COMMENT

COMMON LAW LIENS—AN ANGLO-AUSTRALIAN CONFLICT

The general principles governing the creation of a common law artificer's lien may be briefly stated in three propositions:

(a) if the lien is to be effective as against the owner it must be created by the owner or with his authority;[1]

(b) the lien will only arise where the artificer has performed some work on or in relation to the chattel so as to effect an improvement;[2]

(c) each lien will be a particular lien only, relating solely to the charges for the work done on each individual chattel.[3]

The purpose of the present comment is to examine the first of the above propositions in order to see whether general rules can be laid down to cover the circumstances in which the owner's authority to create such a lien can be established. It is in relation to this first proposition that there appears to be a clear conflict between English and Australian decisions.

Three distinct situations will be considered, namely: a simple bailment, a hire-purchase agreement, and a contract for sale under which either the buyer obtains possession before property in the goods has passed to him, or the seller remains in possession after property has passed to the buyer. In each the goods are in the possession of a non-owner bailee who, it will be assumed, contracts with a workman for their improvement or repair. Clearly the bailee is liable under the contract with the workman to pay the agreed price, or, in the absence of prior stipulation as to price, the reasonable cost of the improvement or repairs. The lien is a good defence to an action in detinue against the workman for recovery of the chattel by the bailee, unless the agreed price or reasonable cost of the repairs has been tendered.

The controversial question is whether, in the event of the bailee refusing to pay, the workman may recover the cost of the repairs from the owner of the goods. This is a question of privity of contract; the answer depends upon whether the bailee was acting as the owner's agent in contracting for the repairs, or was otherwise authorized to pledge his credit. Even where the bailee is not the owner's agent, and hence there is no contract between owner and workman, under which the workman may recover the cost of the repairs, the bailee may have had authority to create a lien which is binding upon the owner. In that situation the owner will be unable to recover his goods without first tendering the cost of the repairs, since the workman set up his lien by

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[1] This proposition was recognised as early as 1743 in *Hartop* v. *Hoare* (1743) 3 Atk. 43 at 47; 26 E.R. 828 at 830. See generally the authorities collected in the judgment of Isaacs, J. in *Fisher* v. *The Automobile Finance Co. of Australia Ltd.* (1928) 41 C.L.R. 167 at 175-6.

[2] See e.g., *Frew* v. *Burnside* (1925) 42 W.N. (N.S.W.) 111; and *Chapman* v. *Allen* (1632) Cro. Car. 271; 79 E.R. 836.

[3] General liens are the exceptions rather than the rule and will only be created by express agreement or established usage. General liens are recognized in favour of solicitors, bankers, factors, stockbrokers, insurance brokers and warehousemen.

way of defence to the owner's action in detinue. The practical effect will often be the same as if the owner himself had contracted with the workman for the repairs.

1. THE SIMPLE BAILMENT SITUATION

The term *lien* has been described as "a right in one man to retain that which is in his possession belonging to another, till certain demands of him the person in possession are satisfied".[4] This description might appear to refer to the relationship between the lienee and the goods, rather than the relationship between lienee and owner. In strict legal theory there can be no relationship between the lienee and the goods, since legal relations can exist only between persons.

On the other hand the right of the lienee is a right *in rem* to retain possession of the goods against all the world including the owner even though there is no contractual relationship between the lienee and owner. Although, of course, an owner may authorize another to repair his goods, thereby creating a contractual relationship from which the law implies a lien, a lien may also arise by operation of law quite independently of any action on the part of the owner.[5] For example, a lien may arise by operation of law, not because the owner intentionally conferred on the workman the rights of a lienee, but because the bailee entrusted the goods to the workman for the purpose of repair or improvement with the implied or ostensible authority of the owner.

The rationale of the principle that only the owner of goods or his authorized agent can create the legal relation which involves a lien is that "liabilities are not to be forced upon people behind their backs".[6] The contrary policy argument that the innocent third person, here the repairer, should not suffer, which was unsuccessfully advanced in *Hartop* v. *Hoare*[7] in 1743 has been consistently rejected,[8] since the owner of the goods is equally as innocent as the repairer, unless of course he has by express or implied agreement, or by his conduct, precluded himself from denying the bailee's authority. The law in relation to common law liens is merely a specialized application of the general principle *nemo dat quod non habet*. As Higgins, J. pointed out in *Fisher's Case*, "no one can give title to an article to which he has no title himself; and no one except the owner can diminish the property of the owner in part, as by conferring a right of lien".[9]

Where the owner expressly authorizes the bailee to create a lien, there is no problem. It will not matter whether the lienee knew or did not know the bailee had such authority. More difficulty arises where it is necessary to resort

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[4] *Hammonds* v. *Barclay* 2 East. 227 at 235; 102 E.R. 356 at 359 *per* Grose, J.

[5] See e.g., Lord Westbury in *In re Leith's Estate; Chambers* v. *Davidson* (1866) L.R. 1 P.C. 296 at 305: "lien is not the result of an express contract; it is given by implication of law"; and Lord Goddard, C.J. in *Bowmaker Ltd.* v. *Wycombe Motors Ltd.* (1946) 1 K.B. 505 at 509: "If I send my servant with my chattel to get it repaired, the artificer will get the lien which the law gives him on that chattel although I may have told my servant that he is not to create a lien. The fact is that the lien arises by operation of law because the work has been done on the chattel."

[6] *Falcke* v. *Scottish Imperial Insurance Co.* (1886) 34 Ch. D. 234 at 248 *per* Bowen, L.J.

[7] *Supra* n. 1.

