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REMEDIES AS PROPERTY: A DIFFERENT PERSPECTIVE ON SPECIFIC PERFORMANCE CLAUSES

DAVID FRISCH*

[A] right is best measured by effects in life.

Absence of remedy is absence of right.

Defect of remedy is defect of right.¹

I. INTRODUCTION

In an article published in 1987,² I argued that buyer status attaches under the Uniform Commercial Code³ "at the moment the purchaser obtains the remedial right to the goods vis-à-vis the seller."⁴ The argument took the following form.

The commercial doctrine of good faith purchase makes it possible for certain transferees of goods to receive under appropriate circumstances a property interest superior to that of the transferor.⁵ One such protected transferee is the buyer in ordinary course of business. Although the question of when during

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I would like to thank my colleagues, Martin A. Kotler and Robert J. Lipkin, for their helpful comments on an earlier draft of this Article. I also wish to acknowledge with thanks the summer research grant so generously provided by Widener University School of Law.

1. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 83-84 (1960).

2. David Frisch, *Buyer Status Under the U.C.C.: A Suggested Temporal Definition*, 72 IOWA L. REV. 531 (1987).

3. Unless otherwise indicated, all references and citations to "the Code" or "U.C.C." in this Article are to the text and comments of the UNIFORM COMMERCIAL CODE (1990).

4. Frisch, *supra* note 2, at 533.

5. Although the scope of this discussion is limited to transactions in goods, the good faith purchase doctrine is not. The primary point of the doctrine is to facilitate exchange between parties in a free and open market. By generally favoring "security of purchase" over "security of ownership," the good faith purchase doctrine stands in sharp contrast to the first principle of Anglo-American property law, which often appears as the Latin maxim *nemo dat quod non habet* (one cannot give what one does not have). See generally Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954).

the life of a sales transaction a purchaser qualifies as a protected buyer can manifest itself when any one of several Code sections is applicable, the context in which most courts have been called upon to decide this question has been in the application of U.C.C. section 9-307(1).⁶

Section 9-307(1) is one of the Code's numerous exceptions to the presumptive effectiveness of a security interest.⁷ This section provides: "A buyer in ordinary course of business . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence."⁸ When section 9-307(1) applies, the security interest ceases to exist.

There are several possible explanations for this section. One possible explanation is that it merely expresses a power of sale which was intended, but not expressly authorized, by the secured party.⁹ However, the security interest is cut off even though the security agreement actually restricts the power of sale, suggesting a somewhat different explanation for the section. The power of sale is imputed not because of what the secured party actually intended; but rather, because the buyer reasonably might have assumed that was what the secured party actually intended. This subtle shift in focus makes the buyer's expectations paramount.

Given the assumption that section 9-307(1) is designed to effectuate the legitimate expectations of the buyer, it is reason-

6. A determination of buyer status is also frequently required under U.C.C. § 2-403(2). The section provides: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." U.C.C. § 2-403(2) (1990). Because the term "buyer in ordinary course" is defined in Article 1 of the U.C.C., *see id.* § 1-201(9), it would seem that the drafters intended a uniform construction of the term irrespective of the particular setting involved.

7. Section 9-201 provides in part: "Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors." *Id.* § 9-201. Therefore, in the absence of some exception, a secured creditor prevails against all other parties. The Code contains a host of such exceptions scattered throughout Part 3 of Article 9. *See, e.g., id.* §§ 9-307 to 9-310, 9-312 to 9-315.

8. *Id.* § 9-307(1).

9. *See* 1 STATE OF N.Y. LAW REVISION COMM'N REPORT: STUDY OF THE UNIFORM COMMERCIAL CODE 241 (reprint ed. 1980) (1955) [hereinafter N.Y. COMM'N REPORT].

able to ask what are the buyer's other expectations as the transaction of sale progresses from contract formation to performance. Though expectations take many forms, they should always correspond to the seller's contractual obligations and the particular enforcement mechanism available if they are breached. Of most relevance is the seller's basic obligation to tender conforming goods when and where the contract requires.¹⁰ If the seller does not deliver the goods, the buyer will find that "its substantial equivalent for all practical purposes is readily obtainable from others than the [seller] in exchange for a money payment."¹¹ In light of this, the buyer's expectations likely are to be satisfied by an enforcement mechanism that limits the buyer's relief to money damages.¹² Where, however, the "subject matter of [a] contract is unique in character and cannot be duplicated" or the purchase of "a substantial equivalent involves difficulty, delay, and inconvenience,"¹³ the seller may have to actually perform.¹⁴

Viewed in this way, one sees a close functional relationship between the good faith purchase doctrine and the Code's remedial rules. Because the seller usually has the option to deliver or pay damages, the point has not been reached where the buyer has a title expectation needing protection. Put another way, if the buyer cannot compel the seller's performance, the state of

10. See U.C.C. § 2-301 (1990) ("The obligation of the seller is to transfer and deliver . . . in accordance with the contract.").

11. 5 ARTHUR L. CORBIN, CONTRACTS § 1142, at 123 (1964). A central assumption of Article 2 is that most goods have substitutes.

12. The buyer's expectation interest is vindicated fully by a damages award based on an imagined purchase, see U.C.C. § 2-713 (1990) (measuring the buyer's damages by the difference between the market price at the time when the buyer learned of the breach and the contract price), or on an actual substitute purchase, see *id.* § 2-712 (permitting the buyer to "cover" by buying elsewhere and to recover from the seller the difference between the cover price and the contract price).

13. 5 CORBIN, *supra* note 11, § 1142, at 117-18.

14. According to § 2-716(1), specific performance is available "where the goods are unique or in other proper circumstances." U.C.C. § 2-716(1) (1990). Similarly, § 2-716(3) provides for replevin when goods are "identified to the contract if after reasonable effort [the buyer] is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing . . ." *Id.* § 2-716(3). The buyer may also have a right to the goods when, because of the seller's insolvency, a monetary claim would be less valuable or worse, valueless. See *id.* § 2-502. For more on these Article 2 sections, see *infra* part III.B.3.

the seller's title is immaterial. The buyer's title concerns crystallize, however, once the buyer acquires the legally cognizable right to obtain possession of the goods. It is then, and only then, that the buyer's legitimate claim to good faith purchaser status materializes.

My point, that the rights of the buyer should turn on the existence of a proprietary power over the goods, ultimately does not turn on the good faith purchase doctrine. It is equally applicable whenever a rule of law secures the buyer's purchase. For example, U.C.C. section 9-306(2) provides that a disposition of collateral pursuant to the secured party's authorization terminates the security interest.¹⁵ One obvious issue is the meaning of the term "disposition." A disposition includes, as the subsection tells us, a "sale" or "exchange," but the term should also be read to include the moment at which a buyer becomes entitled to possessory relief.¹⁶

In this Article, I would like to place the relationship between remedies and protected property interests that I previously have advocated in a broader theoretical perspective. Although much has been written about the nature of property,¹⁷ this more basic relationship largely has been ignored.¹⁸ Part II of this Article argues that, in general, the most useful criterion for determining whether an interest in specific property ("property right") exists is the characteristics of the remedies available for certain deprivations. I maintain that central to the idea of property rights is

15. Section 9-306(2) states in relevant part:

(2) Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise

U.C.C. § 9-306(2) (1990).

16. Unfortunately, not all courts would agree. *See, e.g.,* Weisbart & Co. v. First Nat'l Bank, 568 F.2d 391, 395 (5th Cir. 1978) (failing to give the word "disposition" any meaning independent of sale or exchange); *Mechanics Nat'l Bank v. Gaucher*, 386 N.E.2d 1052, 1055-57 (Mass. App. Ct. 1979) (refusing to allow "disposition" without a completed sale or right to payment).

17. For a relatively recent expanded analysis of this matter, see STEVEN R. MUNZER, *A THEORY OF PROPERTY* (1990).

18. Professor Jay Lawrence Westbrook is one theorist who has acknowledged the relationship between remedies and property. *See* Jay L. Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227, 257-63 (1989).

the legal entitlement to remedies that permits a person to exercise dominion over the specific asset or to exclude the exercise of dominion by others.

Part III examines the life history of a contract for the sale of goods. This Part demonstrates that the buyer ordinarily will not acquire a property interest in goods until the seller has completed performance. In Part IV of the Article, I respond to the decision made by the U.C.C. Article 2 (Sales) Drafting Committee of the National Conference of Commissioners on Uniform State Laws (the "Drafting Committee") that specific performance should be available to the buyer if the parties have expressly agreed.¹⁹ My analysis suggests that the effect of such a statutory provision would be to tolerate misleading appearances of the seller's ownership upon which creditors and purchasers may rely. I deal with the implications of my analysis both inside and outside the seller's bankruptcy.

II. TOWARDS A THEORY OF REMEDIES AS PROPERTY

My explanation for why certain remedies should be seen as defining property interests cannot completely be understood apart from the claim that what we call "property" is but an aggregate of different sorts of legal relations.²⁰ Because I be-

19. Interestingly, the Drafting Committee rejected the idea of providing that specific performance provisions should also be enforceable when they operate in favor of the seller. The seller's right to specific performance will therefore depend on equitable principles that co-exist with the Code under § 1-103. This decision followed from two concerns. One was that a high proportion of these provisions would find their way into the boilerplate of non-negotiated consumer contracts. The other concern follows from the fact that the only difference between specific performance for the seller and an action for the contract price (damages), see U.C.C. § 2-709 (1990), is that enforcement of the former is by contempt. For some members of the Committee this conjured up unacceptable visions of a debtor's prison.

20. See Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 361 (1954) ("[E]ssentially this institution of private property that we are trying to identify in outline is not a collection of physical objects, but rather a set of relationships"). Stephen Munzer refers to this notion of property as the "sophisticated conception":

The other way of understanding property is the sophisticated conception. One might almost call it the legal conception, for 20.1220 it is very common among lawyers. It understands property as *relations*. More precisely, property consists in certain relations, usually legal relations, among per-

lieve that this relational concept of property can best be seen if one approaches the matter from the theoretical perspective of Wesley N. Hohfeld, I will begin by briefly describing his so-called fundamental legal conceptions. Next, I will use Hohfeld's vocabulary to describe what distinguishes property relations from other legal relations. Only then will I present my own view that possessory remedies involve the same sorts of relations among persons and with respect to things as do other more traditional property rights. Finally, I will look at the performance of a sales contract and, in doing so, demonstrate that no property interest vests in the buyer until an effective possessory remedy is acquired.

A. *The Indeterminacy of Legal Concepts and Hohfeld's Fundamental Legal Conceptions*

In 1913, Hohfeld published the first of a series of influential articles in which he claimed to have identified what he described as the eight "lowest common denominators of the law."²¹ These

sons or other entities with respect to things. A metaphorical way of stating the sophisticated conception is that property is a bundle of "sticks."

MUNZER, *supra* note 17, at 16. Bear in mind that because our concern is with legal property interests (these may or may not correspond to natural, political or moral property interests), the only relations that matter are those recognized by the legal system. See the discussion of Hohfeld's work, *infra* notes 21-36.

21. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 58 (1913) [hereinafter Hohfeld, *Some Fundamental Legal Conceptions*]. Hohfeld's other writings include Wesley N. Hohfeld, *Faulty Analysis in Easement and License Cases*, 27 YALE L.J. 66 (1917); Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld, *Fundamental Legal Conceptions*]. Over the years, Hohfeld's selection of eight terms has not gone unchallenged. See, e.g., Albert Kocourek, *Tabulae Minores Jurisprudentiae*, 30 YALE L.J. 215 (1921) (arguing that the correct number of terms is greater than eight); William H. Page, *Terminology and Classification in Fundamental Jural Relations*, 4 AM. L. SCH. REV. 616 (1921) (arguing that the correct number of terms cannot be ascertained); Roscoe Pound, *Legal Rights*, 26 INT'L J. ETHICS 92 (1915) (arguing that the correct number of terms is less than eight). For other worthwhile discussions of Hohfeld, see generally Arthur L. Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226 (1921); E. Adamson Hoebel, *Fundamental Legal Concepts as Applied in the Study of Primitive Law*, 51 YALE L.J. 951 (1942); Isaac Husik, *Hohfeld's Jurisprudence*, 72 U. PA. L. REV. 263 (1924); Max Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141 (1938); Roy L. Stone, *An Analysis of Hohfeld*, 48 MINN. L. REV. 313 (1963).

consist of four primary entitlements (rights, privileges, powers, and immunities) and their opposites and correlatives (no-rights, duties, disabilities, and liabilities).²² His purpose was to demonstrate that only by utilizing these fundamental conceptions was it possible to "think straight" about everyday legal problems.²³ In this connection, he exposed abstract legal ideas like "title," "due process," "privity," and "ownership" as meaningless expressions and, hence, unsuitable guides to the understanding and correct solution of cases.²⁴

The natural starting point in understanding Hohfeld's scheme is to grasp the significance of the manner in which he exhibited

22. See Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 21, at 30.

23. *Id.* at 18.

24. See EDWIN W. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 139 (1953). As one commentator explains:

[I]t was Hohfeld's thought that any legal term can be analyzed in terms of his fundamental legal relations, for they comprise a precise system for describing legal effects at all levels of remoteness. "Title," for example, is not a thing. If the term has any meaning at all, the meaning lies in the legal effects of "having title," that is, in the complex of rights, powers, privileges, immunities, etc., that the law gives to a person who has title to something. The insight that Hohfeld's analytical system provides has already been immensely valuable for understanding legal concepts.

Alan D. Cullison, *A Review of Hohfeld's Fundamental Legal Concepts*, 16 CLEV.-MAR. L. REV. 559, 573 (1967). This nominalist conception of the law was not new. As early as 1782, Jeremy Bentham made a similar argument:

Power, right, prohibition, duty, obligation, burthen, immunity, exemption, privilege, property, security, liberty—all these with a multitude of others that might be named are so many fictitious entities which the law upon one occasion or another is considered in common speech as creating or disposing of. Not an operation does it ever perform, but it is considered as creating or in some manner or other disposing of these its imaginary productions.

JEREMY BENTHAM, *OF LAWS IN GENERAL* 251 (H.L.A. Hart ed., 1970) (1782).

his eight terms to the reader. They were diagrammatically paired in the following manner:²⁵

JURAL OPPOSITES

rights	privilege	power	immunity
no-rights	duty	disability	liability

JURAL CORRELATIVES

right	privilege	power	immunity
duty	no-right	liability	disability

Implicit in the depiction of these terms is the crucial point that Hohfeld perceived the positive legal world²⁶ as a dynamic, multiple two-party system in which legal rights—in the broadest sense²⁷—were defined functionally as sets of jural relations. For example, as I explain below, jural correlatives are no more than a systematic expression of relations. Hohfeld makes it quite clear that each primary entitlement and its correlative are expressions of the same fundamental legal relation, as looked at

25. See Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 21, at 30.

26. It is worth noting that Hohfeld is concerned only with rules of positive law. In fact, one of his preliminary points is that the general failure to distinguish the legal from the non-legal is the root cause of much that is wrong with legal analysis. See *id.* at 20 ("[T]he arguments that one may hear in court almost any day and likewise a considerable number of judicial opinions afford ample evidence of the inveterate and unfortunate tendency to confuse and blend the legal and the non-legal quantities in a given problem.").

27. By the "broadest sense," I mean to include within the scope of the word "right" the additional conceptions of privilege, power, and immunity. As Stephen Munzer explains:

[To do otherwise] ignores, or underemphasizes, a unifying feature of the [right, privilege, power, and immunity] conceptions They are all rights in the broad sense of being individual advantages secured by law—where advantages include both choices and benefits. It is just that the advantage is sometimes secured by something other than a correlative duty on another person.

