THE RISE AND FALL

OF THE

REPUTED OWNERSHIP CLAUSE

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ABSTRACT

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This thesis deals with the history of the reputed ownership clause, a bankruptcy provision that included goods in the estate of the bankrupt that were in the 'apparent' possession of the bankrupt, rather than in his ownership. The reputed ownership clause was enacted in 1624 in order to protect creditors from delusive credit, caused by chattel mortgages that generally took the form of a secret bill of sale.

This thesis, after considering the present state of the academic literature on the topic, explores the origin of the reputed ownership clause and the first two centuries of its judicial interpretation.

The value of this research is that it establishes that the early interpretation of the reputed ownership clause was more sophisticated than modern scholarship suggests. It shows that from the 18th century onwards the courts were already acting on commercial needs, balancing the prevention of fraud against the encouragement of trade and credit. After the leading case *Ryall v Rolle* (1749) the reputed ownership clause was interpreted more extensively, but at the same time, various general exceptions emerged that limited the reputed ownership clause. This resulted in a more sophisticated, and in some respects narrowing, application.

This thesis aims to fill a gap in the literature by providing a doctrinal general legal narrative of the reputed ownership clause, from its enactment until the point at which it came under attack in the mid 19th century. Case-law and treatises from between the late 16th and the early 19th century have been used to conduct this research. The research outcomes of the thesis show that certain assumptions in modern scholarship based on 19th century sources on the development of the reputed ownership clause and the floating charge are questionable.

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OHLE	The Oxford History of the Laws of England
ODNB	The Oxford Dictionary of National Biography

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Introduction

This thesis examines the history of the reputed ownership clause in bankruptcy, introduced by the Bankrupts Act 1624.[1] It deals with the nature and limits of the reputed ownership clause and impliedly questions whether the reputed ownership clause was the main obstacle to the creation of chattel mortgages and floating charges.

Traditionally, the law only recognised *visible* security interests, the mortgage of real property (visible through the title deeds) and the pledge or lien of chattels, because possession and the power of disposal of personal property were the only feasible evidence of ownership of personal property.[2] Under the Statutes of Acton Burnell (1283), Merchants (1285) and Staples (1353) it was possible to have a security interest by way of registered 'recognisances' affecting all the land and chattels of the debtor at the date at which the creditor proceeded to execution. These securities can be seen as a proto-form of the floating charge. They had, however, gone out of common use by the end of the 18th century, for reasons which are unclear.[3]

The general view in the modern literature is that due to the growing demand for capital in the later nineteenth century, these existing security interests were no longer sufficient and non-possessory security interests had to be allowed. However, securities where the mortgagor remained in possession were irreconcilable with the reputed ownership clause.

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[1] The text of the reputed ownership clause as set out in the Bankrupts Act 1624 can be found at pp. 61-62.

[2] Baker JH, 'Property in chattels' in JH Baker, *The Oxford History of the Laws of England (1483-1558),* vol VI (OUP 2003) 739-740.

[3] H Hall, *Select cases concerning the law merchant 1239-1633* vol II (Quaritch 1930) xi.

The reputed ownership clause was a provision in the English bankruptcy laws which became controversial, because it included goods in the estate of the bankrupt that were in the 'apparent' ownership of the bankrupt, rather than in his actual ownership. The clause was first enacted in 1624 with the intention to protect creditors from delusive credit, caused by chattel mortgages that generally took the form of a secret bill of sale.

Secret bills of sale allowed a trader (the mortgagor) to keep possession of his assigned goods (trading tools, utensils, stock, etc.), in order to continue his trade. However, because the assignment was made in secret, only the contracting parties (the mortgagor and mortgagee) were aware of the change of title, giving the trader the appearance of wealth (ostensible ownership). After assignment, the trader kept his equitable title and the equitable right to redeem and was, therefore, able to re-mortgage his goods endless times.[4]

The creation of ostensible ownership could increase the risk of misleading 'innocent' creditors who assumed that the property was unencumbered. In the case of bankruptcy, the mortgagee could take possession of the assigned property before the commencement of the bankruptcy, taking priority over other creditors. The reputed ownership doctrine "punished" mortgagees who created ostensible ownership in the bankrupt by postponing their priority in favour of the unsecured creditors.

This thesis explores the origin of the reputed ownership clause and the first two centuries of its judicial interpretation.

The value of this research is that it establishes that the interpretation of the reputed ownership clause was more sophisticated than current scholarship suggests. The courts were already acting on commercial needs from the early 18th century onwards.[5] It seems that the courts in relation to the reputed ownership clause constantly balanced the prevention of fraud

[4] *Ryall v Rolle* (1750) See below (n 315).

[5] See Chapter 3 of this thesis.

against the encouragement of trade. It shows that after the leading case *Ryall v Rolle*[6] (1749) the reputed ownership clause was interpreted more extensively, but that at the time various general exceptions emerged that limited the reputed ownership clause. This resulted in a more sophisticated, and in some respects a narrowing, application.

This thesis aims to fill a gap in the literature by providing a doctrinal general legal narrative of the reputed ownership clause, from its enactment until the point at which it came under attack in the mid 19th century. It puts emphasis on the early history of the clause, dealing with the reputed ownership clause before the 19th century. Case-law and treatises from the 17th and 18th century have been used to conduct this research. This gives new information, as current scholarship is dominated by later 19th century interpretations (including where it discusses earlier law). Finally, the research outcomes of the thesis show that certain assumptions in contemporary scholarship based on 19th century sources on the development of the reputed ownership clause and the floating charge are questionable.

Chapter 1 sets out the main arguments in the contemporary literature of both the history of the floating charge and the reputed ownership clause. It also shows how the history of the reputed ownership clause fits into the history of the floating charge.

In Chapter 2 the foundations of the reputed ownership clause will be explored. It sets out why possession was the only indication of ownership for moveables and will subsequently deal with the *travaux préparatoires* of the Fraudulent Conveyances Act 1571 and the reputed ownership clause in the Bankrupts Act 1624.

Chapter 3 deals with the initially restrictive interpretation of the reputed ownership clause and shows a turning point in the leading case *Ryall v Rolle* (1749) and the later case of *Mace v Cadell*[7] (1774).

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[6] *Ryall v Rolle* (1750) See below (n 315).

[7] *Mace v Cadell* (1774) 1 Cowp 232; 98 ER 1060; (*v Cammel*) (1774) Lofft 782; 98 ER 917.

In Chapter 4 the interpretation of the reputed ownership clause after *Ryall v Rolle* will be discussed. The chapter shows a sophisticated development of the interpretation of the reputed ownership clause. The interpretation of the clause was expanded, but at the same time restricted by general exceptions.

This thesis will be concluded with an analysis of the four chapters, reflecting on the courts' attention (or not) to commercial need in the earlier interpretation of the doctrine.

1

Literature review

There are several theories of the development of the floating charge. One of those theories is that the judges in the 1870s had to eliminate the reputed ownership clause to make the floating charge possible for companies.[8] This thesis relates to this theory, as it examines the nature and limits of the reputed ownership clause and thus, impliedly, the extent to which this clause was an obstacle to the creation of chattel mortgages and floating charges. This connection is understudied and gives an alternative and more doctrinal perspective, distinct from the dominant view in the literature that the floating charge was introduced out of commercial need. This literature review intends to outline the different theories that explain the development of the floating charge and will show how the reputed ownership clause fits into that picture.

A. (Pennington's) history of the floating charge

More than 50 years after its publication, Robert Pennington's 'The genesis of the floating charge'[9] is still the leading article on the history of the floating charge.[10] Dating back to 1960,

[8] J Getzler, 'Assignment of future property and preferences' in Glister J and Ridge P (eds), *Fault lines in equity* (Hart Publishing 2012) 79 n 26.

[9] R Pennington, 'The genesis of the floating charge' (1960) 23 MLR 630.

[10] Pennington's account is cited in all publications discussed in this literary review discussing the history and development of the floating charge, that were published after Pennington's publication in 1960. Modern lawyers often cite his article to explain the legal theory accompanying the floating charge, see for example L Gullifer (ed) *Goode on legal problems of credit and security* (5th edn, Sweet & Maxwell 2013) 124 n 8; E Ferran, 'Floating charges

the article argues, mainly relying on 19th century case law, that the floating charge was primarily introduced in English law out of economic necessity during the rapid industrial and commercial growth of the Industrial Revolution.[11]

Pennington argues that issuing shares[12] and companies' bonds[13], the existing methods for investors who supplied long-term loan capital for smaller unincorporated companies - which were often family businesses - were no longer sufficient.[14] Investors wanted better security for their loans, but, he argues, the only available forms of security in English law were the mortgage of land or goods or the pledge of goods, which had to be identified at the time of the mortgage or pledge.[15] These forms of security did not meet the needs of

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– the nature of the security' (1988) 47 CLJ 213-237, 230 n 28; S Worthington, 'Floating charges – an alternative theory' (1994) 53 CLJ 81-103, 82 n2; S Worthington, *Proprietary interests in Commercial transactions* (Clarendon Press 1996) 80 n 59.

[11] Pennington (n 9) 630. Whether there was an 'industrial revolution', and if there was, when it was, is debated among historians. For a relatively recent account of the debate see Beaudoin SM, 'Current debates in the study of the Industrial Revolution' (2000) 15 OAH Magazine of History 7.

[12] ibid 630 n 3. Pennington argues that smaller companies were often not able to induce investors to subscribe on shares and were afraid that shares would diminish their voting powers and control of their family business.

[13] ibid 630 n 4. Pennington explains that a large part of the capital for smaller businesses was raised on loans, traditionally companies' bonds. However, due to the growth of credit for current transactions, companies' bonds provided no longer enough security for bondholders, as bondholders often found their claims on equal footing with other creditors in a bankruptcy.

[14] ibid 630.

[15] ibid 631.

companies in the Industrial Revolution, as the greater part of the assets of most companies consisted of raw materials, work in progress, stock-in-trade and trade debts; the assets of a company were constantly changing.[16] An agreement to give security over future property would only create an obligation and created no proprietary rights. The assignment of after-acquired property was in principle impossible.[17] Pennington argues that a lender could only obtain legal title if the mortgage or pledge was supported by a 'new' act.[18] Perhaps following the reliance of counsel on this text for the invalidity of the disposition in *Holroyd v Marshall*, Pennington cites Bacon's *Maxims* as the basis for this rule.[19] On this theory, a fresh mortgage or pledge had to be made each time a new item was added to the class of assets of the business, and a release by the lender had to be given each time an item was disposed of out of it.[20] Subsequent scholars have elaborated on this theory, but it is not all clear that the obtaining of legal title by a 'new act' was stable law. The first citation of Bacon's *Maxims* in relation to a 'new' act in reported case-law only occurred in 1845, in the case of *Lunn v Thornton*.[21] In this judgment Tindal CJ ruled, based on Bacon's *Maxims* regula 14, that the assignment of after-acquired property is void, unless the assignment is supported by a new act.[22]

Pennington argues that the floating charge was introduced to meet the needs of these smaller businesses, and that its development depended on three factors. Firstly, the decision of

[16] ibid.

[17] ibid 632-633.

[18] ibid 632.

[19] Bacon's *Maxims*, regula 14.

[20] Pennington (n 9) 632-633.

[21] *Lunn v Thornton* (1845) 1 CB 379; 135 ER 587.

[22] ibid, 135 ER 591.

Holroyd v Marshall (1862)[23] allowed the assignment of future property in equity. In this case Taylor mortgaged all the machinery of his mill to a trustee, in trust for his creditor Holroyd, but Taylor stayed in possession after the assignment. The mortgage deed also declared that the "machinery, implements, and things specified in the schedule hereunder written and fixed in the said mill" would be part of the mortgage. It was held that in equity a formal deed of conveyance was not necessary for the alienation of existing property and that the mortgage attached to new and additional machinery had priority over the claims of an execution creditor from the moment of its acquisition by the debtor. *Holroyd v Marshall* had general effect and paved the way for the assignments of future book debts by way of security, confirmed in *Tailby v Official Receiver* (1888).[24]

Secondly, Pennington argues that there was a less obvious factor in the development of the floating charge, namely the form of mortgage sanctioned by Schedule C of the Companies Clauses Consolidation Act 1845 (the mortgage debenture), that was used by companies incorporated by statute.[25] These mortgages, generally used for public utility undertakings, allowed the company to assign its "undertaking and all future calls on shareholders and all the tolls and sums of money arising by virtue of [sic]".[26] Pennington argues that because the expression 'undertaking' was not clear, the courts had to determine to what property of the company the mortgage attached and what remedies a mortgagee had for the realization of his security.[27]

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[23] *Holroyd v Marshall* (1862) 10 HL Cas 191; 11 ER 999. Pennington (n 9) 634-638.

[24] *Tailby v Official Receiver* (1888) 13 App Cas 523.

[25] Pennington (n 9) 638-640.

[26] ibid, 638.

[27] ibid.

Pennington argues that by determining the nature of the mortgagee's security the judgment of the *Gardner*[28] case was crucial.[29] In this case Cairns LJ rejected breaking up the railway company and selling its assets on the grounds of public policy, and reasoned that the mortgages of the company's undertaking created a charge on the company as an integrated whole and the security of the mortgagee would not interfere with the carrying on of the company's business as a going concern.[30] Pennington emphasizes that with the recognition of the floating charge the courts thus consciously adopted a form of mortgage already in use by statutory companies.[31]

Pennington argues that full recognition of the floating charge was not yet on the cards, as there still was still much sentiment against the concept. He illustrates this with the opinion of Lord Truro LC:

'But what a fraud it would be upon the general creditors to allow the company to contract largely upon the possession and apparent ownership of property, and then to give to the mortgage or bond creditors the opportunity of asserting their lien when probably the general creditors had allowed the company to obtain on credit the largest portion of their stock. Such a right is not consistent with the general administration of justice, and with the safety and convenience of a commercial concern, which this to a great extent is.'[32]

Finally, Pennington argues that provisions inserted in companies' contracts with the

[28] *Gardner v London, Chatham and Dover Railway Co (No 1)* (1867) LR 2 Ch App 201.

[29] Pennington (n 9) 639.

[30] ibid 638-649.

[31] ibid 639.

[32] ibid 640.

object of limiting the liability of their members for breach of contract to the assets which the companies owned, influenced the development of the floating charge.[33] These provisions were very often used in insurance policies, insurance companies being initially excluded from the Limited Liability Act 1855.[34] Just as in the Companies Consolidation Act 1845, these contracts illustrated the possibility of a company giving a general charge over its undertaking or assets, but with the limitation that the charge is only enforceable at a later time (crystallization) and leaves the company free to do business and deal with its assets as the company pleases.[35]

Pennington's contemporary on the other side of the Atlantic, Grant Gilmore, wrote a similar analysis in 1965 in his book 'Security interests in personal property'.[36] He agrees with the conventional modern position that the chattel mortgage has been recognised in English law out of commercial need and observes that the characterisation of the transfer of an interest in personal property without delivery of possession as fraudulent, as set out in *Twyne's Case*, was gradually abandoned during the nineteenth century.[37] Gilmore notes, however, that this hypothesis does not account for the curious fact that the development of personal property security in the United States was very different and more complicated than in England.[38]

Before the publication of 'The genesis of the floating charge' several other noteworthy publications appeared on the history of the floating charge, namely the preface and

[33] ibid 640-642.

[34] ibid 641.

[35] ibid 642.

[36] G Gilmore, *Security interests in personal property,* vol I (Little, Brown & Company 1965) 24-25.

[37] ibid 24-25.

[38] ibid 25.

introductory chapter of the second edition of Edward Manson's work on debentures (1910)[39], James Jefferys' PhD on the history of the business organisation (1938)[40] and G.F. Curtis article 'The theory of the floating charge' (1941)[41]. Pennington did not cite any of these publications in 'The genesis of the floating charge'.

Manson observed the peculiar nature of the floating charge, as it permits the company a valid charge on its property, while the company remains in possession as the ostensible owner.[42] Manson defends this ostensible ownership problem by remarking that there is a public register of mortgages and charges.[43] That way every person dealing with a company knows, or has the means of knowing, that the company has charged its property. He argues that if someone chose to deal with the company, notwithstanding this knowledge or (implied) notice, he must take the consequences.[44]

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[39] E Manson, *The debentures and debenture stock of trading and other companies*, (2nd edn, Butterworth 1910). The first edition of Manson's book (W Clowes & Sons 1894) was the first of its kind.

[40] JB Jefferys, *Business organisation in Great Britain. 1856-1914* (Doctoral dissertation, University of London 1938) (Arno Press 1977). Jefferys often refers to the legal scholarship of Edward Manson. The significance of Jefferys work is apparent, because it is still a historical reference used in modern scholarship, see C. Coyle and JD Turner, 'Law, politics and financial development: the great reversal of the UK corporate debt market' (2013) 73 J Econ Hist 810-846.

[41] GF Curtis, 'The theory of the floating charge' (1941) 4 UTLJ 131-150.

[42] Manson 1910 (n 39) Preface.

[43] ibid.

[44] See for this argument, *In Re General South America Company* [1876] 2 Ch D 337, 341-343 (Malins VC).

Manson gives his 'genesis of the debenture', including the floating charge, by arguing that the debenture was developed because of its practical character.[45] According to Manson debentures, including floating charges, were such a popular method in corporate finance for three reasons. Firstly, a company is able to borrow from a (large) number of small lenders, just like share capital. At the same time, the company is still able to deal with the assets of the company as it pleases. Secondly, lenders borrowing on debentures are put on equal basis with each other, as if they were only one single mortgagee. To secure this equality, they are ranked *parri passu* and are not allowed to forestall the security. Finally, the debenture or debenture stock had to be transferable free from equities, so that each lender had the liberty to transfer or otherwise deal with his share of the security.[46]

Jefferys argues that the floating charge was the result of the necessities and advantages of the company and the demand from investors.[47] He contends that, despite the *Gardner* case paving the way for debentures for companies with limited liability, these types of debentures only started to be useful for raising capital during the boom of converting iron and coal firms and partnerships into limited companies between 1870 and 1875.[48] Additional capital was needed because the growth of both the numbers and the wealth of investors.[49] At that time ordinary shares gained a reputation of being unsafe and speculative and debentures were seen as the only sound investment.[50] The legal support of the floating charge secured this

[45] Manson 1910 (n 39) Preface.

[46] ibid 1-2.

[47] Jefferys (n 40) 290.

[48] ibid, 251-252.

[49] ibid, 263.

[50] ibid 264. See also, M Lobban, 'Cutting the Gordian knot? Arbitration and company insolvency in the 1870s in M Dyson and DJ Ibbetson, *Law and legal process: substantive law*

confidence.[51] However, it was not until the 1880s that the floating charge became widespread.[52] The advantages of the floating charge were striking, as money could be raised by a floating charge on future assets without the company possessing any tangible property at all. This meant that hundreds of concerns that could otherwise not raise the funds could now easily get security for their loans.[53] Floating charges were not seen as a debt, but as part of the capital.[54]

Curtis argues that the floating charge was developed due to the rapid expansion of trade and industry in the nineteenth century.[55] He argues that the floating charge is a mix of bonds and debentures.[56] Curtis does not explain these lending instruments in his article, but to clarify a bond is a sealed legal instrument containing an acknowledgement that a sum of money was owed by the debtor to the creditor.[57] Bonds have been in use since the 13th century.[58] A debenture is an instrument in the form of a certificate attesting a debt due from

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and procedure in English legal history (CUP 2013) 283. Lobban claims that in the early 1860s mortgage debentures of railway companies were extremely popular with the English Middle classes due to their secure regular income, and thereby offering an alternative to the risky stock exchange.

[51] ibid 261.

[52] ibid 273.

[53] ibid 274.

[54] ibid 275.

[55] Curtis (n 41) 131.

[56] ibid 131.

[57] JH Baker, *An introduction to English legal history* (4th edn, OUP 2007) 323.

