B*'s right or interest is a *lesser title*. But is it correct or helpful to regard this lesser title as *possessory*? This question gives rise to another: what is the meaning of "possessory"? This article will consider four interpretations. According to the first ("Interpretation 1"), to say that lesser titles are "possessory" is to say that they are acquired by obtaining possession. According to the second interpretation ("Interpretation 2"), to say that lesser titles are "possessory" is to say that a given lesser title will subsist only for so long as the title-holder is in possession. According to the third interpretation ("Interpretation 3"), to say that lesser titles are "possessory" is to say that they cannot be alienated without the transferor delivering the chattel to the transferee—without, in other words, the transferor losing, and the transferee acquiring, possession. According to the fourth interpretation ("Interpretation 4"), to say that lesser titles are "possessory" is to say that each such title consists solely of a right to possession.

Parts II to V of this article examine whether, if "possessory" is interpreted in any of these four ways, it can be properly said that *B*'s interest—her lesser title—is possessory. In Part II it is claimed that, while possession is *a* mode by which lesser titles are acquired, lesser titles can be acquired in other ways. Accordingly, lesser titles are not "possessory" in the sense explicated by Interpretation 1. Part III considers whether a lesser title survives a loss of possession by the title-holder. It is argued that it does and, therefore, lesser titles are not "possessory" in the sense identified by Interpretation 2. In Part IV it is claimed that lesser titles can be transferred by way of sale without the transferee obtaining possession and that,

[11] J.L. Austin, "A Plea for Excuses" (1956–1957) 57 Proc. Aris. Soc. 1 at 8.

therefore, lesser titles are not "possessory" in the sense described by Interpretation 3. Part V examines whether lesser titles consist solely of a right to possession. It is argued that they do not and that, therefore, lesser titles are not "possessory" in the sense depicted by Interpretation 4. It would seem that, in the present context, no other meaning could be reasonably attributed to "possessory". If that is right, it is a mistake to call *B*'s interest a "possessory title" or a "possessory right". What, then, should it be called? This question is considered in Part VI. It is submitted that, for the reasons discussed there, the better view is that *B*'s interest should be called a "general property interest".

II. POSSESSION AS A MODE OF ACQUISITION

If we construe the term "possessory" in accordance with Interpretation 1, is it correct to regard lesser titles as possessory? In other words, is it the case that, insofar as chattels are concerned, persons acquire lesser titles by obtaining possession? It is true that the law provides that, generally speaking,[12] if and when a person, *B*, obtains possession of a chattel, *B* will acquire a title to it, that is to say, an interest in the chattel that comprises, among other things, a right to possession.[13] If another person, *A*, has a title that is better than *B*'s, then *B*'s title must be a lesser title.

What, in this context, is possession? The general rule is that, for the purposes of the rules governing the acquisition of title by possession, a person, *B*, has possession of a chattel if and only if: (1) *B* has exclusive physical control of the chattel;[14] and (2) *B* has an intention to exercise such control over the chattel.[15] Hence, there is in this context an important distinction between possession, on the one hand, and a right to possession, on the other. Under what might be called the title-by-possession rule, having possession of a chattel is a *condition of* a person acquiring an interest in the chattel—an interest that comprises, among other things, a right to possession.

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[12] Insofar as the acquisition of a lesser title is concerned, the rule is not confined to cases in which *B* takes possession of *A*'s chattel *without A*'s consent: see, e.g. *Sutton v Buck* (1810) 2 Taunt. 302; 127 E.R. 1094. It might be thought, however, that if *B* takes possession after being granted a proprietary interest in the chattel that includes a right to possession (e.g. a pledge), *B*'s possession does not give *B* an *additional* proprietary interest. It is not possible to examine this issue in this article or to consider more generally the scope of the rule.

[13] *Armory v Delamirie* (1722) 1 Strange 505; 93 E.R. 664; *Parker v British Airways Board* [1982] Q.B. 1004; [1982] 1 All E.R. 834; *Costello v Chief Constable of Derbyshire* [2001] EWCA Civ 381; [2001] 1 W.L.R. 1437; W.J. Swadling, "Property: General Principles" in A. Burrows (ed), *English Private Law*, 3rd edn (Oxford: Oxford University Press, 2013), para 4.422 There is some disagreement among scholars over how these cases relate to a series of cases that supports the proposition that a person who has possession of a chattel is to be presumed to be its owner. For further discussion, see Rostill, *Fundamentals of Property Law: Possession, Title and Relativity* (DPhil thesis, University of Oxford, 2016), Chs 3 and 5.

[14] *Young v Hichens* (1844) 6 Q.B. 606; 155 E.R. 228; F. Pollock and R.S. Wright, *An Essay on Possession in the Common Law* (Oxford: Clarendon Press, 1888), pp.20, 28–42.

[15] Pollock and Wright, *An Essay on Possession in the Common Law* (1888), pp.20, 28–42; *South Staffordshire Water Co v Sharman* [1896] 2 Q.B. 44 at 46–47 per Lord Russell of Killowen C.J.; *Parker v British Airways Board* [1982] Q.B. 1004 at 1019 per Eveleigh L.J. Cf. *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30; [2003] 1 A.C. 419 at [40] per Lord Browne-Wilkinson. For discussion, see: Hickey, *Property and the Law of Finders* (2010), pp.34–53.

Now, if "possession" is interpreted in line with the account of possession in the previous paragraph, it is correct to regard possession as a mode of acquiring a lesser title. However, while lesser titles can be acquired through possession, they can also be acquired in other ways. For example, if *B* has a lesser title, *B*, as we will see in Part IV, could transfer that title to *X* under a contract of sale without giving up possession of the chattel. If this were to occur, *X* would have a lesser title to the chattel; but *X* would not be in possession of the chattel. Indeed, *X* would have a lesser title without ever having been in possession of the chattel. Therefore, it is not correct to regard lesser titles as "possessory" in the sense identified by Interpretation 1.

One might claim that lesser titles are "possessory" because they *can* be acquired through possession, albeit that they can also be acquired in other ways. It is submitted, however, that this does not provide a sound basis for calling lesser titles "possessory titles" or "possessory rights". In fact, it would be misleading to use these terms to denominate lesser titles. This is for two main reasons. First, if we were to call lesser titles "possessory titles" or "possessory rights", it may well be inferred that the current holder of a certain lesser title, *X*, acquired her title by taking possession of the chattel; but *X* might not have actually acquired her title in this way. For, as we have seen, a person may acquire a lesser title under a sale. We could reserve the term "possessory title" for those titles that *are* vested in persons who acquired their titles by obtaining possession. But if we were to adopt this policy, it obviously would not be right to *equate* "lesser titles" with "possessory titles" or to designate *all* lesser titles as "possessory".