[8] The issue involves a conflict between two principles—the first is that property rights should be protected and is epitomised in the maximum *nemo dat quod non habet*. The second supports the sanctity of commercial transactions whereby *bona fide* purchasers for value without notice obtain valid titles. See Denning, L.J. in *Bishopsgate Motor Finance Corporation* v. *Transport Brakes Ltd.* (1949) 1 K.B. 332 at 336-7; *Commonwealth Trust Ltd.* v. *Akotey* (1926) A.C. 72 at 76. See discussion in *Fisher's Case, supra* at 175 *per* Isaacs, J.

[9] *Fisher* v. *The Automobile Finance Co. of Australia Ltd.* (1928) 41 C.L.R. 167 at 178.

to implication to establish the authority, or to prove conduct whereby the owner is precluded from denying that authority. In the succeeding paragraphs the principles of estoppel and implied authority will be applied to the lien situation.

Estoppel

Admittedly the doctrine of common law estoppel, preserved in relation to sale of goods by s. 26(1) of the Sale of Goods Act, 1923,[10] is an exception to the *nemo dat* principle. Estoppel may be by representation or by conduct. In most instances where the bailee of goods delivers them to an artificer for repair without the owner's authority, there will have been no communication between the owner and artificer and hence no opportunity for the owner to represent the bailee's authority. On the other hand, *Albemarle's Case*[11] illustrates that even though the hirer Botfield was expressly prohibited from creating a lien, the owner was estopped from denying his authority because he had held out Botfield as having such authority and by his failure to interfere he had sanctioned the long-continued repairing of the cabs by the defendant.[12] *Albemarle's Case* is in fact primarily a case of ostensible or apparent authority, which the owner was by his conduct estopped from denying.[13]

Although it may not be easy to lay down precisely what conduct will amount to an estoppel against the true owner, it is clear "that the mere possession of the property of another, without authority to deal with the thing in question otherwise than for the purpose of safe custody . . . will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest the owner of his rights against the third party, however innocent in the transaction the latter party may have been".[14] Authority also dictates that mere possession of chattels, with the owner's consent but without more, does not confer authority to create a lien since there has been no conduct of the owner upon which to raise an estoppel.[15] Furthermore, the mere entrusting of possession of goods to a bailee or hirer without more does not cast upon the bailor any duty of care to warn third parties that the bailee has no authority to create a lien.[16] Hence the repairer cannot allege any negligence on the owner's part.

Implication of Authority

The question of estoppel by which the owner is precluded from denying the bailee's ostensible authority to create a lien only becomes important where such authority cannot be implied from the contract of bailment.

An example of authority implied from the written terms of an agreement is the clearly established principle that an express obligation cast upon the bailee to keep the goods in repair without further qualification will confer on the bailee by implication an authority to entrust the goods to a repairer and consequently entitle him to a lien. This proposition was applied by

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[10] Sale of Goods Act, 1923 (N.S.W.).

[11] *Albemarle Supply Co. Ltd.* v. *Hind & Co.* (1928) 1 K.B. 307.

[12] Scrutton, L.J. said at 318: "If a man is put in a position which holds him out as having a certain authority, people who act on that holding out are not affected by a secret limitation of which they are ignorant, of the apparent authority."

[13] *Fisher's Case, supra, per* Isaacs, J. at 177 and Higgins, J. at 180.

[14] Cockburn, C.J. in *Johnson* v. *Credit Lyonnais Co.* (1877) 3 C.P.D. 32 at 36-7, cited with approval by the House of Lords in *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.* (1938) A.C. 287 at 300. And see discussion in Atiyah, *Sale of Goods* (3 ed. 1966) 139-41.

[15] "The mere entrusting a person with [possession of] property is not enough", *per* Isaacs, J. in *Fisher's Case supra* at 176. See also *Hartop* v. *Hoare* (1743) 3 Atk. 43 at 47; 26 E.R. 828 at 830 *per* Lee, C.J.; and *Farquharson Bros.* v. *King & Co.* (1902) A.C. 325 at 342 *per* Lindley, L.J.

[16] *Cf. Farquharson Bros.* v. *King & Co., supra* at 335-6 *per* MacNaughten, L.J.

English judges in *Keene* v. *Thomas*[17] and *Green* v. *All Motors Ltd.*,[18] but both those decisions were distinguished by the High Court of Australia in *Fisher's Case*.[19] This latter case involved a hire-purchase agreement similar to the classical agreement in *Helby* v. *Matthews*,[20] whereby the hirer was given an option to purchase but acquired no property in the goods until all instalments had been paid. Under this agreement the hirer, Brander, acquired possession of a secondhand Chevrolet truck from the owner, Automobile Finance Co. of Australia Ltd. In the agreement Brander agreed that he should "throughout the term of this agreement at his own expense . . . keep the said motor vehicle in good order and condition"; and that he should "not have or be deemed to have any authority to pledge the owner's credit for any repairs to the said motor vehicle or to create a lien thereon in respect of such repairs . . . but if [it] shall require to be repaired the hirer shall allow the owner's nominee to execute the repairs at the hirer's expense and the owner shall be entitled to possession of [it] for such purpose". The agreement also provided that if the hirer made default in payment of any instalment, the hiring should immediately determine without any prior notice or demand. Brander defaulted in payment of one instalment, and two days later before repossession or any other action had been taken by the plaintiff finance company, Brander delivered the truck to the defendant Fisher for the purpose of repairs, which he executed forthwith. The plaintiff demanded possession from Fisher who refused to deliver up the truck until his lien for the repairs was extinguished, whereupon the plaintiff sued him for conversion, or, alternatively, for detention of the truck. The defendant pleaded his lien by way of defence.

