LAW REFORM COMMISSION OF BRITISH COLUMBIA

Working Paper No. 67

Wrongful Interference With Goods

This Working Paper is circulated for criticism and comment. It does not represent the final views of the Commission.

It would be appreciated if comments could be submitted by April 30, 1993.

November, 1992

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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Introductory Note

The Commission makes a general practice of inviting comment and criticism on its research and analysis prior to making a Report to the Attorney General on any particular subject. One of the means by which the Commission carries out this objective is the circulation of Working Papers to those persons, groups or organizations to whom the particular subject under study would be of interest.

This process of soliciting comments of interested persons and bodies provides the Commission with the benefit of the experience and views of the community, and thereby assists the Commission in making proposals for the reform of the law that are both relevant and sound.

This Working Paper represents the present state of the Commission's research on the subject under study, and marks the point at which the views and comments of others would be of greatest value to the Commission. The final recommendations of the Commission will be developed in the light of the comment and criticism received.

It would be appreciated if comments and criticism were submitted by June 30, 1992, to the following address:

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CHAPTER I INTRODUCTION

A. Personal Property

Two separate streams of law, developed over the centuries, protect property rights. Land, for many reasons, is treated differently from personal property. The phrase "personal property" is usually used to mean all property other than land, or property affixed to land.[1]

The legal framework of rights and remedies relating to personal property is comprehensive. Parts of the law developed by analogy to the law of real property, but much of it is unique.

B. The Common Law Actions

Several actions provide remedies for wrongs relating to personal property. These actions have obscure names, reflecting their antiquity. The main ones are conversion (sometimes called trover), detinue and trespass to chattels. Related actions provide remedies in special circumstances.

Even a brief look finds unexpected levels of legal complexity, the necessity for which may be questioned. How well is the law working? This Working Paper addresses these and other questions to decide whether the law needs to be changed.[2]

Chapter II is a straightforward description, and examination of the legal policy, of this part of the law. In this form, the discussion, like that in many texts, describes a complicated, highly technical set of legal principles but, because it accepts these principles at face value, does not really give an idea of hov strange they are from a modern perspective. Even so, when reviewing Chapter II the reader should continually keep in mind the question: What modern policies are served by these legal principles, and the many subtle distinctions to which they lead?

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[1] Land and property affixed to land are usually referred to as "real property." The labels, "real" and "personal" refer to the kinds of remedies the law makes available. Interests in land, in the eyes of the law, differ fundamentally from interests in other property. A "real" action provides a "real" remedy — the recovery of the property itself. In contrast, wrongs relating to personal property are addressed in proceedings described as "personal actions," since the remedy provided is enforced against a person, (usually requiring the payment of damages) as opposed to the recovery of the property itself.

[2] Our work in this area owes a great deal to the work of two other law reform agencies who have reported or published research in this field: The (English) Law Reform Committee's Eighteenth Report *(Conversion and Detinue)* led to the enactment of the *Tort (Interference With* Goods) *Act, 1977.* The Act is set out in an Appendix to this Working Paper. The Ontario Law Reform Commission published a *Study Paper on Wrongful Interference With Goods* (1989), prepared by Ralph L. Simmonds and George R. Steward with David P. Paciocco. The legislation recommended in the Study Paper is also set out in an Appendix to this Working Paper. For convenience, we refer to these documents as, respectively, the "English Report" and the "OLRC Study Paper." There is little else in the legal literature dealing with the common law torts protecting rights in personal property that has comprehensively considered directions for revising the law. This Working Paper has built on, and owes a heavy debt to, these ground breaking works.

Chapter III explores the historical forces that have shapec the common law torts dealing with personal property. It quickly becomes clear that, because this part of modern law is riddled with useless anachronisms, some measure of legal reform is called for.

CHAPTER II THE COMMON LAW ACTIONS

A. Introduction

Activities interfering with property rights fall into three general categories. They may involve damage to the property itself. They may affect ownership. Lastly, they may interfere with possession.

Familiar examples recur through the cases. Property is sold and then recovered when the buyer doesn't pay. A friend or business partner refuses to return borrowed property.[1] An employee uses company property for personal purposes.[2] Someone buys stolen property. A person cuts down trees[3] or extracts minerals from another's property, sometimes intentionally, sometimes by mistake over property lines or claims.[4] A creditor takes too much property to satisfy a debt. A secured creditor takes property that is not subject to the security[5] or improperly appoints a receiver.[6] A repairer refuses to return property until paid for services. A tenant, or a borrower under a mortgage, removes fixtures.[7] A landlord seizes a tenant's property.[8] A courier loses or damages property, or delivers it to the wrong person.[9] An unpaid employee takes company assets.[10] A stock broker refuses to return the client's stocks or sells them without proper authority or at the wrong time.[11]

In all of these cases, the law must untangle rights of ownership and possession and assess loss. The tools it uses are centuries old, fashioned in an entirely different social and economic setting and modified over the years. These tools are the common law actions of detinue, trespass to chattels, conversion and some other, unnamed torts.

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[1] *Tourchin* v. *Haer,* [1990] B.C.D. Civ. 1052-05 (Co. Ct.); *Kerr* v. *Dowthwaite,* (1991) 26 A.C.W.S. (3d) 150 (N.S. Co. Ct.).

[2] *Shibamoto & Co.* v. *Western Fish Producers, Inc. (Trustee of)*, (1991) 26 A.C.W.S. (3d) 354 (F.C.T.D.).

[3] *Shewish* v. *MacMillan Bloedel,* (1990) 48 B.C.L.R. (2d) 290 (C.A.).

[4] *Karup* v. *Rollins,* [1990] B.C.D. Civ. 2695-01 (S.C.).

[5] *Waldron* v. *Royal Bank of Canada,* (1991) 53 B.C.L.R. (2d) 294 (C.A.); *Transamerica Commercial Finance Corp., Canada* v. *Shook.* [1991] B.C.D. Civ. 3865-01 (S.C.).

[6] *Boeing* v. *Island Jetfoil Corp.,* (1991) 3 C.B.R. (3d) 41 (B.C.S.C.).

[7] *R.* v. *Lundgard,* (1991) 63 C.C.C. (3d) 368 (Alta. C.A.).

[8] *Broadway Melody Music* v. *Ho,* (1991)14 R.P.R. (2d) 190 (B.C.S.C.).

[9] *Voest -Alpine Canada Corp.* v. *Pan Ocean Shipping,* (1991) 55 B.C.L.R. (2d) 357 (S.C.).

[10] *Nor-Lite Sea Farms* v. *Ellingsen,* [1991] B.C.D. Civ. 728-30, 1052-01 (S.C.).

[11] *Huff* v. *Price,* (1990) 51 B.C.L.R. (2d) 282 (CA.); *R.F. Fry & Associates (Pacific)* v. *Reimer,* [1991] B.C.D. Civ. 146-06 (S.C.).

This Chapter describes the fundamental features of these common law actions, but it would be possible to devote many more pages to the intricacies of this area of the law. Such a discussion, however, would not further advance the case for reform. The structure of the law itself is flawed but, before our discussion can properly deal with that subject, it is necessary to canvas briefly the principle features of the common law actions and the underlying policies they advance.

B. The Common Law Actions

Detinue (derived from an Old French word[12] meaning "to detain") provides a remedy where a person wrongfully refuses a request to return property.

Trespass to chattels is analogous to trespass to land. It provides a remedy where a person wrongfully takes or damages another's property.

Conversion (also known as "trover")[13] deals with more serious kinds of interference with property, although it overlaps the other two actions. Conversion provides a remedy where property is destroyed, or wrongfully "converted," to the use of another.

The other miscellaneous actions fill in gaps. An owner without an immediate right to possession, for example someone who has leased property to another, can't use the above actions. If a leased car is damaged, the owner must bring one of the unnamed actions (for "damage to the reversionary interest.")[14] Not all of the actions deal with damage caused by an indirect act.[15] Technically, another unnamed action must be brought to recover compensation for damage or loss caused by an indirect act. [6]1

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[12] After the Conquest in 1066 Norman French became the language of the upper classes, government and the administration of justice. Many words introduced then remain part of our legal language.

[13] Trover is the original name for the action. It is also derived from Old French and means "to find." The law initially adopted the fiction that the wrongdoer had found the property — to distinguish this action from detinue or trespass to chattels. In the nineteenth century, legislation removed that pretense from legal pleadings. The name "trover" is no longer appropriate although it is still used occasionally.

[14] *Mears* v. *London & South Western Railway Co.,* (1862) 11 C.B.(N.S.) 850, 142 E.R. 1029. There must, however, be some damage to the reversionary interest. Simply dispossessing the holder of property may have no effect at all on the reversionary interest: *Tancred* v. *Allgood,* (1859) 4 H.&N. 438, 157 E.R. 910. The person leasing the car has possession and may sue in detinue, trespass to chattels or conversion.

[15] A common example shows the difference between direct and indirect acts. Feeding a dog poison is a direct action. Leaving poison for the dog to eat is an indirect action.

[16] The law refers to each ofthe unnamed actions as an action "on the case." Until the latter part of the nineteenth century, each cause of action had a separate writ. A writ is a document used to begin an action.

"Detinue," "trespass to chattels" and "trover" are the names of the writs by which these actions were originally brought forward. Where no specific writ addressed the loss suffered, the plaintiff could sometimes start the action with a generic writ, "on the case." The plaintiff would use this writ to set out in detail the wrong complained of and the court would consider whether it could grant a remedy even in the absence of a specific writ for the wrong. The distinction was causal. If the damage was "direct" then the writ of trespass was available. If "indirect," then one had to resort to the writ of "action on the case." This dichotomy has been illustrated as follows (in *Leame* v. *Bray,* (1803) 3 East 593, 602, 102 E.R. 724, *per* Le Blanc J., referring to *Reynolds* v. *Clarke,* (1725) 1 Str. 634, 636, 93 E.R. 747):

> And the distinction is well instanced by the example put of a man throwing a log into the highway: if at the time of its being thrown it hit any person, it is trespass; but if after it be thrown, any person going along the road receive an injury by falling over it as it lies there, it is case. Neither does the degree of violence with which the act is done make any

Even this brief introduction suggests some of the law's complexity. At least five different actions are required to provide appropriate remedies. Why does the law need so many different, interlocking actions to provide remedies when someone wrongfully interferes with property?

C. Some Examples

The next section considers in some detail the features of the common law actions. First, however, here are a few examples of issues that can arise and how the law deals with them. Is it possible to discern from the examples reasons for these legal distinctions?[17]

i. *I feed your horse poisoned oats, and he gets sick for a few hours. lam liable in trespass.*

ii. *I feed your horse poisoned oats, and he gets sick for a month. I am liable in either conversion or trespass. In conversion, I must pay the whole value of the horse. In trespass, damages will be assessed as your losses.*

iii. *I leave poisoned oats on the ground. Your horse eats them and gets sick for a few hours. This is not trespass. It is an (unnamed) action on the case.*

iv. *You loan me your horse, but I won't return it when you ask. I am liable in detinue.*

v. *You loan me your horse. I loan it to Fred. I can't return it when you ask. I am not liable in detinue. I may be liable in trespass or conversion.*

vi. *I take your horse without your permission, and won't return it when you ask. I am liable in trespass and, possibly, conversion.*

vii. *I take your horse without your permission, and won't return it when you ask. I also ride it. I am liable in conversion.*

viii. *You loan Fred your horse. Fred asks me to take care of it. You ask for it back. I say I must first check with Fred. I have committed no wrong.*

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difference: for if the log were put down in the most quiet way upon a man's foot it is trespass; but if thrown into the road with whatever violence, and one afterwards falls over it, it is case and not trespass.

The common law used the action on the case to work out a number of concepts such as distinctions between willful and negligent acts, and direct and indirect consequences of actions. The law of negligence springs from the action on the case. Chapter III discusses the action on the case in greater detail.

[17] Part of this list is based on a similar exercise set out in the American Law Institute, *Restatement of the Law. Torts* (2d), Ch. 9, 433-6. In some cases, the classification of the particular wrong may be a matter of debate and, in a review of several hundred years of cases, it is possible to find inconsistent findings on similar fact patterns. Quibbles over classification only underscore the extent to which fine and not always necessary distinctions are drawn by the law.

ix. *Fred takes your horse without permission and asks me to take care of it. I do not know of Fred's wrong. You ask for it back. I say I must first check with Fred. I am liable in conversion.*

x. *Fred takes your horse without permission and asks my boss to take care of it (which means I take care of it). You ask for it back. I say I must first check with my boss. I have committed no wrong.*

xi. *You ask for your horse back and I refuse without telling you why (but I want to check with my boss first). I am liable in conversion.*

xii. *I repair your piano and bring it back to you. It's still in the truck when you tell me you can't pay for it. I take it back to the shop. I have committed no wrong.*

xiii. *I repair your piano and bring it back to you. I transport it to your living room and uncrate it and you tell me you can't pay for it. I repack it and put it back on the truck. I am liable in either trespass or conversion.*

xiv. *You lease your house to Fred. I cut down bushes around the house without permission. Fred can sue me for conversion, but you can't. You can sue me in case, for injury to the reversionary interest.*

xv. *You lease your house to Fred. I cut down trees on the property without permission. You can sue me in conversion. Fred cannot.*

xvi. *You leave your coat with me, and I cut it into pieces. I am liable in conversion.*

xvii. *I hide your coat. Moths get at it, ruining it. I am liable in conversion.*

xviii. *You leave your coat with me. Moths get at it, ruining it. I refuse to return it. I am liable in detinue.*

xix. *Same as xviii, but I return it. I am liable in an action on the case.*

xx. *You leave your coat with me. I refuse to return it. (I have lost it, but you don't know that). I am liable in detinue.*

xxi. *You leave your coat with me. I refuse to return it because I have lost it (which you know). I am liable in conversion.*

xxii. *I take your coat without your permission and give it to Fred. I am liable in trespass. Fred is liable in conversion or detinue.*

xxiii. *I take your coat without your permission and purport to sell it to Fred (who believes that it is my coat). I am liable in conversion. Fred is guilty of conversion as well.*

xxiv. *I take your coat without your permission and hire Fred to deliver it to Tom. All three of us are liable in conversion.*

xxv. *I borrow your car. Fred throws a rock at it, damaging it. You and I both can sue Fred for trespass to chattels. You can sue Fred for conversion.*

xxvi. *Same as xxv, except I have the car under a six month lease. I can sue Fred for trespass to chattels. You can't sue Fred for trespass or conversion, but you can sue him in an action on the case.*

xxvii. *Fred steals your car. I buy it from Fred, not knowing it is stolen. I leave it with Tom for repairs. Arthur thinks it is collateral for a bad loan and repossesses it. You can sue Fred and me for conversion. I can sue Arthur for trespass to chattels (even though, because it is a stolen car, I have no title to it).*[18]

The examples reveal little about the law, but they highlight the many distinctions that the law makes. Few of these distinctions are made for obvious reasons. Some distinctions drawn by the law are remnants of the legal pettifogging that was the embarrassment of the nineteenth century. In one way or another, however, even if the route is not clear, it appears that the law usually provides an appropriate remedy.

D. Features of the Principal Common Law Actions

This section examines the common law actions in more detail. Categorizing distinctions the law draws, and identifying reasons for them, should reveal the policies being advanced by the law. At issue is whether these policy objectives remain valid today. Each of the common law actions must face the same general questions:

Who is entitled to sue?

Who should be sued?

When can an action be brought? (When should a wrong require a legal remedy, or what wrongs should do so?) and

What is an appropriate remedy?

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[18] *Wilson* v. *Lombank,* [19631] All E.R. 740.

The common law ordinarily irons out inconsistencies, so legal principles operate in harmony. Surprisingly, that has not happened here. The answers to these questions differ from action to action.

The actions share at least one feature in common: each deals with harm that arises "intentionally" in contrast to harm that arises negligently or inadvertently.[19] That is not to say that the wrongdoer must have "intended" to interfere with a person's rights of ownership or possession. Conduct may be innocent, carried out under the honest but mistaken belief, for example, that the wrongdoer owns the goods, but that will not be a defence. The intentional element refers to the act causing the harm. $^{0}_{2}$

Moreover, once having intermeddled, the wrongdoer will be responsible for any further harm, even if it is out of the wrongdoer's control (such as in example xvii above, where the moths ruin the coat).

1. Detinue

(a) Generally

A person who, without justification, refuses to return property upon the request[21] of a person entitled to it[22] will be liable in detinue.[23]

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[19] *E.g.,* Fleming, *The Law of Torts* (7th ed., 1987) 48 says that "inadvertent damage has long ago become the exclusive concern of negligence." *See also Kirkland* v. *Rendernecht,* (1899) 4 Terr. L.R. 195. Even so, the line between intentional and negligent actions is a fine one. The common law torts pertaining to chattels will sometimes provide a remedy for loss arising negligently, *e.g. London Drugs* v. *Kuehne & Nagel Int.,* (1990) 45 B.C.L.R. (2d) 1, 92 (C.A.), *per* Southin (dissenting); *Bell Canada* v. *Bannermount Ltd.,* [1973] 2 OR. 811 (C.A.).

[20] Compare, however, *Hoodless* v. *Long,* (1921) 67 D.L.R. 600 (Ont. C.A.); *Re Duchon Cooney* v. *Schachter,* (1960) 24 D.L.R. (2d) 646 (Man. C.A.).

[21] There is no cause of action without a request: *Anderson Animal hospital Ltd.* v. *Watt,* (1991) 26 A.C.W.S. (3d) 464 (Man Q.B.).

[22] Actual possession may not be a sufficient interest to support a claim for the return of property. *E.g.,* B owns the property. B loans it to C. D takes it from C. C had possession, but not necessarily an immediate right to possession. The action for recovery of the property should probably be brought by B, the owner, although C may be able to sue since a person with custody is presumed to have a right to immediate possession: *See* OLRC Study Paper at 16, n. 7; *see also Russell* v. *Wilson,* (1923-4) 33 C.L.R. 538. The law uses the word "possession" in a special sense. Sometimes a person without custody of the property will still have possession. The law regards a person whose possession is interrupted by parking a car, *e.g.,* as remaining in possession it. In a few cases, a person with custody of property is not considered to have possession. The law recognizes vicarious possession. An employee, for example, holds property for the employer. The employer has possession of it.

[23] It doesn't matter how the holder obtained the property. In *Russell* v. *Wilson, ibid.,* the police seized money in a raid on a betting parlour. The bookie successfully sued to recover the money in detinue. The action is used typically to regulate relations between an owner and another who holds the property. The receiver is called a "bailee" and the relationship is referred to as "bailment." Bailment is an area of the law rich with distinctions and technicality. Parts of this area of the law are regulated by statute: *see, e.g., Warehouse Receipt Act,* R.S.B.C. 1979, c. 428; *Warehouse Lien Act,* R.S.B.C. 1979, c. 427. *Hogarth* v. *Archibald Moving & Storage,* (1991) 57 B.C.L.R. 319 (S.C.); *Katzel* v. *Tolo Enterprises,* [1991] B.C.D. Civ. 504-01 (S.C.). Rights and obligations vary depending on how the bailment arises, and whether the bailee is paid to look after the property. Some say the only area where conversion has not entirely replaced detinue is where a bailee negligently or accidentally loses goods or allows them to be destroyed: *see, e.g,* English Report, 4. Conversion does not apply because of the requirement for an intentional act. Even so, there seem to be other cases where the two torts do not entirely overlap. For example, B refuses to return A's property. Cases hold that if B's refusal is not an interference with A's dominion, in the sense that B denies A's title or converts the goods to B's own use, it is not conversion and can only be detinue. Suppose B will not return the goods until A pays money owed on another matter. That is probably detinue, not conversion. If B uses the goods in the meantime, however, it is conversion: *Heiseler* v. *Connors,* (1911)10 E.L.R. 61 (N.S.S.C.).

Sometimes a holder need not return property, at least not immediately. Suppose, for example, the holder rents the property and the lease is still in good standing. Refusing to return rented property is not detinue. The holder has every right to continue to enjoy the property until the lease ends. Similarly, the holder may take a reasonable time to find out if the requester has any right to the property. A qualified refusal to return property, consequently, is not usually detinue.

Only detinue allows the court to order the return of property. In 1854, however, England enacted legislation[24] empowering the courts to order the return of property, apparently in any action involving detained property: [5]2

> LXXVIII. 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...

British Columbia incorporated this section as Court Rule 42(18), but introduced a subtle and possibly significant change. The Rule does not empower the court to order the return of property. It provides that *where the court can make such an order,* it need not give the wrongdoer the option of paying damages. Possibly the Rule operates only when the conditions necessary to support the action of detinue are present. Compare the rule with the legislation set out above:

> Rule 42(18) Where it is sought to enforce an order for the recovery of property other than land or money by writ of delivery, upon the application of the judgment holder, the court may order that execution issue for the delivery of the property without giving the other party the option of retaining the property upon paying the assessed value...

The law of British Columbia retains much of the ancient learning associated with detinue, but even the name is inappropriate today. It is an example of legal jargon, At the very least, the action should be renamed. Other jurisdictions see no need for the action at all. England abolished it in 1977.[26]

(b) Summary

It is useful to summarize the discussion according to the four questions raised at the beginning of this section. This summary will help later in comparing policy between the common law actions:

1. *Who may sue?* A person entitled to the possession of the property (not necessarily the owner of the goods).

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[24] *Common Low Procedure Act, 1854,* 17 & 18 Vict. c. 125, s. 78.

[25] The section corrected a defect in the common law, which allowed the wrongdoer the option of returning the goods or paying damages instead. Occasionally, the option produced injustice. *See further, infra,* n. 72.

[26] *Tort (Interference With Goods) Act, 1977.*

2. *Who is liable?* A person with possession of goods who refuses without qualification a request to return them to the person entitled to possession.