The second reason it would be misleading to call lesser titles "possessory titles" or "possessory rights" is that lesser titles are contrasted with best titles; and best titles, as well as lesser titles, can be acquired by obtaining possession. The title that a person, *B*, acquires by taking possession may be supreme, that is, the best title to the chattel; or it might be a lesser title, that is, one that is inferior to another. If, at the time *B* obtains possession, there is no pre-existing title with respect to the chattel, then *B*'s title will be the best title to the chattel. If, however, there is, with respect to the chattel, one or more titles in existence when *B* obtains possession, *B* will be bound by that (or those) pre-existing title(s) and *B* will acquire, not the best title, but a lesser title. Accordingly, best titles *and* lesser titles to chattels can be acquired by obtaining possession. *Pace* Goode and McKendrick, it is, therefore, misleading to designate lesser titles but not best titles as "possessory".

In sum, possession is *a* mode by which lesser titles are acquired, but lesser titles can be acquired in other ways; and, thus, lesser titles are not "possessory" in the sense described by Interpretation 1. Moreover, the fact that lesser titles can be acquired by obtaining possession does not provide a sound basis for calling lesser titles "possessory titles" or "possessory rights".

III. Possession and the Subsistence of Lesser Titles

This Part is concerned with whether lesser titles are "possessory" in the sense explicated by Interpretation 2. In other words, this Part is concerned with whether a lesser title subsists only for so long as the title-holder is in possession of the relevant chattel. A number of eminent scholars have endorsed the view that the subsistence of

a lesser title to a chattel is (in general) conditional on the title-holder being in possession of the chattel. For instance, Goode and McKendrick have maintained that "the holder of a purely possessory title loses his real right when he ceases to have possession";[16] "only an indefeasible title ... survives the loss of possession".[17] Similarly, Fox has argued that, subject to an important qualification, a "possessory title" lasts only so long as the possessor has possession.[18] The qualification is that a possessor has a good title as against a defendant whose title derives from the original wrongdoer.[19]

Some legal commentators have taken the opposite view: they have asserted that a person, *B*, acquires an interest by taking possession of a chattel; that the subsistence of this interest is not conditional on *B* remaining in possession; and that, whether *B* remains in possession or not, *B*'s interest will bind persons in general. Atiyah endorsed this view:

> "Possession itself, even wrongfully or feloniously acquired, confers a possessory title [i.e. a right to possession that binds persons generally]. This title avails against all later possessors even if they are not trespassers against the plaintiff."[20]

We can test the claim that *B*'s lesser title is possession-dependent in the way described by Fox by examining cases in which someone other than *B* has *lawfully* acquired possession and identifying whether *B*'s lesser title has survived her loss of possession. This Part, in order to apply this test, will consider two sets of cases. The first are cases in which the former possessor has *relinquished possession* to another. The second are cases in which a person has *lawfully taken* the chattel from a possessor and the taker's authority subsequently expires. *Armory v Delamirie*,[21] *Bridges v Hawkesworth*,[22] and *Hannah v Peel*[23] are examples of the first type of case. *Webb v Chief Constable of Merseyside Police*[24] and *Costello v Chief Constable of Derbyshire Constabulary*[25] are examples of the second type of case. The main conclusion of this Part is that these cases provide authority for the proposition that Atiyah's view is essentially correct. In other words, a possessor, *B*, acquires, by virtue of her possession, an interest in the chattel, which includes a right to possession that binds

[16] *Goode on Commercial Law*, edited by E. McKendrick, (2016), para 2.07. It is maintained (at para 2.40) that possession is "control, directly or through another, either of the asset itself or of some larger object in which it is contained or of land or buildings on or beneath which it is situated, with the intention of asserting such control against others, whether temporarily or permanently."
[17] *Goode on Commercial Law*, edited by E. McKendrick, (2016), para 2.22.
[18] D. Fox, "Relativity of Title at Law and in Equity" (2006) 65 C.L.J. 330 at 344–349.
[19] Fox, "Relativity of Title at Law and in Equity" (2006) 65 C.L.J. 330 at 345–346. Cf. J. Gordley and U. Mattei, "Protecting Possession" (1996) 44 American J. Comparative L. 293 at 327: "In no case of which we are aware … has an English court allowed a prior possessor, on the strength of his prior possession alone, to recover against a later possessor who neither dispossessed him nor claims the land through someone who did."
[20] P. Atiyah, "A Re-Examination of the *Jus Tertii* in Conversion" (1955) 18 M.L.R. 97 at 107.
[21] (1722) 1 Strange 505; 93 E.R. 664.
[22] (1851) 15 Jur 1079; (1851) 21 L.J.Q.B. 75.
[23] [1945] K.B. 509; [1945] 2 All E.R. 288.
[24] [2000] Q.B. 427; [2000] 1 All E.R. 209.
[25] [2001] EWCA Civ 381; [2001] 1 W.L.R. 1437.

persons generally; and, whether this interest is the best such interest or merely inferior, it is not possession-dependent. If and when *B* ceases to be in possession, *B* will not lose her interest (other things being equal), nor will her interest bind only persons who wrongfully interfered with the chattel when *B* was in possession and their successors in title. On the contrary, *B*'s interest will continue to bind persons in general. Accordingly, it is a mistake to regard lesser titles as "possessory" in the sense described by Interpretation 2.

(a) Delivery by possessor

In the well-known case of *Armory v Delamirie*[26] a chimneysweep's boy found a jewel and took it to the defendant goldsmith's shop in order to find out what it was. He handed it to an apprentice who took out the stones. The boy insisted on having the jewel back again and the apprentice delivered to the boy the socket without the stones. The boy later brought an action in trover against the master. Pratt C.J. ruled that "the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner and consequently may maintain trover."[27] The basis of this decision has been much debated.[28] The important issue, for present purposes, is whether the continued existence of the boy's "property" was dependent upon him remaining in possession. It is submitted that it was not, for, as Douglas has pointed out,[29] the boy clearly did not have physical control of the jewel at the time of the wrong. Indeed, his claim depended upon—and the violation of his right was constituted by—the fact that the goldsmith refused to relinquish physical control of the stones. In other words, the conversion, the wrongful act, did not take place until after the boy had given up his possession.

Atiyah, when defending the view that the possessor's title avails against all later possessors, relied upon two cases: *Bridges v Hawesworth*;[30] and *Hannah v Peel*.[31] In *Bridges v Hawkesworth* the claimant noticed and picked up on the floor of the defendant's shop a parcel that contained banknotes. The claimant handed the notes over to the defendant and told the defendant to keep the notes until the "owner" claimed them. After three years had passed without anyone claiming the notes, the claimant asked the defendant to return them to him. When the defendant refused, the claimant brought an action against him. At trial the judge decided in favour of the defendant. The Divisional Court allowed the claimant's appeal. Patteson J., delivering the judgment of the court, said:

> "[I]f [the claimant] once had the right, the case finds that he did not intend by delivering the notes to the defendant, to waive the title (if any) which he had

[26] (1722) 1 Strange 505; 93 E.R. 664.
[27] (1722) 1 Strange 505; 93 E.R. 664 (emphasis added).
[28] See, for example, R. Hickey, "*Armory v Delamirie* (1722): Possession, Obligation, and the Evolution of Relative Title to Goods" in S. Douglas, R. Hickey and E. Waring (eds), *Landmark Cases in Property Law* (Oxford: Hart 2015).
[29] S. Douglas, *Liability for Wrongful Interferences with Chattels* (Oxford: Hart, 2011), p.31.
[30] (1851) 15 Jur. 1079; 21 L.J.Q.B. 75.
[31] [1945] K.B. 509.

to them, but they were handed to the defendant merely for the purpose of delivering them to the owner, should he appear."[32]

The defendant did not contend that the claimant, by delivering the goods to him, had parted with possession and thereby lost his title; he contended that, since the notes were found in his shop, he had a better title than the claimant. The Court rejected this submission and concluded that there were "no circumstances to take this case out of the general rule of law that the finder of a lost article is entitled to it as against all persons, except the real owner."[33] On Atiyah's view, this result is easily explained. The claimant acquired a title to the notes when he took possession of them. The claimant was not divested of that title when he parted with possession by delivering the notes to the defendant. The defendant did not have a better title to the notes than the claimant, so the defendant was bound by the claimant's title. Therefore, the claimant was entitled to have the notes returned to him and the defendant's failure to return them was tortious.

