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# NINETY-FIFTH REPORT

of the

# LAW REFORM COMMITTEE

of

# SOUTH AUSTRALIA

to

# THE ATTORNEY-GENERAL

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# LAW OF DETINUE, CONVERSION, AND TRESPASS TO GOODS

1987

# NINETY-FIFTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE LAW OF DETINUE, CONVERSION, AND TRESPASS TO GOODS

TO:

The Honourable C.J. Sumner, M.L.C.

Attorney-General for South Australia

Sir,

One of your predecessors asked this Committee to look into the possibility of rationalising the law with respect to detinue, conversion and trespass to goods.

The common law has developed a system of remedies available to persons with interests in goods whereby those interests may be protected. Property holders have, at common law, rights of action for wrongful interference with chattels, whether the interference amounts to a denial of title or possession, or to the damage or destruction of the goods. A plaintiff who has been denied a lawful interest in a chattel can bring an action to recover title or possession, or obtain compensation for the loss sustained, according to the nominate tort into which the particular case falls. These forms of action developed by the common law are:

1. Trespass to chattels;
2. Conversion (or trover);
3. Detinue;
4. Replevin.

These torts were, historically, more distinct in their operation and purpose than they are in modern law. Their historical origins and their unguided development without statutory intervention have resulted in substantial overlap, and

anomalies have arisen in their operation.

Despite the degree of confusion, the opinion of thi Committee is that this area of law has been largely successful i protecting and compensating proprietary interests in goods. Th Committee believes that the need for reform lies in th eradication of unnecessary duplication and historical anomalies.

Before examining what the Committee perceives to be th needs for reform in any detail, it may be convenient an beneficial to briefly define each tort, and then to give a brie history of their development from ancient to modern law.

1. Trespass to Goods

This tort is committed essentially by wrongful interferenc with the possessory title of the plaintiff in respect of good actually in possession at the time of interference. Trespass d bonis asportatis has its gist in the taking and carrying away o the chattel from the plaintiff's possession, i.e. the commissio of an asportation, as in larceny. Direct interference with th actual possession of the plaintiff needs to be established t make out the tort. As with other forms of trespass, the tort i actionable per se, i.e. without the need to show loss by th plaintiff. The action is in its nature personal, as opposed t proprietary, and entitles the plaintiff only to damages Possession of the chattel cannot be recovered by an action i trespass. The damages are generally assessed by reference to th cost of repairs, or the value of the chattel if destroyed.

2. Conversion to Goods

Conversion, the successor of trover is essentially proprietary in nature in contradistinction to trespass which is purely a personal action. The tort of conversion is committed by an unlawful interference with the plaintiff's title in the goods: the defendant has dealt with the chattel in a manner which is so seriously inconsistent with the plaintiff's right to possession of the chattel that it amounts to a denial of that right. Although it has often been said that in conversion the right of property and the right to possess must both concur in the plaintiff [Clerk and Lindsell 21-43, at 55] this right of property needs to be understood in an extended sense if that is to be an accurate statement of the law. [Ibid.] The old forms of pleading assume this extended sense of property, so that, for example, a lien was held to constitute such a property [see Rogers v. Kennay (1846) 9 Q.B. 592 at 596; 72 R.R. 383 at 385; 115 E.R. 1401 at 1402]. In rare circumstances, then, interference other than by one which was direct and unjustifiable could constitute a conversion. Conversion is available to the plaintiff who is out of possession at the time of the defendant's act, whereas trespass is not. The tort of conversion compensates for loss of the right to obtain possession of the chattel. Accordingly, the plaintiff must show a right to immediate possession, and that the defendant's act was a denial. The tort may be committed in diverse factual circumstances. It does, however, generally require a positive act by the defendant, as opposed to mere non-feasance. An exception to this general rule is the inclusion within conversion, for procedural convenience, of the case of a bailee, in breach of duty under the bailment,

allowing bailed goods to be lost or destroyed. [Clerk and Lindsell 15th ed. 21-09 at 32 et seq.] The plaintiff is compensated in damages calculated by reference to value of the hire of the chattel for the period of its conversion or the value of the chattel itself.

3. Detinue

The action for wrongful detention of goods, is again, as with conversion, proprietary in nature. The tort is committed by the wrongful refusal to return goods to the plaintiff on demand In this feature, it is theoretically distinct from conversion which requires intentional interference with the goods. Detinue is not committed by the defendant until a demand has been made by the plaintiff, and the defendant has refused to surrender the goods. Whereas a conversion may be evidenced by a demand and **refusal**, these are essential ingredients of detinue. The tort of detinue is also distinct from many cases of conversion by not carrying the general requirement of an intentional act. A unintentional detention is possible. In common with conversion in detinue the plaintiff must show an immediate right to possession of the goods at the time of the refusal. It is again distinguished, however, in the method of assessment of damages In conversion, damages are assessable at the date of the commission of the tort. Damages in detinue are assessed as at the date of judgment. This statement of the general rule at common law is subject to qualification made later in this report in the discussion of assessment of damages. Secondly, it is open to the plaintiff to seek the recovery of the goods in specie

either in lieu or in addition to damages. While the possibility of recovery of the chattel offers an advantage over conversion, there is doubt whether any practical difference remains between detinue and conversion in the assessment of the quantum of damages which is, again, discussed in the later section on this aspect.

4. Replevin

Replevin is an ancient cause of action and an alternative remedy to trespass in cases where there has been an unlawful interference with the plaintiff's possessory title. Originally, it was a tenant's remedy for wrongful distress of goods by the landlord, but later became available for other forms of taking. In practice, the remedy has been limited to cases of taking by wrongful distress. It is now largely a Local Court procedure for interlocutory relief, and there has been doubt expressed whether there is any modern need for its retention.

Replevin is a summary process by which a person out of whose possession goods have been taken may obtain their return until the right to the goods can be determined by a court of law: Clerk and Lindsell on Torts 14th Ed., paragraph 1184. It is a kind of old fashioned interlocutory process.

It is generally available to recover goods wrongly seized in a distress for rent or distress damage feasant. It is however also available in any case where goods have been taken by trespass whether under the colour of some legal process or otherwise.

Replevin is regulated in South Australia by Part III of the

Local and Districts Criminal Courts Act 1926. Exclusive jurisdiction to replevy goods is vested in the Clerk of the Local Court nearest to the place where the goods were taken. The goods are returned to the replevisor upon his giving security either by bond or cash for an amount necessary to cover the alleged rent or damage or value of the goods (as appropriate) and costs. The security is conditioned on an undertaking to commence promptly an action of replevin and to prosecute it without delay. The action for replevin will claim damages for trespass and detention of the goods, the costs of the replevy, a declaration that the distress was illegal and the cancellation of the replevin bond. If the defendant succeeds in the action, the judgment directs the plaintiff to deliver the goods to the defendant "to hold to him irreplevisable for ever".

Brief History of the Forms of Action

From the foregoing definitions, it can be seen that the torts have developed to stage of duplication. In order to understand their parallel developments to give this result something should be said briefly about their history.

Detinue and replevin are the oldest of these nominate torts. They were in use before the rise of trespass and so predate conversion and trespass to goods, both of which had their genesis in the action of trespass itself. Debt-detinue was originally an action based upon a demand for a certain sum of money or specific chattel. Judgment was given for the sum or the case of goods for the chattel or its value. The defendant had the option of returning the goods or paying their value. In earliest times

debt-detinue was associated with the other ancient forms of covenant and account.

As trespass vi et armis became a popular cause of action, trespass to goods became an extension of the original tort. The gist of the action of trespass de bonis asportatis was a taking of the plaintiff's possession under a claim of dominion. Trespass did not lie in cases of wrongful distress, since the distrainor did not claim any property in the distress. Trespass was and remains strictly a personal action. In these cases the distrainee could bring an action of replevin, the basis of which was "the taking of the plaintiff's chattels and a detention of them against gage and pledge". [Ames "History of Trover" (1897) 11 Harvard Law Review, 37, 374]

Trover, or conversion, developed out of the writ of trespass de bonis asportatis. The plaintiff had to aver that "he was possessed, as of his own property, of a certain chattel; that he afterwards casually lost it; that it came to the possession of the defendant by finding; that the defendant refused to deliver it to the plaintiff on request; and that he converted it to his own use, to the plaintiff's damage." [Fn. Ames 277]. The averments of losing and finding were fictions. In trover, the demand and refusal were surplusage, since they were subsumed in the averment of conversion. The plaintiff, in the practical end result, needed only to show actual possession or an immediate right to possession.

By the sixteenth century, the forms of action were performing discrete functions:

1. In cases of immediate interference with possessory title,

where damages were sought for loss sustained or the destruction of the goods, trespass de bonis asportatis was appropriate;

2. Where the interference was not direct, or only a right to possession was denied, and the plaintiff was seeking damages, conversion was appropriate;

3. Where there was a refusal to return goods, which the plaintiff required in specie, if not compensated for the value of the chattel, detinue was brought;

4. If the plaintiff was seeking relief against distress of goods, where no title was asserted in them by the distrainor, replevin gave relief.

As the torts continued to develop up until the modern day, certain anomalies were removed. For example, in detinue the defendant could resort to compurgatorial oath of title, known as wager of law, and defeat the plaintiff's claim. This anachronism resulted from debt-detinue predating jury trials, and modern evidentiary developments. Wager of law was abolished by the Common Law Procedure Act, 1833.

In their continued development, the distinctions in purpose have diminished among the torts of trespass, conversion and detinue. With the rise of negligence, trespass has diminished in importance. Replevin has become part of the development of modern interlocutory procedure in personal property disputes usually in distress. In modern law there appears a need for reform, without losing any of the possibly beneficial historical

features.

Conversion by Co-owner

At common law, tenants in common and joint tenants in a chattel have no right of action in respect of a mere interference with the right of possession of one or more tenants committed by another tenant or other tenants. The possession of each is equal in law, and its exercise a matter for private agreement among the parties. [Clerk & Lindsell, 15th Edn. 21-65] Beyond an interference with mere possession, an action may lie as between tenants. In Morgan v. Marquis (1854) 9 Ex. 145, 148, 156 E.R. 62 Parke B. said that "it is well established that one tenant in common cannot maintain an action against his companion unless there has been a destruction of the particular chattel or something equivalent to it".

Roscoe's Evidence in Civil Actions [19th ed. at pp. 812, 817 and 852] cites a number of applications of the law with respect to joint-tenancy and tenancy in common in actions of conversion and trespass:

1. Trespass lies against a tenant in common for destruction; but not for dismantling of the property;

2. Co-tenancy is no defence where the trespass amounts to an ouster;

3. A tenant in common is not liable in an action of trespass or for conversion at the suit of the co-tenant from removal of property from land;

4. As the possession of one joint-tenant, tenant in common, or parcener, is the possession of the others, trover cannot in general be maintained by one of them against his companion;

5. The removal of entire chattels by one tenant in common, without the consent or knowledge of the other, for the purpose of selling them, and applying the proceeds to his own use, does not amount to a conversion, although the removal has created a lien on the chattels by a third party;

6. If one tenant in common destroys the thing in common trover lies;

7. A mere sale of an entire chattel by a co-tenant, so as not wholly to deprive the plaintiff of his power of repossession is not a conversion, since it only operates upon the undivided share of the vendor and therefore of the purchaser, unless the sale is in market overt so as to change the property in the whole.

At common law, physical destruction or consumption of property by one co-owner is clearly both conversion and trespass. The ousting of the other from use, enjoyment and benefit by appropriating or taking exclusive control of the chattel, unless by mutual consent, is also a conversion. [Clerk & Lindsell, 15th Ed., 21-65; Baker v. Barclays Bank Ltd. (1955) 1 W.L.R. 822].

There existed at common law an anomaly that a sale (but no lesser disposition of goods by one co-owner without the authority of the others) was regarded as "equivalent to destruction" [see

Roscoe, loc. cit.; Clerk & Lindsell loc. cit.]. Where, for example, the goods were sold in market overt, the non-owner received good title as against the co-owners, and they would have been left without remedy if they were not able to sue the co-owner who had sold. [Ibid.] An ordinary sale is not conversion, however, since no title is passed to the purchaser: a remedy was available to the co-owners against the purchaser. Under s.10 [s.10 1(b)] of the United Kingdom legislation, a co-owner now commits a conversion by making any disposition of the goods which would give the transferee good title to the entire property if the sale were with the co-owner's authority. Under the English legislation, an actionable tort is committed by sale, but not by an unauthorized pledge, which gives only a special property. It seems to this Committee that in appropriate cases, there should exist in the wronged co-owners a right of action for losses sustained by unauthorized dealing in chattels short of sale. There seems no good reason to stop short of giving a right of action for an unauthorized pledge where a loss is sustained.

A case may arise where the co-ownership amounts to a division in the holding of the legal and beneficial titles in goods. It may be that the beneficial owner of equitable property might more suitably seek redress by virtue of an equitable remedy, such as breach of trust [Clerk & Lindsell 1-10]. This however would raise questions as to whether the trustee as legal owner is the party to bring the action or at least a party to be joined as defendant, if the action is against a third party possessor of the chattel. Again if the action is brought in equity a purchaser for value without notice is protected where he

might not be in a common law action for conversion.

However, as Professor Winfield points out, despite the traditional and notional separation of tortious and equitable remedies, it does not follow that breach of trust can never give rise to an alternative action in tort. "A trustee may have been guilty of negligence or of deceit, and negligence and deceit do not cease to be torts merely because it is a trustee who commits them." [Winfield, The Province of the Law of Tort, 1981, pp. 112-113]. Complications arise, however, where the tort alleged by a beneficial owner is trespass or conversion. In the case where the plaintiff has deposited a title deed as security for a loan, no right of action accrues in the beneficial owner for loss of or damage to the deeds before redemption has occurred. This was held to be the case in Gilligan and Nugent v. The National Bank Ltd. (1901) II I.R. 513 by the Irish Queen's Bench Division. In that case deeds held as security by a bank were severely damaged by flooding, on the occasion of an exceptional rain-fall, of the basement of the bank premises in which they were stored, and by reason of their injured condition, G. was obliged to abandon a contemplated sale of the premises. Without offering to redeem, G. commenced an action for damages against the bank for negligence in the care and custody of the deeds. Held, that until redemption, G. had no right of action for damages against the bank. Though an action for negligence, the implications apply pro tanto in actions where an immediate right to possession must be demonstrated. Apart from any special contract, or specific statutory provisions, no duty falls upon the trustee in respect of such securities in tort. It seems that in the case of

destruction of title deeds the quantum of damages is the value of the property [Clerk & Lindsell, 4th Ed., 276]. This is reducible to a nominal sum, upon their return. [Ibid.] Where the security fluctuates in value during the period of interference, it would seem, questions of laches apart, that the plaintiff should recover the best price available for the security during the period, all circumstances considered. The Committee makes no specific recommendation in respect of torts committed to or between equitable co-owners or owners.

Jus Tertii: The Doctrine Generally

The defence of jus tertii, literally "the right of a third party" is one that may be set up by defendants to actions for trespass or conversion in a limited number of circumstances. The principle of the defence is that a plaintiff succeeds if he can show a better title than the defendant to the goods, and that in general a defendant cannot defeat the plaintiff's claim by showing that a third party has a better right to the goods than either of them.

The plaintiff in possession had, at common law, good title to the chattel as against all strangers. His right of possession could only be disturbed by the true owner, or those claiming through the true owner, or a person with some other superior title effective against a party in possession. A defence of jus tertii may be available to a defendant who can show either the authority of the owner to deal in the goods, or the owner's authority to defend the action. The doctrine developed in medieval times in response to a policy discouraging the seizure

of goods in the hope of discovering some flaw in title. It has, however, been criticized at length in the Eighteenth Report of the English Committee (pp. 18-27) because of the consequent promotion of a multiplicity of actions, and the risk of double liability of the defendant to both the plaintiff in possession and the true owner unless he interpleads. Compensation by the defendant of a plaintiff in possession does not, at common law, extinguish any right of action in the true owner. (Wilson v. Lombank (1963) 1 W.L.R. 1294.)

The plaintiff must make out title by showing at least a prima facie right to possession, either by ownership or some other means. The defendant may seek to impeach that title in the following situations.

1. Goods taken from plaintiff's possession

If the goods were in the plaintiff's possession at the time of the interference, the defendant cannot successfully defend by a claim of jus tertii. The superior title of a third party is irrelevant, even if the goods have been returned to the true owner by the defendant.