On appeal to the High Court,[21] the defendant's claim to a lien was rejected. The Court could find no evidence from which the owner's authority could be inferred.[22] Although the case of *Green* v. *All Motors Ltd.*[23] was referred to by Higgins, J.,[24] as a case in which authority to create a lien could be inferred from the obligation to keep in repair, both Mann, J., in the Victorian Supreme Court,[25] and the High Court[26] judgments emphasized that the agreement in *Fisher's Case* expressly prohibited the hirer from pledging the owner's credit or creating a lien for repairs to the vehicle. In other words, where the obligation to keep in repair is coupled with an express prohibition upon creation of a lien, the obligation and prohibition cannot be separated but must be construed together. This proposition also finds support in the judgment of Sargant, L.J. in *Albemarle's Case*.[27] Both the Victorian Supreme Court and the High Court also held the finance company in *Fisher's Case* had not held out Brander as having any authority to create a lien and hence there was no evidence to support an estoppel against the company. *Albemarle's Case*[28] was successfully distinguished[29] as a case of ostensible authority, where it had

[17] (1905) 1 K.B. 136. The dicta of McCardie, J. in *Pennington* v. *Reliance Motor Works Ltd.* (1923) 1 K.B. 127 at 129—"prima facie, a lien cannot be created against a man except by his express authority"—is clearly too restrictive, since his authority may be implied by words or conduct.

[18] (1917) 1 K.B. 625.

[19] The facts stated below are taken from the report of the decision in the Victorian Supreme Court, *Automobile Finance Co. of Australia Ltd.* v. *Fisher* (1928) V.L.R. 131.

[20] (1895) A.C. 471.

[21] *Fisher* v. *Automobile Finance Co. of Australia Ltd.* (1928) 41 C.L.R. 167, also reported in (1928) V.L.R. 496.

[22] (1928) 41 C.L.R. 167 at 174.

[23] (1917) 1 K.B. 625.

[24] (1928) 41 C.L.R. 167 at 180.

[25] (1928) V.L.R. 131 at 139.

[26] (1928) 41 C.L.R. 167 at 178, 180.

[27] (1928) 1 K.B. 307 at 320: ". . . if (as is not the case) the defendants had to rely upon any authority specially given to the hirer by the agreement . . . the special authority could hardly be invoked except subject to the special limitation."

[28] (1928) 1 K.B. 307.

[29] (1928) 41 C.L.R. 167 at 292.

not been necessary to rely upon the written hire-purchase agreement which prohibited the hirer creating a lien.

Anglo-Australian Conflict

Fisher's Case is, however, in conflict with English authorities such as *Green* v. *All Motors Ltd.*[30] which establish that a secret limitation on the bailee's authority of which the repairer is unaware will not prevent the repairer obtaining a lien. The Australian and English cases can be reconciled, although the High Court in *Fisher's Case* did not seek to do so, by the proposition that the workman can only exercise his lien if his possession was lawful at the time the lien first attached. To do so he must establish that the delivery of the goods to him was lawful and continued to be so until some work was done by him on the goods.[31] *Fisher's Case* could therefore be distinguished from the English decisions in *Keene* v. *Thomas* and *Green* v. *All Motors Ltd.* on the two factual grounds that in *Fisher's Case* (a) there was a direct prohibition on the creation of a lien; the delivery to the repairer in such circumstances as to create a lien was therefore a breach of the agreement and unlawful; (b) the bailee had already breached the agreement by failure to pay an instalment prior to his delivery of the goods to the repairer. One of the terms of the agreement was that if the hirer made such default, the hiring should immediately determine.[32]

Therefore, any authority to create a lien implied by virtue of the bailee's right to use the vehicle under the agreement and obligation to keep it in repair, was terminated. However, neither the Victorian Supreme Court[33] nor the High Court seem to have attached any importance to the hirer's default under the agreement. It is certainly not treated as the ground for the decision. It is submitted, however, that the High Court's decision is correct in the principles which it does enunciate, despite the fact that there may have been alternative ways of reaching the same conclusion.

English Decisions

The English decisions of *Keene* v. *Thomas*,[34] *Green* v. *All Motors Ltd.*[35] and *Tappenden* v. *Artus*[36] illustrate a clear conflict of principle with the High Court's views in *Fisher's Case*. It is respectfully submitted that this conflict commenced with an *obiter dictum* in *Keene's Case* which has been unnecessarily adopted and extended by the later decisions. In both *Keene* v. *Thomas* and *Green* v. *All Motors Ltd.*, the respective hire-purchase agreements contained clauses which obliged the hirers to keep the goods in repair but did not include any prohibition upon the creation of a lien. From this obligation to keep in repair, the courts correctly implied that "it was within the contemplation of the parties at the time they made the contract that the car might have to be sent to a repairing establishment to be repaired"[37] in such circumstances that the repairer would obtain a lien.