Now, it could be argued that *Armory* and *Bridges* do not support the contention that a possessor's title is not possession-dependent because in each case the claimant had possession at the time of the tort. However, in both cases the claimant did not have exclusive physical control of the chattel at the relevant time. Alternatively, it might be argued that, due to the rule that a bailee is estopped from denying the title of his bailor,[34] the apprentice in *Armory* and the shopkeeper in *Bridges* could not deny that the claimants had a good title.[35] The problem with this argument, however, is nothing in the reports supports the claim that the decisions were based on an estoppel analysis.

Hannah v Peel also supports the claim that the subsistence of a lesser title is not conditional on the title-holder remaining in possession.[36] The defendant, Peel, had acquired a freehold estate in a house that he never occupied. The house was requisitioned, and in August 1940, Hannah, the claimant, was stationed at the house and, when he was there, he found a brooch in the crevice of a window-frame. He took it and later handed it to the police. In August 1942, the owner not having been found, the police handed the brooch to the defendant. The claimant demanded the return of the brooch from the defendant, but it was not returned. So the claimant commenced proceedings against the defendant, claiming the return of the brooch or its value, and damages for detention. The claimant submitted that, since he was the finder of the brooch, he was entitled to its possession as against all persons other than the true owner, who was unknown. The defendant submitted that he was entitled to possess the brooch because, at the time it was found, it was on his land. Birkett J. rejected the defendant's argument. His Lordship held that the claimant was entitled to possession and awarded him damages of £66. There was no discussion of whether the claimant

[32] (1851) 15 Jur. 1079 at 1082.
[33] (1851) 15 Jur. 1079 at 1082.
[34] *Biddle v Bond* (1865) 6 B. & S. 225; 122 E.R. 1179. For a detailed account of the rule, including the exceptions to the rule, see: *Palmer on Bailment*, edited by N. Palmer, 3rd edn (London: Sweet & Maxwell, 2009), paras 4 –026–4–063.
[35] See N. Palmer "Bad Apples and Blighted Windfalls: Finding, Bailment and the Fruits of Crime" in F. Meisel and P.J. Cook (eds), *Property and Protection* (Oxford: Hart, 2000), p.12.
[36] [1945] K.B. 509.

was in possession at the time of the defendant's tort. It is clear, however, that he was not. The claimant had handed the brooch to the police and the police delivered it to the defendant. The defendant failed to return the brooch when the claimant demanded it. The failure to return the brooch was tortious and, at this time, the claimant was not in possession. Thus, *Hannah v Peel* is a case in which a former possessor of goods was able to successfully bring an action against the current possessor, even though the claimant was not in possession at the time of the defendant's tort. Was the claimant's title the best title? Probably not, but the important point is that it did not matter whether he had the best title or a lesser title. The claimant clearly had a title, which he had acquired when he took possession; and, since the defendant failed to establish that he had a better title than the claimant, the claimant's title was good *relative to* the defendant, i.e. the claimant's interest bound the defendant. Hence, *Hannah v Peel* (and the other cases discussed in this Part) illustrate the doctrine of relative title, which provides that, generally speaking, it suffices that a claimant has a good title as against the defendant(s), notwithstanding that there is some third party who has a better title than the claimant.[37] The case also illustrates that the subsistence of a lesser title is not dependent upon the title-holder being in possession. For, if that were so, the claimant ought to have been required to establish that he had the best title to the brooch. The fact that he did not need to do this indicates that, insofar as his claim against the defendant was concerned, it did not matter whether he had the best title or a lesser title; that lesser titles, like best titles, are not possession-dependent; and that, when the claimant lost possession, his title continued to bind persons in general.

(b) Lawful seizures

The argument advanced in this Part is also supported by a number of cases in which the police lawfully seized chattels from a possessor. In *Webb v Chief Constable of Merseyside Police*,[38] for instance, the police had lawfully seized £36,000 in cash from one Roy Webb on suspicion that it constituted the proceeds of drug trafficking. Webb was not prosecuted to conviction for drug trafficking offences and he subsequently demanded the return of the cash or an equivalent sum. When the police refused, Webb brought an action in conversion. The Chief Constable argued that, as the money was the proceeds of drug trafficking, Webb was not the true owner of the money and, therefore, he was not entitled to it. The Court of Appeal rejected this argument. May L.J. regarded the Chief Constable's submission that the police were entitled to retain the money until the true owner was found as "fanciful".[39] His Lordship asserted that, where goods are in a person's possession, the possessor's "right to possess may be suspended or temporarily divested if the goods are seized by the police under lawful

[37] This rule is now qualified by section 8(1) of the Torts (Interference with Goods) Act 1977, which provides that a defendant to an action for "wrongful interference [with goods]" is "entitled to show, in accordance with rules of court, that a third party has a better right than the plaintiff as respects all or any part of the interest claimed by the plaintiff, or in right of which he sues, and any rule of law … to the contrary is abolished." In order for a defendant to "show" that a third party has a better right than the claimant, the third party must be identified: *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381; [2001] 1 W.L.R. 1437 at [15] per Lightman J.
[38] [2000] Q.B. 427.
[39] [2000] Q.B. 427 at 448.

authority";[40] but, once the police's right of retention comes to an end, "the person from whom they were compulsory taken is entitled to possession."[41] Pill L.J. agreed that the Chief Constable had "no continuing right to retain the money in the face of a better claim by Roy Webb to possess it."[42] Since the police obtained possession of the cash when it was lawfully seized, Webb's title was not conditional on Webb being in possession.