3. *What is the wrong?* Interference with possession (not damage to the goods, or interference with ownership).

4. *What is the remedy?* An order for the return of the goods, or an award of damages.

2. Trespass to Chattels

(a) Generally

A person who wrongfully takes property, or damages it, is liable in trespass to chattels. The person who had possession when the wrong occurred may sue the wrongdoer for damages. The action is available only to the possessor. An owner who has given possession to someone else may not recover damages for the trespass.[27]

If the goods cannot be recovered, damages are usually measured as the value of the goods.[28] In this respect, trespass to chattels functions exactly like detinue and conversion. If the property is recovered, damages compensate for the loss caused by the trespass. Perhaps the goods have diminished in value, or business losses are suffered until the property is repaired or returned.[29]

Trespass requires a *direct* interference with the goods (although there is no requirement that the trespasser come into contact with the goods). Indirect interference is not trespass. As with much of this part of the common law, a proposition like this must be instantly qualified. While indirect interference is not trespass, a related, unnamed tort provides a remedy. [30]

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[27] *Ward* v. *Macauley,* (1791) 4 T.R. 489. Discussions of the law in this context are sometimes misleading. The law may consider a person to have possession even where the property is physically in the hands of another and, it seems, an owner who can call for possession of the property at will may bring an action in trespass. This is an issue upon which there has been much debate. Halsbury's first edition sets out that a person with possession or an immediate right to possession may bring an action in trespass, and Southin J.A. accepts this position in *London Drugs Limited, supra,* n. 19. Others, (among them, Holdsworth, *A History of the English Law* (2d) vol. 7, 422-4, and Pollock and Wright, *An Essay on Possession in the Common Law* (1888) 145-6) are clear that trespass is only available to a person with possession, although there are some exceptions where the holder holds on behalf of the owner. Debates of this kind are a reflection of complexities inherited from a developing legal system. Fleming, *supra,* n. 19 at 49, *e.g.,* explains the inconsistency (the idea of using vicarious possession to extend the ambit of trespass to chattels) arose solely because trover was insufficiently developed at the time. In the end these debates serve only historical purposes to aid in an understanding of the distinctions once drawn between various kinds of actions. Even if the owner is not considered to have an immediate right of possession and therefore may not sue for the trespass to chattels, the owner has a remedy. The tort of conversion may provide the owner with a right to damages and, if not, there are other actions. Modern cases do not always distinguish between trespass to chattels and other analogous actions. Salmond, *The Law of Torts* (6th ed., 1924) 412 says: "...and we need not scruple at the present day to term such an injury to reversionary rights a trespass, although the remedy under the old practice was not trespass but case." Seventy years after this comment, however, the law still from time to time tends to scruple over these classifications. Two contradictory forces blur the legal position. One force emphasizes the common principles of the law and blends them in a synthesis, in this way both refining and simplifying the law. The other emphasizes the technical distinctions, even where they no longer hold any contemporary relevance or utility. By the 8th edition *of Salmond,* the comment has been removed.

[28] *Brierly* v. *Kendall,* (1852) 17 Q.B. 937, 117 ER. 1540.

[29] *See, e.g., McLachlan* v. *C.I.B.C.,* [1989] 4 W.W.R. 341 (B.C.C.A.). There is some debate concerning whether an action lies where there is no loss. Trespass originally arose to perform functions usually associated with criminal law, to keep the peace. Fleming, *supra,* n. 19 at 48, suggests that an unwarranted intrusion, harmless but placing something of value in jeopardy, probably would be actionable. An owner of valuable and fragile property, such as art on display in a museum, should be allowed to forbid touching.

[30] Fleming, *ibid.,* at 57.

(b) Summary

Returning to the four questions raised in the preface to this section:

1. *Who may sue for trespass to chattels?* A person in possession of the property (not necessarily the owner of the goods).

2. *Who is liable?* A person who wrongfully damages or interferes with goods in the possession of another.

3. *What is the wrong?* Interference with possession or damage to the goods (but not interference with ownership).

4. *What is the remedy?* At common law, the wrongdoer had to pay damages measured by the possessor's loss.[31]

3. Conversion

(a) Generally

Conversion applies in many situations also covered by trespass to chattels and detinue. Like trespass to chattels, conversion provides a remedy where a person wrongfully takes or damages goods. Like detinue, it provides a remedy where a person refuses to return goods. Trespass to chattels and detinue, however, deal with possessory rights. Conversion is concerned with a general notion of ownership — or dominion — over the goods.[32]

Virtually any significant dealing with goods can be conversion, such as dispossessing another of the goods, or damaging, destroying or disposing of the goods. Some examples of conversion:

i. transferring or disposing of property without authorization;[33]

ii. destruction, damage or use of property;

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[31] Now legislation also allows the courts to compel the return of property still held by the wrongdoer.

[32] The wrongdoer, however, need not intend to interfere with another's rights of possession or ownership. *E.g.,* the assertion of dominion may be innocent if honestly based upon the belief the wrongdoer owns the goods. Even so, the wrong will qualify as conversion: *Reinholz* v. *Cornell & Gaar Scott & Co.,* (1909) 2 Sask. L.R. 342 (S.C.); *T.D. Bank* v. *Dearborn Motors,* (1968) 64 W.W.R. 577 (B.C.S.C.); *cf. Solloway* v. *Blumberger,* [1933] S.C.R. 163.

[33] Usually , the sale must be completed by delivery before it is considered to be conversion. Wrongfully selling property, or delivering it to another who obtains a lien over it — for repairs, *e.g.* — is conversion but, apparently, pledging the property is not: *Spackman* v. *Foster,* (1883) 11 Q.B.D. 99, an anomaly that England has corrected in legislation: *Tort (Interference with Goods) Act 1977*, s. 11(2); *see also* OLRC Study Paper at 21.

iii. assertion of ownership or denial of another's ownership;[34]

iv. interference with the property where a person is in possession or where a person is not in possession but has the right to it;[35] and

v. refusing to return property.

(b) Contrasted With Trespass to Chattels and Detinue

Comparing conversion with trespass to chattels and detinue gives a good idea of the overlap existing among the major common law actions that protect rights in personal property. The same activities by a wrongdoer might support a claim under two or more of these headings. For example, B damages property owned by C. The remedy available to C depends upon the severity of the damage. Minor damage entitles C to damages for trespass to chattels. If the damage is substantial, however, B's actions are considered to interfere with C's rights of dominion, and the remedy will be in conversion.[36] Fleming describes the tort as follows:[37]

> Conversion may be defined as an intentional exercise of control over a chattel which so seriously interferes with the right of another to control it that the intermeddler may justly be required to pay its full value. Characteristic of this tort is that the ordinary measure of damages is the full value of the chattel. In truth, the action is proprietary in substance, only tortious in form. As has been perceptively observed, the action in effect forces an involuntary purchase on the converter; it permits the plaintiff to say to him: 'You have bought yourself something.'

In the example, it does not advance matters very much to say that B's actions in one case interfere with another's dominion over the chattel, while in the other they do not. The analysis depends upon a fiction since, in each case, B has done exactly the same thing for exactly the same reason.

In some cases of conversion, an interference with another's rights of dominion unmistakably lies at the heart of the action. B refuses to return C's yacht, for example, until C pays an outstanding debt. B keeps the yacht safely moored. This is detinue. B has interfered only with C's rights of possession. If B uses the yacht for B's own purposes, it becomes conversion.[38] Personal use interferes with the owner's dominion over the property. In detinue, C could recover

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[34] *Oakley* v. *Lyster,* [1931] 1 KB. 148, 150, [1930] All E.R. Rep. 234 (C.A.), although it has been suggested that the position is not supported by authority: English Report at 16.

[35] The interference must be serious, and must interfere with the claimant's rights of dominion: *see, e.g., Fouldes* v. *Willoughby,* (1841) 8 M. & W. 540, 151 ER. 1153, which involved a ferry-man with a troublesome passenger who put the passenger's horses off the ferry.

[36] In *Fouldes* v. *Willoughby, ibid.,* the court drew this kind of distinction between trespass to chattels and conversion, but at one time trespass to chattels also provided a remedy where the damage to the chattels was substantial. Trespass originally provided a remedy where goods were destroyed. Conversion eventually replaced trespass as the appropriate cause of action for destruction. Trespass remains for the last function it developed, compensation for minor damage to property: Fleming, *supra*, n. 19 at 47.

[37] *Ibid. at* 49.

[38] *Heiseler* v. *Connors, supra,* n. 23.

the yacht and damages for its wrongful detention. In conversion, however, C could recover the whole of the value of the yacht, forcing B to buy it.[39]

(c) Who May Sue?

The action protects dominion. Dominion is not the same thing as ownership. The action is available to someone with possession when the wrong occurred (in this way, the action is like trespass to chattels or detinue). Even a person without possession can bring the action, if entitled to call for possession (in this way, the action is like detinue).[40]

(d) Misfeasance and Nonfeasance

Conversion developed later than both detinue and trespass to chattels. Eventually, it almost entirely replaced the need for either of the earlier actions. In only a very few situations does trespass to chattels or detinue provide a remedy where conversion does not.

One instance arises from a distinction drawn by the law between wrongs occurring by positive actions (misfeasance) and wrongs occurring passively (nonfeasance). Suppose B holds A's property (as a bailee). If B delivers it by mistake to C, A will be entitled to damages in conversion. B's positive acts qualify as misfeasance. On the other hand, if the property is damaged through a failure to act, conversion will not provide a remedy,[41] although A might receive compensation in an action in detinue, negligence or breach of contract.[42]

(e) What Kinds of Property May Be Converted?

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[39] Ownership of property passes to the wrongdoer after the damage award is paid in full: *Sadler* v. *Scott,* (1946) 63 B.C.R. 313, (1947) 1 D.L.R. 712 (C.A.).

[40] *Troop* v. *Hart,* (1882) 7 S.C.R. 512; *Rogers* v. *Devitt,* (1894) 25 O.R. 84 (Q.B.); *Kerr* v. *Dowthwaite, supra,* n. 1. *E.g.,* A leases a car to B for one month. A cannot demand possession of the car during the month while the lease is in good standing. If C damages the car during that month, A cannot sue in conversion, although B can. The same position is true where the owner gives security to another, unless the documents reserve the owner's possessory rights, even if the owner has actual possession: *Ruttan* v. *Beamish,* (1860) 10 U.C.C.P. 90; *McAulay* v. *Allen,* (1870) 20 U.C.C.P. 417 (C.A.); *Samuel* v. *Coulter,* (1877) 28 U.C.C.P. 240 (C.A.); *see also McCrary* v. *McCrary,* (1863) 22 U.C.Q.B. 520 (C.A.); *cf. McLeod* v. *Mercer,* (1856) 6 U.C.C.P. 197. In contrast, if A merely loans the car to B, A can demand its return any time and, therefore, can sue in conversion. The wrong itself might end the arrangement, restoring an owner's possessory rights: *Sibley* v. *Sibley,* (1871) 8 N.S.R. 325 (C.A.); cf. *Cornish* v. *Niagara Dist. Bank,* (1874) 24 U.C.C.P. 262 (C.A.). Some people, such as a trustee in bankruptcy or a personal representative of a deceased person, have rights that relate back and may be able to bring an action for a wrong committed before they are empowered to call for possession. Some cases suggest that to be successful, a claimant who has possessory rights must also have a right of property. It has been explained, however, that a person with a right of possession has by definition a sufficient right of property: *see, e.g., Sandford* v. *Bowles,* (1873) 9 N.S.R. 304 (C.A.). Much of the law relating to possession reflects principles developed before notions of property and possession were fully worked out. *See* OLRC Study Paper at 25, discussing a possible distinction between rights of immediate possession: the issue is whether rights to immediate possession sufficient for conversion would be sufficient for detinue.

[41] *See, e.g., Lovekin* v. *Podger,* 26 U.C.Q.B. 156 (C.A.); *Gauhan* v. *St. Lawrence & Ottawa Ry.,* (1878) 3 O.A.R. 392; *Spackman* v. *Foster, supra,* n. 33. Where a person comes wrongfully into possession of the property, however, damage arising from nonfeasance might lift the wrong from detinue to conversion. *See, e.g.,* example xvii above.

[42] *See* Holdsworth, *supra,* n. 27 at 407. The English legislation abolishing the action of detinue recasts conversion to provide a remedy for harm caused to goods through nonfeasance. *See Tort (Interference with Goods) Act 1977*, s. 2(3).

Conversion protects tangible personal property,[43] including documents evidencing rights, such as documents of title, negotiable instruments, guarantees, insurance policies and bonds.[44] The action does not protect money.[45]

Fixtures, trees, crops and minerals are regarded as part of the land. Severing them from the land is not conversion.[46] Once severed, however, they are personal property. Any further interference with them is trespass to chattels or conversion .[47]

(f) Measure of Damages

(i) Date of Conversion

The rule of thumb is that damages are the value of the goods, calculated at the date of the conversion.[48] The court may also award damages for consequential loss, taking into account changes in value after conversion.[49]

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[43] Another interesting distinction from detinue lies in how property is to be described to support a claim for damages. The standards are higher where the claim is in detinue: *Mills* v. *King,* (1864) 14 U.C.C.P. 223, 3 E. & A. 120. That is because in detinue the goods themselves must be recovered. This is an example of the law drawing a legal distinction for no surviving purpose. Any rationale for the distinction vanished after the enactment of legislation allowing the goods themselves to be recovered in conversion.

[44] Loss is calculated by reference to the interest represented: *Alsager* v. *Close,* (1842) 10 M. & W. 576, 152 E.R. 600; *c.f. Building & Civil Engineering Holidays Scheme Management* v. *Post Office,* [1964] 2 Q.B. 430. If A rips up a certified cheque for a hundred dollars payable to B, B can recover the hundred dollars from A, and would not be limited to the value of the piece of paper that the cheque is drawn on: Palmer, *Bailment* (1979)138.

[45] Equity, however, will protect a person whose money is taken by granting a lien: *Merchants Express Co.* v. *Morton*, (1868) 15 Gr. 274. Is there any reason why a statutory tort should not protect money? Should taking money be regarded as simply a criminal matter? How much of the explanation is the traditional attitude of the common law toward money — in a time when banking was being created, the common law only really understood barter, and coins in sacks. Or is the point that conversion is available against the original taker, but not against later recipients because it is, after all, currency? Modern cases certainly speak of conversion of money: *see, e.g. Gives* v. *Schneider,* (1991) 26 A.C.W.S. (3d) 1061 (Ont. Ct.).

[46] Damages for a wrongful severance, technically, are pursued in a special action on the case: *London & Westminster Loan & Discount Co.* v. *Drake,* (1859) 6 C.B. (N.S.) 798.

[47] *See, e.g., Northwest Terminals Ltd.* v. *Westminster Trust Co.,* [1939] 1 W.W.R. 642 (B.C.C.A.).

[48] *Trusts & Guarantee Co.* v. *Brenner,* [1933] S.C.R. 656. The rule applies whether the value of the property increases or decreases after the conversion: *Rhodes* v. *Moules,* [1895] 1 Ch. 236 254. In contrast, damages in detinue are determined at the date of trial because they are a substitute for the return of the property: *see supra,* n. 43; *see also, e.g., General & Finance Facilities Ltd* v. *Cooks Cars (Romford) Ltd.,* [1963] 1 W.L.R. 644 (C.A.); *Cash* v. *Georgia Pacific Securities Corp.,* [1990] B.C.D. Civ. 1052-04 (S.C.). This is a distinction without purpose now that legislation allows the courts to order the return of property. In fact, courts have asserted a discretion to award damages calculated at a later time: *Burr* v. *Munro,* (1840) 6 O.S. 57 (C.A.); *Hogg* v. *Benito Farmers Elevator Co.,* [1923] 1 W.W.R. 1303 (Man. C.A.); *McCaskill* v. *Ford Motor Co., Becker Motor (1953) Ltd. and Stanley,* (1955) 17 W.W.R. 239 (B.C.S.C.). In some cases, the court has value property as of the date the conversion is discovered: *see Sachs* v. *Miklos,* [1948] 2 K.B. 23 (C.A). but the Court of Appeal in *Malhotra* v. *Choudhury,* [1980] Ch. 52, 79 criticized this position as being unnecessary, too wide and based on an incorrect headnote of another case. In the view of the English Court of Appeal in *Choudhury,* damages for conversion are assessed at the date of conversion. *See also The Queen* v. *Arnold,* [1971] S.C.R. 209. In *IBL* v. *Coussens,* (1990) *Times,* 16 July (C.A.) C refused to return the plaintiffs vehicles (an Aston-Martin and a Rolls Royce). At the date of conversion they were worth £62,000. By the time of trial they were worth a good deal more than that. The Court of Appeal selected the trial date to value the vehicles.

[49] *Grenn* v. *Brampton Poultry Co.,* (1958) 13 D.L.R. (2d) 279, *aff'd,* 18 D.L.R. (2d) 9 (Ont. C.A.). Damages may also compensate for opportunities lost because the property was not available to the owner: *R.F. Fry & Associates (Pacific) Ltd.* v. *Reimer, supra,* n. 11; but not if the owner could not have taken advantage of those opportunities: *Nor-Lite Sea Farms Ltd.* v. *Ellingsen, supra*, n. 10.

The value of the goods is usually determined as either their market value or replacement cost.[50] Even someone who shares ownership is entitled to damages assessed as the whole of the value of the goods.[51]

The claimant must take steps to limit, or mitigate, losses. This is an important duty when the value of the converted property — such as shares in a company — is subject to fluctuation.[52]

The inflexible measure of damages in conversion may be responsible for much of the law's subtlety. A court will be reluctant to find a person liable in conversion if the damages are out of all proportion to the wrong.[53] The method of measuring damages is one of several unusual elements of conversion.[54] Few other areas of the law operate quite so arbitrarily.

(ii) Proceeds

Suppose B takes A's bicycle and sells it to C. C pays $150, but the bicycle is only worth $100. Measuring damages as the value of the goods, A recovers $100, leaving B with a profit of $50.[55]

While the common law torts technically do not provide compensation to an owner of the property for profits made by the wrongdoer, compensation is usually recoverable in restitution.[56]

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[50] The amount the wrongdoer receives for the goods may not represent a market value. A low price may have been set to encourage a quick sale: *Pathfinder Recreation (Receiver of)* v. *Borg Warner Acceptance Canada,* [1990] B.C.J. No. 686 (S.C.). Some modern cases seem to suggest an inclination to compensate for actual loss rather than an amount arbitrarily determined as the value of the goods. *See, e.g., Karup* v. *Rollins, supra,* n. 4.

[51] An exception is made where the wrongdoer also has an interest in the property. The plaintiff's recovery is limited, either to the value of the plaintiffs interest or, sometimes, the value of the property less the interest of the wrongdoer: *Smith* v. *Sterling Securities Corp.,* [1933] 3 W.W.R. 347 (Sask. C.A.). A typical case involves a secured debt. A lender who wrongfully seizes the security will be liable in conversion, but for what amount? The whole of the value of the property seems an inappropriate standard. The amount of damages is usually the value of the property less the secured debt: *see* Fleming, *supra,* n. 19 at 66.

[52] *Asemera Oil Corp.* v. *Sea Oil & General Corp.,* [1979] 1 5CR. 633. A computer assisted search of Canadian jurisprudence dealing with the common law personal property actions showed that during the past decade mitigation is the issue most often addressed in wrongful interference cases.

[53] Perhaps *Fouldes* v. *Willoughby, supra,* n. 35, the case which established the modern features of the tort of conversion by clearly differentiating it from trespass, was influenced in part by the fact that damages, assessed by the jury, were the whole of the value of the plaintiffs lost property.

[54] There is some doubt whether this principle has been correctly carried forward. In the nineteenth century, e.g., the cases do not say that the measure of damages in conversion is invariably the full value of the property. They say that a jury may award damages in that amount: *see, e.g., Fouldes, supra,* n. 35. But it would be open to a jury to assess damages in any amount.

[55] If C can be located, A can recover the bicycle because C is also liable in conversion. The general rule is that a person cannot convey a greater interest than he possesses: *nemo dat quod non habet.* There are, however, some cases where the law acknowledges an exception by which a purchaser can obtain good title: *see, e.g., Sale of Goods Act,* R.S.B.C. 1979, c. 370, ss. 26-30; G. Battersby, "The Sale of Stolen Goods: A Dilemma for the Law," (1991) 54 Mod. L. Rev. 752. *See also Barberree* v. *Bib,* (1991) 28 A.C.W.S. (3d) 122 (Alta. Q.B.), where a purchaser received good title because the owner did not act within the limitation period.

[56] The claimant is said to "waive" the tort. The claimant recovers the benefit received by the wrongdoer on a restitutionary basis as if the owner authorized the transaction and the wrongdoer acted on the owner's behalf: *see* Goff & Jones, *The Law of Restitution* (3rd ed., 1986) 605; *Lamine* v. *Dorrell,* (1701) 2 Ld. Raym. 1216, 92 ER. 303; *Trusts & Guarantee Co.* v. *Brenner, supra,* n. 48.

A vendor usually invests time and money in carrying out a sale. A recurring fact pattern involves logging another's land or the removal of coal or minerals from another's mine. Should any allowance be made to the wrongdoer who has spent time and money in carrying out the sale of the timber or minerals? The British Columbia Court of Appeal considered this question in *Shewish* v. *MacMillan Bloedel Ltd*.[57] The defendant logged Indian lands. The court held, confirming earlier English and Canadian authority, that the issue turned upon whether the wrongdoer acted innocently. A person who knowingly deals with someone else's property must account for the full value of the goods, less the cost of bringing the property to market. Where the person acts innocently, however, a "mild" rule for damage assessment applies. Damages will be adjusted by deducting not only the cost of transporting the property to market, but also other expenses incurred in extracting, severing, harvesting or manufacturing the property. An allowance is also made for a person who acts negligently. The reason is the same in each case: the owner could not have profited from the sale without incurring the costs.[58]

The "mild" rule is consistent with general theories of compensation. It is not altogether clear, however, what principles justify the other, "severe" rule for damage assessment, which seems to contain an arbitrarily determined punitive component.[59]

(iii) Nominal Damages

If the wrongdoer returns the property in good condition, the claimant usually recovers (often nominal) damages compensating for the wrongful detention.[60] Recovering property, however, is not always a complete remedy. A recent case,[61] for example, involved a broker who sold a client's shares and replaced them when prices dropped, pocketing the difference. The court held that the broker should not be allowed to retain the wrongfully gotten proceeds.

