

VINDICATIO

The Missing Remedy?

In this article, I explain the nature of a *vindicatio* remedy and discuss its rarity in common law legal systems. I set out two arguments – a pragmatic argument, and a principled argument – for making such a remedy available in cases where a defendant is in possession of an item of personal property that belongs to the plaintiff, and examine whether those arguments can be made out.

Nicholas J MCBRIDE*

BA, BCL (Oxon);

Fellow, Pembroke College, Cambridge.

I. Introduction

1 It is often said that one of the most distinctive features of common law legal systems is that in cases where a defendant, *D*, is in possession of personal property which belongs¹ to *P*, the law will not provide *P* with a *vindicatio* remedy that will allow *P* to recover her property, or its value, from *D*. Two examples of such cases are:

(a) “Lost Umbrella”: *P* accidentally leaves her umbrella behind on the train. *T* finds the umbrella and hands it in to *D*, the train company’s lost property office.

(b) “Stolen Car”: *P*’s car is stolen from her by *T*, who then sells² the car to *D*, who honestly believes that the car belongs to *T* at the time he buys it.

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1 In discussing the *vindicatio* remedy, this article will concentrate on the simple situation where *D* is in possession of *P*’s goods. There is, however, no reason to think that the *vindicatio* remedy cannot extend to more complex situations (such as in *Armory v Delamirie* (1722) 1 Stra 505) where *D* is in possession of a thing that does not belong to *P* but to which *P* has a better title than *D*. However, the complications involved in extending the scope of the *vindicatio* remedy to that kind of situation are outside the scope of this article.

2 By “sells” the author means here, and throughout this article, “hands *P*’s car over to *D* in return for money”. Obviously, under the *nemo dat* rule, *T* could not sell *P*’s car to *D* in the sense of “transfer title to the car to *D* in return for money”. Similarly, “buys”, in this article, means “takes possession of *P*’s car in return for money”.

This article will explore whether the lack of a *vindicatio* remedy in cases like these is a matter of regret. The focus will be on English law, but references to the law in other jurisdictions will be made where necessary.

II. What is it?

2 It is sometimes said³ that a *vindicatio* remedy allows *P* specifically to recover her property from *D* in cases like Lost Umbrella and Stolen Car and that common law legal systems lack a *vindicatio* remedy because in cases like these, the most *P* will ever be able to recover from *D* under the common law is the *money value* of her umbrella or car. This way of thinking is a mistake. The mark of a *vindicatio* remedy is that in cases like Lost Umbrella and Stolen Car *P* is allowed to sue *D* without having to allege that *D* has committed a legal wrong in relation to her.⁴ If *P* can base a claim against *D* merely on the ground that *D* is in possession of her property, then the remedy she is seeking is a *vindicatio* remedy – and this is so whether or not she ends up recovering her property *in specie*.

3 That this is so is shown by Roman law, where the formula by which a plaintiff would bring a *rei vindicatio* suit instructed the judge:⁵

If it appears that the property, which this suit concerns ... belongs to the plaintiff, and this property will not be restored [by the defendant], then ... give judgment that the defendant pay as much money as the property is worth.

3 See Graham Virgo, *Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) at p 16: “vindication refers to a specific remedy by virtue of which property, which is in the possession of the defendant but belongs to the claimant, is restored to the claimant. This *vindicatio* is not recognized at Common Law”; Ugo Mattei, *Basic Principles of Property Law* (Greenwood Press, 2000) at p 182: “the *rei vindicatio* [is] an action that allows [the owner of property] to recover possession against any nonowner in possession of the property”; and Sarah Green & John Randall, *The Tort of Conversion* (Hart Publishing, 2009) at p 54: “a *vindicatio* action ... is essentially a proprietary action which enables a dispossessed individual to claim his asset *in specie* from the defendant”.

4 See Peter Birks, “Personal Property: Proprietary Rights and Remedies” (2000) 11 KCLJ 1 at 4: “In classical Roman law a plaintiff could go to court and make a direct assertion of his ownership of the asset in question: ‘That cow, Buttercup, is mine!’ That assertion was called the *vindicatio*.” To the same effect, see Robin Hickey, “Wrongs and the Protection of Personal Property” [2011] Conv 48 at 49; Arianna Pretto-Sakmann, *Boundaries of Personal Property: Shares and Sub-shares* (Hart Publishing, 2005) at p 175; and Simon Douglas, *Liability for Wrongful Interference with Chattels* (Hart Publishing, 2011) at pp 2 and 59.

5 *A Casebook on Roman Property Law* (Herbert Hausmaninger & Richard Gamauf eds) (Oxford University Press, 2012) at p 207. See also Paul du Plessis, *Borkowski’s Textbook on Roman Law* (Oxford University Press, 4th Ed, 2010) at p 75.

So under Roman law, bringing a *vindicatio* action would only result (if the defendant did not choose to give the plaintiff her property back) in a *condemnatio pecuniaria* – a judgment in money.⁶

4 So the *vindicatio* is distinguished as a remedy by its function, rather than its form. In Birksian terminology, it responds to the “not-wrong”⁷ of *D*’s being in possession of *P*’s property and seeks to remedy the problem involved in *D*’s being in possession of that property by allowing *P* to sue *D* either for the property *in specie* or its value. What form the *vindicatio* remedy takes depends on the jurisdiction recognising it. As we have seen, in Roman law it took the form of an order to pay *P* money. In modern civilian jurisdictions, it takes the form of *in specie* recovery.⁸ Were English law or another common law jurisdiction to recognise the existence of a *vindicatio* remedy, we would expect – by analogy with the law on specific performance of contracts and the law on specific restitution of chattels that have been converted by a defendant – that the remedy would take the form of *in specie* recovery where *P*’s property is unique, and that *P* would be confined to recovering the value of her property where a substitute could easily be purchased on the open market.

III. Did we/do we have it?

5 The answer, at least in relation to cases like Lost Umbrella and Stolen Car, is “no”. In cases like these, *P* cannot simply sue *D* claiming, “You’ve got my property!”⁹ Instead, *P* has to allege that *D* has committed

6 Peter Birks, “Personal Property: Proprietary Rights and Remedies” (2000) 11 KCLJ 1 at 5; Reinhard Zimmermann, *The Law of Obligations* (Oxford University Press, 1996) at pp 770–772 and 919.

7 See Peter Birks, “Rights, Wrongs, and Remedies” (2000) 20 OxJLS 1 at 25. The fact that the *vindicatio* responds to a “not-wrong” may lead some to think of a *vindicatio* as affording a plaintiff a cause of action, rather than a remedy; but this view seems to depend on thinking that remedies are always responses to wrongs rather than ways of dealing with “an anxiety or grievance [that needs] to be made better” (at 10). As Birks observes of the Roman *vindicatio* and *condictio* actions (at 10):

Nobody would now doubt the appropriateness of saying that these actions asserted rights, but, equally, we can refer to them as remedies. The word ‘remedy’ sees the availability of those [actions] as the medicine for the pain that brings the plaintiff to the law.

8 See *Cases, Materials and Text on Property Law (Ius Commune Casebooks for the Common Law of Europe)* (Sjef van Erp & Bram Akkermans eds) (Hart Publishing, 2012) at pp 131–132 (France) and 143–145 (Germany); and *Silberberg and Schoeman’s The Law of Property* (Pieter J Badenhorst, Juanita M Pienaar & Hanri Mostert eds) (LexisNexis, 5th Ed, 2006) at pp 242–246 (South Africa).

9 There is more of a case for saying that common law jurisdictions recognise the existence of a *vindicatio* remedy when *D* is in possession of *land* that *P* has a right to possess (for the remedy of recovery of land under English law, see Pt 55 of the
(cont’d on the next page)

a legal wrong in relation to her as a result of the way he has dealt with her property. In Stolen Car that will not be a problem. For reasons we will go into later, *P* will be able to claim that *D* committed the tort of conversion in relation to her by taking possession of her car, and is as a result liable to pay her damages equal to the value of the car if *P* does not recover the car itself. In Lost Umbrella, *P* will not be able to do this. *D* will not have committed the tort of conversion in relation to *P* by taking possession of *P*'s umbrella as *D* had no intention of keeping it for himself when he did so.¹⁰ So if *P* wants to sue *D* in Lost Umbrella, she will have to do something to put *D* in the wrong. The most straightforward way for her to do this is to demand that *D* hand over her umbrella. If *D* unjustifiably refuses to do this, *D* will have converted *P*'s property and *P* will then be able to sue *D*.