2. Plaintiff never in possession

If the plaintiff has never been in possession, he must recover on the strength of his title alone. Where it is shown that a third party has better title, this defeats the basis of his claim.

3. Lost Possession

If one who has bare possession of a chattel altogether and then seeks to recover it from a subsequent possessor defendant, the title of the true owner can be set up against him, if the true owner is known. To show a right of possession, the plaintiff must rely on his title, which is inferred prima facie from his possession. This prima facie claim to title is rebutted when true ownership is proved. There is a possible but undefined exception to this in the case of prior abandonment by the true owner.

4. Title lost before wrongful act

If a plaintiff in trespass or conversion seeks to recover on his title only, it is always permissible to show that such title had ceased before the date of the alleged wrongful act or that the plaintiff is estopped and the estoppel feeds the title.

5. Bailor and bailee

A bailee is not as a general rule entitled to set up a jus tertii against the bailor in respect of the subject-matter of the bailment, whether the bailment is constituted by a delivery or by an acknowledgement of the bailor's title to the goods in the bailor's possession. The bailee is estopped from disputing his bailor's title. The only exception is in a case where the bailee is evicted from the goods by title paramount of the true owner and the bailee is sued by the bailor. In such a case, the bailee is permitted to set up the title of the true owner. [See Betteley v. Reed (1843) 4 Q.B. 511; 144 E.R. 991]

The operation of the exception is not universal. Liability of the bailee depends upon the terms of the contract of bailment.

In some cases he may have bound himself to return the goods in all events or to bear some responsibility for the loss of the goods in the circumstances.

The fact that the bailee is under no responsibility to the bailor for the loss of or damage to the goods resulting from the act of the tortfeasor does not avoid the right of action against him; for the rule of law that the wrongdoer cannot set up the jus tertii against the person in possession, unless he is claiming under it, is absolute, and the relation between the bailor and bailee is therefore immaterial. Accordingly either the bailor or the bailee can sue: The Winkfield (1902) P. 42 at 54-55, 60.

Jus Tertii and Interpleader

The general rule is that a claimant to goods may not set up a jus tertii in an effort to establish a better title to the goods than his opponent. This rule has a particular application in an issue of interpleader. A case illustrating and discussing the principles is Richard v. Jenkins (1886) 17 Q.B.D. 544. The plaintiff had, prior to 1884, demised to Williams a property with engines and plant on it. In that year, the plaintiff became bankrupt, but did not inform the trustee in bankruptcy of the existence of the property. Williams continued to pay rent for the hire of the property. The defendant obtained judgment against Williams, and the goods were taken in execution. The plaintiff claimed them, and an interpleader was directed between the claimant as plaintiff, and the execution creditor as defendant. At trial the defendant set up the title of the

trustee in bankruptcy to defeat the claim of the plaintiff. This plea succeeded in the County Court. The defendant appealed to the Divisional Court where Wills J. delivered the reasons of the Court. The Divisional Court was of the opinion that the County Court Judge was in error in disallowing the defence of jus tertii. Wills J. went on to explain (supra at p. 17) one of the authorities cited and misconstrued by the trial judge: Carne v. Brice (1840) 7 M. & W. 183; 151 E.R. 731; 10 L.J. Ex. 28; 56 R.R. 684 which was thought to favour the result at first instance. In that case, the plaintiff was the execution creditor over goods seized while in the possession of the execution debtor. He therefore had possession in law. The goods were claimed by the trustees of the settlement of the execution debtor's wife. It was held that they failed to make out any title to them on the basis that they were not entitled to set up the prior bankruptcy in order to defeat the execution creditor. Wills J. said that the substance of that decision was that the execution creditor, having prima facie lawful title, can only be defeated by a person showing a better title of some sort. The trustees of the wife's settlement, not being in possession and having obtained no title themselves, could not give themselves title by showing that someone else had a title superior both to their own and that of the execution creditor.

In applying the principle in the case before the Divisional Court, his Lordship held similarly that the execution creditor was in possession and the claimant had no title. Accordingly, the right of the claimant to set up title against Williams ceased upon bankruptcy. The fact that Williams continued to pay rent in

ignorance of the true title of the trustee in bankruptcy was irrelevant. Where the title of the claimant is merely one by estoppel against the debtor, the execution creditor is not bound by such an estoppel. The form of the interpleader issue was immaterial on his Lordship's analysis. He cited the test to be (supra at 548) whether the person disputing execution had "either an absolute or a special property in the goods, and also the right of possession". This is a quotation from the judgment of Parke B. in Gadsden v. Barrow 9 Ex. 514 156 E.R. 220. There was no distinction between equitable and legal rights.

It is sufficient that a party carrying the burden demonstrates good possessory title without proving he is an absolute owner. Equitable title may be sufficient, even if in establishing it it is necessary to establish jus tertii, as in the case where a second mortgagee has to establish the position of the prior encumbrancer in order to show that the equity of redemption has passed to him prior to seizure. In Usher v. Martin (1889) 24 Q.B.D. 272 this type of case was distinguished from that in Richards v. Jenkins (supra). It is legitimate to demonstrate a superior title through which the claimant claims, as opposed to establishing a jus tertii where no title exists in the claimant at all. (supra at 273) A lien may be sufficient, provided it is good against the opposing party, Jennings v. Mather (1901) 1 K.B. 108; (1902) 1 K.B. 1.

Assessment of Damages and Forms of Judgment

The separate historical developments of detinue and conversion have ensured the preservation of two fundamental

distinctions in the actions. First, the gist of the action of detinue is an unlawful failure to deliver goods when demanded. Demand and failure to deliver may and generally will evidence an actionable conversion, but without both there can be no actionable detention. Secondly, in detinue, a plaintiff may sue for the recovery of the goods in specie. An actionable conversion entitles the plaintiff only to damages. This results in a third distinction, namely the method of assessment of damages. In conversion, the damages are assessed as at the date of the action of conversion, which in practice will usually be the date of refusal after demand. However, recent authority seems to indicate that the quantum of damages is not necessarily affected whether the loss is computed from the date of refusal or the date of judgment, since the assessing judge has the two variables of punitive damages and interest by which any real losses may be made good, even where chattels fluctuate in value. [Egan v. S.T.A.(1982) 31 S.A.S.R. 481]. In assessing damages in either detinue or conversion, all aspects of the loss sustained by the plaintiff must be considered, irrespective of whether the action is brought in detinue or conversion. As White J. observed in Egan v. S.T.A.(at 521) (supra), complications arise out of the fact that the different torts are deemed by law to have been committed at different times: the time of refusal of demand, and the date of judgment. His Honour, in that case, adopted the analysis employed by Ogus, The Law of Damages (1973) by examining the compensable loss in terms of "static/basis" loss, descriptive of loss in value of the goods caused by the tort, and "dynamic/ consequential" loss in respect of those damages compensating for

the inability to use or exploit the chattel during the period of its conversion or detention. The latter head of damage was, on His Honour's analysis, broad enough to embrace any special kind of loss: the rise in value of the chattel on its particular market; and also other types of more peripheral damage. Compensation is not then to be expressed in terms of value of the chattel. Instead it is considered in the context of the goal of the common law: attempting to place the victim of a tort, so far as money is capable, in the position he would have been had the tort not been committed. This Committee respectfully agrees with that view. When damages are assessed in conversion, they are translated into money terms that will successfully compensate the plaintiff at the date of judgment. It is only in this way that the objective of compensation can be achieved. It is submitted that the alternative of allowing a defendant to pay for his wrongdoing at a value which may be substantially lower than at the date of judgment will result in an unjust enrichment of the defendant. It is the opinion of this Committee that no legislative reform is required in this respect, since the common law has achieved its own correct development in this area. [See White J. in Egan v. S.T.A.(supra) at 521-533.]

Both torts may lie on the same facts: wherever there is an alleged detention there will probably also be the possible allegation of a conversion. The consideration that will distinguish the appropriate action will be whether the plaintiff wishes to regain possession of the chattel in addition to any damages for loss sustained during the period of detention or for damage to the goods.

Forms of Judgment

In General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd. (1963) 2 All E.R. 314, Diplock L.J. clearly analysed the nature of the remedy in detinue. He said that it took three forms as follows:

(1) Judgment for the value of the chattel as assessed and damages for its detention: A plaintiff can have a judgment in this form if he wants it. It is suitable where the item is an ordinary article of commerce. Under this form, the defendant has no right to return the chattel but could of course return it before judgment and if he did so, the plaintiff would have to accept it. In substance, the remedy is the same as damages for conversion although the amount assessed may be different. Hannan (Local Court Practice) argues that a judgment in this form cannot be given in the Local Court. It is doubted whether that is correct. Section 31 of the Local and District Criminal Courts Act gives the Court jurisdiction in personal actions but that jurisdiction is of course subject to a monetary limit. A claim in detinue is a personal action: Taylor v. Addyman (1953) 13 C.B. 390. If, as a matter of general law, damages alone may be a remedy for detinue, the Committee cannot see why the Local Court cannot give relief of this kind.

(2) Judgment for the return of the chattel or recovery of its value as assessed and damages for its detention: This is the old common law form of judgment which proceeded thus: "That the plaintiff do have a return of the chattel in the

writ of summons mentioned and described as (description of chattel) or recover against the defendant its value to be assessed and damages for its detention also to be assessed". Judgment in this form gives the defendant an option to satisfy it either by returning the chattel or paying its assessed value plus in either case, damages for its detention. It also gives the plaintiff the option to issue a writ of delivery for the chattel or fi fa for an amount equal to its value. If the goods cannot be found, the plaintiff has the option either to have distress levied on the defendant's goods generally until the chattel is produced (but with no power of sale) or alternatively a fi fa for the assessed value of the chattel. The Court does have power to intervene e.g. where the chattel has been destroyed by accident since the judgment. Where that has happened, distress would be futile. It is important that the value of the chattel be separately assessed from damages for its detention. This permits execution for the damages to issue if the chattel is recovered in specie. Much of this comes from section 78 of the Common Law Procedure Act 1854 (infra).

(3) For the return of the chattel and damages for its detention: A judgment in this form is unusual but can be given: Hymas v. Ogden (1905) 1 K.B. 246. Under this form of judgment, the defendant is not permitted to pay compensation but has no option but to deliver up the chattel. This third alternative was unknown to the common law and arises from a statutory jurisdiction conferred by Section 78 of the Common

Law Procedure Act 1854. It is to be distinguished from the jurisdiction of a Court of Equity to grant specific restitution of a chattel: Doulton Potteries Ltd. v. Bronotte (1971) 1 N.S.W.L.R. 591 and North v. Great Northern Railway Co. (1860) 2 Giff. 64 at 69.

Common Law Procedure Act 1854

Section 78 of the Common Law Procedure Act 1854 provides as follows:

> "The Court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and that if the said chattel cannot be found and unless the Court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, till the defendant render such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel: Provided, that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs and interest in such action."

In some cases an order for specific delivery without any right to pay damages is made part of the judgment: Hymas v. Ogden (supra); in others it seems that specific delivery without the option to pay the value of the chattel detained can be ordered at a later stage (presumably in chambers) even though judgment has been given in the ordinary common law form: Bailey v. Gill (1919) 1 K.B. 41 where judgment was for the return of the chattel or payment of its value, on or before a certain date. The defendant failed to obey the judgment and after the time had expired, the judge made an order that a warrant of delivery

should issue. Rowlatt J. held on appeal that by Section 78, a new form of execution of a judgment in detinue had been introduced, the Court being empowered to order that execution should issue for the return of the chattel detained without giving the defendant the option of retaining it upon paying the value assessed.

Where judgment is give in either the second or third form referred to by Diplock L.J. above, Section 78 of the Common Law Procedure Act 1854 requires that the value of the chattel must be assessed and that if it is not, then the Section cannot be relied upon to permit the issue of a writ of delivery for the return of the goods without any option in the defendant to pay their assessed value: Chilton v. Carrington (1855) 15 C.B. 730.

In England, that rule was overturned by Order 48 Rule 1 of the Supreme Court Rules 1883 and by the corresponding rule of the 1965 Rules: see also Hymas v. Ogden (supra). That situation seems to arise from the fact that under one or other of the Judicature Acts, Rules of Court are authorised to override Acts of Parliament in matters of legal procedure.

While in South Australia, we have Rules of Court dealing with the same subject matter as the English Order 48 Rule 1, the terms of the rules differ from the English provisions. It would be necessary in every case to assess the value of the chattels concerned in South Australia. In the Local Court, Rule 167 specifically requires this. In the Supreme Court, authority for this requirement arose from the terms of section 78 of the Common Law Procedure Act 1854 and Chilton v. Carrington (supra).

Demand and Refusal

The gist of detinue is the unlawful failure to deliver up the goods when demanded: Halsbury's Law, 3rd Ed., volume 38 page 774; Clayton v. Le Roy (191) 2 K.B. 1031 at 1048. It is essential that there be a refusal. The defendant may demur and in the circumstances that in itself may be insufficient to found an action. On the other hand, the Court is entitled to have regard to the entire circumstances and may infer refusal even though the defendant has not been forthright about the matter but has merely tried to put the plaintiff off.

All the plaintiff should have to prove in the majority of cases is entitlement to immediate possession of the goods, and that the defendant has them or has had them. The operation of the torts would remain substantially the same without the potentially expensive exercise of engineering a demand and a refusal in all cases of detinue. There are, however, some cases where demand and refusal must remain a feature of the tort of detinue, as the means of determining the defendant's right of possession or title in the goods, such as in the case of a bailment, conditional sale or pledge. In all cases except those where the defendant has special property in the chattel, there seems no reason to retain the strict requirements of demand and refusal. If the right to immediate possession were the basis for both torts, a plaintiff would sue in conversion if damages brought adequate compensation. Where there was an intrinsic value in the chattel itself, an action in detinue could be brought, reserving the possibility of supplementary compensation in damages, assessable at the date of judgment in appropriate

cases. Detinue is the remedy in common use whereby the bailor or mortgagee may obtain possession, and it should be retained. It does not seem, therefore, to this Committee any need exists to abolish the action of detinue.

Where the item is a large one, the question arises whether the plaintiff or his agent can simply make demand or whether it is necessary in those circumstances for the person in attendance to be ready willing and able to physically take possession of the chattel and carry it away. There can be found no authority on this point nor can the Committee see in principle why more should be necessary than to ascertain as a matter of evidence the mere fact that the defendant has refused to deliver up the goods upon request.

Approaches to Reform

There appear to be two major approaches available in reforming this area of the law. First, the old torts could be abolished, and a totally new tort devised. The alternative is to preserve the existing nominate torts or some of them, and rationalize their operation with modern needs. Certainly, there is no need to address some of the anomalies in the area.

In its report, the English Law Reform Committee analysed the issues raised in this area of the law. Its major recommendation was the creation of a new tort now embodied within the Torts (Interference with Goods) Act 1977 (U.K.). This legislation, based ostensibly on the several recommendations of the Committee's Eighteenth Report, and aspects of the report itself has received trenchant criticism. Not the least of these

criticisms is that the "new tort" is in reality the old torts combined in statutory form, and therefore carries with it many of the historical vestiges and anomalies of the old forms of action. The legislation has also been criticized for failure to implement some of the recommended reforms.

It seems to this Committee that, as an approach to reform, there needs to be either complete and comprehensive creation of a truly new tort, or the existing nominate torts should be retained, subject to a certain amount of rationalization. The difficulty would be, in the opinion of this Committee, to create a totally novel right of action in respect of interference with chattels, which carried none of the disadvantages of the old forms, but overlooked no important aspect of the existing remedies. Unless this were achieved, the result would be to deny appropriate relief in some cases. Creation of a "new tort" by reference back to the old causes of action is illusory. In the opinion of this Committee, the English approach manifest in the legislation is an unfortunate compromise between creation and retention, which amalgamates the pre-existing torts into one ostensibly cumulative tort, without necessarily eradicating the undesirable elements of each of the old forms.

The nominate torts should, therefore, it is submitted, be rationalized, but substantially retained.

There are, however, several issues raised and a number of reforms suggested by the English Committee to which this Committee considers it prudent and useful to refer. We now consider the opinions expressed in the Eighteenth report and the various criticisms of the same.