The *Webb* case was considered, and relied upon, by the Court of Appeal in *Costello v Chief Constable of Derbyshire Constabulary*.[43] Costello sued the police for conversion of a car. The police had seized the car from Costello when he was in possession of it. The police were entitled under section 22 of the Police and Criminal Evidence Act 1984 to seize and retain the car for certain purposes. The question was whether Costello was entitled to possess the car once those statutory purposes were exhausted. The police submitted: (1) that the car was to the knowledge of the claimant stolen; and (2) that, on that ground, and though the true owner was not known, they (the police) were entitled to refuse to return the car to Costello. At first instance, Judge Styler accepted both submissions. In the Court of Appeal, however, Lightman J., in a judgment with which Robert Walker and Keene L.JJ. agreed, maintained that, while Judge Styler was fully entitled to reach the conclusion that the car was to the knowledge of the claimant stolen,[44] Costello was entitled to possess the car nonetheless. Lightman J. opined:

> "The fact of possession of a chattel of itself gives to the possessor a possessory title and the possessor is entitled to rely on such title without reference to the circumstances in which such possession was obtained".[45]

While the police's statutory power to seize goods and retain them for as long as is necessary "places in suspension or temporarily divests all existing rights to possession over the period of the detention", it "does not otherwise affect those rights or vest in the police any permanent entitlement to retain the property".[46] As Costello was in possession of the car when it was seized by the police, he had a "possessory title" to it. Accordingly, he was entitled to the return of the car when the statutory purposes under which the police retained it were exhausted. Lightman J. concluded that Costello was entitled to an order for the delivery up of the car and for damages for the wrongful detention.[47]

Costello, like Webb, was not in possession when he asked the police to return the chattel. Indeed, his claim, like Webb's, was based on the fact that the police had

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[40] [2000] Q.B. 427 at 448.
[41] [2000] Q.B. 427 at 448.
[42] [2000] Q.B. 427 at 449. Hale L.J. agreed with the judgments of May and Pill L.JJ.
[43] [2001] EWCA Civ 381; [2001] 1 W.L.R. 1437. For an insightful discussion of the case, see J. Getzler, "Unclean Hands and the Doctrine of Jus Tertii" (2001) 117 L.Q.R. 565.
[44] [2001] EWCA Civ 381; [2001] 1 W.L.R. 1437 at [8].
[45] [2001] EWCA Civ 381; [2001] 1 W.L.R. 1437 at [14]. The assertion that a possessor is entitled to rely on his or her title without reference to the circumstances in which such possession was obtained must be reconsidered in light of the decision of the Supreme Court in *Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467.
[46] [2001] EWCA Civ 381; [2001] 1 W.L.R. 1437 at [14].
[47] [2001] EWCA Civ 381; [2001] 1 W.L.R. 1437 at [35].

wrongly refused—and were wrongly refusing to—return the car. Nonetheless, Costello was entitled to possession when the police's right to retain the car came to an end. Hence, *Costello* and *Webb* are cases in which the claimant, by virtue of his former possession, had an interest in chattels that were in the possession of the police. Furthermore, in *Costello* the goods were stolen. Therefore, an unknown person—the victim of the theft—had a better title to the car than Costello: he had merely a lesser title. Nevertheless, his title survived his loss of possession.

According to Fox, a person who has a lesser title can enforce it "only against third parties who wrongfully dispossess him of the chattel or who derive title through such a person."[48] With respect, this cannot be right. In *Costello*, as in *Webb*, the claimant was not wrongfully dispossessed: the seizure of the goods was *lawful*. And, as aforesaid, Costello lost possession of the goods when the police seized them. In each case, the police's wrong consisted in a refusal to return the goods when its right to retain them had expired—at a time, that is, when the police, and not the claimant, had possession of the goods. Therefore, the police did *not* wrongfully dispossess Costello; they lawfully divested him of possession. The wrong came later, when, after the police's right to retain the car expired, they refused to return the car in violation of Costello's right to possession.

The foregoing analysis is in line with Park J.'s interpretation of *Webb* and *Costello* in *Gough v Chief Constable of West Midlands Police*.[49] Park J., in a judgment with which Carnwath and Potter L.JJ. agreed, maintained that *Webb* and *Costello* had established that "if the police do not have a continuing statutory power or right to retain the property, the *former possessor's* right of possession is superior to theirs".[50] In *Gough* it was accepted that, when the police seized certain car parts from the claimant on suspicion that they were stolen, the claimant ceased to be in possession.[51] Nevertheless, the Court decided that, when the police's right to retain the car parts expired, the claimant was entitled to possession.

The authorities discussed hitherto support the contention that the subsistence of a lesser title is not dependent upon the title-holder retaining possession. Are there any cases that point in the opposite direction? It might be thought that the decision in *Buckley v Gross*[52] provides authority for the view that the subsistence of a lesser title is conditional on the title-holder remaining in possession.[53] Buckley had purchased some tallow from a purchaser who had taken it after it had flowed into the River Thames. The police took the tallow and charged Buckley before a magistrate. The magistrate dismissed the charge against him, but ordered the tallow to be detained under section 29 of the Metropolitan Police Courts Act 1839. Section 29 of that Act provided that, if "the owner cannot be ascertained", the magistrate could lawfully

[48] Fox, "Relativity of Title at Law and in Equity" (2006) 65 C.L.J. 330 at 348.
[49] [2004] EWCA Civ 206; [2004] Police L.R. 164. Cf. *R. v D'Eyncourt and Ryan* (1888) L.R. 21 Q.B.D. 109 at 125 per Wills J: "As to the [£100] now in the hands of the police authorities, it seems clear, upon the facts stated to us, that it ought to be given up to Mary Ryan; and it is clear that the *possession she once had* would give her the right to recover the money from any one who could not shew a better title" (emphasis added).
[50] [2004] EWCA Civ 206; [2004] Police L.R. 164 at [15] (emphasis added).
[51] [2004] EWCA Civ 206; [2004] Police L.R. 164 at [6], [9].
[52] (1863) 3 B. & S. 566; 122 E.R. 213; (1863) 32 L.J.Q.B. (N.S.) 129; (1863) 9 Jur. (N.S.) 986.
[53] Cf. Fox, "Relativity of Title at Law and in Equity" (2006) 65 C.L.J. 330 at 346–348.

"make such order with respect to such goods or money as to such magistrate shall seem meet". The police detained the tallow, but it became a nuisance and the police sold it to the defendants. Buckley demanded the tallow and, when the defendants refused to deliver it to him, he brought an action in conversion. This action failed: it was held that Buckley had no property at the time of the alleged conversion. According to Best and Smith's Report,[54] Crompton J. maintained that "[t]his action must be founded on possession; here the possession was divested out of the plaintiff."[55] On one interpretation, Crompton J. maintained the rights that are acquired by virtue of taking possession are lost if and when the possessor loses possession. It should be recalled, however, that the magistrate had made an order under s.29 of the 1839 Act. For Cockburn C.J. this was crucial: Buckley's title was "taken out of him by virtue of [the magistrate's] enactment."[56] Thus, the Chief Justice maintained that Buckley's title was extinguished, not by virtue of the fact that he had lost possession, but by virtue of the magistrate's order.

Cockburn C.J.'s analysis is supported by a number of later cases, including *Betts v Metropolitan Police District Receiver*[57] and *Irving v National Provincial Bank Ltd*.[58] In *Betts* the police had taken from the claimant's house certain cloth, which they believed to have been stolen from a firm of carriers, Carter Paterson. The police delivered the cloth to Carter Paterson, although no order had been made by a magistrate under section 1 of the Police (Property) Act 1897, which is materially the same as section 29 of the 1839 Act. The claimant brought an action against Carter Paterson (as well as the Receiver) claiming damages in detinue and conversion and du Parcq J. held that, as the defendants had failed to establish that the cloth in question was stolen from Carter Paterson, and as the delivery had been made *without any order under the Act*, the claimant was entitled to succeed in his action against Carter Paterson.

