§ Law in Context

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Property Law

Commentary and Materials

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Title

10.1. What we mean by 'title'

Like many property law terms, the word 'title' is used in a number of different senses. It is often used loosely to refer to someone's right or interest in a thing, but it also has a number of technical meanings. For example, it can be used to refer not to a person's proprietary interest in a thing, but to their *entitlement* to that interest as against another person. As Professor Goode explains in *Commercial Law* at pp. 52–4:

> A person's interest in an asset denotes the quantum of rights over it which he enjoys against other persons, though not necessarily against *all* other persons. His title measures the strength of the interest he enjoys in relation to others.

This is the sense in which the word 'title' will be used here. In this jurisdiction it is particularly important to be able to distinguish a person's entitlement to an interest from the interest itself because our system is primarily concerned with relativity of title rather than with absolute title. In other words, when a person claims to be entitled to a particular interest in a thing, it is usually sufficient for him to prove that his entitlement, or title, to the interest is better than that of the person disputing his claim: it is rarely necessary for him to prove absolute entitlement.

For reasons which will become apparent, it is possible for two or more people to have titles to the same interest in a thing. These rival titles will each be recognised by law, but they will be of different relative strengths, and in a dispute about entitlement to the thing (or more accurately, entitlement to ownership or to some other interest in the thing) between any two of them the court is interested only in the relative strengths of their titles. In other words, in order to win, one of them only has to show that he has a better title than the other party to the dispute, not that he has an absolute title (i.e. a better title than anyone else in the world). And the person with the inferior title (or with no title at all) will not usually be able to defeat the claim of the other by demonstrating that there is a third party, not a party to this dispute, who has the best title of all.

Before looking more closely at these issues concerning relativity of title, it is useful to consider how titles arise.

10.2. Acquiring title: derivative and original acquisition of title

The possibility of rival titles arises because titles can be acquired not only by *derivative acquisition* but also by *original acquisition*.

10.2.1. Derivative acquisition: disposition or grant

Derivative acquisition covers those cases where your title is derived from that of the previous title holder. This can be done by way of a disposition – in other words, the whole of your predecessor's interest is disposed of to you by, for example, his selling or giving it to you, or by your inheriting it from him when he dies. Alternatively, your interest might derive from that of your predecessor by grant – in other words, by his retaining his interest but granting you a lesser interest carved out of it. The obvious example of a grant is where the holder of a fee simple interest in land grants you a lease of that land. To translate this into title/interest terms, you derive your title to the lease from his fee simple, to which he still has a good title, except that his fee simple interest is now reversionary on your lease. If you were then to mortgage your lease to the bank, the bank would acquire a title to its mortgage derived from your title to the lease.

10.2.2. Original acquisition

By way of contrast, a title can be *original*, in the sense of not being derived from anyone else's title. *Original acquisition* occurs in at least three types of situation. The first is where someone becomes the first ever (hence original) interest holder in the thing. We have already looked at some of the cases which fall within this category: as we saw in Part I, there are circumstances in which the law treats a person as having an interest in a thing by virtue of having created it or mixed her labour with it in a Lockean sense, or by having taken an unowned thing and reduced it into private ownership by taking possession of it (for example, by capturing a wild animal, or drawing percolating water, or taking possession of an unowned thing).

Original acquisition of title is not, however, confined to these situations where what is acquired is the first ever interest in a newly created or previously unowned thing. In addition, a new title to a thing can arise notwithstanding the fact that someone else already has a title to that thing. This new title does not derive from, but is independent of, the pre-existing title. For present purposes, the most significant way of acquiring a new title to a thing to which someone else is already entitled is the same as the way of acquiring a title to an unowned thing – i.e. by taking possession of it. It is central to our property law system that possession is itself a root of title, and this applies not only to previously unowned things but also to things to which someone else already has title. The basic principle is that, by taking possession of a thing, you become *entitled* to possession of it against everyone except a person with a better right to possession. We will look at the rationale

of this rule later, but for present purposes the important point is that the title you acquire is a new one: it is not derived from that of any previous or current interest holder. It is not effective against a pre-existing title holder but it *is* effective against everyone else. So, you have a title to the thing you have taken, but so too does the pre-existing title holder. Your title is weaker than hers but stronger than that of a person who has no title. The pre-existing title holder does not have to put up with this situation: she has a better right to possession than you, and can have you evicted or require you to give up possession to her. Unless and until she does so, however, you and she have rival titles to the same interest.

It is important to appreciate that a title acquired by taking possession can be defeated only by someone with a better *right to possession* of the thing in question; it cannot be defeated by someone who has a pre-existing interest in the thing which does not carry with it the right to possession. Take, for example, the case of a person who has granted a lease of land or bailed goods to another person. The essence of a lease and of a bailment is that possession of the land or goods is transferred to someone else for a specified period. If therefore *during that period* an outsider takes possession, it is the tenant/bailee, and not the landlord/bailor, who can take action against the outsider. The landlord/bailor will, however, become entitled to take action against the outsider as and when the lease/bailment ends and the right to possession consequently reverts to them.

Before taking this further, it is worth noting two points here. The first is that, as will be apparent from what has just been said, a person who is in possession of a thing may have become entitled to possession by acquiring an interest in the thing which carries with it a right to possession – in other words, he has possession by virtue of having the interest. Alternatively, he may be entitled to an interest in the thing (and hence entitled to possession) simply by virtue of being in possession of it. Possession and title are, therefore, closely interrelated in our system. The second point is that it may not matter much to outsiders which of the two explanations is the correct one in any particular case – the very fact of possession is sufficient guarantee that the possessor has *some* title even if it is not immediately clear whether it is an absolute title that will defeat all rivals, or one that is liable to be defeated by the 'true' owner.

For the sake of completeness, it is also worth mentioning here one other way in which a new title can arise independently of a pre-existing title. This is where someone with no title at all to a thing nevertheless purports to transfer title to an innocent purchaser. The general rule in English law is *nemo dat quod non habet* – no one can give a better title than he himself has or has the authority to confer. So, for example, you acquire no title from a con-man who 'sells' you the Royal Albert Hall (unless you manage to take possession of it, in which case you acquire *a* title by virtue of your possession, but not a title that will be effective against the 'true' owner). However, there are exceptions to the *nemo dat* rule, and when they apply the purchaser acquires a title which is not only good against the rest of the world but will also defeat the pre-existing title. The

nemo dat rule and the exceptions to it will be considered in more detail in section 10.7 at the end of this chapter.

10.3. Relativity of title

The idea of relativity of title, which is a key point in our notion of title, now requires some elaboration. We have seen that, in property disputes, the question at issue tends to be whether one party has a better claim to a property interest than another, not whether either of them is the absolute or 'true' owner of it. What each party has to prove is that he has a better title than the other, not that he has a better title than anyone else in the whole world. And, as a general rule (to which there are exceptions, as we see below in the note on the *ius tertii*), the holder of the better title will win as against the holder of the lesser title, even if the lesser title holder can prove that someone else who is a not a party to the litigation is the 'true' owner of the interest.