That proposition is unobjectionable. However, both Lord Alverstone in *Keene* v. *Thomas* and Swinfen Eady and Scrutton, L.JJ. in *Green* v. *All Motors Ltd.* based their decisions upon the additional grounds that the hirer "was entitled to use the car in the way in which motor cars are ordinarily

[30] (1917) 1 K.B. 625.
[31] *Bowmaker Ltd.* v. *Wycombe Motors Ltd.* (1946) 1 K.B. 505; *Tappenden* v. *Artus* (1964) 2 Q.B. 185 at 195; (1963) 3 All E.R. 213 at 216.
[32] (1928) 41 C.L.R. 167 at 169.
[33] *Automobile Finance Co. of Australia Ltd.* v. *Fisher* (1928) V.L.R. 131.
[34] (1905) 1 K.B. 136.
[35] (1917) 1 K.B. 625.
[36] (1964) 2 Q.B. 185; (1963) 3 All E.R. 213.
[37] *Green* v. *All Motors Ltd.* (1917) 1 K.B. 625 at 630 *per* Swinfen Eady, L.J.

used, and he could not do so unless the car was repaired".[38] And in *Keene* v. *Thomas*, Lord Alverstone said "the principle laid down by Collins, J. in the case of *Sungen Manufacturing Co.* v. *London and South Western Ry. Co.* goes a long way to support the proposition that the hirer is entitled to use the hired chattel for all reasonable purposes".[39] It is submitted that in each of these cases the sole authority for the creation of the lien came from the obligation to keep in repair. The propositions quoted above certainly establish that the hirer has a right to repair the hired chattel but it does not therefore follow that the hirer has a right to pledge the owner's credit by permitting a lien to be attached to his goods. It is one thing to imply the authority to create a lien from the owner's express authorization to keep goods in repair. It is quite a different matter to imply such an authority from the fact that the owner has allowed another to use the goods. The English decisions fail to distinguish the two situations.[40]

Tappenden v. *Artus* witnesses the extension of the same dicta to the situation where the bailee has not been expressly required to keep the goods in repair. It relies upon the above quoted passages of Swinfen Eady and Scrutton, L.JJ. which it is submitted are really only *obiter dicta.* In *Tappenden* v. *Artus* the bailee was a prospective purchaser under a hire-purchase agreement who was given possession of the van before a hire-purchase agreement had been executed. The vehicle broke down while being driven by the bailee who instructed the artificer to tow it into his garage and execute the necessary repairs. The repairer carried out the repairs while ignorant of the plaintiff's ownership of the van. The bailee failed to pay for the repairs. The owner terminated the bailment and sought to recover the van from the defendant who pleaded his common law lien in defence. The County Court judge made an order in favour of the plaintiff owner and the defendant repairer appealed to the Court of Appeal which upheld the appeal. In a joint judgment read by Diplock, L.J. the Court reviewed the earlier cases and relied in particular upon *Keene* v. *Thomas* and *Green* v. *All Motors Ltd.* The Court noted that in each of these cases there was an obligation cast upon the hirer to keep the goods in repair. The Court of Appeal recognized that Scrutton, L.J. had based his decision in *Green's Case* upon the broader ground that a hirer is entitled to have the goods repaired so that he can use them in the ordinary way, and is therefore entitled to have them repaired without any express authority from the owner. The Court of Appeal concurred in that reasoning, but omitted to give any sound reason why the broader ground should be accepted as the *ratio decidendi* of *Green's Case,* rather than the well-established principle that an obligation to repair implies authority to create a lien.

It is conceded that this approach was open to the Court but it should certainly be viewed as an extension of the previously existing law rather than a fresh application of existing principles. It is also unfortunate that the Australian decisions, *Fisher's Case* and *Lombard Australia Ltd.* v. *Wells Park Motors Pty. Ltd.*[41] were neither cited by counsel nor considered by the Court,[42] even though the former case is discussed in the leading text on the law of bailment.[43]

Even if *Tappenden* v. *Artus*[44] is good law, it is important to note certain

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[38] *Id.* at 631.

[39] (1905) 1 K.B. 136 at 138.

[40] These decisions are in conflict with the decision of *Cassils & Co. and Sassoon & Co.* v. *Holden Wood Bleaching Co. Ltd.* (1914) 84 L.J.K.B. 834.

[41] (1960) V.R. 693.

[42] Compare the disappointment expressed by Dixon, J. (as he then was) in *Waghorn* v. *Waghorn* (1942) 65 C.L.R. 289 at 297-8 that "the Court of Appeal did not take an opportunity of considering the judgment delivered by this court [High Court of Australia] in *Crown Solicitor (S.A.)* v. *Gilbert*".

[43] G. W. Paton, *Bailment in the Common Law* (1952) at 348-9.

[44] (1964) 2 Q.B. 185; (1963) 3 All E.R. 213.

situations to which it does not apply. The rationale of the decision is that the bailee is entitled to have the goods repaired so as to enable him to put them to their ordinary use, for example, to make a motor car or van roadworthy. Where the repairs cannot be justified as reasonably necessary in order to make the goods suitable for their ordinary use, or for the use contemplated under the particular bailment, the reasoning in *Tappenden* v. *Artus* would not apply. For example, had the bailee in that case engaged a spray-painter to duco the van a different colour, the workman probably would not have acquired a lien as against the plaintiff.[45] The Court of Appeal in *Tappenden* v. *Artus* considered that the bailment was not gratuitous since the bailee undertook to license and insure the van at his own expense. The Court did not have to consider what the position would have been if the bailment had been purely gratuitous. There appears to be no authority directly on this point. The principle that the bailee is entitled to have such repairs carried out as are reasonably incidental to his use of the van, would not appear to entitle a third party, who has carried out repairs at the request of a gratuitous borrower, to a lien as against the bailor. Since the bailee has furnished no consideration for his user of the goods, the bailor is under no duty to maintain the goods[46] nor need they be fit for any particular purpose.[47] From this proposition it may be argued that the bailee cannot claim that the delivery of the goods to a repairer is reasonably incidental to his reasonable use of the goods. Where there is a gratuitous loan of goods without any express conditions as to fitness, or obligation on the borrower to repair, there is no basis upon which a court can imply that the owner has authorized the bailee to repair.[48] Similarly where the purpose of the bailment is that the bailee shall perform work upon the goods for reward, he may be entitled to sub-contract the work or part thereof to a third party, but this would not subject the goods to a lien enforceable by the subcontractor against the owner.[49] Such authority would only arise where the contract between the owner and original bailee so provided. It is doubtful whether such authority would be implied solely because the owner was aware, at the time the contract was made, that the bailee could not complete the work alone, and would of necessity be forced to sub-contract part of the work.