(iv) Summary

This concludes the comparison of policy advanced by major common law actions dealing with personal property, summarize, in terms of the four questions guiding our inquiry:

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[57] *Supra,* n. 3; *Canadian Pacific Forest Products* v. *Pacific Forest Industries,* [1991] B.C.D. Civ. 4092-02 (S.C.).

[58] The law's position on this issue is reviewed critically in D.M. Gordon, "Anomalies in the law of Conversion," (1955) 71 Law. Q. Rev. 346. Detinue and conversion provide inconsistent remedies. If the wrongdoer retains the property, the owner can recover it in detinue — or under the statutory power referred to before — without making any allowance for the wrongdoer's efforts. The measure of damages in conversion, as discussed in the text, produces quite a different result. The law deals more lightly with the wrongdoer who disposes of the property than with the wrongdoer who keeps it. Different principles of damage assessment may apply if the claim is for trespass to land or damage to property: *see, e.g., Timpauer* v. *Coffey,* [1991] B.C.D. Civ. 4094-03 (S.C.) where the plaintiff was entitled to the costs of replacing logged trees. *See also Harshenin* v. *Bayoff,* [1991] B.C.D. Civ. 2483-03, 1052-02 (S.C.). Even here, however, damage assessment may turn on whether the defendant's actions were intentional or inadvertent: *Kates* v. *Hall,* (1991) 53 B.C.L.R. (2d) 322 (C.A.).

[59] *See infra,* Chapter III, which explores the historical origins of this and other unusual legal rules that remain part of the modern law.

[60] *Fisher* v. *Prince,* (1762) 3 Burr. 1363, 97 E.R. 876; *Tucker* v. *Wright,* (1826) 3 Bing. 601, 130 E.R. 645; *Moon* v. *Raphael,* (1835) 2 Bing. N.C. 310, 314, 132 E.R. 122, 123. *Day* v. *Horton,* (1913) 5 W.W.R. 751 (Man. C.A.); *Clarke* v. *Baillie,* (1909) 19 O.L.R. 545, *aff'd,* 20 O.L.R. 611, *aff'd,* 45 S.C.R. 50; *Can. Orchestraphone Ltd.* v. *Br. Can. Trust Co.,* [1932] 2 W.W.R. 618 (Alta. CA.). Sometimes the court may stay proceedings altogether.

[61] *BBMB* v. *Eda Holdings,* [19901] W.L.R. 409 (P.C.).

1. *Who may sue in conversion?* A person entitled to the possession of the property (not necessarily the owner of the goods).

2. *Who is liable?* A person who wrongfully damages or interferes with goods in the possession of another where the damage or interference is substantial.

3. *What is the wrong?* Interference with a person's dominion over the goods.

4. *What is the remedy?* At common law, the wrongdoer was liable to pay damages measured as the value of the goods at the date of conversion. The law, however, acknowledges many exceptions to the general principle.[62]

All three actions protect a person who possesses the property when the wrong occurred.[63] Additionally, detinue and conversion protect a person with an immediate right to possession. Each tort serves a principal function that differs from the others. Trespass to chattels provides compensation for damage to, or interference with, property. Detinue provides for the return property. Conversion deals with serious damage to or interference with property. This analysis, however, emphasizes the distinctions, and ignores the substantial degree of overlap, between the actions. Each, for example, provides a remedy if property wrongfully detained.[64] Trespass to chattels was once the only vehicle for obtaining compensation for serious damage to property. Now conversion also serves that purpose.

It is also useful to list situations where there are gaps in the law, or the results achieved by it are anomalous:[65]

i. A claimant without possession when property is damaged has no remedy under the three torts if the damage is not substantial; [66]

ii. A person who keeps goods can be compelled to "buy" them, even where the retention is for an innocent reason;

iii. A person deprived of goods for a short time through other's negligence may have no cause of action.[67]

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[62] Now legislation also allows the courts to compel the return of property still held by the wrongdoer.

[63] Subject to qualifications referred to earlier. *See supra,* nn. 22-3.

[64] Since 1841 (when *Fouldes* v. *Willoughby* was decided), however, conversion has been available if the wrongdoer does not purport to interfere with an owner's dominion over the goods. *See* examples iv and viii.

[65] This list is not complete; *see further* Gordon, *supra,* n. 58.

[66] The owner's remedy is in another branch of case, to protect the "reversionary interest the damage is substantial, the owner has a remedy in conversion.

[67] Palmer, *supra,* n. 44 at 140, suggests there is no action in conversion or detinue for negligent delay rendering, *e.g.,* a valuable document — such as a lottery ticket — valueless.

iv. The focus of the law, and the various remedies volved, turns on matters of distinction that are out step with current legal thought.[68]

v. Different principles of damage assessment apply, pending on the tort involved. Damages in trespass chattels are measured as the extent of the loss suffered by the person in possession. Damages in detinue the value of the goods at the date of trial. Damages in conversion are the value of the goods at the date of the conversion. Damage awards in detinue or conversion may not correspond at all with the plaintiffs actual losses. Courts over the years, however, have qualified these positions so that results achieved are very often similar.[69]

vi. Different standards of proof apply depending upon the tort involved. Detinue requires a higher standard of identifying property than trespass to chattels or conversion. This is because detinue is the only common law action that provides for the return of personal property. Nineteenth century legislation, however, allows the court to grant that remedy in any case.

E. Categories of Distinctions Drawn By the Law

Like the examples first listed above, a discussion of the basic principles fails to produce a readily comprehensible picture of the law protecting rights in property. This section attempts to pull together classes of distinctions drawn by the law to see whether the law is advancing necessary or desirable policies.

1. Ownership and Possession

The common law protecting personal property deals primarily with possessory rights. It is a focus that is responsible for layers of complexity.

The idea of ownership of property is familiar enough today but it was not when courts first began to construct the legal foundations of the law. The medieval mind recognized that it was necessary to protect possession of property to reduce incidents of civil disorder. It is from this viewpoint that the popular wisdom arose: possession is nine tenths of the law. This much exaggerated proposition still has more than a grain of truth. Fleming describes aspects of this feature as it applies in conversion:[70]

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[68] Some examples: the distinction drawn between misfeasance and nonfeasance, direct indirect acts, and the nature of the interest the plaintiff has (whether it is possession, owner plus possession, or ownership plus a future right to possession). Chapter III pursues these aspects of the actions in greater detail.

[69] Sometimes, however, the principles of damage calculation seem extremely quixotic: *see, e.g.,* Gordon, *supra,* n. 58.

[70] *Supra*, n. 19 at 59.

> This emphasis on possession, rather than ownership, is a legacy from an earlier time when wealth was primarily associated with tangibles and the law was preoccupied with repressing physical violence... This explains the seeming paradox that a possessor without title, such as a finder, a bailee, a sheriff who has seized goods, and perhaps even a thief, may recover their full value; whereas an owner who has neither possession nor a right to immediate possession, like a bailor during an unexpired term, cannot compel the wrongdoer to buy him out. So great is the emphasis on protecting possession that even an owner may be guilty of conversion as by dispossessing his bailee during the subsistence of a bailment not determinable at will.

The structure of the law is built upon antiquated notions. The focus on possession, together with legal notions of who has possession in various cases, occasionally produce startling results.

2. Immediate Rights and Other Kinds of Rights: Who May Sue?

Sometimes, only a person who has possession can sue, in others an immediate right to possession is enough. An owner without either attribute must pursue a different course for a remedy (the action on the case). Even accepting the law's emphasis on possession as opposed to ownership, it is not clear why various distinctions in this regard need to be made. It appears to be one of the products of a medieval preoccupation with possessory rather than proprietary rights.

3. Direct Interference and Indirect Interference

Some of the actions do not provide relief for damage resulting from the indirect actions of the wrongdoer. Again, the injured party must bring another action (on the case). The existence of this separate action states more clearly than anything else that limitations placed on the principal causes of action do not turn on the fairness of compensating a person for losses arising from indirect actions. There is no modern policy of the law that requires such a distinction to be made.[71]

4. Kinds of Available Remedies

To the medieval lawyer, only a few kinds of property — such as title deeds and charters to property — were so unique that their return was essential. This remains largely true today. A person deprived of property can usually replace it. Consequently, the familiar remedy is an award of damages, not the return of property. In this respect, the common law attributes of detinue — which allowed a court to order the return of property — are remarkable.[72]

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[71] The authors of the OLRC Study Paper (at 13) however, concluded that there was some utility in retaining the idea of direct interference for the action of trespass to chattels. *See further, infra,* Chapter IV, n. 23.

[72] The bias in favour of damages was so strong that a wrongdoer had the option of paying compensation instead of returning the property until legislation amended the law in 1855. *See supra,* n. 25. Courts would sometimes increase the damages (adding an amount as punishment) so that the sensible defendant would prefer to return the property. Maitland, *The Forms of Action at Common Law* (1963) 62, suggests that reasons for the law's policy "may be found partly in the perishable character of medieval movables, and the consequent feeling that the court could not accept the task of restoring them to their owners, and partly in the idea that all things had a 'legal price' which, if the plaintiff gets, is enough for him."

Even so, this does not explain why the law has adopted so many different approaches to measuring loss. Inconsistencies appear, at least in part, to be attributable to discarded features of the law. One example, mentioned before, is the most striking. Damages in detinue are measured at the date of trial,[73] since they are in substitution for the return of property. Damages in conversion are measured at the date of conversion, overlooking the fact that they too are in substitution for the return of property, which the court now has statutory authority to order.

The common expectation is that the law will provide similar results on similar facts. Personal property rights, however, vary between the torts. Choosing one action over another may affect the level of damages the court is able to award. We are unable to identify a rational policy in favour of such a result.

5. Third Party Rights

C finds property. Before C can return it to the owner, D, B damages it. As we have seen, C can sue B. If C does, can B involve the owner in the proceedings?

Only a person who has an interest in the property, or asserts the authority of one who does, may raise the matter in defence.[74] Otherwise, the law is not concerned that someone else may own all or part of the property. Consequently, B cannot join D in the proceedings, or resist C's claim on the basis that the proper owner is D.[75]

Why is this the law? The law must, for purposes of social order, protect possessory and proprietary rights.[76] Actions affecting one person cannot be excused on the ground that another has an interest in the property.

The prohibition, however, leaves the defendant at risk. Other owners can sue the defendant. The defendant may be liable several times over for the same act. This may be costly if damages are arbitrarily set each time as the whole of the value of the goods.

Allowing the defendant to assert that there are other owners need not deprive the plaintiff of a remedy. Where two or more have an interest in the property, a damage award can be divided among them. Suppose other owners cannot be located, although it is clear that the plaintiff is not

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[73] Another example relates to punitive damages. This is an area of the law which has been going through major revision and possibly the principles that apply where the wrong relates to personal property will be modified in the future. The old principles, however, are set out in Halsbury (lst ed.) 909. Punitive damages are not available in conversion. They are in trespass to chattels. They once were available in detinue, but not since the court was empowered to order the return of property. These statements were endorsed in *Basted* v. *Grafton,* [1948] 1 W.W.R. 614, 618 (B.C. Co. Ct.). *See further* Chapter IV, n. 21.

[74] *Williams* v. Thomas, (1894) 25 0.R. 536 (C.A.); *Eastern Construction* v. *Nat. Trust,* [1914] A.C. 197 (P.C.); *Holy Ghost Miracle Revival Temple* v. *Watton,* (1991) 27 A.C.W.S. (3d) 539 (Nfld. S.C.T.D.).

[75] *See* Baker, "Jus Tertii: A Restatement," (1990) 16 U.Q.L.J. 46.

[76] *Webb* v. *Fox*, (1797) 7 T.R. 391, 397,101 ER. 1037.

the sole owner. Simply confining the plaintiff's damages to actual loss[77] provides an adequate remedy. Exposing the defendant to the prospect of multiple proceedings brought by a variety of plaintiffs is unnecessary.

6. Summary

Many aspects of the common law torts are out of step with policies that underlie other areas of the law. Various positions advanced by the common law torts are not supported by policy. Moreover, it is frequently in these areas that we find the different torts adopting conflicting positions. It is necessary to look elsewhere for an explanation of why the law is as we find it today.

[77] Some provision could be made to allow a plaintiff to claim on behalf of other people with interests in the property. These issues are considered in Chapter IV, Reform.

CHAPTER III LEGACIES OF THE LAW

A. Introduction

In one sense, much of the discussion in Chapter II is largely unnecessary. The forces that shaped the law are well known and all entirely historical.[1] Leading texts agree on this point. They often observe that the common law dealing with wrongful interference with goods cannot be understood without an appreciation of its historical development. The introduction in *Winfield* is typical:[2]

> It is impossible to give an intelligible account of conversion without an historical sketch of the action of trover which was the remedy for it; nor is trover completely understandable without some knowledge of the other actions for injuries to, or interference with, chattels.

Our discussion has inquired first whether the law is operating sensibly, intentionally avoiding what most texts seem to regard as the natural order for exploring the common law torts. Unfortunately, explaining the law in terms of its history often leads to an uncritical treatment. Maitland is one of the few who frankly acknowledges that the law is not a rational product:[3]

> ...we may be led into error by good masters. So long as the forms of action were still in use, it was difficult to tell the truth about their history. There they were, and it was the duty of judges and text writers to make the best of them, to treat them as though they formed a rational scheme provided all of a piece by some all— wise legislator. It was natural that lawyers should slip into the opinion that such had really been the case, to suppose, or to speak as though they supposed that some great king (it matters not whether we call him Edward I or Edward the Confessor, Alfred or Arthur) had said to his wise men, 'Go to now! a well ordered state should have a central tribunal, let us then with prudent forethought analyze all possible rights and provide a remedy for every imaginable wrong.' It was difficult to discover, difficult to tell, the truth, difficult to say that these forms of action belonged to very different ages, expressed very different and sometimes
> discordant theories of law, had been twisted and tortured to inappropriate uses, were the monuments of long forgotten political struggles; above all it was difficult to say of them that they had their origin and their explanation in a time when the king's court was but one among many courts. But now, when the forms of action are gone, when we are no longer under any temptation to make them more rational than they were, the truth might be discovered and be told, and one part of the truth is assuredly this that throughout the early history of the forms of action there is an element of struggle, of struggle for jurisdiction. In order to understand them we must not

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1 See, e.g., J.W. Salmond, "Observations on Trover and Conversion," (1905) 21 L.Q.R. 43, 45.

2 Jolowicz and Lewis, Winfield on Tort (8th ed., 1967) 485.

3 *Forms of Action at Common Law* (1963) 10. See also Salmond, *supra*, n. 1. Maitland is referring to all of the forms of action, not just those dealing with personal property, but the remarks are still appropriate today since, unlike other areas of the law, the personal property torts remain indelibly stamped with the precedents developed under the forms of action. R. Sutton, Personal Actions at Common Law (1929), e.g., says that a complete discussion of the common law torts — as true today as when it was first written — is to be found in *Wilbraham* v. *Snow*, (1669) Wms. Saund. 47,85 E.R. 624, a nominate report annotated in 1825. In virtually every other area, legal principles have undergone such a substantial process of evolution and development, changing in step with modern thinking and needs that a text of such antiquity would bear little resemblance to contemporary law.

> presuppose a centralized system of justice, an omni-competent royal or national tribunal; rather we must think that the forms of action, the original writs, are the means whereby justice is becoming centralized, whereby the king's court is drawing away business from other courts.

The discussion in this Chapter has an historical perspective but is still out of step with the usual approach adopted in texts, which tend to trace the development of the actions from earliest days until the nineteenth century, when principles seemed finally to crystallize.[4] For our purposes, more is to be gained by comparing legal procedure today with the rules that existed before the great reforms of the nineteenth century. From this examination it can be seen that the curious features of the common law torts dealing with personal property are almost entirely the product of notions of law and procedure now long discarded.

B. Modern Procedure

In British Columbia, the Supreme Court can hear and grant an appropriate remedy or remedies, whether the plaintiff (or defendant) has one claim or more, and whether the matter involves a few people or many. The matter is brought to the court's attention by documents setting out the facts that support the various claims asserted by the litigants.

The Rules of Court are designed so that usually everything needed to resolve the dispute is available in a single proceeding. The object is to avoid a proliferation of proceedings. The Rules of Court are based on this policy, which is so important it is set out separately in legislation.[5] It is this feature of the law, originally adopted in England in 1873, that marks the transition between the old system of procedure and the new.

The rules set out a highly flexible procedure aimed at simplifying the task of stating the cases of the plaintiff and the defendant. While many of the rules are technical, the policy seems so natural that it is easy to think that the law must always have been this way. In fact,[6] modern procedure would seem very strange indeed to a lawyer of the nineteenth century and before.

C. The Former Law and the Common Law Torts

1. Introduction

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[4] For such a discussion *see*: Holdsworth, *A History of the English Law,* (2nd ed., 1937) vol. 7; F.B. Ames, "The History of Trover," (1897-1898) 11 Harv. L. Rev. 277-289, 374-386.

[5] *Law and Equity Act,* R.S.B.C. 1979, c. 224, s. 10.

[6] The future may well hold far simpler and more practical procedures. Today, many people are in favour of developing new forms of dispute resolution like mediation, and improving old methods, such as arbitration: *see, e.g.,* Access to *Justice, the Report of the Justice Reform Committee* (1988). For conducting a trial, however, the current rules function well. Recent developments have not altered the focus on avoiding a multiplicity of proceedings. Instead, they are aimed at eliminating some of the more sophisticated tools available to resolve a dispute — such as discovery and lengthy trials — where the issues between the parties are straightforward, or the amount of money in dispute is not large.

The features of the current law described above are each in the sense that they have been part of the law only since the latter part of the nineteenth century. Before that time, legal procedure was quite different, unrecognizably the parent of our present system.

2. Divided Jurisdiction of the Courts

Where there is now one court that can decide any dispute,[7] a number of different courts served, each with a different, separate jurisdiction to hear particular matters. One system of law was administered by the courts of common law (the most notable being the Court of Common Pleas, the King's Bench, and the Court of Exchequer). The jurisdiction of these courts overlapped in some respects, but not all matters could be heard by all courts.

The courts of common law did not administer "equity," a separate system of justice that grew up, over the centuries, to temper the common law and which eventually became equally inflexible. Equity was administered by the Lord Chancellor.[8]

A litigant had to be careful to bring the claim in the right court. If a mistake was made on that point, everything had to begin again.

First, a litigant had to decide whether the claim was one at law or in equity. If it was at law, care had to be taken to bring the action in the common law court that had jurisdiction to hear the matter.

The Court of Common Pleas, for example, had exclusive jurisdiction over the writ of detinue.[9] The courts, however, competed for business — at a time when judges were paid by the litigants[10] it was in their financial interest to be able to hear as broad a range of disputes as possible. Stratagems were devised for enlarging the jurisdiction of the various courts.[11] The Court of King's Bench took the tort of conversion (then called "trover") and, during the 16th and 17th centuries, refined and enlarged it to answer many cases in which formerly only detinue had provided a remedy. This is one reason why the various torts protecting personal property overlap to such an extent. By the early nineteenth century, conversion provided a remedy in most cases formerly dealt with by detinue and trespass to chattels.

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[7] In this province, it is the Supreme Court of British Columbia. Even today, however, there are specialized courts, although they do not generate the jurisdictional problems encountered in the nineteenth century. *E.g.,* matters involving small amounts of money are heard in the Small Claims Court. Matters involving a federal element may be heard in the Federal Court.

[8] Our discussion necessarily compares modern procedure in British Columbia with the system that we inherited from England. While that system applied in British Columbia in colonial days, we did not have the same elaborate system of courts. The British Columbia Supreme Court has always administered both law and equity. This is because when our judicial system was established we only had one judge, Matthew Baillie Begbie who, even so, regarded his ability to administer law and equity as separate matters and would do so in separate proceedings.

[9] Holdsworth, *A History of English Law,* vol. 1, 198.

[10] Which they were, until 1825: Holdsworth, *A History of English Law,* vol. 3, 350.

[11] This process was helped by lawyers. Procedures, costs, defences and remedies varied from court to court. The dispute would be framed to bring it within the jurisdiction of the court that offered the best package.

There was no real need for the law to develop overlapping companion actions. The reason the law grew in this way was a response to procedural and jurisdictional concerns. Well over a century ago, procedural changes — most notably, the unification of the courts — made large parts of the common law actions dealing with personal property entirely unnecessary.

3. The Forms of Action

Today, a claimant must establish that a wrong recognized at law has been committed. The claimant commences the proceedings with a general document, either a writ or a petition, and sets out the *facts* to support the claim.

The former practice was not so simple. Establishing the wrong was not enough. The law recognized particular kinds of action and each had its special writ. Without a writ for the wrong complained of, there was no way to bring the action.[12] A person who commenced an action using the wrong writ would be told by the court to start again. The differences in philosophy between today and a hundred and fifty years ago are striking.

The system of formal writs for discrete claims was called the "forms of action." For 40 years (from 1832 until 1875) Parliament tried to rid the law of the forms of action,[13] but their shadows remain. The ideas underlying the forms of action are still part of the law, a point that becomes clear by an examination of the torts dealing with wrongful interference with property.