MUNZER, *supra* note 17, at 20 (footnote omitted). As noted in the text accompanying notes 29-31, when Hohfeld uses the term "right," he uses it in the more limited sense of the right-duty relation.

from the different perspective of the two parties to the relation. The system is dynamic in that the relations between any two people can change over time. This is evident in Hohfeld's description of an operative fact. According to Hohfeld, "Operative, constitutive, causal, or 'dispositive' facts are those which, under the general legal rules that are applicable, suffice to change legal relations, that is, either to create a new relation, or to extinguish an old one, or to perform both of these functions simultaneously."²⁸ No brief summary can do justice to Hohfeld's work, but it is possible to set out the basic elements of his theory if we consider separately the concepts of "rights" and "powers."

1. *Rights*

Hohfeld begins his discussion of the nature of rights by assailing what he saw as the prevailing "looseness of usage."²⁹ According to Hohfeld, the clue to the only true meaning of the term "right" is found in its correlative, "duty." "[I]f X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place."³⁰ This formulation reveals that Hohfeld has in mind a relation between two specific individuals, one who is the right-holder, and one who is the duty-bearer. Whether we speak of rights or duties we are speaking of the same fundamental legal relation; only our perspective changes. The statement that X has a right against Y means that if Y acts or forbears from acting in a certain manner, a court will grant a remedy to X.

What if Y were at liberty to do or not to do a given act without liability to X? According to Hohfeld, the parties would then stand in a privilege-no-right relation. The best way to think about this relation is that it is the antithesis of the right-duty relation. Note that the term "no-right" is the jural opposite of right, and the term "privilege" is the jural opposite of duty. To use Hohfeld's example, "whereas X has a *right* or *claim* that Y, the other man, should stay off the land, he himself has the *privi-*

28. Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 21, at 25.

29. *Id.* at 30.

30. *Id.* at 32.

lege of entering on the land; or, in equivalent words, X does not have a duty to stay off."³¹ We can also describe the relation from the other end. To the extent that X has a privilege to enter on the land, Y has a no-right (the correlative of X's privilege) that X shall not enter. To say that X's act was privileged means, therefore, that a court will not grant a remedy to Y.

The above discussion demonstrates that Hohfeld's right-duty and privilege-no-right relations are essentially formulations for assessing a defendant's liability. What they offer is a powerful analytical tool for conceptualizing and evaluating the legal effect of behavior. In order for an act to be the basis of civil liability a right-duty relation must exist between the plaintiff and the defendant. Conversely, if the court finds that the parties stand in the relation of privilege-no-right, the outcome of the case will be a judgment for the defendant.

2. Powers

Essentially what Hohfeld means by the term "power" is that Y (the power-holder) has the capacity to alter the legal status of X (the liability-bearer). It is obvious from this statement that the concept of "liability" is simply the correlative of power. The two terms describe the same relation from both ends. The *Restatement of Property* offers some of the clearest examples of the essential character of the power-liability relation. Because these examples also demonstrate the relevance of the right-duty and privilege-no-right relations, they are worth quoting in their entirety:

1. A, the owner of Blackacre, gives B a power of attorney to transfer Blackacre to a purchaser. B has a power. A is under a liability.
2. A is the owner of Blackacre. A authorizes B to transfer Blackacre to a purchaser. B has a power with regard to A's land and A is under a liability with respect to B. So far as B acts in conformity with the terms of his instructions he has both a power and a privilege. If he acts in violation of the terms of his instructions from A but under such circumstanc-

31. *Id.*

es as to bind A, he has a power but not a privilege, that is, A has a right that B shall not transfer as he did and B is under a duty not to transfer in that way, but if he does so transfer to C he will extinguish A's interest in the land.

3. B has the recorded title to Blackacre. He transfers the land to A. A does not record his deed. B makes a formally sufficient conveyance of the same land to C who buys in ignorance of the conveyance to A, and who pays full value for the land and records his deed. B in so conveying to C exercised a power to destroy A's interest and A was under a corresponding liability with regard to B. B has no privilege to do so and in doing so violates A's rights.³²

Last in Hohfeld's scheme is the disability-immunity relation. For Hohfeld, the term "disability" is equivalent to the absence of a power.³³ If a power is absent in one party, a term is needed to express the idea of absence of liability in the other party. Hohfeld selected the term "immunity" for this purpose.³⁴ Consequently, disability is the opposite of power, and immunity is the correlative of disability and the opposite of liability. Hohfeld offers a few examples to make this clear:

X, a landowner, has, as we have seen, power to alienate to Y or to any other ordinary party. On the other hand, X has also various immunities as against Y, and all other ordinary parties. For Y is under a disability (*i.e.*, has no power) so far as shifting the legal interest either to himself or to a third party is concerned; and what is true of Y applies similarly to every one else who has not by virtue of special operative facts acquired a power to alienate X's property. If, indeed, a sheriff has been duly empowered by a writ of execution to sell X's interest, that is a very different matter: correlative to such sheriff's power would be the *liability* of X,—the very opposite of immunity (or exemption). It is elementary, too, that as against the sheriff, X might be immune or exempt in relation to certain parcels of property, and be liable as to others.³⁵

32. RESTATEMENT OF PROPERTY § 3 illus. (1936).

33. Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 21, at 55.

34. *Id.* ("Immunity is one's freedom from the legal power or 'control' of another as regards some legal relation.").

35. *Id.*

In sum, Hohfeld's power-liability and immunity-disability relations signal a susceptibility to having one's legal position altered by certain acts of another. If X, by the doing of some act, can effect a change in a legal relation involving Y, this can be conveniently expressed by saying that X has a power and Y a correlative disability.³⁶ If X cannot affect Y's legal position, Y has an immunity; correlatively, X has no power.

Although much more can be said about Hohfeld's theory, my purpose here is simply to facilitate a better understanding of the relational nature of property interests. Let us now consider exactly what distinguishes property relations from other legal relations.

B. The Character of Property

If the world were inhabited by one person, Blackstone's description of property as the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe"³⁷ might make sense. Such a statement would describe his relation to those things and his unlimited right of free use and disposition. It makes no sense, however, to speak of this person's property. Because property is always subject to limitations and may or may not involve tangible things, it follows that Blackstone's conception of property, in today's world at least, is fundamentally flawed.³⁸ In short, while Blackstone's

36. Specifically, the exercise of a power by X will cause at least one of the following relational changes with Y: (1) an existing immunity-disability relation will change to a power-liability relation; (2) an existing power-liability relation will change to an immunity-disability relation; (3) an existing privilege-no-right relation will change to a right-duty relation; or (4) an existing right-duty relation will change to a privilege-no-right relation. See Cullison, *supra* note 24, at 570. Observe too, that the same act by X may have an effect on her relations with persons who are unknown and too numerous to count. For example, if X were to publicly offer a reward, her relation with each person who learned of the offer would change from an immunity-disability relation to a power-liability relation. Each would have a newly acquired power to create a contract with X (the power of acceptance) and X would be under a correlative liability.

37. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

38. Blackstone's conception of property has two aspects or dimensions: Property can exist only in tangible things and all property is absolute. Clearly, neither aspect

definition may at one time have been capable of providing predictable results,³⁹ a lasting conception of property must be more realistically based. In contrast with Blackstone's definition, a fundamental tenet of Hohfeld's analytical jurisprudence is that any conception of property must assume a relational context. Hohfeld's contribution was to shift the focus of the inquiry from things to legal relations. As Hohfeld explained:

is credible today. The idea that property is limited to a collection of physical objects lost whatever force it had as courts looked for ways to extend the protective umbrella of the Due Process Clause of the Fourteenth Amendment and to protect new forms of wealth. The best strategy they found was to designate the interest involved as property. See Dean G. Acheson, *Book Review*, 33 HARV. L. REV. 329, 330 (1919) ("Everything was thought of in terms of property,—reputation, privacy, domestic relations,—and as new interests called for protection, their success depended upon their ability to take on the protective coloring of property.") (footnote omitted); see also Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980) (discussing the extension of property protection to business goodwill, trademarks, trade secrets, and oil and gas).

It has long been recognized that society would be unmanageable if an absolute right of property were recognized. See MORRIS R. COHEN & FELIX S. COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 13 (1951). Joseph Singer succinctly describes many of the present-day limitations on the use and disposition of property:

Property rules limit what owners can do with their property (building codes, nuisance law, law of easements, covenants, servitudes, licenses, profits, defeasible fees, law of waste, water rights, zoning, environmental protection statutes) The freedom owners have to exclude others from their property is substantially limited by rules that require them to allow others access to their property (public accommodation laws, antidiscrimination laws and fair housing statutes, common carrier obligations to the public, free speech access to shopping centers or universities under state constitutional law, public policy exception to trespass law, the incomplete defense of necessity). Property rules limit the freedom of owners to determine who will own property in the future (the rule against perpetuities, rule against restraints on alienation, rule against creation of new estates, procedures for drafting valid wills, statutory forced shares, the public trust doctrine). Property owners do not have complete immunity from having their property taken away from them without their consent; many rules define circumstances under which property may be transferred involuntarily (recording statutes, title registration, adverse possession, prescriptive easements, implied easements, marital property statutes, constructive trusts, eminent domain law).

Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 641-42 n.108 (1988).

39. See Vandavelde, *supra* note 38, at 329.

Since all legal interests are "incorporeal"—consisting, as they do, of more or less limited aggregates of *abstract* legal relations—such a supposed contrast as that sought to be drawn by Blackstone can but serve to mislead the unwary. The legal interest of the fee simple owner of land and the comparatively limited interest of the owner of a "right of way" over such land are alike so far as "incorporeality" is concerned; the true contrast consists, of course, primarily in the fact that the fee simple owner's aggregate of legal relations is far more extensive than the aggregate of the easement owner.⁴⁰

Today Hohfeld's view is probably the predominate theory of property⁴¹ and is embodied in the *Restatement of Property*. Nowhere defined in the *Restatement* is the term "property." Because "property" is used in the *Restatement* to "denote legal relations between persons with respect to a thing,"⁴² the *Restatement* defines the more appropriate terms "right,"⁴³ "privilege,"⁴⁴ "power,"⁴⁵ and "immunity."⁴⁶ This approach attempts to promote "[c]larity of thought and exactness of expression"⁴⁷

This raises an important question. If property is properly thought of as a collection of legal relations between persons, how do we distinguish between property relations and other legal

40. Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 21, at 24.

41. See, e.g., Morris S. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927) ("Whatever technical definition of property we may prefer, we must recognize that a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things."); Arthur L. Corbin, *Taxation of Seats on the Stock Exchange*, 31 YALE L.J. 429, 429 (1922) ("Our concept of property has shifted; incorporeal rights have become property. And finally, 'property' has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities.") (footnote omitted); Eirik G. Furubotn & Svetozar Pejovich, *Property Rights and Economic Theory: A Survey of Recent Literature*, 10 J. ECON. LITERATURE 1137, 1139 (1972) ("[P]roperty rights do not refer to relations between men and things but, rather, to the sanctioned behavioral relations among men that arise from the existence of things and pertain to their use.").

42. RESTATEMENT OF PROPERTY ch. 1, at 3 (1936) (Introductory Note).

43. *Id.* § 1.

44. *Id.* § 2.

45. *Id.* § 3.

46. *Id.* § 4.

47. *Id.* ch. 1 (introductory note).

relations? In an important article, Felix Cohen nicely elaborates on the significance of this question and, by implication, its difficulty, in the following pedagogical exchange:

C. Mr. Fielden, what do you think of the American Law Institute definition of property as including any "rights, privileges, powers and immunities?" Under that definition, would immunity from racial discrimination in the exercise of the franchise be a property right?

F. Yes, under that definition I suppose it would.

C. And would the right to kill in self-defense be a property right?

F. Yes, I believe so.

C. In fact, any legal relationship under the definition of the American Law Institute is property, is it not?

F. Yes, I think the definition is comprehensive enough to cover any legal relation.

C. Might such a definition of property be useful to the teachers of property law who agreed on this definition in case they want to stake out jurisdictional claims to cover any legal problem whatsoever in their property courses?

F. Yes, I suppose it might have some utility in that direction.

C. But this definition would not be useful to us in trying to determine whether property exists in a given factory?

F. No.⁴⁸

Thus, although the observation that property is a set of legal relations may prove highly useful in preventing the discussion from straying to nonlegal usages of the term, in a sense, we have taken only the first step. A relations-based theory cannot itself explain why certain kinds of relations are not and should not be considered property. The concept of property cannot be completely comprehended, therefore, without considering a more fundamental issue; namely, what constellation of Hohfeldian conceptions are sufficient and necessary to its existence. Recogn-

48. Cohen, *supra* note 20, at 365 (citation omitted); see also Comment, *Adverse Possession of One's Own Debt*, 29 YALE L.J. 91, 94 n.16 (1919) ("Does not property mean anything of value to the individual? . . . This but emphasizes the point that the term is too inclusive to be of assistance in solving most disputed points.").

nizing the necessity of such an inquiry places us in the realm of the "full" or "liberal" concept of ownership.⁴⁹

A fundamental tenet of the liberal conception of property is that all mature legal systems have a common perception of ownership.⁵⁰ To be more concrete, if ownership is defined as "the *greatest possible interest in a thing which a mature system of law recognizes*,"⁵¹ it should be possible to identify its standard incidents. Only when we have a clear idea of the commonly understood meaning of ownership can we expect to determine which lesser incidents comprise more limited property rights.⁵² A well-known listing of the standard incidents of ownership is provided by A.M. Honoré.⁵³

49. I have borrowed this terminology from A.M. Honoré. See A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE (FIRST SERIES) 107 (Anthony G. Guest ed., 1961). For Honoré, the full or liberal concept of ownership is embraced by a legal system if it is possible for all of the 11 incidents of ownership, see *infra* notes 54-67 and accompanying text, to be united in one person. He is careful to point out, however, that the presence of all 11 incidents, while together sufficient to constitute ownership, may not be individually necessary. Honoré, *supra*, at 112-13.

50. Honoré, *supra* note 49, at 108 ("There is indeed, a substantial similarity in the position of one who 'owns' an umbrella in England, France, Russia, China, and any other modern country one may care to mention.").

51. *Id.*

52. Given that the incidents of ownership may be spread in a variety of ways among two or more persons, one may face the baffling question of which person is the actual owner. Honoré himself tries, but fails to provide us with workable criteria for making the choice. In the end, he concedes that the paradigm he presents is the clear and easy case—"a single human being owning, in the full liberal sense, a single material thing." *Id.* at 147. In fact, some have persuasively argued that "[t]he question is meaningless." Singer, *supra* note 38, at 638.

When several parties share legal rights in property, any identification of a single person as the "owner" is likely to be both arbitrary and misleading. It is arbitrary because we could just as easily identify someone else as the owner. It is misleading because it denies the existence of joint interests and the need to determine the legal relations among all the persons with legally protected interests in the property.

Id. Ultimately, for the limited purposes of this Article, it does not matter who the owner is. For what is at issue is the different question of whether the interest at stake may properly be called a *property* interest. Although the two questions are obviously related, a resolution of the former will not necessarily be dispositive of the latter.

53. Reliance on Honoré's incidents of ownership to help explicate a theory of property is not new. See, e.g., LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 7-23 (1977); MUNZER, *supra* note 17, at 22-27.

1. *The Right to Possess*

Honoré defines the right to possess in terms of "exclusive physical control of a thing."⁵⁴ Given that the true owner may not always have actual physical control, it follows that the right to possess entails two distinct aspects: (1) the right to acquire exclusive physical control; and (2) the right to retain exclusive physical control once it has been acquired.⁵⁵ Although Honoré couches his discussion in terms of a right only, the true nature of the relations involved is essentially different. This "right" can be better understood by considering it as part power and part immunity. The owner has the power to divest others of possession and is immune from having his possession divested by others.⁵⁶

2. *The Right to Use*

To prevent overlap with the next two incidents, the right to use is narrowly defined by Honoré to mean "personal use and enjoyment"⁵⁷ only. In Hohfeld's terms, the owner has a privilege to use and a right that his privilege not be interfered with.⁵⁸

54. Honoré, *supra* note 49, at 113.

55. *Id.* Whether this incident of ownership is achieved is not a question that can be answered without reference to the remedies available to the owner; that is, the right to possess is inextricably tied to remedies that enable the owner to keep or obtain possession.