The English Law Reform Committee's Recommendations for Reform

Due to the rather complex way in which the various actions relating to interference with goods are interrelated, the English Law Reform Committee was invited in 1967 to consider whether any changes in the law were desirable.

In 1971 the English Law Reform Committee presented its Eighteenth Report on the topic.

A major recommendation made by the English Committee was that, the remedies available for trespass to chattels, conversion and detinue should be superseded by a new right to sue in tort in respect of any unlawful interference with the plaintiff's chattels.

When considering the nature of the legislation required the English Committee was of the view that two possible approaches existed. One approach was to abolish the whole of the common law relating to conversion, detinue and trespass to goods and to enact an entirely new and self-contained statutory code. That code would create the new tort and would set out all its characteristics and incidents. The other approach was to abolish the common law relating to detinue and trespass to goods, but to retain the existing common law relating to conversion, subject to a number of modifications to the existing law.

The English Committee came down in favour of the latter option, largely due to the fact that a very substantial Bill would be required in order to codify the large volume of case-law relating to interference with goods.

The Committee was of the view that the new tort should be limited to the existing subject-matter of conversion, detinue and

trespass, and that this would involve the specific exclusion of:-

(a) interests in, or rights arising out of land

(b) money other than specific coins or notes

(c) choses in action, including copyright, patents and contractual rights, but not including for this purpose, any tangible object which is evidence of a chose in action

(d) goodwill

(e) trade secrets, know-how, and other intellectual property.

In considering the application of the new tort, the English Committee expressed the view that the remedy for wrongful interference should be open not only to a plaintiff who had, at the material time, actual possession or an immediate right to possession of the chattel, but also to a plaintiff who claimed any other interest, whether present or future, possessory or proprietary (not being an equitable interest), in a chattel, provided that he could show that he had suffered damage in respect of his interest by reason of the wrongful act complained of, on the basis that he should in no case recover damages in excess of the loss suffered by reason of such act.

A number of the recommendations of the English Committee were implemented in the Torts (Interference with Goods) Act 1977. At this stage therefore we will examine the Act and will return later to consider those recommendations of the Committee which were not implemented by the Act.

The Torts (Interference with Goods) Act 1977

The main purpose of the Act is to eradicate certain specific anomalies which existed in relation to the traditional torts to

chattels. To alleviate these anomalies, the draftsman found it necessary to regroup existing remedies (such as trespass, negligence and conversion) within a larger collective concept and to extend the reform of the Act to all members thereof.

Thus the Act introduces the term "wrongful interference with goods", but this is not a new tort (as was intended by the Committee) it is rather a new term encompassing all torts which involve lost or damaged goods. It includes not only conversion and trespass, but also negligence and any other like tort.

Section 1 of the Act sets out the definition of "wrongful interference with goods", it provides:-

> "1. Definition of 'wrongful interference with goods'
>
> In this Act 'wrongful interference', or 'wrongful interference with goods', means -
>
> (a) conversion of goods (also called trover),
>
> (b) trespass to goods,
>
> (c) negligence so far as it results in damage to goods or to an interest in goods,
>
> (d) subject to section 2, any other tort so far as it result in damage to goods or to an interest in goods."

The Abolition of Detinue

The English Law Reform Committee had recommended the abolition of both trespass to goods and detinue, and that a new tort modelled upon conversion be utilized for the protection of proprietary rights.

Although trespass to goods was not abolished, detinue was, and section 2(1) of the Act provides succinctly that "Detinue is abolished".

Although conversion largely overlaps detinue at common law,

there is at least one matter which is covered by detinue but not by conversion; this is where a bailee has by accident lost the goods entrusted to him.

As a result, when detinue was abolished by section 2(1) of the Act, section 2(2) went on to provide:

> "An action lies in conversion for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor (that is to say it lies in a case which is not otherwise conversion, but would have been detinue before detinue was abolished)."

A further valuable feature of detinue is the fact that it enables a plaintiff to obtain, in the exercise of the court's discretion, an order for the specific return of the chattel. The English Committee recommended that if detinue were to be abolished that this feature should be preserved. As a result section 3 of the Act provides:-

> "3. Form of judgment where goods are detained
>
> (1) In proceedings for wrongful interference against a person who is in possession or in control of the goods relief may be given in accordance with this section, so far as appropriate.
>
> (2) The relief is:-
>
> (a) an order for delivery of the goods, and for payment of any consequential damages, or
>
> (b) an order for delivery of the goods, but giving the defendant the alternative of paying damages by reference to the value of the goods, together in either alternative with payment of any consequential damages, or
>
> (c) damages.
>
> (3) Subject to rules of court:-
>
> (a) relief shall be given under only one of paragraphs (a), (b) and (c) of subsection (2),
>
> (b) relief under paragraph (a) of subsection (2) is at the discretion of the court, and the claimant may

choose between the others.

(4) If it is shown to the satisfaction of the court that an order under subsection (2)(a) has not been complied with, the court may -

(a) revoke the order, or the relevant part of it, and

(b) make an order for payment of damages by reference to the value of the goods.

(5) Where an order is made under subsection (2)(b) the defendant may satisfy the order by returning the goods at any time before execution of judgment, but without prejudice to liability to pay any consequential damages.

(6) An order for delivery of the goods under subsection (2)(a) or (b) may impose such conditions as may be determined by the court, or pursuant to rules of court, and in particular, where damages by reference to the value of the goods would not be the whole of the value of the goods, may require an allowance to be made by the claimant to reflect the difference.

For example, a bailor's action against the bailee may be one in which the measure of damages is not the full value of the goods, and then the court may order delivery of the goods, but require the bailor to pay the bailee a sum reflecting the difference.

(7) Where under subsection (1) or subsection (2) of section 6 an allowance is to be made in respect of an improvement of the goods, and an order is made under subsection 2(a) or (b), the court may assess the allowance to be made in respect of the improvement, and by the order require, as a condition for delivery of the goods, that allowance to be made by the claimant.

(8) This section is without prejudice:-

(a) to the remedies afforded by section 133 of the Consumer Credit Act 1974, or

(b) to the remedies afforded by sections 35, 42 and 44 of the Hire-Purchase Act 1965, or to those sections of the Hire-Purchase Act (Northern Ireland) 1966 (so long as those sections respectively remain in force), or

(c) to any jurisdiction to afford ancillary or incidental relief."

This section sets out the forms of relief available in proceedings for wrongful interference against a person who is in

possession or control of goods. It follows the recommendation of the English Law Reform Committee in paragraph 43 of their Report that the plaintiff in an action for wrongful interference should be able to claim (a) the specific return of the chattel and consequential damages, or (b) judgment in the alternative form for the return of the chattel or payment of an appropriate sum of money in lieu, together with consequential damages; or (c) a purely money judgment in damages. Relief under (a) is at the discretion of the court. However, the claimant may choose between (b) and (c).

Section 3(3) is subject to Order 42 rule 1A of the English Supreme Court Rules which provides that notwithstanding anything in section 3(3) of the Act, on a claim relating to detention of goods by a partial owner whose right of action is not founded on a possessory title the judgment or order shall be for the payment of damages only. Here "partial owner" means one of two or more persons having interests in the goods, unless he has the written authority of every other such person to sue on the latter's behalf.

Notes to the rule in the 1982 edition of the Supreme Court Practice state that this rule both preserves the rule that a person with no immediate right to possession is confined to damages limited to his "reversionary" interest in the goods, and also prevents a co-owner obtaining either specific delivery or the assessed value of the goods unless all the other co-owners have authorised him in writing to sue on their behalf.

The effect of section 3 was recently considered in the case of Hillesden Securities Ltd. v. Ryjak Ltd. and another (1983) 2

All E.R. 184. In that case the plaintiff had claimed as damages the full market hire value of a vehicle allegedly converted by the defendant.

It was submitted by the defendant that section 3 only applies where a defendant is in possession or control of the chattel at the time of judgment, and that, since he had not been in possession or control of the chattel for some time, the damages recoverable against him were limited to common law damages in conversion which were not more than the value of the car at the date of conversion plus interest thereafter.

However Parker J. held otherwise, saying at page 187:-

> "If this is correct it would lead to strange results. For example, the hire charge recoverable in this case, on the basis of the Strand Electric case, is £115 per week or £5,980 per annum. If the defendants retained the car until judgment the plaintiffs would therefore be entitled, if judgment were given two years after the original wrong, to the return of the car plus £11,960 or to that sum plus the value of the car at the date of judgment. Suppose, however, that he returned the car the day before judgment. Could it be said that the whole basis of the plaintiff's entitlement changed and that instead of £11,960 and the value of the car at that time he was entitled instead to some wholly different damages for the two-year detention? Or suppose that, instead of returning the car the day before judgment he disposed of it. Is the plaintiff then to be relegated to recovering the value at the date of the original sale plus two years' interest, which, in the present case, would be a much lesser sum? In common sense it should make no difference and, in my judgment, it makes no difference in law either."

Parker J. said that the words of section 3 were apt to describe proceedings such as the present where the defendants were in possession or control of the goods when the proceedings were launched.

Interlocutory orders for delivery up

The English Law Reform Committee recommended that a specific provision be enacted enabling the court to order, by way of interlocutory relief, the delivery up of any chattel, the subject of an action for wrongful interference. The English Committee thought that the power to make such orders might both pave the way for the eventual abolition of replevin and have an important effect on the uncertain right of recaption.

The resulting section 4 of the Act provdes:-

"Interlocutory relief where goods are detained

(1) In this section 'proceedings' means proceedings for wrong interference.

(2) On the application of any person in accordance with rules of court, the High Court shall, in such circumstances as may be specified in the rules, have power to make an order providing for the delivery up of any goods which are or may become the subject matter of subsequent proceedings in the court, or as to which any question may arise in proceedings.

(3) Delivery shall be, as the order may provide, to the claimant or to a person appointed by the court for the purpose, and shall be on such terms and conditions as may be specified in the order.

(4) The power to make rules of court under section 99 of the Supreme Court of Judicature (Consolidation) Act 1925 or under section 7 of the Northern Ireland Act 1962 shall include power to make rules of court as to the manner in which an application for such an order can be made, and as to the circumstances in which such an order can be made; and any such rules may include such incidental, supplementary and consequential provisions as the authority making the rules may consider necessary or expedient.

(5) The preceding provisions of this section shall have effect in relation to county courts as they have effect in relation to the High Court, and as if in those provisions references to rules of court and to section 99 of the said Act of 1925 or section 7 of the Northern Ireland Act 1962 included references to county court rules and to section 102 of the County Courts Act 1959 or section 146 of the County Courts Act (Northern Ireland) 1959."

Pursuant to section 4(4), Order 29 rule 2A was inserted in to the Supreme Court rules in 1978.

The first order pursuant to section 4 was made in Howard F. Perry & Co. Ltd. v. British Railways Board (1980) 1 W.L.R. 1375. There the defendant carriers detained in their depots 500 tons of steel owned by the plaintiff steel stockholders during a national strike of steelworkers, because they feared sympathetic industrial action from their own employees if the plaintiffs were allowed to enter the defendants' depots to collect it. Megarry V.C. held that the power to make such an order was unfettered (rejecting as wrong a note to Rules of the Supreme Court Order 29 rule 2A in the Fifth Cumulative Supplement to the Supreme Court Practice 1979), which states that such an order would only be made when the matter is urgent and there is a real and imminent risk that the goods will be disposed of, lost or destroyed before judgment. He also held that orders for "delivery included orders permitting collection by plaintiffs".

Accepting that interlocutory orders must be made at the court's discretion, Megarry V.C. considered that the severe shortage of steel owing to the strike justified departure from the principle that specific delivery will not normally be granted of ordinary commercial goods, since damage would usually provide adequate redress. The defendants were therefore ordered to permit the plaintiffs to enter the defendant's depots to collect their steel with their own vehicles and employees.

Extinction of title on satisfaction of claim for damages

The English Committee recommended that the existing common

law rules should be preserved whereby the plaintiff's title is extinguished on satisfaction of a money judgment. As a result section 5 of the Act provides:-

> "5. Extinction of title on satisfaction of claim for damages
>
> (1) Where damages for wrongful interference are, or would fall to be, assessed on the footing that the claimant is being compensated -
>
> (a) for the whole of his interest in the goods, or
>
> (b) for the whole of his interest in the goods subject to a reduction for contributory negligence,
>
> payment of the assessed damages (under all heads), or as the case may be settlement of a claim for damages for the wrong (under all heads), extinguishes the claimant's title to that interest.
>
> (2) In subsection (1) the reference to the settlement of the claim includes -
>
> (a) where the claim is made in court proceedings, and the defendant has paid a sum into court to meet the whole claim, the taking of that sum by the claimant, and
>
> (b) where the claim is made in court proceedings, and the proceedings are settled or compromised, the payment of what is due in accordance with the settlement or compromise, and
>
> (c) where the claim is made out of court and is settled or compromised, the payment of what is due in accordance with the settlement or compromise.
>
> (3) It is hereby declared that subsection (1) does not apply where damages are assessed on the footing that the claimant is being compensated for the whole of his interest in the goods, but the damages paid are limited to some lesser amount by virtue of any enactment of rule of law.
>
> (4) Where under section 7(3) the claimant accounts over to another person (the 'third party') so as to compensate (under all heads) the third party for the whole of his interest in the goods, the third party's title to that interest is extinguished.
>
> (5) This section has effect subject to any agreement varying the respective rights of the parties to the agreement, and where the claim is made in court

proceedings has effect subject to any order of the court."

Although it is not affirmatively stated, the effect of this provision is to vest the property in the defendant, or if the defendant has already sold the chattel, then title goes to whomever derives title from the defendant.

Improvement of Goods

At common law where a defendant who has not been guilty of fraud or negligence has bona fide incurred expenses with respect to goods, he is generally held to be entitled to have the expenses taken into account when damages are assessed.

For example, in Munro v. Willmott (1949) 1 K.B. 295 the defendant bailee, who was a bailee for reward, was unable to contact the bailor of a motor car. The car had deteriorated owing to exposure, and the defendant spent £85 in repairs and renovations to the car to make the car saleable. The defendant was held liable in both detinue and conversion for damages assessed at the value of the car £120, less his expenditure in repairing and repainting it to make it saleable and judgment was given against him for £35.

Fleming in The Law of Torts 6th edn. (1983) states at page 64:-

"A converter is entitled to credit for improvements to the chattel, if only because value is assessed as of the date of conversion."

That however is not quite the same as what Lynskey J. was saying in Munro's case (supra) at p. 299.

A rather more difficult situation obtains in detinue cases, where the court is prepared to accede to the plaintiff's demand

for the return of the goods. In that instance it is not just a question of giving damages on the basis of unimproved value, but of compelling the plaintiff to pay to the defendant the amount by which he has increased the value. However since the remedy of specific restitution is an equitable and discretionary one, it is probable that the plaintiff would only be allowed the return of the chattel upon such terms as seemed necessary to the court to do complete justice between the parties, for example that the plaintiff should make a reasonable payment to the defendant in respect of the increase in value.

Thus in Peruvian Guano Co. v. Dreyfus Brothers & Co. (1892) A.C. 166 Lord Macnaghten said at page 176:-

> "...I should doubt whether it is incumbent upon the court to order the defendant to return the goods in specie where the plaintiff refused to make a fair and just allowance and so claimed the interposition of the Court ... for the purpose of obtaining an advantage not consistent with the justice of the case."

This was applied in Greenwood v. Bennett and others (1973) 1 Q.B. 195 an interpleader case where Lord Denning M.R. said at page 201:-

> "So if this car was ordered to be returned to Mr. Bennett's company, I am quite clear the court in equity would insist upon a condition that payment should be made to Mr. Harper for the value of the improvements which he put on it."

Cairns L.J. said at 203:-

> "It appears to me that in interpleader proceedings similar considerations come into play as those which would affect an action for detinue."

Greenwood v. Bennett was strongly attacked in an article by Matthews: Freedom Unrequested Improvements and Lord Denning in 1981 C.L.J. 340.

However a different view was put forward and acted upon by

the Judicial Committee of the Privy Council in Glenwood Lumber Co. v. Phillips (1904) A.C. 405 at page 412. Lord Davey said:-

> "Their Lordships, think that the judgment is in the form usual in actions for detinue, and it would not be right to impose on the respondent the obligation of paying the appellants the expenses of their wrongful acts as a condition of recovering what must be considered in this action as his property."