Australian Courts' Dilemma

It is interesting to consider what approach will now be adopted by Australian courts faced with an obvious conflict between the English Court of Appeal and the High Court of Australia. All of the English decisions cited above are either judgments of the King's Bench Division or of the Court of Appeal. This issue does not appear to have been considered by the House of

[45] "Different considerations would apply to repairs which were not necessary to make the van roadworthy, for the execution of such repairs might not be reasonably necessary to the reasonable use of the van by the bailee, which was the purpose of the bailment." *Tappenden* v. *Artus* (1964) 2 Q.B. 185 at 202; (1963) 3 All E.R. 213 at 220.

[46] G. W. Paton, *supra*, at 153-4: "In gratuitous loan for use, the lender is not responsible for mere nonfeasance in failing to keep the *res* in repair during the period of the loan."

[47] Although earlier cases, such as *Coughlin* v. *Gillison* (1899) 1 Q.B. 145 and *Chapman or Oliver* v. *Saddler & Co.* (1929) A.C. 584 at 596, held that a gratuitous bailor was only obliged to disclose defects of which he was aware, these cases were decided before *Donoghue* v. *Stevenson* (1932) A.C. 562. See generally, discussions by Paton, *supra*, at 151-2, and the warning of J. G. Fleming, *The Law of Torts* (3 ed. 1965) 487: "The modern attitude has become distinctly unsympathetic to continuing discrimination against gratuitous relations."

[48] "It is clear that the bare fact of bailment of goods does not of itself give to the bailee any authority to give actual possession of the goods to anybody else." *Tappenden* v. *Artus* (1964) 2 Q.B. 185 at 196; (1963) 3 All E.R. 213 at 216.

[49] *Cassils & Co. and Sassoon & Co.* v. *Holden Wood Bleaching Co. Ltd.* (1914) 84 L.J.K.B. 834; 112 L.T. 373; and *Pennington* v. *Reliance Motor Works Ltd.* (1923) 1 K.B. 127 at 129.

Lords or Privy Council. Decisions of the English Court of Appeal are not binding on Australian courts although they are generally followed.[50] There is certainly a tendency to follow the English decisions for the sake of comity and where "many transactions may have been adjusted and rights determined".[51] Dixon, J. (as he then was) wrote in *Waghorn* v. *Waghorn* : "I think that if this court [High Court of Australia] is convinced that a particular view of the law has been taken in England from which there is unlikely to be any departure, wisdom is on the side of the court's applying that view to Australian conditions, notwithstanding that the court has already decided the question in the opposite sense."[52] However, in more recent years the High Court has not felt compelled to follow decisions of the Court of Appeal,[53] or for that matter, of the House of Lords,[54] where it is of the opinion that those decisions were manifestly wrong.

Another distinction drawn by Dixon, J. in *Waghorn* v. *Waghorn*[55] related to divergences of English and Australian views (a) where "a particular application of a principle about which there is no difference of opinion" and (b) "where a general proposition [of legal principle] is involved". In the first case he considered that no harm could come from the High Court adhering to its own decision. In the second case he stated that "the court should be careful to avoid introducing into Australian law a principle inconsistent with that which has been accepted in England".[56] Applying these statements to the question of a bailee's authority to create a lien, two points should be made:

(1) There is no divergence between English and Australian courts upon the proposition that a lien can only be created by the owner of chattels or with his authority. That is the general proposition of principle. The divergence relates only to the question whether such an authority can be implied from an entitlement to use the chattel as it is ordinarily used. Although it may be arguable, it would appear that this question involves a particular application of an agreed principle rather than dispute as to the principle itself, and that therefore Dixon, J.'s reasoning would not require the High Court to follow the English authorities.

(2) The second point is that even where the divergence is classified as divergence as to a general proposition, Dixon, J. stated that "the court should be careful to avoid *introducing*[57] into Australian law a principle inconsistent with that which has been accepted in England". When the issue next comes before an Australian court and the question is whether that court should follow *Tappenden* v. *Artus*, it would not conflict with Dixon, J.'s view to decline to follow the Court of Appeal, since to do so would not be to *introduce* an inconsistent principle—it has already been introduced *and established* in Australian law in *Fisher's Case* and *Lombard's Case*, both of which were decided prior to *Tappenden* v. *Artus*.