So, to take the simplest example, if you are walking across a field and see and pick up a gold bracelet, you acquire possession of it and by doing so you acquire a title to it. This title is better than that of any person who has *no* right to possession of the bracelet. So, if your companion snatches the bracelet from you, you can successfully sue her for its return (or damages): she will not be able to defeat your claim by showing that the bracelet 'really' belongs to someone else. On the other hand, the person who dropped the bracelet in the first place *prima facie* has a better right to possession of it than you (unless he can be shown to have lost his title by, for example, having abandoned the bracelet, or to have temporarily transferred the right to possession to someone else by a bailment), and therefore a stronger title than you have. And – in circumstances we will look at later – the same might be true of the owner or occupier of the field or of the Crown.

Essentially, the same applies in relation to land, although the broader range of interests that can exist in land brings added complications. So, as we saw in Chapter 7, a squatter who takes possession of land by taking intentional physical control of it thereby acquires a title to an interest in it. He can be dispossessed by anyone with a better right to possession – by, for example, the holder of the fee simple absolute in possession if the land had not been let, or by the leaseholder if it had. But by taking possession the squatter has acquired a *right* to possession, and consequently the court will protect his possession against strangers. So, if the situation is that O was dispossessed by S1, who in turn was then dispossessed by S2, O has a better title than S1 and S2, but S1 has a better title than S2, who in turn has a better title than X (representing the rest of the world). If S1 applies to the court to regain possession from S2 he will win, and if S2 applies to the court for an injunction to restrain a trespass by X *she* will win: in neither case will the court be concerned that there are others in existence who are entitled to evict the applicant, nor will it be relevant in either case that the applicant seized possession for himself or herself entirely without justification.

This focus on relativity of title rather than absolute title requires some explanation. The nature of our civil justice system clearly has something to do with it, whether as a matter of cause or effect. Our civil courts have evolved as forums for settling disputes between the individuals who come before the courts, rather than as truth-finding tribunals, and consequently they are ill-equipped to enquire into the rights and interests of people who are not present before the court. This is conspicuously true in relation to property disputes. To be sure of producing a definitive answer to the question 'Who owns this book?' or 'Who is entitled to possession of this land?' you need an inquisitorial rather than an adversarial system. In a system such as ours where the only information the court has is that provided by the opposing parties, it is perhaps safer for the courts to confine themselves to relative rather than to absolute entitlement.

However, it would be misleading to think of property law solely in terms of litigation. In a private property law system one of the main functions of the law is to regulate the buying and selling of property interests. At first sight, a system geared towards assessing relative strengths of titles rather than discovering the true owner might appear rather inappropriate for dealing with such straightforward commercial transactions. If you are proposing to spend a large sum of money buying a picture or a house or a car, you want to know that you will get an absolute title, not just one that will stand up against some but not all comers. And, by the same token, if you want to mortgage your interest in your house to a building society, you might expect the building society to insist that you demonstrate absolute entitlement to the land, not merely *an* entitlement which may or may not be vulnerable to other as yet unspecified claimants.

However, on closer examination, the distinction between absolute title and relative title is less great than at first appears. The truth is that absolute title is in practice somewhat elusive. Property interests are, after all, abstract things, even though the subject-matter of the interest (the picture or the car or the house) may be concrete enough. How do you prove entitlement to an abstraction? In fact, we rely principally on three things – possession, provenance, and registration – but, as we shall now see, none of these can be guaranteed to locate absolute entitlement in all cases.

10.4. Proving title

As we have already seen, you might be entitled to a property interest because it originated in your hands or because it was transferred or granted to you from the previous holder by an authorised transmission. *Proving* your entitlement in either of these cases is a different matter. In fact, modern legal systems have had to evolve fairly elaborate rules and conventions about proving title. Without such special provision the difficulties in proving title would be formidable: to be *completely* certain of obtaining an absolute title, any prospective purchaser of your property interest would need to be satisfied, if you claim to be the original title holder, that

the facts which in law give rise to title by original acquisition did indeed occur *and* that you have not since then transferred your interest to someone else, or granted away any subsidiary interest. And, if you are claiming to be entitled as a successor of the original title holder, your prospective purchaser would in addition need proof that you acquired your interest from someone who was then entitled to it, who in turn acquired it from the legitimate holder, and so on right back to the original title holder.

In most cases, therefore, conclusive proof of entitlement would be prohibitively expensive, if not impossible, to provide. A legal system that wants to encourage a market in property interests must therefore adopt mechanisms and rules that make it safe for purchasers to assume that apparent owners *are* absolute owners, or at the very least lessen the risks of a successful challenge to a purchaser's title. In our system we rely largely on registration and possession, buttressed by conventions about proving provenance and by limitation of action rules. Each of these will be considered in turn.

10.4.1. Role of registration

At first glance it might seem that registration could provide a complete answer to the problem of proving title. If we had a universal and unchallengeable register of all property interests in all things, then in theory all problems about title and relativity of title could be made to disappear. Registration itself could be made the unique title-conferrer, so that, if you were named in the register as holder of a particular interest, you would *be* the legitimate holder of it, and if you were not, you would not. However, this is simply not feasible, nor would it be desirable in practice even if it could be achieved. There are a number of reasons for this. The first is that registration is appropriate for surprisingly few types of property interest. One problem is that any register must be updated every time a dealing with the property occurs, and every update takes time and costs money. This makes it pointless to require registration of interests in things which are worth less than the cost of making an application for registration, or in things which are so ephemeral that they will have ceased to exist before the process of registering transfers in title is completed, or in things so frequently exchanged that they change hands faster than the registry can record changes in title. Another problem is that, in the case of tangible things, registration cannot work unless each individual thing is easily distinguishable from every other like thing. This means that registration is ruled out for all types of tangible property except those where each individual item is unique (such as pieces of land, or works of art, or racehorses) or can be made so by fixing on an identification mark or name plate (so, for example, it would be feasible to set up a system for registration of car ownership, although we have not yet done so in this country).