[58] P Brand, 'Aspects of the law of debt, 1189-1307' in PR Schofield and NJ Mayhew, *Credit and debt in Medieval England c.1180-c.1350* (Oxbow Books 2002) 25.

the Crown.[59] Debentures though have been in use in this form since the 15th century and spread to local government corporations in the 16th-17th century, followed by business corporations.[60] Curtis argues that the floating charge is merely a reinvention of these long existing lending instruments.[61] Curtis marks the enactment of the Joint Stock Companies Act 1856, the act which settled the structure of the modern business corporation, as a turning point for this change.[62] After the collapse of the bank Overend, Gurney, Ltd. and the financial panic that followed in 1866[63], investors wanted more security for their loans.[64] The floating charge would give investors a proprietary right, while bonds and debentures would only give an obligation to pay in contract.[65] The risk of fraud due to ostensible ownership could be met by the fact that the activities of companies involve a good deal of publicity, while the chance of an intending creditor not knowing about a bond or debenture issue is comparatively remote.[66]

Chantal Stebbings, elaborating on Pennington's second argument, argues that due to economic need the Court of Equity made the pragmatic decision to make the mortgage debenture of statutory companies available for all commercial companies.[67] Stebbings traces

[59] Oxford English Dictionary.

[60] ibid.

[61] Curtis (n 41) 131.

[62] ibid 132.

[63] ibid 131. See also BC Hunt, *The development of the business corporation in England 1800-1867* (Harvard University Press 1936) 153-154.

[64] ibid 132-133.

[65] ibid 131, 136.

[66] ibid 135.

[67] C Stebbings,'Statutory railway mortgage debentures and the courts in the nineteenth century' (1987) 8 JLH 36, 47.

the development of the floating charge and the mortgage debenture all the way back to case law of mortgages of turnpikes.[68] For example, the public policy argument put forward by Cairns LJ in the *Gardner case*[69] was already suggested in an insolvency case on turnpikes by counsel in *Banks v Booth*[70], decided in 1800.[71] The mortgagees' rights under mortgage debentures became to be determined by the nature of the company.[72] If the legislature had intended for the company to continue after insolvency, the mortgagees could not bring an end to the company.[73] Stebbings argues that this defines a mortgage debenture, and as such is distinguished from a bond or a mortgage.[74]

However, Stebbings' definition gives away an important feature of the mortgage debenture of a statutory company, namely that by its nature it could never crystallize. This is an important distinction from the floating charge and suggests that the floating charge is in fact not a continuation of already existing practice of the statutory mortgage debenture. Instead, it implies that the development of the statutory mortgage debenture and the floating charge were parallel events, which led to the similar, but different results. Therefore, it is questionable if the Companies Clauses Act 1845 had really such an importance as suggested by Pennington.

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[68] ibid 37, 43.

[69] *Gardner v London, Chatham and Dover Railway Company (No. 1)* (1867) 2 Ch App 201.

[70] *Banks v Booth* (1800) 2 Bos & P 219; 126 ER 1245.

[71] Stebbings (n 67) 39-40. At the time Lord Eldon did not want to take away the mortgagees' remedy of ejectment.

[72] ibid 41.

[73] ibid 45-46.

[74] ibid.

Michael Lobban's work may give a better explanation of the transition between the mortgage debenture and the floating charge. He suggests that the *Gardner* case, after which the debenture holders could only claim to be paid from the income generated by the company, 'provoked something of a panic amongst debenture holders'. The decision meant that debenture holders seemed to have less security than commercial creditors under the Companies Act 1862.[75] Parliament passed the London, Chatham and Dover Railway Arrangement Act 1867 as a compromise between the directors and the debenture holders. The act replaced the receiver *of tolls only* appointed under the *Gardner* decision and instead created a broader shift of management powers.[76] This compromise is missing from Pennington's account.

Some of the literature on the history of the floating charge published after Pennington's 'The genesis of the floating charge' is highly influenced by Pennington's study. Roy Goode's 'The exodus of the floating charge'[77] and WJ Gough's chapter on the development of the floating charge in his book 'Company Charges'[78] basically give the same analysis. In Goode's account the enactment of the Bills of Sale Act 1854 precedes Pennington's analysis.[79] He argues that in order to recognise the floating charge the common law objection to non-possessory interests in moveable property had to be overcome.[80] He argues that this was not until the enactment of the Bills of Sale Act 1854, which introduces

[75] Lobban, 'Cutting the Gordian knot?' (n 50) 291.

[76] ibid 292.

[77] R Goode, 'The exodus of the floating charge' in D Feldman and F Meisel (eds), *Corporate law: modern developments* (Lloyd's of London Press 1996) 193-205.

[78] WJ Gough, Company charges (2nd edn, Butterworths 1996) 102-108.

[79] Goode (n 77) 195.

[80] ibid.

the requirement of registration in a public register, and the courts ceasing to regard non-possessory security as a fraud on other creditors.[81] Goode agrees with Pennington that it was through equity alone that the non-possessory mortgage of debts (which at common law were not assignable) and the non-possessory charge were developed.[82] Gough puts special emphasis on *Holroyd v Marshall*, stating that this case was the 'truly significant historical factor in the conceptual development' of the floating charge.[83]

Roger Gregory and Peter Walton acknowledge the dominant view is that the floating charge was introduced out of commercial pragmatism.[84] However, they argue that the sole reason for the development of the statutory "undertaking" mortgage (later known as the floating charge) was to evade the common law bankruptcy ruling *Graham v Chapman*[85], decided by Jarvis CJ in 1852 (until it was overruled by *Ex. p. Hauxwell* in 1883). Jarvis CJ held that it was an act of bankruptcy if a trader gave a security covering all his assets, apart from a small exception. The decision caused that in the event of a bankruptcy mortgages over changing assets paralysed the business of the company.[86] They argue that the chattel mortgage (including mortgaging of future property) with a power to deal was already an established security in the late Middle Ages and that *Graham v Chapman* disrupted the usage of this security that had been commonplace for centuries.[87] This argument implies that the

[81] ibid.

[82] ibid.

[83] Gough (n 78) 106.

[84] R Gregory and P Walton, 'Fixed and floating charges – a revelation' [2001] LMCLQ 123, 123.

[85] *Graham v Chapman* (1852) 12 C.B. 85.

[86] Gregory and Walton (n 84) 123-124, 130-133.

[87] ibid 125-126.

development of the floating charge cannot be explained by new economic developments in the 19th century.

In contrast, R.C. Nolan complements Pennington's analysis of the early case law, with the practical relationship between transactional lawyers drafting loan agreements and how judges reacted to the floating charge.[88] He argues that the development of the floating charge can be traced in the books of early precedents, making special reference to the work of Sir Francis Beaufort Palmer.[89] In order to support his argument he compared three editions of Palmers' 'Company Precedents', published respectively in 1877, 1881 and 1884.[90] He observes that in the first edition it was common for parties to insert an express clause stipulating that the company should be free to deal with the charged assets until some future event (crystallisation). Nolan writes that it was said in the second edition that judges could imply the power to deal with the companies' charged assets if there was a grant of a security over 'all the property' of the company. Nolan writes that in the third edition, the term 'floating charge' equalled a security with the rights and powers to deal with the assets of the company; the express 'powers to deal' were no longer included in the charging agreements.[91]

John Armour takes Nolan's analysis even a step further, by arguing that the floating charge developed because judges in the 1880s allowed new sorts of proprietary rights to be made contractible by private parties.[92] This meant that these agreements were more than a

[88] RC Nolan, 'Property in a fund' (2004) 120 LQR 108, 117-121.

[89] ibid 117, 119.

[90] ibid 120-121.

[91] ibid 121.

[92] J Armour, 'The chequered history of the floating charge' (2004) 13 GLR 25, 30-31. See in addition on 'freedom of contract' doctrine, PS Atiyah, *The rise and fall of freedom of contract*

simple contract and had effect on both the contracting parties as well as the third parties, in particular the unsecured creditor of the corporate debtor.[93] He argues that English judges were unique in allowing private parties to invent new sorts of property right (outside the scope of the *numerus clausus*), as in many jurisdictions, arrangements similar to the floating charge would either be ineffective to create property rights, or would be invalidated on the basis of being fraudulent conveyances.[94]

In a later publication Armour argues, by showing evidence of the commercial use of the floating charge by looking at prospectus advertisements in the Times for the issues of debentures, that until the enactment of the Preferential Payments in Bankruptcy Act 1897 (decreasing the protection of the debenture holder in favour of the general creditor) the floating charge was successful because it was attractive for investors who wanted a good security for their loans.[95] He implies that the depersonalisation of finance made the debenture and the floating charge a safer investment than share capital, as debentures didn't affect the voting control of the company and reliable information about the company was less important.[96]

John de Lacy argues that the development of non-possessory security interests, including the floating charge, is a natural manifestation to accommodate the separation between title and possession from the moment that contractual conveyance mechanisms

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(OUP 1979). According to Atiyah freedom of contract as a dogma was on its way out at the end of the nineteenth century, at the time the floating charge emerged.

[93] ibid 31.

[94] ibid.

[95] J Armour, 'Should we redistribute in insolvency?' in Getzler J and Payne J (eds), *Company charges: Spectrum and beyond* (OUP 2006) 196-197.

[96] ibid 191-192.

began to take off.[97] In line with Pennington's analysis, De Lacy adds that despite the fact that the separation between title and possession could create the problem of ostensible ownership, the growth of the industrialised economy ensured that the interest of non-possessory security interests prevailed.[98]

Joshua Getzler's work challenges the mainstream arguments that the floating charge was developed out of commercial need or the idea of freedom of contract.[99] Instead, he argues that the floating charge was adopted because of specific interests of banks.[100] He illustrates his claim with a quote of Lord Millett in the *Brumark*[101] case:

> "Such a form of security [the floating charge] is particularly attractive to banks, and it rapidly acquired an importance in English commercial life which the Insolvency Law

[97] J De Lacy, 'Reflections on the ambit of the rule in *Dearle v Hall* and the priority of personal property assignments' (1999) 28 Anglo-Am L.R. 87, 96; J de Lacy, 'The evolution and regulation of security interests over personal property in English law' in J de Lacy (ed) *The reform of UK personal property security law. Comparative perspectives* (Routledge Cavendish 2010) 13. The text of De Lacy's article on *Dearle v Hall* relating to non-possessory security interest is almost identical to his book chapter.

[98] De Lacy, 'The evolution' (n 97) 12.

[99] J Getzler, 'The role of security over future and circulating capital: evidence from the British economy circa 1850-1920' in J Getzler and J Payne (eds), *Company charges: Spectrum and beyond* (OUP 2006) 227-228; 230- 231.

[100] ibid 230-231; 248.

[101] *Agnew v Commissioners of Inland Revenue (also known as Re Brumark)* [2001] UKPC; [2001] 2 AC 710.

Review Committee later considered should not be underestimated."[102]

Getzler argues that until close to the end of the nineteenth century business and industrial investment was local and personal, and a shift towards a more centralised banking sector only emerged from the 1870s onwards.[103] Getzler claims that at that time there was actually a large amount of capital available, both within and outside equity markets.[104] However, banks preferred to invest in short-term overdraft facilities and debentures of limited size rather than in equity or long-term bonds.[105] Short-term liquidity was essential for businesses, and credit was only made available if credit suppliers' preferences for short-term liquidity could be met.[106] Hence, banks dictated that the English legal system should develop security instruments attached to circulating assets.[107] In order to facilitate non-possessory security judges had to eliminate the reputed ownership clause for companies.[108]

In a later article Getzler argues that the floating charge became a dominating presence in corporate finance, because of the strong receivership powers afforded to banks and other lenders.[109] This meant that the floating charge had the bonus of effective monitoring by creditors of the quality of management of the company in liquidation.[110] He argues that the

[102] Getzler, *Company charges* (n 99) 231.

[103] ibid 242-243.

[104] ibid 248.

[105] ibid 238, 244.

[106] ibid 250.

[107] ibid 243-244.

[108] ibid 229.

[109] Getzler, *Fault lines in equity* (n 8) 80.

[110] ibid. See also Getzler, *Company charge*s (n 99) 233.

development of hidden securities and assignments by the equity courts in the late 19th century provoked outrage amongst trading communities and some of the senior judges, leading Parliament to introduce a range of registration requirements and extra formality and notice requirements.[111] He argues that all these arrangements relating to non-possessory security proved to be unresolved issues in the law of insolvency and security as such.[112] These dilemmas already existed in Roman times and continue to exist in the 21st century.[113]

B. Reputed ownership

Apart from an occasional reference, literature on reputed ownership is scarce. In fact, there has been no recent article published especially dealing with the topic.[114] However, there are some relevant publications that deal with reputed ownership in one way or another.

Craig Muldrew has shown that in early modern England, when the economy was based around the household, credit networks worked on the basis of trust and the reputation of the members of the household of meeting obligations.[115] It was only when the state became stronger and banks and other businesses became more reliable at the start of the nineteenth

[111] ibid.

[112] ibid 80-81.

[113] ibid 80, 83.

[114] See for the most recent accounts A Elkus and G Glenn, *A treatise on secret liens and reputed ownership* (Baker Voorhis 1910) and the German article H Rudolph, 'Reputed ownership' (1932) Leipziger Rechtswissenschaftliche Studien 74.

[115] C Muldrew, *The economy of obligation: the culture of credit and social relations in early modern England* (Macmillan 1998) 148, 173. See also, E Kadens, 'Pre-Modern Credit Networks and the limits of reputation' (2015) 100 (6) Iowa L Rev 2429-2455.

century that personal reputation became less important.[116] This tends to suggest that the reputed ownership clause was typical in a time of inter-personal credit networks, as it directly dealt with the appearance of wealth and the reputation of the trader. However, it also implies that the reputed ownership became less important when financial markets were fully developed. It implies that creditors could mainly form credit judgments on the basis of apparent assets. However, the role of payment record and personal reputation for general probity in credit-worthiness in Muldrew's account implies that creditors were not dependent *only* on the apparent assets of their debtors in forming judgments under this regime. This in turn suggests that the reputed ownership clause was not *only* based on 'delusive credit', but also on an independent principle that a debtor should not put any assets beyond reach of his creditors (perhaps derived from Roman law).[117]

De Lacy argues that the reputed ownership clause was introduced to regulate ostensible ownership when contractual conveyance mechanisms, that allowed non-possessory conveyances, began to replace traditional possession based forms of conveyance.[118] This meant that a party in physical possession could no longer be regarded as possessing the exclusive proprietary right.[119] Traditionally, this led to the rule that staying in possession after assignment was considered fraudulent.[120] Previous attempts to regulate ostensible ownership were solely based on preventing fraud (e.g. The Statute of Fraudulent Conveyances 1571) and had proved to be insufficient.[121] Over time the presumption of fraud by staying in possession

[116] ibid 182.

[117] This argument will be supported in chapter 2 of this thesis.

[118] De Lacy, 'The evolution' (n 97) 13.

[119] ibid 8-9.

[120] ibid 9.

[121] ibid 13.

became a rebuttable presumption and from the 19th century fraud was interpreted more restrictedly.[122] Because the Fraudulent Conveyances Act 1571 was read narrowly and the reputed ownership clause was only applicable in bankruptcy, the innocent creditor was not protected against false credit.[123] De Lacy argues that the legislature therefore went a step further with the Bills of Sale Act 1854, as this act was passed with the express intention of preventing debtors from false and delusive credit.[124]

De Lacy argues that the judiciary made an attempt to regulate ostensible ownership, namely with the *nemo dat* rule and its equitable counterpart (the rule of *Dearle v Hall*), the main regulating principles in the event of a title conflict caused by misrepresentation.[125]

However, it is arguable that real significance of *Dearle v Hall* lies in the fact that the case applied the 'notice principle'[126] outside the law of bankruptcy. In contrast, Thomas and Lobban argue that The Factors Acts, were designed to operate in the opposite direction to this tendency, and in the same direction as the reputed ownership doctrine: that is, to make the factor's apparent power of disposition operate in favour a *bona fide* purchaser from him or taker of security from him.[127]

De Lacy argues that by the end of the 19th century the courts interpreted the reputed

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[122] ibid 10-11. See also, S Anderson, 'Trusts and Trustees', in Cornish *OHLE, vol vii* (OUP 2010) 262-268.

[123] ibid 15.

[124] ibid 15.

[125] ibid 17

[126] The 'notice principle' will be explained further in the thesis at p. 87.

[127] S Thomas, 'The origins of the Factors Acts 1823 and 1825' (2011) 32 JLH 151-187; Lobban, 'Property torts' in Cornish *OHLE, vol vii* (OUP 2010) 1122-1124.

ownership clause increasingly restrictively.[128] He illustrates his argument with the emergence of exceptions to the rule based on trade customs and by the new requirement to prove reputed ownership in fact. He argues that this slowly started to diminish the efficacy of the doctrine.[129] Michael Lobban affirms that at the end of the 19th century trade customs could limit the reputed ownership clause.[130] He set out the exceptions in relation to hire-purchase agreements.[131]

Gregory and Walton argue that by the 16th century the common law had developed a clear hostility to secret transfers of chattels, but was not opposed to the concept of a mortgage with a power to deal.[132] They explain that mortgages with a power to deal could be struck down when they were fraudulent and honest mortgages could be confirmed by a *novus actus.* This ignores the impracticability aspect set out by Pennington:[133] a trading business would have had to obtain consent of the creditor every time it wanted to dispose of an item of stock.[134]

Gregory and Walton suggest that the development of the reputed ownership clause after *Ryall v Rolle*[135] was unexpected, as it was very inconvenient to trade.[136] It meant that if

[128] De Lacy, 'Reflections on the ambit' (n 97) 104.

[129] ibid 104.

[130] Lobban, 'Consumer credit and debt' in Cornish, *OHLE, vol vii* (OUP 2010) 873-874.

[131] ibid.

[132] Gregory and Walton (n 84) 127-130.

[133] Gregory and Walton (n 84) 129; Pennington (n 9) 632-633.

[134] See also Gullifer (n 10) 124.

[135] *Ryall v Rolle* (1750) 1 Atk 165; 26 ER 107; 1 Wils KB 260; 95 ER 607; *Ryall v Rowles* (1750) 1 Ves Sen 348; 27 ER 1074.

[136] Gregory and Walton (n 84) 128.

future property fell within the terms of the clause, the courts could strike the mortgage down.[137] They suggest that the practical consequence of the reputed ownership clause was the mortgagor had to watch the trade of the mortgagor more carefully.[138] However, the mortgagee could circumvent the reputed ownership clause by obtaining possession of the mortgaged goods before the mortgagor went bankrupt.[139]

Gregory and Walton argue that in *In Re Crumlin Viaducts Company*[140], Jessel MR deliberately excluded companies from the reputed ownership clause, because he wanted to protect companies from the disadvantages of *Graham v Chapman*.[141] Concretely, Jarvis CJ held in *Graham v Chapman* that it was an act of bankruptcy if a trader assigned most of his assets. This had the effect that mortgages over changing assets would paralyse the business of the company in the event of a bankruptcy.[142] With a creative interpretation of s. 10 of the Judicature Act 1875, Jessel MR protected companies from the application of this decision that destroyed the dealing power of all present and future property security in the case of insolvency of a company.[143]

Having regard to the unsuccessful attempt to legislate the application of the reputed ownership clause in relation to the winding-up of a company in the Bankruptcy Bill of

[137] ibid 129.

[138] ibid.

[139] ibid.

[140] *In re Crumlin Viaduct Works Company* (1879) 11 Ch D 755.

[141] ibid 142. *Graham v Chapman* (1852) 12 C.B. 85; 138 E.R. 833

[142] *Graham v. Chapman* is also discussed earlier in this thesis, at p. 26.

[143] ibid 141-143.

1869[144], and to the problematic Bills of Sale legislation and the risk that history would repeat itself in relation to the floating charge, Gregory and Walton's argument seems plausible. However, it is merely speculative, since there is no evidence in any of Jessel MR's judgments that he was concerned to protect companies from the negative effects of *Graham v Chapman*.[145]

Jessel MR held that the rules of reputed ownership only affected the true owner, rather than secured or unsecured creditors of the bankrupt, as provided for in s. 10 of the Judicature Act 1875.[146] The relevant part of that section read as follows:

'In the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt.'

[144] Parliament had left the regulation of the reputed ownership clause in relation to companies to the discretion of a Judge in whom confidence could be placed, rather than to attempt to prescribe every rule of practice in an Act of Parliament. See HC Deb 05 April 1869, vol 185, cols 142-72.