2. THE HIRE-PURCHASE SITUATION

Since a hire-purchase agreement is merely a bailment coupled with an option to purchase, the above discussion of a lien, which a bailee has purported to confer, is equally applicable, so far as the general law is concerned, to the

[50] *Sexton* v. *Horton* (1926) 38 C.L.R. 240 at 244.
[51] *Waghorn* v. *Waghorn* (1942) 65 C.L.R. 289 at 292 *per* Rich, J.
[52] *Id.* at 297.
[53] *Cowell* v. *Rosehill Racecourse Co. Ltd.* (1936) 56 C.L.R. 605; *Wright* v. *Wright* (1948) 77 C.L.R. 191; *Commissioner for Railways (N.S.W.)* v. *Scott* (1959) 102 C.L.R. 392.
[54] *Parker* v. *The Queen* (1963) 111 C.L.R. 610; *Skelton* v. *Collins* (1966) 115 C.L.R. 94; *Uren* v. *John Fairfax & Sons Pty. Ltd.* (1966) 40 A.L.J.R. 124.
[55] (1942) 65 C.L.R. 289 at 297.
[56] *Ibid.*
[57] Italics supplied.

situation where a hirer under a hire-purchase agreement has purported to confer a lien. However, the Uniform Hire-Purchase Act extends in several respects the protection available to the person claiming a lien. The inclusive definition of "Hire-purchase agreement" contained in s. 2 of the Hire-Purchase Act, 1960 (N.S.W.)[58] extends not only to the classical agreement in the sense described above,[59] but also includes an agreement for the *purchase*[60] of goods by instalments where property in the goods does not pass to the purchaser until after delivery, provided the purchaser is not engaged in the business of selling goods of the same nature or description. Thus a contract of sale by instalments will be subject to the Hire-Purchase Act if the above conditions are fulfilled.

Where the hiring or sale agreement is subject to the Act, s. 34(1)[61] will enable a worker,[62] who performs work upon the goods to claim a lien, provided he would have been entitled thereto if the hirer[63] had been the owner of the goods. This provision is subject to s. 34(2) which precludes enforcement of the lien against the owner where the hire-purchase agreement prohibits the creation of a lien by the hirer, and the worker had notice thereof prior to commencing work on the goods. Since there is no doctrine of constructive notice in relation to chattels,[64] mere notice that the goods are subject to hire-purchase will not impute to the worker notice of the prohibition contained in the agreement. It is submitted that the lien will remain enforceable against the owner even where he can prove that the worker knew the goods were on hire-purchase from the owner and that the owner's standard form of hire-purchase agreement prohibited creation of a lien, provided the worker had not seen a copy of the instant agreement and did not have *actual* notice from any other source.

The section presents practical problems for an owner-finance company which wishes effectively to prevent a worker obtaining a lien without its authority. It may sometimes be practicable to place an appropriate notice on a prominent part of the goods, but the notice may be removed or obliterated by the hirer. A possible solution is suggested by the decision in *Bowmaker Ltd.* v. *Wycombe Motors Ltd.*[65] where the hire-purchase agreement contained provisions (a) prohibiting the hirer from creating a lien, and (b) enabling the plaintiff-owners to terminate the agreement upon the hirer's default by giving written notice to the hirer. Following default in payments of hire, the plaintiffs terminated the agreement by letter, but did not repossess the goods. Thereafter the hirer placed the goods with the defendants for repair. The point at issue was whether the defendants were entitled to a lien as against the plaintiffs.

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[58] Sections referred to in the text are from the New South Wales Hire-Purchase Act, 1960. References to equivalent sections in the statutes of other States are listed in the footnotes. Q'ld. s. 2; Vic. s. 2; S.A. s. 2; W.A. s. 2; Tas. s. 4.

[59] I.e. the classical form of hiring agreement, under which the hirer has an option, but not an obligation, to purchase. It first received judicial recognition as falling outside s. 25(2) of the English Sale of Goods Act, 1893 (Sale of Goods Act, (N.S.W.) 1923, s. 28(2)), in the leading case of *Helby* v. *Matthews* (1895) A.C. 471.

[60] Italics supplied.

[61] Q'ld. s. 31; Vic. s. 26; S.A. s. 26; W.A. s. 26; Tas. s. 35.

[62] It would appear that the term "worker" has no technical meaning in this context. The section merely incorporates by reference the general law principles that the lienee must have performed some work on or in relation to the chattel so as to effect an improvement. See text and cases cited at footnote 2. Although the term clearly does not include carriers, innkeepers or warehousemen, they are specially protected by legislation. See, e.g., Common Carriers Act, 1902 (N.S.W.), Innkeepers' Liability Act, 1902 (N.S.W.), and Warehousemen's Liens Act, 1955 (N.S.W.) and the relevant cases cited in Else-Mitchell & Parsons, *Hire-Purchase Law* (3 ed.) 167.

[63] "Hirer" is defined in the definition section to include "the person to whom goods are . . . agreed to be sold under a hire-purchase agreement".

[64] See *Manchester Trust* v. *Furness* (1895) 2 Q.B. 539 at 545 *per* Lindley, L.J.

[65] (1946) 1 K.B. 505.

The defendants argued that the ostensible authority flowing from the hirer's lawful possession continued after termination of the agreement, and until such time as notice of the termination of the agreement was given to the repairer. This argument was rejected by the Court. The hirer's possession following termination of the agreement was equated to that of a thief, since the owner's consent to the bailment had ceased. The harsh operation of the principle advocated by the defendants is obvious when it is realized that the owners would be obliged to notify every person whom the erstwhile hirer might possibly request to repair the goods. The argument that the plaintiffs would receive the benefit of the repairs without payment likewise carried no weight with the Court. In fact the owners were entitled under the hire-purchase agreement to have the goods repaired at the hirer's expense; and, of course, the repairer in theory at least was not left without a remedy when his lien was refused, since he retained a claim in contract against the hirer who authorized the repairs.