Even where registration is feasible and otherwise desirable, there is a fundamental problem about making the register unchallengeable. This is that any registration system is necessarily parasitic on some other title-proving system:

the registrar must know whom to enter on the register. In any system, if I wanted to be registered as entitled to all hitherto wild rabbits in the country, or to the fee simple interest in my neighbour's house, then presumably I would have to produce to the registrar something like the captured rabbits, or some evidence that my neighbour had duly transferred his fee simple to me. It follows that, even in the case of fully registrable property interests, it is impossible to achieve a total identification between the 'true' owner and the registered owner. At any one time there will always be some people *entitled* to be registered (because they can produce the necessary proof to the registrar) but not yet registered, and others who *are* registered but are no longer, or were never, entitled to be (because they have since sold their interest, or gone bankrupt, or were entered on the register by mistake or by dishonesty or fraud). One of the most difficult questions that any registration system has to resolve is the extent to which it will disregard the claims of the 'true' owner as against those of the registered owner. There is little point in having a registration system at all if a registered owner can always be defeated by a 'true' owner. On the other hand, few people would find acceptable a system whereby the register is *always* conclusive evidence of title (so that, for example, you and your neighbour have to swap houses because the registrar inadvertently confused the numbering of the houses). Compensation from the state or the registrar for any loss caused by a 'mistake' in the register can of course increase the acceptability of such a system, but it reintroduces the need to be able to prove entitlement to an interest (and hence entitlement to compensation for its loss) by some means other than entry on the register.

For these reasons it is not feasible in practice to register all property interests, nor would it be desirable to do so even if it was feasible, and even in the case of property interests which are subject to registration, other methods of proving title will still be relevant to varying degrees. We look at registration in some detail in Chapter 15, but here it is sufficient to note that at present in this jurisdiction we have relatively little registration compared to other jurisdictions. We have fairly sophisticated registration systems in operation in relation to some intellectual property rights, an as yet uncompleted registration system for land (which even when completed will provide for registration of some but not all interests in land), and virtually no registration at all for any kind of interest in chattels other than aircraft and ships. And, in most if not all of our registration systems, the correctness of the register can be challenged on the grounds that it does not reflect the 'true' ownership of the property interests recorded there, as we see in Chapter 15.

Registration, then, necessarily has only a limited role in proving titles. What English law has traditionally relied on instead is possession, backed up by conventions about proving provenance and by limitation of action rules.

10.4.2. Possession as a root of title

We have already seen that possession of a thing gives a good title to an interest in that thing, which can be defeated only by someone who can prove that they have a

better right to possession of that thing. In other words, simply by virtue of being in possession of a thing, a person acquires not only a right to possession but also a good title to an interest in the thing, effective against all except those who have a better title. This rule that possession confers title is central to our title proving system. Whatever the rationale of the rule (and we shall be looking at that more closely in the next chapter) its effect is that the outside world can, for the most part, safely assume that apparent owners are actual owners. And, for present purposes, the important point is that someone offering to sell an interest in a thing can prove *an* entitlement to the interest simply by demonstrating that she is in possession of the thing. Of course, the *value* of her entitlement (i.e. the price a buyer would be willing to pay her for the interest) will vary depending on the likelihood of there existing someone with a better title who is able and willing to challenge her title. The role of provenance and of limitation of actions is to diminish the risk of a successful challenge.

10.4.3. Provenance

In practice, the prospective seller who is in possession of a thing can best show that there is *unlikely* to be anyone anywhere with a better title to it if she can show its provenance – in other words, if she can explain the origin and subsequent history of the thing, tracing the devolution of her title down from that of the original interest holder. So, for example, you can prove *almost* conclusively to a potential buyer that no one has a better title than you to a cake in your possession if you can prove that it was sold to you by a baker and that the baker baked it out of his own materials using his own labour which he had not contracted out to anyone else. The difficulty of eliminating *all* possibility of the existence of a better title is apparent even from this simple example, if only because of the regressive nature of the enquiry, and the problem of proving the negative (for example, that the baker had not already sold the cake to someone else before he took your money for it, that you did not buy it as agent for someone else, that you did not sell it to your companion when you left the shop and then offer to carry it home for her, etc.). However, as is equally apparent, it is fairly easy to achieve an acceptably high degree of probability that no one has a better title in such a case: in fact, in the real world, few prospective cake buyers would bother even to ask you where you got the cake from, never mind enquire into the ownership of the baker's labour and materials.

As a general rule, the more valuable the thing, the more likely it is that a purchaser will want to investigate the seller's title to the thing, going beyond the fact of possession and enquiring into the provenance of the seller's interest. In the case of goods not subject to registration whose value does not warrant the cost of elaborate investigation, most buyers are happy to take a risk and rely on possession, particularly where there is nothing in the surrounding circumstances to arouse suspicion (compare, for example, the enquiries you would make before buying a car radio in a pub – assuming you were anxious to obtain an unchallengeable title – with those you would make if buying the same radio from a shop).

Works of art and archaeological finds are good examples at the opposite extreme. At present, there is no register covering these items in this jurisdiction, and buyers rely on a combination of possession and provenance, tracing the history of the work from its creation, or the time and place of its finding, up to and including how it came into the seller's hands, with provenance performing the additional function of authenticating the thing itself. If a seller is in possession of a work of art but is unable to produce all the evidence necessary to prove its provenance, this gap in the evidence will affect the price obtainable for his interest precisely to the extent that it (a) increases the possibility of there existing someone who has, and is likely to assert, a better title to the work, and (b) throws doubt on the authenticity of the work.

Historically, provenance has also been of prime importance in proving titles to interests in land (and it continues to be of some significance even though we now have a land registration system covering the whole country, since the process of putting all land titles on the register has not yet been completed). For obvious reasons, it is rarely if ever possible for a seller of an interest in land in this country to trace his title back to that of the first ever interest holder. Nevertheless, the further back a seller can trace his title, the smaller the risk that someone with a better title will appear to challenge it. Consequently, for centuries the accepted method of proving titles to land in this country has been for the seller to demonstrate that he is in possession of the land (or can put the buyer in possession on completion of the sale), *and* show an unbroken chain of title going back for a specified number of years (currently fifteen years, progressively reduced from sixty over a period from 1874). This system is still in operation in relation to land where the title has not yet been put on the land register. So, if you now want to buy a house and you discover that the seller's title (to be precise, his title to the fee simple absolute in possession of the land) is not registered, you will require him to produce the document by which *he* acquired his title (usually a deed by which his predecessor sold the fee simple to him); in addition, if this occurred less than fifteen years ago, you will also require him to give you proof (by producing the original documents of transfer) of how *his* seller, and his seller's seller, acquired their titles, and so on going back to a transfer of the title which happened not less than fifteen years ago. If he can do this, it will not *guarantee* that he has (and hence can transfer to you) an absolute title, but it will lessen the risk that there is someone around able and likely to make a successful challenge to his title. The degree of risk is then reduced still further by the operation of limitation of action rules, as we shall now see.