56. It is not enough that the owner is immune from the efforts of others to divest him of possession. Such an immunity would be of limited value if it were not ultimately protected by a right-duty relation with third parties. Such a relation is necessary if the owner is to recover damages for attempted and real interferences with his possession. See BECKER, *supra* note 53, at 21 ("If I have the right to possess a thing, others do not merely have 'no right' that I not possess it; they have a duty not to interfere with my possession—perhaps even to see to it that the thing is restored to me if lost.").

57. Honoré, *supra* note 49, at 116.

58. It must be understood that the owner has what Hohfeld would describe as a "right" only when we can expect the legal system to act in a predictable enough manner to make the expectations of sanctions (remedies) against third parties justified. See *supra* note 26.

3. *The Right to Manage*

The right to manage is most profitably thought of as a collection of powers.⁵⁹ Simply put, the owner gets to decide how the thing owned shall be used and by whom.

4. *The Right to the Income*

When Honoré speaks of income, he means "a benefit derived from forgoing personal use of a thing and allowing others to use it for reward."⁶⁰ I view this "right" as being the functional equivalent of the statement that the owner of a thing is to be treated as the owner of the income from it. In light of this, the analysis of this incident of ownership will correspond to an analysis of ownership generally. That is, we go back to incident 1 and start again with regard to whatever constitutes the income.

5. *The Right to the Capital*

This incident is part power and part privilege. It is the power to alienate the thing owned,⁶¹ and the privilege to consume, waste, or destroy it.

6. *The Right to Security*

Ownership assumes—apart from bankruptcy and debt collection remedies—that the thing owned cannot be expropriated by a nonowner without first obtaining permission to do so from the owner.⁶²

59. Honoré, *supra* note 49, at 116 ("This right depends, legally, on a cluster of powers, chiefly powers of licensing acts which would otherwise be unlawful and powers of contracting . . .").

60. *Id.* at 117.

61. *Id.* at 118 ("This comprises the power to alienate during life or on death, by way of sale, mortgage, gift or other mode, to alienate a part of the thing and partially to alienate it.").

62. *See id.* at 119-20. To find the presence of this incident, what matters, once again, is the nature of the remedies that are generally available to the owner. *See id.* at 119 ("[A] general power to expropriate subject to paying compensation would be fatal to the institution of ownership as we know it."). *See also infra* notes 76-92 and accompanying text.

7. *The Incident of Transmissibility*

The incident of transmissibility is the term Honoré uses to describe an owner's power to devise by will the thing owned.⁶³

8. *The Incident of Absence of Term*

This incident neatly captures the idea that the owner's interest is indeterminate. That is, the duration of the interest is not correlated to the happening of a stated event or a definite and specific time or date.⁶⁴

9. *The Prohibition of Harmful Use*

With this incident and the next, Honoré makes the point that ownership entails disadvantages as well as advantages. One rather obvious disadvantage is that the owner is under a duty not to use or manage the thing owned in ways that would be harmful to other members of the public.⁶⁵

10. *Liability to Execution*

A second disadvantage is that creditors have a power as against the owner (the owner has a liability) to coerce satisfaction of their claims by taking from the owner the thing owned.⁶⁶

11. *Residuary Character*

Understanding the residuary character concept requires us to recognize that there may be property interests in a thing that do

63. Varying degrees of transmissibility are possible, from those that would permit the owner's interest to pass to a limited number of generations only, to one that would permit that interest to go on indefinitely. The latter is what Honoré has in mind. See Honoré, *supra* note 49, at 120-21.

64. See *id.* at 121-22. That this incident and the incident of transmissibility are two parts of the same concept of "unlimited duration" should be obvious. In contrast to the former, however, the incident of absence of term assumes the owner's continued well-being.

65. See *id.* at 123. As Munzer concludes: "The idea of *property rights* is narrower than that of property. Property rights involve only advantageous incidents. Property involves disadvantageous incidents as well." MUNZER, *supra* note 17, at 24.

66. See Honoré, *supra* note 49, at 123-24.

not amount to ownership. Honoré maintains that when all such lesser interests terminate, a corresponding aggregate of rights, privileges, powers, and immunities will always vest in the owner.⁶⁷

C. *The Character of a Property Interest*

With this account of the liberal concept of ownership in hand, let us now consider exactly which incident(s) or subsets of incidents can properly be regarded as a property interest, even though that interest may amount to something less than ownership.

To make this identification, I suggest that we focus on what is the essential and fundamental similarity among the incidents of value⁶⁸ in Honoré's list. If each right is examined carefully, one discovers that the legal conceptions of power and immunity predominate. The right to possess, and to use, and to manage, and to the income, and to the capital, and to security would be academic without the ability to exclude others from exercising dominion over the thing. If X does not have available to her an arsenal of remedies that would allow her to acquire and retain possession against persons *generally*,⁶⁹ how could it be said that she has, in any realistic sense, a property interest? The value of each right listed by Honoré would be seriously impaired, and possibly destroyed, if legitimate rights holders who have not misbehaved could be deprived of their rights by others without their consent. An interest, therefore, is logically a property interest only if others can be excluded by the use or threat of legal force.⁷⁰ To state this in Hohfeldian terms: X can claim that she

67. See *id.* at 126-28. For example, "[w]hen the sub-lessee's interest determines the lessee acquires the corresponding rights; but when the lessee's right determines the 'owner' acquires these rights. Hence the 'owner' appears to be identified as the ultimate residuary." *Id.* at 128.

68. See *supra* note 65 and accompanying text.

69. As this Article will discuss, a property interest may be present even though an immediate and unqualified right to possession is lacking. See *infra* notes 72-75 and accompanying text.

70. Other writers have acknowledged that the legal power to exclude is an essential ingredient in any definition of property. For example, Morris Cohen observes that "the essence of private property is always the right to exclude others." Cohen, *supra* note 41, at 12. Felix Cohen, too, makes the point that "[p]rivate property may

is the holder of a property interest if (1) she has a general power to obtain or get back the thing with a correlative liability in others to have the thing transferred against their will to X and (2) X has a general immunity from having the item taken away from her involuntarily with a correlative disability in others to force X to relinquish possession and control.⁷¹

Before we continue further, an important caveat is in order. I am not claiming that the existence of a property interest depends upon the availability of remedies that can be used to exclude all persons from the property; only that the holder must be entitled to exclude persons generally. It is here that it might be useful to distinguish between rights, privileges, powers, and immunities in personam, and rights, privileges, powers, and immunities in rem.⁷² The expression "in rem" traditionally has been used to describe a similar, though separate relation, that exists with very many persons. In contrast, in personam⁷³ relations concern a limited number of individuals only.

or may not involve a right to use something oneself. It may or may not involve a right to sell, but whatever else it involves, it must at least involve a right to exclude others from doing something." Cohen, *supra* note 20, at 371. The power to exclude is also an economic necessity if we wish to encourage the efficient use of resources. Certainly, no one would have the incentive to improve or otherwise invest in property if that property were at all times up for grabs. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 10-16 (1973).

71. I should add that it is here that one must have a firm grounding in the applicable law. See *supra* note 26. Unless the government can be counted on to render the appropriate assistance in excluding others, the requisite power and immunity would not exist.

72. For an in-depth exposition of the distinction, see generally Hohfeld, *Fundamental Legal Conceptions*, *supra* note 21. Hohfeld prefers to use the expressions "paucital" and "multital" instead of in personam and in rem. See *id.* at 712.

73. On this distinction, Hohfeld writes:

A paucital right, or claim, (right *in personam*) is either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a few fundamentally similar, yet separate, rights availing respectively against a few definite persons. A multital right, or claim, (right *in rem*) is always one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people.

Id. at 718 (footnotes omitted).

The character of the power and immunity that we should seek to find before concluding that a property interest has been created is one that is in rem. A simple example may serve to make this clear. Suppose that "A, the owner of Blackacre, has given his friends C and D, 'leave and license' to enter, A has no rights against C and D that they shall not enter; but he has such rights against persons in general; and they are clearly to be classified as being 'multital' or 'in rem.'"⁷⁴ No one would doubt in such a case that, notwithstanding the absence of a power in personam to exclude C and D, A continues to have a property interest in Blackacre.⁷⁵

With this caveat in mind, we can proceed to a more specific characterization of the nature of the remedies that define property interests. In 1972, Calabresi and Melamed wrote an article in which they discussed several techniques for protecting legal entitlements.⁷⁶ One such technique is a "property" rule. They maintain that an entitlement is protected by a property rule when it cannot be transferred without the current owner's consent. Consequently, anyone who wishes to acquire the entitlement is compelled to purchase it at a price which is acceptable to the owner.⁷⁷ Another technique is a "liability" rule. With such a rule the transfer of an entitlement may be compelled without the current owner's consent, provided the owner is com-

74. *Id.* at 719 n.22.

75. It is probably also true that A's power of exclusion is subject to other interests and his immunity from having Blackacre taken away from him involuntarily is not universal. A requirement of universality in this regard would simply not be in accord with reality. See *supra* note 38. Moreover, A's property interest does not preclude the possibility that C and D may also have a property interest in Blackacre. Whether they do will depend, in turn, on the extent to which they are empowered under the relevant law to exclude others. Cf. *International Postal Supply Co. v. Bruce*, 194 U.S. 601 (1904). According to Justice Holmes:

In the case at bar the United States is *not the owner* of the machines, it is true, *but it is a lessee in possession*, for a term which has not expired. It *has a property, a right in rem*, in the machines, which, though less extensive than absolute ownership, has the same incident of a right to use them while it lasts.

Id. at 606 (emphasis added); see also U.C.C. § 2A-531 (1990) (Standing to Sue Third Parties for Injury to Goods).

76. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

77. *Id.* at 1092.

pensated, ex post, for its loss.⁷⁸ The amount of the loss (damages) is set by the state, typically a court.

Although Calabresi and Melamed focus on how we should choose between a "property" rule and a "liability" rule,⁷⁹ the point I wish to emphasize is that if an entitlement, under appropriate circumstances, cannot be protected by the former rule, the entitlement (whatever else it may be) is not a property interest.⁸⁰ Some examples may help illustrate the congruence between the rule chosen (the remedy) and the character of the entitlement or interest.

Assume that X is the "owner" of timberland on which it conducts a logging operation. No one would deny that when the trees are cut down, X has a property interest in the logs. The reason is clear. X could permanently enjoin third parties generally from interfering with her possession.⁸¹ Now assume that Y,

78. *Id.* The final type which they discuss is the "inalienability" rule. *Id.* at 1092-93, 1111-15. Voting rights, for example, cannot be sold or transferred. *Id.* at 1111-15.

79. Essentially they maintain that a property rule promotes an efficient allocation of resources in those situations in which the cost of negotiating a consensual transfer of the entitlement would not be unduly high. If the owner's consent to the transfer is required, she is guaranteed to receive a price that she perceives to be a fair approximation of the object's value. On the other hand, if acquiring the owner's consent would be prohibitively expensive, economic efficiency would be better served by a liability rule which gives the owner what others believe the object to be worth. *See id.* at 1106-10, 1125-27. For more on the economic consequences of the choice of rule, see Susan Rose-Ackerman, Note, *I'd Rather Be Liable Than You: A Note on Property Rules and Liability Rules*, 6 INT'L REV. L. & ECON. 255 (1986). For a discussion of the choice in the context of philosophical theories of autonomy and consent, see Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1 (1993).

80. For a similar observation along these lines, see Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1338-39 (1986) ("It is surely odd to claim that an individual's right is protected when another individual is permitted to force a transfer at a price set by third parties. Isn't the very idea of a forced transfer contrary to the autonomy or liberty thought constitutive of rights?"). How, then, should we characterize X's interest in cases in which she is the beneficiary of a liability rule? My suggestion is simply to emphasize that the conception of entitlements includes more than property interests. For example, where a sales tax must be paid to the State when an item is sold, the State has an entitlement; however, I doubt that anyone would maintain that the State has a property interest in all items that are subject to that tax.

81. *See, e.g.*, HENRY L. MCCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* §§ 133-134, at 361-63 (2d ed. 1948) (discussing injunctions against trespass to land and injunctions against nuisance). X would also have the common law privilege to defend

a trespasser, succeeds in removing some of X's logs. The question of whether X still has a property interest in those logs is once more reduced to that of the extent of X's legal remedies and the choices she makes. X can either recover damages equal to the full value of the logs⁸² or the logs themselves.⁸³ Because a remedy presumably exists which would allow X to recapture the logs, the taking by Y, without more, would have no effect on X's property interest. However, if X elects to obtain a judgment for damages only, she will have chosen by her own accord to empower Y to take title to the logs by satisfying that judgment.⁸⁴ If the power is exercised, either by or for Y,⁸⁵ X's legal interest will be extinguished.⁸⁶

her possession of the logs by using reasonable force. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 21, at 131-37 (5th ed. 1984).

82. The substantive tort of "conversion," as distinguished from "trespass to chattels," is reserved for situations where, as here, the interference with possession is substantial. See generally KEETON ET AL., *supra* note 81, § 15, at 88-106. If we assume that the plaintiff is the owner of the chattel, the usual measure of damages for conversion is the value of the chattel. See *id.* at 90.

83. "Detinue" and "replevin" were the two common law actions which were available for the recovery of personal property. Today, a statutory replevin action is the typical vehicle for obtaining possession of property wrongfully taken. Depending upon the jurisdiction, replevin is sometimes referred to as Claim and Delivery, Detinue, Revendication, or Sequestration. See generally DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 5.13, at 399-403 (1973). X would also have the limited privilege to use self-help to recapture her logs. See KEETON ET AL., *supra* note 81, § 22, at 137-42.

84. By satisfying the judgment, Y in effect is buying the chattel. See, e.g., *Miller v. Hyde*, 37 N.E. 760 (Mass. 1894); *Gunther v. Morey Larue Laundry Co.*, 29 A.2d 713 (N.J.), *aff'd*, 33 A.2d 893 (N.J. 1943).

85. If X has a judgment against Y, X usually will have available to her one or more postjudgment remedies which will allow her to sell property of Y in satisfaction of the judgment. In Hohfeld's terms, the judgment empowers X (Y has the correlative liability) to transfer Y's legal interest in property to a third party.

86. This conclusion follows from the fact that the transfer of title to Y means that X may no longer recover possession or exclude others; hence, she has been stripped of her rights in rem. In a slightly different context, this same point was made by Professor Ames in an article written in 1892:

Trespass, however, was a purely personal action; it sounded only in damages. The wrongful taking of chattels was, therefore, a more effectual disseisin than the ouster from land. The dispossessed owner of land, as we have seen, could always recover possession by an action. Though deprived of the *res*, he still had a right *in rem*. The disseisor acquired only a defeasible estate. One whose chattel had been taken from him, on the other hand, having no means of recovering it by action, not only lost

Finally, assume that Y is the owner of an adjoining piece of property and that when he takes the logs he honestly believes them to be his. Y then uses the logs to make barrel hoops.⁸⁷ What effect will this transformation have on X's property interest? In this situation we would have to look to the doctrine of specification to see whether X has lost her possessory remedy and is limited to the recovery of conversion damages.⁸⁸ Specification occurs when a new article is made out of one person's chattel through the skill and labor of another.⁸⁹ If the barrel hoops are considered to be a new species of good, X's interest terminates; if not, X retains the option of choosing to take possession of the hoops.⁹⁰ Although the doctrine is easily stated, its

the *res*, but had no right *in rem*. The *disseisor* gained by his tort both the possession and the right of possession; in a word, the *absolute property* in the chattel taken.