The plaintiff's approach in *Bowmaker's Case* may be capable of further refinement, by providing in the hire-purchase agreement that the agreement will terminate *eo instanti* with any attempt by the hirer to authorize work on or in relation to the goods in such circumstances that when the work is performed the worker would obtain a lien. Such a provision should preclude any argument that the agreement had not been effectively terminated prior to the worker commencing work on the goods. That argument was raised by the defendants in *Bowmaker's Case* but rejected on the facts.[66] It would appear that this provision would protect the owner's rights notwithstanding the Hire-Purchase Act, since once the agreement is terminated, the goods would no longer be "goods comprised in a [subsisting] hire-purchase agreement" within the meaning of s. 34(1) of the Act.

3. SELLER OR BUYER IN POSSESSION

The third situation to be considered is that of a seller remaining in possession after property has passed to the buyer, or alternatively, of a buyer who has obtained possession but not property in the goods. In both cases the non-owner is in possession as bailee for another. He is empowered by s. 28(1) and (2) respectively of the Sale of Goods Act, 1923 (N.S.W.) to confer a good title upon a *bona fide* purchaser or pledgee without notice of the prior sale. Although there are material differences in the language of the two subsections in other respects,[67] their operation is limited by the identical conditions that there must be a "delivery or transfer by that person [that is, the non-owner bailee in possession] or by a mercantile agent acting for him of the goods or documents of the title under any sale pledge *or other disposition*[68] thereof to any person receiving the same in good faith and without notice. . . ."

Obviously a lienee cannot claim to have had the goods delivered to him under a sale or pledge. Likewise it is submitted that the delivery of goods to a repairer is not a disposition thereof. The term "disposition" would appear

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[66] (1946) 1 K.B. 505 at 511 *per* Humphreys, J.

[67] These differences are: (a) s. 28(1) relates only to a sale, whereas s. 28(2) applies both where a person has bought or merely agreed to buy, (b) under s. 28(1) the seller need not have retained possession with the consent of the buyer; the seller must have consented to the buyer obtaining possession under s. 28(2), (c) s. 28(1) provides that the effect of the second sale shall be the same as if the seller were expressly authorized by the owner, while the result under s. 28(2) will be the same as if the person delivering or transferring were a mercantile agent intrusted by the owner with the goods or documents of title. This third difference is discussed *infra*. For general discussion of these differences, see K. C. T. Sutton, *The Law of Sale of Goods in Australia and New Zealand* (1967) 258-62.

[68] Italics supplied.

to refer to disposal of a proprietary interest in the goods rather than a transfer or delivery of mere possession. Admittedly s. 28 will not operate where there has been an attempted sale or disposition of property in the goods without transfer or delivery of possession of the goods themselves or documents of title thereto. However the words of the section "delivery or transfer . . . under any sale, pledge or other disposition" clearly indicate that "disposition" must be construed *ejusdem generis* with sale and pledge, and they refer to the disposition of property rather than the disposal of possession.[68a] Thus "disposition" has been held to include disposal of an interest in goods by hire-purchase.[69] Dr. Sutton suggests that a disposition by way of gift would also fall within s. 28.[70] This proposition is consistent with the *ejusdem generis* construction of disposition, in the sense that a disposition, whether by sale, pledge or gift, involves a transfer of proprietary rights. However, it may be argued that since both sale and pledge require consideration, the *ejusdem generis* rule requires the meaning of disposition to be restricted in the same way. On the other hand, the inclusion of gifts within the meaning of the term "disposition" in other contexts referred to in the preceding footnote would tend to reduce the importance of the element of consideration in the construction of the present provision and permit the *genus* to be extended to include transfers without consideration.

Delivery[71] to a repairer, carrier or warehouseman is not an act, dispositive of any proprietary interest in the goods. A lienee does not acquire any rights of property in the goods and hence has no power of sale, except where specifically conferred by statute.[72] Assuming for the moment, however, that delivery to a repairer, carrier or warehouseman could be construed as a disposition, it is interesting to note the differing results under the two subsections. Under s. 28(1) the disposition "shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same". If s. 28(1) applies, it would deem the owner-buyer to have authorized the seller to make the "disposition"—that is, the delivery for repair, carriage or warehousing. Delivery pursuant to such authorization would create a lien enforceable against the owner. On the other hand, s. 28(2) provides that the disposition "shall have the same effect as if the person making the delivery or transfer were a mercantile agent intrusted by the owner with the goods or documents of title". Section 28 (2) makes no reference to the mercantile agent having been authorized to make any disposition of the goods, but it does incorporate the provisions contained in the

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[68a] This view is supported by the decision in *Roache* v. *Australian Mercantile Land & Finance Co. Ltd.* (1966) 84 W.N. (Pt. 2) (N.S.W.) 71, especially *per* Jacobs, J.A. at 73-5, where he deals with the meaning of "disposition" in the Factors (Mercantile Agents) Act, 1923, s. 5.

[69] *Union Transport Ltd.* v. *Ballardie* (1937) 1 K.B. 510.

[70] *Supra,* at 272. Sutton cites no authority and there does not appear to be any decided case in which a donee from seller or buyer in possession has acquired a good title under s. 28(1) or (2). Turning to other areas of the law, the Conveyancing Act, 1919 (N.S.W.) s. 7 contains a definition of "disposition" which makes no reference to any requirement of consideration but which would include a conveyance by way of gift. The term is also frequently used in legislation imposing death and succession duties, where the context obviously implies that dispositions for less than full consideration are included. See e.g. Stamp Duties Act, 1920-1966 (N.S.W.) s. 100; and *Duke of Northumberland* v. *A.-G.* (1905) A.C. 406 at 410-11, where Lord Macnaghten said with reference to the construction of the Succession Duty Act, 1853, "it is clear that the terms 'disposition' and 'devolution' must have been intended to comprehend and exhaust every conceivable mode by which property can pass, whether by act of parties or by act of the law. . . . In many cases the purpose of the Act would be defeated unless you give to the term 'disposition' the largest possible signification".

