

Answer Guidance for Chapter 2 Practice Questions

1. Explain and give examples of the following terms:

- thing in action
- possessory title
- bailment
- attornment
- equitable title
- assignment

Thing in Action

- A thing in action is a piece of property which cannot be physically possessed and so can only be enforced through court proceedings for the payment of money. Examples would include a claim for payment under a bill of exchange, like a cheque or for damages for breach of contract or in tort.

Possessory title

- A person who has possession of property is said to have possessory title to it. He is entitled to protection of his interest through the law of tort as against anyone unless they have a better title. A thief therefore has possessory title to the property he has stolen and can defend it against everyone except the 'true' owner, that is to say the person with a better right to possess the property, so too (probably) a person who has hired the property from the true owner.

Bailment

- Bailment involves the transfer of possession of goods on the basis that the bailee must either redeliver the goods to, or effect delivery as instructed by, the bailor once the purpose of the bailment has been concluded. A person who leaves his goods with a repairer, or who entrusts them to a carrier or warehouseman effects a bailment.

Attornment

- A bailor retains what is called 'constructive possession' of goods while the bailee holds the property to his order. Attornment is a process whereby constructive possession can be passed from one person to another. An example occurs in a sale and leaseback where a financier purchases goods from a business which immediately agrees that it holds them to the order of the financier. This attornment effects delivery of possession of the goods to the financier who then leases them back to the business i.e. the financier grants possession of the goods to the business .

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Equitable title

- Equitable title to property is a title which would only have been enforceable in the Court of Chancery prior to the Judicature Acts 1873-5. So for example a life interest in goods can exist as an equitable interest but was not recognised in the courts of common law. Likewise although a legal mortgage required the execution of a deed, an agreement to grant a mortgage was treated in the Court of Chancery as a mortgage, in other words it was an equitable mortgage.

Assignment

- Assignment is the process whereby title to things in action can be transferred. Thus, if a business is owed debts by its customers, it can assign the right to recover the money to a financier in return for an immediate cash sum.

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2. Explain why possession of goods is so important in English law

Introduction

- As with all essays, you should begin with an introduction that sets out what the question is about, why the topic is an important one, and how your essay will go about answering the question set. By providing an outline structure of the discussion to follow, your essay will be clearer and more structured.
- This question has a fairly limited scope though the issue is central to much of commercial law since it concerns the ways in which English law understands the concept of ownership. You will need to explain what is meant by possession since this is by no means self-evident and then identify some examples of how possession functions in relation to goods.

What is possession?

- Possession involves two elements: the exercise of control over the object and an intention to possess the object. You will need to point out that the exercise of control need not involve physical possession and, as *Michael Gerson* demonstrates, a person may remain in possession of goods throughout his period of ownership of them without ever having seen them.
- A discussion of *Michael Gerson* leads neatly into a brief discussion of how attornment effects constructive possession.
- You should also point out that the degree of control needed in order to constitute possession and the way it is manifested will depend on the type of property and sometimes its location. A key point to raise in respect of the intention to possess is that it consists of an intention to exclude others from possession to the extent permitted by law since you can return to this idea later when discussing relativity of title.

You now need to give some examples of how important possession is. The following sections provide three such examples.

Possession in the sale of goods and documentary intangibles

- Page 22 of *Commercial Law* notes that English Law distinguishes between things in possession (or goods) and things in action such as the right to recover a debt and various pieces of increasingly important property such as shares and intellectual

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property rights. This distinction between property which can be possessed and intangible property is important because, as the chapters on the sale of goods makes clear, one of the key obligations of a seller is to give possession of the goods to the buyer – s 27 Sale of Goods Act 1979 and s28 Consumer Rights Act 2015 (see pages 322-5 of *Commercial Law*). You might consider *Michael Gerson* here where it was argued that, although on the facts incorrectly, a transaction structured as a sale was in fact a sham since there was no delivery of the goods to the buyer.