[145] *Albion Steel and Wire Company* (1878) 7 Ch D 547; *In re Printing and Numerical Registering Company* (1878) 8 Ch D 535, 537-538; *In re Crumlin Viaduct Works Company* (1879) 11 Ch D 755, 757-759. *Graham v Chapman* is discussed earlier in this thesis, at p. 26 and p. 35.

[146] *In re Crumlin Viaduct Works Company* (1879) 11 Ch D 755, 757-759.

Jessel MR reasoned that the rules of 'order and disposition' set out that 'property of which the bankrupt was reputed owner' could include property of which the bankrupt was never owner, of which he was the mortgagor or the owner of the equity of redemption. The bankruptcy laws prescribed that property in the reputed ownership of the bankrupt was to form part of the bankrupt's estate to be sold or distributed for the benefit of the general creditors free from the mortgage if the true owner had given consent to his acting as reputed owner.

Therefore, Jessel MR decided that the rules of order and disposition did not affect the rights of creditors at all:

> 'It affects the rights of true owners of property, which property is in the reputed ownership of the bankrupt. It is quite immaterial whether the true owner is or is not a creditor of the bankrupt: the rule applies all the same.'[147]

Jessel MR thereby implicitly referred to *Mace v Cadell*, as in that case, Lord Mansfield CJ established that the reputed ownership clause included goods in the control of the bankrupt, even if the goods were not of a creditor of the bankrupt.

Jessel MR, therefore, argued that the reputed ownership clause was strictly speaking a rule of ownership and not a rule that affected either secured or unsecured creditors of the bankrupt, as set out in s. 10 of the Judicature Act 1875 and decided that there was no room for the application of s. 10 of the Judicature Act 1875 in relation to the reputed ownership clause.

Jessel MR reasoned that if the legislature had actually intended to apply the reputed ownership clause, they would have specifically included this in the Act.

[147] ibid 757.

Second, he held that the conclusive argument against the application of the reputed ownership clause in the winding-up of a company was that its effects would lead to 'utter absurdity'.

Hence, section 10 of the Judicature Act 1875 did not import the reputed ownership clause into corporate insolvency, and hence, in turn, the debenture holders in the present case could not be defeated by the reputed ownership objection.

It seems that Jessel MR made this decision rather arbitrarily, stating that the effects would lead to 'utter absurdity'. His reasoning in the case is inconsistent with earlier case law on the reputed ownership clause. But it is equally possible that he chose to follow his own arguments. When he was still an MP he had discussed the undesirability of the reputed ownership clause, putting emphasis on the great hardship it could cause.[148] Not being able to get rid of the reputed ownership clause by parliamentary means, it is possible that Jessel excluded it from application to companies by deciding the case arbitrarily. Jessel MR was rather known for his quick (and arbitrary) judgments.[149]

Getzler similarly argues that *In re Crumlin Viaduct Works Company* can been seen as the final push from the Victorian Courts to uproot the reputed ownership clause in order to make way for the floating charge.[150]

[148] HC Deb 05 April 1869 142-72. (Jessel in the second reading of the Bankruptcy Bill).

[149] GH Jones, 'Jessel, Sir George (1824-1883)', *ODNB* (OUP 2004) [http://ezproxy-prd.bodleian,ox.ac.uk:2167/view/article/14803, accessed 29 Dec 2016]; AL Goodhart, *Five Jewish lawyers of the common law* (OUP 1949) 17-18

[150] Getzler, *Fault Lines in Equity* (n 8) 79 n 26.

C. The reputed ownership clause and the Bills of Sale legislation (1854-1882)

Lobban has discussed bankruptcy and the Bills of Sale Acts, with the reputed ownership clause as a side issue. He suggests that the introduction of the registration systems of the Bills of Sale Acts was a response to an unsuccessful proposal of Lord Brougham to consider the giving of any bill of sale, while staying in possession of goods, as an act of bankruptcy.[151] Even when Brougham had proposed to exclude goods that were registered in a bill of sale[152], the legal and commercial communities stressed that this measure would only jeopardise honest transactions and that it would limit all credit, greatly harming the commercial enterprise on which the country's economy greatly depended.[153]

Bills of sale were generally not given by great merchants (except grand bills of sale for ships), but rather by 'the man of small pecuniary means'[154], small traders for amounts less than 500 pounds.[155] Before the enactment of the Bills of Sale Registration Act 1854, a mortgage on a bill of sale was an easy way to provide a family business with instant cash, as

[151] M Lobban, 'Bankruptcy and Insolvency' in Cornish, *OHLE vol vii* (OUP 2010) 813-816. The report included a second unsuccessful proposal from Lord Brougham. He had proposed that the true owner of the goods had to withdraw his consent for the retained possession two months before the bankruptcy, to exclude his goods from the reputed ownership clause, instead of only a day before the bankruptcy. See 1849 Bankruptcy Committee 67.

[152] Lobban 'Bankruptcy and Insolvency' 814 n 229.

[153] ibid, 814.

[154] Anonymous, *Bankruptcy Law Consolidation Bill* (1849) 38 LO 22.

[155] 1849 Bankruptcy Committee 66. (Brougham)

no strict inquiries about the solvency of the debtor were needed and no lawyer had to be present at the formation of the contract.[156]

However, Jarvis CJ held in *Graham v Chapman*[157] (1852) that a security covering all the trader's assets, apart from a small exception, would be considered fraudulent and would amount to an act of bankruptcy as soon as a trader gave this security.[158]

It seems that *Graham v Chapman*[159] was an attempt from a common law court to try to solve the problem of fraudulent preferences by bills of sale.[160] The decision was peculiar as surely the object of a bill of sale was to enable a trader to carry on his business in times of financial difficulty, rather than to paralyse it; and that *Graham v Chapman*[161] had effectively the same result as Brougham's unsuccessful proposal in the 1849 Bankruptcy Reports to make fraudulent preferences in a bill of sale amount to bankruptcy.[162]

The Royal Commission on bankruptcy revisited the issue on fraudulent preferences in 1854. However, before anything could be followed up, the Bills of Sale Act 1854 was enacted on the initiative of the Trade Protection Society of Northern England (representing only part of the mercantile community).[163] Every bill of sale had to be registered within twenty-one

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[156] The Wolverhampton Law Society stated that it feared that exclusion of bills of sale would lead to a monopoly of certain lenders (i.e. banks). Anonymous (n 154) 22.

[157] *Graham v Chapman* (1852) 12 C.B. 85; 138 E.R. 833.

[158] Lobban 'Bankruptcy and Insolvency' (n 151) 813.

[159] *Graham v Chapman* (1852) 12 C.B. 85; 138 E.R. 833.

[160] The doctrine of fraudulent preferences is discussed further in this thesis, at pp. 93-95.

[161] *Graham v Chapman* (1852) 12 C.B. 85; 138 E.R. 833.

[162] This is my own conclusion.

[163] Lobban, 'Bankruptcy and Insolvency' (n 151) 816.

days at the Court of Queen's Bench.[164] Registered bills of sale were good against execution creditors, but the 1854 Act did not prevent the operation of the reputed ownership clause.[165]

Lenders were advised to specify in their deeds that the borrower could keep possession (since 'possession consistently with the terms of the mortgage-deed would rebut the presumption of fraud'[166]); otherwise the creditor would run the risk of losing the goods under the reputed ownership clause.[167] Without this term in the deed (e.g. when the bill of sale was drawn up in a hurry)[168], creditors seized their goods before an act of bankruptcy and notified the bailiffs of the county courts of the bill of sale to forestall their security.[169] It was not uncommon that the debtor knew his secured credit and could warn him to retract his goods before the bankruptcy, thereby depriving the other creditors from any relief.[170]

Lobban argues that registering bills of sale under the Bills of Sale Act 1854 was very unpopular with both borrowers and lenders; borrowers were afraid for their reputations (the stigma of being listed in the trade gazette and potential ruin) and lenders were afraid of rival lenders.[171]

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[164] ibid.

[165] ibid 816. See further, *Ex parte Harding, In re Fairbrother* (1873) LR 15 Eq 223, 228 (Bacon CJ). See for earlier litigation on the matter *Stansfeld v Cubitt* (1858) 2 De G & J 222; 44 ER 373; *Badger v Shaw* (1860) 2 El & El 472; 121 ER 178; *Ashton v Blackshaw* (1870) LR 9 Eq 510; *Ex parte Homan, In re Broadbent* (1871) Law Rep 12 Eq 598.

[166] Lobban, 'Bankruptcy and Insolvency' (n 151) 814.

[167] ibid 816.

[168] Lobban, 'Consumer credit and debt' (n 130) 860.

[169] ibid 859.

[170] 1849 Bankruptcy Committee 45. (Minutes of Evidence, Germain Lavie)

[171] Lobban, 'Consumer credit and debt' (n 130) 859.

On the initiative of the Associated Chambers of Commerce the Bills of Sale Registration Act was amended in 1878.[172] Lobban argues that the two advantages for the lender, the removal of the operation of the reputed ownership clause and the attestation and explanation given by a solicitor, in the 1878 Act led to an increase of registration.[173] The Bills of Sale Act 1878 had made the position of the borrower more vulnerable, because with the exclusion of the reputed ownership clause the mortgagee was absolutely secure in bankruptcy. He had no incentive to keep the debtor from bankruptcy and could ignore the interests of the other creditors in a bankruptcy.[174]

In a circular among judges after the enactment of the Bills of Sale Act 1878, worrying figures appeared among the registered bills of sale.[175] Especially bills of sale for small sums of money had experienced an explosive rise[176], and judges stated that 70, 80 or even 90 % were usual interest rates and sometimes even rose up to 500%.[177] These high interest rates could be explained by the abolition of the usury laws in 1854, which meant that interest rates were no longer controlled.[178]

The interest rates were problematic, as the debtors, generally illiterate working-class people, would mortgage all their property in return for only a small amount of money. The debtors could often not pay the high interest rates and went bankrupt and did not know that

[172] ibid 859.

[173] ibid 860.

[174] Bills of Sale Committee PP 1881 (341) viii 63-65. (Daniel)

[175] House of Commons Parliamentary Papers, *Return of number of bills of sale in each county of England and Wales, 1875-80, 1881* (LXXXIII) 14-15.

[176] ibid.

[177] Bills of Sale Committee PP 1881 (341) viii 63-65. (Fowler and Hill)

[178] Lobban, 'Consumer credit and debt' (n 130) 859.

with these bills of sale they would let themselves fall into ruin.[179] Since working class families continued to rely on interpersonal credit with local shopkeepers, etc., permitting usurers and vendors of overpriced furniture on credit to swallow the whole estate in the event of bankruptcy by all-assets bills of sale was fraudulent against these other creditors.[180]

According to Lobban the working of bills of sale was often harsh, as they were often drawn up in a hurry and allowed seizure after any act that might prejudice the security.[181] Bills of sale could often be set aside, but many borrowers did not have the means to challenge them.[182] Therefore, many argued for reform to protect the poor borrower, while permitting bills of sale to continue to be used commercially because of their usefulness to inject cash into family businesses during liquidity difficulties.[183]

This led towards reform and the Bills of Sale Act (1878) Amendment Act 1882. In order to make things easier for the borrower and save him a trip to a solicitor[184], a bill of sale had to be made in the form prescribed by the Schedule of Act.[185] Personal chattels had to be specifically listed in the Schedule, which prevented the assignment of future-acquired

[179] Bills of Sale Committee PP 1881 (341) viii 36. (Monk)

[180] GR Rubin 'The county courts and the tally trade. 1846-1914' in *Law, economy and society. Essays in the history of English law 1750-1914* (Professional Books 1984) 335-344; WH Whitelock, 'The industrial credit system and imprisonment for debt' (1914) 24 The Economic Journal 33-40.

[181] Lobban, 'Consumer credit and debt' (n 130) 860.

[182] Lobban, 'Consumer credit and debt' (n 130) 860.

[183] ibid 860-861. See also Lobban, 'Bankruptcy and Insolvency' (n 151) 814.

[184] It can be questioned whether this was a wise decision, as illiterate people probably could not make sense of the Schedule either.

[185] Lobban, 'Consumer credit and debt' (n 130) 861.

property by bill of sale.[186] If the formal requirements were not met, the 1882 Act could render the bill of sale void between parties.[187] A bill of sale made or given in consideration of any sum under thirty pounds was no longer allowed, thereby protecting the most vulnerable debtors.[188] Finally, the legislature decided to reinforce the reputed ownership clause for conditional sales (absolute sales stayed under the ambit of the 1878 Act), making the reputed ownership clause effectively a consumer' protection measure.[189] However, it was clear that the Bills of Sale Acts remained problematic; amending the Acts proved not to be sufficient.[190]

Conclusion

The mainstream position in the literature is that the development of the floating charge was the result of new economic needs of industrial businesses. The theory of the elimination of the reputed ownership clause, in combination with the narrowing interpretation of the Fraudulent Conveyance Act 1571, *Twyne's Case* and *Worseley v Demattos*, is an elaborated variant of this doctrine. De Lacy represents the more detailed version of the account.

Both Gregory & Walton and Getzler (in 'Company Charges: Spectrum and beyond') express clear distinctive opinions from the main view. Gregory and Walton argue that floating securities were well established before the Industrial Revolution and the new developments of the later 19th century responded merely to a wrong turn in insolvency law taken in *Graham v Chapman*. In contrast, Getzler argues that the development of the floating charge had nothing

[186] ibid.

[187] ibid.

[188] ibid.

[190] ibid.

[190] ibid 861-862. The Bills of Sale Acts were also amended earlier in 1866 and in 1890. See for more recent reform proposals www.lawcom.gov.uk/project/bills-of-sale.

to do with the capital needs of industrial firms, but instead reflected the specific interests of banks.

Lobban and Getzler (in 'Fault lines in equity) imply that there may not be much to explain the development of non-possessory security interests in the late nineteenth century. Lobban does not give a clear argument or explanation of the bills of sale reform in the late nineteenth century and instead goes into a mass of micro-narrative detail in lobbying exercises and the views of particular judges and parliamentarians. On the other hand, Getzler argues that non-possessory security interests prove to be unresolved issues in the law of insolvency and security as such.

The literature primarily focuses on distinct issues between the mid and later nineteenth century, without fully pulling together the different strands of argument in relation to the development of non-possessory security interests.

Except for De Lacy and Gregory and Walton, the literature completely excludes the pre-mid nineteenth century history of non-possessory security, instead relying on narratives written in the later nineteenth century and early twentieth century about the earlier history in order to explain the changes in the later nineteenth century.

This thesis, then, seeks to explore the earlier history in more depth, offering a general narrative of the development of the reputed ownership clause. It will interrogate the value of the 'standard pre-narrative' which says that late 16th – early 19th century lawyers were insensitive to commercial needs. By doing so it will then call into question aspects of the mainstream account of the reasons for the later 19th century developments.

2

The rise of the reputed ownership clause

This chapter examines the foundations of the reputed ownership clause, as enacted in the Bankrupts Act 1624,[191] in relation to the chattel mortgage. It argues that the existence of the reputed ownership clause stood in direct correlation with the rejection of the chattel mortgage in English law, as the chattel mortgage could create ostensible ownership. The law originally only recognised security interests where the goods were in possession of the actual owner. Therefore, the reputed ownership clause was in line with the traditional view in English law that possession was a good indication of ownership.[192]

This chapter argues that the reputed ownership clause was a hardening of the Fraudulent Conveyances Act 1571, an act that continued to exist in parallel to the reputed ownership clause and was aimed at protecting creditors from fraud.

This chapter starts with an account of the paradigm that possession was the only indication of ownership of moveables and will subsequently deal with the *travaux préparatoires* of the Fraudulent Conveyances Act 1571 and the reputed ownership clause in the Bankrupts Act 1624 and the relation between these two enactments.

A. Possession as the only indication of ownership

Traditionally, a mortgage of land, and a pledge of, or lien on, goods were the only security interests allowed. This was derived from an old rule in English law that for a valid transfer of

[191] See for a general outline history of the bankruptcy laws in the early modern period, WJ Jones, *The foundations of English bankruptcy: statutes and commissioners in the early modern period (American Philosophical Society 1979).*

[192] JH Baker, 'Property in chattels' (n 2) 739-740.

a chattel a delivery of possession was necessary.[193] This is illustrated in the case of *Lord Dudley v Lord Pole*[194] (1489) in which Bryan CJ held that a pledge could only be created by actual delivery; the alternative was to give the creditor a licence to take the thing, which would not create property in the creditor until he actually took it.

There were only two exceptions to the rule that for a valid transfer delivery was mandatory. The first exception, originated in the fourteenth century, was a contract of sale where the intention of the parties was that the property should pass before delivery.[195] This conceptual problem was tackled by a constructive bailment.[196] Possibly during the course of the fifteenth century, but certainly during the sixteenth century the second exception was introduced, namely gift by deeds.[197] For example, in *Docwra v Prior of the Hospitallers*[198] (1535) one of the judges took the view that if there was consideration, title would pass to a lease or other moveable under a deed expressed as a covenant. According to Holdsworth it was these two exceptions that helped to develop the idea that ownership of movables was a distinct right separate from physical control.[199]

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[193] WS Holdsworth, *A history of English law,* vol III (Sweet and Maxwell 1991) 318-360.

[194] *Lord Dudley v Lord Pole* (1489) YB M 5 Hen. VIII fo. 1a pl. 1.

[195] SFC Milsom, 'Sale of goods in the fifteenth century' (1961) 77 LQR 257.

[196] DJ Ibbetson, 'Sale of goods in the 14th century' (1991) 107 LQR 480, 498 n74.

[197] Holdsworth, *Vol. III* (n 193) 357. Furthermore, *Wood v Foster* (1586) shows that at that date a lessor of a flock of sheep retained no property right capable of being disposed of, but only a contractual claim against the lessee. *Wood v Foster* (1586) 1 Leo 42, 74 ER 39; *Wood v Ash and Foster* (1586) Godb 112, 78 ER 69.

[198] Dowcra v Prior of the Hospitallers (1535) YB T27H8 f 14b pl.6 Translation and commentary can be found at http://www.bu.edu/phpbin/lawyearbooks/display.php?id=22280.

[199] Holdsworth, *Vol. III* (n 193) 356.

However, Sir John Baker argues that until 1558 it was, except in very limited cases, not clear that ownership of movables could exist in English law apart from possession of them.[200] This was due to the fact that it had not been fully settled how far title to chattels could be treated as an abstraction, distinct from physical possession.[201] Initially, possession was a concept primarily linked to chattels real (leases of land), as an equivalent to seisin, but gradually the term became more associated with moveable goods.[202] It was said that an owner of chattels needed to be in possession to give good title to a stranger, just as seisin was needed to transfer title of land.[203] Apparently, this even extended to execution under judgments for debt. Holdsworth states that during the reign of Edward IV no execution could be levied on chattels if they were out of the possession of the debtor (unless the creditor was the king).[204]

That possession was considered as the only indication of ownership is readily explicable. In the case of unregistered movables, nobody, apart from the original owner, could be aware of the title of the goods. Therefore, the pragmatic solution to determine who was the owner of goods and chattels was to look at who was in possession of the goods. It seems that creditors mainly formed credit judgments on that basis.[205] It was for this reason that it was considered fraudulent for an assignee not to take possession of the goods after the debtor had assigned his title of the goods. Not only did the assignee help the debtor to conceal assets beyond the reach of his creditors, he also assisted in creating ostensible ownership. He helped

[200] JH Baker, 'Property in chattels' (n 2) 739-740.

[201] ibid 739.

[202] ibid.

[203] ibid.

[204] Holdsworth, *Vol III* (n 193) 353.

[205] See the literature review of this thesis and Muldrew (n 115) 148, 173, 182.

the debtor to hold out to the world that the debtor was the real owner of the goods, when in fact the goods were already encumbered.

When domestic and foreign credit expanded during the early modern period, and conditional bills of sale and assignments of debt were the main methods to finance trade, more certain conditions for creditors were required who were to finance England's newly acquired position in world commerce.[206] As a result, the Fraudulent Conveyances Act 1571 was enacted to protect creditors from fraud (in general) and the reputed ownership clause in the Bankruptcy Act 1624 was especially designed to tackle the problem of ostensible ownership, created by non-possessory security interests.