J.B. Ames, *Disseisin of Chattels*, 3 HARV. L. REV. 23, 29 (1890) (emphasis added).

87. For an actual case involving an innocent trespasser who converted lumber into barrel hoops, see *Wetherbee v. Green*, 22 Mich. 311 (1871).

88. Once again, if the possessory remedy has been lost, she would no longer have rights *in rem* and her property interest in the now transformed lumber would cease to exist. Instead, X would be left with a right *in personam* (a claim for damages) against Y.

89. If the specifier has succeeded in creating a new species of good, the original owner's interest terminates; if not, the owner of the original good retains title to the end product. See RAY A. BROWN, *THE LAW OF PERSONAL PROPERTY* § 6.2, at 50-51 (3d ed. 1975); Earl C. Arnold, *The Law of Accession of Personal Property*, 22 COLUM. L. REV. 103, 105 (1922); Roscoe Cross, *Another Look at Accession*, 22 MISS. L.J. 138, 138 (1951). The doctrine of specification originated in Roman Law, and its common law evolution has been influenced by civil law notions of property rights. There is a distinction made under the civil law, however, that has not been accepted wholesale by common law courts. Under Roman Law, if the specifier transformed the original good into a new item with different physical properties than the original, title to the good vested with the specifier. If, however, merely the size or shape of the original good were altered, the owner of the original good retained title to the end product. See BROWN, *supra*, § 6.2, at 50. This distinction apparently not been rigorously maintained in the common law. As Professor Brown has noted:

The [Roman] doctrine . . . is artificial and unconcerned with an ethical determination of the problem it purports to solve. It is arbitrary and unjust to hold that he who makes wine from another's grapes acquires title to the resulting product, while he who carves a work of art from another's stone does not. From the standpoint of justice the law cannot ignore the proportion in which the materials of one and the labor of another contribute to the value of the resulting product.

Id. at 51.

90. In *Wetherbee*, the court held that title to the barrel hoops was with the inno-

application is fact-specific and inherently subjective.⁹¹ As one court succinctly noted, "[the authorities] have not agreed upon any rule by which it can in all cases be ascertained whether this transformation has or has not taken place."⁹² Thus, the decision whether X has a property interest in the barrel hoops ultimately will rest on a doctrine that is notoriously difficult to apply. Whatever its difficulties, the key point is that the availability of certain remedies is precisely what is at stake in these cases. That is, the true concern of the specification doctrine is not the location of title as an abstract or ideal concept, but whether X, the original owner, can recapture the transformed good. If the judicial response is yes, the interference by Y should not be viewed as extinguishing X's property interest.

The foregoing discussion demonstrates that when the existence of X's property interest in an item is called into question, the courts have three alternatives. They can (a) withhold *all* remedies, thus allowing third parties generally to deprive X of possession and control; (b) require third parties generally to compensate X (pay damages) if they wish to deprive her of possession and control; or (c) protect X's interest with a property rule, thus giving X the power to exclude third parties generally. Only the third option is consistent with the recognition of a property interest.

cent trespasser. *Wetherbee*, 22 Mich. at 320. The court was influenced by the fact that the value of the hoops was 28 times that of the original lumber. *Id.* at 313, 320.

91. Compare *Riddle v. Driver*, 12 Ala. 590, 591-92 (1847) (wood transformed into charcoal is same species of good) and *Eaton v. Langley*, 47 S.W. 123, 125-26 (Ark. 1898) (timber transformed into cross ties is same species of good) and *Burris v. Johnson*, 24 Ky. (1 J.J. Marsh.) 196, 197-98 (1829) (timber transformed into boat frame is same species of good) with *Lampton's Ex'rs v. Preston's Ex'rs*, 24 Ky. (1 J.J. Marsh.) 454, 467 (1829) (clay transformed into fired brick is a new species of good) and *Potter v. Mardre*, 74 N.C. 36, 42 (1876) (timber transformed into canoe is a new species of good).

Often relevant to the doctrine's applicability is the specifier's good faith. As one court observed, a "wilful wrongdoer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be." *Silbury v. McCoon*, 3 N.Y. 379, 387 (1850).

92. *Eaton*, 47 S.W. at 124.

This approach to identifying property interests requires some substantive doctrine by which the availability of remedies can be assessed. In other words, the claimant must be able to defend his or her choice of remedy by pointing to a particular substantive rule.⁹³ Unfortunately, this approach often raises problems very similar to those encountered when the relevant source of law is specification. Where the issues are simple, it may be that a particular doctrine can be applied with a high level of confidence. In other cases, its application is harder. Moreover, each doctrine generates unique problems of its own.⁹⁴ This is no reason, though, to reject a definition of property that is predicated on the power to exclude. Courts make difficult decisions every day and clearly have the institutional competence to determine what, if any, remedies may be awarded in a given case. Admittedly, this leads to some conceptual indeterminacy, but this has always been true of efforts to characterize property and cannot be avoided.⁹⁵ To conclude, on this view the definition of property will not tell us when the law ought to make available certain remedies, but the remedies the law makes available will tell us when a property interest exists.

III. APPLICATION TO CONTRACTS FOR THE SALE OF GOODS

In this Part of the Article, I survey the performance of a contract for the sale of goods from the moment of its formation through to its execution. This survey is intended to provide the basis for understanding when a property interest may legitimately be said to vest in the buyer.⁹⁶ In so doing, the signifi-

93. See DOBBS, *supra* note 83, § 1.2, at 3 ("The remedy is merely the means of carrying into effect a substantive principle or policy . . . [A]nyone considering remedies must have at least some notion what the substance is about.").

94. For example, consider the complexity of the doctrine of good faith purchase. Despite its partial codification in U.C.C. § 2-403, problems of scope and application continue to abound. For a discussion of some of these problems, see Fairfax Leary, Jr. & Warren F. Sperling, *The Outer Limits of Entrusting*, 35 ARK. L. REV. 50 (1981).

95. See, e.g., Comment, *The Variable Quality of a Vested Right*, 34 YALE L.J. 303, 309 (1925) ("[T]he difficulty that causes such a volume of disagreement is the chameleon character of the term 'property right' or 'vested right': the fact that it is not an absolute standard, but a variant which each man, layman, legislator, and judge, determines individually out of his own background.").

96. Recall that a fractionalization of property interests is possible. See *supra* notes

cant Article 2 events that reflect the gradual shift of entitlements from the seller to the buyer will be assessed. Because the availability of some remedy that empowers the buyer to exclude others is an unavoidable prerequisite of a property interest, the emphasis throughout is upon the remedial aspects of each event.

A. Contract Formation

In order to decide whether contract formation alone is sufficient to establish a property interest in the buyer,⁹⁷ consider the simple case of a buyer who, on June 1, agrees to purchase a popular brand of television set after inspecting a demonstration model on the seller's showroom floor. First, assume that the seller maintains a large inventory of sets and the parties understand that the seller will select one at random for shipment to the buyer. Second, assume that the contract says nothing about the buyer's remedies should the seller fail to deliver.

What are the property rights of the buyer on June 1? To this question Article 2 provides a clear answer: "Goods must be both existing *and* identified^[98] before any interest in them can pass."⁹⁹ Moreover, before identification there is not even a sale. Section 2-106(1) defines "present sale" as "a sale which is accomplished by the making of the contract."¹⁰⁰ Because a "sale" takes place when title passes from the seller to the buyer,¹⁰¹

52-53 and accompanying text. The possibility exists, therefore, that both the seller and the buyer will have a property interest in the goods. See *infra* notes 166-70 and accompanying text.

97. By phrasing the issue in this manner and making the assumptions that follow, I intend to eliminate from consideration any factor other than the existence of a contract. An alternative phrasing of the issue would be whether contract formation, *in every case*, transfers a property interest to the buyer.

98. The concept of identification is discussed *infra* notes 107-09 and accompanying text. Suffice it to say here that identification has not occurred because no particular television has been singled out for shipment to the buyer.

99. U.C.C. § 2-105(2) (1990) (emphasis added). In this respect, Article 2 is consistent with its statutory precursor, the Uniform Sales Act. The latter provided that "no property passes until the goods are ascertained." UNIF. SALES ACT § 17, 1 U.L.A. 309 (1950) (withdrawn 1962).

100. U.C.C. § 2-106(1) (1990).

101. *Id.*

and because title cannot pass before identification,¹⁰² merely contracting to buy will not necessarily result in a sale.¹⁰³ Consequently, at this point in the transaction it is obvious that the buyer cannot point to a particular television from which she has the legal power to exclude others.¹⁰⁴ But it does not follow that the absence of an interest in rem is the absence of an interest in personam. The buyer has the right to receive a television "in accordance with the contract"¹⁰⁵ and this right always can be enforced against the seller by an award of damages.¹⁰⁶

102. See *id.* § 2-401(1).

103. In some instances, "title will pass at the time . . . of contracting." *Id.* § 2-401(3)(b). What the definition of present sale requires is the concurrence of *two* events: formation of a contract and passage of title.

104. Oddly enough, some case law arguably stands for the proposition that one in the position of our hypothetical television buyer can be a buyer in the ordinary course of business. For a discussion of this authority, see Frisch, *supra* note 2, at 543-47.

Indeed, the idea that at a minimum goods must be identified to the contract before an interest can pass has been a constant in the development of sales law. Holdsworth noted that

[i]f, therefore, a contract of sale were made which gave the purchaser the right to bring detinue for the thing sold, it was easy to say that he had the property as the result of the sale. It is clear that this reasoning will not apply to sales of chattels which are not specific, as detinue would not lie in such a case.

3 HOLDSWORTH, HISTORY OF ENGLISH LAW 356-57 (3d ed. 1923). This common law view also found expression in the Uniform Sales Act which provided for specific performance in those cases "[w]here the seller has broken a contract to deliver *specific or ascertained goods* . . ." UNIF. SALES ACT § 68, 1 U.L.A. 291 (1950) (withdrawn 1962) (emphasis added). The drafters of the Code, however, sought to remove this barrier to specific performance. "Specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting." U.C.C. § 2-716 cmt. 2 (1990). Evidently, the reason for the change was to increase the likelihood that the remedy will be available for the breach of contracts, such as long-term supply contracts, where all of the goods cannot be identified when the contract is made and will not be identified by the seller after its breach. *Id.* The change was certainly never intended to accelerate the moment that a property interest passes to the buyer. The goods still must first be identified by someone. See *id.* § 2-105(2); *supra* note 99.

105. U.C.C. § 2-301 (1990) ("The obligation of the seller is to transfer and deliver . . . in accordance with the contract.").

106. The buyer would also have an in personam claim against any third party who intentionally interfered with this contractual right. The *Restatement (Second) of Torts* provides:

One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or other-

B. Identification

Let us assume the same facts and assumptions as in the previous hypothetical, except that the seller has selected and addressed a television for shipment to the buyer. In Code parlance, a television has now been "identified" to the contract of sale.¹⁰⁷ No longer is it intuitively and textually obvious that the buyer is without a property interest. Indeed, in so far as the explicit text of Article 2 is concerned, it leaves little doubt that an interest of sorts has been acquired. According to section 2-501(1), with identification the buyer acquires "a special property and an insurable interest in goods."¹⁰⁸ But is this characterization of the buyer's interest a property interest? Whatever terminology is employed, the key point is that a true property interest cannot be defined independently of the remedial consequences the Code attaches to the buyer's special property. Saying that the buyer has a special property, therefore, ultimately does no more than pose the crucial question that must be answered: Are remedies triggered that now give the buyer the power to compel the delivery of the television? The following discussion identifies and explains the main Code rules that are predicated on the concepts of identification and special property.¹⁰⁹

wise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

RESTATEMENT (SECOND) OF TORTS § 766 (1977).

107. Identification as a separate concept appeared for the first time in the Code. It does have, however, its statutory antecedents. See UNIF. SALES ACT § 18(1), 1 U.L.A. 8 (1950) (withdrawn 1962) (referring to "specific or ascertained" goods). Under § 2-501, identification takes place when a particular good is in some way earmarked for a particular buyer. The Code tells us (in a circular definition) that this happens "when the contract is made if it is for the sale of goods already existing and identified," U.C.C. § 2-501(1)(a) (1990), or, if the sale is of future goods, "when [they] are shipped, marked or otherwise designated by the seller as goods to which the contract refers." *Id.* § 2-501(1)(b). The Code's definitional approach to identification assumes that the parties have not agreed otherwise. They remain free to establish their own rules as to when identification will occur. See *id.* § 2-501(1). Also, identification does not require that the goods conform to the contract, *id.*, or "be in a deliverable state." See *id.* § 2-501(1) cmt. 4.

108. *Id.* § 2-501(1).

109. Section 2-501 is primarily definitional. With the exception of equating identification with a special property and an insurable interest in the goods, the section's basic purpose is to prescribe when identification occurs. *Id.* § 2-501(1) cmt. 3.

1. *An Insurable Interest*

The Code specifically gives the buyer an insurable interest in goods which are both existing and identified to the contract.¹¹⁰ In our hypothetical, the buyer has this insurable interest in the television even though she does not have possession, even though she does not have title,¹¹¹ and even though she does not bear the risk of loss.¹¹² Can we presume from this that a property interest is the basis for the insurable interest? A brief look to the recognized bases for finding an insurable interest should give us our answer.

Because most buyers have an economic interest in the receipt of the goods, a rule that only a property interest may serve as an insurable interest would undermine the purpose of property insurance by placing an artificial limitation on the ability of buyers to obtain protection against a real risk of pecuniary damage.¹¹³ Not surprisingly, and notwithstanding the obvious logic of a concept of insurable interest premised on a property right,

110. Although this is stated as a two-pronged test—goods must be in existence and be identified—clearly, the controlling prong is identification. It is difficult to imagine a situation where nonexistent goods have been identified. Of course, even identification may not always be a prerequisite for an insurable interest. Subsection (3) to § 2-501 incorporates non-Code law rules about insurable interest. It provides: "Nothing in this section impairs any insurable interest recognized under any other statute or rule of law." *Id.* § 2-501(3). It may be that insurability outside the Code is not always dependent upon identification. However, one commentator observed that "[w]hile there is no authority on the question, it is doubtful whether any jurisdiction, in the absence of statute, would recognize such an interest." John M. Stockton, *An Analysis of Insurable Interest Under Article Two of the Uniform Commercial Code*, 17 VAND. L. REV. 815, 831 (1964).

111. See U.C.C. § 2-401 (1990). When no explicit agreement encompasses the time and place title is to pass, title passes "at the time and place at which the seller completes his performance with reference to the physical delivery of the goods." *Id.* § 2-401(2).

112. Typically, the risk of loss will not pass to the buyer until delivery. See *id.* § 2-509 (Risk of Loss in the Absence of Breach).

113. See N.Y. COMM'N REPORT, *supra* note 9:

[I]f the market price has risen after the making of the contract or if buyer's business operations are interrupted by the non-arrival of the goods, buyer faces loss. In some instances, destruction of the goods by casualty may excuse the seller from responding to buyer in damages. Even if seller is legally responsible to buyer for the loss, a cause of action against seller is not an adequate substitute for insurance.