6 Before we consider whether the lack of a *vindicatio* remedy in cases like Lost Umbrella and Stolen Car is a matter of regret, it is worth asking: (a) whether English law ever recognised the existence of a *vindicatio* remedy in relation to goods and lost it somewhere along the way in an absence of mind; and (b) whether there are any areas of English law that currently recognise the existence of a *vindicatio* remedy in relation to chattels outside cases like Lost Umbrella and Stolen Car. If the answer to questions (a) and/or (b) is “yes” then the case for recognising the existence of a *vindicatio* remedy in situations like Lost Umbrella and Stolen Car would be strengthened. If the answer to (a) is “yes” then the lack of a *vindicatio* remedy in these situations would seem to be a result of historical accident rather than considered principle. If the answer to (b) is “yes” then consistency would seem to demand that a *vindicatio* remedy in relation to goods be made available outside the enclaves where it currently operates.

A. *Detinue*

7 Lionel Smith argues that “[i]t is clear that detinue” – the cause of action that would allow a plaintiff to sue a defendant for detaining her property, and which was abolished in England in 1977¹¹ – “was originally a *vindicatio*”.¹² Detinue’s roots as a *praecipe* writ – under which

Civil Procedure Rules). However, even this has been doubted: see Ben McFarlane, *The Structure of Property Law* (Hart Publishing, 2008) at pp 358–360.

10 *Fouldes v Willoughby* (1841) 8 M & W 540. *P* might be able to sue *D* for committing a trespass to her goods when he took possession of her umbrella, but as *D*'s touching *P*'s umbrella caused *P* no loss, suing *D* for trespass to goods will not give *P* the kind of remedy she wants.

11 Torts (Interference with Goods) Act 1977 (c 32) (UK) s 2(1): “Detinue is abolished.”

12 Lionel Smith, “Restitution: The Heart of Corrective Justice” (2001) 79 *Tex L Rev* 2115 at 2125, fn 39.

the King would order a *D* to do *x* and if he did not do so, to come before the King's justices to explain why (*ostensurus quare*) he had not done *x* – made detinue well-suited to operate as a *vindicatio* remedy: the *praecipe* writs did not have as their object the remedying of wrongs but the vindication of rights.¹³ However, as early as 1431,¹⁴ and certainly over the course of the 16th century,¹⁵ detinue was not acting as a *vindicatio* in cases where a bailee of *P*'s goods no longer had *P*'s goods. In such a case, the bailee could not always escape liability in detinue by pleading “I haven't got your goods!” (*non detinet*).¹⁶ Such a plea should always be good against a *P* seeking a *vindicatio* remedy as such a remedy responds to *P*'s claiming “*D*'s got my goods!”. So the fact that a bailee could not escape liability in detinue by saying, “No I haven't!” indicates that what detinue was really concerned with – at least by the start of the 17th century – was providing a remedy to a *P* who was, or had been, *wrongfully* deprived of her goods by *D*.

8 This is why a bailee of *P*'s goods could not defeat a claim in detinue by saying, “I haven't got your goods!” Such a plea would amount in most cases to an admission that the bailee had wrongfully failed to look after *P*'s goods, with the result that *P* would be entitled to a remedy against the bailee for wrongfully depriving her of those goods. It was only when *P* brought a claim in detinue against a non-bailee – a claim in detinue *sur trover* (so-called because *P* would claim that *D* had found goods that *P* had lost, and had unjustly detained them) – that a plea of *non detinet* was good, and that was because a finder of goods, unlike a bailee, had no obligation to keep them safe.¹⁷ However, as Simon Douglas points out,¹⁸ even in a detinue *sur trover* case, *P* could not simply sue *D* in detinue on the basis that *D* was in possession of her goods. *P* had first to demand that *D* return her goods, and it was only if *D* unjustifiably refused to do so that *P* could bring a claim in detinue against *D*. This again indicates that, whatever its origins, detinue did not

13 See John Baker, *An Introduction to English Legal History* (Butterworths, 4th Ed, 2002) at p 59.

14 *The Abbot of S's Case* (1431) B&M 297 (“B&M” does not stand for any set of law reports, but Sir John Baker & Stroud F C Milsom, *Sources of English Legal History* (Oxford University Press, 2nd Ed, 2010)).

15 *Anon* (1535) B&M 302, *Anon* (1550) B&M 302, *Anon* (1572) B&M 303, *Anon* (1582) B&M 588, *Southcote v Bennett* (1601) B&M 303 (see n 14 above).

16 See John Baker, *An Introduction to English Legal History* (Butterworths, 4th Ed, 2002) at p 392; James B Ames, “The History of Trover” (1898) 11 Harv L Rev 374 at 376 and 383. Simon Douglas, *Liability for Wrongful Interference with Chattels* (Hart Publishing, 2011) denies (at pp 84–89) that *D* could be liable in detinue where he was not in possession of *P*'s goods at the time *P* sued *D*, but concedes (at pp 87–88) that there was an exception to this rule in bailment cases.

17 Stroud F C Milsom, “Not Doing Is No Trespass” (1954) 12 Camb LJ 105 at 113–114.

18 Simon Douglas, *Liability for Wrongful Interference with Chattels* (Hart Publishing, 2011) at p 90.

operate to provide dispossessed owners of goods with a *vindicatio* remedy but to provide a remedy to a *P* who had been *wrongfully* deprived of her goods by a *D*.

B. *Recaption*

9 If, in *Stolen Car*, *P* found her car parked on the street, *P* would then be entitled to get in the car and drive it away. *P*'s power to "recapture" her car in this kind of case seems to be operating as a *vindicatio* remedy as she is entitled to exercise that power to recover her car without having to establish that *D* is a wrongdoer. However, it is questionable whether *P*'s power to take back her car here is genuinely remedial in nature: it seems to be identical to the everyday power *P* had before her car was stolen to get in it and drive it wherever she wanted. Where the law on "recaption" does seem genuinely remedial in nature is where it empowers *P* to use force against *D*¹⁹ or to enter onto *D*'s land²⁰ in order to recover her property. However, such a power no longer exists in English law,²¹ and when it did exist it seems that the power could only have been exercised against a *D* who wrongfully took possession of *P*'s goods or wrongfully refused to hand the goods over to *P* when *P* asked *D* to do so.²²

C. *Money had and received*

10 Suppose it were not an umbrella that was handed in to *D* at the lost property office in *Lost Umbrella* but a wallet, containing £100. It seems that the claim "He's got my money!" will unlock the door to a remedy in a way that the claim "He's got my umbrella!" will not. One of the categories of situation where *P* could traditionally bring a claim for "money had and received" against *D* was the case where *D* received money belonging to *P*.²³ Peter Birks analysed *P*'s entitlement to sue in this kind of case as arising to prevent *D* from being unjustly enriched at *P*'s expense.²⁴ He dismissed the alternative analysis – that *P* is entitled to a *vindicatio* remedy here which allows her to sue *D* for the value of her money simply on the basis that it was *her* money that was in *D*'s

19 *R v Milton* (1827) 1 M & M 107; *Devoe v Long* [1951] 1 DLR 203.

20 *Patrick v Colerick* (1838) 3 M & W 483; *Anthony v Haney* (1832) 8 Bing 186 at 192.

21 See the Tribunals, Courts and Enforcement Act 2007 (c 15) (UK), which (by virtue of a combination of s 65 and Sch 12) abolishes any self-help remedy involving taking goods which are in another's possession unless one is doing so in order to pay off a debt.

22 See generally *Fleming's Law of Torts* (Carolyn Sappideen & Prue Vines eds) (Lawbook Co, 10th Ed, 2011) at pp 105–107.

23 *Clarke v Shee & Johnson* (1774) 1 Cowp 197; *Holiday v Sigil* (1826) 2 Car & P 197.