In that case however the appellants were trespassers who cut down timber on Crown lands over which the respondent had a valid licence from the Crown.

Fleming (supra) at page 64 states that it still remains doubtful if an improver can claim for improvements as a defendant in detinue (rather than conversion) or as a plaintiff seeking restitutionary relief.

In England the Courts had a discretion under their Order 45 Rule 4 - see Salmond on Torts 16th Edn. (1973) p.115 but our analogous rule: Order 42 Rule 6 is in different terms and does not appear to vest any discretion in the Court.

When considering the necessity for reform in this area of the law, the English Law Reform Committee said at paragraph 89:-

> "...where goods have acquired an increased value as a result of acts of the defendant, it is clear that, as a general rule, the plaintiff cannot, either in conversion or in detinue, recover such increase as part of the value or as damages and this principle has been applied not only to physical additions or repairs to the goods but also in cases where the defendant has incurred expense in making the goods saleable. As to increases in value resulting from the acts of a third party, there is a dearth of authority and we think that the law should be clarified. Where a chattel has, after being taken from the plaintiff and before coming into the defendant's possession, been improved in value as a result of the act of a third party, such increase will normally have been reflected in the price paid by the defendant for the chattel, and we see no reason in principle why the plaintiff should obtain the benefit of the increse either as part of the value of the

chattel or as damages. We therefore recommend that increases in value effected by a third party should be treated in the same way as increases effected by the defendant, with the result that if the plaintiff recovers the chattel itself it should be on the terms of his compensating the judgment for the increase, and if he obtains a judgment for the value of the chattel it should not include the value of the increase."

As a result of these recommendations section 6 of the Act provides:-

"6. Allowance for improvement of the goods

(1) If in proceedings for wrongful interference againt a person (the 'improver') who has improved the goods, it is shown that the improver acted in the mistaken but honest belief that he had a good title to them, an allowance shall be made for the extent to which, at the time as at which the goods fall to be valued in assessing damages, the value of the goods is attributable to the improvement.

(2) If, in proceedings for wrongful interference against a person ('the purchaser') who has purported to purchase the goods -

(a) from the improver, or

(b) where after such a purported sale the goods passed by a further purported sale on one or more occasions, on any such occasion,

it is shown that the purchaser acted in good faith, an allowance shall be made on the principle set out in subsection (1).

For example, where a person in good faith buys a stolen car from the improver and is sued in conversion by the true owner the damages may be reduced to reflect the improvement, but if the person who bought the stolen car from the improver sues the improver for failure of consideration, and the improver acted in good faith, subsection (3) below will ordinarily make a comparable reduction in the damages he recovers from the improver.

(3) If in a case within subsection (2) the person purporting to sell the goods acted in good faith, then in proceedings by the purchaser for recovery of the purchase price because of failure of consideration, or in any other proceedings founded on that failure of consideration, an allowance shall, where appropriate, be made on the principles set out in subsection (1).

(4) This section applies, with the necessary modifications, to a purported bailment or other disposition of goods as it applies to a purported sale of goods."

Section 6(1) enables a person who improves goods which are not his, and is then sued for wrongfully interfering with them, to claim an allowance for any increase in their value due to the improvements.

The allowance may only be claimed, however, when the person who improves the goods acted in the mistaken but honest belief that he has a good title. Subsection (2) extends this principle for the benefit of subsequent purchasers in good faith of improved goods and thus clarifies the law on this point as recommended by the English Law Reform Committee.

When sued for wrongful interference by the owner any subsequent purchaser may claim an allowance in respect of an improvement effected by an earlier purchaser (which will normally be reflected in the price). Where there has been more than one purported sale the person who is sued has to show nobody's good faith other than his own.

Subsection (3) extends the provision to someone who has bought in good faith under a contract that turns out to be void, while subsection (4) extends the provision to other dispositions of goods.

Jus tertii

At common law a defendant cannot plead that the plaintiff is not entitled to possession as against him because a third party is the true owner, except where the defendant is acting with the authority of the true owner or where the plaintiff was not in

actual possession of the goods.

This inability to raise the "jus tertii" or the right of some third person has on a number of occasions been criticised. The jus tertii rule will allow recovery by a plaintiff who may himself have wrongfully ousted the true owner and expose the wrongdoer to the risk of double liability should the true owner also sue.

The English Law Reform Committee made a detailed study of the jus tertii rule. In paragraph 61 the Committee set out what it considered to be the objects which the law should seek to secure namely:-

(a) to avoid multiplicity of actions by giving any interested third party a right to be joined in an action for wrongful interference;

(b) to protect defendants, so far as is practicable, from the risk of double liability;

(c) to limit, so far as is practicable, the plaintiff's damages to his actual loss.

After an extensive discussion in paragraphs 51-78 of the Report, the English Committee summarised their recommendations at pages 43-44 by saying:

> "(11) the law governing the right to raise the jus tertii as a defence should be amended so as to secure, as far as practicable, that interested third parties have an opportunity to join in the action, that the defendant is not exposed to the risk of double liability and that the plaintiff's damages are measured in general by his real loss (paragraphs 51-78) and for these purposes -
>
> (a) an interested third party should have a right to apply to be joined in the action (paragraph 62);
>
> (b) a defendant sued twice in respect of the same act

of wrongful interference should be entitled to bring in the first plaintiff as co-defendant to the second action, or sue him separately in an independent action (paragraphs 63-65);

(c) there should, as a general rule, be a right to set up, either as a defence or in diminution of damages, the title of a third person; but, the defendant should be required to serve notice on both the plaintiff and third person, making him a party to a summons for directions with a view to his being joined in the action; failure on the part of the third person to attend, or to comply with any direction, should empower the court to debar him from making a subsequent claim against the defendant (paragraphs 66, 67 and 76);

(d) a plaintiff relying on a possessory title should be required to state in his pleading the circumstances in which he acquired possession or an immediate right to it and to give particulars of any other interest in it of which he is aware (paragraphs 68-72);

(e) while a limited owner's damages should, as a general rule, be measured by his actual loss, a plaintiff with a limited title should be treated as a full owner if he sues with the authority of the other part-owners; and for this purpose a plaintiff in possession, or with a right to immediate possession, of the chattel at the time of the wrongful interference is to be presumed to have the authority of any other part-owners to sue, unless it be shown that they have objected to his recovering damages on their behalf (paragraphs 73-75);

(f) recovery of damages measured by the full value of a chattel by either bailor or bailee should continue to bar a claim by the other (paragraph 76);"

The 1977 Act largely implements its recommendations.

Section 7 deals with double liability and provides:-

"7. Double Liability

(1) In this section 'double liability' means the double liability of the wrongdoer which can arise-

(a) where one or two or more rights of action for wrongful interference is founded on a possessory title, or

(b) where the measure of damages in an action for

wrongful interference founded on a proprietary title is or includes the entire value of the goods, although the interest is one of two or more interests in the goods.

(2) In proceedings to which any two or more claimants are parties, the relief shall be such as to avoid double liability of the wrongdoer as between those claimants.

(3) On satisfaction, in whole or in part, of any claim for an amount exceeding that recoverable if subsection (2) applied, the claimant is liable to account over to the other person having a right to claim to such extent as will avoid double liability.

(4) Where, as the result of enforcement of a double liability, any claimant is unjustly enriched to any extent, he shall be liable to reimburse the wrongdoer to that extent.

For example, if a converter of goods pays damages first to a finder of the goods, and then to the true owner, the finder is unjustly enriched unless he accounts over to the true owner under subsection (3); and thenthe true owner is unjustly enriched and becomes liable to reimburse the converter of the goods."

Section 8 abolishes the jus tertii rule and provides:-

"8. Competing rights to the goods

(1) The defendant in an action for wrongful interference shall be entitled to show, in accordance with rules of court, that a third party has a better right than the plaintiff as respects all or any part of the interest claimed by the plaintiff, or in right of which he sues, and any rule of law (sometimes called jus tertii) to the contrary is abolished.

(2) Rules of court relating to proceedings for wrongful interference may -

(a) require the plaintiff to give particulars of his title,

(b) require the plaintiff to identify any person who, to his knowledge, has or claims any interest in the goods,

(c) authorise the defendant to apply for directions as to whether any person should be joined with a view to establishing whether he has a better right than the plaintiff, or has

a claim as a result of which the defendant might be doubly liable,

(d) where a party fails to appear on an application within paragraph (c), or to comply with any direction given by the court on such an application, authorise the court to deprive him of any right of action against the defendant for the wrong either unconditionally, or subject to such terms or conditions as may be specified.

(3) Subsection (2) is without prejudice to any other power of making rules of court."

Pursuant to section 8(2) the Supreme Court Rules were amended in 1978 to include Order 15 Rule 10A which provides:-

"(1) Where the plaintiff in an action for wrongful interference with goods is one of two or more persons having or claiming any interest in the goods, then, unless he has the written authority of every other such person to sue on the latter's behalf, the writ or originating summons by which the action was begun shall be indorsed with a statement giving particulars of the plaintiff's title and identifying every other person who, to his knowledge, has or claims any interest in the goods.

This paragraph shall not apply to an action arising out of an accident on land due to a collision or apprehended collision involving a vehicle.

(2) A defendant to an action for wrongful interference with goods who desires to show that a third party has a better right than the plaintiff as respects all or any part of the interest claimed by the plaintiff may, at any time after giving notice of intention to defend, and before any judgment or order is given or made on the plaintiff's claim, apply for directions as to whether any person named in the application (not being a person whose written authority the plaintiff has to sue on his behalf) should be joined with a view to establishing whether he has a better right than the plaintiff, or has a claim as a result of which the defendant might be doubly liable within the meaning of section 7 of the Torts (Interference with Goods) Act 1977.

(3) An application under paragraph (2) shall be made by summons, which shall be served personally on every person named in it as well as being served on the plaintiff.

(4) Where a person named in an application under paragraph (2) fails to appear on the hearing of the summons or to comply with any direction given by the Court on the application, the Court may by order deprive him of any right of action against the defendant for the wrong, either unconditionally or subject to such terms and conditions as the Court thinks fit."

Section 9 provides machinery to enable concurrent proceedings for wrongful interference to be heard together, even though they originated in different courts and provides:-

"(1) This section applies where goods are the subject of two or more claims for wrongful interference (whether or not the claims are founded on the same wrongful act, and whether or not any of the claims relates also to other goods).

(2) Where goods are the subject of two or more claims under section 6 this section shall apply as if any claim under section 6(3) were a claim for wrongful interference.

(3) If proceedings have been brought in a county court on one of those claims, county court rules may waive, or allow a court to waive, any limit (financial or territorial) on the jurisdiction of country courts in the County Courts Act.

(4) If proceedings are brought on one of the claims in the High Court, and proceedings on any other are brought in a county court, whether prior to the High Court proceedings or not, the High Court may, on the application of the defendant, after notice has been given to the claimant in the country court proceedings:-

(a) order that the county court proceedings be transferred to the High Court, and

(b) order security for costs or impose such other terms as the court thinks fit."

Conversion as between Co-owners

The English Law Reform Committee when discussing the law relating to conversion as between co-owners pointed out that the present law could lead to unfair results. In paragraph 36 the

following example was set out:-

> "If O and R own and possess a piano jointly, and R without authority sells and delivers it to T (otherwise than in market overt), O can proceed against T, but, on the basis of the above authority, cannot sue R in conversion. He can claim an account, but this is an unsatisfactory remedy if R has sold the piano for less than its value; and T and the piano may have vanished."

As a result the English Committee recommended that the law should be altered so as to provide that an unauthorised sale and delivery or other disposition by one co-owner to a third party may amount to wrongful interference actionable by the other co-owner or co-owners, notwithstanding that it does not operate to pass title to the third party.

Consequently section 10 of the Act provides:-

> "(1) Co-ownership is no defence to an action founded on conversion or trespass to goods where the defendant without the authority of the other co-owner:-
>
> (a) destroys the goods, or disposes of the goods in a way giving a good title to the entire property in the goods, or otherwise does anything equivalent to the destruction of the other's interest in the goods, or
>
> (b) purports to dispose of the goods in a way which would give a good title to the entire property in the goods if he was acting with the authority of all co-owners of the goods.
>
> (2) Subsection (1) shall not affect the law concerning execution or enforcement of judgments, or concerning any form of distress.
>
> (3) Subsection (1)(a) is by way of restatement of existing law so far as it relates to conversion."

Paragraph (b) of subsection (1) extends the common law so as to make the disposition a conversion even if it does not confer a good title on the disponee.

Thus the law as to disposition by a co-owner is closer to that governing disposition by a non-owner, where it has never

been suggested that conversion does not lie if the disposition is invalid.

Contributory Negligence

The English Law Reform Committee recommended that in general, contributory negligence should not be recognised as a defence in an action for wrongful interference. The English Committee commented in paragraph 81:-

> "If such a defence were to be admitted, we fear that much judicial time would be occupied, to little advantage, in considering what particular precautions are required from householders against burglars, or from an ordinary citizen against pickpockets, or from a store proprietor against shoplifters."

This is the law in Australia. See Wilton v. Commonwealth Trading Bank of Australia (1973) 2 N.S.W.L.R. 644 and Day v. The Bank of New South Wales (1978) 18 S.A.S.R. 163 per Bray C.J. at 176 and Zelling J. at 186.

The English Committee's recommendation was adopted in the Torts (Interference with Goods) Act which provides in section 11(1):-

> "contributory negligence is no defence in proceedings founded on conversion or on intentional trespass to goods."

Receipt of Goods by way of Pledge

At common law it is a conversion to receive a chattel by way of purported sale under which the title does not pass, even if the purchaser acted in good faith, and liability is not dependent upon the defendant's subsequent non-compliance with a demand for the return of the goods made by the true owner. However, in the case of Spackman v. Foster (1883) 11 Q.B.D. 99 a different rule

was applied to the recipient of a pledge on the ground that the position was similar to that of a finder of goods so that the defendant was liable only upon his later refusal to comply with a demand by the owner. This decision was followed by the Court of Appeal in Miller v. Dell (1891) 1 Q.B. 468 - a case not of pledge but of a fraudulent use of a lease as security.

The English Law Reform Committee could see no good reason why an innocent receipt by way of pledge should differ from a similar receipt by way of purported sale and pointed out that section 223 of the American Restatement recognises no such distinction. The English Committee therefore recommended that the rule, that receipt under a purported sale amounts to conversion, should be retained, and that a similar rule should be applied to other purported dispositions, including pledge. As a result section 11(2) of the Act provides:-

> "(2) Receipt of goods by way of pledge is conversion if the delivery of the goods is conversion."

Assertion of ownership

Section 11(3) of the Act provides that "denial of title is not of itself conversion".

This endorses the opinion of the English Law Reform Committee that the statement of Scrutton L.J. arguendo in Oakley v. Lyster (1931) 1 K.B. 148 at 150, quoting from the 7th Edition of Salmond on Torts, that a denial of the plaintiff's title if absolute might amount to conversion even if the defendant had never been in physical possession of the goods was wider than the facts of that case warranted and if applied literally was inconsistent with other authority, and implements the English

Committee's recommendation that mere denial of title without handling or delivery should not amount to wrongful interference. In fairness to Scrutton L.J. it should be added that he did not follow up his interjection during argument in his judgment at pp. 153-4.

Disposal of Uncollected Goods

There is at common law no general right to dispose of goods which a bailor has refused, or is unable to collect.

In Sachs v. Miklos (1948) 2 K.B. 23 at 37 Lord Goddard C.J. suggested that the bailee might place the bailor in a position of having impliedly consented to a sale, by writing to him and warning him that this will take place unless the goods are collected within a specified time. But this raises difficulties, not least in that silence in response to an offer cannot generally be taken to connote consent. Nor will the principle of agency of necessity relieve the bailee, except in very limited circumstances, from the consequences of an unauthorised disposal.

In England and a number of Australian jurisdictions legislation was enacted in an attempt to deal with these difficulties. For example, the English Disposal of Uncollected Goods Act was passed in 1952. A number of difficulties were encountered with that Act, including that all gratuitous and involuntary bailments are excluded, as well as a very high proportion of bailments for reward. As a result the English Law Reform Committee when reporting on Detinue and Conversion also made recommendations with respect to the position of bailees of uncollected goods.

Speaking of the 1952 Act, they said:-

"...