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[12] One kind of generic writ was recognized, for the action on the case. Speculation concerning the origins of case caused something of an academic furor in the 1930's — *see* T.F.T. Plucknett, "Case and the Statute of Westminster II," (1931) 31 Col. L. Rev. 778; W.S. Holdsworth, (1931) 47 Law. Q. Rev. 334; P.A. Landon, "The Action on the Case and the Statute of Westminster II," (1936) 52 Law. Q. Rev. 68; T.F.T. Plucknett, "Case and Westminster II," (1936) 52 Law. Q. Rev. 220 — with the result that much that was generally accepted has been called into question. Even so, this much is clear: while other writs were based on the wrong committed, the action on the case was based on the injury. The plaintiff would set out in detail the particular facts. The unnamed actions, referred to earlier, were brought before the court in this way. An action on the case allowed the courts some latitude in fashioning new causes of action. Trover began as an action on the case, as did elements of the law of negligence.

[13] The reforms attempted to correct a malfunctioning system of procedure by simplifying the process of bringing an action before the appropriate court. These are some of the major events in the nineteenth century revision of procedural law:

i. 1832, *Unification of Process Act,* 2 Will. IV, c. 39: until 1832, there were different ways of starting an action depending on the form of the action and the appropriate court in which it had to be brought. This Act established a single writ, much like the modern writ, in replacement;

ii. 1833, *Limitation of Actions and Suits relating to Real Property Act,* 3 & 4 Will. IV, c. 27: this Act abolished real and mixed actions, with some exceptions, and also abolished wager of law (or "compurgation"). Wager of law was a ritualized oath. The defendant would win by gathering the requisite number of oath givers who would swear orally, without fault, that the defendant made a good oath (not that what was said was true, because they needed no knowledge of that). It was the ritual that proved the defendant's case. If, for example, any of the compurgators made a mistake in the oath, the defendant lost. Salmond describes it as "a form of licensed perjury which reduced to impotence all proceedings in which it was allowable." *See* Salmond, *supra,* n. 1 at 45.;

iii. 1852, *Common Law Procedure Act,* 15 & 16 Vict., c. 79,s.3: the Act removed the need to state the form of action in the writ, although each form of action still retained its own precedents;

iv. 1854, *Common Law Procedure Act,* 17 & 18 Vict., c. 125: the Act allowed courts to order the return of property. The *Common Law Procedure Acts* of 1852 and 1854 went a great distance towards allowing common law courts to recognize equitable claims and defences and vice versa, by essentially vesting courts with a largely coordinate jurisdiction;

v. Judicature Acts of 1873, 36 & 37 Vict., c.66, and 1875, 38 & 39 Vict., c. 77: these two Acts formed a single court to administer both law and equity, and abolished the forms of action.

The following are useful discussions of the former practice and the nineteenth century reforms that changed it: Lord Bowen, "Progress in the Administration of Justice during the Victorian Period," *Select Essays in Anglo-American Legal History* (1907) Vol. 1, 516; V.V. Veeder, "A Century of English Judicature 1800-1900," *Select Essays on Anglo-American Legal History* (1908) vol. 2, 731; Sir Jack Jacob, *The Reform of Civil Procedural Law* (1982); W. Tidd, *The Practice of the Courts of King's Bench and Common Pleas* (9th ed., 1828); Sutton, *supra,* n. 3. *See also* Holdsworth, *The History of English Law* vol. 3 and 7.

Each form of action developed its own set of precedents. While various writs might deal with related causes of action, the law viewed each action individually.[14] In this way different, sometimes inconsistent, principles developed in actions supported by separate writs. The process can be seen in the conflicting policy choices made in detinue, conversion and trespass to chattels. Each of these, until the nineteenth century, were supported by different writs and each was a separate form of action.

The importance of selecting the correct writ continued until 1832, when legislation introduced an important reform: a single writ was created for all actions.[15] It was no longer possible to use the wrong *writ,* but a plaintiff was still at risk if the wrong *form of action* was pleaded. That is why so many nineteenth century cases continued to be obsessed with the kind of wrong involved: Is this trespass to chattels? Is this conversion? The procedural reform did not go very far because the former policies were inextricably woven into the fabric of the substantive law. Further reforms, introduced in 1852 and 1873, also tried to break down the artificial boundaries between the actions. The last of these had the most success, but remnants of the forms of action are still patched to the law.

The forms of action, and their modern significance, was described by Diplock L.J. in *Letang* v. *Cooper*:[16]

> A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. Historically, the means by which the remedy was obtained varied with the nature of the factual situation and causes of action were divided into categories according to the "form of action" by which the remedy was obtained in the particular kind of factual situation which constituted the cause of action. But that is legal history, not current law. If A., by failing to exercise reasonable care, inflicts direct personal injury upon B., those facts constitute a cause of action on the part of B. against A. for damages in respect of such personal injuries. The remedy for this cause of action could, before 1873, have been obtained by alternative forms of action, namely, originally either trespass vi et armis or trespass on the case, later either trespass to the person or negligence....Certain procedural consequences, the importance of which diminished considerably after the Common Law Procedure Act, 1852, flowed from the plaintiffs pleader's choice of the form of action used. The Judicature Act, 1873, abolished forms of action. It did not affect causes of action; so it was convenient for lawyers and legislators to continue to use, to describe the various categories of factual situations which entitled one person to obtain from the court a remedy against another, the names of the various "forms of action" by which formerly the remedy appropriate to the particular category of factual situation was obtained. But it is essential to realise that when, since 1873, the name of a form of action is used to identify a cause of action, it is used as a convenient and succinct description of a particular category of factual situation which entitles one person to obtain from the court a remedy against another person. To forget this will indeed encourage the old forms of action to rule us from their graves.

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[14] It is important to stress just how fundamental this idea was in the nineteenth century. In *Reynolds* v. *Clarke,* (1725) 1 Str. 634, 636, 93 E.R. 747, 748, *e.g.,* dealing with the distinction between trespass and case, it is said "We must keep up the boundaries of the actions; otherwise, we shall introduce the utmost confusion."

[15] *Supra*, n. 13.

[16] [1965] 1 Q.B. 232, 242-243 (C.A.).

Much judicial work of the 20th century has focused on weeding out the archaic notions.[17] Some areas of the law seem to be entirely free of the influence of the forms of action. In other areas, the influence is all too visible.

The law of contract, for example, consists of precedents developed over the centuries. Even so, following the procedural reforms of the nineteenth century, the courts managed to recast the law to fashion a synthesis of the relevant principles.[18] Contractual issues are no longer analyzed in terms of the forms of action — debt, covenant and assumpsit — which originally provided remedies in that sphere, nor, as was formerly the case, in terms of the different kinds of contract (for the sale of goods, of employment and so on).[19] In the field of wrongful interference with goods, however, the law is still asking in effect, "which writ was used to bring this action." B has C's property and the law asks: is it trespass? is it detinue? is it conversion? These are the wrong questions. They lost any meaning in 1873. The correct questions, in terms of modern legal policy and procedure, should be: Is C entitled to the return of the property? Has C suffered any damage for which B should be responsible? A single, statutory tort, framed to ask these two questions, would unify the law and clear away a good deal of confusion.

4. Multiple Claims

For most of the nineteenth century, the focus of the law was not on limiting the number of proceedings, but on narrowing the issues between the parties. The special procedural rules devised for that purpose, now long abandoned, increased the likelihood that multiple proceedings would be necessary before the legal dispute was resolved.

Under the former procedure, the plaintiff could raise only one claim in a proceeding[20] and usually had to elect immediately between alternative forms of relief. For example, C steals B's car and sells it to D. Does B want damages for the conversion? Or does B want to recover the proceeds of the sale? At one time, B had to decide before starting the action. A claim for the proceeds meant that B could not proceed against C for the conversion. A person wishing to pursue other claims, even if they were all related, had to bring them in separate proceedings.

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[17] There are numerous examples, but *see, e.g., Cahoon* v. *Franks*, [1967] S.C.R. 455, 458-9 (concerning the lingering effects of the forms of action on a limitations issue); *Letang* v. *Cooper, ibid.; United Australia Ltd.* v. *Barclays Bank Ltd.*, [1941] A.C. 1 (H.L.). Sometimes, the courts need the assistance of legislation to restate the principles. *See, e.g., Report on Set-Off* (LRC 97. 1988).

[18] P.S. Attiyah, Pragmatism and Theory in English Law (1987). Attiyah credits the great contract scholars of the latter part of the nineteenth century, when the first modern texts on contract appeared, with developing a single theory ofcontract.

[19] Assumpsit eventually superseded the older personal actions of debt and covenant and formed the basis of our law of contract: Holdsworth, *supra*, n. 4. Today, in the law of contract, there is little if any consideration of the separate channels of precedent that originally served the separate writs. Only odds and ends exist, such as, for example, the legal significance of a sealed document, which preserves much of the ancient law of covenant: *see Report on Deeds and Seals* (LRC 96, 1988).

[20] In *Fouldes* v. *Willoughby,* (1841) 8 M. & W. 540, 151 E.R. 1153, *e.g.,* the plaintiff selected conversion and was told that his claim was in trespass to chattels. *See* also Bowen, *supra* , n. 13 at 520 "... and two causes of complaint could not be prosecuted in one and the same action unless they belonged to the same metaphysical 'form.'" This principle had a few, but not many, exceptions. In fact, in some cases, not only the claim, but the kind of relief required, dictated the choice of court. A broken agreement to sell land provides a useful example. Only a court of equity could order a defendant to complete the sale. Only a court of common law could award damages for breaking the agreement.

Similarly, since the whole emphasis was on narrowing the matters in dispute to a single issue, a defendant was usually unable to raise a claim against the plaintiff in the same proceeding, even if it was directly related to the matter in dispute.[21]

Modern pleading requires the plaintiff to set out the facts supporting the claim. The facts may support one or more causes of action. In this way, a plaintiff can request one or more remedies and raise any number of related claims in the same proceedings.

More than one curious feature of the law can be directly traced from the old procedural rules. The emphasis on identifying the exact nature of the plaintiff's claim is an example. Under the former practice, it made sense to say: "this is trespass to chattels," or "this is conversion," because the rules forced the plaintiff to choose between them. Today, it is inconsistent with the rule that requires the plaintiff to plead facts, since the evidence at trial will establish the kind of wrong that actually occurred.

"Modern" principles of damage assessment also bear marks of the forms of action. The "severe" and the "mild" rule discussed in the last Chapter can be partly explained as an incomplete synthesis of principles worked out in two separate forms of action.[22]

5. Multiple Parties

For the same reason — to refine the dispute to a single issue — the rules had the objective of restricting the number of parties involved in the proceeding. This is an additional way that procedural policies shaped the substantive law.

Limits were placed on who could sue and who could be sued. This policy can be seen in the way the separate torts developed: one tort for a person who had possession of the property; another for an owner out of possession; another for a person who would only become entitled to possession at a later date. The emphasis on narrowing the parties to the proceedings led to the development of remedies that were only available to parties satisfying a particular description. Consequently, where more than one person had an interest in the affected property, even if they agreed, the law prevented them from taking part in the same proceeding. They had to use different writs, raise different actions, and bring their separate proceedings before different courts.

The policy of restricting the parties to a dispute also led to restricting a defendant's ability to add other parties to the proceeding. A defendant who believed someone else was responsible for the plaintiffs loss, or someone else had a better claim than the plaintiff, could not join that person. There were no procedures for doing so, and legal rules were developed based on the

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[21] An exception was made by statute where the plaintiff sued to recover a debt and the defendant was owed a debt by the plaintiff. In other cases, a defendant could sometimes request a court of equity to stay proceedings in a court of common law until the defendant's claim could be heard in separate proceedings before another court. *See further Report on Set-Off, supra,* n. 17.

[22] *See further* the discussion in Chapter IV at n. 12.

principle that third party interests were largely irrelevant. This was probably one of the reasons that led to the rule preventing a defendant from raising a third party's interest in the plaintiffs property as a defence.

The torts that protect rights in personal property are consistent with the former procedural principles of the law and quite out of step with the current principles. Modern law assumes as a usual rule that all parties suffering or causing a particular loss should take part in a single proceeding, in order to limit the number of proceedings that must eventually be brought to settle all of the matters in dispute.

(a) Narrowing the Issues in Dispute

The policy of narrowing the questions in dispute to a single issue also carried through into the style of pleadings. Pleadings were technical and involved. Today one party will file a document setting out the basis of the claim asserted (this is called a "Statement of Claim"), the other party will answer with a "Statement of Defence," and that will usually be the end of formal pleadings.[23] Formerly, however, a series of technical documents — declaration, defence, reply, rejoinder, surrejoinder and so on — would be exchanged until a single question was presented to the courts for decision.

This highly sophisticated process reduced issues to technical, arid questions that had, it sometimes seemed, little to do with the actual dispute between the parties. One example might be useful: in detinue and in conversion, as discussed in the last Chapter, evidence of the tort may consist of (1) a request for return of the goods, and (2) an unqualified refusal to return them.[24] Suppose B gives goods to C to deliver to D, and C does so. B has a change of heart and demands the goods back from C. C no longer has them and can't return them.[25] To a modern eye, C's actions do not appear to be conversion or, for that matter, any wrong at all. To the nineteenth century lawyer, however, the claim is in conversion and pleadings reduce the issues to the central one: Was there a request for return? Was there a refusal? This kind of analysis is still part of our current law.[26] Asking whether a defendant can properly refuse to return goods that the defendant no longer has seems to be a very oblique way to approach the issue.[27] It would make more sense

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[23] The position is equally straightforward where proceedings are brought by petition.

[24] This requirement seems to be an essential feature of detinue: *see, e.g., Ball* v. *Sawyer-Massey Co.*, [1929] 2 W.W.R. 582 (Sask C.A.) and is a good example of nineteenth century procedural concerns becoming transformed into 20th century substantive law. Perhaps a request and refusal is necessary to support the action of detinue, but it would seem to be an entirely unnecessary precondition or empowering a court to order the return of property under Rule 46. A formal request, and a refusal, served a different purpose for conversion: *see infra,* n. 38.

[25] *See, e.g., Morrison* v. *Fishwick,* (1879) 13 N.S.R. 59 (C.A.).

[26] *See, e.g. Capital Finance Co.* v. *Bray,* [19641] W.L.R. 323 (C.A.); *Asfar Consulting Engineering (Ace)* v. *Mahood,* [1988] B.C.D. Civ. 999-03 (S.C.); *see also Stanley Canada* v. *683481 Ontario,* [1990] O.J. No. 1760, 23 A.C.W.S. (3d) 142 (Ont. Ct. (Gen. Div.)). The defendant refused to deliver property across a picket line. Nothing prevented the plaintiff from taking steps to recover it, except the picket line. The real issue appears to be whether a holder of property is under a duty to deliver it. Shaped by the contours of these ancient torts, however, the question becomes: is a refusal to delivers wrongful detention? The answer: no.

[27] This form of pleading is explained by Salmond, *supra,* n. 1 at 51-2, as the trick that allowed trover to serve in cases formerly dealt with in detinue.

to ask instead: Does the defendant retain the plaintiffs property? If so, should it be returned to the plaintiff? If not, should the defendant compensate the plaintiff'? Precedents developed during the nineteenth century in an entirely different legal and procedural context, however, still dictate the content of our modern law:[28]

> Forms of action are dead, but their ghosts still haunt the pre cincts of the law. In their life they were powers of evil, and even a in death they have not wholly ceased from troubling. In earlier days they filled the law with formalism and fiction, confusion and complexity, and though most of the mischief which they did has been buried with them, some portion of it remains inherent in the law of the present day. Thus if we open a book on the law of torts, howsoever modern and rationalized, we can still hear the echoes of the old controversies concerning the contents and boundaries of trespass and detinue and trover and case, and we are still called upon to observe distinctions and subtleties that have no substance or justification in them, but are nothing more than an evil inheritance from the days when forms of action and of pleading held the legal system in their clutches.
>
> In no branch of the law is this more obvious than in that which relates to the different classes of wrongs which may be committed with respect to chattels. In particular the law of trover and conversion is a region still darkened with the mists of legal formalism, through which no man will find his way by the light of nature or with any other guide save the old learning of writs and forms of action and the mysteries of pleading.

(b) Pleading and Legal Fictions

Much of the law has developed in steps. A legal principle applied in one case is reconsidered, and possibly revised, in new situations presented by later cases. A technique once much used in this process of adaptation is the legal fiction. Lawyers and judges would pretend — through the use of a fictitious device — that nothing had changed at all and that old tools were not being applied in new situations. The pretense sometimes involved constructing a story that would be assumed to be true, in order to raise and answer a particular legal question. A modern reader will not find this description very helpful without an example or two of the process in operation.

A striking example is found in the development of real property law. Until 1852, legal questions about the ownership of land relied upon an elaborate fiction that transformed an action originally used to protect tenants' rights.

> Suppose B occupies land that A claims to own. A would not simply sue B and claim to be the proper owner.[29] Instead, a scenario was devised under which A, it was pretended, leased land to John Doe, a fictitious person, who was wrongfully ousted by Richard Roe, another fictitious person.[30] A would sue Roe in the name of Doe. One of

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[28] Salmond, *ibid.*, at 43.

[29] The common law did provide an action allowing A to recover the land directly, but it was an ancient, intricate, ponderous proceeding, subject to serious delays and involving trial by battle. It was an unpopular action. An alternative remedy had to be developed.

[30] When this action was first being transformed, the owner of the land engaged in a little charade before bringing the action: the owner would actually lease the land to a friend, and arrange for the friends ouster from the property: *see* A.W.B. Simpson, *An Introduction to the History of Land Law (1961)* 135-145.

the documents delivered to B, the true defendant, would be a notice from Roe advising that Roe intended to let judgment go by default (in which case, the sheriff could be directed to evict B). This was the action of ejectment.[31]

Legal fictions operate well only in particular fact patterns and have a tendency to generate still more fictions. The law used (and in some cases still uses) them as a crutch: adopting a legal fiction avoids the need to define the actual principles of law involved. Unfortunately, it is often easy to mistake a legal fiction for a substantive principle of law. The nineteenth century was particularly fond of fictions. A 20th century trend has been to do away with them.

Many examples of legal fictions can be found in the law dealing with personal property. Most discussions make the point that detinue involves a wrongful detention and trespass to chattels requires a direct interference with the property. The gist of trover, however, is the conversion (the wrongdoer converts the property of another to the wrongdoer's own purposes). Except by a stretch of the imagination, however, many acts embraced by trover do not seem to really involve a conversion. A person who damages property belonging to another may be liable in trespass to chattels (if the damage is slight) or in conversion (if it is substantial). What event transforms the wrongdoer's act from a trespass into a conversion to the wrongdoer's own purposes? Another instance: withholding property is detinue, but to both withhold *and use it* is characterized as conversion. The lines being drawn are very fine indeed. One more example: If trover requires a conversion, it seems to follow that the wrongdoer must have had possession of the goods. This is an issue that proved troublesome in several cases.[32] The idea, however, now appears to be entirely abandoned.[33] It is clear that substantial damage to a chattel is conversion, even if the damage is caused by someone who never had possession. While there is general agreement that the gist of trover is the conversion, it is an essential element that doesn't always seem to carry very much weight.

A review of 16th century procedural concerns suggests that many of the features the modern law regards as bearing on the issue are little more than fictions used by one court to usurp the jurisdiction of another.

Detinue was the exclusive jurisdiction of the Court of Common Pleas. For a variety of reasons, such as the availability of the defence of wager of law,[34] litigants wanted an alternative to detinue. Trover was a writ of the Court of King's Bench but, in the 16th century, the Court was reluctant to extend its writ to cover situations dealt with by other writs of other courts. In *Lord*

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[31] Eventually, the style of cause for ejectment in old case reports takes the form of *Doe d. [plaintiffs name]* v. *[defendant's name]*. Doe is the fictitious plaintiff. The "d." is an abbreviation of "demise," which means to grant or lease. The style of cause would translate as: The fictitious defendant under a lease from [the true plaintiff] against [the true defendant].

[32] *See, e.g.. Dickey* v. *McCaul*, (1887) 14 OAR. 166 (CA.); *Mothers* v. *Lynch*, (1869) 28 U.C.Q.B. 354 (C.A.).

[33] *Douglas Valley Finance Co. Ltd.* v. *Hughes (Hirers) Ltd.*, [19691] Q.B. 738.

[34] *See supra*, n. 13.

Mounteagle v. *Countess of Worcester*,[35] for example, it is said that an action on the case (trover) will not lie,

> ...because it appears that the plaintiff may well maintain an action of detinue, and when a man has an ordinary writ ready framed in the Register for his case, then he shall not sue out a new form of writ.

By the end of the 17th century[36] the objection that another writ already applied was no longer persuasive but, in the meantime, the pleading of conversion had been shaped to distinguish it from both detinue and trespass to chattels, possibly for the sole reason of overcoming the technical objection.[37] The writ of trover alleged that the property had been found by the wrongdoer (to distinguish it from trespass, where the writ only applied if the plaintiff had been in possession when the wrong was committed), and that the property had been sold by the defendant and the proceeds converted to the defendant's use, whether or not there had been a sale (to distinguish it from detinue, because detinue could not provide a remedy where the wrongdoer no longer had the property). While these are clearly legal fictions — a defendant could not defend the action on the basis that the fictitious averments were false — they came to shape the way we think of these torts: the gist of trover is the conversion of the property to the wrongdoer's uses. What we regard as an important feature of the substantive law is not really a reflection of sound legal policy, but the consequence of a subterfuge by which a court extended its jurisdiction. It is a good example of long forgotten procedural manoeuvring masquerading as substantive law.