10.4.4. Extinguishing title by limitation of action rules

In relation to both goods and land, limitation of action rules (of ancient origin, but now contained in the Limitation Act 1980) lessen the risk of old titles resurfacing. They do this by eliminating dormant claims. Precisely how this operates in relation to property interests will be considered in the next chapter, but for present purposes it is sufficient to note that all claims relating to property (and indeed to

anything else) are extinguished without compensation if the claim is not brought before the court within a specified number of years after the cause of action first arose – generally twelve years in the case of actions to recover land and six years in other cases. The position has been modified somewhat in relation to registered land by the Land Registration Act 2002, but leaving aside these changes (which we look at in Chapter 11) if someone in possession of land is dispossessed, or goods are taken from their owner, the possessor/owner's claim to recover the land or goods will be lost if not brought before the court within the limitation period. And, once the claim is lost, so too is the possessor/owner's title. So, to take again the example of the squatter, if Squatter A takes possession of O's land on 1 January 1990, O immediately becomes entitled to recover possession from Squatter A. Mechanistically, this means that O becomes entitled either to retake possession by physically evicting Squatter A (subject to the safeguards considered in Chapter 7) or to apply to the court for a possession order against Squatter A. Ignoring for the moment the changes made by the Land Registration Act 2002, if O has done neither of these things by 31 December 2001, he loses his right to do either, *and in addition* his title to the land is irrevocably extinguished. If between 1 January 1990 and 31 December 2001 Squatter A is evicted by Squatter B, this does not affect O's position: O will have to bring his possession action against Squatter B rather than Squatter A, but his right to does so will still expire on 31 December 2001.

This is of tremendous importance in relation to proving titles to interests in land. In cases not covered by the Land Registration Act 2002, if your seller can prove that his title can be traced back through an unbroken chain to a transfer which took place at least fifteen years ago, he is effectively demonstrating that, even if his title *does* derive directly or indirectly from someone who dispossessed the 'true' owner, that dispossession cannot have taken place within the last fifteen years. Since in most cases the limitation period runs from the date of dispossession and expires after twelve years, any title that was better than his will therefore almost certainly have been extinguished. The risk that someone can assert a better title is, therefore, negligible. It is not *completely* eliminated, because there are various exceptions to the limitation of action rules which either delay the start of the twelve-year period or postpone or extend its effect. For example, if at the time when a squatter takes possession, the land is let to a tenant, the limitation period for the tenant expires twelve years later but the limitation period *for his landlord* (i.e. the person who then holds the fee simple in reversion on the tenancy) does not start until the date the tenancy ends (because it is only then that the landlord becomes entitled to possession), and it will continue to run for another twelve years from then. So, even if, when you bought your house, you satisfied yourself that your seller's title can be traced back to a legitimate purchase at least fifteen years ago, you still will not have eliminated the possibility that someone may turn up in the future who is able to prove that she is now entitled to the reversion on a lease of your land, and that your title is derived from that of a squatter who dispossessed her tenant some time before the start of the fifteen-year period you investigated. However, the chances of this happening are so small as to be hardly

worth considering, and the same applies to the other events which can postpone or extend the limitation period. So, for all practical purposes, the combination of the conventions for proving the provenance of titles and the limitation of action rules make unregistered titles to land as fully marketable as registered titles.

In relation to goods, the limitation of action rules are less effective in extinguishing dormant claims. This is for technical reasons which will be considered in the next chapter, but essentially the problem is that time does not run in favour of thieves (and goods, unlike land, can be stolen), nor does it start to run in favour of innocent takers (such as finders) unless and until they commit the tort of conversion. The role that limitation of actions plays in proving title is therefore more restricted. Nevertheless, even in relation to goods, the combination of provenance and limitation of actions is enough to make most goods fully marketable most of the time.

10.4.5. Relativity of title and the *ius tertii*

One final point to note about relativity of title is that there are some exceptional cases where a defendant in a title dispute can successfully defend the action by pleading a *ius tertii* – i.e. by showing that a third party has a better title than the plaintiff has. It has already been seen that the basic principle is that, in any dispute about title, the law is concerned only with the relative strengths of the titles of the rival claimants: it is not concerned to establish the 'true' ownership of the thing in question, and a court will order the return of the thing to the claimant who can prove he holds the stronger title, even if it can be proved that there exists someone else whose title is stronger still. This was recently reaffirmed in the High Court by His Honour Judge Rich in *Ezekial* v. *Fraser* [2002] EWHC 2066 (a case concerning disputed possession of a house), where he reviewed all the authorities and confirmed the basic principle that the *ius tertii* of the 'true' owner is no defence in a possession action brought by the first wrongful takers of the house against those who subsequently dispossessed them.

However, a statutory exception to this general principle, applicable only to goods, was created by section 8 of the Torts (Interference with Goods) Act 1977 partially implementing recommendations made in 1971 by the Law Reform Committee in its *Eighteenth Report on Conversion and Detinue* (Cmnd 4774, 1971). The most important effect of this is that it ensures that a defendant does not have to pay damages for wrongful interference with goods to a claimant who is not the owner. This applies only if the 'true' owner can be found and is willing to be joined as a party, and then only at the price of having to pay damages to the true owner instead. This is of immense practical importance to a defendant faced with the threat of multiple liability for damages in tort arising out of the wrongful interference with goods: as a consequence of this provision and section 7, the threat of double liability is removed.

10.5. The *nemo dat* rule

The *nemo dat* rule is that no one can give to another a greater interest in a thing than he himself has. However, the application of the rule is determined by policy

not logic, and when policy reasons demand, English law sees no conceptual difficulty in making exceptions to the rule. The classic statement of the policy considerations at work here was made by Lord Denning in *Bishopsgate Motor Finance Corp. Ltd* v. *Transport Brakes Ltd* [1949] 1 KB 322 at 336–7:

> In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our times.

Decisions as to whether, in any particular circumstance, an exception should be made to the *nemo dat* rule have tended to be made on an *ad hoc* basis, and consequently the detailed picture is complicated and technical. However, the following broad principles can be abstracted.

10.5.1. Scope of the *nemo dat* rule

First, it is helpful to distinguish the situations in which the *nemo dat* rule is relevant from essentially similar situations which English law views as involving issues of priority and enforceability rather than the *nemo dat* rule. There are at least four different ways in which you can try to give someone more than you yourself have, and the *nemo dat* rule affects only two of them. In order to distinguish between them it is necessary to revert to the distinction made at the beginning of this chapter between title and interest. In general, the *nemo dat* rule is concerned with title, not with quantum of interest. To make this clearer, consider the following four situations:

1 You purport to transfer something in respect of which you have no interest or title whatsoever. It might be that you never had any interest in the thing: for example, you might purport to sell to T a car you have just stolen, or to mortgage the Royal Albert Hall to M. Alternatively, you might once have had an interest in the thing but have since lost it: for example, you purport to sell to T a car you once owned but have already sold to X.
2 *Nemo dat* and section 62 of the Law of Property Act 1925. You do have an interest in the thing, but the interest you actually hold is not as extensive as the one you purport to transfer. For example, you purport to sell the fee simple in land to P when all you have is a monthly tenancy of the land, or you hire a car from O and then purport to sell it to P.
3 Priority of derivative interests. You have an interest in the thing and you then grant lesser interests in the thing to a series of grantees, each lesser interest being actually or potentially incompatible with the others. For example, you hold the legal fee simple in your house and you first grant a seven-year lease of the house to T, then you mortgage the legal fee simple to M1 and then you mortgage it again to M2. Or you charter your ship to C for twenty-one years, then allow it to become subject to a lien to secure S's charges for rescuing the ship, and then mortgage the ship to M.