24 Peter Birks, "Personal Property: Proprietary Rights and Remedies" (2000) 11 KCLJ 1 at 12–14.

hands²⁵ – on the basis that “a claim of that kind has never been known to the common law”.²⁶ But that simply begs the question of how *P*’s right to sue *D* should be analysed. A more straightforward way of rejecting the *vindicatio* analysis lies in observing that in the case where *D* received money belonging to *P*, *P* would be entitled to bring a claim for money had and received against *D* whether or not *D* still had *P*’s money in his hands at the time *P* sued him. This automatically establishes that *P*’s right to sue *D* in this kind of case cannot be rationalised as providing *P* with a *vindicatio* remedy against *D* because, as has been noted, a plea of “I haven’t got your property anymore!” should always be sufficient to defeat an action for a *vindicatio* remedy.²⁷

D. Saunders v Vautier

11 Peter Birks was willing to acknowledge that “Equity does have a *vindicatio*”.²⁸ It is true that where *D* holds property on trust for *P* and no one else has an interest in the trust property, *P* will be entitled, under the rule in *Saunders v Vautier*,²⁹ to collapse the trust and demand that *D* hand over the trust property to her without having to allege that *D* has done anything wrong in relation to the trust property. However, it is doubtful whether this power of *P*’s amounts to a true *vindicatio*, in the sense that it enables *P* to make a claim against *D* in respect of property which belongs to her without having to allege that *D* has done anything wrong in relation to that property. The better view of a trust is that no one owns anything when *D* holds property on trust for *P*.³⁰ *D* occupies an office (of being a trustee)³¹ that entitles him to exercise

25 See Graham Virgo, *Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) at pp 11–17 and 642–643; and Peter Millett, “Jones v Jones: Property or Unjust Enrichment?” in *Mapping the Law: Essays in Memory of Peter Birks* (Andrew Burrows & Alan Rodger eds) (Oxford University Press, 2006) at pp 267–269 and 273.

26 Peter Birks, “Personal Property: Proprietary Rights and Remedies” (2000) 11 KCLJ 1 at 13.

27 This does not, however, mean that we have to adopt Birks’ analysis of *P*’s right to sue *D* here: see William Swadling, “Ignorance and Unjust Enrichment” (2008) 28 OxJLS 627, arguing that the cases allowing a claim for money had and received against the recipient of another’s money can be explained on the basis of the recipient being held liable for converting the plaintiff’s money.

28 Peter Birks, “Personal Property: Proprietary Rights and Remedies” (2000) 11 KCLJ 1 at 4.

29 (1841) 4 Beav 115; affirmed in (1841) Cr & Ph 240.

30 See Bernard Rudden, “Things As Thing and Things As Wealth” (1994) 14 OxJLS 81 at 88 and Tony Honoré, “Trusts: The Inessentials” in *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Joshua Getzler ed) (LexisNexis UK, 2003) at p 10.

31 See Tony Honoré & Edwin Cameron, *Honoré’s South African Law of Trusts* (Juta, 5th Ed, 2002) at §§31 and 44 and C Reinold Noyes, *The Institution of Property* (Lawbook Exchange, 1936) at p 469, observing that:

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certain owner-like powers in relation to property that is designated as being held “on trust” for *P*, and *P* has certain rights against *D* that *D* exercise those powers in a certain way.³² The rule in *Saunders v Vautier* allows *P* to collapse this set-up. This is not because *P* is the “real” owner of the trust property but because of the hostility of the courts to the idea of allowing property to be tied up on trust for any longer than is necessary.³³ In jurisdictions – most notably, the US – where a different set of public policy priorities obtain, the rule simply does not exist.³⁴

E. Public bodies

12 English law *does* seem to make a *vindicatio* remedy available against certain public bodies that have come into possession of a *P*'s goods in the course of their duties. The Police (Property) Act 1897³⁵ (“the 1897 Act”) allows a *P* whose goods have been seized by the police in the course of their investigations to obtain a court order requiring the police to give *P* her goods back if they are no longer needed for the police's investigations. If goods belonging to *P* have been seized by a judicial “enforcement agent” for the purpose of paying off a debt owed by a third party, *P* can make an application to the court to prevent the goods being sold under para 60 of Sch 12 of the Tribunals, Courts and Enforcement Act 2007,³⁶ and the court can direct the goods to be returned to *P* under Pt 85.7 of the Civil Procedure Rules. The availability of a *vindicatio* remedy in these cases can be explained on two grounds. First, if *P*'s goods are in the hands of a public body, it would be constitutionally embarrassing if the only way *P* could recover those goods, or their value, was by showing that the public body had wrongfully withheld *P*'s goods from her. Secondly, allowing *P* a *vindicatio* remedy in these cases provides a convenient procedural means by which a public body can get direction from a judge as to what to do with goods in its possession so that it can avoid doing anything legally wrong in the way it disposes of those goods. As Matthew Dyson and Sarah Green observe of the 1897 Act, the police are normally happy to return goods that they have seized in the course of their investigations to their

When a trustee is removed for cause the [trust] property is not taken away from him. He is taken away from the property. He is removed from an office which is merely connected in administrative ways with the body of property.

32 See William Swadling, “Property Law” in *English Private Law* (Andrew Burrows ed) (Oxford University Press, 3rd Ed, 2013) at §§ 4.140–4.151 and Ben McFarlane & Robert Stevens, “The Nature of Equitable Property” (2010) 4 J Eq 1.

33 See Paul Matthews, “The Comparative Importance of the Rule in *Saunders v Vautier*” (2006) 122 LQR 266 at 276–281; to the same effect, Elise Bant & Michael Bryan, “Specific Restitution without Trusts” (2012) 6 J Eq 181 at 184.

34 Paul Matthews, “The Comparative Importance of the Rule in *Saunders v Vautier*” (2006) 122 LQR 266 at 291–292.

35 c 30 (UK).

36 c 15 (UK).

rightful owners, but if there is doubt about who is entitled to the goods, anyone asking for the goods to be returned to them is told to make an application for their return under the Act.³⁷

IV. Should we have it?

13 If, then, *D* is in possession of goods belonging to *P*, the general rule in English law is that *P* will *not* be entitled to obtain a *vindicatio* remedy against *D*, with the cases set out in the previous paragraph forming the only exception to that rule. The position of English law in this regard is supported by William Blackstone's remark that "it is a general and indisputable rule, that where there is a legal right there is also a legal remedy, by suit or action at law, *whenever that right is invaded*" [emphasis added].³⁸ On this view, English law does not take the position *ubi ius, ibi remedium* (where there is a right, there is a remedy) but rather *ubi iniuria, ibi remedium* (where there is a violation of a right, there is a remedy).³⁹ The general lack of a *vindicatio* remedy in English law is perfectly in line with this position – instead of straightforwardly allowing *P* to assert her rights against *D* that he return her property (or its value) in cases like *Lost Umbrella* or *Stolen Car*,⁴⁰ English law only provides *P* with a remedy against *D* if she can show that *D* has

37 Matthew Dyson & Sarah Green, "The Properties of Law: Restoring Personal Property through Crime and Tort" in *Unravelling Tort and Crime* (Matthew Dyson ed) (Cambridge University Press, 2014) at p 411.

38 William Blackstone, *Commentaries on the Laws of England* vol 2 (Oxford: Clarendon Press, 1765–1769) ch III (Of courts in general) at para 3. For criticism of Blackstone's position, see Peter Birks, "Rights, Wrongs, and Remedies" (2000) 20 *OxJLS* 1 at 14–16 and 25–29.

39 The pervasiveness of this principle in English law is shown by the fact that even in the case of *quia timet* injunctions, which are designed to prevent someone's rights being violated in the future, the central case where such injunctions will be available is where A can prove "that his proprietary rights are being wrongfully interfered with by B, and that B intends to continue his wrong": *Pride of Derby and Derbyshire Angling Association v British Celanese* [1953] Ch 149 at 181, per Lord Evershed MR.

40 Some remarks of Lord Denning MR's in *Miller v Jackson* [1977] 1 QB 966 at 978, indicating that a homeowner will not have a duty to return a cricket ball to some cricketers who have accidentally knocked the ball into the homeowner's back garden may induce a twinge of doubt as to whether *D* actually has a duty to give *P* back her umbrella/car in *Lost Umbrella* or *Stolen Car*. But if *D* does not have such a duty, it is hard to see why his unjustifiably refusing to hand over the umbrella/car would amount to the *tort* of conversion. Lord Denning's hypothetical can be distinguished on the basis that the interests of homeowners in the quiet enjoyment of their property, and their not being burdened with duties to find, fetch and carry things that have landed on their property or to allow complete strangers to come onto their property, justifies them being treated as a special case. If *P*'s property is on *D*'s *business* premises, there seems little doubt that *D* has, at the very least, a duty to allow *P* to come onto the premises to remove the property: *Howard E Perry & Co Ltd v British Railways Board* [1980] 1 WLR 1375.

violated her rights (in other words, committed a tort) in the way he has dealt with her property.