To summarize, the old form of pleading answered two needs. First, it was designed to narrow the dispute between the parties to a single issue. Sometimes the conventions of formal pleading characterized the dispute in terms that now appear somewhat arbitrary and artificial. Even after the total transformation of procedural policies and rules, these features of the law remain alive today.

Second, the pleadings were used to emphasize distinctions between the writs, again in response to now abandoned procedural principles, so that different courts, using different writs, could still apply them in largely similar fact patterns (while pretending not to). This has produced a legal position today that is not without a little irony. Legal ingenuity allowed the different courts to provide satisfactory remedies in a broad range of areas. The formation of one supreme court of judicature removed any need for overlapping remedies. Pretenses once used to broaden the torts are now mistakenly seen as substantive principles narrowing the ambit of these actions,[38]

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[35] (1556) 2 Dy. 121a at f. 121b, 73 E.R. 265. *See also* Holdsworth, *A History of the English Law* (2nd ed., 1937) vol. 7, 408.

[36] Holdsworth, *ibid.*, at 413.

[37] *See, e.g., Milsom, Historical Foundations of the Common Law* (1969) 326.

[38] Another example is the legal analysis applied where conversion deals with a wrongful taking and a wrongful detention. The first of these was originally dealt with by trespass, the second by detinue. When conversion was being extended to ap ly in these cases, two inconsistent techniques were adopted which remain a confusing part of the current law. A wrongful taking was originally regarded as a trespass but it was eventually held that conversion could apply and that the act of taking was a constructive conversion. In this way, the term "conversion" itself was used in a broad sense, not simply as converting to one's personal use (since not every taking will have that element). For a wrongful detention, however, it was held that a refusal by the holder of the owner's request to return the property is not in itself conversion, but strong evidence of it. Salmond, *supra,* n. 1 at 52, points out the inconsistency:

allowing the five (and more) causes of action that cover the area to operate in some kind of harmony. But we are so far distant from the former law that few are probably aware that this process has taken place.

These are the forces that shape the current law. They have fragmented the law into discrete areas, serving no modern purpose. They produce legal and technical differentiation for its own sake.

D. Summary

Reviewing the former law serves two purposes. It underscores the many odd aspects of the current law and it explains their origin. For the most part, the law is riddled with curious distinctions and has evolved in highly technical ways. It developed, not in response to the demands of policy, but by historical accident, in the process of bridging gaps in the jurisdiction of the courts. It is a response to now rejected procedural ideas that were once the embarrassment of the English system of justice. The correction of the jurisdictional and procedural problems should have allowed the law to develop in a more rational way, but that has not happened.

Some of the oddities listed above are usefully summarized here: the law draws distinctions based on the nature of the plaintiff's interest in the property, which provides the basis for selecting among five (and more) torts for the appropriate route to a remedy. The law also draws distinctions on other factors, such as whether the wrong complained of was direct or indirect, whether it was the result of misfeasance and nonfeasance, whether the interference with property was nominal or serious and whether the injury was to dominion, possession or a right to possession.[39] The modern law usually takes most of these factors into account when deciding that a wrong has occurred, selecting the kind of remedy, and settling on an appropriate level of damages. Legacies of history, however, require these factors to find expression in various disparate causes of action dealing with rights in personal property.

Comparing the actions reveals indefensible levels of inconsistency. Different actions provide different kinds of remedies, different rules for assessing damages, and different principles for determining liability. Even the constituent elements of the actions are antiquated, based largely on a belief in the equivalence of money and property and focusing not on ideas of ownership but rather possession (and, in the process, applying peculiar rules for determining who has possession).

> If we use the term conversion in its original and strict sense, it is clear that neither a taking nor a detention is anything more than evidence; each amounts at the most to a constructive conversion, a conversion in law though not in fact. While if we adopt the wider sense, and mean by conversion any deprivation of property, it is clear that both a taking and a detention are actual conversions, if there is no lawful justification for them, and that there is no distinction to be drawn between them. To say that taking is a conversion, but that detention is merely evidence of one, is to use the term conversion in two diverse senses, its old and its new; it is to retain the old historical theory of trover in one case, and to abandon it in the other.

[39] Trespass is considered interference with possession — even though the plaintiff need not necessarily have had physical custody of the property — while detinue and conversion are consider to be interference with *rights* of possession: *see* Pollock and Wright, *An Essay on Possession in the Common Law* (1888) 28.

Signs like these often suggest the need for reform, a question pursued in the next Chapter.

CHAPTER IV THE NEED FOR REFORM

A. Introduction

Chapters II and III show that the law of wrongful interference with goods is flawed. Many of its defects are attributable to historical development. The great nineteenth century reforms but steps in this direction have been hesitant at best.

The need for legislative restatement arises when the engine of the common law is unable to keep legal principles operating logically and consistently in changed economic and social settings. This Chapter considers to what extent modern courts have managed to keep the law up to date, and factors that may be responsible for the delay in legal development.

B. The Likelihood of a Common Law Solution

1. Detinue, its Death and Revival

At one point, in the eighteenth century, it appeared that one action would eventually answer in most cases dealing with wrongful interference with property. Conversion virtually replaced detinue and trespass to chattels. Had this development continued, it would have been a fairly straightforward matter for the usual process of the common law to refine the appropriate principles, from case to case, as new legal issues emerged.

Why did conversion prevail, at least temporarily, over its rivals? The similarities between conversion and trespass are marked. Possibly, conversion overtook trespass because it applied in more cases. A remedy was more likely to be available in conversion than trespass. Whatever the reason, conversion eventually came to govern, particularly in more serious matters.

Detinue's popularity waned because of wager of law. Wager of law was mentioned in the last Chapter. A defendant could win the case by gathering eleven neighbours prepared to swear that the defendant had made a good oath (that they knew the defendant to be truthful). The defence had nothing to do with the facts of the case and allowed many to escape liability. Most areas of the law abandoned the procedure, but it was available in detinue until 1832.

Wager of law was never available in conversion. A claimant would prefer, if it was at all possible, to frame the claim in conversion instead of detinue. In time, conversion evolved to deal with most of the situations detinue had addressed:[1]

[1] F.W. Maitland, *The Forms of Action at Common Law* (1963) 71.

> Thus, by the beginning of the eighteenth century, Trespass and the various branches that it had thrown out, had come to be the only forms of action that were in very common use...Trover covered, and more than covered, the old province of detinue.

With the decline of detinue, the law became more straightforward. Trespass to chattels and trover provided almost a complete array of remedies and, in many cases, trover prevailed over trespass.

In 1832, legislation abolished wager of law,[2] breathing new life into the action of detinue, which by then had been largely unused for over one hundred years. Where the development of the law had been following a course of simplification, in the form of the single tort of conversion, there was again a rival. From that day until this, consequently, the law has developed in several separate channels (trespass to chattels, detinue, conversion and case) instead of one.

2. The Common Law Actions in The 20th Century

Chapter II discussed in some detail the classical features of the common law torts. This description, although supported by the leading texts, may not truly reflect the views of modern courts. A computer assisted search of current Canadian law, for example, shows many cases deal with interference with property. Only a few of these make any more than a passing mention of the law. More often, the court notes that a claim was made for damages for damage to property or a wrongful detention[3] and later, without much discussion, awards damages or declines to do so. If the property is damaged or unrecoverable, damages are assessed as the value of the property. Otherwise, the plaintiff's actual losses decide the award.

Modern courts have proved to be hostile to many of the positions technically advanced by the law. The principle that conversion measures damages as the whole of the value of the goods is an instance. In one case,[4] for example, a person, B, salvaged, repaired and used a tractor abandoned in tidal waters by the federal government. C learned of B's efforts and arranged to purchase the property from the government for a hundred dollars. The repairs, however, raised the tractor's value closer to eight thousand dollars. C wasn't interested in the property. He saw a way of making some money and sued the salvager in conversion, expressly refusing to claim detinue. The court could not bring itself to require the salvager to pay the whole of the value of

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[2] 3 & 4 Will. IV, c. 42, s. 13.

[3] *See, e.g., Cashman Holdings* v. *Canada Trustco Mortgage,* [1990] B.C.D. Civ. No. 2769-05 (S.C.). Few cases spend much time worrying about the principles applied: *see, e.g., McLachlan* v. *C.I.B.C.,* [1989] 4 W.W.R. 341 (B.C.C.A.) where the Court of Appeal, and the two trial court decisions (one on liability, the other damages) do not deal with at all with the law relating to trespass to chattels and the principles that apply when calculating damages. Even the vocabulary of the law has changed. It is unusual, for example, to find a court referring to detinue. More often, the court deals with a "wrongful detention." If the claim is classified, it is usually referred to as conversion. The OLRC Study Paper notes the paucity of trespass to goods cases litigated, which cannot be explained by the broad scope of conversion, since conversion does not answer in every case that trespass provides a remedy.

Of particular value, in the OLRC Study Paper, is the empirical research that was carried out. The survey analyzed court files from Essex County and the Judicial District of York during 1981/82. The authors of the Study Paper note that the law is both little understood and seldom taught "in common law faculties of law, falling as it does between the law of torts and the law of property." Moreover, the survey "revealed that the profession in fact often does not classify causes of action in this area under the relevant label or labels. Instead, they utilize the freedom offered by our system of fact-based pleading." (at 35).

[4] *Dixon* v. *Spencer,* (1951) 4 W.W.R. 222 (B.C.S.C.).

the repaired property. Instead, it found (arguably against the evidence) that there had been no conversion. The plaintiff received no remedy whatsoever.

A refusal to apply settled law, and the inability to give an owner an appropriate remedy, is a pretty clear sign that the law does not advance contemporary policies. Courts appear to require more flexibility than the current law grants them.

Construing the state of the modern law is necessarily impressionistic. Possibly, there is a gap between theory and application. What clues there are suggest that the common law is, in these areas, undergoing a process of synthesis but one that is not taking place overtly. If the law is being altered, the changes taking place are implicit, usually subtle, at times almost imperceptible.

There are, of course, cases that endorse the technical features of the common law actions.[5] Not all of these seem to have completely mastered the more complex aspects of the law, however. Consider, for example, *Rowbotham* v. *Nave*.[6] R loaned money to N. A chattel mortgage secured the loan. Under the terms of the mortgage, the lender had no immediate right to the possession of the property. Consequently, when the borrower wrongfully sold the security, the lender could not bring an action in trespass to chattels, detinue or conversion. The court did acknowledge that "an action may lie for the damage to [the lender's] reversionary interest in the goods" but, like a court of the nineteenth century, did not further consider the issue. A failure to make out the action supported by the writ was an end of the matter even where the defendant was clearly responsible for a different wrong. Perhaps the plaintiff had pleaded incorrectly. Under modern rules, however, it is difficult to make a fatal mistake because a plaintiff is only required to plead the facts, not characterize the legal wrong. Mislabeling the action is not usually fatal.[7] Perhaps the court was mislead by nineteenth century precedent decided under the old procedural rules. Whatever the explanation, the court's approach resembles more that of a pre-*Judicature Act* court than a modern day one.

The legal rules for the assessment of damages is another area that still carries forward technical features of the old forms of action. It was mentioned in Chapter II that the British Columbia Court of Appeal, in the *Shewish* case, has recently affirmed that where trees are logged from property,[8] there is a mild and there is a severe rule for measuring damages. A defendant who acts innocently or negligently must pay the plaintiff the market price of the lumber, less the costs of cutting the trees and taking them to market. A defendant who acts intentionally, however, is not permitted to deduct the costs of cutting down the trees. When damages are assessed in this

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[5] *See London Drugs* v. *Kuehne & Nagel Int.,* (1990) 45 B.C.L.R. (2d) 1, 88-93 (C.A.) *per* Southin J.A (dissenting).

[6] (1991) A.C.W.S. (3d) 1296, O.J. No. 105.

[7] *See, e.g.*, OLRC Study Paper, 35.

[8] The same principles apply where minerals are extracted.

way, the plaintiff is compensated for actual losses and something more. Damage assessment has a punitive element.[9]

It seems sensible enough that a person who acts intentionally should be subject to a greater penalty than one who acts innocently, but it is not completely obvious why the law has settled on this particular approach for distinguishing between different kinds of wrongs. An approach more consistent with modern principles of damage assessment might be to first determine an amount to compensate the plaintiff for losses and then determine an additional amount as aggravated or punitive damages. Why is the additional component in damage awards made in these cases determined in such an arbitrary way?

Suppose B mines A's coal without permission. What amount of money would compensate A for the loss? A has lost the opportunity to sell the coal. It would make sense, consequently, to compensate A for the lost profit. That would be measured by the market value of coal less the costs of severing and bringing the coal to market.[10] The mild rule of damage assessment, consequently, focuses on compensating the plaintiff for what has actually been lost. It was not the mild rule, however, but the severe rule that was originally applied by the courts in these cases.[11] Why did the courts originally select the severe rule to assess damages?

The reason is to be found in the way claims were formerly brought before the court. The first cases dealing with this issue were claims in trover. Trover relates to the conversion of a chattel. Consequently, the court's attention was not on the extraction of coal, but what happened with the coal once it was severed from the land and became a chattel. So far as the law was concerned, no wrong occurred until after the coal was mined, when the defendant transported it to market for sale. The plaintiff's losses, consequently, were not based on the value of coal before its extraction but after it had been mined. For that reason, the defendant was not entitled to deduct the costs of mining the coal.

Even though procedural rules forced this kind of analysis, pre-*Judicature Act* courts were aware that it overcompensated the plaintiff. Fortunately, principles of damage assessment were relatively fluid and it was possible for the courts to modify them in such a way that the so-called "mild rule" — aimed at simply compensating the plaintiff for actual losses — applied in cases where the defendant acted innocently or negligently.[12]

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[9] Ironically, it is generally held that punitive damages are not available in trover: *see supra,* Chapter II, n. 69. Clearly, however, while the courts would not make an express award of punitive damages, parts of some awards serve the same kind of purpose.

[10] In the particular facts of the case, this formula might be unduly simplistic. Mining the coal may have caused damage to land formerly used for recreational purposes. Or the coal market might be depressed and a well advised person would wait to market the coal. Even so, while there may be special circumstances to take into account in particular cases, the general principles of damage assessment are clear.

[11] *Livingstone* v. *Rawyards Coal Company,* (1880) 5 App. Cas. 25, 39-40 (H.L.).

[12] A damage award aims at making the plaintiff whole. Damages can focus on one of three objects: (1) replacing or repairing the damage done to the plaintiff's property; (2) giving the plaintiff the profit the plaintiff would have made from removing the trees (Or minerals) from the land; (3) giving the plaintiff the profit the wrongdoer made from dealing with the plaintiff's land. (Items (2) and (3) may be the same amount, but they represent different premises for damage assessment). Suppose D mines and markets P's coal. In the ground, the coal is worth $50. Brought to the surface, it is worth $75 (the difference in prices represents the costs of extraction — in this case $25). Brought to market, the coal is worth $90 (the cost of transport, consequently, is $15). If damages are assessed on the profit the plaintiff could have made, damages

No reason exists for retaining these principles of damage assessment, based as they are on technical features of the law that have now been abandoned. The courts should assess damages to compensate for the plaintiff's actual loss, using, essentially, the mild rule for that purpose. If there is more in the defendant's behaviour that justifies compensation, it should be dealt with in the form of aggravated or punitive damages.

3. Failure of Earlier Reforms

Not only the common law has failed to come to terms with these torts. Legislation has not helped very much either.

For example, detinue's popularity was due to the unusual remedy it provided, namely the return of property. For this reason, its revival was welcomed after the abolition of wager of law.[13] A person not content with an award of damages (the only remedy available in conversion) would now frame the claim as one of detinue. But detinue's exclusive right to return property lasted for only another twenty years. Legislation enacted in 1854 allowed the court to order the return of property in any case involving a wrongful interference with personal property.[14] This reform effectively removed the need for the action of detinue,[15] and yet it survives to this day[16] as the method by which a court can make an order compelling the return of property. The legislative reform is largely ignored.

Suppose B takes C's goods. The law could have developed in this way:

> *In the circumstances, the court decides that an award of damages (assessed as the whole of the value of the goods) is inappropriate, it orders the return of the property, under its statutory power to do so.*
>
> *Instead, the courts say: This is not conversion. It is detinue. And then it orders the return of the property.*[17]

Legal analysis continues to be shaped by the common law and the forms of action.

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should be assessed as market value, less all of the costs of extraction and transportation. P should receive $50. This is the amount the "milder" rule would award P. If the severe rule applied, P would receive $75, more than the actual loss (the additional amount is arbitrarily set at the cost of extraction).

[13] The abolition of wager of law did not have as its reason the resurrection of detinue, but the removal of an obsolete form of defence generally.

[14] Supra, Chapter III, n. 13.

[15] Except in a very few instances involving bailment.

[16] Modern courts mention it even where it is inapplicable, almost as if it were part of an incantation: *see, e.g., Com/Mit Hi-Tech Services* v. *Valley-Vu Realty (Ottawa),* (1990) 21 A.C.W.S. (3d) 506 (Ont. H.C.J.).

[17] *See, e.g., Mayne* v. *Kidd,* (1951) 1 W.W.R. 833 (Sask. C.A.). In some cases, the statutory power to order the return of property is applied, shaped by the principles ofdetinue, so that a court will still order damages if the goods are of no special value, or leave the matter to the defendant's option.

The forms of action have even survived the reforms introduced by the *Judicature Acts* in 1873 and 1875. In Chapter I, Salmond on Tort[18] was quoted as stating that in 1923 it is no longer necessary to distinguish between trespass and related actions on the case. This sentiment was frequently expressed early on in Canadian cases and probably should have been true, since the "new" procedure required the pleading of the facts, not the cause of action.[19] A late nineteenth century Ontario case — *Stimson* v. *Block*[20] — made the following observations:[21]

> The old learning on the subject of 'conversion' need not be imported into the system introduced by *The Judicature Act,* which provides for redress in case the plaintiff's goods are wrongfully detained or in case he is wrongfully deprived of them. In all such cases the real question is, whether there has been such an unauthorized dealing with the plaintiffs property as has caused him damage, and if so, to what extent has he sustained damage.

A hundred years of judicial development has not quite brought the law to this point. A legislative push is probably necessary.

4. Factors That May Explain Why the Law Has Stopped Developing

This area of the law is one of the few that has somehow managed to resist the great nineteenth century reforms. It is difficult to explain why. One possible reason, operating in other areas that have similarly remained unchanged,[22] is the sheer complexity of the former law combined with the relatively rare times it is necessary for a court to consider the matters.[23] Cases

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[18] *Supra,* Chapter II, n. 35.

[19] The *Judicature Act* reforms encouraged ajudicial rethinking of the common law immediately after they were passed and for many years following, possibly until the last of the judges familiar with pre-*Judicature Act* procedure retired from the bench. Certainly, more recently many cases are decided by reference to pre-*Judicature Act* authority without considering whether changes in procedure cast doubt upon the soundness of the precedent. The law of set-off, canvassed in our *Report on Set-Off* (LRC 97, 1988) reflects this kind of evolution in judicial thinking. Immediately after the *Judicature Acts,* the seminal cases on modern set-off were decided, recasting the principles in light of the new procedure. Modern courts have recently modified some of these principles by reference to "binding" *pre-Judicature Act* authority, possibly without a sufficient appreciation of the quite different procedural rules within which set-off originally developed.

[20] (1886)11 O.R. 96.

[21] The observation has been endorsed in a number of cases. *See, e.g., Dzarnan* v. *Riggs,* [1927] 3 W.W.R. 433 (Alta. C.A.); *Basted* v. *Grafton,* [19481] W.W.R. 614 (B.C. Co. Ct.). In *Basted,* ironically, the judge refers to the quote from *Stimson* — which suggests that pre-*Judicature Act* authority should be treated with suspicion — and then simply adopts without consideration pre*Judicature Act* principles relating to punitive damages: *see supra,* Chapter II, n. 73. The issue had been previously considered in a half page decision by the Manitoba Court of Appeal, *Campbell* v. *Northern Crown Bank,* (1914) 7 W.W.R. 321. The court, relying on Halsbury, said that the claim for punitive damages in conversion was "plainly not justified by authority." The authority cited by Halsbury, however, does not deal with punitive damages at all. *Finch* v. *Blount,* 7 Car.& P.478, 173 ER. 212, deals with whether a defendant can reduce liability for conversion on the basis that a third party also has an interest in the goods. It is in this way that much of our modern law of conversion has been handed down to us. Senseless distinctions, sometimes supported by case authority, sometimes not, are accepted at face value.

[22] Such as the law of set-off.

[23] One example of the daunting task emerges from the OLRC Study Paper. It is a very carefully researched and well drafted document and its authors are expert in this area of the law. They conclude, however, that the action of trespass to chattels should retain the element requiring damage or loss to arise from a direct act (as opposed to an indirect act: *see supra,* Chapter II for an explanation of the distinction): "It has been suggested in the United States, where the directness requirement seems to have disappeared, that the distinction it calls for is "artificial." We do not agree. If the policy of the law is to discourage scrambles for possession, and generally is one of concern with intimate relations with goods, directness or some requirement like it would seem to have a role to plan. We have concluded that there is no reason to do awar with such a requirement." (at p. 13). This decision is made, however, without a consideration o the companion action on the case (Fleming, *The Law of Torts* (7th ed., 1987) at 57, says "For mere damage there had been an action on the case since the late 14th century, preceding the action for conversion by 100 years.") which allowed recovery for damage arising indirectly. The decision in the OLRC Study Paper, consequently, does not adopt the policy that the law should only protect against loss arising from direct actions. It merely perpetuates the borders between two causes of action which, together, provide recovery for direct and indirect actions. Modern legislation should encourage a

involving rights in personal property arise frequently enough. These cases, however, do not seem to raise questions that involve the court in a major reconsideration of the basic principles of the law. Where contract has evolved dramatically, and continues to do so, and negligence has been similarly transformed, the law dealing with wrongful interference with personal property remains, as if frozen in amber, a monument to the past.