4 Enforceability of derivative interests. You have an interest in a thing but having already granted lesser interests to third parties (as in 3 above), you now purport to transfer your interest to P free from any lesser interests. So, taking the examples given in 3, you now purport to sell to P the fee simple in your house free from T's lease and the mortgages to M1 and M2, and to sell the ship to P free from C's charterparty, S's lien, and M's mortgage.

In Case 1, the issue is whether you can give a better *title* to the interest you are purporting to transfer or create than the title you yourself have: in resolving this issue, the only relevant principle is the *nemo dat* rule.

Case 2 is slightly more complicated. In determining whether you can give a good title *to the interest you are purporting to transfer or create*, the relevant principle is again the *nemo dat* rule, as in Case 1, but there is also a separate and subsidiary issue: if because of the *nemo dat* rule you fail to confer a good title to *that interest*, might you nevertheless succeed in conferring a good title to the lesser interest you do in fact have? The answer is usually yes, because of the basic property principle that a disposition of a greater interest than you have will be effective to dispose of whatever interest you do have in the same thing. This is enshrined in section 62 of the Law of Property Act 1925 (not confined to land) and the same result can be achieved via the doctrine of partial performance, as demonstrated in *Thames Guaranty Ltd* v. *Campbell* [1985] QB 210 (i.e. if this is what the buyer wants, the court will order you to perform your contract up to the extent you can do so, and pay damages to compensate for the shortfall).

Cases 3 and 4, on the other hand, have nothing to do with the *nemo dat* rule at all. In Case 3, each grantee will get a good title to the interest you purport to grant to him, but the issue is whether that interest will be postponed to or take priority over the interests of the other grantees. English law treats that issue as a question of *priorities* between the competing lesser interests, and ranks them between themselves in an order arrived at by applying special priority rules.

Similarly, in Case 4, there is no difficulty about title: there is no reason why P should not get a good title to the fee simple – the only issue is whether she will take the interest subject to or free from the encumbrances you have carved out of that interest. English law treats that issue as a question of the *enforceability* of each of the lesser interests as against P, governed by special enforceability rules. While priority rules and enforceability rules have close affinities with the *nemo dat* rule (and with the common law *bona fide* purchaser rule Lord Denning contrasted with it in the above quotation from *Bishopsgate Motor Finance Corp. Ltd* v. *Transport Brakes Ltd* [1949] 1 KB 322), they are not explicitly based on them and it avoids confusion in this context if they are kept distinct. Priority and enforceability of interests are therefore considered separately in Chapter 14.

In cases where the *nemo dat* rule is relevant – Cases 1 and 2 – the balance drawn between the *nemo dat* rule and the *bona fide* purchaser rule varies depending on the nature of the property in question. In the following sections we consider first some general principles applicable to all types of property and then the specific principles applicable to goods, money and land respectively.

10.5.2. General principles applicable to all property

10.5.2.1. Registration and the *nemo dat* rule

Where registration of title systems apply, it is registration itself which confers title. So, even a purchaser from someone with an unimpeachable title will not himself acquire a good title unless and until he becomes registered as title holder. And conversely anyone who becomes registered as title holder thereby acquires a better title than anyone else in the world, even if the registration was simply a mistake, or was procured by forgery or a trick. This is essentially what happens in our system of registration of title to land under the Land Registration Act 2002, and also in our system for registering interests in ships under the Merchant Shipping Act 1995.

In such a system, the *nemo dat* rule has no application. If T is registered as title holder, but X, who has no title whatsoever, executes a transfer deed in favour of P and P manages to become registered as title holder instead of T, then P acquires a good title and T's title is extinguished. This is a purely mechanical process. The court (or the Registrar) might have a power to order rectification of the register so as to divest P of his title and reinstate T, but rectification is neither as of right nor retrospective, and it is unlikely to be ordered to the detriment of any innocent purchaser who acts on the faith of P's registration.

10.5.2.2. Dispositions to volunteers

It is a basic principle of English law that a donee can never be in a better position than his donor. In accordance with this principle, a volunteer (i.e. a transferee who gave no consideration for the transfer) can never obtain a better title or a greater interest than his transferor, whatever the nature of the property. There are only two qualifications to be made to this. The first is the point already made about registration – once a volunteer's interest is registered, his title is as good as anyone else's (although some registration systems treat registered volunteers less favourably than registered purchasers when it comes to issues of enforceability, as we see in Chapter 15 below). The second qualification to be made is that the donee might have some sort of general law defence, such as estoppel, which will effectively prevent the true owner asserting his title.

This basic principle that a volunteer can never obtain a better title than his transferor is entirely consistent with the policy enunciated by Lord Denning in *Bishopsgate Motor Finance Corp. Ltd* v. *Transport Brakes Ltd* [1949] 1 KB 322, quoted above, that exceptions to *nemo dat* arise out of the need to protect commercial transactions: in the absence of some added factor such as estoppel, gifts are not regarded as requiring the same protection.

10.5.2.3. Powers of sale

There are some circumstances in which the holder of an interest in a thing is invested with a special power to confer on a purchaser a greater interest in the thing than she herself possesses. The interest held by the seller is nearly always a security

interest, such as a mortgage or charge or lien. For example, a mortgagee whose mortgage was made by deed has a statutory power of sale (conferred by section 101(1)(i) of the Law of Property Act 1925), and this enables the mortgagee to confer on a purchaser the *mortgagor's* interest in the thing in question, free from the mortgage and from any other derivative interest to which the mortgage takes priority (section 104 of the Law of Property Act 1925). So, suppose you hold the fee simple in your house and first mortgage it to the Building Society, and then (without the Building Society's authority) grant a seven-year lease of it to T. If you then fail to make the agreed payments under the mortgage, the Building Society (which holds no interest in your house other than the mortgage) is nevertheless able to confer on P, a purchaser, the fee simple interest in the house, free from the mortgage and free from T's lease.

Most of these special powers of sale are statutory, but a few (mainly of ancient origin, such as the power of a pledgee of goods to sell them on default by the pledgor) are common law.

10.5.3. The application of the *nemo dat* rule to goods

In transactions relating to goods *nemo dat* is the basic rule, but there are several common law and statutory exceptions to it. The rule is now set out in section 21(1) of the Sale of Goods Act 1979 and the statutory exceptions appear in sections 23–26.