B. The Fraudulent Conveyances Act 1571

I. The words of the statute

The Fraudulent Conveyances Act 1571, also known as the Statute of 13 Elizabeth,[207] was the predecessor of the reputed ownership clause and was enacted to protect creditors from fraud.[208] The protection was aimed at 'feigned, covinous and fraudulent Feoffments, Gifts, Grants, Alienations, Conveyances, Bonds, Suits, Judgments and Executions, as well of Lands and Tenements as of Goods and Chattels.'[209] The Preamble reads that these fraudulent

[206] MM Postan, *Medieval trade and finance* (CUP 1973) 31; P Nightingale, 'Monetary contraction and mercantile credit in later medieval England' (1990) 43 (4) Ec Hist Rev 560, 573, 574.

[207] The Fraudulent Conveyances Act 1571 (13 Eliz 1, c 5).

[208] ibid Preamble.

[209] ibid Preamble.

transfers were ‘more commonly used and practised in these Days than hath been seen or heard of heretofore’ at the time of its enactment.[210]

The most important provisions for creditors in the statute were ss 2 and 6. These sections set out that conveyances,[211] involving both real and personal property, made by a debtor with the ‘purpose and intent’ to ‘hinder, delay or defraud creditors’ were ‘utterly void, frustrate [sic] and of none effect’,[212] unless the transfers were made with good consideration and *bona fide*.[213] The statute did not extend to ‘any Person or Persons, or Bodies Politick or Corporate, not having at the Time of such Conveyance or Assurance to them made, any Manner of Notice or Knowledge of such Covin, Fraud or Collusion as is aforesaid.’[214]

In the case of a fraudulent transfer of goods or chattels, a penalty equating to the whole value of these goods and chattels was imposed and, in addition, imprisonment for six months without bail or mainprise.[215]

II. The history of the Act

i.) Roman law influences

The Fraudulent Conveyances Act 1571 is said to be the common law answer to the Roman *in integrum restitutio* and *interdictum fraudatorium* and the later Justinianic *actio Pauliana*.[216]

[210] ibid Preamble.

[211] ibid. And all the other dispositions of property as mentioned.

[212] ibid s. 2.

[213] ibid s. 6.

[214] ibid s. 6.

[215] ibid s. 3.

In Roman law it was possible that, if the debtor made an assignment of his property with the intent to cause loss to his creditors (*in fraudem creditorum*), an assignment could be nullified.[217] The praetor had two legal actions at hand. First, the praetor could issue an *in integrum restitutio* during the insolvency procedure. All creditors could apply for this action in which the recipient of the assigned property was obliged to restore what he had received from the debtor. Secondly, the assignees could ask the praetor for an *interdictum fraudatorium* after execution. In addition, the praetor could issue an *actiones in factum* against the *bona fide* purchaser of a good obtained *in fraudem creditorum*.[218] In the Justinianic Code the *in integrum restitutio* and the *interdictum fraudatorium* were fused into one single action, the *actio Pauliana*.[219] The *actio Pauliana* was generally used to prevent debtors from favouring their family interests over other creditors. For example, in D.42.8.17.1 a father transferred all his property to his children, despite having creditors. It was established that because the father knew he had creditors, he had the intention to defraud them. Both the father and the children, who did not need to be aware of the intention of their father, would be liable, based on the *actio Pauliana*.

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[216] JAC Thomas, *Textbook of Roman law* (North-Holland Publishing Company 1976) 375; M Kaser and R Dannenbring, *Roman private law* (2nd end, Butterworth 1968) 52; C Willems, *Actio Pauliana und fraudulent conveyances* (Dunker & Humblot 2012) 132.

[217] Thomas (n 216) 375.

[218] D. 42.8.1; Kaser and Dannenbring (n 216) 52.

[219] The *actio Pauliana* is mentioned in one single text of Paulus in D.22.1.38.4. The *actio Pauliana* was a fictitious action, because it was assumed that the fraudulent transaction had not occurred.

ii.) English statute history

The Fraudulent Conveyances Act 1571 was not the first attempt of the English legislature to prohibit fraudulent transactions; three other statutes preceded the Statute of Elizabeth. The first statute to prohibit fraudulent transfer was enacted during the rule of King Edward III in 1376.[220] The second statute, the Fraudulent Conveyances Act 1378[221], was enacted shortly after. The third statute was enacted during the reign of King Henry VII.[222] The Fraudulent Deeds of Gift Act 1487 stated that 'all deeds of gift of goods and chattels made or to be made of trust to use of the person or persons that made the same deed of gift,' were declared 'void and of none [no] effect'.[223]

iii.) Parliamentary history

Geoffrey Elton and Constantin Willems argue that the Fraudulent Conveyances Act 1571 can directly be traced back to a document called the 'Articles touching the Parliament' endorsed in 1566 by Queen Elizabeth I's Secretary of State William Cecil (the later Lord Burghley).[224] This document set out several matters in need of legal reform, together with the names of the Queen's legal counsel who was made responsible for drafting an accompanying bill.[225] James

[220] Confirmation of Liberties and Charters, Pardon, Arrest of Clergy, Fraudulent Conveyances, Cloth Act 1376 (50 Edw III, c. 6).

[221] Fraudulent Conveyances Act 1378 (2 Ric stat 2, c. 3).

[222] Fraudulent Deeds of Gift Act 1487 (3 Hen VII c. 4).

[223] ibid.

[224] Willems, *Fraudulent Conveyances* (n 216) 132; GR Elton, *The Parliament of England, 1559-1581* (CUP 1986) 73. See for a full parliamentary history Willems, *Fraudulent Conveyances* (n 216) 132-137.

[225] Elton (n 224) 73.

Dyer, the Chief Justice of the Common Pleas, was made responsible for the drafting of a bill to regulate fraudulent conveyances.[226]

Bills for the act started almost simultaneously in both the House of Commons and the House of Lords. Willems remarks that in both Houses the bill sparked particular interest among members of the house associated with the legal and trading professions.[227] Nevertheless, the bill failed in the House of Commons.[228] However, when the House of Lords introduced an official bill, the Commons gratefully accepted the bill to be discussed in their parliamentary debates.[229]

The debates showed that the crucial question was whether the gift had been made for an acceptable consideration.[230] In the next Parliament, the Commons passed a bill that proposed to stop gifts by private agreement and without any record, in order to protect people who later acquired the property in good faith.[231] Francis Alford MP was the great promoter of the bill. His motives seemed egocentric, as he had suffered from fraud himself; and a private bill could not remedy his grievances.[232] His bill led to much debate, 'some saying that it called every conveyance in doubt and others that it dealt with an infamous kind of fraud which before this had deceived even the Lord Keeper and the Lord Chief Justice.'[233]

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[226] Elton (n 224) See also Willems, *Fraudulent Conveyances* (n 216) 132.

[227] Willems, *Fraudulent Conveyances* (n 216) 134.

[228] Elton (n 224) 296.

[229] ibid.

[230] ibid.

[231] ibid.

[232] ibid.

[233] ibid.

The next Parliament dropped Alford's proposal,[234] and while the Fraudulent Conveyances Act 1571 was eventually passed, the problem of defrauded creditors and unfortunate purchasers remained unsolved.

III. The interpretation of the Fraudulent Conveyances Act 1571 by the courts

i.) *The Case of Bankrupts* (1584) – The purpose of the Fraudulent Conveyances Act 1571

Although the Fraudulent Conveyances Act 1571 was not part of insolvency legislation, its application is generally associated with insolvency, as creditors are generally only prejudiced by fraudulent conveyances if the debtor does not have sufficient assets to pay for his debts. The preamble of the object of the statute was merely to protect against delusive credit and not to obtain equal distribution of the debtor's assets. However, Coke CJ explicitly asserts in *The Case of Bankrupts*[235] (1584) that equal distribution was an aim of the Bankrupts Act 1571, c.7 in the same parliamentary session as the Fraudulent Conveyances Act 1571, c.5. He held that the intent of the statute 'was to relieve the creditors of the bankrupt equally, and that there should be an equal and rateable proportion observed in the distribution of the bankrupt's goods amongst the creditors, having regard to the quantity of their several debts'.[236]

ii.) *Twyne's Case* (1601) – Leading case on presumptions of fraud

a.) *Twyne's Case* (1601)

An account of the Fraudulent Conveyances Act 1571 is incomplete without reference to *Twyne's Case*, the leading case on fraudulent conveyances decided by the Court of Star

[234] ibid.

[235] *Smith v Mills* 'Case of Bankrupts' (1584) 2 Co Rep 25a, 76 ER 441.

[236] ibid 464-468 (Coke CJ).

Chamber in 1601.[237] *Twyne's Case* is reported in several places, but the most commonly cited version is that with the comments of Chief Justice Coke in *Coke's Reports*.[238] *Twyne's Case* established the principle that an assignment of personal chattels by the grantor without delivery is *prima facie* proof of fraud. The case gives a broad interpretation of the Fraudulent Conveyances Act 1571 using a markedly objectivist approach to 'fraudulent'.

The facts of the case were as follows: Pierce had borrowed £400 from Twyne and £200 from Warburton. Warburton had obtained judgment against Pierce and had directed the Sheriff of Southampton to make execution of the goods of Pierce by the means of a writ of *fieri facias*. This writ ordered the Sheriff to seize and sell Pierce's chattels to raise money to pay Pierce's debts. Chamberlain, the under-sheriff who executed the writ, was forcibly resisted by Twyne's employees and prosecuted Twyne in Star Chamber.

Pierce had made a secret deed of gift of all his real and personal goods and chattels, worth £300, to Twyne to pay off his debts. However, there was no real or constructive delivery of the goods and chattels and, after the transfer, Pierce remained in possession of the goods and continued to deal with the property, including selling some sheep and marking some other sheep as his own. In short, Pierce acted if he was still the true owner. In addition, the transaction resulted in a trust between Pierce and Twyne and the transfer deed had contained a somewhat unusual clause asserting that the transfer was made *bona fide*. Furthermore, there had been good consideration for the transfer, since Pierce's debt to Twyne exceeded the value of the property transferred.

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[237] See for a recent account of *Twyne's Case*, C Willems, 'Coke, Collusion and Conveyances: Unearthing the roots of Twyne's Case' (2015) 36 JLH 135.

[238] *Twyne's Case* (1601) 3 Co Rep 80a; 76 ER 809; *Chamberlain vers Twyne & Auters* (1601) Moore (KB) 638; 72 ER 809; WP Baildon (ed), *Les reports del cases in Camera Stellata. 1593 to 1609. From the original of John Hawarde* (Privately Printed 1894) 125.

Nevertheless, the Star Chamber held that the transaction between Pierce and Twyne was fraudulent. Because Pierce had continued to be in possession of the goods, the transfer was void against Pierce's other creditor.[239] Therefore, the Star Chamber convicted Twyne for fraud.[240]

At the time of the enactment of the Fraudulent Conveyances Act 1571, bankruptcy was still considered a crime.[241] Therefore, the 'purpose and intent' to 'hinder, delay or defraud creditors' had to be proved. Unless the gift was made *bona fide* and for good consideration the Fraudulent Conveyances Act 1571 invalidated the transfer as fraudulent. The Fraudulent Conveyances Act 1571 was later held only to extend to voluntary conveyances, where the grantor was indebted at the time, or where the deed was also fraudulent.[242]

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[239] ibid.

[240] All the other parties involved were convicted of a riot. That 'the others' were held accountable for a riot was not uncommon in the Star Chamber, as this court was mainly concerned with cases on real property in connection to a criminal element, like riots. Allegations were often fictitious and exaggerated. See Baker, *Introduction* (n 57) 118. However, on the facts of *Twyne's Case* the claim of riot does not seem to be a fiction to give the Star Chamber jurisdiction, but to reflect actual forcible resistance to the bailiffs.

[241] E Kadens, 'The last bankrupt hanged: balancing incentives in the development of bankruptcy law' (2010) 59 Duke LJ 1229, 1246, 1249; MRT Macnair, *The law of proof in early modern equity* (Dunker & Humblot 1999) 23 n 42.

[242] *Twyne's case* (n 238) 76 ER 809 n B. This is a comment added to a 19th century edition of Coke's *Reports*. The authority given as support for it starts in the late 17th century, but with an *obiter* argument of counsel.

There was certainly adequate consideration in the transaction between Pierce and Twyne in *Twyne's Case*, as the consideration for Pierce's grant to Twyne was an antecedent debt to Twyne, and Twyne's forbearance to enforce this debt. However, whether the gift was made *bona fide* was hard to prove. Therefore, the Star Chamber, apart from the statutory presumption of fraud in case of a voluntary conveyance, resolved this problem of facilitating the proof of fraud by using presumptions of fraud.[243] It held that fraud had to be proved based on the assessment of the surrounding circumstances (by a court or jury).[244]

According to *Coke's Reports* the Star Chamber considered whether the gift made by Pierce to Twyne was fraudulent under the Fraudulent Conveyances Act 1571 based on six presumptions, or so-called 'badges', of fraud. The Star Chamber considered that (1) the gift was too general. The transfer that Pierce made included all his possessions and he left nothing for the payment of his debts; (2) The donor remained in possession. Pierce had continued to be in possession of, and used the sheep as, if they were his own. Pierce had traded and trafficked with other parties, and because of that had defrauded and deceived these other parties. The Star Chamber had no other explanation for the debtor to remain in possession of assigned goods than to produce a delusive credit; (3) The gift was made in secret. Coke suggested that the transfer should have been made in a public manner, because secret transfers were always considered as a badge of fraud; (4) The gift was made pending litigation; (5) The gift was made in trust. Coke commented that no gift could be considered to be *bona fide* when the gift was accompanied with any trust, either express or implied. It was necessary to take immediate possession of the goods after the transfer, as '*continuance in possession by the donor is a sign of a trust for his benefit*'; and (6) the deed was suspicious, because the deed

[243] Macnair, *Proof* (n 241) 273; Willems, 'Coke, Collusion and Conveyances' (n 237) 135.

[244] WS Holdsworth, *A history of English law,* vol IV (Sweet & Maxwell 2007) 481. See, eg. *James Apharry v Roger Bodingham and the Petit Jury* 78 ER 598; (1593) Cro Eliz 350.

contained a clause that the gift was made honestly, truly and *bona fide* and unusual clauses always induce suspicion. Although, each of these 'badges' indicates fraud, none is conclusive evidence of fraud; the presumptions of fraud could be rebutted.[245]

b.) Roman and Medieval influences on presumptions of fraud

The usage of presumptions in equity, as used by the Star Chamber and Coke CJ in the case of fraud in *Twyne's Case*, equally has its roots in the civilian system.[246] The Digest contains a whole chapter devoted to the law of proof and on presumptions, D.22.3.[247] Current Romanists debate whether presumptions were actually already a technique of the classical Roman law or a mere interpretation of rules by the 'law schools' of Justinian's time.[248] In any case, the Roman doctrine of presumptions of fraud was revived by the glossators in the 13th century in the *ius commune*, who commented extensively on the Roman law text relating to presumptions of fraud.[249] Constantin Willems argues that Dinus Mugellanus (late 13th century) invented the idea of the first five 'badges' and that Bartolus de Saxoferrato (1313-1357) subsequently systemised them and added a sixth presumption.[250] The English canonist William Lyndwood (c. 1375 - 1446), and subsequently Dutch jurist Nicolaus Everardus

[245] *Crisp v Pratt* (1639) Cro Car 549; 79 ER 1072. The case is also reported in *Crispe v Pratt* (1639) Jones W 437; 82 ER 230 and *Crisp v Prat* (1639) March NR 34; 82 ER 399. Note that whether fraud could be presumed was controversial. See, Macnair, *Proof* (n 241) 273-74.

[246] Macnair, *Proof* (n 241) 125.

[247] D.22.3; Willems, 'Coke, Collusion and Conveyances' (n 237) 145.

[248] Willems, 'Coke, Collusion and Conveyances' (n 237) 145.

[249] ibid 129-151.

[250] ibid 142-143.

(1462-1532) took over these badges, although with some variations in their description.[251] Willems argues that despite not disclosing this fact, the Court of Star Chamber and Edward Coke sought inspiration in the *ius commune* to decide *Twyne's Case*.[252] It is known that Lyndwood was cited in *Twyne's Case* in Hawarde's report. Nevertheless, Willems suggests that Coke borrowed his ideas for his comments on *Twyne's Case* on the works of Everardus, as Coke and Everardus sixth badge 'trust' overlap.[253] However, Willems admits that Everardus is absent from Coke's library catalogue,[254] and the term 'trust' was expressly used in the Fraudulent Deeds of Gifts Act 1487. Therefore, it is not evident that Coke adapted the badges from Everardus; rather, he may have adapted them from Lyndwood. Interestingly, an important presumption in Roman law,[255] that an assignment made to a close relative is an indication of fraud, is missing in the judgment of the Star Chamber. However, Coke seems to accommodate this deficiency when commenting that a close family relation is equal to a trust relationship and is therefore fraudulent.

iii.) *Stone v Grubham* (1614) – Difference between absolute and conditional transfers

Stone v Grubham[256] (1614) established that the Fraudulent Conveyances Act 1571 made a distinction between absolute and conditional assignments in the assessment of a fraudulent conveyance of interests in land. It is not clear from the report whether the same rule applied to

[251] ibid 142-142.

[252] ibid 142.

[253] ibid 142-143.

[254] ibid 138 n 47.

[255] D.24.1.24.

[256] *Stone v Grubham* (1614) 2 Bulstrode 225; 80 ER 1079. The case is also reported in (in Law French) in 1 Rolle 4; 81 ER 285.

goods and chattels. Coke CJ held that retention of possession of land after an absolute conveyance 'shall be adjudged in law to be fraudulent because this hath the face of fraud', meaning that remaining in possession after an absolute conveyance without delivery was always considered *prima facie* evidence of fraud pursuant to the Fraudulent Conveyances Act 1571. However, a conditional conveyance (including a mortgage) of land was not considered fraudulent. The reasoning behind the difference was that the conveyance to the mortgagee is explicitly conditional and it cannot give rise to a false appearance of title in the mortgagee and the retention of possession by the mortgagor is consistent with the nature of the security.

IV. The shortcomings of the Fraudulent Conveyances Act 1571

The Fraudulent Conveyances Act 1571 proved to be insufficient to protect creditors against fraudulent conveyances and delusive credit. The Statute suffered from three deficiencies.

The first deficiency was that in the case of a bankruptcy the Fraudulent Conveyances Act 1571 was not available to the commissioners or assignees. In *Hawes v Leader*[257] (1611) it was held that the Fraudulent Conveyances Act 1571 could only avoid dispositions in favour of creditors and purchasers; the statute had no effect in favour of the parties themselves or their representatives (which would in principle include commissioners, assignees and executors).

Secondly, the Fraudulent Conveyances Act 1571, in spite of the broad construction and rules against preference in *The Case of Bankrupts* and the 'badges of fraud' in *Twyne's Case*, couldn't be stretched 'by equity' to cover the holders of securities that were made *bona fide* and for good consideration. This meant that conveyances that created ostensible ownership (but were not necessarily fraudulent) were outside the limits of the Statute.

[257] *Hawes v Leader* (1611) Cro Jac 270, 79 ER 232.

Thirdly, *Stone v Grubham*[258] had established that the Fraudulent Conveyances Act 1571 was not applicable to explicitly conditional sales (including mortgages). That was very inconvenient, as trade was for a large part financed that way, including by (secret) bills of sale.[259]

The reputed ownership clause, introduced in the Bankrupts Act of 1624, overcame all of these deficiencies.

C. The reputed ownership clause

I. The words of the statute

The first version of the reputed ownership clause, as set out in ss 10 and 11 of the Bankrupts Act 1624, was as follows:

> [s 10(5):] 'And for that it often falls out, that many Persons before they become Bankrupts, do convey their Goods to other Men upon good Consideration, yet still do keep the same, and are reputed the Owners thereof, and dispose the fame as their own:'

> [s 11:] 'Be it enacted, That if at any Time hereafter any Person or Persons shall become Bankrupt, and at such Time as they shall so become Bankrupt shall by the Consent and Permission of the true Owner and Proprietary have in their Possession, Order and Disposition, any Goods or Chattels, whereof they shall be reputed Owners, and take upon them the Sale, Alteration or Disposition as Owners, that in every such Case the said Commissioners or the greater Part of them shall have Power to sell and

[258] *Stone v Grubham* (n 256).