103 ... This provision was directed to the case of bailees who are owed money by their bailors and we understand that little use has in fact been made of it, probably in part because of the complicated procedure involved. For both these reasons, we doubt whether it could aptly or with advantage be extended to cover all bailments. But we think that there should be some amelioration in the position of bailees generally in respect of uncollected goods.

104 ... It has been suggested to us that this problem might be covered by conferring on bailees a right of prescription, but we consider that such a right would be less than just to bailors in some of the many different circumstances in which the problem may arise. In our opinion, it would be better to make any right of the bailee to dispose of the goods depend, not on the passage of a fixed period of time, but on his having taken reasonable, but unsuccessful, steps to obtain the instructions of his bailor.

105 ... It is probably true that in some cases a bailee, faced with the practical need to dispose of the goods and with the impossibility of obtaining his bailor's instructions, will, particularly where the goods are perishable or of little value, 'chance his arm' by selling them for the best price obtainable, in the reasonable confidence that, if the bailor does subsequently appear on the scene, the most he can in practice be liable for is the price he has obtained.

106 ... This will not, however, always be the case. A bailee who cannot rely on its being necessary (though it may be convenient) for him to sell may not be willing to run the risk of an action by the bailor - or even of the prosecution for theft (although in all probability he would have a good defence by virtue of section 2 of the Theft Act 1968). Moreover, his prospective purchaser may be unwilling to accept a defective title with the possibility of subsequent litigation at the suit of the bailor.

107 ... To meet these difficulties, we think that the law should confer on a bailee a positive right to sell the goods if he had made reasonable efforts to trace, and obtain instructions from, his bailor, but has not succeeded in doing so within a reasonable time. In these circumstances, provided he obtains a reasonable price for the goods, we think that the bailee's only liability to his bailor should be to account for the price he has obtained (less the costs of the sale) and that, as against the bailor, the purchaser should acquire a good title.

108 ... A solution on these lines would, we think, meet most of the cases where the goods are of no great value. Its advantage is that it puts the bailee to hardly any trouble or expense. Its disadvantage, on the other hand, is that it gives neither the bailee nor his purchaser complete protection, since, should the bailor ever sue for the conversion of his goods, the court may hold that the bailee's actions have not been reasonable.

109 ... In practice, it is only where the goods are of considerable value that the bailor will sue or the purchaser inquire into (or worry about) the bailee's title to sell. In such a case, it is reasonable that the bailee should be able to safeguard his position with more certainty than he could do under the recommendation in paragraph 107 above. For this purpose, we think that the bailee should be able to apply to the court for directions. If satisfied that the bailee had made reasonable but unsuccessful efforts to trace the bailor, the court should be empowered to give such directions for the disposal of the goods as appeared to be just, including an order that the bailee should bring into court the proceeds, or part of the proceeds, of the sale, less his reasonable costs. The effect of compliance with the directions would be that-

(a) the bailor's only right would be to claim the balance of the purchase price; and

(b) the purchaser would acquire a good title as against the bailor.

This procedure should, in our view, be open to any bailee, whether or not covered by the Disposal of Uncollected Goods Act 1952. Accordingly, we recommend the repeal of that Act."

As a result sections 12 and 13 of the Act provide:-

"12. Bailee's power of sale

(1) This section applies to goods in the possession or under the control of a bailee where -

(a) the bailor is in breach of an obligation to take delivery of the goods or, if the terms of the bailment so provide, to give directions as to their delivery, or

(b) the bailee could impose such an obligation by giving notice to the bailor, but is unable to trace or communicate with the bailor, or

(c) the bailee can reasonably expect to be

relieved of any duty to safeguard the goods on giving notice to the bailor, but is unable to trace or communicate with the bailor.

(2) In cases in Part I of Schedule 1 to this Act a bailee may, for the purposes of subsection (1), impose an obligation on the bailor to take delivery of the goods, or as the case may be to give directions as to their delivery, and in those cases the said Part I sets out the methods of notification.

(3) If the bailee -

(a) has in accordance with Part II of Schedule 1 to this Act given notice to the bailor of his intention to sell the goods under this subsection, or

(b) has failed to trace or communicate with the bailor with a view to giving him such a notice, after having taken reasonable steps for the purpose,

and is reasonably satisfied that the bailor owns the goods, he shall be entitled, as against the bailor, to sell the goods.

(4) Where subsection (3) applies but the bailor did not in fact own the goods, a sale under this section, or under section 13, shall not give a good title as against the owner, or as against a person claiming under the owner.

(5) A bailee exercising his powers under subsection (3) shall be liable to account to the bailor for the proceeds of sale, less any costs of sale, and-

(a) the account shall be taken on the footing that the bailee should have adopted the best method of sale reasonably available in the circumstances, and

(b) where subsection (3)(a) applies, any sum payable in respect of the goods by the bailor to the bailee which accrued due before the bailee gave notice of intention to sell the goods shall be deductible from the proceeds of sale.

(6) A sale duly made under this section gives a good title to the purchaser as against the bailor.

(7) In this section, section 13, and Schedule 1 to this Act,

(a) 'bailor' and 'bailee' include their respective successors in title, and

(b) references to what is payable, paid or due to the bailee in respect of the goods include references to what would be payable by the bailor to the bailee as a condition of delivery of the goods at the relevant time.

(8) This section, and Schedule 1 to this Act, have effect subject to the term of the bailment.

(9) This section shall not apply where the goods were bailed before the commencement of this Act."

It would be necessary in South Australia to exclude from the purview of any such legislation our Unordered Goods and Services Act 1972, the Warehousemen's Liens Act 1941-74 and the Workmen's Liens Act 1893.

"(1) If a bailee of the goods to which section 12 applies satisfies the court that he is entitled to sell the goods under section 12, or that he would be so entitled if he had given any notice required in accordance with Schedule 1 to this Act, the court -

(a) may authorise the sale of the goods subject to such terms and conditions, if any, as may be specified in the order, and

(b) may authorise the bailee to deduct from the proceeds of sale any costs of sale and any amount due from the bailor to the bailee in respect of the goods, and

(c) may direct the payment into court of the net proceeds of sale, less any amount deducted under paragraph (b), to be held to the credit of the bailor.

(2) A decision of the court authorising a sale under this section shall, subject to any right of appeal, be conclusive, as against the bailor, of the bailee's entitlement to sell the goods, and gives a good title to the purchaser as against the bailor.

(3) In this section 'the court' means the High Court or a county court, and a county court shall have no jurisdiction in the proceedings if the value of the goods does not exceed the county court limit."

Palmer in Bailment does have some criticism to make of this section. He says at page 1029:-

> "Every variety of bailment seems to be included but nowhere is the concept of bailment defined. It is therefore unclear whether cases of involuntary bailment, sub-bailment and bailment without the consent of the owner qualify as bailments for the purposes of the Act. The draftsman would have been well advised to study the Western Australian legislation, which applies to every case in which one person is in lawful possession of goods which belong to another."

Section 14 is the interpretation provision and of most interest for our purposes is the definition of "goods" which is said to include "all chattels personal other than things in action and money".

Section 15 repeals the Disposal of Uncollected Goods Act 1952.

Section 16(3) provides:-

> "This Act shall bind the Crown, but as regards the Crown's liability in tort shall not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act 1947."

## Criticisms of the Act

Before expressing any recommendations regarding the adoption of reform in similar terms to the English Torts (Interference with Goods) Act 1977, the Committee will examine criticisms which have been made concerning the Act.

## Detinue

Various criticisms have been made with respect to section 2 of the English Act, which abolishes detinue. One writer who has been particularly critical of the English reforms relating to detinue is N.E. Palmer.

Palmer is particularly concerned that there is a possibility

that conversion, even as extended by section 2(2) of the Act, will not be available in all situations in which detinue would previously have been available. He adverts to this in his text entitled Bailment when he says at pages 1018-1019:-

> "Secondly, there is the question whether ss. 2(1) and 2(2) abolish that form of the action for detinue which is based upon a simple demand and refusal, unaccompanied by loss or destruction of the goods. Evidently a refusal of this kind will no longer, per se, constitute a tort, and the question will be whether the refusal to return the goods amounts to a conversion. It can hardly be argued that the parenthesis to s. 2(2) expands the action for conversion to all cases of what would, prior to the Act, have been detinue. Rather, the parenthesis must be taken to be qualified by the specific situation described earlier in s. 2(2), and thus confined to cases where the bailee has allowed the loss or destruction to occur in breach of his duty to the bailor. Of course, most cases involving a wrongful refusal to redeliver goods to one's bailor will involve commission of the tort of conversion. This is not, however, a necessary equation, and it may be questioned whether the abolition of this aspect of detinue is a desirable consequence of s. 2(1)."

Likewise Palmer says in his article entitled the Abolition of Detinue (1981) Conveyances 62 that section 2(2):-

> "fails to preserve that aspect of detinue which consists of wrongful refusal to restore goods to their owner (or to a claimant with a superior proprietary right) upon reasonable demand. Thus the provisions in section 3 of the Act, which enable the court to make an order for the specific redelivery of goods, and in section 4, which empower delivery up in an interlocutory proceedings are ineffective in a case where an unjustified detention does not also constitute conversion: the misconduct in question is no longer a tort and cannot therefore give rise to an action for wrongful interference with goods. The Act is thereupon ousted."

by which we take it that he means that these situations are not covered by the Act.

Indeed in the first reported decision under the Torts (Interference with Goods) Act 1977 the defendants attempted to

avoid liability by arguing that although their actions would have constituted detinue at common law, they did not constitute conversion even as expanded by section 2(2) of the Act.

In Perry v. British Railways Board (1980) 2 All E.R. 579, the Board had failed to comply with the owner's demand for their steel, because the Board did not want trouble with the National Union of Railwaymen who had decided to support the steelworkers' strike by refusing to handle or transport steel.

The plaintiff's brought an action against the defendants seeking an order under section 4 of the Act and Order 29 rule 2A of the English Supreme Court Rules for delivery up of the steel.

The defendant raised various defences and relied heavily upon the abolition of detinue by section 2(1) of the Act. The defendant argued that no order could be made under sections 3 or 4 unless there has been a wrongful interference within section 1.

Detinue is abolished by section 2(1), and only that aspect of it which involves the loss or destruction of goods arising from a bailee's breach of duty towards his bailor is explicitly preserved as tortious by section 2(2). The defendant contended that the only common law tort it had committed was detinue by adverse detention, a limb of the tort which was never wholly assimilated under conversion at common law.

The defendant argued that its refusal was not a conversion for three reasons. First: it had acknowledged throughout the plaintiff's title and right to possession of the steel. Secondly, it was detaining only for a short (albeit indefinite period), and in a manner which involved no use or enjoyment of the goods. Finally, that its detention was prompted by a genuine

and reasonable fear of industrial reprisals.

These considerations, according to the defendant, disclosed a detention that at Common Law sounded in detinue alone, and that in 1978 such conduct ceased to be tortious.

The defendant failed, because Megarry V.C. was able to discover a "clear case of conversion". In his view, this was a plain and unjustified detention, consciously adverse to the plaintiff's possessory rights, which was calculated to endure for an indefinite period and this indefinitely deprived the plaintiffs of the possession and use of their steel.

Megarry V.C. at page 584 cited with approval the contention of the English Law Reform Committee in paragraph 8 of their report on Conversion and Detinue that:-

> "The present position appears to be that conversion will lie in every case in which detinue would lie, save only that detinue lies, but conversion does not lie against a bailee of goods who in breach of his duty has allowed them to be lost or destroyed."

Palmer in a note on Perry v. B.R.B. (supra) in 44 M.L.R. 87 doubts the assumption made by the English Law Reform Committee and by Megarry V.C. that at common law every unjustified detention of goods arising from a refusal to surrender upon a reasonable demand constituted a conversion. Palmer says at page 90:-

> "It is highly doubtful whether every instance of detinue arising from an unjustified refusal to surrender goods upon a reasonable demand was also a conversion. Much depended upon the period, purpose and manner of the detention. Such an equation holds good for the great majority of cases and there are, indeed, decisions where the two forms of liability are discussed interchangeably, but the better view is that a wrongful detention is merely evidence (albeit very good evidence) of conversion. If this be correct, detinue had an existence independent from conversion

and section 2(1) has reduced the spectrum of civil wrongs to goods. It is submitted that the equation should be confined to cases factually closer to Howard Perry, where the proposed detention was indefinite (albeit temporary) and the claimant's title beyond doubt. Megarry V.C.'s account of the relationship is too broad; the abolition of detinue was almost certainly a mistake."

Likewise Palmer states in (1981) Conveyancer 62 at page 68:-

"If, however, there is neither contract nor bailment between the claimant and the detainer, or if such bailment as exists is not one into which the courts will imply an enforceable term as to redelivery, the detainer will be free (provided he abstains from conversion) to keep the goods. Naturally the likelihood of liability in conversion is directly proportionate to the length of the detention. But this is no consolation when the claimant requires the goods for an urgent purpose; and only rarely will the claimant be able to argue that a protracted detention amounts to a breach of the detainer's duty of care. Indeed, it may be that no such duty is owed, as where the detainer is an involuntary bailee.

It is in this area, exemplified by situations like that in Clayton v. Le Roy (1911) 2 K.B. 1031 that the misadventure of section 2 (2) is most pronounced. The notion that a defendant non-bailee can deny, or even delay, the owner's recovery of his goods when such recovery would cause no inconvenience or expense to the defendant seems absurdly unfair. And yet this seems the inescapable consequence of section 2 (1). It seems illogical that whereas section 2 (2) explicitly preserves an aspect of detinue which is bound in almost every case to be adequately complemented by other forms of action, section 2 (1) excises from our legal system a remedy which is without auxiliary elsewhere. Section 2 should be re-examined and amended, not only to cure the anomalies of subsection 2, but to resuscitate the primary function of the old tort of detinue: the specific redelivery of goods to their owner (or to anyone with an immediate right of possession arising out of a proprietary right) by a possessor who has no right to the continuation of his possession."

Samuels also questions the wisdom of the abolition of detinue, stating in an article entitled Wrongful Interference with Goods 31 I.C.L.Q. 357 at 384:-

"It is perhaps unfortunate that the remedy of detinue has been abolished especially given the retention of trespass and conversion with the hope, expressed by the

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> Law Reform Committee, that negligence was developed to deal primarily with compensation for injuries - as opposed to claims for interference with rights - and conversion was a remedy aimed at protecting title rather than possession. The complaints, 'you dented my car', 'you lost my car' and 'you won't return my car' are it is submitted, quite different both in fact and policy."

It is clear that if detinue were to be abolished here, careful consideration would have to be given to ensuring that all matters which are presently actionable under detinue, could also be dealt with under the replacement tort. If that cannot be done, then detinue should not be abolished.

Improvement of Goods

One of the most frequently criticised provisions of the Act has been section 6 dealing with improvement of goods. Particular concern has been expressed about the requirement that the improver have an honest though mistaken belief that he has title to the goods.

For example, McGregor on Damages says at page 724:-

> ".... the introduction of a test of bona fides - honest belief in title in the case of an improver, acting in good faith in the case of the transferee from the improver - is a little disturbing; certainly it has made no appearance in the cases and seems to be a backward step.
>
> .... in Munro v. Willmott (1949) 1 K.B. 295 the defendant clearly had no honest but mistaken belief that he had a good title; on the contrary, he was well aware of the plaintiff's title but wished to rid himself of the goods which were becoming an embarrassment to him. It is true that for the type of circumstances that arose in Munro v. Willmott section 12 of the Torts (Interference with Goods) Act 1977 would not give to the defendant bailee the right to sell goods of his bailor without being liable in conversion if he had taken reasonable, though unsuccessful, steps to trace or communicate with him, but the bailee remains liable to account to the bailor for the proceeds of the sale less any costs of sale and no mention is made of any further permitted deduction on account of improvements effected. It would seem

therefore that the bailee must now improve the goods at his peril, even if the goods as improved can command a far better price in the market."

Likewise Clerk and Lindsell on Torts 15th Edn. (1982) state at paragraph 21-96.