In *Irving v National Provincial Bank Ltd*,[59] the Court of Appeal adopted and applied the reasoning of Cockburn C.J. in *Buckley v Goss*. In *Irving*, a magistrate made an order under s.1 of the Police (Property) Act 1897 for the delivery of money to the defendant. The police had taken the money from the claimant when he was arrested on suspicion of breaking and entering. He later brought an action against the defendant bank, arguing that his former possession had given him a title to the money that he could assert against it. The claimant's action failed. The Court of Appeal held that the effect of the order under s.1 of the 1897 Act was to divest the claimant of any title he might have had by virtue of his possession. Holroyd Pearce L.J. said that the Act "could have preserved the prior rights of possession in the former possessor. But

[54] It should be noted that "the variations in the reports of the judgments in [*Buckley v Gross*] raise questions as to the reliability of various reports": *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381; [2001] 1 W.L.R. 1437 at [22] per Lightman J.
[55] (1863) 3 B. & S. 566 at 573; 122 E.R. 213 at 216. Cf. (1863) 32 L.J.Q.B. (N.S.) 129 at 131; (1863) 9 Jur. (N.S.) 986 at 987.
[56] (1863) 3 B. & S. 566 at 572; 122 ER 213 at 215 (emphasis added). Cf. (1863) 32 L.J.Q.B. (N.S.) 129 at 131; (1863) 9 Jur. (N.S.) 986 at 987.
[57] [1932] 2 K.B. 595.
[58] [1962] 2 Q.B. 73; [1962] 1 All E.R. 157.
[59] [1962] 2 Q.B. 73.

it has not done so".[60] *Irving* not only supports the view that, in *Buckley v Gross*, the claimant's title was extinguished, not by virtue of the fact that Buckley had lost possession of the tallow, but by virtue of the magistrate's order; it also supports the more general argument advanced in this Part. For, if a loss of possession itself extinguishes a lesser title, then their Lordship's reasoning would have been superfluous: it would not have been necessary to determine whether the magistrate's order extinguished the claimant's rights. Their Lordships apparently thought that the claimant would *not* have lost his title had the order not been made, notwithstanding the fact that the claimant had lost possession of the money. It was the magistrate's order, not the claimant's loss of possession, that extinguished the claimant's title.

One might think that the rules that were applied in *Webb*, *Costello*, and *Gough* regarding the subsistence of titles acquired by possession are confined to cases in which the police have lawfully seized goods from a possessor.[61] When, however, one looks at these cases alongside *Armory v Delamirie*, *Bridges v Hawkesworth* and *Hannah v Peel*, it becomes apparent that they really involved the application of general rules to a particular context. These cases, taken together, make clear that the interest that is acquired by taking possession, even if it is a lesser title rather than a best title, binds persons generally; and its subsistence is not conditional on the title-holder being in possession. Therefore, lesser titles are not "possessory" in the sense described by Interpretation 2.

IV. POSSESSION AND THE ALIENATION OF LESSER TITLES

According to Interpretation 3, when it is said that lesser titles are "possessory" it is meant that lesser titles cannot be alienated without the transferor delivering the chattel to the transferee—without, in other words, the transferor losing, and the transferee acquiring, possession. It is argued in this Part that lesser titles are alienable; that lesser titles can be transferred without the transferee acquiring possession; and that, therefore, lesser titles are not "possessory" in the sense described by Interpretation 3. We will focus on the law of sale because the case law and legislation concerning the sale of goods make it clear that a title that is acquired by possession—whether or not it is the best title—can be alienated by way of sale

Section 2 of the Sale of Goods Act 1979 defines three of the law of sale's key terms: "contract of sale", "sale", and "agreement to sell". A "contract of sale" is "a contract by which the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price."[62] A "contract of sale" is either a "sale" or an "agreement to sell": it is a "sale" if, under the contract of sale, "the property in the goods is transferred from the seller to the buyer";[63] it is an "agreement to sell" if, under the contract of sale, "the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled".[64] Where

[60] [1962] 2 Q.B. 73 at 79.
[61] Cf. *Palmer on Bailment*, edited by N. Palmer, 3rd edn (London: Sweet & Maxwell, 2009), para 4-149.
[62] Sale of Goods Act 1979 (SGA 1979) s.2(1). Cf. s.5 of the Consumer Rights Act 2015.
[63] SGA 1979 s.2(4).
[64] SGA 1979 s.2(5).

a contract is an "agreement to sell" it "becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."[65] Thus, a "sale" involves a contract and a transfer of "property" in goods.[66]

What is the meaning of the term "property" in these provisions? The Act defines "property" as "the general property in goods, and not merely a special property."[67] One view is that "the general property in goods" means "the true ownership of goods" or "the best title to goods". It has been thought that Atkin L.J. adopted this view in *Rowland v Divall*;[68] for his Lordship maintained that "[t]here can be no sale at all of goods which the seller has no right to sell."[69]

Battersby and Preston have advanced a very convincing argument against that view;[70] and this argument has been endorsed, and lucidly described, by Goode and McKendrick.[71] Accordingly, it will suffice here to briefly outline three key points. In the first place, if "general property" means "best title" then there could never be a breach of the implied undertaking as to title in section 12 of the Act. The implied term, in the case of a "sale", is that the seller has "a right to sell the goods". If every "sale" necessarily involves a transfer of the best title to the goods, "section 12 becomes redundant."[72] Secondly, section 55 provides that the parties may "negative or vary" any "right, duty or liability" arising under a "contract of sale" of goods by implication of law; and the view that a sale necessarily involves the transfer of a best title "requires us to read into section 55 an exception in favour of section 12."[73] Thirdly, sections 24 and 25 of the Act enable a person who does not have the best title, by delivering goods "under any sale", to pass a title that is better than his; and these provisions would "make no sense" if there could not be a sale of a lesser title.[74]

Three conclusions can be drawn. First, the term "property" in section 2 of the Sale of Goods Act does not mean "the best title to the goods". Secondly, lesser titles

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[65] SGA 1979 s.2(6).

[66] *Benjamin's Sale of Goods*, edited by M.G. Bridge, 9th edn incorporating the Second Supplement (London: Sweet & Maxwell, 2016), para 1-027; *Colley v Overseas Exporters* [1921] 3 K.B. 302 at 310; (1921) 90 L.J.Q.B. 1301 at 1305 per McCardie J.

[67] SGA 1979 s.61(1). Cf. s.4(1) of the Consumer Rights Act 2015.

[68] [1923] 2 K.B. 500; [1923] All E.R. Rep 270. See Battersby and Preston, "The Concepts of 'Property', 'Title' and 'Owner' Used in the Sale of Goods Act 1893" (1972) 35 M.L.R. 268 at 272–274.