[71] The better view would appear to be that the delivery contemplated by s. 28 must be actual delivery and not merely a constructive delivery.

[72] See e.g. Government Railways Act, 1912 (N.S.W.) s. 26; Warehousemen's Liens Act, 1935 (N.S.W.) s. 6; and Disposal of Uncollected Goods Act, 1966 (N.S.W.) s. 5.

Factors (Mercantile Agents) Act, 1923 (N.S.W.). That Act provides in s. 5 that "where a mercantile agent is entrusted as such with the possession of any goods or the documents of title to goods, any sale pledge *or other disposition*[73] of the goods made by him in the ordinary course of business of a mercantile agent shall . . . be as valid as if he were expressly authorized by the owner of the goods to make the same".

Thus, if a disposition under s. 28(2) is to be effective it must be carried out in the manner in which a mercantile agent carries on the ordinary course of his business. This further limitation has been described as "vague and unsatisfactory".[74] In effect it raises the question of fact, whether the particular disposition was of the kind which a mercantile agent, dealing in this type of goods, would normally transact. In the context of the present discussion, the question becomes: Would a mercantile agent entrusted with goods, as such, be acting in the ordinary course of his business if he were to deliver them to a repairer, carrier or warehouseman without specific authorization from the owner? It is submitted that the answer must depend on the circumstances of each case. For example, if the goods are likely to deteriorate unless certain repair work is carried out, there may be an inference that it would be ordinary business practice for a mercantile agent to take the necessary preventive action. The test under s. 28(2) is, in any event, a rather hypothetical one, as was illustrated by the decision in *Newtons of Wembley Ltd.* v. *Williams*,[75] and the English Law Reform Committee has recommended that it be amended to correspond with the test in s. 28(1).[76] Again it is emphasized that s. 28 will only apply if delivery for repair, carriage or warehousing can be construed as a disposition, which appears unlikely.

Quite apart from s. 28, where the seller or buyer is in possession as a non-owner bailee, it may be argued that, provided he retains possession with the owner's consent, he is entitled to have the goods repaired in such circumstances that a lien will be enforceable against the owner. Such an argument might find support in the judgments in *Tappenden* v. *Artus*.[77] However, it is submitted that the situation is distinguishable since the bailee in the s. 28 situation is not a bailee under a separate contract of bailment from which it can be implied that the bailee "is entitled to have it repaired so as to enable him to use it in the way in which such a chattel is ordinarily used".[78] Once property as well as possession have passed to the buyer, a lien created by him is fully effective.[79] Even though the seller has not been paid, he has lost all rights in respect of the goods themselves such as his unpaid seller's lien[80] and right of stoppage,[81] and is relegated to his personal action against the buyer to recover the price.[82] Similarly, while property and possession remain with the seller, a bailment by him to a third party for repair will be fully enforceable against the buyer as well as the seller. The buyer's only remedy will be against the seller for non-delivery,[83] tender or payment of the price being the normal condition precedent to action.[84]

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[73] Italics supplied.

[74] K. C. T. Sutton, *supra* at 262.

[75] (1965) 1 Q.B. 560.

[76] Twelfth Report (Transfer of Title to Chattels) 1966. Cmnd. 2958. Para. 23.

[77] (1964) 2 Q.B. 185; (1963) 3 All E.R. 213.

[78] *Green* v. *All Motors Ltd.* (1917) 1 K.B. 625 at 633 *per* Scrutton, L.J., cited with approval in *Tappenden* v. *Artus* (1964) 2 Q.B. 185 at 199; (1963) 3 All E.R. 213 at 218.

[79] In *Mulliner* v. *Florence* (1878) 3 Q.B.D. 484, for example, the defendant innkeeper was held to have acquired a valid lien over his guest's horses, wagonette and harness, even though the guest, a swindler named Bennett, had never paid the purchase price to the plaintiff.

[80] Sale of Goods Act, 1923 (N.S.W.) s. 45.

[81] *Id.* s. 46.

[82] *Id.* s. 51.

[83] *Id.* s. 53.

[84] E.g., s. 31 provides that "unless otherwise agreed, delivery of the goods and payment

Conclusion

The validity of a common law lien is governed by the following principles:

(1) A lien can only be created by the owner or with his authority.
(2) The owner's authority may be express, or implied from an authority to keep the goods in repair, or from a course of conduct (ostensible authority).
(3) Mere possession of goods, although lawfully obtained, is not sufficient in itself to authorize the creation of a lien.
(4) English cases indicate that possession, coupled with a right to use for the bailor's benefit, is sufficient authority to create a lien effective against the owner. It is submitted that Australian courts would still require some further authorization from the owner.
(5) The Hire-Purchase Act, 1960 (N.S.W.) s. 34 confers a statutory right of lien upon a worker who does work upon goods comprised in a hire-purchase agreement without notice of any prohibition contained in the agreement.
(6) A seller or buyer of goods, who is in possession of them, but has not property therein at the relevant point of time, is not in a position to bind the owner by a lien under s. 28(1) or (2) of the Sale of Goods Act, 1923 (N.S.W.). The delivery to the repairer is not a "sale pledge or other disposition" within the meaning of that section.

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of the price are concurrent conditions, that is to say, . . . the buyer must be ready and willing to pay the price in exchange for possession of the goods".

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