Id. at 462-63.

three other types of insurable interest have developed: contract right, legal liability, and factual expectancy.¹¹⁴ It does not necessarily follow, therefore, that the insurable interest given by identification always will be based on a property interest. It could be based just as easily on either a concept of contract right¹¹⁵ or the factual expectancy of economic disadvantage.¹¹⁶ Thus, it is reasonable to assume that the drafters' purpose in including a section on insurable interest was to free property insurance from any notion that "all the definitions of an 'insurable interest' import an interest in the property which can be enforced at law or in equity."¹¹⁷

In sum, the Code gives the buyer of the television an insurable interest for no reason other than she faces a loss if, for any reason, the seller fails to deliver. It should now be clear that an insurable interest cannot identify instances in which a property interest is present. However difficult an inquiry into remedies might be, it remains the only inquiry that matters.

2. *The Right of the Buyer to Sue for Injury to Goods*

Under section 2-722, the buyer may sue a third party tortfeasor for injury to goods following their identification to the contract.¹¹⁸ The seller, too, will have a cause of action after

114. See generally Bertram Harnett & John V. Thornton, *Insurable Interest in Property: A Socio-Economic Reevaluation of a Legal Concept*, 48 COLUM. L. REV. 1162, 1165-75 (1948) (discussing these four types of insurable interests); Stockton, *supra* note 110.

115. One who makes a contract certainly has an economic interest in goods that have been identified to that contract and ordinarily should be able to protect that interest with insurance. See *supra* note 113.

116. See Stockton, *supra* note 110, at 817 ("This . . . concept rests on the very general theory that one should have an insurable interest in any property which if lost, damaged, or destroyed, might result in economic disadvantage to him.").

117. *Farmers' Mut. Ins. Co. v. New Holland Turnpike Rd. Co.*, 15 A. 563, 565 (Pa. 1888).

118. Section 2-722 reads in part:

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract (a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods

U.C.C. § 2-722 (1990). Because a buyer has an insurable interest and a special property in goods upon identification, he will be able to maintain an action as the real

identification if he has any one of the following: (1) title,¹¹⁹ (2) a security interest,¹²⁰ (3) an insurable interest,¹²¹ or (4) (in the event of destruction or conversion of the goods) the risk of loss.¹²² Thus, if a thief were to abscond with the television that has been readied for shipment to the buyer and identified to the contract, both the seller and the buyer would have the right to sue as the real parties in interest. However, to assume that we can deduce who has a property interest in the television from this statutory right to sue would be a mistake.

Prior to the Code, the right of the buyer or the seller to sue a third person ordinarily was based on a perceived property interest in the goods.¹²³ For example, at least one court had construed the New York real party in interest statute as requiring the plaintiff to have some title, legal or equitable, to the goods.¹²⁴ In the comment accompanying New York's section 2-722, the drafters explain that their purpose is "[t]o adopt and extend somewhat the principle of the statutes which provide for suit by the real party in interest."¹²⁵ Thus, section 2-722 will broaden the class of proper plaintiffs in some state jurisdictions

party in interest.

119. For the point at which title will usually pass to the buyer, see *infra* note 111.

120. The seller may have an Article 9 security interest. Another form of security interest is an Article 2 security interest. Section 2-401(1) states that "[a]ny retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." U.C.C. § 2-401(1) (1990); see also *id.* § 2-505 (addressing a seller's shipment of goods under reservation). This may not be the only instance in which the seller is given an Article 2 security interest. See generally *id.* § 9-113 (referring to a security interest arising solely under Article 2); Thomas H. Jackson & Ellen A. Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907 (1978) (discussing potential Article 2 security interests other than the common law seller's lien paradigm).

121. See U.C.C. § 2-501(2) (1990) ("The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him . . .").

122. *Id.* § 2-722(a).

123. See N.Y. COMM'N REPORT, *supra* note 9, at 587 ("Present law lends itself to a simple premise: a cause of action for damage to goods depends on the invasion of a 'property' interest."). There was, however, authority supporting a bailee's right to sue. See, e.g., *Colvin v. Fargo*, 94 N.Y.S. 377 (App. Div. 1905).

124. See *Scholick v. Fifth Ave. Coach Co.*, 68 N.Y.S.2d 208 (N.Y. City Mun. Ct. 1947).

125. N.Y. U.C.C. § 2-722 cmt. (Consol. 1981) (emphasis added).

to sometimes include buyers and sellers who lack property interests. Moreover, the section seems to indicate that the plaintiff may recover even if he is not the actual party injured. If there is injury to "a party," then either party—buyer or seller—who qualifies under paragraph (a) has standing to sue.¹²⁶

The drafters probably had in mind two separate and independent justifications for how the section was drafted. First, they likely desired to relieve courts from the practical difficulties of identifying a single person as the "owner" when both buyer and seller may share an interest in the property.¹²⁷ Second, section 2-722 reflects an effort to accommodate the economic interests of both sellers and buyers without regard to the location of title. As was discussed above, pecuniary damage may result even though a property interest is lacking.¹²⁸ If a buyer can insure against the risk of loss in such a situation, it would be anomalous to deny him the right to sue the person who is responsible for the loss.

In short, section 2-722 cannot tell us whether the buyer has a property interest because this section is not about remedies.¹²⁹

126. See N.Y. COMM'N REPORT, *supra* note 9, at 589 (suggesting that "it may be possible to conclude that the party *who sues* must show 'actionable injury', but this reading does not flow naturally from the language of the Code"). When one party recovers for injury to the other party's interest, "his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract." U.C.C. § 2-722(b) (1990). From this it follows that § 2-722 precludes separate suits and separate recoveries by buyer and seller. See *Mitsui & Co. (USA) v. Hudson Tank Terminals Corp.*, 1 U.C.C. Rep. Serv. 2d (Callaghan) 1220 (2d Cir. 1986).

127. See N.Y. COMM'N REPORT, *supra* note 9, at 718 ("The section would remove the difficulties which have often been encountered heretofore in determining who, as between owners of divided interests in property, had a right of action when the property was converted, damaged, or destroyed by a third person.").

128. See *supra* notes 114-16 and accompanying text. In our example, even if the buyer does not have a property interest in the televisions, she does have an economic interest in the seller's performance which ought to be protected. Thus, at a minimum she should be permitted to recover damages under U.C.C. § 2-713 (the difference between the market price and the contract price) or U.C.C. § 2-712 (the difference between the "cover" price and the contract price) from the tortfeasor.

129. At least one case demonstrates that there is no assurance that courts will understand the proper function of the section. In *Carey Aviation, Inc. v. Giles World Marketing, Inc.*, 46 B.R. 458 (Bankr. D. Mass. 1985), the court erroneously concluded that § 2-722 was the source of the buyer's right to recover possession from the seller's secured party. The court failed to appreciate that once the buyer's priority under § 9-307(1) was established (the court was wrong on this count too, but this is

Rather, section 2-722 amounts to no more than a statutory addendum to existing rules about who is the real party in interest. The real issue is not whether the buyer may sue for a loss which may or may not be hers, but whether there are remedies available which make it possible for her to obtain and keep possession of the goods.

3. *The Buyer's Right to Goods on Seller's Insolvency*

Any extended discussion of Article 2 invariably will touch on the subject of the seller's insolvency.¹³⁰ This is the case because the most scrupulous seller will find it more difficult to perform when insolvent and the buyer likely will find that damages are not an adequate remedy. This raises an important policy issue: what special rights, if any, should be afforded the buyer when the seller's insolvency intervenes? Historically, the seller's insolvency has not been a sufficient condition for granting specific performance, especially in those cases where the buyer has prepaid in whole or in part.¹³¹ In this situation, section 2-502 provides that

another story, *see generally* Frisch, *supra* note 2) the remedy of replevin—or its state law equivalent—would lie without regard to § 2-722.

130. Under the Code, "[a] person is 'insolvent' who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law." U.C.C. § 1-201(23) (1990).

131. The argument against granting specific performance to a prepaying buyer is that such a grant would prefer the buyer over other creditors of the seller who also have extended credit. *See, e.g.,* Jamison Coal & Coke Co. v. Goltra, 143 F.2d 889 (8th Cir.), *cert. denied*, 323 U.S. 769 (1944); CORBIN, *supra* note 11, § 1156. On the other hand, where there has been no prepayment there would be no preference and allowing the remedy would not seem to violate any particular principle. While some courts have considered the seller's financial condition to be a relevant factor, *see, e.g.,* Livesley v. Johnston, 76 P. 946 (Or. 1904), most have held that it is not a sufficient reason to give specific performance to the buyer. *See* H.C. Horack, *Insolvency and Specific Performance*, 31 HARV. L. REV. 702 (1918); Henry L. McClintlock, *Adequacy of Ineffective Remedy at Law*, 16 MINN. L. REV. 233 (1932); Note, *Specific Performance and Insolvency—A Reappraisal*, 41 ST. JOHN'S L. REV. 577 (1967). *But see* Proyectos Electronicos, S.A. v. Alper, 37 B.R. 931 (E.D. Pa. 1983) (holding specific performance appropriate because the seller was in bankruptcy). For a discussion of the buyer's rights when the seller goes bankrupt, *see infra* notes 202-29 and accompanying text.

a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price.¹³²

New here is the explicit recognition that the prepaying buyer deserves some special protection even if granting that protection means that she is being preferred over the seller's other creditors.¹³³ And what flows from this recognition? Upon reading the section, one cannot help but notice that the legal power it grants is nothing short of an illusion destined ever to elude the grasp of most buyers who may wish to use it.

One reason the power afforded by section 2-502 is illusory is that to make use of the section, the buyer must have a "special property" in the goods under section 2-501, which is the same as saying that the goods must be identified to the contract. Although this requirement may not present an insurmountable problem for some buyers, it may make the section unavailable to a large portion of those buyers who contract for specially manufactured goods.¹³⁴ Furthermore, there is the near impossible task of having to prove that the seller was solvent when it received the first installment and that it became insolvent within ten days thereafter.¹³⁵ Beyond these restrictions, the buyer may have to contend with the Bankruptcy Code's limitations on the exercise of state-created powers to recover property.¹³⁶

132. U.C.C. § 2-502(1) (1990).

133. The seller too is afforded limited preferential treatment when the buyer turns out to be insolvent. *See id.* § 2-702.

134. It has been suggested that identification of specially manufactured goods to the contract does not occur prior to their completion. *See* 3A R. DUESENBERG & L. KING, BENDER'S UNIFORM COMMERCIAL CODE, SALES AND BULK TRANSFERS UNDER THE U.C.C. § 9.05[3], at 9-50, 9-51 (1980). *But see* Little v. Grizzly Mfg., 636 P.2d 839 (Mont. 1981) (holding that identification occurs at the time of the first step in production).

135. For a case that held that § 2-502 was inapplicable when the seller was insolvent at the time of the initial payment, *see* First-Citizens Bank & Trust Co. v. Academic Archives, Inc., 179 S.E.2d 850 (N.C. Ct. App. 1971).

136. *See infra* notes 210-29 and accompanying text.

To repeat, section 2-502 in its present incarnation does no more than pay lip service to the protective needs of the prepaying or financing buyer.¹³⁷ We can say with substantial confidence, for example, that the section would be of no assistance whatsoever to our television buyer—regardless of whether there was or was not a prepayment—should the seller default. We can say with equal confidence that if the section were available, the buyer would have a property interest in the television. This property interest would arise from the legal power to force the seller to deliver.¹³⁸

4. *Buyer's Right to Specific Performance or Replevin*

Given that the same Code section (section 2-716) defines the circumstances in which both specific performance and replevin are available, I shall combine my discussion of these two remedies. A unified discussion of specific performance and replevin is particularly appropriate in light of the fact that the use of both may sometimes depend on a common factual predicate.¹³⁹

Few premises are recited so frequently and so reflexively as "specific performance will not be granted unless it is shown that the legal remedy (damages) is inadequate." No one would doubt a careful study of pre-Code specific performance cases would yield the uniqueness of the goods as the major explanatory principle.¹⁴⁰ If the seller does not deliver the goods, the buyer most

137. This reality led to the Article 2 Study Group's recommendation to repeal § 2-502. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 2, PRELIMINARY REPORT 132 (Rec. A2.5(2)) (1990) [hereinafter PRELIMINARY REPORT]. The Drafting Committee, however, has taken the opposite approach. Rather than scrap the section because of its restrictive limitations, the Committee has decided to strengthen the section by scrapping some of the limitations. See U.C.C. § 2-502 (Discussion Draft Dec. 21, 1993).

138. Moreover, so long as the seller's possession is not viewed as fraudulent under non-Code law, this power can be exercised notwithstanding the objections of the seller's unsecured creditors. See U.C.C. § 2-402(1) (1990) ("[R]ights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this Article (Sections 2-502 and 2-716).").

139. I wish to emphasize at the outset that despite our present concern with the remedial consequences of identification, only the availability of replevin is dependent on this event. See *infra* notes 146-47 and accompanying text.

140. See generally D.A. Norris, Annotation, *Specific Performance, or Injunction*

often will be able to obtain similar goods elsewhere. As a result, the buyer's expectation interest is fully vindicated by a damages award. Thus, the remedy at law was adequate. The legal community has been so well indoctrinated to search solely for uniqueness that even the revolutionary language of the Uniform Sales Act fell on deaf ears.¹⁴¹

The Code, not surprisingly, reserves specific performance for those cases "where the goods are unique or in other proper circumstances."¹⁴² Ironically, however, this seemingly traditional statement belies the drafters' true intent, which they inexplicably decided to express in the comments. The drafters, apparently hoping to foster a liberalization of the remedy,¹⁴³ offer in the comments an expanded definition of uniqueness that takes into account "the total situation which characterizes the contract." In addition, "relief may also be granted 'in other proper circumstances' and inability to cover is strong evidence of 'other proper circumstances.'"¹⁴⁴

No doubt much more may be said, but what has been said leads to the inescapable conclusion that despite the ambiguity of the tests chosen by the drafters, the remedy of specific performance was never intended to be available absent the buyer's actual or practical inability to tap an alternative source of supply.¹⁴⁵ On the facts of our hypothetical, application of sec-

Against Breach, of Contract for Sale of Tangible Personal Property, 152 A.L.R. 4 (1944).

141. The Uniform Sales Act reads:

Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer by its judgment or decree direct that the contract shall be performed specifically

UNIF. SALES ACT § 68, 1A U.L.A. 291 (1950) (withdrawn 1962). Although this provision invited courts to reform traditional specific performance doctrine, the invitation was refused. "[D]ecisions have construed this language against a background of equity practice to require a showing that the remedy at law be inadequate." N.Y. COMM'N REPORT, *supra* note 9, at 575.

142. U.C.C. § 2-716(1) (1990).

143. *See id.* § 2-716 cmt. 1 ("[T]his Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.").

144. *Id.* § 2-716 cmt. 2.

145. For a valuable analysis of § 2-716 and the buyer's right of specific performance, see generally Harold Greenberg, *Specific Performance Under Section 2-716 of*

tion 2-716 rather easily yields the conclusion that should the seller refuse to deliver the television, the court most surely would deny specific performance.

Replevin, the second remedy in section 2-716, also was never intended by the drafters to be available to average buyers. If the goods have been identified to the contract, the right to replevy them is conferred "if after reasonable effort [the buyer] is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered."¹⁴⁶ One core obstacle to using replevin emanates from the requirement that the goods must have been identified to the contract. Professor Nordstrom correctly points out that if the contract is for future goods, the seller who has decided to breach is unlikely to make the requisite identification.¹⁴⁷ The buyer faces further difficulty in attempting to prove an inability to cover by the purchase of substitute goods.¹⁴⁸ It is particularly hard to know whether the circumstances reasonably indicated that a reasonable effort to obtain cover would have been unavailing.¹⁴⁹

the Uniform Commercial Code: "A More Liberal Attitude" in the "Grand Style", 17 NEW ENG. L. REV. 321 (1982).

146. U.C.C. § 2-716(3) (1990). This provision is new. Formerly, the only requirement for replevin was that title to the goods had passed to the buyer:

Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

UNIF. SALES ACT § 66, 1A U.L.A. 240 (1950) (withdrawn 1962).