[69] [1923] 2 K.B. 500 at 506. But see D. Tiplady, "When is a Seller not a Seller?" (1988) 51 M.L.R. 240 at 243: "Atkin L.J., while addressing himself to the basic purpose of a contract of sale, was simply indicating that, generally speaking, this purpose cannot be achieved if the seller is not entitled to pass property. He did not suggest—indeed it would have been preposterous to have done so—that an agreement in which this right or power is lacking could not be a sale. If that conclusion had followed, there would have been no room for discussion regarding section 11 and section 12 of the Sale of Goods Act, around which the judgments in *Rowland v Divall* in fact turned."

[70] Battersby and Preston, "The Concepts of 'Property', 'Title' and 'Owner' Used in the Sale of Goods Act 1893" (1972) 35 M.L.R. 268.

[71] *Goode on Commercial Law*, edited by E. McKendrick, (2016), paras 7.27–7.28.

[72] Battersby and Preston, "The Concepts of 'Property', 'Title' and 'Owner' Used in the Sale of Goods Act 1893" (1972) 35 M.L.R. 268 at 274.

[73] Battersby and Preston, "The Concepts of 'Property', 'Title' and 'Owner' Used in the Sale of Goods Act 1893" (1972) 35 M.L.R. 268 at 274.

[74] *Goode on Commercial Law*, edited by E. McKendrick, (2016), para 7.27.

count as "general property" for the purposes of the Sale of Goods Act. Thirdly, a lesser title can be transferred by way of sale.

These conclusions are supported by the case law. In *National Employers' Mutual General Insurance Association Ltd v Jones*,[75] for instance, the House of Lords implicitly accepted that, where a person acquires a title to a chattel by possession, the title can be transferred by way of sale even if the title is not the best title to the chattel. In *Jones* a car had been stolen from one Hopkins and the thief purported to sell the car (or, more precisely, his interest in the car) to one Lacey. Thereafter, a number of (purported) sales occurred. The car was eventually purchased by a company, A. Ltd. This company sold it to another company, M. Ltd, which in turn sold it to the defendant. Hopkins' insurers, who had bought out her interest, asked the defendant to return the car and, when the defendant refused to do so, they brought an action against him, claiming delivery up of the car or, alternatively, damages. The defendant, relying on section 9 of the Factors Act 1889 and section 25(1) of the Sale of Goods Act 1979, submitted that he had acquired a good title to the car. Section 25(1) of the 1979 Act, which is materially the same as section 9 of the 1889 Act, provides that, where a person has bought or agreed to buy goods and obtains, with the consent of the seller, possession of the goods, "the delivery or transfer by that person ... of the goods ... under any sale, pledge or other disposition thereof" to a bona fide third party "shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods with the consent of the owner." The defendant submitted that, as M. Ltd had purchased the car from A. Ltd and M. Ltd had obtained, with the consent of A. Ltd, possession of the car, the delivery of the car under a sale to the defendant, who was in good faith, had the same effect *as if* M. Ltd were a mercantile agent in possession of the goods with the consent of "the owner", i.e. Ms Hopkins; and, therefore, the defendant took a good title to the car as against her and her insurers. The House of Lords rejected this analysis and, in particular, the submission that term "owner" in section 9 of the 1889 Act and section 25(1) of the 1979 Act meant the "true owner". Rather, the effect of these provisions was to divest the title of the person who had entrusted the factor or agent with the goods or documents. Therefore, where a thief, or a purchaser from a thief, entrusted stolen goods to a factor or agent, the provisions did not enable a person who purchased the goods from the factor or agent to override the title of the person from whom the goods had been stolen.

The reasoning of the House of Lords in *Jones* supports the three conclusions outlined above. For, if the thief and his successors in title did not have "property" in the goods, section 9 of the 1989 Act and section 25(1) of the 1979 Act would *not have applied at all*. As Battersby has explained,

> "[These provisions] can be invoked only where the subsequent transaction is a sale, i.e. brings about the transfer of the seller's property in the goods to the buyer. If the seller has no property at all, the transaction cannot be a sale".[76]

[75] [1990] 1 A.C. 24; [1988] 2 All E.R. 425.
[76] G. Battersby, "Acquiring Title by Theft" (2002) 65 M.L.R. 603 at 605.

The House of Lords, then, implicitly accepted that the thief had acquired "property" in the car and that this interest was ultimately transferred to the defendant.[77] The thief must have acquired that interest upon taking possession. Thus, the decision of the House of Lords supports the view that the interest that is acquired by obtaining possession of a chattel—whether or not it is the best title—counts as "property" for the purposes of section 2 of the Sale of Goods Act and can be transferred by way of sale. Accordingly, a lesser title to a chattel can be alienated without the transferor delivering the chattel to the transferee. Lesser titles are not, therefore, "possessory" in the sense described by Interpretation 3.

V. LESSER TITLES AND THE RIGHT TO POSSESSION

This Part considers whether a lesser title is "possessory" in the sense described by Interpretation 4, i.e. whether a lesser title consists solely of a right to possession. This interpretation raises two questions: (1) does a lesser title comprise a right to possession? (2) If so, does it comprise *only* a right to possession? It is argued in this Part that, while lesser titles comprise a right to possession, they do not consist solely of a right to possession and, therefore, lesser titles are not "possessory" in the sense expounded by Interpretation 4.

It is necessary to begin by providing a working definition of a "right to possession". If a person, *B*, has a right to possession with respect to a certain chattel, *B* has, if *B* is in possession of the chattel, a right not to be dispossessed of the chattel; and, if *B* is not in possession, *B* has a right to obtain possession. A right not to be dispossessed is a right not to be (non-consensually) deprived of possession. So, if *B* has a right not to be dispossessed as against *X*, *Y*, and *Z*, then *X*, *Y*, and *Z* owe *B* a duty not to deprive *B* of possession of the chattel. Where *B* is not in possession of a chattel but has a right to obtain possession of it as against the current possessor, *X*, then *X* owes *B* a duty to surrender possession to *B* or *B* has a power to place *X* under such a duty.

Where *B* acquires a title to a chattel by obtaining possession of it, *B*'s title, whether it is the best title or a lesser title, comprises, a right to possession (as defined above). While *B* is in possession, she has a right not to be dispossessed as against persons in general: a dispossession will, generally speaking, amount to a trespass (unless the dispossessor has a better right to possession).[78] Thus, persons in general owe *B* a duty not to deprive her of possession. Furthermore, if *B* ceases to be in possession, then, provided *B* has not parted with her right to (immediate) possession,[79] *B* will have a right to obtain possession from the current possessor (unless the current possessor has a better right to possession). If *B* has not parted with her right to (immediate) possession, *B* can, by demanding the return of the chattel, place the

[77] Cf. *National Employers' Mutual General Insurance Association Ltd v Jones* [1990] 1 A.C. 24 at 50 per Sir Denys Buckley.