14 We can shortly state the case for sticking with the current position and not adding a *vindicatio* remedy to the armoury of remedies that are available to *P* in cases like these. First, the existence of a *vindicatio* remedy would add nothing to the remedies available to *P* in a case like *Stolen Car* (as *D*'s act of taking possession of *P*'s car gives *P* a good claim against *D* for the value of the car). A *vindicatio* remedy would also add very little to the remedies available to *P* in a case like *Lost Umbrella* because even if a *vindicatio* remedy were available to *P*, the rules on pre-action protocol would demand that in a case like *Lost Umbrella* *P* first ask *D* for her umbrella back, and only launch a claim against *D* if he refused to hand it over⁴¹ – which is exactly what *P* would have to do anyway to bring a claim against *D* in conversion.

15 Secondly, there is something to be said for the courts' waiting to see if *D* has violated *P*'s rights before proceeding to award a remedy against him: (a) it ensures that the valuable time and resources of the courts are only spent on the most important cases where their intervention is urgently required; and (b) it affords *D* the chance to choose for himself whether or not to comply with the demands that the law places on him for *P*'s protection, thereby acknowledging *D*'s dignity as an agent who "is recognised as having the ability to control and regulate [his] actions in accordance with [his] own apprehension of norms and reasons that apply to [him]".⁴² Against this, two arguments might be made in favour of recognising a *vindicatio* remedy in cases like *Lost Umbrella* and *Stolen Car*: a practical argument, and an argument from principle.

A. *Resolving disputes*

16 The practical advantage of recognising a *vindicatio* remedy is shown by the case of *Clayton v Le Roy*.⁴³ The case concerned a Breguet watch that was stolen from *P* in 1908. *B* acquired the watch in 1910, it having been in the meantime pawned and then sold at auction by the pawnbrokers to the person who subsequently sold the watch to *B* for £44.⁴⁴ *B* sent the watch to *D*, a jeweller, to have it valued. As it happens, *D* had sold the watch to *P*'s wife in 1902, and after the watch was stolen,

41 Civil Procedure Rules, Practice Direction – Pre-Action Conduct and Protocols at paras 3 and 6.

42 Jeremy Waldron, "How Law Protects Dignity" (2012) 71 Camb LJ 200 at 202. See also 206: "[T]he law strains as far as possible to look for ways of enabling voluntary application of its general norms and many of its particular decrees."

43 [1911] 2 KB 1031.

44 Almost £5,000 in today's money.

P had asked D to keep on the lookout for it. Recognising the watch, D informed P that he had the watch that had been stolen from him, and that B (whom D had been in touch with, to tell him that the watch was stolen property) would be willing to give it up if he was reimbursed the money he had paid for it. P sent his solicitor to D's shop to demand that D hand over the watch. D refused to do so, and was instantly served with a writ of detinue.

17 The Court of Appeal dismissed P's claim against D (by a majority of 2:1) on the ground that service of the writ was premature: D's refusal to hand over the watch did not amount to a tort given the circumstances of the case. Fletcher Moulton LJ held that D had at no point evinced an "intention ... to detain the watch if it belonged to the plaintiff"⁴⁵ and that "a man does not act unlawfully in refusing to deliver up property immediately upon demand made. He is entitled to take adequate time to inquire into the rights of the claimant"⁴⁶ Farwell LJ went further and held that, in the circumstances, when P's solicitor came into D's shop to demand the watch, it was "the duty of the defendant ... to *refuse* to hand the watch over" [emphasis added].⁴⁷

18 The result of the dismissal of P's claim in *Clayton v Le Roy* was that the watch *remained* in D's hands, and the issue as to who was ultimately entitled to the watch – P or B – was left unresolved. (There was a question as to whether B had acquired a good title to the watch on the basis that the auction at which it was purchased amounted to a market overt, but the Court of Appeal felt it unnecessary to deal with this issue – having found that D was entitled to refuse to hand over the watch to P even if the watch actually belonged to P, they did not need to deal with the issue of who actually owned the watch.) Such an unsatisfactory outcome is always on the cards where *D* is in possession of goods that *P* claims belong to her, but *D* attempts to justify his refusal to hand the goods over to *P* on the ground that at the time he refused to hand the goods over he needed more time to investigate whether the goods genuinely belonged to *P*.⁴⁸ The only way of ensuring that this

45 *Clayton v Le Roy* [1911] 2 KB 1031 at 1049.

46 *Clayton v Le Roy* [1911] 2 KB 1031 at 1051.

47 *Clayton v Le Roy* [1911] 2 KB 1031 at 1053.

48 For a recent case where this unsatisfactory outcome was narrowly averted, see *Spencer v S Franses Ltd* [2011] EWHC 1269 where D, an antiques specialist, was asked by P to value some embroideries that had come into P's hands and were potentially worth millions. D then refused to give the embroideries back to P on the basis that (a) a third party might have a better title to the embroideries than P; and (b) D had a lien over the embroideries for as long as D was not paid for his work valuing the embroideries. It was held that at the time D refused to give the embroideries back, sufficient time had elapsed for D to investigate any third party claims to the embroideries to make (a) unsustainable as a basis for refusing to give the embroideries back to P, but (b) was made out. D had therefore not committed

(cont'd on the next page)

outcome is avoided is to allow *P* to seek a *vindicatio* remedy against *D*.⁴⁹ Had *P* been able to do this in *Clayton v Le Roy*, the court would have had to deal directly with the question “Who is entitled to this watch?”, and order *D* to hand over the watch or its value to whoever was entitled to it. For the case instead to turn on the issue “Did *D* act wrongfully in refusing to hand the watch over to *P*’s solicitor?” would strike most laypeople as very odd indeed.

B. Undoing history

19 The principled argument in favour of allowing a *vindicatio* remedy in cases like Lost Umbrella and Stolen Car runs as follows:

Step 1: we only have strict liability in conversion because of the non-existence of a *vindicatio* remedy in these kinds of cases;

Step 2: this strict liability is unjustified and not a happy accident of the way legal history has unfolded; and

Step 3: it follows from step 1 that in order to remove this unjustified strict liability from the law, we must first provide *Ps* in cases like Lost Umbrella and Stolen Car with an effective *vindicatio* remedy.

Does this argument work?

20 Let us begin with step 1. The existence of strict liability in conversion cannot be doubted. It is the reason why in a case like Stolen Car, *D* is vulnerable to being sued by *P* in conversion for the value of her car.⁵⁰ By taking possession of *P*’s car and treating it as though it were his, *D* has committed the tort of conversion. The fact that *D* acted perfectly reasonably in doing what he did is irrelevant. Many legal academics argue that as a matter of legal history this strict liability owes its existence to the common law’s failure to provide an effective *vindicatio* remedy in cases like Lost Umbrella and Stolen Car. Milsom is typical in this regard, arguing that when an:⁵¹

conversion by refusing to give *P* the embroideries back, but as soon as he was paid for his work on them, he would commit conversion were he then to refuse to give them back.

49 Cf the rationale of the *vindicatio* remedy provided by the Police (Property) Act 1897 (c 30) (UK) (see para 12 above).

50 *P* will not be able to sue *D* for damages equal to the value of her car if the car is returned to her but she will be able to do so if, for some reason, the car cannot be returned to her – for example, if it were destroyed while it was in *D*’s hands.

51 Stroud F C Milsom, *Historical Foundations of the Common Law* (Butterworths, 2nd Ed, 1981) at p 379.

... innocent auctioneer who sells another's property [and is held] liable for its full value to an owner of whom he could not have known, and although he got nothing out of the sale but his commission [although we] tell ourselves that he is the victim of a policy discouraging theft; ... in truth he is the victim of history.

21 Different explanations are given as to *how* the common law's failure to provide an effective *vindicatio* remedy in cases like Lost Umbrella and Stolen Car resulted in strict liability entering the law on conversion. Milsom argued that in the case where *D* was currently in possession of property stolen from *P*, in order to allow *P* an effective remedy against *D* – and in the absence of a *vindicatio* remedy – the courts *had* to take the position that *D*'s refusal to give up the goods when *P* demanded them from him amounted to a legal wrong *even if D* refused to give her the goods because he honestly believed that he was entitled to them. And once *D*'s honest belief:⁵²

... was made irrelevant in that case, it was inevitably made irrelevant when [*D*] had resold [*P*'s property] ... The result was to fix the almost absolute liability appropriate to [a *vindicatio* remedy] not merely upon the present possessor, the proper target of that claim, but also upon past possessors.