[259] Postan (n 206) 31; Nightengale (n 206) 560, 573, 574.

dispose the same, to and for the Benefit of the Creditors which shall seek Relief by the said Commission, as fully as any other Part of the Estate of the Bankrupt: (2) And for the better Payment of Debts and discouraging Men to become Bankrupt.'[260]

II. The explanation of the words in the statute

In simple terms, the sections of the reputed ownership clause provided that, if a *true owner* of goods or chattels gave *consent* to the assignor keeping the factual possession, an assignee in bankruptcy could take possession of goods not belonging to the bankrupt, if the goods were still in the *'order and disposition'* of the bankrupt '*at the commencement of the bankruptcy'.*

Hence, the statute set out the four essential requirements for the operation of the reputed ownership clause. First, the bankrupt had to have the 'order and disposition' of the goods and chattels after assignment. Concretely, this entailed that the bankrupt still had possession and the use of assigned goods and chattels, which appeared as if they were the property of the bankrupt.[261] The meant that under the reputed ownership clause the actual property of the bankrupt at the time of the bankruptcy was not available to the commissioners. Secondly, the true owner must have left the goods with the bankrupt. General property law determined the person who was considered to be the true owner at the date of the bankruptcy. Thirdly, the true owner had to give consent to leave the goods and chattels with the bankrupt. The true owner could retract his express or implied consent before notice of an available act

[260] Bankrupts Act 1623 [1624] (21 Jac 1 c. 19), ss. 10 and 11.

[261] It was not until the decision of *Lingham v Biggs* (1797) that 'order and disposition' was formally defined. Eyre CJ described the term as 'being allowed to have possession of goods under circumstances which give the reputation of ownership. Eyre CJ adds that this reputation of ownership is not only between parties, but to the world at large. *Lingham v Biggs* (1797) 1 Bos & P 82; 126 ER 790, 794.

of bankruptcy. However, if the true owner failed to do so, the reputed ownership clause would take effect; the true owner would lose his priority in the bankruptcy, and the goods would pass to the assignees in bankruptcy in order to be distributed among the general creditors. Finally, the reputed ownership clause only applied to goods that were in the possession of the bankrupt at the time of the commencement of the bankruptcy. Therefore, the reputed ownership clause did not apply to after-acquired property. However, the 'commencement' had a technical meaning within the 'doctrine of relation back', which meant that the title of the commissioners or assignees related back to the time that the first act of bankruptcy was committed.[262] The preamble of the Bankrupts Act 1624 confined bankruptcy in general, and hence the reputed ownership clause, to traders.[263]

III. Parliamentary history of the statute

The reputed ownership clause was enacted by Parliament as part of the Bankrupts Act 1624, in order to give extra protection to creditors against delusive credit.[264] It seems that delusive credit was of great concern in the cloth trade and played an important role in the enactment of the Bankrupts Act 1624.[265] In a debate on 14 February 1621, six reasons were given for the

[262] Bankrupts Act 1623 [1624], s. 10. The 'doctrine of relation back' was established in the Bankrupts Act 1571, s. 2.

[263] ibid Preamble.

[264] See for a summary on the parliamentary debates on the Bankrupts Act 1624, SD White, *Sir Edward Coke and the grievances of the commonwealth* (Manchester University Press 1979) 291-292 (Appendix C).

[265] ibid Preamble.

"great fall of wools and clothing,"[266] of which the second was 'the great number of Bankrupts that deceitfully and fraudulently breaks to the overthrow of divers Clothiers.'[267] According to Coke (then MP) these cloth merchants were often deceived, as bankrupts often borrowed money when they knew that they were about to go bankrupt.[268] The House of Commons was to help by making 'some strict law of punishing such Bankrupts and the help the Creditor to his Debts'.[269] The wish for a new bankruptcy act was part of a wider policy of change in English economic policy, which amongst others also included a new usury act.[270]

Parliamentary debates on the Bankrupts Bill took place in the House of Commons and the House of Lords in 1621 and 1624.[271] However, no significant remarks or suggestions for amendments were made during this debate in relation to reputed ownership.

In 'A Briefe of the Bill exhibited against Bankrupts'[272], what would now be called 'Explanatory Notes', calendared at 13 March 1624[273], the reputed ownership clause was described as: 'That where lands, goods, or chattels, of any Bankrupt, be assigned over upon

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[266] See for a short summary on the rise of the wool and cloth industry, JD Mackie, *The Earlier Tudors 1485-1558* (Clarendon Press 1952) 461-468.

[267] W Notestein, FH Relf and H Simpson, *Commons Debates 1621,* vol 5 (Yale University Press 1935) 457.

[268] ibid vol 3 296.

[269] ibid vol 5 457.

[270] White (n 265) 34.

[271] ibid.

[272] Notestein, *vol 4* (n 267) 104-108. This 'Briefe' is also published as an appendix to D Graham, 'A dark and neglected subject: landmarks in the reform of English insolvency law' (2002) 11 Int Insolv Rev 97-119, 117-119.

[273] This is the same as SP 14/160:74, calendared under March 13, 1624.

good consideration, yet the same remaining in the possession, order and disposition of the Bankrupt, after such grant or gift[274] make to receive the rents, and take the profits; That such lands, goods, and chattels be made subject to the Commission.' The Bill extended only to bankrupts that made a living 'by buying and selling'. The 'Brief' gives the reasoning behind the clause: 'This possession of the Bankrupt, the grant being concealed, was the motive of the Bankrupts great trust and credit. This possession of the Bankrupt, is a badge of fraud, and lyeth in the desck many yeeres thus concealed'.[275]

The parliamentary history of the Bankrupts Act, including the reputed ownership clause, shows that Parliament was primarily concerned with the misconduct of the bankrupt, and to remedy the misfortunes of creditors. The 'Briefe' suggests that the reputed ownership clause only extended to assignments of goods for good consideration, which would not be covered by the Fraudulent Conveyances Acts. The bankrupt's assets were only within the scope of the reputed ownership clause, if the bankrupt remained in possession after a grant or

[274] In the 17th century common law the words 'grant' and 'gift' both corresponded to the modern word 'conveyance' and had thus a more extensive meaning than the modern 'gift. The word 'grant' taken largely meant 'where anything is granted or passed from one to another'. The word 'gift' meant 'importing no more, then transferring of the property from one to another, is of a larger extent then a feoffment, which is always applied to an immoveable thing; for this is often applied to moveable things also, as trees, cattell [sic], household-stuffe [sic] & c. the property whereof is, and may be as well by gift, as by sale or grant.' See W Sheppard, *The learning of common assurances or, a plain and familiar treatise, opening the learning of the common assurances or conveyances of the Kingdome* (M.F. London, 1648) 227-228.

[275] Notestein, *vol 4* (n 267) 104-108.

gift. The Bankrupts Act 1624 considered the reputed possession of the bankrupt as a 'badge of fraud'.

IV. The purpose of the Act

The reputed ownership clause was part of the Bankrupts Act 1624 that was designed for the 'aid, help and relief of the creditors of such person or persons as already be or hereafter shall become bankrupt.' [276] The reputed ownership clause became controversial because the assignee in bankruptcy could take goods and chattels in a bankruptcy proceeding that were not the property of the bankrupt; the bankrupt merely had the goods in his possession and appeared to be the owner to the world at large, by using them as his own. The reputed ownership clause was however in line with the traditional view in English legal doctrine, as the clause considered movables *prima facie* as the absolute ownership of the person in whose possession they were found.[277]

This meant that, in practice, people other than the bankrupt could end up paying for the bankrupt's debts. The justification behind this seemingly unjust rule was that these people provided the bankrupt with the appearance of ownership and credibility, and thereby enabled him to acquire more credit than he ought.[278] In that way, they deceived *bona fide* creditor,

[276] Bankrupts Act 1623 [1624], Preamble.

[277] ibid ss. 10 and 11. See JH Baker, 'Property in chattels' (n 2) 739-740 for this view.

[278] W Roberts, *A treatise on the construction of the statutes, 13 Eliz. c. 5. and 27 Eliz. c. 4. relating to voluntary and fraudulent conveyances, and on the nature and force of different considerations to support deeds and other legal instruments, in the courts of law and equity* (Strahan, 1800) 551.

without notice of the assignment or conveyance, who gave credit to the (soon to be) bankrupt on the faith of that credibility.[279]

The owner of the goods who had permitted the bankrupt to obtain false credit lost his priority in the bankruptcy due to his 'own misbehaviour' or 'negligence', even if the conveyance was made for good consideration.[280] In that way, the reputed ownership clause worked like a penalty. The assignee in bankruptcy would redistribute the proceeds of the goods in the bankruptcy among all the creditors, in order to give all the creditors some kind of relief.

Hence, the reputed ownership clause was not aimed to correct the bankrupt; rather it punished creditors that had assisted the bankrupt with false wealth. The working of the reputed ownership clause was, therefore, different from the aim proposed in the parliamentary history.

V. The relation to the Fraudulent Conveyances Act 1571

If the assignor went bankrupt, while being in possession of movables after assignment, the retaining of possession could potentially be considered fraudulent under the reputed ownership clause of the Bankrupts Act 1624 alone, or both the Fraudulent Conveyances Act 1571 and the reputed ownership clause. There seems, however, to be inconsistencies in the assessment based on the 'Briefe' and the words of the 1624 statute on the one hand and the judgment of *Crisp v Pratt*[281] (1639) on the other.

On the basis of the 'Briefe' and a statutory analysis, an assignment could be caught by the reputed ownership clause, even if the assignment was not a fraudulent conveyance. The

[279] W Cooke, *A compendious system of the bankrupt laws* (Edward Brooke, 1785) 228.

[280] ibid.

[281] *Crisp v Pratt* (1639) (n 245).

reputed ownership clause could then only be avoided if the transfer was notorious to the world at large. After all, the reputed ownership clause included assignments that were made *bona fide* and for valuable consideration. Conversely, it also meant that an ostensible assignment could also be a fraudulent conveyance under the Fraudulent Conveyances Act 1571. But, as the reputed ownership clause would already caught these assignments, there was little reason to try to establish whether these assignments were fraudulent or not.

However, in the case of *Crisp v Pratt* it was established that the Bankrupts Act 1624 was an extension of the Fraudulent Conveyances Act 1571 and that fraud had to be expressly found. The case dealt technically with the effect of the Bankrupts Act 1571, s. 2 and the Bankrupts Act 1604, s. 5, but it is reported *inter alia* as to how to interpret the Bankrupts Act 1624.

The majority of the judges (Bramston CJ, Croke J, Jones J) read a requirement of fraud into the Bankrupts Act 1604 and Bankrupts Act 1624, even when this was not specifically set out in the words of statute. They held that although the jury had found facts from which fraud could be inferred (based on the idea of 'badges of fraud'), the court could not infer fraud from the facts, but that the conveyances could only be avoided if the jury has expressly found fraud. Berkeley J dissented, arguing that the conveyance was in the express words of the statute and no construction should be made to evade the statute.

Powell (1791) later wrote that the importance of *Crisp v Pratt* lay in the fact that the fairness of an assignment was a question of fact, which depended on an assessment of the surrounding circumstances, and had to be decided by a jury.[282]

[282] JJ Powell, *A treatise upon the law of mortgage,* vol I (3rd end, Butterworth 1791) 18. Bankruptcy cases were decided in the Court of Chancery; questions of fact were commonly decided in the King's Bench, but exceptions applied. See J Oldham, *English common law in the age of Mansfield* (University of North Carolina Press 2004) 107.

In his treatise on fraudulent conveyances (1800), William Roberts explained the difference between the statutes by stating that the Fraudulent Conveyances Act 1571 considered the continuing of possession *prima facie* as an argument of intentional fraud, whereas the reputed ownership clause considered it as affording an opportunity of committing fraud.[283]

Therefore, the reputed ownership clause adopted a 'presumptive fraud' approach using retained possession as a 'badge of fraud' more forcefully than the Fraudulent Conveyances Act 1571 and *Twyne's Case*, in particular the third 'badge of fraud' that no assignment should be made in secret.

Conclusion

The reputed ownership clause was one of the legal provisions that was taken to protect creditors from delusive credit. The reputed ownership clause adopted a 'presumptive fraud' approach using retained possession as a 'badge of fraud' more forcefully than the Fraudulent Conveyances Act 1571 and *Twyne's Case*. The reputed ownership clause did not limit the Fraudulent Conveyances Act and as such the reputed ownership clause was not only based on 'delusive credit', but also on equal distribution amongst the creditors.

The rise of the reputed ownership clause stood in direct correlation with the rejection of the chattel mortgage in English law, as the chattel mortgage could create ostensible ownership. The law only recognised *visible* security interests. Creditors could only make credit judgments on the basis of visible possession, because possession and the power of disposal were the only evidence of ownership of personal property. If ostensible ownership was created, the reputed ownership clause penalised the mortgagee for this unwanted practice.

[283] Roberts (n 278) 556. See also Cooke, *Bankrupt laws 1785* (n 279) 228. However, Cooke's description is clearly influenced by the decision of *Ryall v Rolle* (1750) See below (n 315).

The innocent creditors thereby gained access to the value of the assets in the reputed ownership of the debtor in the general insolvency and the mortgagee descended to the rank of a normal creditor.

3

The early interpretation of the reputed ownership clause

The earliest direct reference to the reputed ownership clause in the reported cases is in Sir William Jones' report of *Awdley v Halsey*[284] (1629). The case is merely using the reputed ownership clause to indicate that a prior disposition cannot be attacked at common law if the requirements of the statute are not met. At the end of the seventeenth century appear some other cases that implicitly apply the reputed ownership clause[285], but explicit discussion of the scope of the reputed ownership clause in printed reported cases only started to appear at the beginning of the eighteenth century, discussed below (A). Most of these cases resulted in the creation of exceptions to the reputed ownership clause, discussed below (B). It took the courts 125 years after the enactment of the reputed ownership clause to decide the leading case *Ryall*

[284] *Awdley v Halsey* (1629) W Jon 202, 82 ER 107. The report states: '& devant recovery le party devient bankrupt, & apres un recovery ewe ceo avoidera le sale per le commission de bankrupt, & ceo appiert per L'estatute 21 Jacobi; car la est un special provision, que en ceo case les biens serrond en possession le vendee, come biens le bankrupt, ideo ceo est per L'estatute de Bankrupt'. Not in Croke's (translated) report *Audley v Halsey* (1629) Cro Car 148, 79 ER 731.

[285] *Bingly v Warcop* (1675) 3 Keble 480; 84 ER 834 held that if the goods were not seised before the party became bankrupt, before the *teste* (date) of the commission the goods were bound by the bankruptcy; *Philips v Thompson* (1682) 3 Lev 69; 83 ER 581 states that the Bankrupts Act 1624 aimed at equal distribution amongst all creditors (the reputed ownership clause was a method in Bankrupts Act 1624 to achieve this). The case also refers to *Awdly v Halsey*.

v Rolle (1749).[286] *Ryall v Rolle,* below (C) and the later case of *Mace v Cadell*[287] (1774) were the most important cases in the case law relating to the foundations of the reputed ownership clause. However, *Ryall v Rolle* did not cause the reputed ownership doctrine to become without limitations, discussed below (D).

A. The extent of the enacting clause

The first case that explicitly dealt with the reputed ownership clause was *L'Apostre v Le Plaistrier*[288] (1708). The case dealt with the scope of the enacting clause of the reputed

[286] This could explain why treatises published between 1624 and 1749 only mention the provision of the reputed ownership clause in their chapters on the commissioners' title and provide no further explanation or details of the reputed ownership clause. Goodinge makes only some general comments on the commissioners' title. He writes that the sale of goods by a bankrupt is void, albeit the commissioners never seised of the goods and he mentions one exception when the goods of the bankrupt were liable to the sale by the Commissioners, notwithstanding the bankrupt had sold them in Market Overt. T Goodinge, *The law against bankrupts: or, A treatise wherein the statutes against bankrupts are explained* (S Heyrick 1695) 116, 118. Later editions of this treatise, the latest published in 1719, do not go further than a mention of the clause. See also M Bacon, *A new abridgement of the law,* vol I (A Lintot 1736) 260. A separate chapter on reputed ownership only appears in the third edition of Powell's treatise on mortgages. Powell (n 282) 23-46. See S Howard, *Every tradesman his own lawyer* (Stratford 1794) 87-89 for the reputed ownership clause in relation to set-off.

[287] *Mace v Cadell* (1774) 1 Cowp 232; 98 ER 1060; *(v Cammel)* (1774) Lofft 782; 98 ER 917.

[288] *L'Apostre v Le Plaistrier* (1708) 1 P Wms 316; 24 ER 406, reported in *Copeman v Gallant* (1716) 1 P Wms 314; 24 ER 404.

ownership clause. An action of trover was brought for a parcel of diamonds against the defendant, who acted as an assignee in bankruptcy of Levi. Before the bankruptcy, the plaintiff had delivered the diamonds to Levi, in order for him to sell them. The assignee in bankruptcy had claimed the diamonds under the reputed ownership clause. Holt CJ decided in the King's Bench that this seemed to be 'hardship' on the plaintiff and ruled that the general words of the enacting clause ought to be explained by the preamble. This meant that the diamonds, being originally the plaintiff's, with the bankrupt only having authority to sell them, were outside the scope of the reputed ownership clause.

Some doubt was cast on the extent of the reputed ownership clause in the case *Copeman v Gallant* (1716),[289] decided by Cowper LC in the Court of Chancery in 1716. The case dealt with a trust dispute. A. had made a bill of sale of some leases and personal estate to B. and C. in trust to pay A's debts. At first, B. had acted as a trustee, but later C. took the whole trust estate into his possession and became a bankrupt. It was argued for A. that the enacting clause was only intended to prevent a fraud in the bankrupt and was not meant to punish an innocent man, or a third party. The meaning of the statute was that if the bankrupt assigns his goods, and still continues to be in possession, and still acts as owner of them, those assets are available for distribution to his creditors. However, Cowper LC held that the preamble should not restrain the enacting clause, because the preamble might be too 'narrow and defective'. Nevertheless, Cowper LC decided that the case was not within the scope of the operation of the reputed ownership clause after all, because the assignment to B. and C. was made with an honest intent, namely the payment of the debts of the assignor. The latter judgment made the authority of *Copeman v Gallant* disputable, as honest intent was of no relevance for the application of the reputed ownership clause.[290] In Viner's alternative report

[289] *Copeman v Gallant* (1716) 1 P Wms 314; 24 ER 404.

[290] ibid.

of the case it is suggested that the case might be different if the goods were left with C long enough to give him the reputation of ownership.[291]

In the later case of *Ryall v Rolle* (1749, see below) Parker CB, Lee CJ and Lord Hardwicke C expressed *obiter* disagreement with Lord Cowper's judgment, as it was established that the goods must fall both within s 11 (the enacting clause) and s 10 (5) (the preamble to s 11),[292] i.e. that the goods in question must have been property of the bankrupt before the disposition. *Ryall v Rolle* therefore had a restrictive effect on the text of the reputed ownership clause. It meant that the assignee in bankruptcy could only get hold of the property of the bankrupt if the transaction fell within the scope of s 10 (5); the property must have been assigned over by the bankrupt. *L'Apostre v Le Plaistrier* and *Ryall v Rolle* were decided in line with the initial intention of the act as explained in the 'Briefe' on the bankruptcy bill.[293]

However, Lord Mansfield CJ reversed the decision in *Ryall v Rolle* on this point when he ruled in *Mace v Cadell*[294] that the enacting part of s 11 was not restrained by the preamble. The decision meant that the reputed ownership clause did not only apply to property which was originally the bankrupt's, but also applied to goods that had never been owned by the bankrupt.

The claim was in trover. Mace, who had a licence to keep a public house, went to the Excise Office and stated that she was married. Penrice, the presumed husband, had the licence and continued to be in possession of the house and goods, until he committed an act of bankruptcy. Subsequently, Mace claimed the goods under a bill of sale she had made with Penrice, but later claimed the goods as her own property, denying she was married to Penrice.