Superficially, these exceptions to the *nemo dat* rule are rational enough. They all arise where the good faith purchaser has bought from someone who has *apparent* authority to sell, either as owner or as agent, even if he has no actual title or authority, and in most cases this misleading appearance will have been produced by the true owner. So, for example, the exceptions in section 25 depend on the true owner having transferred possession of the goods or their documents of title to the seller, even though the true owner has not yet parted with all his interest in the goods. Similarly, the exceptions in section 24 can only arise where a buyer of goods has allowed his seller to remain in possession of them or their title deeds, so allowing his seller to continue to pass himself off as true owner. Even the exception in section 23 depends on the true owner not yet having taken steps to have the voidable title of the seller set aside. So, at first glance it looks as if the good faith purchaser is preferred over the true owner only where the true owner has in some way contributed towards the purchaser's mistaken belief that he is dealing with someone with power or authority to sell.

Until recently, there was an additional common law exception (later embodied in statute) which did not conform to this pattern. By this exception, abolished by section 1 of the Sale of Goods (Amendment) Act 1994, a good faith purchaser would acquire a good title to any goods sold in market overt. 'Market overt' meant a market legally constituted by statute, charter or custom (covering, under this last heading, all shops in the City of London) and sales had to be open and made between sunrise and sunset. Now that this exception of sales in market overt has

been abolished, it is impossible for a thief to pass on a good title to goods (i.e. a better title than that of the true owner: even a thief will acquire, and can transmit, a possessory title good against everyone except the true owner: see further Chapter 11) except in the rare cases where the circumstances outlined in the previous paragraph also happen to exist.

However, although when seen in outline the exceptions to the *nemo dat* rule seem rational, the appearance is misleading. In reality the superficially clear statutory rules are riddled with inconsistencies and enmeshed in a mass of over-technical and not always coherent case law rules. For a detailed analysis reference should be made to Goode, *Commercial Law*, Chapter 16, which Professor Goode concludes with the following comment:

> The present patchwork of legislative provisions detailing the exceptions to the *nemo dat* rule can hardly be described as satisfactory. The legislation has generated a vast amount of case law and has given rise to grave problems of interpretation, often resolved at a highly technical level. In 1989, in a review on behalf of the government directed primarily at security interests in personal property [Diamond, *A Review of Security Interests in Property*] Professor Aubrey Diamond recommended that the existing statutory provisions be replaced with a broad principle that, where the owner of goods has entrusted them to, or acquiesced in their possession by, another person, then an innocent purchaser of those goods should acquire good title. In January 1994, the Department of Trade and Industry issued a Consultation Paper inviting comments on this proposal and on particular exceptions to the *nemo dat* rule. The ensuing abolition of the market overt principle appears to have owed nothing to this Consultation Paper, and it is unclear what provoked its publication. It is to be hoped that no government department will ever in the future seek to deal with such a complex set of issues in such an ill-conceived document, a mere eight pages long, containing no analysis, no reasoning, no discussion of the policy issues and no detailed proposals. (Goode, *Commercial Law*, p. 485)

10.5.4. The application of the *nemo dat* rule to money

'Money' can mean at least three different things. First, it can refer to physical coins or notes, valued not as currency but rather for the intrinsic value of the paper or metal out of which they are made, or as curios. It is characteristic of coins and notes valued in this way that their market value bears little resemblance to their face value. Viewed in this way, coins and notes behave just like any other goods – the *nemo dat* rule prevents title passing on a transfer by a non-owner unless any of the statutory or common law exceptions apply.

Secondly, money can mean physical coins or notes valued as currency rather than for the intrinsic value of the paper or metal out of which they are made, and fungible in the sense that any unit is interchangeable with any other unit or combination of units of the same denomination: this is what Goode calls physical money (Goode, *Commercial Law*, pp. 490–1). In the case of physical money there is

a blanket exception to the *nemo dat* rule in favour of a good faith purchaser. Even a thief can pass title to physical money to a good faith purchaser – indeed, it is the essence of currency that recipients for value and in good faith acquire a good title.

Thirdly, there is what Professor Goode calls intangible money – for example, money in a bank account. Money in an intangible form is analytically quite different from physical money, and different considerations arise when it comes to resolving competing claims to it. When you pay physical money into your bank account you cease to own it. Instead, the bank owes you an equivalent amount, and you acquire a chose in action against the bank – a right to sue the bank for payment of the amount it owes you. *Nemo dat* problems therefore do not arise in the same form.

The classic statement of the principle that the *nemo dat* rule has no application to physical money or intangible money comes from *Miller* v. *Race* (1758) 1 Burr 452:

> William Finney sent by post to Bernard Odenbury a bank note for the payment of £21 10s to himself or bearer on demand. Odenbury never received it: there was a mail robbery and the note was taken by the robbers. The following day the bank note was paid over to Miller, an innkeeper, who received it in the ordinary course of his business and gave valuable consideration for it, not knowing that it had been stolen. However, by the time Miller presented the note to the bank for payment, Finney had told the bank about the robbery and instructed them to stop payment. The bank therefore refused either to pay Miller or to return the note to him.
>
> Miller brought this action against Race (the bank clerk concerned). The action was in trover, and in order to succeed in the action it was necessary for Miller to prove that he had a good title to the note.
>
> It was accepted by all the parties that at that time such bank notes were treated as cash, passing from one person to another as cash, by delivery only and without any further enquiry or evidence of title.
>
> It was held by the court that the plaintiff, Miller, having acquired the note in good faith and for value, had acquired a good title to it even as against Finney, the true owner. The bank note was to be treated as currency and consequently the *nemo dat* rule did not apply. The judgment of the court was given by Lord Mansfield.
>
> LORD MANSFIELD: ... [I have] no sort of doubt, but that this action was well brought, and would lie against the defendant in the present case; upon the general course of business, and from the consequences to trade and commerce, which would be much incommoded by a contrary determination.
>
> It has been very ingeniously argued ... for the defendant. But the whole fallacy of the argument turns upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, namely, to goods, or to securities, or documents for debts.
>
> Now they are not goods, nor securities, nor documents for debts, nor are they so esteemed: but they are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash ...

> ... It has been quaintly said 'that the reason why money cannot be followed is because it has no earmark', but that is not true. The true reason is, upon account of the currency of it: it cannot be recovered after it has passed in currency. So, in case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration, but before money has passed in currency, an action may be brought for the money itself ...
>
> Apply this to the case of a banknote. [If a person finds a dropped bank note] an action may lie against the finder, it is true (and it is not at all denied), but not after it has been paid away in currency ...
>
> Here, an inn-keeper took it, *bona fide*, in his business from a person who made an appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber ... Indeed, if there had been any collusion, or any circumstances of unfair dealing, the case had been much otherwise. If it had been a note for £1,000 it might have been suspicious, but this was a small note for £21 10s only, and money given in exchange for it.
>
> ... The case of *Ford* v. *Hopkins* Hil 12 W 33, in Lord Chief Justice Holt's court, was also cited and was an action of trover for million lottery tickets. But this must be a very inaccurate report of that case: it is impossible that it can be a true representation of what Lord Chief Justice Holt said. It represents him as speaking of bank notes, exchequer notes and million lottery tickets as like to each other. Now no two things can be more unlike to each other than a lottery ticket and a bank note. Lottery tickets are identical and specific: specific actions lie for them. They may prove extremely unequal in value; one may be a prize, another a blank. Land is not more specific than lottery tickets are. It is there said 'that the delivery of the plaintiff's ticket to the defendant, as that case was, was no change of property' And most clearly it was no change of the property ...
>
> [But] a bank note is constantly and universally, both at home and abroad, treated as money, as cash, and paid and received as cash; and it is necessary for the purposes of commerce that their currency should be established and secured.