22 Tony Weir's explanation was slightly different.⁵³ He argued that making *D* strictly liable to *P* was appropriate: (a) where *D* sold *P*'s goods and had in his hands the money obtained from the sale (as "it would be quite wrong for me, however innocent I was, to keep the price of someone else's goods"); and (b) where *D* bought goods that were stolen from *P* and they were still in his hands (as "it would be quite wrong for me, however, innocent I was, to keep someone else's goods"). A *vindicatio* remedy would easily allow *P* to sue *D* in both cases, but the absence of such a remedy created a need to find that *D* had done something legally wrong to *P* in each of these cases in order to provide *P* with a remedy against *D*. "The common lawyers ... with their characteristic penchant for false analysis" decided that the wrong committed by *D* in each of these cases was the same: that he was:

... guilty of a denial of the true owner's title. Once this false rationalisation is made, two results follow. First, the buyer [of stolen goods] becomes liable even if he no longer has the goods, because now the wrong [that makes the buyer liable] is thought to be the purchase,

52 Stroud F C Milsom, *Historical Foundations of the Common Law* (Butterworths, 2nd Ed, 1981) at pp 378–379. See also, to the same effect: David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) at pp 111–112; John Baker, *An Introduction to English Legal History* (Butterworths, 4th Ed, 2002) at p 399; and Peter Birks, "Personal Property: Proprietary Rights and Remedies" (2000) 11 KCLJ 1 at 6–7.

53 Tony Weir, *A Casebook on Tort* (Sweet & Maxwell, 10th Ed, 2004) at pp 485–486.

not in the retention after demand. Secondly, the auctioneer [of stolen goods] becomes liable, although he doesn't keep the price of the goods he sells.

23 The authority of these academics means that many will be inclined without more to accept that step 1 of the principled argument for allowing a *vindicatio* remedy in cases like Lost Umbrella and Stolen Car is made out. However, for those of a more sceptical disposition – and because the author has not seen it laid out anywhere else – the author has set out a legal historical timeline in an “historical appendix” at the end of this article that puts some flesh on the bones of Milsom and Weir’s assertions and shows how precisely we ended up with strict liability in conversion because of the lack of an effective *vindicatio* remedy in cases like Lost Umbrella and Stolen Car.

24 Granting, then, that step 1 in our principled argument is made out, is step 2? We have no reason to think that a legal rule is unjustified just because it only exists as a result of an accident of history. Some accidents of history are happy ones. The doctrine of consideration is one example: a requirement for the enforceability of promises in *assumpsit* that was imported into the law for no very good reason⁵⁴ ended up helping to ensure that the only informal promises that were enforced by the courts were bargained-for promises, which we have a considerable social interest in enforcing, and that people who were informally promised a gift were left to fend for themselves, as they should be. Other accidents of legal history are unhappy. One example is the way in which the ability of a creditor to bring a claim against their debtor in *indebitatus assumpsit* from 1600 onwards led people to believe that *all* debts – including debts that arose out of *D*'s being unjustly enriched at *P*'s expense – could be sued on because the debtor had “assumed” to pay the debt, and therefore that all debts were contractual in nature. This resulted in the true nature and origin of debts arising out of someone's being unjustly enriched at another's expense being underexplored until the 20th century.⁵⁵ Into which category – happy or unhappy – does the fact that a *D* who disposes of goods⁵⁶ that turn out to belong to *P* will be held strictly liable to *P* in conversion fall?

54 See Alfred W B Simpson, *A History of the Common Law of Contract* (Oxford University Press, 1975) chs 4–7.

55 See Peter Birks, *An Introduction to the Law of Restitution* (Oxford University Press, Rev Ed, 1989) at pp 34–36.

56 The author uses “disposes of goods” as a catch-all expression for *D*'s handing over goods to *T*, or *D*'s destroying goods in his possession.

25 Andrew Tettenborn is in the “unhappy” camp.⁵⁷ He takes the view that if English law were rational, it would distinguish between the cases where (a) *D* is *currently* in possession of *P*’s goods; and (b) *D* was in possession of *P*’s goods. In (a), *P* should be able to take advantage of a *vindicatio* remedy to recover her goods or their value from *D* on a strict liability basis. In (b), *D* should only be held liable to *P* if: (i) *D* did something legally wrong in relation to *P* in dealing with *P*’s goods; or (ii) *D* was unjustly enriched as a result of receiving *P*’s goods. (i) will only be made out if (A) *D* took *P*’s goods from her (in which case *D* should be held liable in trespass on a strict liability basis (assuming, of course, there was no lawful justification for the taking)); or (B) *D* dealt with *P*’s goods in a way that he *knew* at the time he had no right to do. As to (ii), the mere fact that *D* received *P*’s goods will not suffice to establish that he was unjustly enriched at *P*’s expense – something more by way of proof that *D* used *P*’s goods, or that *D* sold *P*’s goods and still has the money from the sale (or whatever was obtained with that money) in his hands, would be required. Reforming the law along these lines would, Tettenborn argues, bring English law into line with the position taken in France, Germany and Scotland.⁵⁸

26 In considering “whether any changes are desirable in the law relating to conversion and detinue”,⁵⁹ the Law Reform Committee (“LRC”) was given the chance to remodel English law along the lines proposed by Tettenborn. However, the LRC rejected that opportunity in its Eighteenth Report, presented to Parliament in 1971. It took the view that “conversion should be retained as a remedy of strict liability” on the ground that in the case where *D* had been in possession of *P*’s goods in the past, were *D* only to be held liable to *P* if he had disposed of *P*’s goods in bad faith or carelessly “the burden of proving bad faith or want of due care on the part of [*D*] is likely to be a difficult one” with the result that “liability based on fault might well prove an encouragement to dishonesty”.⁶⁰ However, this is a less than satisfactory basis for rejecting Tettenborn’s position, for two reasons.

57 Andrew Tettenborn, “Conversion, Tort and Restitution” in *Interests in Goods* (Norman Palmer & Ewan McKendrick eds) (LLP, 2nd Ed, 1998) at pp 825–831.

58 Andrew Tettenborn, “Conversion, Tort and Restitution” in *Interests in Goods* (Norman Palmer & Ewan McKendrick eds) (LLP, 2nd Ed, 1998) at pp 826, fn 12, and 827, fn 16.

59 Law Reform Committee, *Conversion and Detinue* (Law Reform Com No 18) (Cmd 4774, 1971) at p 3.

60 Law Reform Committee, *Conversion and Detinue* (Law Reform Com No 18) (Cmd 4774, 1971) at pp 6–7.

27 First of all, consequentialist arguments like the one advanced by the LRC are very difficult to assess and easy to contradict. For example, Tettenborn observes of the LRC's position that:⁶¹

... [t]he suggestion that strict liability discourages dishonesty and thus acts *pour encourager les autres* ... is hardly persuasive. There is no evidence that other Europeans, or the Scots ... are as a result any less honest than the English.

Secondly, the LRC's argument seems to put the cart before the horse. We do not normally find that *D* has committed a legal wrong in relation to *P* in order to provide *P* with a remedy against *D*. We provide *P* with a remedy against *D* because we find that *D* has committed a legal wrong in relation to *P*. So we get things the wrong way round if we argue that because it would be desirable to provide a remedy against a *D* who has in good faith disposed of *P*'s goods (because doing so will discourage dishonest dealing in other people's goods), we should therefore find that *D* did something legally wrong in relation to *P* in acting as he did.

28 The proper way of proceeding, I would suggest, is to ask the *big question*: In the case where *D* disposes of goods that actually belong to *P*, is there any justification for the law's imposing a duty on *D* for *P*'s benefit, requiring *D* not to do what he is doing, assuming that:

- (a) *D* has no idea that the goods actually belong to *P*, and thought that they were his, *D*'s, to dispose of; and
- (b) in disposing of those goods, *D* is behaving perfectly normally and is not engaging in the kind of activity that would normally be legally wrongful unless *D* could point to some legal justification for engaging in that activity?