Perhaps the reason is, in part, the absence of academic activity in this sphere or, at least, the direction of scholarly interest that does exist. A legal subject typically attracts the attention of a whole spectrum of viewpoints, ranging from historical development to future evolution. Scholarly work dealing with wrongful interference with personal property mainly stresses the fascinating details of its history. Few express any interest in directions for its improvement.

C. Conclusion

The law governing wrongful interference with goods, with all of its inconsistencies, gaps, redundancies and curiosities, is no longer serving us well. It is true that courts can often overlook the baggage of the centuries and arrive at fair, reasonably straightforward solutions to legal disputes. Even so, the defects of the law rise up often enough to cause mischief and injustice. We are far removed from the judicial and social context in which the features of the law last made sense. There is a need to review and update the relevant legal principles and clear away the sometimes baffling encrustations of earlier times. It is our tentative conclusion that legislation should be enacted to restate the principles of the law that apply when there is a wrongful interference with personal property. The details of this legislation are considered in the next Chapter.

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blending of the causes of the action. Similarly, the contemporary acceptance of the distinction between conversion and trespass does not seem to be based on a consideration of the policy for the rule. The distinction was adopted to reinforce the boundaries between the forms of action, a policy abandoned in 1873 when legislation was enacted to finally free the law of the tyranny of the forms of action: *see supra,* Chapter II, n. 36, and Chapter III, n. 14.

CHAPTER V REFORM

A. Introduction

This Chapter identifies the principles that should be embodied in revising legislation. In this task, we are assisted by the earlier work of the English Law Reform Committee[1] that led to the enactment of the *Torts (Interference With Goods Act) 1977* and the *Study Paper on Wrongful Interference with Goods* published by the Ontario Law Reform Commission.[2]

B. Models For Reform

Sometimes revising legislation need only address a few issues, leaving most of the common law alone to be developed by the courts. At other times, something more substantial is called for. Two basic approaches for a larger undertaking are available: one operates against the background of the current law; the other replaces it entirely.

Our study suggests that, for wrongful interference with goods, limited intervention is unlikely to accomplish very much. It is for this reason that England has adopted, and the O.L.R.C. Study Paper recommends the enactment of, detailed revising legislation.[3]

The English and the Ontario solutions take different approaches, but each attempts to retain some of the lessons of the current law. The English legislation recasts the common law torts by abolishing detinue and enlarging the sphere of conversion. What is interesting about this approach is that it mirrors the state of the law that existed in the eighteenth century, when the action of detinue was largely neglected.[4]

The O.L.R.C. Study Paper would retain all of the existing actions, reshaping them into a single tort of wrongful interference with goods.[5] Essentially, the legislation builds on the current law. Any action brought for wrongful interference will provide the same remedies that exist at common law as well as any additional remedies provided under the legislation.[6]

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[1] The Committee's Report (the English Report) was reviewed critically: *see* D.J. Bentley, "A New-Found Haliday: The Eighteenth Report of the Law Reform Committee (Conversion and Detinue)," (1972) 35 M.L.R. 171; but the legislation based on it was well received. The legislation implemented the Committee's recommendations only to a very limited extent: Brazier, *Street on Torts,* (8th ed., 1989) 34.

[2] The OLRC study Paper was written by R.L. Simmonds and G.R. Steward, with David P. Paciocco.

[3] The English legislation is in Appendix A. The draft suggested in the OLRC Study Paper is in Appendix B.

[4] And before *Fouldes* v. *Willoughby* had drawn back the borders of conversion. *See supra,* Chapter II, n. 36, and Chapter III, n. 14; *see also Wilbraham* v. *Snow,* (1669) Wins. Saund. 47a.

[5] Section 1.

[6] Section 3.

While there are differences between these two approaches, at heart they attempt to give effect to the same policy: the conceptual unification of the torts.

An approach considered but rejected in both England and Ontario is the complete replacement of the common law with a statutory tort. The O.L.R.C. Study Paper discussed the issue in these terms:[7]

> All of this raises the question of whether the law might not be simplified and made more accessible. We considered a number of proposals. One, to which initially we were very attracted, was the creation of a new cause of action for wrongful interference with goods. Depending upon the characteristics of the claimant's case there would be various forms of relief available: various forms of specific relief, various measures of damages. The existing nominate torts would be swept away, and the conceptual unity of the law in this area would be emphasized.
>
> The Law Reform Committee in its Eighteenth Report considered just such a proposal. They rejected it for reasons which seem to us to be sound. The drafting of a statute like this would likely be very cumbersome indeed. To this we would add that it would seem to require a more complete inquiry into the field of personal property law than we or the English were able to accomplish. And it is unclear to us that such an inquiry would be warranted by the problems it might unearth.

Both England and Ontario seem to believe that a statutory tort must involve a comprehensive restatement of the law — in effect, codification.[8] Codification is a difficult technical exercise. It is not clear, however, that either jurisdiction fully considered the case in favour of a statutory tort.

Retaining the general outlines of the law (and, in both the English and Ontario models, much more of the law than that) may seem the simplest route for reform, but it is a costly one. Problems can be expected from stating the law in a technical and outdated fashion (or resting it on such principles) in terms ordinary people find baffling and even legally trained people have tended to abandon. A statutory tort need not codify the existing law. There is more than a little that can be said in favour of a new start, where legislation restates the general principles to be applied, even if the new legislation fails to address every conceivable issue on which some sort of legal solution has been arrived at in the past eight hundred or so years.

As to the need for detailed legal research, when considering reform of any area of the law it often makes sense to deal with the existing principles as a whole. The law usually consists of rational policy choices and much of modern conduct and commerce will be carried out in reliance on it. In these cases, more often than not, it is necessary to identify the current policy of the law, determine whether it remains valid and devise options for change.

Where, as with wrongful interference with goods, the whole of the law owes less to rational development than historical accident, is unfamiliar to most and largely ignored by lawyers and

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[7] OLRC Study Paper, 35-6

[8] English Report, para. 32.

courts, the exercise seems hardly worthwhile.[9] It makes more sense to start afresh, directly identify the policies that should be advanced by the law and assemble these into a rational structure, in the form of draft legislation.[10]

C. General Principles

Our review of the existing law suggests that most of its complexity is unnecessary and arises from two structural elements. These are:

i. employing a number of torts to deal with damage or loss arising from an interference with property. This feature emphasizes differences between various related actions rather than their similarities.

ii. providing largely inflexible remedies that are selected by a technical process of channelling. The appropriate remedy is picked by reference to the nature of the person's interest that is harmed, the nature of the wrong, and the degree of loss it causes. Modern law no longer depends upon a formal channelling process to select a remedy. Instead, courts usually enjoy some flexibility in settling on an appropriate remedy.

These are the main concerns new legislation must address. They suggest that revising legislation must be based on four general principles:

- Remedies should be made available through a single cause of action,
- The action should be available to anyone with an interest in the property,
- Damage awards should compensate for a claimant's actual loss, and
- The courts should be able to select from a full range of remedies.

1. A Single Tort

First, at the highest level of generality, no purpose is served by fragmenting the various causes of action. A single, statutory tort devised to deal with any wrongful interference with

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[9] In our work, we have encountered other areas of the law where it has seemed pointless to base reform on a detailed analysis of the existing legal principles: *see, e.g., Report on Distress for Rent* (LRC 53, 1981). This is usually true of areas of the law which have lain dormant, ignored or largely unchanged for a century or more. It is also these areas of the law which the courts are least able to handle. Legal principles plucked from the nineteenth century are often times too difficult to deal with because we no longer understand the social or legal context in which they were developed. In these cases, the courts see their task solely as identifying the legal principle, not its policy rationale. Legal principles are accepted at face value.

[10] It is not unusual to find areas of the law which, while technically still alive, are largely ignored. In B.C., *e.g.,* the *Commercial Tenancy Act,* R.S.B.C. 1979, c. 54 has numerous provisions which, if applied, would produce unreasonable results. Many of its provisions are indecipherable. There is a need to replace the legislation, but only because it no longer does any good in its current form. It is not causing much mischief, however, because its provisions are entirely ignored. *See Report on the Commercial Tenancy Act (LRC* 108, 1989).

property would allow similar situations to be resolved by reference to a common and consistent set of legal rules. The statutory tort, consequently, could provide a remedy in any case that a person directly or indirectly interfered with property wrongfully, such as stealing it, disposing or damaging it, or refusing to return it to a person entitled to have it. No purpose is served here by distinguishing between classes of wrongs, a source of much of the bewildering complexity of the current law.

2. Available to Anyone with an Interest in the Property

From this position, it follows that anyone with an interest in the property, who has suffered loss as a result of another's actions, should be entitled to a remedy under the new statutory tort. This is the second principle that should shape the new legislation. The need to distinguish between the kinds of interests a plaintiff may have (actual possession, a right to possession, future or residual rights, interrupted possession, or proprietary rights) arises only when the court must choose an appropriate remedy.[11] Not everyone, for example, should be entitled to the return of property, and the size of a damage award will depend upon how great an interest the plaintiff had in the goods.

Nothing is accomplished by distinguishing between classes of interest to determine who can bring the action. The nature of the interest will determine the remedy, not the route by which the claim is brought before the court.

3. Compensation Limited to Actual Loss

The approaches to assessing damages that the common law actions currently apply should be abandoned in favour of modern methods for determining compensation. Consequently, the third principle is that damages should be measured as the actual loss suffered by the claimant. The claimant's actual loss will usually consist of two elements: the diminished value of the property and the lost opportunity to use the property. [12]

4. A Full Range of Remedies

Lastly, the courts should have sufficient flexibility to provide an appropriate remedy in the circumstances. Consequently, new legislation should empower the courts to grant one or more remedies from a comprehensive list.

Compensating for actual loss is only one of the functions of an award of damages. Damages can be used for other purposes, to dissuade certain conduct or punish those whose actions are high handed or unconscionable. The court should have a full discretion to make an appropriate

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[11] See further Chapter II.

[12] This approach resolves a number of issues. E.g., currently a bailee may bring an action and recover the whole of the loss. The bailee would be under an obligation to account to the owner, but the owner may be without a remedy if the bailee absconds with the money or becomes bankruptcy. The statutory tort would allow anyone affected by the wrongdoer's actions to join in the proceedings.

award of punitive, exemplary or aggravated damages, even in circumstances where a person with an interest in the property has suffered no actual loss.[13] Such an approach ensures that the law is able to provide an adequate remedy in any case where a person wrongfully interferes with another's property

In addition to awarding damages, the court should be able to order the return of the property. In some cases, all that will be required is a declaration as to rights of ownership or possession (including the possibility that one person should hold the property in trust for others). In other cases, in order to untangle the various interests people have in property, it will be necessary to sell it and divide the proceeds, in a fashion similar to partition of land, where a dispute arises among co-owners. [4]1

Conversion currently operates as a kind of forced sale. The wrongdoer is responsible for the whole of the value of the personal property and, upon paying that amount, becomes the owner of the goods. There will continue to be circumstances where this is a useful solution to a dispute. The court, consequently, should also have power to transfer ownership of property.

Additional options should be available. The court, as a general matter, is fully empowered to make a wide range of orders. For example, a court should be able to order the return of property before trial, perhaps requiring security to be posted. It is empowered to do this under the Rules of Court.[15] In some cases, all that is needed is an order that the defendant stop interfering with the property. A court can order an injunction as part of its general equitable jurisdiction.

5. Summary

It is not a difficult task to identify the primary features of a new statutory tort to replace the existing common law actions. Moreover, starting afresh, it is clear that its outlines need not be complex. Defining the general principles that should apply in precise enough terms should allow the courts to begin again in determining legal rights and remedies, suitable for contemporary social and business needs.

D. Specific Issues

1. Relationship with Negligence

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[13] Aggravated damages are compensatory: *Voruis* v. *I.C.B.C.,* [1989] 1 5CR. 1085. The term "punitive damages" refers to those kinds of damages that are designed to punish, or demonstrate society's disapproval of particularly high handed or immoral acts. The court will not award punitive damages where there has already been a sanction for criminal conduct: *Rioux* v. *Smith,* (1983) 48 B.C.L.R. 126 (C.A.). *See also B.(A.)* v. *J.(I.),* (1991) Alta. L.R. (2d) 81 (Q.B.).

[14] *See further Report on Co-Ownership of Land* (LRC 100, 1988).

[15] Rule 46. Rule 46 implemented the Commission's recommendations in *Report on the Replevin Act* (LRC 38,1978).

The law of negligence has developed extensively during this century. Many cases involving interference with personal property are dealt with under the head of negligence. The common law actions once served to provide a remedy in many cases where the wrongdoer's actions were negligent. Today the law tends to distinguish between intentional harm and negligent harm. While some commentators suggest that the line is firm, there is authority in British Columbia which holds that the common law actions apply equally in negligence. [16]

Should the statutory cause of action apply in situations addressed by the law of negligence? Even if the legislation were drafted to carefully delineate the boundaries between the statutory tort and negligence, as a matter of careful practice the plaintiff will ordinarily claim a remedy under both. We would appreciate advice on this issue, but our tentative view is that it is not one that is unduly troubling. Little if anything is gained by attempting to minimize an overlap between the statutory tort and negligence.

2. Third Party Interests, Defences and Representative Actions

The prohibition against defending on the basis that another person has an interest in the goods is not one that needs to be carried forward. Courts have little difficulty in sorting out rights and remedies where there is more than one plaintiff or defendant. Of course, a defendant should not be able to escape liability solely because more than one person has an interest in the property.

Earlier, it was tentatively concluded that an award of damages should be measured by the extent of the loss the claimant has suffered. If there is more than one person with an interest in the property, several approaches might be adopted:

- The claimant could recover an amount based on the claimant's interest.
- The claimant could recover on behalf of all those having interests in the affected property.
- All person's having interests in the property could be added to the action as plaintiffs or third parties.

A defendant must be able to raise the interests of others to determine the correct award of damages. For that reason, legislation should allow a defendant to defend on the basis that someone else has an interest in the property (and join such a person as a third party to the proceedings)

(a) if authorized by the third party who, if the third party had performed the act, would have had a defence against the plaintiff's action; or

(b) if the third party also would have a claim against the defendant for the same wrong.

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[16] *See* the discussion *supra,* Chapter II, n. 19.

In some cases, it may not be clear that others have an interest in the property. Even if the defendant does not raise that possibility, where the plaintiff is awarded damages on the basis of being the sole owner of the property, the defendant's liability should be limited to the judgment given in the first action.

Is there a need for special rules to deal with representative actions? Rule 5 of the Rules of Court already addresses two cases, where one person represents others with identical interests and where a trustee represents beneficiaries of the trust.

Rules 5 (17) and (18) satisfactorily address any problems that may arise where there are equitable interests involved. The Rules relating to representative actions, however, are incomplete since they only operate when all parties have the same interest in the proceeding (Rule 5(11)). Often, the interests of those in the property will not be identical: one may be an owner, another might have a lease, another might have had limited rights of possession. Even where owners are involved, they may have unequal shares.

It would seem, consequently, that either a new rule should be added, or the legislation should specifically address the issue of a representative action where not all interests are identical. This is not an entirely alien concept. The *Wills Variation Act,* for example, provides:[17]

> 8. (1) Where an action has been commenced on behalf of a person, it may be treated by the court as, and so far as regards the question of limitation shall be deemed to be, an action on behalf of all persons who might apply.

Legislation along these lines should provide a suitably flexible response. A court, alerted by the defendant or the plaintiff about other possible interests in the property can make an appropriate order.[18]

3. Co-owners

Suppose property is disposed of or destroyed. Does it matter whether the wrongdoer is a stranger or someone who also has an interest in the property?

One might guess that it would make no difference. An innocent co-owner who suffers loss as a result of the action of another co-owner should be entitled to a remedy. The law, however, does not fully agree with the proposition. The innocent co-owner is entitled to a remedy if the property is damaged or a sale successfully transfers the innocent co-owner's interest to another[19]9 But no remedy is available if one co-owner deprives another of possession and refuses to return

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[17] R.S.B.C. 1979, c. 435, s. 8.

[18] The court is prepared to take into account the interests of persons who are not a party to the proceedings regarding tort claims: *see, e.g., Wells* v. *McBrine,* (1988) 33 B.C.L.R. (2d) 86 (C.A.).

[19] *Morgan* v. *Marquis*, (1854) 9 Ex. 145,156 ER. *62;Henderson* v. *Rouvala,* [1923] 1 W.W.R. 467 (B.C.C.A.); *Jacobs* v. *Seward,* (1872) L.R. 5 H.L. 464,41 L.J.C.P. 221.

the property, nor if a co-owner purports to sell the property to another, but the transaction is ineffective to transfer the innocent co-owner's interest.

Some of these legal principles appear to be borrowed from the law dealing with land.[20] Co-owners of land are considered to each have full rights of possession. No one is entitled to exclusive possession of a part of the co-owned land. If B and C co-own land, B can't forbid C from occupying all or part of it, and is only entitled to legal redress if C prevents B from entering the land at all.

By analogy, co-owners of personal property have similar rights of possession. B cannot complain if C has possession of the property, since C as a co-owner is entitled to its possession. Only if C's actions amount to a kind of ouster by, for example, destroying the personal property, will B have a remedy.[21]

The position regarding attempted sales of property has another explanation. It is a legal principle that a seller can convey no more than the seller has. If one co-owner attempts to sell co-owned property, the sale is usually effective to convey only that owner's interest.[22] Other co-owners, consequently, lose nothing because the "sale" can't affect their interests. They cannot recover the property from the purchaser, however, because as a new co-owner the purchaser is entitled to possession.[23]

It has been forcefully argued that this aspect of the law requires amendment.[24] The analogy with co-ownership of land is a false one. For one reason, possession by one co-owner may very well amount to a total frustration of another's rights in the property.[25] Moreover, the law fails to provide a remedy in the situation where it is probably most needed:[26]

> It is submitted, from the point of view of protecting purchasers at large, that there is more reason for permitting a co-owner to sue his companion in trover than there is when only strangers are involved. So many times a co-owner may carry with him all the indicia of absolute title to a chattel by way of documents, receipts, etc., which might not be available to a fraudulent stranger purporting to sell such a chattel. Surely, if a wronged co-owner is to be given a remedy against anyone, it is better that he should be permitted to recover his damages from the person with whom he has been in legal relations and who

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[20] D.P. Derham, "Conversion by Wrongful Disposal as between Co-owners," (1952) 68 L.Q.R. 507, 511. *See further Report on Co-Ownership of Land, supra*, n. 14.

[21] *Rourke* v. *Union Ins. Co.,* (1894)23 S.C.R. 344.

[22] There are a few exceptions where a purchaser can acquire complete title. *See, supra,* Chapter II, n. 55.

[23] *McNabb* v. *Howland,* (1862) 11 U.C.C.P. 434 (CA.). *See however Rathwell* v. *Rathwell,* (1866) 26 U.C.Q.B. 179 (C.A.); *Smith* v. *Sterling Securities Corp.,* [1933] 3 W.W.R. 347 (Sask. C.A.).

[24] Derham, *supra*, n. 20.

[25] It is also anomalous that an ineffective sale is a defence if a co-owner sells the property, but no defence if the sale is by a stranger.

[26] Derham, *supra,* n. 20 at 511.

is the real wrong-doer, rather than from a purely innocent and surprised stranger who purchased in good faith from a co-owner?

In our view, co-ownership should not be the bar to relief it currently represents, and revising legislation should make that clear. But even more, there is a need for legislation to unravel disputes between co-owners. Some of these disputes will involve third parties. Others will consist entirely of a deadlock of views as to the use to which personal property should be put.

Disagreements like these may have no solutions if the co-owners are unprepared to cooperate with each other. Another part of land law provides a useful model for dealing with these kinds of disagreements. Disputes between co-owners are resolved by applying for partition of property (or sale of the property and partition of the proceeds).[27] The legislation creating these rights for co-owners of land does not apply to those who own personal property.[28] In our tentative view, this would be an equally useful procedure where ownership of personal property is shared.

Should any limits be placed on when one co-owner is entitled to relief because of the actions of another co-owner? Some conduct, objectionable by a stranger, is entirely consistent with a co-owner's property rights. Not every exclusive use of the co-owned property, for example, should entitle another co-owner to damages.

Probably the reformulation of damage principles provides a complete answer. A co-owner is entitled to recover compensation for actual loss. Any damages would be limited by the extent of the co-owner's interest, and it would also seem to follow that co-ownership of particular kinds of property must implicitly allow for limited exclusive use which would not give rise to damages.[29] Moreover, simply requesting damages would not prevent a court from granting a more appropriate remedy, such as partition or sale of the property.

4. Innocent Parties

The common law torts are remorseless. Someone who acts innocently may be liable for losses caused an owner of property, even where the person has been duped by another. For example, B buys property from C not knowing that it is D's property. B becomes a converter as soon as the property is delivered.[30] An auction4eer who conducts a sale of property put up by someone other than the owner is a converter, on delivery of the property. In some cases, a carrier, or agent,

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[27] *Report on Co-Ownership of Land, supra*, n. 14.

[28] *Re Waterer & Diakow,* [1991] B.C.D. Civ. 1642-02 (S.C.).

[29] *E.g.,* a request for the return of the property could be properly refused by a co-owner and not justify an award of damages for wrongfully detaining the property.