147. ROBERT J. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 159, at 481 (1970). Moreover, whatever evidence of identification that does exist usually will be in the seller's possession. *Id.* at 482. Perhaps this explains the relative dearth of reported replevin cases when compared to those that involve specific performance. As noted by the Article 2 Study Group, specific performance, "which is not limited to identified goods, appears to be a more complete goods oriented remedy." PRELIMINARY REPORT, *supra* note 137, at 233 (Rec. A2.7(14)(B)). For this reason the Study Group recommended that § 2-716(3) be deleted. *Id.* However, the Drafting Committee has decided otherwise. The reason for the Committee's decision was that replevin, when it is an option, may be a more expeditious remedy than specific performance.

148. This test for replevin may be the same as that for specific performance if inability to cover is the result of uniqueness or is taken to establish "other proper circumstances." See U.C.C. § 2-716 (1990).

149. In resolving this issue, the court in *Big Knob Volunteer Fire Co. v. Lowe &*

No matter how you slice it, the television hypothetical presents an easy case. The result should be the same whether the buyer requests specific performance or replevin. Given the vast and easily accessible market for televisions, I doubt that even the most liberally minded judge could find in the text of section 2-716 a reason why the buyer should be given a proprietary power over the television.

C. Tender of Delivery and Beyond

To this point in the performance of the television sales contract, the buyer has yet to acquire a property interest.¹⁵⁰ To be sure, the buyer has a special property interest and an insurable interest in the television. But, as I have noted, these interests do not rise to the level of a property interest. If the seller now repudiates or later fails to make delivery when due, the buyer, if she still wishes to watch television, will have to shop elsewhere for her set. Keeping this in mind, we can continue with the remainder of the story.

It is now time for the seller to complete its performance by making a proper tender of delivery.¹⁵¹ Assume that the agreement provides for the shipment of the television to the buyer by means of an independent carrier.¹⁵² Accordingly, the seller

Moyer Garage, Inc., 487 A.2d 953 (Pa. Super. Ct. 1985), used as its guide cases that discuss mitigation as a prerequisite to the recovery of consequential damages under § 2-715(2)(a). This led the court to conclude that in addition to the type of goods involved, "[i]t may also be pertinent . . . to consider the expense of replacement and the financial capabilities of the buyer." *Big Knob Volunteer Fire Co.*, 487 A.2d at 960.

150. This statement also assumes the inapplicability of § 2-613. Although ostensibly the purpose of this section is to state one ground for the excuse of the seller's non-performance (Casualty to Identified Goods), the section can be read as giving the buyer a possessory remedy should the buyer still want the goods. See U.C.C. § 2-613(b) (1990) ("[I]f the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless *demand* inspection and at his option . . . accept the goods . . .") (emphasis added).

151. See *id.* § 2-301 ("The obligation of the seller is to transfer and deliver . . ."). Because it would add nothing to the discussion in the text, I purposely have ignored the buyer's payment obligation and the effect that it may have on the seller's duty to deliver. See, e.g., *id.* § 2-511(1) ("Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.").

152. Section 2-503(1) provides that "[t]he manner, time and place for tender are determined by the agreement and this Article" *Id.* § 2-503(1). I have assumed

places the television in the possession of the trucker and makes a proper contract of carriage.¹⁵³ When this is done, I believe the buyer for the first time enjoys a property interest.

Preliminarily, I note that title to the television and the risk of loss passed from the seller to the buyer when the seller delivered the goods to the carrier for shipment to the buyer.¹⁵⁴ Thus, we see and sense that the buyer is rapidly accumulating many of the standard incidents of full ownership.¹⁵⁵ As important as such incidents may be, they do not necessarily imply a property interest. However, when we look further, we see that the buyer finally has the power to obtain possession of the television. To find this power we must alter our perspective and focus on the possessory remedies that are available to the seller if it should wish to reclaim the television. The limitations of these remedies are the best evidence of the power of possession and control that now resides with the buyer.

Under section 2-505, for example, the seller may control delivery of the television by several methods of shipment.¹⁵⁶ The obvious inference to draw from this section is that if one of these methods is not utilized and no other section of the Code is applicable, the seller must lose and the buyer must gain the right of

that the parties have agreed to shipment by carrier for two reasons. First, it would be unreasonable to assume that the agreement would permit the seller to tender by holding the goods at its place of business. *Id.* § 2-308(a). Second, shipment by means of the seller's own truck would have no effect on the buyer's rights. Until actual delivery, the situation would be the same as it was pre-shipment. *See, e.g., id.* § 2-509(3) (passing risk of loss to the buyer upon receipt of the television).

153. When the contract either requires or authorizes the seller to ship the goods to the buyer there is a strong presumption that the contract is a "shipment contract." *Id.* § 2-503 cmt. 5; *see* *Electric Regulator Corp. v. Sterling Extruder Corp.*, 280 F. Supp. 550, 558 (D. Conn. 1968) (recognizing the U.C.C.'s "presumption in favor of 'shipment' contracts"). In a shipment contract the seller tenders delivery at the point of shipment and must comply with the provisions of § 2-504. U.C.C. § 2-503(2) (1990).

154. Section 2-401(2)(a) provides that if the contract is a shipment contract, "title passes to the buyer at the time and place of shipment . . ." U.C.C. § 2-401(2)(a) (1990). Similarly, "the risk of loss passes to the buyer when the goods are duly delivered to the carrier . . ." *Id.* § 2-509(1)(a).

155. *See supra* notes 54-67 and accompanying text.

156. Section 2-310(b) provides that "unless otherwise agreed . . . if the seller is authorized to send the goods he may ship them under reservation" pursuant to § 2-505. U.C.C. § 2-310(b) (1990).

possession the moment that the television is handed over to the carrier. If the seller procures a negotiable bill of lading, the seller will have a security interest in the television until the bill of lading is surrendered to the buyer.¹⁵⁷ The seller also retains a security interest when a nonnegotiable bill of lading names the seller as consignee.¹⁵⁸ By reserving a security interest in the television, the seller continues to have a property interest.¹⁵⁹ But property interests can be divided up.¹⁶⁰ Importantly, calling the seller's interest a property interest does not preclude a property interest from also vesting in the buyer. Section 2-716 provides that replevin may be invoked by the buyer "if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered."¹⁶¹ This gives the buyer ultimate control over the disposition of the television.

The reservation of a security interest aside, there is one instance in which the seller can still wrest possession and control of the television away from the buyer before delivery.¹⁶² Section 2-705 empowers the seller to stop delivery of any shipment "when [the seller] discovers the buyer to be insolvent."¹⁶³ In such a case, even if the television is not shipped under reservation the seller is given a remedy that sounds very much like a

157. *Id.* § 2-505(1)(a). It makes no difference who is made the order party. *Id.*

158. *Id.* § 2-505(1)(b). This subsection further provides that "a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading." *Id.*

159. It is now well established that a security interest is a state-created property right. *See, e.g., Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

160. *See supra* notes 52-53 and accompanying text. "The security interest reserved to the seller under subsection (1) is restricted to securing payment or performance by the buyer and the seller is strictly limited in his disposition and control of the goods as against the buyer and third parties." U.C.C. § 2-505 cmt. 1 (1990).

161. *Id.* § 2-716(3). "If a negotiable document of title is outstanding, the buyer's right of replevin relates of course to the document not directly to the goods." *Id.* § 2-716(3) cmt. 5.

162. After delivery, the seller's possessory remedies are limited to § 2-702(2) (credit seller's explicit right of reclamation) or § 2-507(2) (cash seller's implicit right of reclamation).

163. U.C.C. § 2-705(1) (1990). The right of stoppage is broader for large shipments: *e.g.,* carload, truckload or plane-load. *Id.* In that case, the seller may stop delivery "when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods." *Id.*

security interest.¹⁶⁴ Obviously, this remedy would be unnecessary if the buyer did not otherwise have a proprietary power. If the buyer is not insolvent, when the seller places the television in the possession of the carrier, the power to take possession and exercise control passes to the buyer.¹⁶⁵

Finally, let us briefly consider the allocation of property interests between the buyer and the seller after delivery. I suspect that only the buyer will have a property interest,¹⁶⁶ and that interest is likely to continue until it is transferred to another with her consent. Suppose, however, that after receipt of the television, the buyer exercises her rights to reject¹⁶⁷ or to revoke acceptance.¹⁶⁸ Upon the exercise of such rights, the process by which the buyer gained a property interest will be thrown into reverse. The seller will regain title¹⁶⁹ and possession will follow provided the seller returns to the buyer what the buyer paid for the television.¹⁷⁰ In short, there may be an ebb and flow of property interests as the buyer/seller relationship matures and develops.

164. In fact, the right of stoppage may be an Article 2 security interest. *See id.* § 9-113 cmt. 1 (stating that "the seller has rights of resale and stoppage . . . which are similar to the rights of a secured party").

165. For example, "if the carrier, upon instructions from the consignor, returns the goods to him, the consignee may recover the goods from the consignor or his insolvent estate." *Id.* § 7-303 cmt. 2.

166. The seller will also have a property interest if it can reclaim the television under § 2-702(3) or § 2-507(2) or if it has an Article 9 security interest.

167. *See* U.C.C. § 2-601 (1990) (Buyer's Rights on Improper Delivery).

168. *See id.* § 2-608 (Revocation of Acceptance in Whole or in Part).

169. *See id.* § 2-401(4) ("A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance reverts title to the goods in the seller.").

170. Section 2-711(3) provides as follows:

On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

Id. § 2-711(3). Although this security interest arises by operation of law under Article 2, in some respects it also will be subject to the provisions of Article 9. *See id.* § 9-113 (Security Interests Arising Under Article on Sales or Under Article of Leases).

IV. THE IMPLICATIONS FOR SPECIFIC PERFORMANCE

To this point, much of what I have said is abstract and theoretical. I have sought to sketch a positivist approach to property rights that necessarily fixes its focus on legislative and court-made remedies, but I have not yet confronted the hard question of just what difference all of this makes in the real world. In this Section, I take up the recent decision of the Article 2 Drafting Committee to permit a buyer of goods to create a right to the remedy of specific performance by private agreement. As will become apparent, the concept of property rights that I have outlined entails very practical implications for these specific performance clauses.¹⁷¹

An Article 9 security interest affords a perspective. Article 9 accepts the policy imperative that a secured party should be required to give notice of its otherwise secret interest by filing or taking possession of the collateral.¹⁷² Thus far no one has suggested that buyers who use a specific performance clause should be subjected to a similar Article 9 type filing requirement. To be sure, the remedy of specific performance is not a lien.¹⁷³ Still,

171. Each of these implications is multifaceted and cannot be fully explored here. I shall confine my discussion to those aspects that bear on the problem of ostensible ownership created by the use of a specific performance clause.

172. See U.C.C. §§ 9-302(1), 9-305 (1990). Generally, if the secured party fails to take either step (i.e., "perfect" the security interest), it will lose out to most third parties who subsequently acquire an interest in the collateral. *Id.* § 9-301. The often-stated rationale for Article 9's perfection and priority scheme is the doctrine of ostensible ownership or, as it is sometimes called, reputed ownership. This doctrine, with its genesis in the celebrated *Twyne's Case*, 76 Eng. Rep. 809 (Star Chamber 1601), is premised on the simple idea that third parties rely on a person's possession of property as a signal of ownership. Because courts have sought to maintain the accuracy of this signal, they have viewed as fraudulent any separation of ownership and possession, with the result that the ostensible or apparent owner of the property has been treated as the true and exclusive owner. For a comprehensive discussion of ostensible ownership and the issues it raises in today's commercial environment, see Charles W. Mooney, Jr., *The Mystery and Myth of "Ostensible Ownership" and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases*, 39 ALA. L. REV. 683 (1988).

173. An Article 9 security interest is a consensual lien on "personal property or fixtures which secures payment or performance of an obligation." U.C.C. § 1-201(37) (1990). Its most important attribute is the limited power it gives the secured party after default to "sell, lease or otherwise dispose of any or all of the collateral" *Id.* § 9-504(1). Once the indebtedness has been satisfied, the secured party must

the interest created by a specific performance clause strongly resembles a security interest. What we have in both cases is a consensually created property interest that gives its holder the power to take possession of designated property.¹⁷⁴ Consequently, those who urge the enforceability of specific performance clauses must explain how the so-called ostensible ownership problem created by the buyer's secret interest can be handled successfully or why it is not really a problem.¹⁷⁵

A. *A New Regime for Specific Performance*

My discussion of the simple television sale provided a single important insight. It showed that only rarely will the buyer of goods have available to her a possessory remedy prior to the time that the goods are shipped or delivered; that is, no property interest passes until the seller has tendered delivery. In this setting, it matters a great deal whether courts are willing to honor a clause that gives the buyer the right to specifically enforce the contract. If the Drafting Committee has its way and a provision is added to the Code that declares that courts may enforce a clause in a contract providing for specific performance, the frequency of use and effectiveness of such clauses can be expected to change dramatically.

Considering the lack of litigation that specific performance clauses have engendered over the years (counting both Code and

turn over any surplus proceeds to the debtor. *Id.* § 9-504(2). Unlike a security interest, the property interest created by a specific performance clause would not require the buyer to dispose of the property and if it is disposed of by the buyer, the seller would have no interest in the proceeds.

174. If specific performance derives not from a clause in the contract but from the nature of the goods or transaction, a constructive trust analogy might be more appropriate. The constructive trust is an equitable remedy that gives title to the plaintiff "of something that in equity and good conscience [does] not belong to the defendant." DOBBS, *supra* note 83, § 4.3, at 241.

175. In this Article, I do not purport to judge either the merits of the ostensible ownership rationale for mandating the public disclosure of interests or the choice made by the Drafting Committee with regard to the enforceability of specific performance clauses. I assume that, once the implications of that decision are properly understood, the ostensible ownership debate that until recently centered around the drafters' decision not to require public filing for leases of goods under Article 2A, will begin again. For a good overview of that debate, see generally Mooney, *supra* note 172.

non-Code cases), I have to assume that they rarely find their way into contracts.¹⁷⁶ One can speculate that such a clause, despite being potentially advantageous to many parties,¹⁷⁷ is rarely used because courts by and large do not feel that the use of the clause dispenses with the need to establish the traditional prerequisites for specific relief.¹⁷⁸ The explanation most often given for this restrictive view is historical: "Because the availability of equitable relief was historically viewed as a matter of jurisdiction, the parties cannot vary by agreement the requirement of inadequacy of damages, although a court may take appropriate notice of facts recited in their contract."¹⁷⁹ The latter

176. I have found only two U.C.C. cases where a clause providing for specific performance was used. In both instances the clause operated in favor of the seller and was found to be a proper exercise of the parties' right to provide for their own remedies under § 2-719. See *Martin v. Sheffer*, 403 S.E.2d 555 (N.C. Ct. App. 1991); *Frank LeRoux, Inc. v. Burns*, 480 P.2d 213 (Wash. Ct. App. 1971). The Drafting Committee's proposal may be seen to be a rejection of this result. See *supra* note 19. For a collection of the leading non-Code cases that address the enforceability of clauses providing for specific performance or injunctive relief, see Ian R. Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495, 521 n.88 (1962).

177. Professor Yorio lists the three advantages most often noted by commentators:

First the clause protects any subjective interest that the promisee has in performance by the particular promisor. Placing a monetary value on that interest and assessing damages for its loss are likely to be difficult. Second, a specific performance clause enables a promisor who is a newcomer in the trade to offer the added inducement of an explicit contractual guarantee of performance to secure a contract that might otherwise be unobtainable. Third, a specific performance clause reduces litigation costs whenever assessing damages would be complex, time-consuming, and expensive.

EDWARD YORIO, *CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS* § 19.2.2, at 442-43 (1989).