29 If the answer to the *big question* is "no – there is no justification" then it should be concluded that step 2 of the principled argument in favour of adopting a *vindictio* remedy is made out. If the answer to the *big question* is "yes – there is a justification" then it should be concluded that step 2 of the principled argument in favour of the law's adopting a *vindictio* remedy is *not* made out, and that the only case that can be made in favour of incorporating such a remedy into the law is the pragmatic one that the existence of such a remedy could be much more helpful in resolving certain disputes over personal property than the current wrong-based remedies are.

30 How we answer the *big question* will depend on what view we take of the nature of private law duties. Three views can be distinguished.

61 Andrew Tettenborn, "Conversion, Tort and Restitution" in *Interests in Goods* (Norman Palmer & Ewan McKendrick eds) (LLP, 2nd Ed, 1998) at p 828.

On the first view, a private law duty owed by *D* to *P* exists to *guide* *D* to act in ways that will benefit *P*. We can call this the “Fullerian view” after Lon Fuller, who was the most prominent exponent of the view that legal duties in general exist to guide people’s conduct and are defective when their form or content makes it impossible for them to perform that function.⁶² On the second view, a private law duty owed by *D* to *P* marks out a *boundary* between *D* and *P* that *D* cannot cross without violating the relationship of mutual independence between *D* and *P* that *D* and *P* each have a right to enjoy.⁶³ We can call this the “Kantian view” as this view is based squarely on Kant’s Doctrine of Right, as set out in his 1797 book *The Metaphysics of Morals*.⁶⁴ On the third view, a private law duty owed by *D* to *P* authoritatively tells *D* what he is morally required to do for *P*. We can call this the “Razian view” after Joseph Raz, who takes the view that in determining what legal duties we are subject to, the courts and legislatures make the claim that we will do better in terms of performing our moral duties if we abide by our legal duties than if we decide for ourselves what to do.⁶⁵

31 On the Fullerian view, it makes no sense to impose a strict legal duty on *D* not to dispose of certain goods because, unknown to *D*, those goods belong to *P*. As *D* is unaware the goods belong to *P*, he cannot be aware that he is subject to a duty not to dispose of them; as a result, his conduct cannot be influenced by the existence of this duty.⁶⁶ So on the Fullerian view, the answer to our *big question* would be “no”.

62 See Lon Fuller, *The Morality of Law* (Yale University Press, Rev Ed, 1969) ch 2.

63 See Dennis Klimchuk, “Unjust Enrichment and Corrective Justice” in *Understanding Unjust Enrichment* (Jason Neyers, Mitchell McInnes & Stephen Pitel eds) (Hart Publishing, 2004) at p 124.

64 Ernest Weinrib was the first to seek to explain private common law duties by reference to Kant’s Doctrine of Right: see Ernest Weinrib, *Idea of Private Law* (Harvard University Press, 1st Ed, 1995; Oxford University Press, 2nd Ed, 2012) ch 4. Arthur Ripstein provides a clearer treatment of the relationship between the two in Arthur Ripstein, *Force and Freedom* (Harvard University Press, 2009) and Arthur Ripstein, *Private Wrongs* (Harvard University Press, 2016).

65 See Joseph Raz, “Authority, Law and Morality” in Joseph Raz, *Ethics in the Public Domain* (Oxford University Press, 1994) and Joseph Raz, “On the Nature of Law” in Joseph Raz, *Between Authority and Interpretation* (Oxford University Press, 2009).

66 It might be argued that *D*’s knowing that he *might* be subject to a duty not to dispose of goods that, unknown to *D*, belong to *P* will influence *D*’s conduct by, for example, encouraging *D* to take reasonable steps to assure himself that he is entitled to dispose of goods that are in his hands before he actually does dispose of them. But if the law’s object is to encourage *D* to take such steps, it makes no sense for the law to impose a *strict* duty on *D* not to dispose of goods that, unknown to *D*, belong to someone else – the appropriate duty to impose on *D* is a duty of *care* not to dispose of goods that actually belong to someone else.

32 By contrast, on the Kantian view, imposing a strict legal duty on *D* not to dispose of goods that, unknown to *D*, belong to *P* makes perfect sense. Whether *D* knows it or not, if he disposes of goods that belong to *P*, he is violating *P*'s independence as a person in that he rather than *P* is getting to determine what happens to *P*'s property. So *D* will be crossing the boundary between him and *P* in terms of their enjoying a relationship of mutual independence if he disposes of *P*'s goods. By imposing a legal duty on *D* not to do this, the law acknowledges and marks out this boundary. If *D* crosses this boundary, he must re-cross it and re-establish the relationship of mutual independence that ought to exist between him and *P* by making it as though this boundary-crossing never happened.⁶⁷ The best way to do this is to restore *P*'s goods to *P*, or account to *P* for their value, so that *P* can once again determine what happens to the means that belong to her. So on the Kantian view, the answer to the *big question* is a firm “yes” – and whatever were the crooked roads by which the common law reached its current position, it has lucked out by arriving at the right position, which is that a *D* who disposes of a *P*'s property will be held to have legally wronged *P*, irrespective of *D*'s state of knowledge at the time he disposed of *P*'s property.

33 On the Razian view, the law *may* be justified in imposing a strict duty on *D* not to dispose of *P*'s goods, even though he has no idea that those goods actually belong to *P*. This is because there is a sense in which it can be said that *D* is doing something morally wrong by disposing of *P*'s goods, despite his lack of knowledge of what he is doing.⁶⁸ The fact that he does not know what he is doing does not make his conduct morally right. This is shown by the fact that if we were better informed than *D* about the provenance of the goods *D* is proposing to dispose of, we would have strong reason to warn him to stop what he is doing precisely because he is in danger of blundering into doing something that, morally, he ought not to do. So law, as a morally authoritative institution, might well impose a legal duty on *D* not to dispose of *P*'s goods regardless of *D*'s state of knowledge. It follows that someone who adopts the Razian view of private law duties may well say that the answer to the *big question* is “yes”.

67 See Arthur Ripstein, “As if It Had Never Happened” (2007) 48 *Wm & Mary L Rev* 1957.

68 Derek Parfit calls this sense the “fact-relative sense”, so that “[s]ome act of ours would be wrong in the *fact-relative* sense just when this act would be wrong in the ordinary sense if we knew all of the morally relevant facts” [emphasis in original]: Derek Parfit, *On What Matters: Volume One* (Oxford University Press, 2011) at p 150.

34 It is beyond the scope of this article to discuss fully which of these views of private law duties is correct.⁶⁹ However, the Fullerian view seems (at least to this author) to have more going for it than either the Kantian or Razian views. The problem with the Kantian view is that it seems to fetishise the idea of *D* and *P* enjoying a relationship of mutual independence, with the result that the existence and maintenance of that relationship is given such overriding importance that it transcends and renders irrelevant any other consideration that might lead us to want to mould that relationship along other lines which emphasise, for example, the importance of maintaining a relationship of solidarity or trust or co-operation between *D* and *P*. The problem with the Razian view is that it is questionable whether morality is sufficiently *law-like* for law to be capable of acting as a moral authority for its subjects. A number of thinkers⁷⁰ reject the idea that morality can be codified – that is, reduced to a series of clearly defined dos and don'ts – and argue that “being moral” is not a matter of conforming (willingly or unwillingly) with a series of law-like commandments, but a matter of *seeing* the world as it really is, and deciding what to do in light of that understanding of the world. Law cannot help us do this. If, for reasons like these, neither the Kantian nor the Razian views of private law duties work, then that leaves the Fullerian view as the only one standing.

35 If – and it is a big if – the Fullerian view of private law duties is correct, then the answer to the *big question* is “no” and step 2 of the principled argument in favour of the law's allowing plaintiffs to take advantage of a *vindicatio* remedy is made out. But what about step 3 – that undoing the current state of the law whereby a *D* who has disposed of a *P*'s property without having any justification for doing so will be held strictly liable in conversion requires that we allow *P* to take advantage of a *vindicatio* remedy in the case where *D* currently *has* her goods in his hands? It might be thought that this final step in the argument does not work.

36 We *could* maintain the position that *P* will only be allowed to obtain a remedy against *D* where *D* has committed a legal wrong in relation to her, and just have different rules as to when *D* will commit a legal wrong in relation to *P* in cases where *D* has disposed of *P*'s goods,

69 The author discusses this issue in more detail in Nicholas J McBride, “The Humanity of Private Law – An Introduction” University of Cambridge Faculty of Law (Research Paper No 63/2015) (available on SSRN) at pp 25–40.