- As a further example of the importance of possession in sales, parties to a sale of ascertained goods will by virtue of s18 rule 5(2) of the Sale of Goods Act 1979, be taken prima facie to have intended property in the goods to pass to the buyer once they are delivered to him or to a carrier for transmission to him. (See *Commercial Law* pages 250-51). In consumer sales, risk will not pass to the purchaser until the goods are in the physical possession of the consumer or a person identified by the consumer to take possession of the goods (s29 Consumer Rights Act 2015.)
- Possession is equally important in the case of documentary intangibles. Here title to a thing in action which is itself intangible, is treated in law as being embodied in a document - which is of course tangible (a chattel). For example with a bill of exchange the passing possession of the document in the right circumstances also passes the right to enforce the duty to make a payment under the bill.

Possession and tort

- Rather surprisingly the primary property-related torts of conversion and trespass protect possession or the immediate right to possess goods rather than absolute ownership. Even in negligence, while a person who does not have an immediate right to possession of goods may bring an action in respect of negligent damage to them, his damages will be limited to losses caused to the residual value of the goods, ie their value when he recovers possession of them (see for example *HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd*).

Possession and ownership

- Because of the availability of tortious actions to protect possession of goods it is clear that the right to exclude others from deriving the benefit of goods or damaging enjoyment of that benefit is extremely important and indeed as cases like *Costello* and *Wilson v Lombank* demonstrate, possession constitutes a form of ownership (perhaps better thought of as 'title') to goods even though there is someone else who has an even better right to possess. Such a person could obtain possession through exercising his tortious rights and until he does the person in possession can protect that possession against the whole of the remainder of the world.

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- Possession is a proprietary interest in goods. *Commercial Law* gives an illustration on pages 25 and 26 of the important difference between such an interest and a contractual claim, especially where a defendant is insolvent, and you should give an explanation of this point. You could also consult an article by Norman Palmer, 'Possessory Title', in Norman Palmer and Ewan McKendrick (eds), *Interests in the Goods* (2nd edn, Informa Press 1998).

Conclusion

- Clearly it is up to you to devise a sensible conclusion. However, one possible route may be to focus on the issue of possession as a form of title and compare it with ownership by reference to Tony Honoré. Honoré argued that ownership was a bundle of rights recognised by the legal system as corresponding to property rights exercisable over a thing and consequently ownership simply consists of the ability to resist competing claims made by another person in respect of property by asserting your own. If this is so it is not surprising that possession has such an important role in English property law since the mode of asserting a claim in respect of property is primarily through the law of tort and the key torts protect possession not ownership. Consequently, a person whose possession of goods is interfered with by anyone other than the owner may assert his right to possess/re-possess whilst an owner without an immediate right to possess has only a limited range of claims as *HSBC Rail* illustrates. Thus, while possession is only one of what Honoré called the 'standard incidents of ownership', it is clearly the most important.

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3. Carol decided to set up business as a three-dimensional printer and wanted to acquire an RDX3 machine. These were normally made to order and consequently rare, but she located one and wanted to acquire it. She entered into an agreement with Lesley under which Lesley agreed to buy the machine from the manufacturers and to lease it to Carol for ten years, which was its expected working life. Lesley bought the machine but decided to sell it to Pete, who now has possession of it. Carol also sold one of her two-dimensional printers, an RDX2, to Jim and delivered it to him on the basis that Jim would hold the machine on trust for Carol until he paid for it. Jim has subsequently sold the RDX2 also to Pete. Carol agreed to buy 100 gallons of plastic polymer to use in the RDX3 from Andy. The polymer was stored in a warehouse belonging to Brenda, and Andy told Brenda to hold it to Carol's instructions. Pete persuaded Brenda to release the polymer to him and he now has possession of it. Andy, Brenda Lesley and Pete are all insolvent and Carol wants to know whether she can recover the RDX2, the RDX3, and the polymer from Pete.

Introduction

- Many students think that only essay questions require an introduction, but this is not so. Answers to problem questions should also begin with a lucid and well-structured introduction that clearly highlights the area (or areas) of law to which the question relates. By doing this, you demonstrate immediately that you have understood the question and have clearly identified the relevant legal topics.
- Although a little daunting all this question is doing is inviting you explore proprietary rights. The reason why such rights are key in this question is that all of the possible defendants are insolvent so that personal claims against them, for example for breach of contract, will what is called 'abate' in the insolvency. That is to say each ordinary creditor will receive only a percentage of their claim. However a proprietary claim is a claim in the asset itself and not a money claim. What you will need to do is to take each of the goods in turn and determine the nature of Carol's claim and whether it is enforceable against the relevant defendant.