178. See, e.g., *Snell v. Mitchell*, 65 Me. 48, 50 (1876) ("Neither party to a contract can insist, as a matter of right, upon a decree for its specific performance."); *Manchester Dairy Sys., Inc. v. Hayward*, 132 A. 12, 15 (1926) ("[A]uthority, if any here, is to be found not in the express stipulations for equitable relief, but in the general principles limiting equitable jurisdiction.").

179. RESTATEMENT (SECOND) OF CONTRACTS § 359 cmt. a (1979). Professor Dobbs, however, questions the legitimacy of this view. See DOBBS, *supra* note 83, § 12.5, at 825. Others who question the wisdom of the present-day approach include Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 376 (1978) (stating that contracting parties are better equipped than courts to dictate the appropriateness of specific performance); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 277 (1979) ("The very fact that a promise requests specific performance thus implies that damages are an inadequate remedy."); Thomas S. Ulen, *The Effi-*

part of this statement suggests that although a specific performance clause cannot guarantee the remedy, it may make a difference in a close case.¹⁸⁰

In sum, the contemplated revision to Article 2 would work a revolution in theory. It would change the way courts respond to specific performance clauses. Once the core obstacle to their enforcement has been lifted, we can expect a corresponding revolution in the practice of those who draft and negotiate contracts.

B. Nonbankruptcy Implications

1. When the Seller Sells the Goods to a Third Party

One issue that is certain to arise is the relative rights of the first buyer ("First Buyer") and a second buyer ("Second Buyer") who purchases goods from the seller, only to find later that the goods were subject to a specific performance clause in favor of First Buyer. Put another way, the issue is whether First Buyer could sue Second Buyer for conversion and recover the value of the goods from him, or in replevin for a return of the goods themselves. Under real estate law, the rule in such cases is that Second Buyer is protected if she can be described as a good faith purchaser for value.¹⁸¹ Although one is tempted to apply settled real estate law principles to resolve this new issue of personal property law, analogizing to the former is proper only if we find that doing so is consistent with the text and policies of the Code.¹⁸²

ciency of Specific Performance: Toward a Unified Theory of Contract Remedies, 83 MICH. L. REV. 341, 350-56 (1984) (viewing specific performance clauses as an efficient means of allocating risks and protecting subjective values). *But see* Edward Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365, 1368-69 (1982) (arguing that contract remedies should reflect more than just the interests of the immediate parties).

180. See Kronman, *supra* note 179, at 371 ("A contractual provision accompanied by a lengthy description of those aspects of the transaction that make specific performance desirable is likely to carry more weight than a provision unadorned by supporting explanation.").

181. See, e.g., *Saperstein v. Mechanics' & Farmers' Savings Bank*, 126 N.E. 708 (N.Y. 1920); *Maurer v. Albany Sand & Supply Co.*, 337 N.Y.S.2d 44 (App. Div. 1972); *Flackhamer v. Himes*, 53 A. 46 (R.I. 1902).

182. This is exactly what was not done in *Joneil Fifth Ave. Ltd. v. Ebeling &*

In Article 2, the general conveyancing principle appears in section 2-403(1): "A purchaser of goods acquires all title which his transferor had or had power to transfer"¹⁸³ Thus, in the absence of a statutory or common law exception, Article 2 follows the derivation principle of *nemo dat* and provides that Second Buyer takes the goods subject to the property interest created by First Buyer's specific performance clause. Many would find this result shocking. No prospective buyer would be able to determine, with relative accuracy, the risks he faces from competing claimants. I do not mean to make light of this problem, but this is already a circumstance that buyers are forced to confront.¹⁸⁴ In any event, I believe that the relative rights of the two buyers will turn exclusively on whether the court will consider non-Code law.¹⁸⁵

Reuss Co., 458 F. Supp. 1197 (S.D.N.Y. 1978). There, in a sale of goods case the court applied, without explanation, the real estate rule that a good faith purchaser does not take subject to specific performance remedy. *Id.* at 1200-01.

183. U.C.C. § 2-403(1) (1990). The principle expressed in this section has two aspects. One is the "derivation" principle of *nemo dat*. See *supra* note 5 for the complete latin phrase. *Nemo dat* dictates that the transferee takes its interest subject to all third-party claims and interests that were enforceable against the transferor. This principle is not confined to Article 2. See, e.g., *id.* §§ 3-305(a), 3-306, 7-504, 8-301, 9-318. The second aspect to § 2-403(1) is commonly referred to as the "shelter" principle. When the transferor has priority over third-party claims, the transferee will enjoy that same priority. This principle too is reflected in other Code sections. See, e.g., *id.* §§ 3-203(a), 7-504(1). For insightful discussions of the conveyancing principles that underlie the Code, see generally PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB COMMENTARY ON THE UNIFORM COMMERCIAL CODE: COMMENTARY 6 (Final Draft Mar. 10, 1990), reprinted in [Index/PEB Commentaries] U.C.C. Rep. Serv. 2d (Callaghan); John F. Dolan, *The U.C.C. Framework: Conveyancing Principles and Property Interests*, 59 B.U. L. REV. 811 (1979); Steven L. Harris, *The Interaction of Article 6 and 9 of the Uniform Commercial Code: A Study in Conveyancing, Priorities, and Code Interpretation*, 39 VAND. L. REV. 179 (1986).

184. The number and variety of potential hidden interests about which a buyer has to worry are too numerous to detail. Suffice it to say that they include security interests, see, e.g., U.C.C. § 9-302(1)(d) (1990) (a purchase money security interest in consumer goods is perfected without filing or possession); the ownership interest of one from whom the goods were stolen, see, e.g., *Morgan v. Hodges*, 50 N.W. 876 (Mich. 1891); and the ownership interest of a lessor, see U.C.C. § 2A-305 (1990).

185. The question whether the court will consider non-Code law is not easy to predict. This point was made recently in an essay by Professor Harris criticizing courts for their failure to appreciate the role that non-Code law may play in what is ostensibly a Code-covered case. See Steven L. Harris, *Using Fundamental Principles of Commercial Law to Decide UCC Cases*, 26 LOY. L.A. L. REV. 637 (1993).

Unless a court were willing to characterize the seller's interest as "voidable title,"¹⁸⁶ there is no statutory exception in the Code to the general rule in section 2-403(1).¹⁸⁷ Therefore, it seems appropriate that we accept the invitation of section 1-103 and concentrate our focus on non-Code law.¹⁸⁸ Because real estate law already affords a theoretical construct for dealing with the property rights of the two buyers, a court might wish to apply it to the conflict under discussion.

The first step in applying the real estate construct would be to extend the doctrine of equitable conversion to contracts for the sale of goods. Because the doctrine "is merely and exclusively the consequence of the application by a Court of Equity of the doctrine of specific performance,"¹⁸⁹ a goods contract that includes a specific performance clause would satisfy the core criterion for its application. As Professor Dobbs explains, "The whole doctrine can be expressed by saying that, in equity, the purchaser is owner of the land, and the vendor is owner of the purchase price. The vendor's interest, then, can be thought of as personal property (the purchase price) rather than real property (the land)."¹⁹⁰ In other words, the buyer is viewed as the equitable

186. The second sentence of § 2-403(1) provides that "[a] person with voidable title has power to transfer a good title to a good faith purchaser for value." U.C.C. § 2-403(1) (1990). Although the term "voidable title" is undefined, the examples given by the drafters suggest that it is a concept reserved for buyers. See *id.* § 2-403(1)(a)-(d).

187. The only other statutory exception to *nemo dat* that might conceivably be relevant is the entrustment rule of § 2-403(2), which reads as follows: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." *Id.* § 2-403(2). But has there been an entrusting? Unless First Buyer can be said to have acquiesced in the seller's retention of possession, *id.* § 2-403(3), the answer is no.

188. Section 1-103 explicitly mandates that courts supplement Code provisions with general principles of law and equity unless they have been displaced by particular Code provisions. *Id.* § 1-103. Similarly, a comment to § 2-403 reads:

[T]he policy of this Act expressly providing for the application of supplementary general principles of law to sales transactions wherever appropriate joins with the present section to continue unimpaired all rights acquired under the law of agency or of apparent agency or ownership or other estoppel, whether based on statutory provisions or on case law principles.

Id. § 2-403 cmt. 1.

189. Haynes v. Haynes, 62 Eng. Rep. 442, 452 (1861).

190. DOBBS, *supra* note 83, § 2.3, at 41.

owner of the property. To be sure, this is merely a fiction, but equitable conversion reasoning has practical utility. For one thing, such reasoning would enable a court to apply the longstanding rule that in a dispute between a legal titleholder and an equitable titleholder, the former will prevail if he purchased the legal title for value and without notice of the preexisting equitable claim.¹⁹¹ As a result, Second Buyer (the legal titleholder) would defeat First Buyer (the equitable titleholder).

2. *The Rights of Unsecured Creditors of the Seller*

Article 2 contains a provision that explicitly subordinates the rights of a seller's unsecured creditors (presumably judicial lien creditors) against goods in which the buyer has a specific proprietary interest. Section 2-402(1) provides: "Except as provided in subsections (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this Article (Sections 2-502 and 2-716)."¹⁹² Because prior identification is not a prerequisite for specific perfor-

191. See *id.* § 4.7, at 281-83. Alternatively, the court could skip the equitable conversion analysis and analogize to those cases that applied the rule to similar disputes involving constructive trusts and equitable liens. See *id.* at 283.

Another consequence of equitable conversion reasoning is that it may permit First Buyer to recover from the seller the profit that the seller earned on the sale to Second Buyer. See, e.g., *Coppola Enters. v. Alfone*, 531 So. 2d 334 (Fla. 1988). Because sellers often will breach when the market is rising or a better deal comes along, the significance of measuring First Buyer's recovery by the amount of the seller's gain rather than by the amount of the seller's loss cannot be overstated. Because such a measure would eliminate whatever incentive the seller would otherwise have to breach, First Buyer's interest in the contract would now be protected by something closely akin to a property rule. See Kronman, *supra* note 179, at 380-82.

192. U.C.C. § 2-402(1) (1990). Subsection (2) deals with the effect of the seller's possession of sold goods. Its basic design is to leave intact, in each jurisdiction, the *Twyne* rule, see *supra* note 172, in whatever form it exists at present. The subsection does not incorporate law external to the Code in one situation: creditors have no right to void as fraudulent the "retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification." U.C.C. § 2-402(2) (1990). For the purpose of this Article, I assume that the seller's possession of the goods will not be deemed to be fraudulent under applicable state law. Finally, subsection (3) makes the point that the section was not meant to impair the rights of secured creditors under Article 9. See *id.* § 2-402(3)(a).

mance,¹⁹³ one unanswered question arises: Does this section apply if a court compels the seller to make an identification after the goods have been levied upon? Whatever the answer, the subsection gives fair warning to unsecured creditors that reliance on the seller's possession is, at best, risky business.

3. *The Rights of Secured Creditors of the Seller*

Consider first the case of a secured party whose security interest predates the buyer's contract with a specific performance clause. Because I remain convinced that buyer status is achieved the moment the buyer acquires a pre-delivery possessory right against the seller,¹⁹⁴ I would approach this priority dispute in the same manner as I would any other involving a buyer. That is, I would decide in favor of the secured party unless the buyer is a buyer in the ordinary course of business or the disposition was authorized by the secured party.¹⁹⁵

However, it strikes me that by permitting buyers to contract for pre-delivery buyer status we may have found one way for the prepaying or financing buyer¹⁹⁶ to protect himself without having to incur the expense of obtaining a subordination agreement

193. See *supra* note 104.

194. See generally Frisch, *supra* note 2.

195. See U.C.C. § 9-307(1) (1990) (a buyer in ordinary course of business generally takes free of a security interest); *id.* § 9-306(2) (a security interest does not continue if the disposition was authorized). Prior to actual delivery it would not matter whether the secured party's security interest was perfected. See *id.* § 9-301(1)(c) (buyer not in ordinary course of business must receive delivery to take priority over an unperfected security interest).

196. For present purposes, I use these terms interchangeably to include any buyer who prepays. Others may not be so inclined.

[A] financing buyer might be defined narrowly to include only those who advance funds to the seller that in fact enable the seller to manufacture or process the goods to be sold. Or, eligibility for the special priority might be defined expansively to include any buyer who prepays. The Committee tends to favor the former, narrower approach.

PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 9 REPORT 196 (1992) (footnote omitted) [hereinafter PEB ARTICLE 9 REPORT]. For more on the plight of the prepaying buyer, see generally Irving A. Gordon, *The Prepaying Buyer: Second Class Citizenship Under Uniform Commercial Code Article 2*, 63 NW. U. L. REV. 565 (1968); Thomas H. Jackson & Anthony T. Kronman, *A Plea for the Financing Buyer*, 85 YALE L.J. 1 (1975).

from the seller's earlier-in-time inventory financier or seek questionable purchase money priority under section 9-312(3).¹⁹⁷ Moreover, buyers would receive even more protection than they would if the Code gave them a special enabling lien with priority. The Article 9 Study Committee put the matter in context:

A senior security interest alone would not, of course, enable a financing buyer to obtain specific performance of the sale contract. Rather, it would entitle the financing buyer to enforce its damage claim for non-delivery against the collateral. The Drafting Committee may wish to consider a more radical approach, such as giving the financing buyer an automatically perfected, statutory lien that would be senior to any earlier-in-time inventory security interest and would (to the extent practicable) entitle the financing buyer to enforce against the collateral a right of specific performance. If the Article 2 Drafting Committee adopts the recommendation of the PEB Article 2 Study Group that the remedy of specific performance be more readily available when the parties so agree, the differences between the Committee's recommendations and the statutory lien approach might be negligible.¹⁹⁸

Next, consider the different question of who gets the goods when the claimants are a first-in-time buyer with a specific performance clause and a second-in-time secured party. Application of *nemo dat* protects the buyer's interest. To elaborate, the secured party's rights are limited to those of its debtor, the seller. As a consequence, the secured party takes subject to the property interest arising under the buyer-seller contract—the power of the buyer to take possession by way of specific performance.¹⁹⁹ To be sure, not all courts can be expected to appreciate the relevance of *nemo dat*. Professor Harris spoke powerfully to this point when he said that “[t]he opinions represent a lack

197. The impediments to achieving purchase money priority are detailed fully in Jackson & Kronman, *supra* note 196. Probably the most significant requirement is the need to show that the money advanced was in fact used to acquire the goods. See U.C.C. § 9-107(b) (1990).

198. PEB ARTICLE 9 REPORT, *supra* note 196, at 195-96 n.4.

199. Presumably, the seller still would have sufficient rights in the collateral to support a valid security interest. See, e.g., *Kinetics Technology Int'l Corp. v. Fourth Nat'l Bank*, 705 F.2d 396 (10th Cir. 1983) (holding that any interest other than naked possession gives the debtor rights in the collateral).

of understanding of one of the fundamental concepts of commercial law and, for that matter, all property law. The failure properly to utilize *nemo dat* evidences a failure to comprehend the concept's role in commercial law jurisprudence."²⁰⁰ Notwithstanding this undoubtedly correct characterization of some cases, there have, in fact, been many courts that have reached the right result.²⁰¹ In more practical terms, the buyer's secret interest would involve a certain amount of risk for uninformed secured parties.