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[291] *Copeman v Gallant* (1716) 2 Eq Ca Abr 113; 22 ER 96.

[292] The text of the relevant sections of the Bankrupts Act 1624 is set out at pp. 61-62.

[293] Notestein, *vol 4* (n 267) 104-108.

[294] *Mace v Cadell* (1774) 1 Cowp 232; 98 ER 1060; (*v Cammel)* (1774) Lofft 782; 98 ER 917.

Counsel for Mace gave three reasons to limit the enacting clause.[295] First, the preamble of the Bankrupts Act 1624 was restricted to bankrupts and a preamble limits and declares the meaning of every statute. Secondly, the enacting clause only spoke of bankrupts and finally, because the Bankrupts Act 1624 was a penal statute it was argued that the statute had to be construed strictly to the letter, and not carried beyond to what is neither within the words or professed view of the Act.

Counsel for the assignee in bankruptcy offered four counterarguments. Firstly, counsel relied on the argument that the grievances in the preamble and an enacting clause do not need to be of a similar nature. The second argument was that the object of the reputed ownership clause was for the better payments of debts and that there should be no difference whether these debts were paid by a trader or not. Thirdly, the common law always considered a secret transfer of moveable goods as a badge of fraud. And fourthly, in this case, the woman was reputed to be the wife of Penrice and counsel argued that she could not choose to be Penrice's wife only when it suited her.

Lord Mansfield CJ's decision made the reputed ownership clause more controversial, because it meant that the enacting clause extended to goods of a person (whether that person was a creditor or not) that were in the possession of the bankrupt, while the bankrupt had never owned those goods.

For example, as in the case of *Mace v Cadell,* if Penrice was not Mace's husband and the only transaction between Mace and Penrice was that she had permitted Penrice to deal with goods she owned as if he was the owner. Another possible example would be if Mace bailed goods to Penrice, Penrice then sub-bailed them to C under an ostensible authority only, and C then became bankrupt. Therefore, *Mace v Cadell* was crucial for the development of the reputed ownership clause. Lord Mansfield CJ argued that his decision was consistent with

[295] Arguments of counsel can be found in Lofft's report.

the doctrine of *Twyne's case*, as even before the enactment of the reputed ownership clause, a conveyance, while remaining in possession, was considered fraudulent. However, his argument to include the enactment clause of the reputed ownership clause, by a parallel reading of the Fraudulent Conveyances Act 1571, was wrong. A fraudulent conveyance under the reputed ownership clause assumed a *bona fide* assignment with valuable consideration. Nevertheless, Lord Mansfield CJ extended the definition of a 'badge of fraud' further than had been intended by the legislature at the time of the enactment of the reputed ownership clause; and *Mace v Cadell* became a leading case in relation to the reputed ownership clause.

However, Lord Mansfield CJ made clear that he did not see the clause as extending to all possible cases where one man had another man's goods in his possession.[296] He excluded factors, goldsmiths, trustees and people that only had the bare authority to sell for the use of their principal, from the scope of the reputed ownership clause.[297]

When the Bankrupts Act was reframed in the time of George IV as the Bankrupts (England) Act 1825, the legislature left out this preamble to the reputed ownership clause.[298] However, it was later argued that the latter part of s 10 was printed separately from the enacting part of s 11 of the reputed ownership clause by mistake.[299]

B. Early exceptions to the reputed ownership clause

From *L'Apostre v Le Plaistrier* onwards, it was always clear that the reputed ownership clause was not unlimited. The operation of the reputed ownership clause could be rebutted, if

[296] *Mace v Cadell* (1774) 1 Cowp 232, 233; 98 ER 1060, 1061.

[297] ibid.

[298] Bankrupts (England) Act 1825, s. 110.

[299] HC Deb 05 April 1869, vol 195, cols. 142-72.

there was evidence that the title of the true owner was notorious to the world, analogously to the presumptions of fraud under the Fraudulent Conveyances Act 1571.[300]

A year after the decision of *L'Apostre v Le Plaistrier*[301] a more complicated case relating to the reputed ownership clause was decided. In *Bucknal v Roiston*[302] (1709), a trader travelled for three years on a cargo ship to the East Indies. On board, Brewer had several goods and commodities that he had borrowed from Bucknal. At the time of assignment, Brewer had made a bill of sale to Bucknal of his goods and commodities and *'the produce and advantage that should be made thereof'* he would make after the three-year journey. Three years later, the ship arrived back on English shores, but Brewer had died at sea. Royston, Brewer's creditor, took possession of several of the goods and commodities on the ship that had been in the possession of Brewer at his death. Royston insisted that he was a creditor ranking higher in priority than Bucknal and that Brewer's keeping possession of the goods after the sale made it fraudulent and void as against creditors. However, the Lord Chancellor decided that keeping possession of the goods had not given Brewer false credit because at the time of the transaction it was agreed between parties that the mortgage was made for that particular purpose. In addition, Royston's judgment was before the transaction between Bucknal and Brewer; hence Royston, as a prior creditor, had in no way given credit to Brewer on the credit of these goods.

Goods that were in the possession of bankrupt people that were well known to be representatives, such as trustees, factors and executors, and where the goods were distinguishable from the general mass of the property, were also excluded from the reputed

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[300] *Crisp v Pratt* (1639) See above (n 245).

[301] *L'Apostre v Le Plaistrier* (1708) 1 P Wms 316; 24 ER 406, reported in *Copeman v Gallant* (1716) 1 P Wms 314; 24 ER 404.

[302] *Bucknal v Roiston* (1709) Prec Ch 285; 24 ER 136.

ownership clause.[303] In *Ex parte Chion*[304] (1721) trust stock was excluded from the reputed ownership clause. A trader in London bought with the money of J.S. (who resided in Holland) South Sea stock as a factor for J.S. He took the stock in his own name, but entered the transaction in his account book. Afterwards the trader became bankrupt. Lord Macclesfield LC held that trust stock did not fall within the scope of the reputed ownership clause, because '*it would lessen the Credit of the Nation to make such a Construction.'* The decision in of *Ex parte Chion* was important, because people that were concerned about losing their priority of their goods in a bankruptcy, or were unable to monitor their goods properly, could put them in a trust.

This exception was held to extend to family settlements in *Lockyer v Savage*[305] (1732). In this case it was held that the part of the settlement set aside for the maintenance of the wife and children in a family settlement made before marriage, was a separate estate from the bankrupt and therefore not within the limits of the reputed ownership clause. In *Godfrey v Furzo*[306] (1733) bankrupt factors were excluded from the reputed ownership clause, even though a factor has the possession of the goods of his principal and the power of immediately selling them and taking the money. In *Ex parte Marsh*[307] (1744) it was held that goods in the

[303] See for a detailed account on these types of exceptions, see the section on 'factors, executors and other trustees' that appeared in the second edition of W Cooke, *The bankrupt laws* (2nd edn, E & Brooke 1788) 414-428. In later editions of the book the case law concerning these exceptions are further extended.

[304] *Ex parte Chion* (1721) 3 P Wms 187 n 2; 24 ER 1023.

[305] *Lockyer v Savage* (1732) 2 Str 947; 93 ER 959.

[306] *Godfrey v Furzo* (1733) 3 P Wms 185; 24 ER 1022.

[307] *Ex parte March* (1744) 1 Atk 158; 26 ER 102.

possession of an administrator are not within the scope of the reputed ownership clause, because the administrator has them *auter droit,* in another's right.

Interests in land fell outside the scope of the reputed ownership clause. *Stephens v Sole*[308] (1736) illustrated the exclusion of mortgages of interests in land. Creditors could not be deceived and deluded by the possession of real property, because in the case of mortgages of land the mortgagor usually remained in possession (unless in the case of intentional fraud) and the assignment could be traced through the title deeds. A prior mortgagee, who had not taken the title deeds, would be postponed to a second who had.[309] In contrast, possession of goods and chattels was said to be equivalent to the title deeds of real property, as this is the only evidence of the ownership of the goods.[310]

Bourne v Dodson dealt with an assignment of goods and ships at sea. Lord Hardwicke LC argued that this type of assignments might be caught by the reputed ownership clause, but he did not make a definite decision; the report ends with a direction for jury trial of the date of the act of bankruptcy, and the case was settled without further proceedings. Lord Hardwicke C explained that either decision could lead to inconveniences. To include these assignments could be inconvenient for trade, due to the frequency of assignments of ships and cargoes at sea (and no actual possession could be delivered until the ship returned from sea). On the other hand, to exclude these assignments from the reputed ownership clause could encourage fraud.[311]

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[308] *Stephens v Sole* (1736) 1 Ves Sen 353; 27 ER 1077 (reported in *Ryall v Rowles*); 1 Atk 157, 161, 170; 26 ER 100 (reported in *Bourne v Dodson*).

[309] T Cunningham, *The merchant's lawyer: or the law of trade in general,* vol II (2nd edn, Kearsly 1762) 548; Roberts (n 278) 550; Cooke, *Bankrupt laws 1785* (n 279) 228.

[310] Cooke, *Bankrupt laws 1785* (n 279) 228; Cunningham, *vol II* (n 309) 546.

[311] *Bourne v Dodson* (1740) 1 Atk 154; 26 ER 100.

In *Brown v Heathcote*[312] (1746) Lord Hardwicke LC decided another case about assignments of goods, bills of lading, and policies of insurance at sea. He held that delivery is not always necessary to complete a contract. He argued that it was impossible to complete the assignments by delivery, as goods at sea could not be delivered. However, not to be able to assign ships and goods at sea 'would be a great detriment to trade and commerce in general'.[313] Therefore, if the mortgagee takes all methods in his power to get the possession of the bills of lading and invoices, assignments of ships and goods at sea were excluded from the reputed ownership clause.[314]

The nature of these judgments showed that the courts initially gave a fairly restrictive interpretation to the reputed ownership clause, limiting the scope, rather than extending it. In relation to the working of the reputed ownership clause, in some contexts the need to enhance credit, trade and commerce weighed more than to protect creditors from fraud by postponing the assignee's security and giving general priority in the bankruptcy. In particular, *Ex Parte Chion* and *Brown v Heathcote* demonstrate that the courts sometimes explicitly limited the scope of the reputed ownership clause for that reason.

However, all the accepted exceptions of the reputed ownership clause have in common that the court held (in one way or another) that it was notorious that the person in possession had parted with the ownership of goods, and that he retained possession only according to the contract between him and the assignee.

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[312] *Brown v Heathcote* (1746) 1 Atk 160; 26 ER 103; (1745) Dick 100; 21 ER 206.

[313] ibid 26 ER 106. (Lord Hardwicke LC).

[314] ibid 26 ER 106. (Lord Hardwicke LC).

C. *Ryall v Rolle* (1749)

The leading case on the reputed ownership doctrine is *Ryall v Rolle*.[315] The case had been long depending[316] and was decided in the Court of Chancery in 1749, which was presided over by Lord Chancellor Hardwicke, who was assisted by Sir William Lee, Lord Chief Justice of the Court of King's Bench, Sir Thomas Parker, Lord Chief Baron of the Court of Exchequer, and Sir Thomas Burnet, one of the justices of the Court of Common Pleas. The case was considered very important for the reputed ownership doctrine, as it was held that when a mortgagor retained possession of goods after assignment under a conditional sale (chattel mortgage) and the mortgagee does not insist upon delivery of the goods, the mortgagee was assumed to have given the mortgagor false credit.[317] In consequence, the

[315] *Ryall v Rolle* (1750) 1 Atk 165; 26 ER 107; (1750) 1 Wils KB 260; 95 ER 607; *Ryall v Rowles* (1750) 1 Ves Sen 348; 27 ER 1074. (*Ryall v Rowles* (1750) Ves Sen Supp 165; 28 ER 490 is merely an early nineteenth century editorial note). The manuscript of Burnet J's judgment is published as *Ryall v Rowles* 9 Bligh NS 377n; 5 ER 1331; undated in Bligh and in the *English Reports* reprint, this note is misdated to 1835 in the Justis, Westlaw and Juta-Hart databases. See also WJ Zwalve, '*Ryall v Rolle* and the civilian tradition' (1996) 56 La L Rev 437.

[316] Cunningham, *vol II* (n 309) 532 (Appendix).

[317] The importance of the case is remarked by T Cunningham in the preface of the first volume to his treatise '*The merchant's lawyer'*. T Cunningham, *The merchant's lawyer: or the law of trade in general,* vol I (2nd end, Kearsly 1762). He attached an adjusted version of case of *Ryall v Rolle* with a copy of the Fraudulent Conveyances Act 1571 as an appendix to the book, because he thought the case was that important for the law of trade. The report of the case is adjusted by Cunningham to make it clear and intelligible for the reader. Cunningham, *Vol II* (n 309) 532- 597 (Appendix).

chattel mortgage did not give priority to the mortgagee over general creditors in a bankruptcy proceeding. Contrary to what *Stone v Grubham* had done for fraudulent conveyances under the Fraudulent Conveyances Act 1571, *Ryall v Rolle* established that there was no difference between absolute and conditional assignments in the application of the reputed ownership clause.[318] The criterion for reputed ownership was that the assignor (bankrupt) deceived creditors with delusive credit, which could be done with conditional as well as absolute assignments.

There are four reports available of *Ryall v Rolle*, although two are reported as *Ryall v Rowles*.[319] The facts were as follows: William Harvest, a trader, owed a debt of £1500 to Benjamin and Joseph Tomkyns. In order to pay his debts, Harvest agreed to assign his house and brewhouse, including all the coppers and utensils of brewing, fixed or belonging to the brewhouse, for a term of 500 years. The parties agreed that if Harvest paid his debt plus interest his possessions were redeemable. It was not the first time Harvest had used his premises to secure a debt, as the premises were already mortgaged twice to Stone.

After these assignments, Harvest went into a business partnership with Stevens. The utensils and stock of the brewhouse were valued at £14,000 and, for consideration of £7000, Harvest conveyed half of the business to Stevens. In consequence, Harvest and Stevens became business partners until Harvest became a bankrupt.

After concluding the partnership deed, Harvest re-mortgaged and re-assigned his moiety of the utensils and stock of the brewhouse several times, in the following way: Harvest mortgaged, for valuable consideration, his share of the partnership, including stock, utensils, debts, and future profits in trade, to Potter in trust for Stevens. In addition, Harvest twice

[318] The reputed ownership clause had no restrictive effect on the Fraudulent Conveyances Act 1571 in relation to protecting creditors against fraud.

[319] *Ryall v Rolle* (1750) See above (n 315)

mortgaged a seventh part of his original moiety to two additional creditors. Harvest had already conveyed his house and premises to Stone, but by endorsement of this mortgage, he additionally assigned the utensils of the brewhouse to Stone. Subsequently, Stone assigned his whole mortgage to Baugh, who assigned the mortgage of the utensils and stock back to Harvest. In addition, after lease and release, Baugh assigned his mortgage of the house and brewhouse to Jonathan Stevens. Harvest, who was a party to the release, sold and assigned his moiety of the utensils of brewing to Jonathan Stevens. The final mortgage, one-seventh of his original moiety, was made to Harvest's son George. When Stevens died, Rolle became his executor. After all of these assignments and mortgages, Harvest continued to trade and appeared as much a business partner and owner of the brewhouse as before he made the assignments and mortgages.

The dispute in this case was whether any of these mortgagees were entitled to the goods or whether the goods would pass to the assignee in bankruptcy to be distributed among the general creditors based on the reputed ownership clause in the Bankrupts Act 1624. The main legal question was whether conditional sales or mortgages fell within the reputed ownership clause. The answer to this question depended on whether any of the mortgagees had permitted the bankrupt to continue in possession of the goods. In order to deliver judgment, the Court of Chancery dealt with four sub-questions (in addition to the determination, discussed above, whether s 10 restrained the enacting clause of s 11 of the reputed ownership clause): (I) whether the mortgagor or the mortgagee was the real owner of the goods, as meant in the reputed ownership clause; (II) whether the mortgagor could stay in possession of the goods mortgaged; (III) whether a chose in action was within the scope of the reputed ownership clause; and (IV) whether it made a difference if a mortgage was made with a stranger or a partner in a partnership.

I. True owner

In regard to the first question, whether the mortgagor or the mortgagee was the real owner within the statute, counsel for the mortgagees argued that Harvest should still be considered the true owner.[320] They argued that the common law mortgage of chattels was the equivalent of the Roman law *hypothec* and referred in their argument to Inst. 4.6.7.[321] In this text two types of real security interests were distinguished, the *pignus* and the *hypothec*.[322] A *pignus*, or pledge, required delivery after assignment and, therefore, deprived the debtor of his possession.[323] This meant that the thing pledged could only be used once as a security. It has been suggested that the lack of the possibility of re-mortgaging and the disadvantage this had on the Roman economy led to the development of a modified *pignus* in the Justinianic codification, the *hypothec*.[324] The *ius honorarium*, the law of the praetor (the Roman law equivalent to the Equity jurisdiction) recognised new transactional practices that triggered the development of the *pignus*.[325] The advantage of a *hypothec* was that the mortgaged item did

[320] *Ryall v Rowles* (n 315) 27 ER 1078,1079.

[321] J. Inst. 4.6.7 (translation available JAC Thomas, *The Institutes of Justinian* (North-Holland, 1975) 284.

[322] Kaser and Dannenbring (n 216) 126-134.

[323] Thomas (n 216) 348.

[324] ibid; HLE Verhagen, 'Ius honorarium, equity and real security; parallel lines of development' in E Koops and WJ Zwalve, *Law & Equity: Approaches in Roman law and common law* (Martinus Nijhoff 2014). HLE Verhagen 'The evolution of *pignus* in classical Roman law Ius honorarium and 'ius novum' (2013) 81 *TvR* 51, 79.

[325] Verhagen 'Ius honorarium' (n 316) 57-59, 79; Thomas (n 216) 39.

not have to be delivered and the thing could be mortgaged more than once.[326] The idea behind the *hypothec* was that the mortgagor did not lose either ownership or possession; instead it remained vested in him. The mortgagee did not obtain immediate possession, but a *right to* possession enforceable by the fictitious *Actio quasi Serviana*.[327] As a result of the extension to non-possessory pledges, the *actio Serviana* did not include the condition that the pledged property had to be in the possession of the creditor, but instead referred to the pledge agreement.[328] The *ius honorarium* thus allowed a right *in rem* (*hypothec*) to be created merely by way of informal agreement: *nuda conventione*.[329] Roman law did not protect a *bona fide* purchaser against a pledge unknown to him, as this could paralyse the debtor's business.[330]

Transferring this theory to the English chattel mortgage, counsel argued that this would mean that Harvest could not be regarded as a reputed owner, as he was still the *true* owner.[331] The reputed ownership clause did not apply when the true owner was the bankrupt. As a consequence, the goods mortgaged to Stephens would not be subjected to the reputed ownership clause and, therefore, Rolle should have priority over the ordinary creditors in the bankruptcy.

Unfortunately for Rolle and the other mortgagees, Burnet J dismissed this argument, referring to C. Just. 4.52.2,[332] a Roman law text that referred to sale with power to redeem:

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[326] Thomas (n 216) 349.

[327] Thomas (n 216) 348.

[328] Verhagen, 'Ius honorarium' (n 324) 59.

[329] Verhagen, 'Ius honorarium' (n 324) 60.

[330] Verhagen 'Evolution of *pignus*' (n 324) 65.

[331] *Ryall v Rowles* (n 315) 27 ER 1079.

[332] C. Just. 4.54.2 Translation available in BW Frier (ed), *The codex of Justinian. A new annotated translation with parallel Latin and Greek text*, vol II (CUP 2016) 1030-1031.

> '…for an hypotheca gave only a lien and no property, with a right to be satisfied on failure of the condition; a mortgage with us, is an immediate conveyance with a power to redeem.'[333]

Burnet J meant to illustrate the difference in relation to conditional sales by the English 'equity of redemption'. A Roman *hypothec* or *pignus* did not involve this concept and therefore liable to be defeated by a subsequent act of the party in performing the condition. It did not convey property in the thing, but only a right to have it sold for satisfaction upon failure of the condition (in substance a forfeiture mechanism).[334] And therefore, if a *pignus* or *hypothec* contained a condition, that if the money had not been paid on the agreed day, the creditor would enjoy the thing at the agreed price, this was considered to be a conditional sale in Roman law.[335] Therefore, the Roman law *hypothec* could not be compared with an English mortgage.