In 'Bona Fide Purchase and the Currency of Money', David Fox considers the historical background to Lord Mansfield's explanation of currency. He argues that, although the old common law rationale for currency was that 'money has no earmark', it was supplanted by the *bona fide* purchaser rule. He locates the origin of the *bona fide* purchase rule as the modern rationale of currency in the practices of bankers and commercial people who wished to promote the free circulation of bills of exchange and promissory notes. The courts of common law and equity gradually absorbed these commercial practices and gave legal force to the rights of *bona fide* purchasers of bills and notes. When Lord Mansfield explained the currency of money in terms of *bona fide* purchase he was therefore not declaring a new rule, but expressing in a refined and principled way a rule which had been evolving in the common law during the previous sixty years. Fox concludes:

> As was true of his contributions in other areas of the commercial law, Lord Mansfield's skill lay in the clear formulation of existing principles and in his grasp of the practical reasons on which they were founded. It is apparent from the tone of Lord Mansfield's judgment that the rule of *bona fide* purchase was already well established. He thought

that any suggestion that banknotes were governed by the *nemo dat* rule because they were earmarked was hopelessly outdated. He dismissively referred to the 'no earmark' maxim as 'quaint'. He delivered a fully reasoned judgment, not because he was declaring new law, but because he wanted to avoid any doubts in the commercial community about the rights of *bona fide* purchasers.

Two points stand out in Lord Mansfield's judgment. First, he gave priority to the commercial functions of money as a medium of exchange, not to its attributes as a chattel. '[Banknotes] are not goods, not securities, nor documents for debts ... but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money.' Because banknotes were functionally identical to coins they too should have the attribute of currency. He rejected the 'no earmark' maxim as the real reason why money could not be followed. If money was no longer to be considered as a kind of chattel, the rules for passing of property should not depend on its physical appearance and the possibility of the owner recovering possession of it. In consequence he made *bona fide* purchase the reason for the currency of coins as well as banknotes. Traditionally, coins passed as currency because they had no earmark. The result of *Miller* v. *Race* was to extend *bona fide* purchase from its origins in the special rules governing negotiable instruments, so that it explained the currency of all kinds of property that circulated as money.

The other important point was the commercial justification for the *bona fide* purchase rule. He was concerned, as usual, that the common law should not hamper trade and commerce. The 'general course of business', said Lord Mansfield, 'would be much incommoded' if the recipient of a lost note did not have a valid claim against the issuing bank, or if he were liable to the original owner. He did not elaborate. He was perhaps alluding to the inconvenience that would be caused if transactions which appeared to be closed had to be reopened because a creditor later found that he was liable to return a banknote which had been stolen from its original owner. The assurance of getting title by *bona fide* purchase would mean that the creditor would not have to investigate whether the payer actually had title to the money that he tendered in payment ...

Bona fide purchase now underlies the currency of all forms of money – coins, banknotes and purely abstract sums represented as bank balances. It is a common law rule, historically distinct from the much wider equitable defence of *bona fide* purchase for value without notice. The common law rule only applies to money. A person who acquires the legal title to any kind of property in good faith for valuable consideration and without notice takes it clear of any equitable rights. The rationale of the defence is that a *bona fide* purchaser has an untainted conscience so he ought not to be bound by equities affecting the property he received ...

Currency is a special legal attribute which allows a recipient of money to take a fresh legal title which is good against the whole world. Money passes into currency in this way when it is received by a *bona fide* purchaser for valuable consideration. At this point the title of any previous owner of the money from whom it may have been stolen is extinguished. It helps money to circulate readily in the economy in that it reduces the need for recipients to make detailed inquiries into the title of people who tender money in payment of debts or to buy goods.

The rule of *bona fide* purchase originated in the practices of merchants and bankers in the late seventeenth and eighteenth centuries. The common law progressively absorbed these practices, refined them and gave them the status of legal rules. Lord Mansfield's decision in *Miller* v. *Race* was the final point in this process. It confirmed that *bona fide* purchase was the rationale for the currency of all kinds of money. The decision put an end to the old common law rule that coins had the attribute of currency because they had 'no earmark' by which their original owner could specifically identify them.

10.5.5. The application of the *nemo dat* rule to land

10.5.5.1. The general principle

Except where title is registered, the *nemo dat* rule is absolute in relation to land dealings – there are no exceptions whatsoever. Except in cases where registration itself confers title, it is impossible for anyone, even a purchaser for value in good faith, to acquire any title whatsoever to an interest in land by virtue of a purported disposition by someone who himself has no title.

However, although there are no true exceptions to this rule, there are two important reservations to make.

10.5.5.2. After-acquired property

The first is that, if someone who tried to sell something to which they had no title *does* later acquire title to it, equity will treat the purported sale as retrospectively effective. So, if I purport to sell Buckingham Palace to you for £1,000, then clearly you can acquire no interest in Buckingham Palace if I had no interest to start with. If, however, I subsequently do acquire title to Buckingham Palace, equity will require me to transfer that title to you, and until I do so will treat you as already entitled in equity (see further below).

10.5.5.3. Interests by estoppel

The second reservation is more important in relation to the grant of derivative interests. If I purport to grant you, say, a lease or a mortgage of land to which I have no title, then again clearly I cannot confer on you any interest in the land which is effective against the true owner, or indeed against anyone else. However, as between ourselves, I will not be allowed to deny that the interest I purported to create does exist. To take again the Buckingham Palace example, I cannot by granting you a lease of Buckingham Palace give you any rights in Buckingham Palace which are enforceable against the Queen or against anyone else. I will, however, have created in you an interest which is enforceable against me – as against me, you have a tenancy by estoppel in Buckingham Palace. There are two reasons why this may be worth having. The first is the one given above: if the Queen does later transfer Buckingham Palace to me, your lease will automatically and retrospectively be validated (the estoppel will be 'fed'). The second, however, is

that, even if that never happens, I will not be allowed to act as if you had no lease. This will be important if I have lesser rights in relation to Buckingham Palace, which are not sufficient to enable me to grant you a lease, but nevertheless are sufficient to enable me to give you some *de facto* use of it. This was the point which the court had to consider in *Bruton* v. *London & Quadrant Housing Trust* (discussed in Notes and Questions 17.5 below).