> "The requirement of the improver's honest belief in his own title and of good faith on the part of transferees and transferors are innovations. The section is silent as to the position of an improver who is aware that he does not own the goods and of a transferee who does not take 'in good faith'. The implication appears to be that such an improver or transferee is to receive no allowance at all and is to be liable for the full improved value as at the date of judgment. Thus, although the defendant bailee in Munro v. Willmott would today have a right under section 12 of the 1977 Act to sell the car in its deteriorated state and to deduct the expenses of the sale before accounting to the bailor for the proceeds, if it were to prove unsaleable in that state he would appear disentitled to either the cost of, or any increase in value resulting from, any improvement effected in order to render it saleable."

The text goes on at para 21-97 to point out that principles similar to but not identical with those applicable before 1978 to improvements to chattels apply where a portion of realty is severed and the party entitled elects to sue for it as a chattel rather than for trespass to land. The writer goes on to say that if minerals are unlawfully mined the miner may recover from the owner the cost of raising the minerals but not the cost of severance where if the defendant has acted in good faith, he can recover both such costs. In Bilambil-Terramora Pty. Ltd. v. Tweed Shire Council (1980) 1 N.S.W. L.R. 465 the New South Wales Court of Appeal were divided as to the proper basis of assessment where the defendant was a wrongdoer.

On the other hand, Palmer in his text entitled Bailment is of the view that because of an improver's right to be allowed any expenses which he would previously have been allowed, then he

must continue to be so allowed those expenses.

Sacks in an article entitled Torts (Interference with Goods) Act 1977 41 M.L.R. 713 is also critical of this aspect of the Act and adds the further criticism at pages 714-715 that:-

> "The section further gives no indication whether the honest belief should be an objectively reasonably one or merely that the defendant did in fact believe himself to be entitled. Cases have shown that attempts to draw the line between good and bad faith are often doomed to failure since 'there are an infinite number of possible cases between the extremes of malicious bad faith and utterly blameless good faith'. It would have been preferable to have given the court discretion so as to enable it to take all the circumstances into account. The thief and the defendant in Munro v. Wilmott ought not to receive identical treatment. Furthermore the relationship with the equitable doctrine of acquiescence where the improver's state of mind is only one of the relevant factors must remain a matter for conjecture. Again, the section fails to indicate whether the 'mistaken belief' must be one of fact or law. Is, for example, the improver under the belief that "finder keepers" in a different position from the improver who mistakenly believes that he has bought from one who had title to the goods? When one considers the difficulties that have arisen under the rubric of recovery of money paid under a mistake of law, and bearing in mind that in these cases there are often two innocent parties involved, clarification on this point is highly desirable."

Sacks was also critical of the provisions in section 6(1) that the improver shall be compensated to the extent to which ... the value of the goods is attributable to the improvement. She explained that this may have undesirable effects, by using the following illustration at page 715:-

> "On the assumption that the Act means current market value, this may give to the improver a windfall. For example, a painting worth £100 is given by its owner to restorers for cleaning. Before any work is done the painting is stolen and comes into the hands of a bona fide purchaser for value. He spends £500 on restoration and cleaning, and the painting is now worth considerably more than the amount spent, say £1,000. If the owner then sues the improver he will recover £100 leavingthe now valuable painting owned by the

improver."

Sacks then went on to conclude:-

> "Most legal systems, while according some rights to improvers, give him the cost of making the improvement or the increased value, whichever is the lesser. The rationale for such an approach was succinctly stated recently. 'Since the owner neither requested nor freely accepted the services, it would be improper to require him to reimburse the improver for the value of improvements if that sum is more than the improved value of the chattel ... in any event he should not be allowed to benefit from his tortious act."

So says G. Jones Restitutionary Claims for Services Rendered (1977) 93 L.Q.R. 273 at 293: " At least the court ought to have a discretion".

Sacks also points out that in some instances it may even be unfair to force the owner to pay anything for the cost of the improvement. For example, a family heirloom retained for sentimental reasons may in the eyes of the owner not be increased in value at all as a result of the improvements, and may even spoil it for him. Sacks suggests that instead of the present position under the Act where compensation for the improved value is mandatory, that for expenses other than necessary ones compensation should be discretionary and based upon improved value or cost of labour and materials whichever is the lesser.

Is an allowance for improvement only available where the improver is the defendant?

Sacks raises the question of whether the improver is only entitled to receive his money if he is the defendant. She adds at page 716:-

> "The wording of section 6 'in proceedings for wrongful interference against a person (the improver)' indicates that this indisputably is so, yet one is driven to

> believe that this is a mistake. The law cannot intend to penalise the person who in possession of goods meekly hands them over when informed of his lack of right to them, and reward those who resist rightful and honest requests. Such a result can only be described as against public policy and the legislature must be urged to amend without delay this unfortunate section of the Act."

Similarly Goff and Jones in the 2nd edition of their text The Law of Restitution state at page 112:-

> "It is doubtful, however, whether the improver is entitled to the statutory allowance if the owner recapts the goods, for 'the allowance shall be made' only in proceedings for wrongful interference 'against the improver'."

Goff and Jones were however of the view that even though the improver may not be entitled to an allowance under section 6, that he may be able to recover for improvements by relying upon the authority of Lord Denning's judgment in Greenwood v. Bennett (1973) 1 Q.B. 195.

In that case B entrusted S with a car, worth £400-£500, for the purpose of doing £85 worth of repairs. S took the car out on a frolic of his own and extensively damaged it in a collision with another vehicle. S then sold the car to H for £75. He put the car in good order, spending £226 on labour and materials, and then sold it to a finance company which let it on hire-purchase to P for £450. In the meantime B had informed the police that the car was not in S's possession. The police found it with P and took possession of it. Eventually the dispute resolved itself into a contest between B and H.

The police took out interpleader proceedings in the county court to determine the question of the parties' rights. The county court judge held that B was entitled to the car and that H was not entitled to any allowance. H appealed from this

judgment. The Court of Appeal allowed the appeal, holding that the judge ought not to have released the car except on condition that B paid H £225 in respect of the improvements.

While each member of the court gave a different reason for his decision, Lord Denning M.R.'s reason appears to be the most radical. He said at page 202:-

> "Here we have an innocent purchaser who bought the car in good faith and without notice of any defect in the title to it. He did work on it to the value of £226. The law is hard enough on him when it makes him give up the car itself. It would be most unjust if the company could not only take the car from him, but also the value of the improvements he has done to it - without paying for them. There is a principle at hand to meet the case. It derives from the law of restitution. The plaintiffs should not be allowed unjustly to enrich themselves at his expense. The court will order the plaintiffs, if they recover the car, or its improved value, to recompense the innocent purchaser for the work he has done on it. No matter whether the plaintiffs recover it with the aid of the courts, or without it, the innocent purchaser will recover the value of the improvements he has done to it."

Thus Lord Denning would allow an independent action, based on the principle of "unjust enrichment" rather than an allowance parasitic upon an action for wrongful interference.

This approach has been criticised by Mathews in an article entitled Freedom, Unrequested Improvements and Lord Denning (1981) C.L.J. 340. He says at page 356:-

> "I query whether it can be called 'enrichment' at all, when the owner may not have wanted to do what the improver has done. The improver may say (as Lord Denning may agree) that he has enriched the owner, but these things are subjective."

and then at page 358 he goes on:-

> "It is respectfully submitted, then, that the wider ground of decision in Greenwood v. Bennett is, judged both on principle and by precedent, quite wrong and should not be followed. Of course, it is true that the

1977 Act has abrogated the owner of chattels freedom of choice when the improver is bona fide and the true owner is out of possession, but it is no more ground for abrogating the rest of his freedom, than the existence in principle of local government compulsory purchase is an argument for extending it to householders to practise on their next-door neighbours."

What Mathews is saying therefore is, even though under the 1977 Act an allowance can be made for improvements in proceedings for wrongful interference, there is no reason to extend the principle to allow an independent action for improvements, when the owner has gained possession of the improved chattel without the aid of the courts.

In contrast Jones in an article entitled Restitutionary Claims for Services Rendered 93 C.W.R. 273 at 292-3 said:-

"The mistaken improver should enjoy a restitutionary claim against the owner because the owner has been incontrovertibly benefited; for he has gained a financial benefit, the increased value of the chattel, which may be readily realisable by the chattel's sale. The restitutionary claim should, however, be granted only on the following conditions:

(a) The burden of proving his mistake should be on the improver, though it should be irrelevant that the mistake is of fact or law.

(b) The claim should be for the value of materials and labour expended on the chattel, or if this is less, the increased value of the chattel as a result of the improvements. Since the owner neither requested nor freely accepted the services, it would be improper to require him to reimburse the improver for the value of the improvements if that sum is more than the improved value of the chattel. The improver should then recover only the improved value. In any event he should not be allowed to benefit from his tortious acts.

(c) It should be a defence if, on the special facts, it is unjust to require the owner to sell the chattel to meet the improver's restitutionary claim; for example, the chattel may be unique and the improver may have no free funds to pay for the increased value."

This approach of course, still speaks in terms of the mistaken improver, and therefore would not be of assistance in the Munro v. Willmott type of situation.

In any event Lord Denning's judgment in Greenwood goes well beyond other authorities and there is much force in Mathews' argument.

We trust that, for the avoidance of uncertainty, the statutory right to reimbursement for improvements should be stated to be exclusive. It leaves the matter very much to the fabled length of the Lord Chancellor's foot to allow a concurrent remedy in restitution, based upon different principles, in such a situation.

Time of Assessment of Damages

At common law the time of assessment of value of goods differs depending upon whether the proceedings are brought in detinue or conversion. Clerk and Lindsell on Torts 15th Edn. (1982) explain the difference at paragraph 21-91 in the following manner:-

> "In detinue their value was assessed at the date of judgment, when their return would have been ordered, and not at the earlier time of refusal to return them. So in Rosenthal v. Alderton and Sons Ltd. (1946) K.B. 374 the plaintiff recovered an increase in the value of the goods which occurred after the defendant gratuitous bailee's failure to return them when demanded. In conversion, however, despite some contrary authority, it appears to be established that the time of conversion is normally the proper time for assessment of the value of the goods."

It would appear therefore that a plaintiff is better off to sue in detinue on a rising and in conversion on a falling market. The difference in the amount of damages awarded in

either conversion or detinue will not necessarily be significant however as fluctuations in the market value may be compensated for by way of granting damages for consequential loss. Ogus in The Law of Damages (1973) explains this at page 150 when he says:-

> "Certainly it is clear that the time at which the basic loss is assessed is different. But then, as has been seen, in each test compensation for the basic loss may be supplemented by allowing damages for consequential losses where such consequential losses are claimed in respect of fluctuations in the 'market value', the plaintiff is in effect claiming for the loss of an opportunity to sell the chattel at the higher or highest 'value'.

For his statement Ogus only cites the opinion of the English Law Reform Committee and in the present state of flux in the law on consequential damages particularly in the area of non-economic loss, his statement must be taken with some reserve.

There may still be some advantage in electing between conversion or detinue. This is due to the fact that the measure for the loss of opportunity to sell at the higher price will not necessarily be equal to the profit that would have been made if the opportunity had been taken, and the plaintiff claiming for consequential losses will often be unable to recover the full amount of rises or falls in the value of the chattel.

This is illustrated by Ogus (Ibid) in the following way:-

> "(a) Rise in value from £2x at the time of appropriation to £3x at the date of judgment. In detinue, plaintiff may recover £3x. In conversion, plaintiff may recover £2x + such a proportion of the rise in 'value' (£x) as represents the likelihood of his having sold the chattel at a price higher than £2x.
>
> (b) Fall in value from £2x at the time of appropriation to £x at the date of judgment. In conversion, plaintiff may recover £2x. In detinue, plaintiff may recover £x + such a proportion of the fall in 'value' (£x) as represents the likelihood of his having sold

the chattel at a price higher than £x."

Ogus suggests that it is unfair to the defendant to make him wholly bear the risk of any fluctuations in the value of the chattel he has appropriated, irrespective of whether or not the plaintiff would have benefited from such fluctuations adding:-

> "It would seem, therefore, to be more consistent with the restitutio in integrum doctrine if the plaintiff were restricted to one possible remedy, which would take account of the possibilities of his having obtained a pecuniary advantage from fluctuations in 'value'. To this end a case might be made out for abolishing the action in detinue insofar as it allows the plaintiff to recover the 'value' of his property at the date of judgment."

The English Law Reform Committee recommended that the plaintiff's damages should equal his actual loss and that damages ought to be assessed at the date of judgment with the plaintiff being entitled to recover as special damages any diminution in value. Clerk and Lindsell at paragraph 21-91 comment that, given the abolition of detinue and the extension to conversion of the former remedies in detinue, it might have been expected that the 1977 Act would make the date of judgment the time of assessment; rather than remaining silent on the matter, with the result that the established rules as to the time of assessment in conversion continue to apply.

Abolition of Bailee's estoppel

By section 8(1), the defendant in an action for wrongful interference is entitled to show in accordance with rules of court that a third party has a better right than the plaintiff as respects all or any part of the interest claimed by the plaintiff, or in right of which, he sues.

Palmer in his text "Bailment" at page 1026 states that it

would have been better to have retained the bailee's estoppel, while abolishing merely the principle that as against third parties possession counts as title. The removal of the estoppel could give rise to inconvenience in cases of commercial bailment where the bailor had ceased to own the goods and the bailee had not yet attorned to any subsequent owner. At Common Law the bailee's responsibilities qua bailee are solely to the original bailor until the latter's displacement and substitution upon an attornment. Now there may be a danger that bailees, sued upon the original bailment, will be able to engage in delaying tactics by adducing evidence of a series of later changes of ownership and by requiring later owners to be made parties to the proceedings, whereas if such owners are unknown to the bailee the value of s.8(1) may, even in terms of its apparent objectives, be reduced.

Clerk and Lindsell on Torts (15th Edn. 1982) also points to this possibility, saying at paragraph 21-80:-

> "... since the defendant in any action for wrongful interference may apply for joinder of a named tertius, a bailee sued by his bailor is no longer estopped from denying that his bailor had a good title when the bailment commenced or from asserting that he had subsequently lost it, e.g. by a later sale to a buyer to whom the bailee has not attorned."
>
> They comment however that:-
>
> "Should defendants abuse this right in order to delay delivery of the goods, resort may be needed to the court's power to make interlocutory orders for delivery up."

Definition of Goods

The term "goods" is defined in section 14(1) of the Act to include "all chattels personal other than things in action and

money."

The list of exclusions is somewhat briefer than that which the English Committee appears to have envisaged. The English Committee had in paragraph 29 of their Report listed the following exclusions:-

(a) interests in, or arising out of land;

(b) money, other than specific coins or notes;

(c) choses in action, including copyrights and patents and contractual rights, but not including, for this purpose, any tangible object which is evidence of a chose in action;

(d) goodwill;

(e) trade secrets, know-how, and other intellectual property.

If the words "arising out of land" in (a) are given a wide meaning, they could alter the common law that things severed from or won from land may be treated as chattels at the option of the claimant.

Clerk and Lindsell on Torts in paragraph 21-34 express regret that the definition in the Act is considerably less specific as regards its exclusions than the English Law Reform Committee recommended that it should be. They comment that:-

> "This may cause uncertainty as to the meaning to be attributed to 'money' and as to the real effect of the ostensibly total exclusion of choses in action both on documents of which the sole real value lies in the intangible rights which they embody and, more particularly, on copyright."

Clerk and Lindsell add however, their belief that the statutory definition of "goods" effects no material change from the common law as regards the subject matter of actions for conversion. Thus they comment at paragraph 21-36:-

> "It is clear that the Law Reform Committee intended no change in this distinction between money as currency and specific coins or bank notes regarded as items of corporeal personal property and it is thought that as regards the new statutory definition of 'goods' the exclusion of 'money' will be confined to money as currency."

and at 21-37:-

> "Again, it is clear that the Law Reform Committee intended no change in this distinction between intangible rights, which cannot be converted, and the documents evidencing or embodying them, which can and it is thought that in interpreting the exclusion of 'things in action' from the statutory definition of 'goods' the courts will exclude the former but not the latter."

Matters not dealt with by the Act

Apart from criticisms as to the actual wording of the provision of the Act, the Act has also been criticised for not dealing with various matters at all. For example, the Act has been criticised for not completely codifying the law with respect to interference with chattels. The Act has also been criticised for not abolishing replevin, not dealing with innocent finders of chattels, and not covering the interaction with bailment.

Introduction of a new tort

As discussed above the English Law Reform Committee had recommended that the remedies of trespass to chattels, conversion and detinue should be abolished and replaced by a new single tort of wrongful interference with chattels, though this new tort would take as its basis the old tort of conversion.