In contrast, Hardwicke LC's and Parker CB's explanation that the mortgagee was the true owner was different from Burnet J's. Their reasoning was based on the exact words of the statute. Hardwicke argued:

> 'The legislature had explained it's [sic] sense by putting the words *true owner*, in opposition to the *reputed owner*.'[336]

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[333] *Ryall v Rolle* at 1 Atk 165; 26 ER 108.

[334] Verhagen, Ius honorarium (n 324) 73-74.

[335] *Ryall v Rowles* at 1 Ves Sen 359; 27 ER 1080. Cunningham, *The merchant's lawyer II* (n 309) 541.

[336] *Ryall v Rolle* at 1 Atk 184, 26 ER 119.

In Vesey Senior's report, Lord Hardwicke's point is more fully stated:

> 'the legislature has explained their own sense, by putting the words *true owner* in opposition to reputed, not *special owner*; and then the last words can only mean a person, who by specious acts of possession, order and disposition, gives himself the appearance of property he has not really till the mortgage money is paid.[337]

Parker CB held that 'by consent of the true owner' was 'put in opposition to a false and seeming ownership'. Therefore the mortgagee was said to be the true owner, as 'a contrary construction would defeat this clause'.[338]

Lee CJ added that the true owner loses his priority in the bankruptcy, based on the following reasoning:

> 'It [the Fraudulent Conveyances Act 1571] is against fraudulent conveyances, with a proviso in favour of conveyances *bona fide*, whereas the act of 21 Jac. 1 supposes a fair conveyance, but deprives the party of any preference, because he does not give proper notice of his conveyance, and it seems to me that the cases upon this statute are more like the cases that may happen upon the registering acts, where a person does not register, and so loses the priority of the security …'[339]

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[337] *Ryall v Rowles* at 1 Ves Sen 372, 27 ER 1088.

[338] *Ryall v Rowles* at 1 Ves Sen 365; 27 ER 1084.

[339] *Ryall v Rolle* at 1 Atk 165; 26 ER 117.

In his judgment Lee CJ laid the foundation for the 'notice principle'. The 'notice principle' set out that if a creditor gave proper notice of an assignment to the world, credit was not considered false and delusive, because persons (whether this were creditors or not) dealing with the debtor knew that the apparent ownership was not the actual ownership of the debtor.[340] When notice to the world has been given, the reputed ownership clause could be set aside and the creditor retained his priority in a bankruptcy proceeding. Lee CJ based this idea on the provisions in several local land title deeds registration acts[341], which provided that where a person did not register, he would lose the priority of the security.

Overall, it was established that Harvest was considered to be the reputed owner, as meant by the reputed ownership clause in the Bankrupts Act 1624. Rolle, as the true owner, lost his priority in the bankruptcy.

II. Continued possession

The outcome of the second question, whether the mortgagor could stay in possession of the goods mortgaged, was not surprising. *Ryall v Rolle* did not make a distinction between absolute and conditional assignments. The common law rule that possession was a good indication of ownership remained unchanged after *Ryall v Rolle*. Burnet J confirmed the doctrine by arguing:

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[340] *Ryall v Rolle* (1750) (n 315) 26 ER 117 (Lee CJ). See for the application of this approach to choses in action, *Ryall v Rowles* (1750) (n 307) 27 ER 1074, 1086-1087 (Lee CJ).

[341] Yorkshire (West Riding) Land Registry Act 1703 (2 & 3 Ann, c. 4), Yorkshire (West Riding) Land Registry Act 1706 (6 Ann, c. 20), Yorkshire (East Riding) Land Registry Act 1707 (6 Ann, c. 62), Middlesex Registry Act 1708 (7 Ann, c. 20) and Yorkshire (North Riding) Land Registry Act 1734 (8 Geo 2, c. 6).

> ‘Possession can be no otherwise a badge of fraud, than as it is calculated to deceive creditors: as to the possession of goods, I have no way of coming to the knowledge of the owner, but by seeing who is in possession of them.’[342]

It was held that mortgages of goods that were capable of delivery would be within the scope of the reputed ownership clause.[343] Conversely, mortgages of fixtures would be excluded from the reputed ownership clause.[344]

III. Choses in action

In regard to the third question, whether a chose in action was within the scope of the reputed ownership clause, it was held that the reputed ownership clause extended to choses in action, in particular debts.[345] Lee CJ argued that *Fulwood's Case* (1590)[346] proved that a chose in action (as an obligation) was a chattel. If then goods and chattels include choses in action, all the debts, acquired by the partnership by sale of the joint stock, must be distributable as

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[342] *Ryall v Rolle* at 1 Atk 165; 26 ER 109; *Ryall v Rowles* at 1 Ves Sen 360; 27 ER 1081; *Ryall v Rowles* 9 Bligh NS 393; 5 ER 1340.

[343] *Ryall v Rolle* at 1 Atk 165; 26 ER 107-112, 115-118 (Lee CJ & Burnet J).

[344] Fixtures to the freehold follow the lands, and are secured in interest to the lessee or assignee by the title deeds: See *Poole’s Case* (1703) 1 Salk 368; 91 ER 320, copied Holt KB 65; 90 ER 934. Roberts (n 278) 550.

[345] No difference was made between an absolute and a conditional conveyance. *Ryall v Rowles* at 1 Ves Sen 370, 27 ER 1087 (Lee J); 1 Ves Sen 372; 27 ER 1088 (Lord Hardwicke LC).

[346] *Fulwood’s Case* (1590) 4 Co Rep 64; 76 ER 1031.

goods.[347] In the case of the assignment of choses in action, only equitable assignment was possible.[348] However, although choses in action were not strictly assignable at common law, the assignor could deliver the original debt instrument to the assignee, and/or make the assignee his attorney on record, and the assignee's failure to demand this would be equivalent to leaving physical goods in the grantor's position and be liable under the reputed ownership clause.[349] It was held that notice of the assignment would be equivalent to a delivery, for the debtor cannot afterward justify payment to the assignor. Choses in action had to be within the reputed ownership clause, because otherwise the debtor could assign without notice to others and thereby obtain the order and disposition as meant in the reputed ownership clause and demonstrate false wealth.[350] As no notice of the assignment seems to have been given, the assignees in bankruptcy could dispose of the choses in action in favour of the general creditors.[351]

IV. Partnership and the reputed ownership clause

The fourth question, whether there was a difference between a mortgage to a partner and to a stranger, was answered in the negative. The mortgage to Potter in trust for Stevens was considered as a mortgage directly made to Stevens.[352] Neither Potter nor Stevens had taken

[347] *Ryall v Rowles* at 1 Ves Sen 348; 27 ER 1086-1087 (Lee CJ).

[348] *Ryall v Rowles* at 1 Ves Sen 363; 27 ER 1083 (Burnet J).

[349] *Ryall v Rolle* at 1 Atk 171; 26 ER 111; *Ryall v Rowles* at 1 Ves Sen 363, 27 ER 1083; *Ryall v Rowles* at 9 Bligh NS 393; 5 ER 1339 (Burnet J); *Ryall v Rowles* at 1 Ves Sen 367; 27 ER 1085.

[350] *Ryall v Rowles* at 1 Ves Sen 363; 27 ER 1083 (Burnet J).

[351] *Ryall v Rowles* at 1 Ves Sen 369-70; 27 ER 1074.

[352] ibid.

possession of the trust assets, therefore Harvest had continued in possession and remained the visible owner of half of the partnership. Harvest had still the order and disposition over his moiety and was therefore the reputed owner of the moiety. As a consequence, Stevens was considered the true owner. However, although Stevens was seised *per my et per tout*[353], (i.e., as a joint tenant) which meant that actual delivery was technically not necessary, the assignment was still considered fraudulent. The reasoning behind this was that otherwise the door would be open to fraud, because the remaining partner would then being permitted to retain all the badges of reputed ownership and deceive the rest of the world.[354]

V. Concluding remarks

Wilson aptly summarised the effect of *Ryall v Rolle* in his short report of the case. The Court of Chancery held unanimously that:

> 'if a man mortgages his goods and chattels and debts for a valuable consideration, and the mortgagee permits the mortgagor to keep possession, and to have the ordering selling, and disposition thereof, this gives the mortgagor a false credit, is fraudulent against creditors, and the mortgagor afterwards becoming bankrupt, the assignees under the commission are entitled to have these goods for the benefit of themselves and the rest of the creditors seeking relief under the commission, and the mortgagee can only come in for his proportionate share under the commission.'[355]

[353] By every part and by the whole.

[354] *Ryall v Rowles* at 1 Ves Sen 363; 27 ER 1083. Powell (n 282) 26.

[355] *Ryall v Rolle* at 1 Wils KB 260; 95 ER 607.

The final judgment of *Ryall v Rolle* was that all the mortgages, except the mortgages to Tomkins and Stone, were within the operation of the reputed ownership clause and the assets covered by them went to the assignee in bankruptcy.

In a later case, *Worseley v Demattos* (1758), Lord Mansfield CJ made the interesting observation that the act of bankruptcy upon which the commission proceeded in *Ryall v Rolle* was made long after the mortgages. The assignees did not want to carry it further back and therefore never argued that the bankrupt's remaining in possession made the mortgages fraudulent. If they had done that, the presumption of fraud would have been disproved. The same fund was mortgaged six times, but all the mortgagees had trusted their conveyance as a title, without possession, if a bankruptcy was to happen.[356]

Conclusion

It seems that the courts in relation to the reputed ownership clause constantly balanced the prevention of fraud against the encouragement of trade. On the one hand the creditor had to be protected and the creation of ostensible ownership had to be avoided, but on the other hand the disclosure of true financial position of the trader could damage the business of the trader and the credit market at large. This balancing of interests is clearly visible in *Ryall v Rolle*. The early case law shows that until *Ryall v Rolle* the courts on the whole interpreted the reputed ownership clause restrictively.

[356] *Worseley v Demattos* (1758) 1 Burr 467; 97 ER 407, 415-416.

4

The reputed ownership clause after *Ryall v Rolle*

After *Ryall v Rolle* the scope of the four terms, *true owner*, *consent*, *'order and disposition' or possession and* '*at the commencement of the bankruptcy'* were further developed by case law, but it would take too much space to discuss all these cases in detail.[357] Prior rules discussed earlier in this thesis still applied in full; the reputed ownership clause applied, unless the person claiming to be owner could rebut the claim.[358]

This chapter argues that after *Ryall v Rolle* the courts seemed to interpret the reputed ownership clause more extensively, but at the same time general rules were established to exclude the application of the reputed ownership clause.

This chapter sets out this more sophisticated development of the interpretation of the reputed ownership clause. The final section sets out the special rules that applied to assignments of ships and goods at sea.

A. The extension of the reputed ownership clause

I. The doctrine of fraudulent preferences

In the later eighteenth century Lord Mansfield CJ developed a doctrine against fraudulent preferences by the debtor. A fraudulent preference arose when a debtor, knowing that he would be (likely) to become bankrupt, made a payment or assignment to a creditor that

[357] See for a very clear and detailed account, B Montagu, *A digest of the bankrupt laws*, vol I (2nd edn, Butterworth 1819) 552-586.

[358] [Cf above,] *Crisp v Pratt* (n 245). Explicit mention of the possibility of rebutting the reputed ownership clause, see *Lingham v Biggs* (1797) 1 Bos & P 82; 126 ER. 790 (Eyre CJ); *Gurr v Rutton* (1816) Holt NP 327; 171 ER 260.

prevented the equal distribution of assets among general creditors. The purpose of considering a preference as fraudulent was to prevent a creditor from wrongfully obtaining a security in the bankruptcy for an antecedent debt. Fraudulent preferences were common practice halfway through the eighteenth century, as the preamble of the Bankrupts Act 1746[359] explicitly mentions the great concern of bankrupt debtors that 'commit secret acts of bankruptcy unknown to their creditors'.

Robert Weisberg argues that until *The Case of Bankrupts* (1584) English law, to an extent drawing on Roman law, allowed an insolvent person to pay a legitimate debt to a preferred creditor, unless the payment was fraudulent.[360] Weisberg argues that a preference was not considered a crime, unlike a fraudulent conveyance, because it benefited at least one creditor.[361] However, when the law of bankruptcy became more focused on the debtor's condition and English law became to view a bankruptcy more as a fair settlement of claims of injured parties, rather than the crime of the bankrupt, the preferential transfer became more important in bankruptcy law.[362]

Hence, *The Case of Bankrupts* did not only deal with equal distribution of the debtor's assets, but it also recognised what might loosely be called a preferential transfer. The question in the case was whether the commissioner's title to the bankrupt's property related back to the original act of bankruptcy. Coke's report says that:

[359] Bankrupts Act 1746 (19 Geo. 2, c. 32), Preamble.

[360] R Weisberg, 'Commercial morality, the merchant character, and the history of voidable preference' (1986) 39 Stan L Rev 3, 40.

[361] ibid 39.

[362] ibid 40.

> ‘if, after the debtor becomes a bankrupt, he may prefer one (who peradventure hath least need) and defeat and defraud many other poor men of their true debts, it would be unequal and unconscionable, and a great defect in law, if after he hath utterly discredited himself by becoming a bankrupt, the law should credit him to make distribution of his goods...’[363]

Weisberg and James Oldham argue that Lord Mansfield CJ developed Coke’s idea into the rule that the payment of a *bona fide* debt by an insolvent debtor to a favoured creditor was itself an act of bankruptcy, which allowed the commissioners to set aside the assignment. *Worseley v Demattos* (1758) was the first case that explicitly addressed this rule.[364]

II. *Worseley v Demattos* (1758)

Worseley v Demattos,[365] decided by Lord Mansfield CJ, not only confirmed the opinion of Chief Justice Lee in *Ryall v Rolle* — that someone who does not give proper notice of his assignment loses his priority in bankruptcy — but thus also laid the basis of the rule regarding fraudulent preferences in bankruptcy in English law.[366] In *Worseley v Demattos* Lord Mansfield CJ held that the payment of a *bona fide* debt, for consideration, by an insolvent debtor to a preferred creditor was an act of bankruptcy. The existence of the doctrine of relation back (to the bankruptcy) meant that the reputed ownership clause would apply as soon as a preference was made.[367]

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[363] *Case of Bankrupts* (1584) See above (n 235) 473.

[364] Weisberg (n 360) 46, Oldham (282) 119.

[365] *Worseley v Demattos* (1758) 1 Burr 467; 97 ER 407.

[366] Oldham (n 282) 119.

[367] Bankrupts Act 1623 [1624], s. 10.

The case was about Slader, a trader, who could not continue his trade because he could no longer pay his debts in London. Therefore, Slader was in search of a creditor to act as his banker and agent in London. Davis, the agent of De Mattos, fully aware of Slader's financial situation (having even had a bookkeeper examine all Slader's accounts and affairs before signing), paid Slader's debts, after Slader and De Mattos negotiated an agreement that De Mattos would do so in return for security. Slader and De Mattos signed the deed on 20 October 1756. The nature of the agreement appeared only on a deed dated 23 October 1756. In the deed, Slader mortgaged all his estate and interest in the premises of his mill to De Mattos, as well as all his stock-in-trade he used as a brewer. In addition, Slater authorised De Mattos to enter and take possession upon default of payment. The end of the deed proposed a secret trust, that in case Slader should become bankrupt, his whole estate should first be vested in De Mattos. In other words, De Mattos would get priority over the other creditors in a potential bankruptcy. Slader remained in possession of everything conveyed by the deed and continued to trade. De Mattos' agents even recommended Slader as a good debtor to other creditors.

A feigned issue[368] was sent out of Chancery to determine whether Slader, by this mortgage, had committed an act of bankruptcy and, if so, when he had become a bankrupt. It was established that Slader undoubtedly committed an act of bankruptcy on 13 November 1756, but the plaintiffs argued that Slader already had committed an act of bankruptcy on 23

[368] A feigned issue was a fictitious common law action between two parties about a question of fact or mixed fact and common law, essential to determine the outcome of a case pending in equity. H Horwitz, *Chancery Equity records and proceedings 1600-1800* (HMSO, 1995) 19, 20. It is not clear why a feigned issue was sent out, as in *Ryall v Rolle* and other cases Lord Harwicke had decided this issue himself in equity, rather than sending it to the King's Bench.

October 1756 when he mortgaged his property and stock-in-trade to De Mattos. They argued that the deed was fraudulent and an act of bankruptcy under the Bankrupts Act 1624, as the statute expressly stated that any fraudulent conveyance, whereby the trader's creditors may be defeated or delayed of their just debt was an act of bankruptcy.

Counsel for the defendants argued that Slader's making the deed, but continuing in possession was not an act of bankruptcy.[369] He argued that it was only a mortgage of his personal property and for fair consideration.

Lord Mansfield CJ held that the deed was indeed made for good consideration. However, Lord Mansfield CJ also cited the second 'badge of fraud' from *Twyne's Case*, emphasising that with the deed De Mattos permitted Slader to continue in possession:

> 'By the express tenor of the deed, Slader was to have the absolute order and disposition as before. In fact he was permitted to continue in possession, and act as owner. They who dealt with him, trusted to his visible trade and stock. They trusted to the bankrupt-law that he could neither have sold or mortgaged, and in case of a misfortune, that his effects must be equally distributed. They were imposed on false appearances.' [370]

Slader and the agents of De Mattos had concealed that Slader had already mortgaged all his property. It was clear that Slader could not continue his trade without De Mattos. Heavily relying on the reasoning of *Ryall v Rolle*, Lord Mansfield CJ continued:

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[369] Since Slader was bankrupt, it is almost certain that the defence was actually run by De Mattos, though Slader was a nominal defendant.

[370] *Worseley v Demattos* (1758) 1 Burr 467; 97 ER 407, 411.

'If he mortgages and parts with the possession of goods, the world has notice; but, to give priority from mortgaging goods, of which the trader is allowed to act and appear as the owner, would be enabling him to impose upon mankind; and draw them in by false appearances. No injustice is done to such mortgagee; because he really trusts only to the general credit of the trader: the conveyance is not a fraud against him, but against his other creditors.' [371]

However, Lord Mansfield CJ went a step further. The secret arrangement between Slader and De Mattos was an intended preference and was considered fraudulent and unlawful because it was against the two main objects of bankruptcy law: (1) preference deprived other creditors from the commissioners' management of the bankrupt's assets; and (2) the preference disturbed an equal distribution of the bankrupt's assets among creditors.

III. A preference as an act of bankruptcy

The result of *Worseley v Demattos* was that a particular type of preference - assigning the whole of the trader's estate to one creditor - was an act of bankruptcy.[372] The rationale behind the preference rule was that the debtor had in effect assigned his solvency.[373]

However, in *Hooper v Smith*[374] Lord Mansfield CJ held that if a preference was made to one creditor, by assigning only part of the goods, and to pay only part of the debt, the

[371] ibid, 116.

[372] ibid; Lord Mansfield CJ came to the same conclusion in *Wilson v Day* (1759) 2 Burr 827; 97 ER 583.

[373] *Compton v Bedford* (1762) 1 Wm Bl 362; 96 ER 202.

[374] *Hooper v Smith* (1763) 1 Wm Bl 441, 96 ER 252. In *Hooper v Smith* Lord Mansfield CJ refers to the earlier cases *Cock v Goodfellow* (1721) 10 Mod 489; 88 ER 822 and *Small v*

preference was generally not considered an act of bankruptcy. Although Lord Mansfield CJ refrained from deciding what the exact acceptable amount of the preference should be to consider it valid.

In *Alderson v Temple*[375] (1768) Lord Mansfield CJ drew back from the strict words of *Worseley v DeMattos*, by ruling that a payment of a debt was only fraudulent if the preference was given outside the normal course of trade. The debtor must have intended to give a fraudulent preference. 'If [a creditor] demands it first, or sues him or threatens him, without fraud, the preference is good'.[376] Lord Mansfield CJ accentuated in *Harman v Fishar* (1774) that the debtor cannot make a voluntary preference. The debtor 'cannot take his estate out of the management which the law put it into', as this would be 'a fraud upon the whole system of laws concerning bankrupts'.