[30] *Greer* v. *Faulkner,* (1908) 40 5CR. 399. Fleming, *The Law of Torts* (7th ed., 1987) at 54-5; *Canadian* Pacific *Forest Products* v. Pacific *Forest Industries,* [1991] B.C.D. Civ. 4092-02 (S.C.); *Jerome* v. *Bentley & Co.,* [1952] 2 All E.R. 114; *Central Newbury Car Auctions* v. *Unity Finance,* [1957] 1 Q.B. 371. Contrast a purchase at a court ordered sale: *Buckley v.* Gross, (1863) 3 B.& S. 566, 122 ER. 213.

acting on behalf of another, may also be liable in conversion. The test has been framed as follows:[31]

> ...one who deals with goods at the request of the person who has the actual custody of them, in the bona *fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods or intrusted with their custody...A warehouseman with whom goods have been deposited is guilty of no conversion by keeping them, or restoring them to the person who deposited them with him, though that person turns out to have had no authority from the true owner.

The American Restatement adopts the position that an agent who both negotiates an acquisition or disposition of property, and completes the transaction (by receiving or delivering the property, as the case may be) is liable in conversion. But one who does only one or the other — only negotiates, or only completes the transaction — is not liable.[32] Similarly, a bailee, agent or employee who receives or redelivers property, unaware that a third party has the right to immediate possession, is free from liability.

The O.L.R.C. Study Paper also provides a defence for innocent handlers based on an objective test. It is available to

(a) persons who reasonably believe they are acquiring valid interests, or

(b) persons who reasonably believe they are acting under the authority of someone with a valid interest.[33]

It is not clear to us that legislation needs to set down a fixed rule for resolving these kinds of issues. Legislation could instead empower the courts, as a discretionary matter, to relieve any person who acts honestly and reasonably from liability. A distinction should probably be drawn between acting innocently and acting foolishly or recklessly, but these are factors that a court would naturally weigh when considering whether to exercise its discretion. Such a discretion would operate in much the same fashion that the discretion to relieve a trustee from breach of trust operates.[34] It would allow the court to relieve a person from liability to pay damages. The defence, however, would not allow a court to leave the defendant in possession of the claimant's property. The court can balance the interests of the parties involved and examine their actions. We tentatively prefer this alternative.

5. Return of Property to One Who Does Not Have an Immediate Right of Possession

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[31] *Hollins* v. *Fowler,* (1875) L.R. 7 H.L. 757,766-7, *per* Blackburn J.

[32] Ss. 231 and 233.

[33] Or who is acquiring a valid interest. Like the test set out in *Hollis* v. *Fowler, supra,* n. 31 the interest referred to must, if it had existed, justify the wrong complained of.

[34] *Trustee Act,* R.S.B.C. 1979, c. 414, s. 98.

Allowing any person with an interest in property to bring an action, in which the court may select from a list of orders, may raise some difficult problems. Sometimes, the plaintiff will not have an immediate right to possess the property (the owner who has leased the property for six months, for example). What is the court to do if the person entitled to possession does not take part? The O.L.R.C. Study Paper suggests that the court should be able to give possession to a person even if the person does not have an immediate right to it. We think this is correct in principle, although we see no need to address the matter in a separate section of legislation. Provided the legislation empowers the court to declare rights of possession, and direct who is to have possession, there is sufficient flexibility to settle upon an appropriate order. Much can be left to the good sense of our judges.

6. Other Issues

A review of any standard text reveals a profusion of issues arising in the context of wrongful interference with goods. The draft legislation set out in the next section addresses most of - these matters — often simply by identifying a general guiding principle. The draft legislation is annotated, which is, perhaps, the most efficient method of describing its anticipated operation. (The reader may wish to compare the suggested legislation with the more detailed English statute and the proposed Ontario Act. There are set out in Appendices A and B.)

7. Draft Property Law Amendment Act

1. HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. The *Property Law Act*, R.S.B.C., 1979, c. 340, is amended by adding the following as a heading after [section 49]:

The legislation could take the form of a separate Act. However, the *Property Law Act* also seems to be a sensible location. That Act now deals with land. We have also recommended that it be a mended to add a new Part 2 dealing with co-ownership of land and partition and sale of land. This draft contemplates a new Part 3, applying to personal property. The section number begins at s. 50, leaving room for the new sections recommended in *Report on Co-Ownership of Land* (LRC 100, 1988).

PART 3
PERSONAL PROPERTY

2. The following sections are added:

Definitions

50. In this Part

Currently, the nature of the interest determines the kind of action that can be brought. *E.g.*, only someone with possession can bring an action for trespass chattels. A person with a reversionary interest must bring an action on the case. Under the draft legislation, anyone with an interest can bring an action. The defendant is protected by the principle that damages may not be awarded to the extent that they are attributable to the interest of an owner who is not a party to the action. *See* s. 52(2)(b).

"interest" includes a security interest in property and a present or future right of possession or ownership of property,

A person with an equitable interest may bring an action or the matter might be pursued by the person who holds the legal interest. Often, the interests of the two are in conflict. *E.g.*, a person who borrows money and gives the lender a mortgage against personal property retains only an equitable interest in the property. If the property is damaged, each has a separate claim that may be brought under this Act.

"owner" means a person with an interest,

Self-explanatory

"property" means tangible personal property and includes

(a) money,
(b) a document representing an interest in tangible personal property, and
(c) identifiable property received in exchange, or as a substitute, for the original property,

The definition does not include intangible personal property, such as choses in action, nor property affixed to land. The current law makes similar distinctions. Documents of title are included. Interference with the paper that represents an interest in property - such as ripping up a winning lottery ticket, for example, or a cheque - can cause loss equal to interference with the property itself.

The usual view is that the common law actions are unavailable where the property involved is money, although remedies are available in equity. But there is no reason why the draft legislation should not provide a remedy where, *e.g.*, money is stolen.

The definition of property also includes substitutes for the original. In this way, a claimant can also look to, *e.g.*, money received by a wrongdoer who sells the property.

Wrongful Interference With Property

51. (1) A person, with respect to property owned by another, must not interfere with, or harm, directly or directly

The reference to "owned" triggers the definition of owner: *see* the *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 28(4).

Trespass to chattels provides a remedy where property is damaged. Conversion deals with serious damage (which amounts to depriving the owner of property rights) or where a person refuses to return the goods. Detinue also deals with wrongfully detained goods, but provides the alternative remedy of the return of the goods.

The draft legislation replaces the need for the common law actions with a single cause of action. The new cause of action will operate consistently, smoothing out the historical oddities that exist in the current law. Some thought was given to abolishing the common law actions, since the statutory action will be a complete replacement. However, there is some risk that a person who pleads incorrectly might be left without a remedy. There is no need to plough up the dirt road when the superhighway is built. The Act will be sued instead of the common law actions. They will become as obsolete as other actions - like assumpsit - overtaken by modern remedies.

The section deals with intentional acts as well as negligence, embracing the same kinds of behaviour as the common law torts.

The language used to describe interference with property is broad enough to embrace any kind of dealing, even where the wrongdoer, for example, does not come into contact with the property but acts through another. The usual categories of interference are dispossessing another of property, detaining property, disposing of property and destroying property.

(a) the property or
(b) the owner's interest in the property,

without lawful justification.

Part of the merging of the actions requires that the statutory remedy protect both the personal property and rights in it. That is accomplished by paragraphs (a) and (b).

(2) A person who receives possession of property owned by another must, on the request of an owner entitled to the possession of the property or according to the terms (if any) upon which it was received, return it or make it available to the owner in the condition in which it was received, unless the person is

In most cases, a person who holds property belonging to another must take care of it. This is a requirement of the current law, and the policy is carried forward in the craft legislation

Subsection (2) deals with two kinds of situations: where a person comes into the possession of property by agreement (bailment) or in some other way. The subsection requires that property be protected, and returned upon request. The requirement for return on request is expressed in absolute terms but the corresponding common law duty allows the holder to make reasonable enquiries as to who owns the property, and whether there is any reason - such as settling a bill for the property's storage - to retain the property temporarily. There is no reason why the courts should depart from that approach under the statutory model, particularly since the holder will be liable if possession of the property is released to the wrong person. *See* s. 51(3).

In some cases, the arrangement will be governed by contract. In other cases, obligations will vary by reference to how the holder acquired the property: by finding, *e.g.*, or perhaps a formal arrangement of bailment.

The law of bailment is complex. Obligations vary depending on the manner in which property is received. Some aspects of the relationship between bailor and bailee are protected by the common law actions dealing with personal property. The statutory remedy will also serve this purpose. It is important to realize, however, that this legislation only peripherally affects the law of bailment, which is an amalgam of statute, contract, trade custom, and rights that arise from the bailment itself.

(a) prevented from doing so by events which could not have been avoided by taking reasonable care, or

The holder of the property in only responsible for intentional or negligent acts which cause harm to the owner's property.

(b) relieved of this obligation

In some cases, the holder of the property will be under no obligation, or the extend of the obligation will be altered. The parties, *e.g.*, can agree between themselves on the standards that are to apply. In some cases, the owner's conduct will be officious or overbearing and no duty will arise. *E.g.*, unsolicited goods received in the mail would not be subject to the obligations outlined in this section, by reason of the owner's conduct.

(i) by the consent, agreement or conduct of an owner, or

(ii) by operation of law or court order.

A sheriff who seizes property in execution would not be under an obligation to deliver it to the owner for two reasons. First, the obligation would be excused by court order, provided the seizure was lawful. Second, an owner whose property has been seized in execution would not satisfy the condition under s. 51(2) that the request by made by an owner entitled to possession.

(3) A person requested to return property may make reasonable enquiries to assess the validity of the request.

Orders

52. (1) Where a person is in breach of a duty imposed by section 51, an owner may bring a proceeding for relief under subsection (2).

Under the Rules of Court, a proceeding can be brought by petition - which is a relatively streamlined method of resolving a dispute - or writ of summons, which is more complex, and allows for, among other things, discovery.

(2) In proceeding under this section, the court may do one or more of the following:

It is useful to contrast this subsection with the current law. In an action for conversion, an award of damages, once satisfied, operates as a forced sale, and the defendant becomes owner of the property. This is an inflexible response to the kinds of issues that arise. Under the draft legislation, the court can make an appropriate award of damages, which may be less than the value of the property, and can also determine who should have ownership. In some cases, an appropriate remedy will follow the forced sale model. In other cases, however, the courts will be able to frame a more subtle and fitting remedy.

(a) declare the ownership of, or right of possession to, the property,

(b) award damages for reasonably foreseeable loss or injury except to the extent that the person against whom relief is claimed can establish that the loss sustained, or part of it, is to the interest of an owner who I snot a party to the action,

Under the current law, one measure of damages is the whole of the value of the property. This is inflexible, and moreover, leaves the defendant at some risk, since where there are multiple claimants they may be able to recover many times over. Under the draft legislation, an owner must prove the actual loss arising from damage to the property or interference with the owner's rights of property or possession. The common law limits the circumstance in which a defendant can raise as a defence the interest of another person in the property (called the *jus tertii*). This section reverses the rule. The owner's claim is limited to the extent that other interests have been damaged by the wrongdoer's actions (although the responsibility of establishing that there are other owners is on the defendant.) However, a claimant can recover on behalf of others: *see* paragraph (g).

(c) damages for profit earned by a person by reason of the breach of duty,

This concept is currently dealt with by the law in a restitutionary context. The process is called "waiver of tort" since, in a sense, the owner is ratifying the wrong and treating the wrongdoer as an agent, in order to recover the profit. The draft legislation avoids this fiction and allows the court to make an award of damages to recover profit where that is appropriate.

(d) award aggravated, exemplary or punitive damages,

Technical terms to describe damages over and above an award aimed at compensating a claimant are not entirely fixed. "Aggravated" may cover the field, although some cases distinguish between aggravated damages (as being compensatory) and exemplary damages which serve different functions, such as punishing the wrongdoer. Sincere there are gradations of meaning, the draft must use all three terms.

(e) order the return of the property,

At common law, only the action of detinue would allow the court to make an order for the return of the property. Under the draft legislation, it is an order the court can make whenever the wrongdoer retains the property, if such an order is appropriate in the circumstances. Should the legislation provide that preference should be given to such an order? Should it be left to the option of the plaintiff? or the option of the defendant? Al of these ideas have been considered at one time or another. The last, curiously enough, is the one adopted at common law.

(f) order the sale of the property (or of other property where the original property has been mixed with it, added to it, or now forms a part of it) and distribution of the proceeds,

Perhaps there is more than one owner. An order for sale might be the best method of protecting the rights of all (including those who are not parties to the proceedings).

Property has an extended meaning and covers property substituted for the original. *See* the definitions. Paragraph (f) further provides that remedies extend to a mixture of the original property with other property.

(g) direct that the property or an award of damages be held in trust for other persons with interests in the property,

This option, like paragraph (b), is also added to take into account the possibility that more than one person is an owner, but not necessarily a party to the proceedings. The court can treat the applicant's claim as a representative one and make an appropriate order on behalf of those who are not present.

(h) compensate a person for improvements to the property, or expenses assumed maintaining or preserving the property.

Sometimes the wrongdoer, particularly one who acts innocently, should be compensated for benefits conferred upon the owner. *See, e.g., Greenwood* v. *Bennet*, [1973] 1 Q.B. 195; *Reid* v. *Fairbanks*, (1853) 13 C.B. 692, 138 E.R. 1371; *Munro* v. *Willmott*, [1949] 1 K.B. 295.

(2) An order under this section may be subject to such terms and conditions, if any, as may be appropriate in the circumstances.

Self-explanatory.

(3) A court may relieve a person, either wholly or partly, from

(a) liability to pay damages, or

(b) an obligation to contribute where another must pay damages

under this Act where the person acted honestly and reasonably.

Technical breaches need not always require a remedy. In some cases, a person may quite innocently intermeddle with another's property. *E.g.*, the wrongdoer may request a carrier to deliver the property to another. An auctioneer may, at the request of the wrongdoer, arrange for the sale of the property. In these cases, the Act provide the court with a discretion to relieve the person from liability. However, not every case of an innocent interference should be excused. The question of who should bear the loss - owner or person carrying out the wrong - will usually be answered in favour of the owner. Notice that the court's discretion to relieve is limited to liability for damages. A court would not have the power under this section, for example, to leave a third party in possession of property that still belongs to the claimant. This subsection will allow the court, on a discretionary basis, to consider matters like the contributory negligence of the claimant.

53. An owner is not disentitled to relief by reason only that the person against whom relief is sought is

(a) also an owner, or

(b) a person who acquired an interest through an owner.

The current law prohibits an action by one owner against another in various cases where the owner could have succeeded against a third party. S. 53 provides, for greater certainty, that an owner is entitled to appropriate relief under the draft legislation. In many cases, a dispute between co-owners should be resolved by vesting title in one owner and compensating the other, or by selling the property and dividing the proceeds of the sale. The court is authorized to make either of these orders under s. 52.

Relationship With Negligence

54. Nothing in this Part affects or limits rights an owner may have against another who negligently causes the owner loss or damage.

The statutory action will provide relief in cases involving negligence, but does not prevent a person from styling the cause of action s negligence. Of course, an owner cannot recover twice-over.

Agreement

55. Rights and obligations under this Part may be varied or waived by the agreement of the parties.

The draft legislation provides for rights and obligations between the parties in the absence of agreement. Clearly, an owner can authorize various dealings with property. Authority can be implied, *e.g.,* from conduct, or given in advance by contract. This section is added for greater certainty, but other parts of the draft legislation are clear on this point. *See, e.g.*, 51(1), which refers to "lawful justification," and 51(2)(d)(I), which refers to the "consent, agreement or conduct of an owner."

Representative Proceeding

56. A proceeding under this Part may be treated by the court as, and so far as regards the question of limitation shall be deemed to be, an action on behalf of all persons with interests in the property.

A proceeding brought by one owner may be regarded as a representative action. Another owner may join in the first proceeding even if the expiration of the limitation period would have prevented another action from being brought.

Amendments to the *Limitation Act* will be necessary to ensure that the policy of that Act continues to apply to proceedings relating to personal property. Briefly, the *Limitation Act* provides that where loss arises from damages caused to property, the limitation period is 2 years: s. 3(1)(a). Where economic loss arises from a dealing in property which does not harm the property, the limitation period is six years: s. 3(3). S. 10 provides that where a series of further or new actions are possible arising from an interference with goods, the limitation period is six years from the accrual of the first cause of action. Necessary amendments to the *Limitation Act* are dealt with in Appendix C.

8. Invitation for Comment

These are the preliminary views of the Commission. Final recommendations will be prepared in light of the comment and advice received on this Working Paper.

APPENDIX A
TORTS (INTERFERENCE WITH GOODS) ACT 1977, C. 32
(UNITED KINGDOM)

Preliminary

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 results in damage to goods or to an interest in goods.

2. Abolition of detinue

(1) Detinue is abolished.

(2) 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).

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 any 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.

4. Interlocutory relief where goods are detained

(1) In these section "proceedings" means proceedings for wrongful interference.

(2) On the application of any person in accordance with the 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.

Damages

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 al 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 or 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.

6. Allowance for improvement of the goods

(1) If in proceedings for wrongful interference against a person (the "improver") who has improved the goods, it is shown that the improver acted in the mistaken but honest belief that he ha 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 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 principle 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.

Liability to two or more claimants

7. Double liability

(1) In this section "double liability" mean the double liability of the wrongdoer which can arise -

(a) where one of 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 then the true owner is unjustly enriched and becomes liable to reimburse the converter of the goods.

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) authorize the defendant to apply for directions as to whether any person should be jointed 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, authorize the court to deprive him of nay 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.

9. Concurrent actions

(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 county courts in [the *County Courts Act 1984*] or the *County Courts [(Northern Ireland) Order 1980]* so as to allow another of those claims to be brought in the same county court.

(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 county court proceedings -
   (a) order that the county court proceedings be transferred to the High Court, and
   (b) order security fro costs or impose such other terms as the court thinks fit.

Conversion and trespass to goods

10. Co-owners

(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 effect 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.

11. Minor amendments

(1) Contributory negligence is no good defence in proceedings founded on conversion, or on intentional trespass to goods.

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

(3) Denial of title is not of itself conversion.

Uncollected goods

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 the 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 t this Act given notice to the bailor of his intention to sell the goods under this subsection, or
   (b) ha 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 reasonable 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 terms of the bailment.

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

13. Sale authorized by the court

(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 authorize the sale of the goods subject to such terms and conditions, if any, as may be specified in the order, and
(b) may authorize 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 authorizing 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 jurisdiction in the proceedings if the value of the goods does not exceed the county court limit.

Supplemental

14. Interpretation

(1) In this Act, unless the context otherwise requires -

("county court limit" means the [amount which for the time being is the county court limit for the purposes of section 15 of the *County Courts Act 1984*], or in Northern Ireland the current amount mentioned in [Article 10(1) of the *County Courts (Northern Ireland) Order 1980*],

"enactment" includes an enactment contained in an Act of the Parliament of Northern Ireland or an Order in Council made under the *Northern Ireland (Temporary Provisions) Act 1972*, or in a Measure of the Northern Ireland Assembly,

"goods" includes all chattels personal other than things in action and money,

"High Court" includes the High Court of Justice in Northern Ireland.

(2) References in this Act to any enactment include references to that enactment as amended, extended or applied by or under that or any other enactment.

15. Repeal

(1) The Disposal of Uncollected Goods Act 1952 is hereby repealed.

(2) In England and Wales that repeal shall not affect goods bailed before the commencement of this Act.

(3) (Applies to Scotland only.)

16. Extent and application to the Crown

(1) (Applies to Scotland only.)

(2) This Act, except section 15, extends to Northern Ireland.

(3) This Act shall bind the Crown, but as regard 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*.

17. Short title, etc

(1) This Act may be cited as the *Torts (Interference with Goods) Act 1977*.

(2) This Act shall come into force on such day as the Lord Chancellor may by order contained in a statutory instrument appoint, and such an order may appoint different dates for different provisions or for different purposes.

(3) Schedule 2 to this Act contains transitional provisions.

APPENDIX B
LEGISLATION PROPOSED IN THE O.L.R.C. STUDY PAPER

AN ACT TO PROVIDE FOR REMEDIES FOR
WRONGFUL INTERFERENCE WITH GOODS

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

SECTION 1: DEFINITIONS

1. In this Act, unless the context otherwise requires,

   (a) "goods" means those things in respect of which apart from this Act any of the torts referred to in subparagraphs (c)(i)-(iv) of this section could be committed;
   (b) "relief" means
      (i) damages or other monetary relief, including an order to account;
      (ii) defences to liability which might otherwise arise when there is a retaking or recaption of goods;
      (iii) recovery of possession of goods; and
      (iv) any other remedy which the court considers it appropriate to grant, including without limiting the generality of any of the foregoing declarations and injunctions.
   (c) "wrongful interference" or "wrongful interference with goods" means
      (i) conversion of goods;
      (ii) detinue;
      (iii) trespass to goods;
      (iv) injury to a reversionary interest in goods;
      (v) negligence so far as it results in loss or destruction of or damage to goods or to an interest in goods; and
      (vi) any other conduct for which the court considers it appropriate to grant relief so far as that conduct results in loss or destruction of or damage to or other interference with goods or an interest in goods, including without limiting the generality of any of the foregoing conduct giving rise to liability out of a bailment and for breach of contract.

SECTION 2: APPLICATION TO WAIVER OF TORT

2. For greater certainty, the provisions of this Act apply to claims for relief in respect of a benefit derived from an interest in goods which belonged to the claimant which might apart from this Act be styled a claim based on a waiver of tort.

SECTION 3: CHARACTERIZATION OF WRONGFUL INTERFERENCE CLAIMS

3. (1) All actions in which a claim for relief for wrongful interference with goods is made shall to that extent be deemed to be actions for wrongful interference with goods.

(2) Subject to the provision of this Act, a claimant for relief for wrongful interference with goods in an action for wrongful interference with goods shall be entitled to all or any of the relief to which apart from this Act he would be entitled, or such other relief as the court considers appropriate in the circumstances, or any combination thereof.