The English Law Reform Committee hoped to achieve the abolition of all the old factual distinctions which, in their view plagued the area of moveable property and their replacement by the single distinction of intentional and unintentional acts

of interference, that is, a law based not so much as facts but rather on states of mind.

The 1977 Act abolishes only detinue and introduces in sections 3-9 as read with sections 1 and 2 provisions for the common treatment, rather than the unification, of not only conversion and trespass, but also negligence and any other tort so far as it results in damage to goods or to an interest in goods.

While some writers have criticised the fact that the Act does not follow the recommendations of the English Law Reform Committee regarding the introduction of a single tort, others appear to be of the view that the English Committee's recommendations would not have produced a satisfactory result. For example, Samuel in an article entitled Wrongful Interference with Goods 31 I.C.L.Q. 357 says at page 378:-

> "What the Committee hoped to achieve by this proposal was the abolition of all the old factual distinctions which, in their view, plagued the area of movable property, and their replacement by the single distinction of intentional and unintentional acts of interference; in other words the Committee wanted to achieve for conversion and negligence what Lord Denning M.R. had tried to achieve for trespass and negligence in Letang v. Cooper - a law based not so much on facts but rather on states of mind. The problem with this approach, however, is that it tries to utilise negligence as the basis of an unintentional interference (with rights) remedy, whereas in reality negligence is a concept that was developed to deal with injury claims arising from wrongs. If this difference between a claim for a right and an action for a wrong is not properly understood, then, it is submitted, the common law will become more, rather than less, confused because there really is a world of difference between the policy factors underlying both types of suit. The motivation for awarding compensation for the careless causing of injury is rooted, to an extent, in the behaviour itself (i.e. negligence); whereas the motivation for awarding compensation for the invasion of a right - as in, for example, Ingram v. Little,

> Wilson v. Lombank or Moorgate Mercantile v. Twitchings (not to mention some of the 'innocent' defamation cases) is founded in some very different focal point, a focal point which takes as its starting point, not the defendant, but the plaintiff. And it is perfectly sensible for a legal system to reflect these differences of policy in differences of types of action."

Bentley in a report on the English Committee's report in 35 M.L.R. 171 also expressed concern at the workability of the new tort proposed by the English Committee. He however added at page 171:-

> "My real criticism of the proposals for a new tort is that the Committee has not been told enough. Fearful of losing a place in the legislative queue, it rejects the possibility of replacing the common law by an 'entirely new and self-contained statutory code which would create the new tort and set out all its characteristics and incidents'. Instead it is proposed to abolish the common law relating to detinue and trespass to goods, but to retain the existing law relating to conversion (subject, of course to the other changes proposed in the report)."

Indeed there appears to be no consensus of opinion as to what approach should have been taken. Some are of the view that the 1977 Act went too far in abolishing detinue. Others are of the view that the Act did not go far enough and that it should have followed the English Law Reform Committee's recommendations and abolished detinue trespass to goods and conversion and replaced it with a new tort based primarily upon conversion. Still others hold the view that the complete codification of the law relating to interference with goods is called for.

Bailment

Palmer in an article entitled The Application of the Torts (Interference with Goods) Act 1977 to Actions in Bailment 41 M.L.R. 629 has suggested that certain provisions of the Torts

(Interference with Goods) Act 1977 may be circumvented by bringing an independent action for breach of bailment.

Palmer points out that the obligations which arise under any bailment are materially different from those which exist between the parties to an ordinary action in tort. He adds that while a bailee's duty of reasonable care is markedly similar to simple liability in negligence and no doubt an action in tort for negligence could remedy the default; this does not mean that the sole remedies that may issue against the bailee are remedies in tort.

Palmer concludes at page 633-634:-

> "If bailment enjoys (as we suggest) an independent conceptual integrity, it must follow that the primary remedy for breach of the bailee's obligations is an action for breach of bailment. Tort (and contract) are purely auxiliary remedies. It is therefore an oversimplification to equate even an action for breach of the bailee's duty of care with an action in tort for negligence.
>
> Any argument that the word negligence is used in section 1(c) in some broader sense, to include actions for breach of a duty of reasonable care arising otherwise than in tort, is rebutted by section 1 (d). This section lays down a residual category of wrongs which are to be included within the definition of 'wrongful interference'. Into the group falls 'any other tort so far as it results in damage to goods or to an interest in goods'. Thus to fall within the preceding sections 1 (a) to 1 (c) the action brought to remedy the wrong must likewise be an action in tort. An action for breach of bailment is not (except for certain artificial purposes) an action in tort but an independent form of action. Thus, it would seem that, by suing in bailment, a bailor who complains of a lack of reasonable care on the part of his bailee may evade the operation of much of the 1977 Act."

Palmer adds at page 636:-

> "There can be no doubt that a bailor who complains of conduct on the part of his bailee which constitutes an established tort may sue in tort if he pleases. The fact remains that, by suing in contract or bailment, he seems able to avoid characterisation of his action as

> one in tort and thus to avert the operation of much of the Act. This could be particularly advantageous if, for example, he wishes to circumvent the abolition in cases of wrongful interference of the rule against pleading jus tertii."

While Palmer is undoubtedly concerned about this aspect of the Act, it should be noted that other commentators on the Act discount the possibility of such difficulties. For example, Clerk and Lindsell on Torts in the 1984 supplement say that the courts are unlikely to accept the argument that the Act may be inapplicable to actions for breach of bailment, where the breach of bailment is also a tort. They point to the case of American Express Co. v. British Airways Board (1983) 1 W.L.R. 701 where it was held that it would make nonsense of section 29 of the English Post Office Act 1969 protecting the Post Office from proceedings in tort, if the Post Office could be liable for breach of bailment. The sole cause of action against the Post Office lay in the entirely statutory action created by section 30 of the Act. This however is only a single judge decision and it is not certain that the same result would be reached in Australia. If the decision is to be supported, it can only be on the basis that section 30 of the Post Office Act gave a limited cause of action against the Post Office which excluded all other rights of action. An action lies against a bailee for breach of the contract of bailment as well as for detinue see Bullen & Leake's Precedents of Pleadings 11th Edn. (1959) pp. 106-7 and these causes of action are quite separate.

Samuels in an article entitled Wrongful Interference with Goods 31 I.C.L.Q. 357 suggests in note 180 on page 381 that Palmer puts too much emphasis on the categories of contract, tort

and bailment, and when examined from an historical angle there is a whole criss-cross of legal ideas which cannot be rationally analysed only in terms of general causes of action like the categories mentioned. Samuels points out that even Palmer himself admits that legislative categorisation of contract and tort is artificial, and Samuels submits that as a result one must take a wide view of the word "tort" in section 1 of the 1977 Act.

Samuels says at pages 382-3:-

> "... it could be argued that a breach of bailment duty which causes 'damage to goods or to an interest in goods' will amount to 'any other tort' for the purposes of section 1 on the general principle that any breach of duty - especially where the behaviour is deliberate - which causes damage to another is prima facie a tort; and if this is so, then, where there is a bailment the new statutory tort of wrongful interference could be available to deal with all interferences with possession or ownership free from the factual or procedural distinctions which attended to the old forms of action.
>
> Certainly Sir Robert, with his generous view of conversion, seems to be taking this approach - that is an approach which looks more to the invasion of interest rather than to the type of act of the defendant - and thus the learned Vice-Chancellor may be achieving for interference with goods what Wright J. achieved in Wilkinson v. Downton (1897) 2 Q.B. 57 for interference with the person: a shift from the law of actions to the law of things. The importance of this shift of emphasis in historical terms is that it is laying the foundations for a new approach to interference with chattels rather as Donoghue v. Stevenson laid the foundations for a new approach towards physical injury, and, just as in personal injury cases the courts no longer ask whether the facts fit within a precise form of action but look instead to a general principle of liability, so in interference with goods cases the courts will ask only if the plaintiff's possessory interest has been invaded by wrongful behaviour. In other words section 1 of the 1977 Act as interpreted by Howard E. Perry v. B.R.B. could well be construing a new conceptual approach to liability, with the result that the new statutory tort of wrongful interference with goods is not just a comprehensive description of old duty situations. The Torts (Interference with Goods) Act 1977 could then earn its place alongside the other milestones on the

long road from forms to causes of action, a road which, as has been seen, officially began in 1852 but, as yet, has not reached its conclusion."

In answer to that mass of special pleading, we point out that the distinction now thought to be abolished by a side wind has been firmly established in the law for centuries - the locus classicus is the famous judgment of Lord Holt C.J. in Coggs v. Bernard (1703) 2 Ld. Raym. 909 - and it would seem unlikely that the law could be so changed, with drastic results to the different degrees of care related to the nature of the bailment, without express statutory authorization. The shift of onus of proof in bailment was recently re-affirmed by the High Court in Pitt Son & Badgery v. Proulefco S.A. (1984) 58 A.L.J.R. 246.

Finders of Chattels

There is a considerable amount of uncertainty regarding the rights of finders of chattels.

The finder of a chattel ordinarily acquires a good title against all but the rightful owner. In the well-known case of Armory v. Delamirie (1721) 1 Stra. 505 a chimney sweep's boy found a jewel and handed it for appraisal to a goldsmith who, under the pretence of weighing it, extracted the stone from its setting and offered 1½d for it. When the boy rejected the offer, the jeweller refused to return the stone. The jeweller was held liable in trover, because the boy had acquired a possessory title which was not impaired by temporarily entrusting custody to the defendant.

The position is not so clear cut however, where the contest is between the finder and the occupier on whose land the chattel was found.

In two situations the occupier clearly acquires rights to the chattel over the finder first where the finder finds as a servant or agent of the occupier, he takes possession not for himself but for his employer Willey v. Synan (1937) 57 C.L.R. 200. Second, where the finder is a trespasser Hibbert v. McKiernan (1948) 2 K.B. 142.

If that which was hidden was gold or silver the above remarks must be read subject to the prerogative rights of treasure trove.

In other situations, the occupier's claim seems to depend on whether he had manifested an intention to exercise control over the area and anything upon or in it. Such an interest is presumed with respect to things attached to or in the occupier's building or land. If the chattel is found on the land, it is a question of fact whether the occupier has manifested an intent to control and thereby gained prior possession, in which case the nature of the place where it is found is obviously relevant.

As a result of uncertainty in relation to the law of finders, the English Law Reform Committee annexed additional recommendations relating to the rights of finders to their report on Conversion and Detinue. The English Committee recommended that a set of rules be enacted setting out the circumstances in which the finder or occupier will acquire title. It was recommended that rules be enacted along the following lines:-

(1) The occupier should have title as against the finder to an article found on premises -

(a) as the result of a trespass by the finder, or

(b) by a servant of the occupier, or any other person

engaged on work there for the employer.

(2) The occupier should also have title as against the finder to an article which, at the time it was found, was attached to or under premises.

(3) In all other cases a broad distinction should be drawn between premises of a private and those of a public character, and the rule should be that where the place of finding falls within the first of these categories the occupier, and where it falls in the second the finder, should have title.

"Private" premises include not only premises to which members of the public do no habitually have access but also "managed" premises to which they do habitually have access.

"Managed" premises for this purpose being defined as those on which the occupier or a servant or agent of his willing to accept custody of articles found, is normally available in reasonable proximity to the place of finding.

These recommendations were not implemented by the 1977 Act, which has been the cause of some criticism. However, it should be noted that since the English Committee made those recommendations the English Court of Appeal has formulated a series of propositions as to the rights and the obligations or liabilities of finders and of occupiers, that is seemingly more favourable to finders than the test proposed by the English Committee.

In Parker v. British Airways Board (1982) Q.B. 1004, the plaintiff, whilst awaiting a passenger flight, found a gold

bracelet on the floor of a lounge at Heathrow Airport to which the defendant occupying lessees admitted only first-class passengers and members of their passengers' Executive Club. He handed it, with a note of his name and address, to an employee of the defendants, asking for its return to him if unclaimed by the true owner. The employee handed it to the defendants who, since no other claimant appeared, sold it for £850, which they retained. Evidence showed that, whilst no organised searches of the lounge for lost articles were made, the defendant's staff had instructions to hand in articles found but those instructions were not publicised. The county court awarded the plaintiff £850 damages for wrongful interference and £50 interest. In dismissing the appellant's appeal the Court of Appeal unanimously held that, by taking the bracelet into his care and control honestly with a view to finding the true owner the plaintiff acquired a right to possession against all but the true owner or persons claiming through that owner or person having a prior right to possession subsisting at the time of finding. As occupiers of a building upon or within, but not attached to, which the thing was found, the defendants would have had a right superior to the finder's right if, but only if, they had manifested an intention to exercise control over the building and things that might be found on or within it but on the evidence, they had not sufficiently manifested such an intention.

In the principal judgment Donaldson L.J. (as he then was) after reviewing and explaining the earlier cases, formulated a series of propositions, extending beyond the facts of the case itself, as to the rights and obligations or liabilities of

finders and of occupiers. These principles were set out by him at pages 1017-1018 as follows:-

"Rights and obligations of the finder

1. The finder of a chattel acquires no rights over it unless (a) it has been abandoned or lost and (b) he takes it into his care and control.

2. The finder of a chattel acquires very limited rights over it if he takes it into his care and control with dishonest intent or in the course of trespassing.

3. Subject to the foregoing and to point 4 below, a finder of a chattel, whilst not acquiring any absolute property or ownership in the chattel, acquires a right to keep it against all but the true owner or those in a position to claim through the true owner or one who can assert a prior right to keep the chattel which was subsisting at the time when the finder took the chattel into his care and control.

4. Unless otherwise agreed, any servant or agent who finds a chattel in the course of his employment or agency and not wholly incidentally or collaterally thereto and who takes it into his care and control does so on behalf of his employer or principal who acquires a finder's rights to the exclusion of those of the actual finder.

5. A person having a finder's rights has an obligation to take such measures as in all the circumstances are reasonable to acquaint the true owner of the finding and present whereabouts of the chattel and to care for it meanwhile.

Rights and liabilities of an occupier

1. An occupier of land has rights superior to those of a finder over chattels in or attached to that land and an occupier of a building has similar rights in respect of chattels attached to that building, whether in either case the occupier is aware of the presence of the chattel.

2. An occupier of a building has rights superior to those of a finder over chattels upon or in, but not attached to, that building if, but only if, before the chattel is found, he has manifested an intention to exercise control over the building and the things which may be upon it or in it.

3. An occupier who manifests an intention to exercise control over a building and the things which may be

upon or in it so as to acquire rights superior to those of a finder is under an obligation to take such measures as in all the circumstances are reasonable to ensure that lost chattels are found and, upon their being found, whether by him or by a third party, to acquaint the true owner of the finding and to care for the chattels meanwhile. The manifestation of intention may be express or implied from the circumstances including, in particular, the circumstance that the occupier manifestly accepts or is obliged by law to accept liability for chattels lost upon his 'premises', e.g. an innkeeper or carrier's liability.

4. An 'occupier' of a chattel, e.g. a ship, motor car, caravan or aircraft, is to be treated as if he were the occupier of a building for the purposes of the foregoing rules."

Simon Roberts in an article entitled More Lost than Found 45 M.L.R. 683 when commenting upon Parker v. British Airways Board, states that the case represents a considerable shift in direction.

He says at page 689 that there had been "a growing readiness to treat occupiers of land as being in possession of chattels found upon it. This was also the tenor of McNair J.'s judgment in City of London Corporation v. Appleyard (1963) 1 W.L.R. 982. Now the position is reversed and it is clear that the finder will succeed against the occupier in a significant, if uncertain range of circumstances".

However we feel that any changes in the law, if thought desirable are outside this remit. They would also require a consideration of the law of fraudulent conversion on the point, and we think that if you wish the topic to be further considered by us, it should be the subject of a separate remit.

Replevin

While not abolishing replevin, the English Torts

(Interference with Goods) Act appears to have diminished the importance of replevin. Section 4 of the Act enables a court to order by way of interlocutory relief, the delivery up of any chattel, the subject of an action for wrongful interference, on such terms as may be just.