C. Bankruptcy Implications

Appreciation of the interesting and problematic fate of specific performance clauses in bankruptcy begins with an understanding of some elementary principles governing modern bankruptcy law.²⁰² One of these is equality of distribution among creditors. This principle historically has limited the availability of specific performance against the trustee.²⁰³ One can look at specific performance as essentially a remedy that requires the seller's other creditors to pay the buyer's claim in full. Think about it this way: If specific performance is denied, the buyer's claim will be paid in "bankruptcy dollars" and the full value of the goods

200. Harris, *supra* note 185, at 645.

201. See, e.g., *Northwestern Bank v. First Virginia Bank*, 585 F. Supp. 425, 428 (W.D. Va. 1984) ("[I]n the absence of special circumstances a security interest attaches only to the extent of the debtor's interest."); *First Nat'l Bank & Trust Co. v. Smithloff*, 167 S.E.2d 190, 197 (Ga. App. Ct. 1969) (same); see also *State Bank of Young America v. Vidmar Iron Works, Inc.*, 292 N.W.2d 244, 250 (Minn. 1980) ("[T]he secured party only gets rights in the goods to the extent of the debtor's rights in them.").

202. In this Part, I do not purport to present an in-depth analysis of the relevant provisions of the Bankruptcy Code and many of the complex and controversial issues that they raise. The reader who wishes more than the truncated account I can give in the limited space available should see Michael T. Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U. COLO. L. REV. 1 (1991) [hereinafter Andrew, *Executory Contracts Revisited*]; Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. COLO. L. REV. 845 (1988) [hereinafter Andrew, *Executory Contracts in Bankruptcy*]; Vern Countryman, *Executory Contracts in Bankruptcy* (pts. 1 & 2), 57 MINN. L. REV. 439 (1973), 58 MINN. L. REV. 479 (1974); Westbrook, *supra* note 18. Nonetheless, I believe that the analysis presented here is sufficient to support my "conjecture" that the enforceability of specific performance clauses will affect profoundly the buyer's position in the seller's bankruptcy.

203. See Westbrook, *supra* note 18, at 255-57.

will be available for distribution to creditors generally, as part of the bankruptcy estate. In other words, relieving the estate from the duty of specifically complying with the contract increases the value of the seller's assets.²⁰⁴

However, this principle of equality is limited, insofar as it does not attempt to prohibit a distribution of assets according to preexisting property interests.²⁰⁵ For example, in the case of a secured creditor in bankruptcy, if the security interest has been properly perfected and is not otherwise subject to avoidance, the creditor is entitled to the collateral or to be paid the amount of the allowed secured claim before other creditors.²⁰⁶ As Professor Jay Westbrook explains, "This 'property' principle is central to bankruptcy law because it is by far the most important exception to the principle of equality of distribution."²⁰⁷ The question is then solely one of determining whether the creditor possesses a property interest in a specific asset, and more particularly, whether that interest can survive application of the bankruptcy avoiding powers.²⁰⁸

In deciding whether an interest is property for bankruptcy purposes, the Supreme Court frequently has shown great deference to nonbankruptcy law. In two cases, the Court has emphasized that

[i]n the absence of a controlling federal rule, we generally assume that Congress has "left the determination of property rights in the assets of a bankrupt's estate to state law," since such [p]roperty interests are created and defined by state

204. *See id.*

205. *See id.* at 257-63.

206. *See, e.g.*, 11 U.S.C. §§ 506, 725, 1129(b)(2), 1325(a)(5) (1988).

207. Westbrook, *supra* note 18, at 257. Professor Andrew explained the situation this way:

The principle behind the "no-specific-performance" argument is that allowing specific performance would prefer one claimant over others similarly situated. But bankruptcy law recognizes that not all claimants are similarly situated; those with rights to property, good as against competing claimants under state law, do not lose those rights. Thus, there is no elevation to priority. the non-debtor party started off differently situated as compared to other claimants, and the analysis simply takes account of and preserves that difference, consonant with the rest of bankruptcy law.

Andrew, *Executory Contracts in Bankruptcy*, *supra* note 202, at 926.

208. *See* 11 U.S.C. §§ 544-549 (1988).

law." . . . Moreover, we have specifically recognized that "[t]he justifications for application of state law are not limited to ownership interests," ²⁰⁹

Accordingly, if the state-law remedy of specific performance would be available outside of bankruptcy, it would seem to follow that the property interest it creates appropriately may be exercised in bankruptcy. However, even if specific performance were regarded as a form of property, some property interests still would be invalid and unenforceable because there are independent limitations on the validity or enforceability of property interests in various circumstances. It is to these limitations that we now turn. In so doing, it is helpful to distinguish between those cases where the buyer has prepaid for the goods and those cases where he has not.

1. Where the Buyer Has Prepaid

Where the buyer has prepaid for the goods and all that remains is the seller's performance, it seems clear enough that the trustee ordinarily will be powerless to defeat the buyer's right to specific performance.²¹⁰ The avoiding power most likely to create difficulties for the buyer is the "strong-arm" power under section 544(a).²¹¹ Section 544(a) gives the trustee the rights of a hypothetical lien creditor. Because a lien creditor that acquires its lien after the buyer enters into a contract with a specific

209. *Nobelman v. American Sav. Bank*, 113 S. Ct. 2106, 2110 (1993) (quoting *Butner v. United States*, 440 U.S. 48, 54-55 (1979)).

210. Despite my bold assertion in the text, there is apparently ground for difference of opinion. See Westbrook, *supra* note 18, at 273 n.201 ("In the rare instance of a specific performance right in personal property, as under U.C.C. § 2-716 (1987), . . . specific-performance . . . would not likely survive avoiding power attack. 11 U.S.C. § 544 (1988) . . ."). However, if the subject matter of the contract were real property, Professor Westbrook undoubtedly would be correct. See 11 U.S.C. § 544(a)(3) (1988) (providing that the trustee may avoid any transfer that is voidable as to a bona fide purchaser of real property).

211. I am assuming that the seller's retention of possession is not fraudulent under state law, see *supra* note 192, and that the contract price is roughly equivalent to the value of the goods. If either assumption turns out to be incorrect, the buyer's property interest is subject to a fraudulent conveyance challenge in bankruptcy. See 11 U.S.C. §§ 544(b), 548 (1988).

performance clause takes subject to that remedy,²¹² the trustee is not able, by virtue of enjoying the powers of a lien creditor, to avoid the buyer's property interest. In most instances this will work out to give the buyer an advantage over other unsecured creditors who have extended pre-petition credit to the seller and whose claims have an equally strong moral basis.

In the situation in which the buyer prepays and the seller later supplies goods before the seller's bankruptcy, but during the preference period,²¹³ when the bankruptcy ensues, the buyer faces the prospect of having to return the goods received during the preference period or to disgorge their value, while the trustee gets to keep the full amount of the payments made. The theory is that the prepayment was the antecedent debt on account of which the later transfer was made. Such a harsh result might be avoided if the sales contract contains a specific performance clause. If the specific performance clause would have been unavoidable in bankruptcy,²¹⁴ then the buyer is no better

212. See *supra* note 192 and accompanying text.

213. This hypothetical is adapted, with some revisions, from Westbrook, *supra* note 18, at 273-74. See also Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 746 & nn.180-85 (1985). Section 547(b) of Title 11 reads as follows:

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property-

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made-

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if-

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b) (1988).

214. Much will depend, I think, on when the goods were identified to the contract. Although the remedy of specific performance does not depend on identification, see *supra* note 104, the property interest that it generates probably does so depend. It

off as a result of the pre-petition transfer. If the seller had not delivered the goods, the buyer would have been entitled to specific performance of the contract, and therefore could have gotten the goods anyway. Thus, one of the elements of a preference (the creditor must be better off because of the transfer)²¹⁵ would not be satisfied.

2. *Where the Buyer Has Not Prepaid*

Our consideration of the implications of specific performance clauses in bankruptcy has proceeded without mention of the most troublesome feature of the Bankruptcy Code's treatment of pre-petition contracts,²¹⁶ the law of executory contracts. When a contract is executory, section 365 gives the trustee or debtor-in-possession the choice (subject to court approval and to exceptions not relevant here) of "assuming" or "rejecting" a pre-bankruptcy contract.²¹⁷ If the contract is assumed, the debtor's obligations thereunder become obligations of the estate. Should the estate later breach, the creditor would have an administrative expense priority claim.²¹⁸ Conversely, the rejection of an executory contract "constitutes a breach of such contract . . . (1) . . . immediately before the date of the filing of the petition"²¹⁹

is difficult to imagine how one could have an interest in goods that are either non-existent or not particularized. Therefore, if identification postdates payment, the antecedent debt element of a preference would be satisfied.

215. 11 U.S.C. § 547(b)(5) (1988).

216. 11 U.S.C. § 365 governs the treatment of "unexpired leases" and "executory contracts." Professor Westbrook observes that there is no area of bankruptcy where "the law [has] become more psychedelic than in the one titled 'executory contracts.'" Westbrook, *supra* note 17, at 228. Professor Andrew sums it up by saying that in the law of executory contracts "lurks a hopelessly convoluted and contradictory jurisprudence." Andrew, *Executory Contracts Revisited*, *supra* note 202, at 2.

217. 11 U.S.C. § 365 (1988).

218. One of the points on which Professors Andrew and Westbrook disagree relates to assumption. According to Andrew, the contract is excluded from the estate until assumption. See Andrew, *Executory Contracts in Bankruptcy*, *supra* note 202, at 856-66. This "exclusionary" approach is rejected by Professor Westbrook, who argues that the pre-bankruptcy contract becomes property of the estate under § 541 whether it is assumed or not. See Westbrook, *supra* note 18, at 323-32.

219. 11 U.S.C. § 365(g) (1988); see also *id.* § 502(g) ("A claim arising from the rejection, under section 365 . . . shall be determined, and shall be allowed . . . the same as if such claim had arisen before the date of the filing of the petition.").

Because only executory contracts can be assumed or rejected, one should not be surprised to find that "executoriness" is the most enigmatic concept of section 365. In cases of contracts of modest complexity, lawyers and supposedly disinterested judges often could argue almost too easily for sharply conflicting, yet credible, notions of when a contract is executory.²²⁰ The Bankruptcy Code does not define the term "executory contract." Courts generally have relied on the definition formulated by Professor Countryman. As he defined it, an executory contract is "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."²²¹ It is likely, therefore, that where, as here, the buyer is still obligated to pay the purchase price and the seller still has to deliver the goods, the contract remains executory.²²²

If the contract is executory what are the consequences that flow from rejection? Because the traditional view of rejection holds that it somehow destroys the contract, a number of courts have held that specific performance is no longer a remedial op-

220. The court in *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 687 (Bankr. S.D.N.Y. 1992) commented on this dilemma:

After grappling with the issues presented by the parties, we believe that we could, using existing "executoriness" precedent, plausibly justify any number of results, from affording either party the complete relief it seeks, to deciding the case as we actually do. While "executoriness" analysis can provide a reason for any result we might reach, we find it useless as a tool for reaching a reasoned result.

Id. at 696.

221. Countryman pt. 1, *supra* note 202, at 460. Courts that have adopted this test include *In re Terrell*, 892 F.2d 469 (6th Cir. 1989); *Sharon Steel Corp. v. National Fuel Gas Distrib. Corp.*, 872 F.2d 36 (3d Cir. 1989); *In re Streets*, 882 F.2d 233 (7th Cir. 1989); *Draper v. Draper*, 790 F.2d 52 (8th Cir. 1986); *Gloria Mfg. Corp. v. International Ladies' Garment Workers' Union*, 734 F.2d 1020 (4th Cir. 1984).

222. *See, e.g., In re Alexander*, 670 F.2d 885 (9th Cir. 1982) (holding that the contract was executory where the buyer of real property had not yet paid the purchase price and the seller had not yet conveyed title). A different conclusion might be called for if, prior to the seller's bankruptcy, the buyer actually had obtained a judgment for specific performance. *See, e.g., In re Pribonic*, 70 B.R. 596 (Bankr. W.D. Pa. 1987) (once a judgment for specific performance is entered, the contract is no longer executory); *In re Roxse Homes, Inc.*, 74 B.R. 810 (Bankr. D. Mass. 1987) (same); *In re Kendell Grove Joint Venture*, 46 B.R. 531 (Bankr. S.D. Fla. 1985) (same), *aff'd*, 59 B.R. 407 (S.D. Fla. 1986).

tion.²²³ Rather, the creditor's recovery is limited to monetary damages for the breach.²²⁴ However, people have begun to think anew about what it means to reject an executory contract.²²⁵ One prominent and unanimous end of this rethinking is a realization that rejection "does not invalidate, rejudicate, repeal, or avoid"²²⁶ the contract. As a result, more and more courts are reaching the conclusion that section 365 is not an avoiding power that can be used to destroy a right in or to property created by the contract.²²⁷ Adopting this new approach, the bankruptcy court in *In re Walnut Associates* declared that "if state law does authorize specific performance under the rejected executory contract, it means that the debtor should be able to enforce the contract against the Debtor, irrespective of his rejection of it."²²⁸

Thus, if specific performance clauses are enforceable under state law, the current trend promises to increase significantly their importance in bankruptcy. Whether one perceives the contract as executory or whether one views the contract as executed, the question is one of the impact of the trustee's avoidance powers.²²⁹

223. See, e.g., *Leasing Serv. Corp. v. First Tenn. Bank Nat'l Ass'n*, 826 F.2d 434 (6th Cir. 1987); *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985); *In re Waldron*, 36 B.R. 633 (Bankr. S.D. Fla. 1984); *In re Roman Crest Fruit, Inc.*, 35 B.R. 939 (Bankr. S.D.N.Y. 1983).

224. Some courts have embraced the view that if under the circumstances state law does not permit an award of damages in lieu of specific performance, then the creditor's right to specific performance is not a claim, see 11 U.S.C. § 101(4)(B) (1988), which can be discharged. Consequently, the remedy survives rejection. See, e.g., *In re Aslan*, 65 B.R. 826, 830-31 (Bankr. C.D. Cal. 1986). Professor Andrew suggests that this argument misses the point. According to him, the "issue to which the 'claims-and-discharge' is relevant is whether the non-debtor can specifically enforce a contract against the debtor post-bankruptcy." Andrew, *Executory Contracts in Bankruptcy*, *supra* note 202, at 927. I presume that in most instances where a specific performance clause is used, the parties would not expressly agree that it is the exclusive remedy so as to preclude an award of damages if the buyer should choose that remedy. See U.C.C. § 2-719(1)(b) (1990).

225. Most prominent in this area is the work of Professors Andrew, see *supra* note 202, and Westbrook, see *supra* note 18.

226. *In re Walnut Assocs.*, 145 B.R. 489, 494 (Bankr. E.D. Pa. 1992).

227. See, e.g., *id.*; *In re Seymour*, 144 B.R. 524 (Bankr. D. Kan. 1992); *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 687 (Bankr. S.D.N.Y. 1992).

228. *Walnut Assocs.*, 145 B.R. at 494.

229. See *supra* notes 208-15 and accompanying text.

V. CONCLUSION

Despite the importance of the issue, the relationship between remedies and property interests has never received the attention that scholars have lavished on the concept of property in other contexts. As a result, we seem to have never gained the proper perspective on the issue, leading to serious confusion in the courts²³⁰ and the hasty decision of the Article 2 Drafting Committee to make specific performance clauses enforceable as a means of assuring performance by the seller.

While arguing that central to the idea of property rights is the availability of remedies that permit a person to exercise dominion over the specific asset, I have also attempted to show some of the ramifications of the Drafting Committee's decision. My position is not, surely, that the decision was wrong. Rather, my message is that the Committee made its policy choice in a vacuum without considering the consequences that are likely to follow.

The ultimate point is fairly simple. If specific performance clauses are recognized, another type of secret interest will have been created. But the drafters have always shown a willingness to tolerate misleading appearances in the "right" situations.²³¹ It is, therefore, no solution to the problem of specific performance clauses to say simply that they should not be enforced because they create secret interests, which may cause some troublesome problems. The inquiry is whether this is another proper situation for tolerating these problems.

230. See, e.g., Frisch, *supra* note 2, at 540-52.

231. See *supra* note 184.