However, when a debtor assigned his business premises and his whole stock-in-trade to one creditor, but did not assign his domestic chattels and his choses in action, as in the case of *Law v Skinner*[377] (1775), this preference was considered an act of bankruptcy as well.

The main problem with the mortgaging of the trader's whole estate is that it includes a mortgage of all his stock-in-trade. This is problematic because a trader could not assign all of

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Oudley (1727) 2 P Wms 427; 24 ER 799 in which the preference had been held good against the commissioners.

[375] *Alderson v Temple* (1768) 4 Burr 2235; 98 ER 165; 1 Wm Bl 660; 96 ER 384.

[376] ibid 96 ER 385. If the bankrupt gave a preference out of fear of legal process, the preference was not voluntarily and was not considered fraudulent. See *Thompson v Freeman* (1768) 1 TR 155, 99 ER 1026.

[377] *Law v Skinner* (1775) 2 Wm Bl 996; 96 ER 585.

his stock-and-trade, — doing so leaves the trader with nothing to trade, and puts him in substance out of the trading business.[378] Lord Mansfield CJ explained:

> 'A trader is trusted upon his character, and *visible* commerce: that credit enables him to acquire wealth. If by *secret liens*, a few might swallow up all, it would greatly *damp that credit*.'[379]

Therefore, a trader needed visible stock as a security to continue to trade. The doctrine of fraudulent preferences is therefore in line with the traditional view in English law that movables were *prima facie* considered as the absolute possession of the person in whose possession they were found; and also with the theory that creditors made credit judgments on the basis of the actual possessions, and the reputation, of the trader.[380]

IV. Treatise literature

The treatise literature shows a more extensive interpretation of the reputed ownership clause after *Ryall v Rolle*, including the important decision of *Mace v Cadell*, and a series of detailed cases shortly after the turn of the nineteenth century. The difference between the fifth and sixth edition of Cooke's 'Bankrupt laws' shows significant changes in that respect.[381] The

[378] See *Worseley v Demattos* (1758) 97 ER 407; *Wilson v Day* (1759) 2 Burr 827; 97 ER 583; *Compton v Bedford* (1762) 1 Wm B 362; 96 ER 202; *Law v Skinner* (1775) 2 Wm Bl 996; 96 ER 585; *Butcher v Easto* (1779) 1 Doug KB 295; 99 ER 191.

[379] *Worseley v Demattos* (1758) 97 ER 407, 116 (Lord Mansfield CJ).

[380] Muldrew (n 115); Weisberg (n 360) 39.

[381] W Cooke, *The bankrupt laws* (5th edn, Brooke and Clarke 1804; W Cooke, *The bankrupt laws. With alterations and considerable additions by WP Gregg* (6th edn, Reed and Hunter

fifth edition still shows a general structure and exceptions of the reputed ownership clause, whereas in the sixth edition a substantial amount of the cases discussed are examples of detailed cases where the reputed ownership clause did apply.[382]

B. Exceptions to the reputed ownership clause after *Ryall v Rolle*

Ryall v Rolle had extended the scope of the reputed ownership clause, but the reputed ownership clause was never understood to be unlimited. For example, in *Banks v Farquharson*[383] (1752) Lord Hardwicke C held that choses in action were excluded from the reputed ownership clause, if the assignment was made when the bankrupt was not a trader. The reasoning behind it was that the reputed ownership only applied to traders and the bankrupt had made the assignment as a non-trader. He referred to *Crisp v Pratt*, where two years had passed between the assignment and the time when the debtor became a trader and subsequently a bankrupt, in this case five years had passed. *Banks v Farquharson* is a clear and deliberate limitation of the reputed ownership clause, because the fact remained that at the time of the bankruptcy the choses in action had created ostensible ownership in the apparent ownership of the bankrupt.

The case law also established three general exception rules, in which case the reputed ownership clause did not apply.[384]

1812). Cooke's fifth edition only has one additional case compared to the fourth edition. W Cooke, *The bankrupt laws* (4th edn, Brooke and Clarke 1799).

[382] ibid.

[383] *Banks v Farquharson* (1752) reported in *Jones v Gibbons* (1809) 2 Ves Jr 177; 34 ER 1047.

[384] See Montagu (n 357) 552-586 and RH Coote, *A treatise on the law of mortgage* (Butterworth 1821) 263-265.

The first exception, established in *West v Skip*[385] (1749), decided shortly after *Ryall v Rolle*, was that the reputed ownership clause did not apply when the bankrupt was unwilling to give the possession back to the true owner. Lord Hardwicke C held that if the real owner of the goods had commenced any adverse suit against the trader for the recovery of a good or chattel, and the trader went bankrupt pending that suit, the reputed ownership clause did not apply.[386]

The second exception was that if the bankrupt was unable to give possession to the assignee, in that case it was sufficient to give possession as far as possible in the situation. *Brown v Heathcote* and *Ryall v Rolle* already paved the way for this exception, in which it was held that the delivery of the insurance policies and invoices were enough for a valid assignment of goods at sea. This rule was further extended in *Manton v Moore*[387] (1796) in which it was held that if the property was held on the premises of the real owner, a delivery of symbolic possession was sufficient.[388]

The third rule was established in *Bamford v Baron*[389] (1788) and *Edwards v Harben*[390] (1788). The reputed ownership clause could be excluded if the possession accompanied and

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[385] *West v Skip* (1749) 1 Ves Sen 239; 27 ER 1006; further proceedings (1750) 1 Ves Sen 456; 27 ER 1140; 19th century notes at Ves Sen Supp 130, 199, 28 ER 477, 500.

[386] *West v Skip* also confirmed that the reputed ownership clause does not apply in the case of the mere leaving of possession without a power to dispose.

[387] *Manton v Moore* (1796) 7 TR 67; 101 ER 858.

[388] The case dealt with the reputed ownership of a trader who left his goods at a canal company, where he was working on commission. Considering this case dealt with a public utility, it is possible that Kenyon CJ decided the case in favour of the mortgagee for economic reasons.

[389] *Bamford v Baron* (1788) 2 Term Rep 594 n 5; 100 ER 319.

followed a deed. If a deed consisted of an absolute conveyance, possession had to be delivered immediately after the conveyance.[391] When the assignment was conditional, the continuance in possession is allowed, until the condition was performed. However, if the mortgagor stayed longer in possession than was set out in the deed, the reputed ownership clause did apply.

In addition to these three exceptions, Sir James Mansfield CJCP laid the foundations for a rule to make an exception in relation to established trade customs. He ruled in *Thackthwaite v Cock* (1811)[392] that a clearly proven custom can take goods out of the operation of the reputed ownership clause, so 'that persons dealing with the traders may see and know that the goods may possibly not be the property of the possessor'.[393] The rationale behind this exception was that persons dealing with the bankrupt were assumed to be familiar with the custom and therefore were not treated as they had given the bankrupt delusive credit.[394] Trade customs could be seen as some kind of 'implied' notice.[395] However, it was not until Lord Selborne C affirmed this rule in *Ex parte Watkins, In re Couston*[396] (1873) that this rule became a firmly established exception.[397] By the end of the nineteenth century the

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[390] *Edwards v Harben* (1788) 2 Term Rep 587; 100 ER 315.

[391] Parties who were privy and had approved of the deed of assignment, could not set it up as an act of bankruptcy or take advantage of it. *Hooper v Smith* (1763) 1 Wm Bl 441, 96 ER 252.

[392] *Thackthwaite v Cock* (1811) 3 Taunt 487; 128 ER 193.

[393] ibid 128 ER 195

[394] A Roper, *Trustees In Bankruptcy* (Sweet and Maxwell 1929) 175.

[395] This is my own terminology.

[396] *Ex parte Watkins, In re Couston* (1873) LR 8 Ch App 520.

[397] ibid. Selborne restricted the reputed ownership slightly further, when he held that an investigation into the actual state of knowledge of (potential) creditors was not necessary; it

rule became widely used to avoid the application of the reputed ownership clause.[398] The courts were willing to exclude goods that were not part of the trader's business[399], but were not willing to expand the exception any further.[400]

C. Ships and goods at sea

The case law in both the eighteenth and the nineteenth century often dealt with assignments of ships and goods at sea. The assignments of ships and goods at sea were especially prone to reputed ownership (the possession was after all not visible), it not surprising that a substantial amount of the case law and treatise literature was devoted to these types of assignments.[401] The assignments of ships and goods at sea fell into the second general exception, but some additional rules applied to these kinds of assignments.[402] In the case of a mortgage by a trader of a ship at sea, the delivery of the 'grand bill of sale' was sufficient to prevent the reputed

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was enough that persons in the same trade knew of the custom. *Ex parte Watkins* was very much in line with earlier precedent. See e.g. *Hamilton v Bell* (1854) 10 Ex 545; 156 ER 554; *Prismall v Lovegrove* (1862) 6 LT (NS) 329; *Priestley v Pratt* (1867) LR 2 Ex 101.

[398] e.g. successful attempts were made in relation to customs of horses, sent to horse dealers on sale and return (*Ex parte Wingfield, In re Florence* (1897) 10 Ch D 591), for a three years' hiring system for pianos (*Ex parte Hattersley* (1878) 8 Ch D 601) and for the custom of hotel furniture (*Crawcour v Salter* (1881) 18 Ch D 30).

[399] *Ex parte Lovering, In re Murell* (1883) 24 Ch D 31.

[400] *Ex parte Brooks, In re Fowler* (1883) 23 Ch D 261.

[401] E Green, *The spirit of the bankrupt laws* (4th ed, Edward Brook 1780) 138-140; Montagu (n 357) 552-586; Coote, *A treatise on the law of mortgage 1821* (n 384) 270-299.

[402] Montagu (n 357) 552-586; Coote, *A treatise on the law of mortgage* (n 384) 270-299.

ownership clause from operating.[403] However, possession had to be taken as soon as the ship arrived in an English port, even if the ship afterwards sailed and did not return at the time of the bankruptcy.[404] In addition, the assignment had to be in compliance with the registry acts. Failing to do so resulted automatically in the application of the reputed ownership clause. However, the registry was not conclusive evidence of a lack of reputed ownership.[405]

The assignment of cargo at sea also fell within the second exception rule. Earlier discussed case law, *Brown v Heathcote* and *Ryall v Rolle* applied. In the case of a mortgage by trader of a cargo at sea as a collateral security for the payment of a bond debt, it was sufficient to deliver the bonds, bills of lading, insurance policies, invoices, etc., if the mortgagee was not able to take actual possession upon arrival of the ship in an English port.[406] In *Lempriere v Pasley*[407] (1788) it was held that if the payment was made with notes of hand (promissory notes) a letter of a delivery the insurance policy and letters of advice,

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[403] *Brown v Heathcote* (1745) Dick 100; 21 ER 206; (1746) 1 Atk 160; 26 ER 103; *Ex parte Matthews* (1751) 1 Ves Sen 343; 28 ER 151; 2 Ves Sen 272; 28 ER 176; *Falkener v Case* (1781) 1 Bro CC 125; 28 ER 1029; *Hall v Gurney* (1784) 3 Doug KB 356; 99 ER 694; *Atkinson v Maling* (1788) 2 TR 462; 100 ER 249; *Gordon v East India Company* (1797) 7 TR 228; 101 ER 946; *Moss v Charnock* (1802) 2 East 399; 102 ER 422.

[404] *Ex parte Matthews* (1751) (n 393) 28 ER 151; 28 ER 176; *Falkener v Case* (1781) 1 Bro CC 125; 28 ER 1029.

[405] *Rolleston v Hibbert* (1789) 3 TR 406; 100 E.R. 646; *Ex parte Standgroom* (1790) 2 Cox Eq Cas 234; *Moss v Charnock* (1802) 2 East 399; 102 ER 422; *Hubbard v Johnstone* (1810) 3 Taunt 177; 128 ER 71; 30 ER 109; *Wilson v Heather* (1814) 5 Taunt 642; 128 ER 842; *Ex parte Jones* (1815) 4 M & S 450; 105 ER 900.

[406] See e.g. *Ex parte Jones* (1815) 4 M & S 450; 105 ER 900. See also, Montagu (n 357) 563.

[407] *Lempriere v Pasley* (1788) 2 TR 485; 100 ER 262.

together with an undertaking to assign the goods and to deliver the bill of lading upon its arrival, was sufficient, if the bankruptcy happened before the arrival either of the goods or the bills of lading.[408]

Conclusion

Ryall v Rolle appears to be a turning point in the interpretation of the reputed ownership clause. Initially, the courts applied a restrictive interpretation of the reputed ownership clause, but after *Ryall v Rolle*, the courts extended the reputed ownership clause. This is particularly visible in *Worseley v Demattos* and the introduction of the doctrine of fraudulent preferences. This tends to suggest that the prevention of fraud and the interest of the creditor overall prevailed at that point. However, even after *Ryall v Rolle* the reputed ownership clause was never unlimited, illustrated by the general exceptions that were established by the courts. It seems that there was an equal balance between the extension of the clause and narrowing it.

[408] See also, Montagu (n 357) 563.

Conclusion

This thesis examined the origin of the reputed ownership clause and the first two centuries of its judicial interpretation.

The reputed ownership clause was one of the legal provisions that were taken to protect creditors from delusive credit. The clause postponed mortgagees that gave their debtors permission to stay in possession of their assigned goods. The rationale behind this was that creditors could only make credit judgments on the basis of visible possession. In consequence, this rationale for the clause stood in direct correlation with the rejection of the chattel mortgage in English law, as the chattel mortgage could create ostensible ownership.

The general view in the current literature is that due to the growing demand for capital in the later nineteenth century, non-possessory security interests had to be allowed.

However, the early narrative of the reputed ownership clause shows that in relation to the interpretation of the reputed ownership clause, the courts already acted on commercial needs from the early 18th century onwards and constantly balanced the prevention of fraud against the encouragement of trade.

Initially, due to economic reasons, the courts had interpreted the reputed ownership clause restrictively. The most notable example of this was *Ex parte Chion* (1721), in which trust stock was excluded from the application of the reputed ownership clause out of fear that the contrary decision would jeopardise the credit market.

The reputed ownership clause was not in the interest of either the mortgagee or the mortgagor. It limited the availability of security, which could make mortgagees less inclined to inject some cash in the downgrading business of the debtor. The only people that profited from the clause were the general creditors, who according to the bankrupt laws gained equal distribution of the bankrupt's assets if the goods were in the apparent ownership of the debtor

at the time of the bankruptcy. Overall, the time period 1571-1854 showed a strong favouritism of the legislature towards creditors, explained by the constant need for credit. Creditors could only make credit judgments on the basis of apparent ownership. It was not always reliable, but it was the best option they had to check a debtor's creditworthiness.

A turning point in the narrative was the decision of *Ryall v Rolle* (1749). *Ryall v Rolle* is not a typical leading case. It extended the interpretation of the reputed ownership clause, in order to fight delusive credit, but at the same time established the 'notice-principle'[409] and had thereby opened the door for a way to exclude the clause from its application. Both interpretations were expounded in the case law, which meant that the 'rise and fall of the reputed ownership clause' developed in parallel.

It was, therefore, not *Dearle v Hall*, but *Ryall v Rolle* that laid the foundations for the 'notice principle', meaning that by giving notice to the world, security holders, not in possession of the assigned goods, gained priority in a bankruptcy proceeding. Indeed, the judgment of Chief Justice Lee had made it clear that if a creditor gave proper notice of an assignment to the world, credit was not considered false and delusive.[410] *Dearle v Hall* merely expands on the idea that it was impossible to give possession of a chose in action (which was also already established in *Ryall v Rolle*). Therefore giving notice to the debtor of an assignment of a chose in action was considered sufficient for the situation.[411] When notice to the world has been given, the reputed ownership could be set aside and the creditor retained his priority in a bankruptcy proceeding.[412] Therefore, from a historical point of view *Ryall v*

[409] The 'notice principle' has been explained in this thesis, at p. 88.

[410] *Ryall v Rolle* (1750) (n 315) 26 ER 117 (Lee CJ). See for the application of this approach to choses in action, *Ryall v Rowles* (1750) (n 307) 27 ER 1074, 1086-1087 (Lee CJ).

[411] This would fall under the second general exception rule of the reputed ownership clause.

[412] ibid.

Rolle should be seen as the leading case on priorities, rather than *Dearle v Hall,* the actual leading case on priorities.

The foundation of the decline of the reputed ownership clause was thus more an 18th century phenomenon, than a 19th century one. However, it is too strong to say that the exceptions diminished the reputed ownership clause, rather it made its application more sophisticated.

However, by the end of the 19th century the application of the reputed ownership clause became so limited, that it appears that only fraudsters and the vulnerable illiterate working class would continue to use bills of sale, the latter giving security for a high interest rate over all their property in return for only a small amount of money. Poor workers were still dependent on interpersonal credit networks, because their creditworthiness was not sufficient to get a loan from a bank. But because the debtors had no alternative, the creditors could ask for high interest rates. To protect the poor borrower from this usury, the reputed ownership clause transformed into a consumers' protection measure.

Due to the restrictive application of the reputed ownership clause, a direct application of the reputed ownership clause to the liquidation of companies did not make much sense at the end of the 19th century. It is therefore not surprising that Jessel MR excluded the reputed ownership clause in *In re Crumlin Viaduct Works Company,*[413] even though it was an arbitrary decision. However, from a legal doctrinal perspective Jessel MR's reasoning ignored the earlier precedent of *Ryall v Rolle*. In this judgment it was held that the mortgagee was considered the 'true owner' within the meaning of the reputed ownership clause; and a mortgagee is surely a secured creditor.[414] It is true that volunteers, too, could potentially lose

[413] *In re Crumlin Viaduct Works Company* (1879) 11 Ch D 755. See also the earlier discussion of *In re Crumlin Viaduct Works Company* in this thesis at pp. 36-38.

[414] *Ryall v Rolle* (1750) See above (n 315) (Hardwicke LC).

their property under the reputed ownership clause. If it was proved that the assignments to volunteers created ostensible ownership, they were automatically also considered fraudulent within the meaning of the Fraudulent Conveyances Act 1571.[415] Because of the express exception for conveyances that were made *bona fide* and for good consideration under the Fraudulent Conveyances Act 1571, this Act could be fairly widely read as giving the presumption that a voluntary conveyance was fraudulent. In *Mace v Cadell* it was explicitly held that volunteers were within the scope of the reputed ownership clause, being essentially implied creditors. It was the point of the reputed ownership clause to postpone all 'creditors' that created ostensible ownership. Jessel MR's statement that reputed ownership has nothing to do with creditors is therefore wrong.

Getzler has shown that the growing need for capital was not typical of the latter half of the 19th century. It is argued in the mainstream literature that big industrial factories at the time needed more capital. However, it is questionable whether it is not harder for a small trader, with no property but his trading tools and circulating stock (the characteristic 18th century business) to give real security for a loan, than a 19th century factory that at least had some fixed capital to mortgage. Getzler's argument that the floating charge was introduced to accommodate the banks with strong receivership powers could therefore give a better explanation.

There are still a lot of questions left unanswered. For example, it is not clear how important the reputed ownership clause was for the legal community and the credit market. In terms of percentages it is unknown how many assignments were affected by the reputed ownership clause. The reputed ownership clause is extensively dealt with in the treatise literature, suggesting the reputed ownership clause was important, but it could also have been included because it was such a controversial provision. It is also possible, since this thesis

[415] See Roberts (n 278) 556.

only looked at reported cases, and not either at the records, or manuscript reports, that courts were already sensitive for commercial needs from the 17th century, or have been since the enactment of the reputed ownership clause. The floating charge could also merely have been a replacement for recognisances, after a few decades delay and in the new context of later 19th century personal and corporate insolvency law.

More importantly, the thesis does not give a conclusive answer why the floating charge was introduced at the end of the nineteenth century. It merely questions the mainstream argument that this was out of commercial need. It might be that either Gregory and Walton, or Getzler, are right in their (different) analyses, but equally this thesis does not necessarily supports either argument. More research on 19th century securities and bankruptcy law is needed to find an answer. This thesis can merely be seen as a starting point for further research.

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