10.6. Legal and equitable title

A final general point to make about title is that not all titles to property interests are legal. There are some circumstances in which equity will treat a person as entitled to an interest even though in law he has no entitlement. In these circumstances, the interest that the person has is equitable, and so, necessarily, is his title.

Equitable titles, for the most part, can only be acquired by derivative acquisition. This is because the methods of acquiring title by original acquisition that we now recognise in this jurisdiction all evolved long before the emergence of equity, and, for one reason or another, equity has never intervened in this area to any significant extent. Consequently, titles acquired by taking possession of a thing, or by becoming the first-ever interest holder in a thing, have historically always been legal and, subject to one exception, this remains the case in all circumstances. The exception is where, as in our system of registration of title to interests in land, statute has made *legal* entitlement to an interest dependent on registration. When this applies even the title acquired by taking possession of a thing will be equitable unless and until the possessor registers it.

In the case of acquisition of titles by derivative acquisition, however, equity has had a significant effect on the basic common law rules. In the following extract from *Commercial Law*, Professor Goode explains how equitable entitlement arises:

> Equity, although not directly overriding the common law, effectively modified the strict rules of transfer, originally by acting on the conscience of the obligor and ordering him to perfect at law the transfer that he had undertaken to carry out, or the trust he had undertaken to observe, and later by treating as done that which ought to have been done. An agreement to transfer ownership, provided that it was of such a kind as to be enforceable by specific performance, was given effect in equity as if the transfer had already been executed, so that, while legal title remained in the intended transferor, beneficial ownership was held to vest immediately in the intended transferee. Similarly, equity gave effect to the trust by insisting that the transferee honour the condition upon which the property was transferred to him. Initially, this too was a purely personal obligation binding only on the trustee, but over time it was extended to cover purchasers with notice of the trust, donees (with or without notice) and also the trustee's heirs, personal representatives and creditors. Ultimately, it became established that a trust would bind anyone into whose hands the property passed other than a *bona fide* purchaser of the legal title for value without notice. Hence the

interest of the beneficiary under a trust, like that of a party to whom another had contracted to sell or mortgage property, started as a purely personal right against the trustee and later became converted into a full-blooded property interest; and when the object of the trust was ownership itself, as opposed to a limited interest, the beneficiary had now to be recognised as the beneficial owner.

Equitable title to property (whether land or goods) thus involves divided ownership, legal title being in A and beneficial ownership in B. When A holds the legal title primarily for the benefit of B, the relationship is that of trustee and beneficiary. But division of ownership may also occur without a trust relationship, namely, when A holds the legal title primarily for his own interest, as in the case of a mortgage. Divided ownership in one form or another is the essence of equitable title. If both legal and beneficial ownership are vested in the same person, there is no scope for equity to operate on the asset, and no separate equitable interest can be said to exist. One consequence of this is that the legal and beneficial owner cannot transfer a bare legal title while reserving to himself equitable ownership. If he wishes to produce this result, he must do it by way of transfer of his entire interest, followed by a charge or declaration of trust in his favour by the transferee. In other words, the equitable interest must be created by way of grant, not by way of exception or reservation. Another consequence is that equitable tracing rights are not available to the legal and beneficial owner. His claim rests on his legal ownership.

Though an equitable interest can be carved out of the legal title, the converse is not true. The holder of an equitable interest can transfer only an equitable interest. Hence equitable ownership can be acquired in any of the following ways:

(a) by an agreement to transfer a legal or equitable title;
(b) by a present transfer which is defective at law, e.g. for want of compliance with some legally requisite formality, such as an instrument by deed;
(c) by creation of a trust, either

  (i) by the intended transferor declaring himself to be a trustee for the intending transferee, or
  (ii) by transfer of the asset to a third party to hold as trustee for the intending transferee;

(a) by a purported present transfer of an after-acquired asset;
(b) by a transfer made by one whose title is purely equitable ...

As in the case of legal ownership, it is necessary, when discussing ownership in equity, to distinguish interest and title, interest denoting the quantum of the right to the asset, title the strength of that right as against others. The range of interests that can exist in equity is considerably greater than the range of legal interests; for whereas almost every interest capable of subsisting as a legal estate or interest can equally subsist in equity, there are many interests which (through a combination of common law rules and statutory restrictions) can exist only in equity. These include future interests, life interests, remainders and executory interests, charges on goods and any mortgage of goods granted after and during the currency of a legal mortgage given by the same mortgagor.

> Though the principle of relativity of title applies to equitable interests, it operates somewhat differently than in relation to legal interests. In the first place, an equitable right or interest can be acquired only by charge or assignment [except, of course where it arises by statute or operation of law], not by possession, though the delivery of possession may evidence an intention to make a transfer. Secondly, possession is itself a purely legal concept. Whereas there can be equitable ownership, there is no such thing as equitable possession ... Thirdly, an equitable interest is not as marketable as a defeasible legal interest, for it is on its face subject to a legal interest outstanding in another, and is liable to be overridden by a transfer of the legal interest to a *bona fide* purchaser for value without notice. Fourthly, whereas there can be only two concurrent legal interests in goods, there is no limit to the number of concurrent equitable interests that can subsist in goods.

In this passage, Professor Goode draws a distinction between those interests that can exist only as equitable interests and those that can be either legal or equitable. In this latter group, typically the equitable interest arises where a legal title holder intends to transfer or grant a legal estate or interest to the grantee but for one reason or another (essentially, examples (a) (b) and (d) given by Professor Goode) has not yet completed the process necessary to carry out that intention. When this happens, the intended transaction is effective in equity although not (or not yet) effective in law. It would therefore be logical to say that what the grantee has at this stage is an equitable title to the legal interest he is intended to get. However, legal terminology telescopes title and interest at this point, and what we say instead is that the grantee has at this stage an equitable *interest*. The fact that the entitlement is equitable makes the interest itself equitable (or means the same as saying that the interest itself is equitable). So, for example, if you hold a legal lease of land and you enter into a binding agreement to sell it to your cousin (Professor Goode's example (a)) or you purport to transfer it to her outright but by mistake use a transfer document which is not a deed (his example (b)), the legal title to the legal lease remains with you but your cousin is said to acquire an equitable lease (her title to it being necessarily equitable) rather than an equitable title to your legal lease. This is because of the operation of the rule in *Walsh* v. *Lonsdale*, which we consider further in Chapter 12.

As far as title is concerned, though, what it comes down to is that by legal title we mean the entitlement to a legal interest, whereas by equitable title we mean the entitlement to an equitable interest. Consequently, an enquiry into how equitable entitlement arises is essentially an enquiry into how equitable interests arise.