[78] *Clerk & Lindsell on Torts*, edited by M. Jones, 21st edn incorporating the Second Supplement (London: Sweet & Maxwell, 2016), paras 17-131–17-133. The orthodox view is that the interference must be "direct". But this "directness" requirement has recently been doubted: Douglas, *Liability for Wrongful Interferences with Chattels* (2011), pp.107–110.

[79] *B* would cease to have a right to immediate possession if, for instance, *B* were to create a pledge in favour of *C*: *Halliday v Holgate* (1868) L.R. 3 Ex. 299; (1868) 18 L.T. 656.

current possessor, *X*, under a duty to surrender possession to her; a refusal to give up possession (without lawful justification) will be a conversion.[80]

Thus, a lesser title comprises a right to possession. It does not, however, consist solely of a right to possession. To establish this, we will consider in greater detail the protection afforded to lesser titles by the torts of trespass and conversion. The title that is acquired by possession (whether or not it is the best title) is protected by the tort of trespass.[81] The protection conferred by the tort of trespass includes protection against interferences with a chattel that do not divest the title-holder of possession. Accordingly, a person may tortiously interfere with the title-holder's chattel without depriving the title-holder of possession and, thus, without violating any duty not to dispossess. This means that the title-holder's interest does not consist solely of a right to possession. For example, if *B* had obtained possession of a car and thereby acquired a title to it, and if *X* then intentionally (and without lawful justification) scratched the car, *X* would commit trespass as against *B*,[82] and *B* would be able to sue *X* and recover damages. But, of course, *X*, by so acting, has not deprived *B* of possession. So, while such an act would violate *B*'s rights, it would not violate *B*'s right to possession. Hence, the title that *B* acquired when he obtained possession of the car does not consist solely of a right to possession.

B's title, whether it is the best title or a lesser title, is also protected by the tort of conversion.[83] A person may convert *B*'s goods without dispossessing *B*. This has long been the case, but it was put beyond doubt by the House of Lords in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 & 5)*.[84] In that case the Iraqi Government directed the defendant to fly ten of the claimant's aircraft to Iraq. On 17 September 1990, the Revolutionary Command Council of Iraq adopted Resolution 369, which purported to dissolve the claimant and transfer the claimant's assets to the defendant. Thereafter, the defendant incorporated the aircraft into its own fleet and used them for its own flights. The claimant brought proceedings against the Republic of Iraq and the defendant, claiming the return of its aircraft or payment of their value and damages. The House of Lords was required to consider, inter alia, whether the defendant's acts

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[80] *Howard E Perry & Co Ltd v British Railways Board* [1980] 1 W.L.R. 1375; [1980] 2 All E.R. 579; *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381; [2001] 1 W.L.R. 1437. But the title-holder, *B*, does not have a right to have the chattel delivered to her: *Capital Finance Co Ltd v Bray* [1964] 1 W.L.R. 323; [1964] 1 All E.R. 603.

[81] Scholars disagree about whether or not a person who, at the time of an alleged trespass, has a right to possession but not possession, is able to successfully bring an action in trespass. A common view is that possession is necessary subject to certain exceptions: see, e.g., *Clerk & Lindsell on Torts*, edited by M. Jones, (2016), para 17-137. However, the better view is that a person who has a right to possession, but not possession, is protected by the law of trespass: Douglas, *Liability for Wrongful Interferences with Chattels* (2011), pp.31–33. In *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35; [2011] 1 A.C. 380 at [29]–[31], Lord Hope (with whom, on this issue, Lord Walker, Lord Brown, Lord Collins and Lord Clarke agreed) maintained that Bocardo, which, at the relevant time, had a right to possession but not possession, was entitled to succeed in trespass. Unfortunately, Lord Hope muddied the waters by invoking a fiction: his Lordship asserted that, as Bocardo had a right to possession, Bocardo should be deemed to be in possession.

[82] In *Fouldes v Willoughby* (1841) 8 M. & W. 540 at 549; 151 E.R. 1153 at 1157 Alderson B. said: "[s]cratching the panel of a carriage would be a trespass". See also: *Clerk & Lindsell on Torts*, edited by M. Jones, (2016), para 17-131.

[83] *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381; [2001] 1 W.L.R. 1437.

[84] [2002] UKHL 19; [2002] 2 A.C. 883.

were such as to be tortious in English law. The claimant submitted that the defendant's acts amounted to a conversion of the aircraft.[85] The defendant denied this and submitted that it could not have committed conversion unless it had deprived the claimant of the use and possession of the thing; and none of the defendant's acts had deprived the claimant of the use or possession of the aircraft.[86] In particular, the defendant did not take the aircraft from the claimant; the government of Iraq had taken the aircraft from the claimant in exercise of its sovereign authority. The House of Lords rejected these submissions. Lord Nicholls maintained that the defendant's argument failed "to appreciate what is meant in this context by 'depriving' the owner of possession".[87] This, said his Lordship, does not mean "that the wrongdoer must himself actually take the goods from the possession of the owner."[88] For the purposes of conversion, "an owner is equally deprived of possession when he is excluded from possession, or possession is withheld from him by the wrongdoer."[89] On the facts, the defendant was in possession and control of the ten aircraft on and after 17 September 1990. And the defendant believed the ten aircraft were its property and acted accordingly:

> "It intended to keep the goods as its own. It treated them as its own. It made such use of them as it could in the prevailing circumstances … In so conducting itself [the defendant] was asserting rights inconsistent with [the claimant's] rights as owner."[90]

Kuwait Airways is a case in which the claimant had already lost possession of a chattel before the defendant tortiously interfered with the chattel; it was thus a case in which the defendant's wrong did not consist in dispossessing the claimant. As Lord Nicholls explained, in the context of conversion, the central feature of a "deprivation" is not divestment but exclusion;[91] and a claimant may be excluded without the wrongdoer depriving the claimant of possession and without the wrongdoer obtaining possession. Hence, one might convert another's goods without divesting that other of possession or obtaining possession oneself.[92] Therefore, a person may commit conversion without violating a right to possession.

In conclusion, a lesser title to a chattel does not consist solely of a "right to possession" (as defined above). It comprises what may be called a right to exclude or a right to non-interference. Persons in general owe the holder of a title (whether or not it is the best) a duty not to interfere with the chattel.[93] Of course, one may adopt a broader definition of a "right to possession". One could say, for instance, that a "right

[85] [2002] UKHL 19; [2002] 2 A.C. 883 at 1071–1072.
[86] [2002] UKHL 19; [2002] 2 A.C. 883 at 1068.
[87] [2002] UKHL 19; [2002] 2 A.C. 883 at [40].
[88] [2002] UKHL 19; [2002] 2 A.C. 883 at [40].
[89] [2002] UKHL 19; [2002] 2 A.C. 883 at [40].
[90] [2002] UKHL 19; [2002] 2 A.C. 883 at [43].
[91] Cf. Douglas, *Liability for Wrongful Interferences with Chattels* (2011), pp.74–76.
[92] *Oakley v Lyster* [1931] 1 K.B. 148; [1930] All E.R. Rep 234; *Bryanston Leasings Ltd v Principality Finance Ltd* [1977] R.T.R. 45; *Douglas Valley Finance Co Ltd v S. Hughes (Hirers) Ltd* [1969] 1 Q.B. 738; [1966] 3 All E.R. 214.
[93] Cf. S. Douglas and B. McFarlane, "Defining Property Rights" in J.E. Penner and H.E. Smith (eds), *Philosophical Foundations of Property Law* (Oxford: OUP, 2013), pp.223–226.

to possession" is a right that comprises a right to exclude.[94] However, even if we were to interpret "right to possession" in this way, it would not be correct to regard lesser titles as consisting solely of such a right: for lesser titles also comprise a number of legal powers, including, as we have seen, a power to alienate the title by way of sale. Therefore, lesser titles are not "possessory" in the sense described by Interpretation 4.