The RDX3

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- The transaction described here is a common mechanism for financing the acquisition of goods by businesses called finance leasing. Although this issue is dealt with in detail in chapter 25 of *Commercial Law* we do not need any more information than we have in Chapter 2, in addition to a basic understanding of the law of contract in order to analyse the situation.
- Lesley has agreed to give possession of the goods to Carol in return for a series of payments but has not given Carol possession. Clearly Carol is not the owner. Lesley was and she has passed ownership (title) to it to Pete. Equally, clearly Carol has a claim against Lesley for breach of the leasing contract, but this is a personal money claim and will abate in Lesley's insolvency. She may have a claim against Pete for the tort of inducing a breach of contract if he knew about the lease agreement, but this too is a personal claim. Consequently it would appear Carol only has personal not proprietary claims (though see footnotes 26 and 27 in chapter 2 of *Commercial Law*). It is much like the example at the top of page 26 of *Commercial Law* and the explanation given lower down the page.
- This is a perfectly respectable answer to the question. However, on page 29 of *Commercial Law* reference is made to the fact that equity looks on as done those things that ought to have been done so that for example a contract to create a mortgage or to transfer a chose in action was treated by equity as an equitable mortgage or an equitable assignment because equity would award the remedy of specific performance of the contract so that the mortgagor or assignor had a duty to mortgage or assign. The major exception to this principle is in relation to sale of goods where specific performance would not be granted unless the goods were unique. In our problem it might therefore appear arguable that specific performance would be granted of the leasing agreement and that consequently Carol has an equitable lease of the machine. However, this is not correct though we could not deduce this from Chapter 2. What Lesley has agreed to do is to give possession to Carol, not ownership, and there is no such thing as 'equitable possession' (see pages 689 of *Commercial Law*), ie possession which is recognised in equity but not at law. The situation might be different if Lesley had agreed to sell (ie pass ownership of) the goods to Carol since there is such a thing as equitable ownership, as is clear from the next section.

The RDX2

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- Here it is clear that Carol has an interest in the machine under a trust with Jim as trustee. Although the common law does not recognise a situation where A owns property but is under a duty to use it solely for the benefit of B, equity does and treats the beneficiary, in our case Carol, as owner of the goods. She has what is called equitable title and this is a proprietary right. Consequently Carol has a proprietary claim against Jim and since such claims 'go with the property' she has one against Pete, though, as is pointed out on page 29 of *Commercial Law*, equitable claims are not enforceable against bona fide purchasers for value of a legal interest in the property and without notice of the existence of the equitable rights. Pete is a purchaser, so whether Carol will succeed will depend on whether Pete knew or ought to have known of the leasing arrangement.

The polymer

- The question clearly states that this is an agreement to sell, not a sale itself, and that because ownership of the goods has not passed to Carol, any proprietary claim she has must therefore be based on possession.
- Possession requires an intent to possess, which we can assume Carol has but she must also have control over the goods. In this problem she will have to show that she had constructive possession in that Brenda, who has physical control has attorned to Carol. As *Godts v Rose* demonstrates in a case of a sale like this all three parties must agree to Brenda holding to Carol's order and it seems clear that at least for a time this was so.
- Consequently Carol had possession of the goods and was dispossessed by Brenda parting with possession to Pete. This certainly gives Carol a claim in conversion against Brenda but this cannot be proprietary since Brenda no longer has the goods and such claims 'go with the goods'.
- Pete too has dispossessed Carol and so also appears to have committed the tort of conversion and this time, since it appears he still has possession of the goods, this will be a proprietary claim. However suppose that Pete has acquired title to the polymer from Andy. As owner he will have a better right to possess than Carol and so will not be liable in conversion, leaving her with personal claims against Brenda for breach of her duties as bailee and Andy for breach of the contract of sale.

Conclusion

- Only a short conclusion is needed, perhaps along the lines of pointing out that until a contracting party has either ownership or possession of goods their position if they

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are simply relying on personal claims in contract or bailment are precarious and susceptible to the problem of the insolvency of their counterparty.