70 Prominent modern figures in this school of thought are Elizabeth Anscombe, Simone Weil, Iris Murdoch, Alasdair MacIntyre and Charles Taylor. The most prominent modern thinkers who *do* endorse the idea that morality is law-like and busy themselves searching for a “rule of recognition” that will determine which maxims/principles/courses of conduct are morally obligatory and which are not are Derek Parfit and Thomas Scanlon.

and in cases where *D* has *P*'s goods in his hands and has refused to hand them over to her. The rules on when *D* will have wronged *P* by disposing of her goods would require that *D* have known (or, perhaps, that *D* ought to have known) at the time that the goods were not his to dispose of, while the rules on when *D* will have wronged *P* by refusing to give back her goods would downplay this requirement of knowledge so as to ensure *P* is not shut out of obtaining a remedy against a *D* who stubbornly insists that *P*'s goods actually belong to him, *D*, and refuses for that reason to give *P* her goods back. As will be seen in the historical appendix below, this is the road the law could have taken from 1600 onwards⁷¹ – so all we need to do is back the common law car up to that point and go down that road.

37 However, experience teaches us that common law systems do not cope well with this kind of subtlety – not least because the “life of the common law has been in the abuse of its elementary ideas”⁷² as lawyers unceasingly seek to gain some kind of advantage for plaintiffs – and that if we are to avoid history repeating itself and strict liability being reintroduced across the board into the law of conversion, it is necessary to have a *uniform standard* of wrongdoing that will apply *both* in cases where *D* has disposed of *P*'s goods *and* in cases where *D* has refused to give *P* back her goods when *P* demanded that he hand them over. Under this uniform standard, *D* would be held to have acted wrongfully if at the time he acted like he knew (or, perhaps, ought to have known) that the goods in question did not belong to him, and he had no lawful justification for what he did.⁷³ In order to ensure that this uniform standard of wrongdoing does not shut *P* out of obtaining an effective remedy where *D* has *P*'s goods and *P* wishes to recover them, or their value, from *D*, a *vindicatio* remedy would have to be provided to *P*, allowing *P* to sue *D* without having to allege that *D* has wronged her in the way he has dealt with her goods.

38 To round out the picture of how this new scheme of remedies would work, it should be noted that under the pre-action protocol, in the case where *D* currently has *P*'s goods in his possession, *P* would always have to ask *D* for her goods back before being allowed to sue *D*.⁷⁴

71 See para 46 below.

72 Stroud F C Milsom, *Historical Foundations of the Common Law* (Butterworths, 2nd Ed, 1981) at p 6.

73 *How much* *D* would be liable for is a separate issue. The options are that: (a) if *D* acts wrongfully in doing any of (a)–(d), and *P* is now unable to recover her goods, *D* will be held liable to *P* for the value of those goods and any further losses that his doing (a)–(d) have foreseeably caused *P* to suffer; or (b) if *D* acts wrongfully in doing any of (a)–(d), *D* will be held liable to *P* for any losses that his wrongdoing foreseeably caused *P* to suffer. (b) is the normal rule that applies in tort cases; but (a) is the rule that has in the past prevailed in conversion cases.

74 See para 14 above.

If *D* refused to give the goods back and *P*'s case ended up in court, *P* would then have the option of (a) suing *D* for wronging her by refusing to return her goods; or (b) bringing a claim for a *vindicatio* remedy against *D*. In practice, where *D* still has *P*'s goods in his hands at the time *P*'s case comes to court, *P* would go for (b) because that would be the far more straightforward claim. It would only be necessary to resort to (a) where *P*'s goods were for some reason lost or destroyed after *D* refused to hand them over but before *P*'s case against *D* came to court. In such a case, and given the uniform standard of wrongdoing, *P* would have to prove that at the time *D* refused to hand over her goods he knew (or, perhaps, ought to have known) that the goods did not belong to him, and that he had no lawful justification for refusing to hand over the goods.

39 So if steps 1 and 2 of our principled argument are made out – and, it must be repeated, there is a big question mark over whether step 2 is made out – step 3 would seem to follow. Any attempt to expel from the law of conversion the generalised strict liability that currently prevails there could only be successfully done by allowing plaintiffs to take advantage of a *vindicatio* remedy in cases where they want to sue a defendant who has their goods and is refusing to hand them over.

V. Conclusion

40 Whether the lack of a *vindicatio* remedy in common law jurisdictions is a matter of regret ultimately turns on whether the answer to the *big question* identified above⁷⁵ is “yes” or “no”. If the answer is “yes” – and generally holding people strictly liable in conversion for disposing of other people’s goods can be justified – then the principled argument in favour of recognising a *vindicatio* remedy⁷⁶ falls down and all we are left with is the pragmatic argument⁷⁷ that certain property disputes are best resolved through the use of a *vindicatio* remedy and that the common law is therefore missing a trick by failing to recognise such a remedy. I would suggest that this pragmatic argument, on its own, is not sufficiently weighty to overcome the arguments *against* recognising a *vindicatio* remedy.⁷⁸ However, if the answer to the *big question* is “no” then the principled argument for recognising a *vindicatio* remedy is made out, and that, together with the pragmatic argument, should suffice to sweep aside any objections to incorporating such a remedy into the common law. Whether we think the answer to the *big question* is “yes” or “no” will ultimately depend on what view we

75 See para 28 above.

76 Set out at para 19 above.

77 Set out at paras 16–18 above.

78 Briefly set out at paras 14–15 above.

take – Fullerian, Kantian, or Razian – as to the nature of private law duties. I have briefly argued in favour of the Fullerian view, but much more needs to be said on this issue before we can reach a final conclusion on the *big question*, and therefore on the desirability of recognising a *vindicatio* remedy in the common law.

VI. Historical appendix

41 In this appendix, I will attempt to show that strict liability in conversion entered English law as a result of English law's failure to provide plaintiffs with an effective *vindicatio* remedy.

42 The word “conversion” first cropped up in the law in two types of cases where *P* sought to bring an action on the case against a *D*, who had held *P*'s property as a sub-bailee: (a) cases where *P* alleged that *D* had, by altering the property (and thereby destroying it), “converted it to his own use”;⁷⁹ and (b) cases where *P* alleged that *D*, by selling⁸⁰ the property, had “converted it to his own use”.⁸¹ In both of these types of cases, it was arguable that a claim in detinue was not available to *P*: she was suing a sub-bailee with whom she had no direct relationship,⁸² and *D* might (at that stage in the development of the law on detinue)⁸³ have been able in cases (a) and (b) to defeat a claim in detinue by pleading that he no longer had *P*'s goods. However, *P* would in any case have positively *not* wanted to sue *D* in detinue, as a claim in detinue was always vulnerable (as an action on the case was not) to being defeated by *D* “waging his law” and swearing on the Bible that he was not liable to *P*, and getting 11 people to swear that they believed him.⁸⁴

43 Once the idea had entered the legal imagination that *D*'s “converting” *P*'s property “to his own use” by destroying that property or selling it might unlock an action on the case against *D*, it was not long before the idea was entertained that an action on the case could be brought against a *finder* of *P*'s property who had then gone on to sell the property and thereby “converted it to his own use”. Such a claim was

79 *Calwodelegh v John* (1479) B&M 578 (see n 14 above); see Alfred W B Simpson, “The Introduction of the Action on the Case for Conversion” (1959) 75 LQR 364.

80 That is: “by handing over *P*'s property to a third party in return for money”. See n 2 above.

81 *Bourghchier v Cheseman* (1504) B&M 579 (see n 14 above).