VI. SUPPLANTING "POSSESSORY TITLE"

A lesser title is not "possessory" in any of the senses outlined in Part I. Possession is a mode, but certainly not the only mode, of acquiring a lesser title. Moreover, the subsistence of a lesser title is not tied to the title-holder's (or anyone else's) possession and the title-holder has a power to alienate the title without giving up possession. Finally, a lesser title does not consist solely of a right to possession. Hence, unless "possessory" can reasonably be interpreted in some other way, it is a mistake to call lesser titles "possessory titles" or "possessory rights".

What term or terms are appropriate? We could use "lesser title".[95] This term, however, is full of ambiguity. It is also uninformative. If "a title" simply means "a right or interest", the sentence "*B* has a lesser title to a certain chattel" tells us merely that *B* has a right or interest in the chattel that is not the best. Since the term does not capture anything else about the nature of *B*'s right or interest, it leaves a lot to be desired. Indeed, this is precisely why the term has been used in this article hitherto: by using the term, one can avoid committing oneself to anything more than very limited claims about the nature of the interest. But now that we have examined the interest, we can do better.

We know that, if *B* takes possession of *A*'s chattel, *B* will acquire an interest that is inferior to *A*'s; an interest that comprises a right to possession, a right to non-interference and certain dispositive powers. What name should be given to this interest? The following terms have been proposed: "absolute interest",[96] "ownership",[97] and "general property interest".[98] One problem with "absolute interest" is that it is not clear what "absolute" signifies. It may reasonably be regarded as indicating that the interest binds everyone without exception. But, as we have seen, lesser titles are not absolute in this sense. If *A* has the best title with respect to a certain car and *B* takes possession of it without *A*'s consent and thereby acquires a lesser title, *B*'s title will not bind *A*. Alternatively, "absolute" may be regarded as signifying that the interest is exclusive in the sense that, with respect to a particular chattel, there can be no more than one such interest. But the thought that the interest is exclusive in this sense is mistaken. There is, in principle, no limit on how many titles can exist concurrently with respect to a single chattel.

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[94] Cf. Honoré, "Ownership" in Guest (ed), *Oxford Essays in Jurisprudence* (1961), pp.113–114.
[95] Cf. Swadling, "Property: General Principles" in Burrows (ed), *English Private Law*, 3rd edn (2013), para 4.131.
[96] See, e.g., Battersby and Preston, "The Concepts of 'Property', 'Title' and 'Owner' Used in the Sale of Goods Act 1893" (1972) 35 M.L.R. 268 at 268–271.
[97] See, e.g., *Goode on Commercial Law*, edited by E. McKendrick, (2016), para 2.20–2.32.
[98] See, e.g., Hickey, *Property and the Law of Finders* (2010), pp.166–167.

It might be thought that, as "ownership" also connotes exclusivity, it, too, is unsuitable. McFarlane has explained that this problem can be avoided by distinguishing between "ownership", which refers to the general concept of ownership, and "an Ownership", which refers to a particular kind of interest that is conferred by English law.[99] Accordingly, one might say that each of *A* and *B* is "an Owner".

The third suggestion is that *B*'s interest should be called a "general property interest". This term has a number of advantages. It is used in the Sale of Goods Act 1979 and it signifies (1) that the interest can be transferred by way of sale; and (2) that the interest is not a lesser (or "special") proprietary interest, such as a pledge.[100] Thus, as Hickey has said, the term "seems to adequately reflect the substance of the law without relying expressly on the terminology of 'ownership'" and it can serve "as a personal property equivalent to 'fee simple'".[101] It is true that some lawyers have thought that the holder of a lesser title has, not a "general property", but merely a "special property".[102] This thought, however, is premised on a mistaken view of the nature of a lesser title. Once it is appreciated that such titles have the features described in this article, it will be seen that it is appropriate to call them "general property interests". One might object to this proposal on the ground that "general property interest" is a technicality and, unlike ownership, esoteric. But this is really no objection at all; for a precise, unambiguous term of art is exactly what is needed.[103] It is submitted, accordingly, that the interest that a person acquires upon taking possession of a chattel should be called a "general property interest".

VII. CONCLUSIONS

We should cease to call the interest that a person acquires upon taking possession of a chattel a "possessory title" or a "possessory right"; for such denominations are misleading or erroneous. It would be better to call the interest a "general property interest". This term indicates that the interest can be alienated by way of sale and, thus, that the interest comprises powers of alienation. It also comprises a right to possession (although not necessarily a right to *immediate* possession)[104] and a right to non-interference. A general property interest might be "supreme" or "inferior": if it is the best such interest in a given chattel, it is supreme; if not, it is inferior. Accordingly, if *A* has the best general property interest in a chattel and *B* takes possession of it without *A*'s consent, we can say that each of them has a general property interest in the chattel; but whereas *A*'s general property interest is supreme, *B*'s is merely inferior.

"Possessory title" is well established and well known. It can be found in countless textbooks and judgments. So it will be difficult to dislodge the term. If,

[99] B. McFarlane, *The Structure of Property Law* (Oxford: Hart, 2008), pp.140–146.
[100] SGA 1979 s.61(1). Cf. *Sewell v Burdick (The Zoe)* (1884) 10 App. Cas. 74 at 92–93; (1884) 54 L.J.Q.B. (N.S.) 156 at 166 per Lord Blackburn.
[101] Hickey, *Property and the Law of Finders* (2010), p.167.
[102] See N. Curwen, "General and special property in goods" (2000) 20 L.S. 181 at 182–183.
[103] Cf. A.D. Hargreaves, 'Modern Real Property' (1956) 19 M.L.R. 14 at 19–23.
[104] A person in whom a general property interest is vested will not have a right to immediate possession if, for instance, he or she pledges the chattel to another: *Halliday v Holgate* (1868) L.R. 3 Ex. 299.

however, the arguments advanced herein are correct, it is high time it was replaced. Many scholars have noted that the law of property, insofar as it concerns personalty, is intellectually underdeveloped.[105] If we are to make progress, we must be prepared to revise its concepts and its terminology. The rewards of doing so could be great. The adoption of a superior terminology would enhance the clarity and accuracy of legal discourse and facilitate sound legal reasoning and adjudication.

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[105] See, e.g., A. Pretto-Sakmann, *Boundaries of Personal Property: Shares and Sub-Shares* (Oxford: Hart, 2005), p.3.

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