SECTION 4: CONTRIBUTORY FAULT IN WRONGFUL INTERFERENCE CASES

4. (1) In an action for wrongful interference with goods, if fault or negligence is found on the part of the claimant for relief that contributed to the wrongful interference, the court shall reduce any monetary relief by such amount as the court considers just and equitable having regard to the culpability of each party's conduct and its contribution to the wrongful interference.

(2) In determining culpability under this section, the court shall take account of, without being limited to, the risks created by each party's conduct and his knowledge or means of knowledge thereof.

(3) In determining under this section the contribution of each party's conduct to the wrongful interference the court shall take account of, without being limited to, that conduct's causative importance in relation thereto.

(4) Where the claimant for relief is found to be entitled to recovery of possession, and subsection (1) of this section otherwise applies, the court shall not make a final order for such relief without awarding to the person from whom recovery is ordered an amount equal to the amount by which otherwise the claimant's monetary relief would have been reduced under subsection (1) of this section.

(5) Where goods have been recovered without a final order for recovery of possession, the person from whom they were so recovered may, in addition to any other claim to a reduction under subsection (1) of this section, claim the amount to which he would otherwise have been entitled had a final order for recovery of possession been made.

(6) Subject to the provisions of this section, it shall be deemed to be an application of section 2 of the *Negligence* Act.

(7) Notwithstanding any other provision of this Act, this section shall be subject to contrary agreement or contract and shall apply to liability on causes of action for breach of contract only if section 2 of the *Negligence Act* is so subject and so applies.

SECTION 5: CONTRIBUTION IN WRONGFUL INTERFERENCE CASES

5. (1) Where two or more persons are liable to a claim for relief by the same person in an action for wrongful interference relating to the same goods, although not necessarily the same wrongful interference, and the wrongful interference of each contributed to the wrongful interference by the person seeking contribution under this section, then as between such persons, each is liable to make contribution to the other having regard to the degree of culpability of the conduct of each which is wrongful interference and its contribution to the liability in respect of which contribution is claimed.

(2) In determining culpability under this section, the court shall take account of, without being limited to, the risks created by each party's conduct and his knowledge or means of knowledge thereof.

(3) In determining under this section the contribution of each party's conduct to the liability in respect of which contribution is claimed, the court shall take account of, without being limited to, that conduct's proximity to the last transaction with the person to whom each party is liable under subsection (1) of this section, as part of that conduct's causative importance in relation to the liability in respect of which contribution is being claimed.

(4) The liability in respect of which contribution may be claimed under this section shall be measured by reference to the value of the relief granted in any action for wrongful interference with the goods against the contribution claimant.

(5) Where goods have been recovered without a final order for recovery of possession, the person from whom they were so recovered shall be able to claim contribution by reference to the amount to which he would otherwise have been entitled had a final order for recovery of possession been made, in addition to any other amount by reference to which he may claim.

(6) Subject to the provisions of this section, it shall be deemed to be an application of section 4 of the *Negligence Act.*

(7) Notwithstanding any other provision of this Act, this section shall be subject to contrary agreement or contract and apply to liability on causes of action for breach of contract only if section 4 of the *Negligence Act* is so subject and so applies.

SECTION 6: RIGHT TO PLEAD THE TITLE OF ANOTHER (THE JUS TERTII)

6. (1) The person against whom a claim is made in an action for wrongful interference with goods shall be entitled, subject to the provisions of this section, to plead that an identified other person has a better right or title than the claimant as respects all or any part of the interest alleged by the claimant, or in right of which he claims.

(2) Subject to the Rules of Civil Procedure, the court shall order that the other person referred to in subsection (1) of this section be joined as a party to the action.

(3) The court may, where the other person referred [to] in subsection (1) of this section is joined as a party to the action or, being joined, fails to defend or disclaims an interest, deprive him of any right of action against the person against whom the claim is made, either unconditionally, or subject to such terms or conditions as may be specified.

(4) Where the other person referred [to] in subsection (1) of this section is joined as a party to the action and appears and disclaims any interest, or fails to defend, or is not made a party to the action, the person raising the defence referred to in subsection (1) shall, unless the court otherwise orders, not be entitled to continue therewith.

(5) The provisions of this section are subject to contrary agreement, express or implied, between the claimant and the person against whom the claim is made.

SECTION 7: PARTICULARS OF TITLE AND OF ANY TERTIUS

7. (1) The claimant in any action for wrongful interference with goods shall in his pleadings give particulars of his right or title.

(2) The claimant in any such action shall also identify in his pleadings any person who to his knowledge has or claims any interest in the goods the subject of the action.

SECTION 8: DOUBLE LIABILITY ISSUES

8. (1) Where another person has a better right or title than the successful claimant in an action for wrongful interference with goods, but the other person was not joined as a party to the action, the successful claimant shall hold in trust for that other person that portion of the proceeds of the action which the other person might have recovered had he brought the action or joined it.

(2) Where the other person referred to in subsection (1) of this section who is not barred from so doing brings an action for wrongful interference with goods against the person against whom the successful claim referred to in that subsection was made, that person shall be entitled to an indemnity from the original successful claimant, either in that other person's action, or in subsequent proceedings.

SECTION 9: ALLOWANCE FOR IMPROVEMENTS

9. (1) In an action for wrongful interference with goods where the subject goods have been improved by the person against whom the action is brought, or that person purchased the goods from the improver or from some one who derived his title from the improver, the court may make an allowance as provided for in this section to that person if he acted reasonably.

(2) Where goods have been recovered without a final order for recovery of possession, the person from whom they were so recovered may claim the allowance referred to in subsection (1) of this section.

(3) In determining reasonableness for the purposes of subsections (1), (2) and (7) of this section, the court may take account of, without being limited to, the following factors:

(a) whether or not the person seeking the allowance had an honest belief as to title;
(b) whether or not he knew or had reason to know of the interest of the person from whom he claims the allowance;
(c) whether or not he made any attempts to contact the holder of that interest; and
(d) whether or not the improvements in question were necessary.

(4) In determining whether or not to exercise its discretion to make an allowance under subsections (1) and (2), the court may take account of without being limited to, the following factors:

(a) whether or not the person seeking the allowance had a contract under which he is to be or has been paid for the improvements himself;
(b) whether or not, but for any wrongful interference, the other person would have made the improvements himself;
(c) whether or not the improvements are or are likely to be of no value to the person from whom the allowance is being claimed; and
(d) whether or not the effect of the allowance would reasonably be to require the goods to be sold to pay for the allowance.

(5) The court may make an allowance in the form of an order for physical separation of the improvements on terms that the other person be reimbursed for the cost of repairing any physical injury excluding diminution in value of the whole caused by the absence of the improvements or by the necessity for replacement.

(6) The court, in making a monetary allowance, shall award the lesser of the cost of the improvements or the increase in the value of the goods attributable thereto except

where, in the light of all the circumstances, including whether or not the person seeking the allowance was ignorant of any wrongfulness, the court considers that that would be unfair to that person and that a different basis should be employed.

(7) In proceedings by the purchaser of improved goods against his seller for recovery of the purchase price because of a failure of consideration, or in any other proceedings based on that failure of consideration, or for damages, the court, where it is appropriate, may make an allowance to the seller under this section if the seller acted reasonably.

(8) In determining appropriateness for the purposes of subsection (7) of this section, the court may take account of, without being limited to, the following factors:

(a) whether or not the purchaser has received an allowance under this section; and
(b) whether or not the seller would, had he been sued in an action for wrongful interference with goods, have received an allowance under this section.

SECTION 10: DEFENCE FOR GOOD FAITH INTERMEDDLERS

10. (1) Subject to subsection (2) of this section and section 11, the person against whom a claim has been made in an action for wrongful interference with goods shall be entitled to show by way of defence that he reasonably believed in good faith that he or the person by whose authority he was acting had or was acquiring a legally recognized interest in the goods, provided that that interest would have justified the wrongful interference complained of.

(2) The defence in subsection (1) of this section shall not apply to a merchant.

(3) For the purposes of this section a merchant is a person

(a) who deals in goods of the kind involved in the wrongful interference;
(b) who by his occupation holds himself out as having knowledge or skill appropriate to the practices or goods involved; or
(c) to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out has having such knowledge or skill.

(4) A person otherwise entitled to raise the defence referred to in subsection (1) of this section shall be entitled to do so in any claim for contribution, indemnity or damages against him including one arising on a breach of contract in respect of that person's otherwise wrongful interference.

SECTION 11: DEFENCE NOT AVAILABLE TO PERSON IN POSSESSION

11. (1) Subject to subsection (2) of this section, the defence in section 10 shall not of itself prevent the court from making a final order for recovery of possession in the action for wrongful interference with goods.

(2) Any final order for recovery of possession in an action for wrongful interference with goods in which the defence in section 10 is established shall be on terms that an allowance shall be made to the person from whom possession is recovered equal to the lesser of the price or, if the price was not in the form of money, its equivalent value in money, paid by that person for his interest in the goods or the value of the goods.

(3) Where goods have been recovered without a final order for recovery of possession, the person from whom they were so recovered may claim the allowance to which he would otherwise have been entitled had a final order for recovery of possession been made as described in subsection (2) of this section.

SECTION 12: RECOVERY BY PERSONS WITHOUT RIGHT TO POSSESSION

12. (1) Subject to this section and section 13, in an action for wrongful interference with goods a party may claim recovery of possession whether or not he has a right to immediate possession of the goods.

(2) A party claiming recovery of possession in an action for wrongful interference with goods who does not have a right to immediate possession shall not be entitled to an order for recovery of possession if it appears that some other person with an interest in the goods objects to such recovery.

(3) Subject to the Rules of Civil Procedure the court may order that the other person referred to in subsection (2) of this section be joined as a party to the action.

SECTION 13: PRIMA FACIE RIGHT TO RECOVERY IN SPECIE

13. (1) A successful party to an action for wrongful interference with goods who has claimed recovery of possession shall be entitled, at his option, to an order for the recovery of possession of the subject goods unless the court is satisfied that some other disposition is more appropriate, and the burden of satisfying the court that some other disposition is more appropriate shall be on the party resisting the order.

(2) In determining whether or not to exercise the discretion under subsection (1) of this section to make a disposition other than an order for recovery of possession, the court may take account of, without being limited to, the following factors:

(a) any alteration of the goods, any arnxing of the goods to other goods or premises, or any improvement of the goods;
(b) the degree of fault or negligence of the parties;

(c) any failure of the party claiming recovery of possession to obtain substitute goods when he could reasonably have done so;
(d) the effect of an order for recovery of possession on the creditors or others of the party against whom the order is sought; and
(e) the nature and extent of the interest in the goods of the party claiming an order for recovery of possession.

SECTION 14: PRIMA FACIE RIGHT TO INTERIM RECOVERY IN SPECIE

14. (1) On the motion of any party in accordance with the Rules of Civil Procedure, upon a showing of a *prima facie* case of wrongful interference with goods, that party shall be entitled to an order for the interim recovery of possession of the subject goods unless the court is satisfied that some other disposition is more appropriate.

(2) In determining whether or not to exercise the discretion under subsection (1) of this section the court may take account of, without being limited to, the following factors:

(a) the nature of the goods;
(b) the conduct of the parties;
(c) the nature and extent of the interests of the parties in the goods; and
(d) any other matter which the court considers relevant.

SECTION 15: RECAPTION AND INTERFERENCE WITH LAND OR GOODS

15. (1) Subject to subsection (2) of this section, in any civil action for interference with property, real or personal, it shall be no defence that the interference took place in the course of taking possession of goods the refusal to deliver possession of which would be wrongful interference with goods on the part of the person from whom the goods were taken or to be taken.

(2) Notwithstanding subsection (1) of this section, but subject to subsection (3) of this section, in any civil action for interference with property, real or personal, which is in the nature of an action for nominal damages arising out of trespass to goods or land *per se,* it shall be a defence that the interference took place in the course of taking possession of goods the refusal to deliver the possession of which would be wrongful interference with goods on the part of the person from whom the goods were taken or to be taken.

(3) Notwithstanding subsection (2) of this section, the defence referred to in subsection (1) of this section shall not be available in circumstances where the interference with property is entry into a dwelling house.

(4) The liability of any person for an interference described in subsection (1) of this section other than his liability in a civil action as there referred to shall be determined without regard to this section.

SECTION 16: RECAPTION AND INTERFERENCE WITH THE PERSON

16. (1) In any civil action for interference with the person it shall not be a defence that the interference took place in the course of taking possession of goods the refusal to deliver possession of which would be wrongful interference with goods on the part of the person from whom the goods were taken or to be taken.

(2) The liability of any person for an interference described in subsection (1) of this section other than his liability in a civil action as there referred to shall be determined without regard to this section.

SECTION 17: DEFENCE OF GOODS BY PERSON IN PEACEABLE POSSESSION

17. A person in peaceable possession of goods shall be justified in using reasonable and necessary force in defence of that possession except against a person or someone acting by that person's authority the refusal to deliver possession of the goods to whom would be a wrongful interference with the goods.

SECTION 18: DEFENCE RULES NOT WAIVABLE IN Al) VANCE

18. Sections 15, 16 and 17 of this Act shall operate notwithstanding any licence or consent, express or implied, granted or given prior to the commencement of an attempt to take possession of goods.

SECTION 19: RECOVERY ON BASIS OF INTEREST IN GOODS

19. (1) Subject to this section and section 20, for the purposes of assessing damages or other monetary relief in an action for wrongful interference with goods, a person in such an action may claim recovery on the basis only of interference with his interest in the goods.

(2) Notwithstanding subsection (1) of this section, but subject to subsections (5) and (6) of this section and section 20, a person in an action for wrongful interference may claim recovery of damages or other monetary relief on the basis of absolute ownership of the goods even if he is not the owner if at the time of the wrongful interference he was in actual possession of the goods or had a right to immediate possession thereof.

(3) Notwithstanding subsection (1) of this section, but subject to subsections (4), (5) and (6) of this section and section 20, a person in an action for wrongful interference may claim recovery of damages or other mone[tarly relief on the basis of an interest in

the goods held by another person from whom he has authority in writing to claim on that person's behalf.

(4) A person relying on the authority referred to in the previous subsection of this section shall disclose that fact in his pleadings, and shall on request disclose to the person from whom relief is sought the terms of that authority.

(5) A person in an action for wrongful interference shall not recover damages or other monetary relief on the basis of an interest in goods of any other person if it appears that such other person objects to such recovery.

(6) Subject to the Rules of Civil Procedure, in any action for wrongful interference described in subsections (2) and (3) of this section the court may order that the other person referred to in those subsections be joined as a party to the action.

(7) A person who gave the authority referred to in subsection (3) of this section shall be barred from any further action for the wrongful interference against the person from whom relief is sought.

SECTION 20: RECOVERY FOR ACCOUNT OF ANOTHER PERSON

20. (1) Where a person in an action for wrongful interference with goods recovers damages or other monetary relief on the basis of the interest of some other person, he shall hold in trust for that other person so much of the relief as is for interference with that interest.

(2) Where the other person referred to in subsection (1) of this section who is not barred by subsection (7) of section 19 from so doing brings an action for wrongful interference with goods against the person from whom damages or other monetary relief on the basis of his interest was recovered, that person shall be entitled to an indemnity from the original successful claimant, either in the action of the first person mentioned in this subsection, or in subsequent proceedings.

SECTION 21: RIGHT TO POSSESSION SUFFICIENT FOR TRESPASS ACTION

21. A person may bring an action for wrongful interference with goods which might apart from this Act be styled trespass to goods notwithstanding that he only had a right to immediate possession of them.

SECTION 22: TITLE TO SUE IN CONVERSION AND DETINUE

22. (1) A person may bring an action for wrongful interference with goods which might apart from this Act be styled detinue notwithstanding that he only had a right to

immediate possession sufficient for an action for wrongful interference which might apart from this Act be styled conversion.

(2) A person may bring an action for wrongful interference with goods which might apart from this Act be styled conversion notwithstanding that he only had a right to immediate possession sufficient for an action for wrongful interference with goods which might apart from this Act be styled detinue.

SECTION 23: TITLE TO SUE IN CONVERSION

23. A person may bring an action for wrongful interference with goods which might apart from this Act be styled conversion notwithstanding that he only had an interest in the goods sufficient for an action for wrongful interference with goods which might apart from this Act be styled injury to a reversionary interest.

SECTION 24: PLEDGE AND CONVERSION

24. A person may bring an action for wrongful interference with goods which might apart from this Act be styled conversion notwithstanding that the interference was only a delivery or receipt of goods by way of pledge.

SECTION 25: CO-OWNERS AND CONVERSION

25. A person who is a co-owner of goods may bring an action for wrongful interference with goods if the interference would have been sufficient for such an action by him if he were sole owner.

SECTION 26: SHORT TITLE OF ACT

26. The short title of this Act is the *Remedies for Wrongful Interference with Goods Act, 19 .*

APPENDIX C

CONSEQUENTIAL AMENDMENTS TO THE *LIMITATION ACT*

A. Introduction

The *Limitation Act*[1] deals comprehensively with actions involving personal property. This is the structure that applies:

- Loss arising from damage to personal property is subject to a two year limitation period: s. 3(1)

- Other claims relating to personal property (such as those aimed at recovering possession or involving questions of legal title) are subject to a six year limitation period: s. 3(5).

- Where an owner has lost possession of the goods, not only the claim is foreclosed when the limitation period expires. All rights in the goods are lost: s. 9.

- Where a series of further or new claims arise from an interference with personal property, they are subject to a single limitation period of six years from the accrual of the first cause of action: s. 10.

B. Strategy for Revising the *Limitation Act*

The *Limitation Act* implements recommendations made by the Commission in *Report on Limitations — General*.[2] The goal of this Working Paper has been to consider, and restate, the law relating to wrongful interference with personal property. Revisiting the law of limitations and rethinking policy in that area is not a necessary part of the process. Moreover, case law suggests that the *Limitation Act* is operating soundly for claims relating to personal property.[3]

Nevertheless, even simply ensuring that current limitations policy continues to apply to the new statutory action suggested in this Working Paper will require some revisions to the

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[1] R.S.B.C. 1979, c. 236.

[2] (LRC 15,1974).

[3] Recent issues do not challenge the policy of the legislation. More often than not, the question is simply selecting the appropriate limitation period for he articular cause of action: *see, e.g., Harshenin* v. *Bayoff,* [1991] B.C.D. Civ. 2482-03 (S.C.) (which considered whether claims for trespass, conversion, and damage to property could be postponed under the Act), and *Sobata* v. *Kleider,* (1986) 36 C.C.L.T. 79 (B.C.S.C.) (which considered the limitation period that should apply to an action in bailment). Problems like these will be resolved by legislation which restates the common law actions in terms of a single statutory action.

Limitation Act. The following is a list of parts of the *Limitation Act* that must be revised, and those parts that can be retained. Most of the changes called for result from changes, introduced by the new legislation, in the basic vocabulary that describes proceedings that can be brought and available remedies:

- Some parts of the Act deal with the current law in generic terms. For the most part these provisions can remain, unchanged.

- The parts of the *Limitation Act* retaining the language of the old actions must be changed.[4]

- Where the *Limitation Act* must make specific references to the statutory cause of action, it is sufficient to refer to the new Part 3 of the *Property Law Act.*

C. Draft Legislation

The changes suggested above are relatively straightforward to introduce into the *Limitation Act:* sections 3(1)(b), 3(5)(c) and 9 must be revised; section 3(5)(d) must be repealed without replacement; section 10 must be replaced with a new section; sections 3(1) and (4) remain unchanged.

The following is one way of redrafting those portions of the *Limitation Act* that govern proceedings for wrongful interference with goods. Only a very few changes are needed to meet the objectives outlined in this Appendix. (In the following draft, the new portions are *italicized* and deletions are indicated by [smaller print in square brackets]):

3. (1) After the expiration of 2 years after the date on which the right to do so arose a person shall not bring an action
    (a) for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;
    (b) for trespass to [property] *land* not included in paragraph (a);

3. (4) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of 6 years after the date on which the right to do so arose.

3. (5) Without limiting the generality of subsection (4) and notwithstanding subsections (1) and (3), after the expiration of 6 years after the date on which the right to do so arose an action shall not be brought

[4] Subsections 3(1)(a) and (4) of the *Limitation Act* will still deal with the existing common law actions. The Working Paper does not suggest repealing the common law actions protecting rights in personal property. There is no need to do so. The new legislation will apply to causes of action arising after it comes into force. The old law will still serve for actions arising before the new legislation comes into force.

(c) [for damages for conversion or detention of goods] *for relief under Part 3 of the Property Law Act* where the claim for relief is not based on tangible physical injury to the property;

[(d) [for the recovery of goods wrongfully taken or detained;]

9. *(Section 9 sets out in column form the effect of the expiration of limitation periods on particular actions. The first line in column 1 reads "For conversion or detention of goods." This can be modified satisfactorily by deleting the words "conversion or" since the essential idea is that a person detains an owner's goods.)*

[10. Where a cause of action for the conversion or detention of goods accrues to a person and afterwards, possession of the goods not having been recovered by him or by a person claiming through him,

(a) a further cause of action for the conversion or detention of the goods;

(b) a new cause of action for damage to the goods; or

(c) a new cause of action to recover the proceeds of a sale of the goods,

accrues to him or a person claiming through him, no action shall be brought on the further or new cause of action after the expiration of 6 years from the date on which the first cause of action accrued to the plaintiff or to a person through whom he claims.]

10. (1) Where under Part 3 of the Property Law Act a breach of duty forms the basis of a claim for relief and a further breach of duty occurs in relation to the same property, no action shall be brought for relief based on or arising out of the further breach of duty after the time limited for claiming relief based on the earlier breach of duty.

(2) Subsection (1) does not apply where

(a) any claim for relief is based on tangible physical injury to the property, or

(b) the person entitled to relief, between the original breach of duty and the further breach of duty, recovered possession of the property.

The Commission welcomes comment on these suggestions.