The English Law Reform Committee when commenting upon this recommendation said in paragraph 97:-

> "While we accept that the cases which would justify the use of this power may be few in number, we consider that in principle it ought to be available and that its provision would not only pave the way for the abolition of replevin, but would also have an important bearing on the right of recaption; for if a plaintiff were in a proper case in a position to obtain speedy interlocutory relief, somewhat stricter limits could properly be imposed on the exercise of self-help."

Manchester in an article entitled The Torts (Interference with Goods) Act (1977) 127 N.L.J. 1219 has suggested that replevin should have been abolished along with detinue.

It is therefore with interest that we note that in British Columbia the writ of replevin has been abolished for some time and replaced with statutory replevin proceedings. Still more recently it has been recommended that the term replevin be abolished altogether.

The Law Reform Commission of British Columbia when reporting on the Replevin Act in 1978, recommended its repeal. It was recommended that in its place the Rules of Court dealing with detention, preservation and recovery of property be allowed so as to include provisions in the following terms.

"Recovery of Specific Property

(4) Where a party claims the recovery of specific property other than land, the Court may order that

the property claimed be given up to the claimant pending the outcome of the action either unconditionally or upon such terms relating to giving security, time, mode of trial or otherwise as it thinks just.

Indemnity for Wrongful Recovery

(5) Where an order is made under subrule (4) and the claimants' action is dismissed, the opposing party is entitled to be compensated by the claimant for any loss suffered or damages sustained arising out of the delivery of the property to the claimant or compliance with any other order."

Uncollected Goods

South Australia is the only State in which there is no general legislation dealing with the disposal of uncontrolled goods. However provisions to a similar effect are contained in the Workmen's Liens Act 1893. Sections 41 and 42 of this Act provide:-

"41. Every person who has bestowed work or materials upon any chattel or thing in altering the condition thereof, or improving the same, and who is entitled to a lien on such chattel or thing at common law, may, while such lien exists, if the amount due to him in respect of such lien remains unpaid for one month after the same has become due, sell such chattel or thing by public auction, upon giving to the owner thereof, or posting to him at his last known place of abode in South Australia fourteen days before such sale, a notice in writing, by registered letter, stating the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale, and the name of the proposed auctioneer.

42. Upon any sale under the last preceding section the

proceeds arising therefrom shall be applied in payment of the amount in respect of which such lien exists, and of the costs of and incidental to such sale, and any surplus shall forthwith be paid to the clerk of the local court nearest to the place of sale, to be held by him for the benefit of the person entitled thereto.

A special magistrate may, on the application of such last-mentioned person, order payment of such moneys to him."

As noted earlier there are also provisions in the Unordered Goods and Services Act 1971 and the Warehousemen's Liens Act 1941 bearing on the topic.

Palmer in Bailment, when commenting upon restrictions upon the ambit of legislation from other States recommends the width of the Western Australian Disposal of Uncollected Goods Act 1970, which provides in Part VII that its provisions may be invoked by any person who:-

"... without committing a criminal offence, has or acquires possession of goods in any way other than under bailment to which Part II, III or VI apply."

In such a case, the possessor is given the right to apply to the court for an order to sell or otherwise dispose of the goods. But certain conditions both factual and procedural, must first be satisfied.

First, either the possessor must be unaware of the identity or whereabouts of the person through whom he came into possession, or the person through whom he came into possession must refuse or fail to relieve him of possession after having been given notice of the possessor's intention to apply for an order to sell or otherwise dispose of the goods.

Secondly, at least one month before making his application, the possessor of the goods must give notice of his intention to do so to the usual third parties and, where appropriate, to the

person through whom he came into possession.

Although disposal of Uncollected Goods has been dealt with in the English Act, the Committee feels that possibly the topic would best be dealt with in a separate Act. We also feel that any reform should be carefully considered and that it is not appropriate for this Committee to undertake such a project within the confines of this remit. Possibly you may consider that the topic is a suitable one to be referred to us in the future.

Act binding upon the Crown

The Committee recommends that the Act should be expressed to be binding upon the Crown.

The use of examples

The English Act at various places has examples, as in section 7(4) which provides:-

> "For example, if a converter of goods pays damages first to a finder of the goods, and then to the true owner, the finder is unjustly enriched unless he accounts over to the true owner under subsection (3), and then the true owner is unjustly enriched and becomes liable to reimburse the converter of goods."

In commenting upon the use of examples Sacks in an article entitled Torts (Interference with Goods) Act 1977 41 M.L.R. 713 says at 720:-

> "The use of examples in this statute is unusual; whether they are useful only time will tell but one does wonder whether the judge is bound to decide an identical case in the way the example indicates. The analysis in the example attached to section 7(4) may not be so attractive where the converter is a thief."

The Committee is not entirely sure that the use of examples is a good idea. We feel that Parliamentary Counsel should draft the provisions with his accustomed clarity so that examples would

be unnecessary.

Bailment

Palmer has expressed concern that the provisions of the Act could be avoided by plaintiffs by bringing proceedings for breach of bailment, which Palmer argues would not be characterised as a wrongful interference within the terms of section 1. This would mean that plaintiffs wishing to avoid the consequences of the abolition of the jus tertii rule could do so by suing in bailment.

As we have shown above, the special rules relating to bailment do not fit easily into the concepts of this proposed legislation. Probably more injustice would ensue from a change in the law than by leaving it as it is, particularly bearing in mind that the rights and duties of parties to most bailments are carefully regulated by contrast in commercial documents, and parties should not by a legislative side wind be deprived of their rights of action existing outside the law of tort.

Replevin

As the Committee said earlier, replevin is a cheap and easy mode of recovery usually in limited jurisdiction courts, and can well stay as it is.

Finders of Chattels

As we said earlier, this should form the subject of a separate remit.

Limitation of Actions

When considering the topic of Conversion and Detinue the

English Law Reform Committee expressed concern about the effect of the provisions of the Limitation Act on the ability to sue for conversion.

As was pointed out specific reform had already been implemented to deal with one difficulty relating to conversion. Section 3 of the **English 1939 and subsequent 1980 Limitation Act provides:-**

> "3. (1) Where any cause of action in respect of the conversion of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion takes place, no action shall be brought in respect of the further conversion after the expiration of six years from the accrual of the cause of action in respect of the original conversion.
>
> (2) Where any such cause of action has accrued to any person and the period prescribed for bringing that action has expired and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished."

This means that where there are successive acts of conversion by the same person as where, for example, the defendant wrongfully takes a chattel, and on a subsequent date wrongfully consumes it, or refuses to restore it on demand or where there are successive conversions by different persons, as for example where A wrongfully disposes of the plaintiff's chattel to B who subsequently refuses to deliver it up on demand, the cause of action is extinguished after six years from the original conversion.

The English Committee said however in paragraph 84:-

> "... it may be argued that the subsection has an undesirable consequence in that it places a defendant who originally acquired possession unlawfully (as by a wrongful taking) in a better possession than one whose original acquisition was lawful (as by a bailment), in which case time does not begin to run until his refusal of a demand for the return of the chattel; but we have

not been persuaded that the subsection should be altered on this account."

The English Committee were however more concerned about the possibility of unfairness resulting from the fact that time could run against an owner of a chattel, whether or not he knows that the tort of conversion has been committed. The English Committee said at paragraph 85:-

> "The existing rules do, however, in our opinion, raise the problem whether the position of a plaintiff should be improved to the extent that, under the existing law, his action may become barred and his title extinguished before he is aware either that the tort has been committed or the identity of the tort feasor."

The English Committee concluded at paragraph 87:-

> "The general approach of English law to the question of limitation, whereby a plaintiff's action may (apart from fraud) be barred before he can effectively sue, should, we think be reconsidered; but the problem which involves the balance to be struck between hardship to the plaintiff on the one hand and, on the other, the public interest in not disturbing long and innocent possession, must in our view be dealt with in the context of a general review of the law of limitation."

This suggestion appears to have been dealt with to some extent at least in the 1980 Limitation Act, which provides that where the defendant has deliberately concealed from the plaintiff any fact relevant to his right of action, the period does not begin to run (except in favour of a subsequent purchaser for value who was neither party to, nor actually or constructively aware of the concealment), until the plaintiff has, or should have, discovered the concealment.

Thus section 32 of the Act provides:

> "Fraud, concealment and mistake
>
> 32. (1) Subject to subsection (3) below, where in the case of any action for which a period of limitation is prescribed by this Act, either -

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(3) Nothing in this section shall enable any action -

(a) to recover, or recover the value of, any property; or

(b) to enforce any charge against, or set aside any transaction affecting, any property;

to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment (as the case may be) the transaction in which the mistake was made took place.

(4) A purchaser is an innocent third party for the purposes of this section -

(a) in the case of fraud or concealment of any fact relevant to the plaintiff's right of action, if he was not a party to the fraud or (as the case may be) to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and

(b) in the case of mistake, if he did not at the time of the purchase know or have reason to believe that the mistake had been made."

This Committee is currently considering reform to the law

relating to limitation of actions. We are giving consideration to the inclusion of a provision along the lines of section 32 of the English Limitation Act in our Limitation of Actions Act, it is therefore not necessary to examine the question any more fully in this report except to say that such a provision appears desirable, and possibly also a provision along the lines of section 3 of the English Act, which fixes a time limit in the case of successive conversions and provides for the extinction of title of the owner of the converted goods.

RECOMMENDATIONS FOR REFORM

The Committee advises the retention of detinue.

In view of the fact that in an action for detinue the plaintiff is entitled as of right to a judgment for damages and no more, we do not believe that it is feasible or logical to abolish detinue and replace it with a "chattels" version of the summary procedure currently available for the recovery of land. There are cases where under the present law a plaintiff can obtain a judgment for damages only for detinue but in respect of which, conversion would not lie. Cases where goods are wrongly withheld on the termination of a bailment are an example. For that reason, the present classification of detinue as a tort is necessary and logical. The refusal to deliver up crystallizes the wrong. To pay over damages for something which is not categorised as a wrong strikes the Committee as rather odd.

Wrongful detention of the goods against a person entitled to immediate possession of them is the gist of an action of detinue. It is proved by a demand and a refusal. We cannot see any real

way of simplifying this process. Essentially it involves a confrontation between the plaintiff (or his agent) and the defendant. The defendant may be justified in demurring in order to check out the authenticity of the plaintiff or his agent. But sooner or later he will have to respond or his failure to do so must be taken as a refusal. On reflection, we do not think a mere demand is enough. A response must be elicited. This will generally not be obtained unless a personal approach is made.

Section 78 of the Common Law Procedure Act 1854 should be made inapplicable in South Australia (it is currently applicable by virtue of the operation of Section 17 of the Supreme Court Act) and the remedies in detinue should be codified. We suggest that those remedies should be in the three alternative forms referred to by Diplock L.J. in General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd.. (Supra).

In relation to codification of the remedies we make the following points:

(1) Codification should be made in a statute of general application so that the law is equally applicable in any court having jurisdiction in an action of detinue.

(2) The plaintiff should be entitled to elect for a judgment for damages only.

(3) The traditional common law form of judgment in detinue should remain. Where such a judgment is given, it should not be possible for a writ of delivery to issue before the value of the chattel has been assessed. Once the value has been assessed the plaintiff should be free to issue a writ

of delivery or a writ of fi.fa.at his option. If a writ of delivery is unsuccessful, the plaintiff should have the right, with the leave of a judge, to issue a writ of fi fa. If judgment is given in the ordinary common law form, the plaintiff should not thereafter have any right to have a writ of delivery for the return of the goods on the basis that the defendant is denied the option to pay their assessed value.

(4) The Court should have power to give judgment for the return of the goods without any right in the defendant to pay their assessed value. It should be possible in a case of this kind to give judgment for the return of the goods and to adjourn sine die the question of their assessed value. In this class of case, it will rarely be necessary to proceed to assessment. This will occur only where for some reason or other it has proved impossible to secure the return of the goods themselves. In that event, the Court would proceed to assess the value and the plaintiff would then proceed with the issue of a writ of fi.fa.

(5) Section 131 of the Local and District Criminal Courts Act 1926 should be repealed and Section 167 of the same Act will need to be amended.

(6) Section 78 of the Common Law Procedure Act 1854 gives a plaintiff the right to distrain the defendant's property generally if judgment in detinue is given but the chattel cannot be found. This Section is applicable in the Supreme

Court. Section 167 of the Local and District Criminal Courts Act provides to the same effect. The right is to distrain only. No power of sale is given. We see no reason to continue this power.

(7) Provision should be made for interlocutory orders for delivery up upon the plaintiff giving such security as the Court thinks fit. In making such an order the Court would have regard to the apparent strength of the plaintiff's case, the balance of convenience and generally the circumstances under which he was dispossessed of the goods. It should be possible to enforce or supervise the enforcement of the security in the same action. One of the unsatisfactory features of the replevin action is that if the defendant succeeds but the goods are not handed over, he is forced to commence a fresh action to enforce the replevin bond. Such a state of affairs would be seen by the ordinary citizen as intolerable. Provision should be made for much more flexibility in the provision of security than is available in a matter of replevin. In that case security is either by way of a replevin bond or a cash security paid into Court.

Replevin should be abolished once an interlocutory procedure for detinue is in place. Detinue is available wherever replevin is available. We are not aware of any circumstances where an action for replevin would lie where an action for detinue would not.

The present requirement of having the replevy of the goods

attended to by a Clerk of Court is unsatisfactory. He is an administrative and not a judicial officer. The question of satisfactory security, whether an undertaking to the Court, a mortgage or charge or bond should be a matter for a Master or Judge to decide. In our view, it is no part of a clerk's function.

These reforms would require the repeal of sections 131 and 167 and Part III of the Local and District Criminal Courts Act 1926 and section 78 of the Common Law Procedure Act 1854. They would also require the inclusion in the Wrongs Act of available remedies in an action for detinue in the three forms referred to by Diplock L.J. in the General and Finance Facilities Case (supra) and provisions dealing with the various matters referred to above.

We do not advocate either the abolition of detinue altogether or any modification of the present law concerning demand and refusal.

We have the honour to be:-

Law Reform Committee of
South Australia.

(Mr. P.R. Morgan had ceased to be a member of the Committee when this report was signed.)

Articles


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|---|---|
| Palmer | The Abolition of Detinue (1981) The Conveyancer 62 |
| Thornely | New Torts for Old or Old Torts Refurbished? 1977 Cambridge L.J. 248 |
| Bentley | A new Found Haliday: The Eighteenth Report of the Law Reform Committe (Conversion and Detinue) 35 M.L.R. 171 |
| Samuel | Wrongful Interference with Goods 31 Int. & Comp. L.Q. 357 |
| Palmer | The Application of the Torts (Interference with Goods) Act 1977 to Actions in Bailment 41 M.L.R. 629 |
| Thornely | Conversion by Innocent Auctioners of Hire-Purchase Goods 1978 Cam. L.J. 232 |
| Manchester | The Torts (Interference with Goods) Act 1977 127 (1977) N.L.J. 1219 |
| Goldring | The Negligence of the Plaintiff in Conversion 11 M.U.L.R. 91 |
| Palmer | Conversion off the Rails: Howard E. Perry & Co. Ltd. v. British Railways Board 44 M.L.R. 87 |
| Sacks | Torts (Interference with Goods) Act 1972 41 M.L.R. 713 |
| Jones | Restitutionary Claims for Services Rendered 93 L.Q.R. 273 |
| Mathews | Freedom, Unrequested Improvements and Lord Denning 1981 C.L.J. 350 |
| Wier | Doing Good by Mistake - Restitution and Remedies 1973 C.L.J. 23 |
| Kewley | Torts (Interference with Goods) Act 1977 127 N.L.J. 978 |
| Samuels | Torts (Interference with Goods) Act 1977 121 Sol. Jo. 583 |
| Derham | Conversion by Wrongful Disposal as Between Co-owners 68 L.Q.R. 507 |

Books

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|---|---|
| Fifoot | History and Sources of the Common |
| Clerk & Lindsell | Torts 15th Edn. |
| Winfield & Jolowitz | Tort |
| Wier | A Casebook on Torts |
| Prosser | Torts |
| McGregor | Damages |
| Morison, Sharwood Phegan & Sappideens | Cases on Torts |
| Luntz, Hambly and Hayes | Torts: Cases and Commentary |
| Palmer | Bailment |
| Fleming | The Law of Torts 6th Edn. |
| Street | Torts 7th Edn. |
| Jacob | Supreme Court Practice 1982 |
| Ogus | The Law of Damages |

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