82 See James B Ames, “The History of Trover” (1898) 11 Harv L Rev 374 at 377.

83 See para 7 above.

84 “Wager of law” was abolished in England by s 13 of the Civil Procedure Act 1833 (c 42) and as a result detinue thereafter became a cause of action that plaintiffs were more willing to rely on; hence its use in the 1911 case of *Clayton v Le Roy* [1911] 2 KB 1031.

successfully brought in 1531 in the case of *Wysse v Andrew*.⁸⁵ *Pace Weir*,⁸⁶ it does not seem to be the case that the courts allowed such claims to be brought against a finder because he *still* had the proceeds of the sale of *P*'s goods in his hands. In fact, in bringing a claim against the finder, the word "conversion" would usually be used not in relation to the sale of *P*'s goods, but as to what the finder *D* did with the *proceeds* of the sale. *D* would be said to have "converted" the proceeds,⁸⁷ which presumably in this context means spent or wasted. So in these kinds of cases, *P* was positively alleging that *D* no longer had *anything* in his hands – no doubt to avoid her case being dismissed on the ground that she should sue *D* in detinue, rather than bring an action on the case against *D*. The real basis for allowing *P* to sue *D* in these cases was that *D*, as someone who had *found P's* goods, *knew* that he was not entitled to sell them and spend the proceeds.⁸⁸ However, the courts were soon (and certainly by the early 1600s) happy to hold that in these types of cases, *P*'s allegation that *D* had "found" her goods was non-traversable; that is, *D* could not defeat *P*'s claim by saying, "I did not find your goods!"⁸⁹

44 This introduced, for the first time, the *potential* for a *D* to be held strictly liable in what soon became known as "trover" (from the French "*trouver*", to find). In cases where *D* did not *find P's* goods, but was given them, or sold them, *D* might well have thought that he was free to do what he liked with the goods. However, if he did sell the goods and "convert the proceeds" and was then sued by *P* in trover, he could not defeat *P*'s claim by saying, "I did not find your goods!" So *D* would be vulnerable to being held liable to *P* in this situation unless the courts made it clear that liability in trover was limited to cases where *D* was *at fault* for disposing of *P*'s goods. This vulnerability first became clear in a couple of cases decided in 1589 and 1590.⁹⁰ In both cases, *P* sued *D* for selling her goods, and *D* sought to defend by saying that he did not know the goods were *P*'s as he had bought them from a third party who appeared to be the owner of the goods. In both cases, the judges were

85 (1531) B&M 584 (see n 14 above).

86 See para 22 above.

87 See, for example, *Anon* (1575) B&M 587 (see n 14 above):

The plaintiff counted that a stranger gave him a coverlet of arras work and silk ... and he lost it, and it came to the defendant's hands, and he sold it to persons unknown and converted the proceeds ...

88 *Cf Note in the Inner Temple* (1494) B&M 583 (see n 14 above):

[If] someone finds my goods, so long as he behaves as a finder he is not punishable; but if he sells them he becomes a trespasser by reason of his subsequent wrongdoing, and trespass clearly lies against him.

89 Sarah Green & John Randall, *The Tort of Conversion* (Hart Publishing, 2009) at p 22.

90 *Gallyard v Archer* (1589) B&M 589; *Vandrink v Archer* (1590) B&M 590 (see n 14 above).

divided, with some saying that *D* could not be held liable as he had not acted fraudulently, and others saying that he should be held liable as he had sold *P*'s goods without any legal justification. The issue would only finally be decided in the 19th century, and (just as Milsom and Weir argued)⁹¹ a quite different type of claim in trover would play a large part in determining how that issue was settled.

45 The fact that *P* could bring an action on the case against a *D* who had “converted” her property to his own use made plaintiffs wonder whether they could employ the same formula against a defendant who *currently* had the plaintiff's goods in his hands. Had an effective *vindicatio* remedy been available to plaintiffs back in the late 1500s, the thought of attempting to bring an action on the case in this sort of situation would never have occurred to them. However, as we have seen, the closest thing such plaintiffs had to a *vindicatio* remedy – a claim in detinue – was not attractive because of the ability of defendants to escape liability by “wager of law”. The attempt to bring an action on the case against a defendant who was *currently* in possession of the plaintiff's goods was made in 1579. The plaintiff declared that he had lost his horse, that the defendant had found it, and that – employing the by then standard formula – the defendant “had sold it and converted the proceeds of sale to his own use”.⁹² The defendant claimed that he was not liable *because he still had the horse*. As the plaintiff must have hoped they would, the court held that that did not matter – “the detaining and using of the horse was in law a converting to the defendant's use” that would unlock an action in the case against the defendant. However, there were rumblings of dissent, with Gawdy J pointing out that had this case not been brought in the Queen's Bench but in the Court of Common Pleas, that court would have dismissed the claim on the basis that if the defendant still had the horse and had not sold it, detinue was the right cause of action. However, by 1600 the Court of Queen's Bench was regularly allowing a *P* to bring a claim in trover against a *D* who had her goods in his hands,⁹³ and any resistance on the part of the Court of Common Pleas to do the same seems eventually to have been overcome.

91 See paras 21–22 above.

92 *Anon* (1579) B&M 587 (see n 14 above).

93 *Eason v Newman* (1596) B&M 590; *Gumbleton v Grafton* (1600) B&M 582 (see n 14 above). Though there was some backtracking in the judgments of Houghton J and Coke CJ in *Isaack v Clark* (1615) B&M 594, denying that *D*'s refusing to give *P* her goods back amounted in itself to an act of conversion, but was instead “evidence” that *D* had converted the goods (presumably, by destroying or selling them – in which case *D* would be unable to give *P* her goods back because he would no longer have them), nothing seems to have come of it: Simon Douglas, *Liability for Wrongful Interference with Chattels* (Hart Publishing, 2011) at p 57. James B Ames (in James B Ames, “A History of Trover” (1898) 11 Harv L Rev 374 at 385) points out that “for many years after [*Eason v Newman*] trover
(cont'd on the next page)

46 So by 1600 – after just over a century’s worth of legal development – it was becoming clear that a *P* could bring a claim in trover against: (a) a *D* who had *P*’s goods in his hands *in the past* but had subsequently sold or destroyed them; and (b) a *D* who had *P*’s goods *currently* in his hands. But it still had to be settled *when D* would be held to have committed a wrong in relation to *P* in cases (a) and (b), with the result that *P* could then obtain a remedy against *D*. In dealing with this question, the law could have taken the position set out above.⁹⁴ That is, it could have said that in a type (a) case:

A *D* who sells or destroys *P*’s goods will only be held to have acted wrongfully if he *knew* (or ought to have known) the goods did not belong to him at the time he acted, and he could not show that he had any lawful justification for what he did.

In a type (b) case – and in order to ensure, in the absence of an effective *vindicatio* remedy, that *P* was not shut out of obtaining a remedy against a *D* who stubbornly insisted that *P*’s goods belonged to him and for that reason refused to hand over the goods to *P* – the law could have said:

A *D* who refuses to hand over to *P* goods which belong to her will be held to have acted wrongfully if he had no lawful justification for refusing to hand them over.

As it happens, that *was* the rule adopted by the courts to deal with type (b) cases – but it was adopted *before* the courts determined what rule would apply in type (a) cases. And this made all the difference to what rule the courts eventually applied in type (a) cases.

47 In 1615, *Isaack v Clark*⁹⁵ made it clear that, in the case where *D* had *P*’s goods in his hands, a *mere* refusal to hand them over to *P* when *P* demanded that *D* hand them over would *not* make *D* liable to be sued by *P* in trover. Croke J held that “there ought to be a pertinacity and contumacy in the manner of the denier ... [which] keeps the party from his possession”. This decision left the law in some uncertainty as to when exactly a refusal on demand to give someone their goods back would amount to conversion. Almost a century later, in 1704, Holt CJ sought to resolve the confusion. In *Baldwin v Cole*,⁹⁶ a carpenter’s servant, *P*, who had been working for some time in the Queen’s yard, handed in his notice. The surveyor, *D*, who was in charge of the work at the yard refused to allow *P* to take away his tools, claiming that *D* was allowed to

was not allowed against a bailee who refused to deliver the chattel to the bailor on request” but that last citadel of resistance had fallen by 1675.

94 See para 36 above.

95 (1615) B&M 594 (see n 14 above).

96 (1704) 6 Mod 212; (1704) 87 ER 964.

retain P's tools "until the Queen's business was done". P sued D in trover and Holt CJ held that D had converted P's tools:

The very denial of goods to him, that has a right to demand them, is an actual conversion ...; for what is a conversion, but an assuming upon one's self the property and right of disposing another's goods, and he that takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them.

48 Holt CJ's identification of conversion with "assuming upon one's self the property and right of disposing another's goods" went on to play a significant part in discussions of when a *D* would be held to have acted wrongfully in the case where he had destroyed or sold goods that belonged to *P*. However, those discussions initially took place in a particular context – where a sheriff, *D*, was ordered to sell goods belonging to *T* in order to pay off a debt that *T* owed a creditor, and ended up instead selling goods that belonged to *P* (who was usually *T*'s assignee in bankruptcy). In this sort of context, holding *D* strictly liable for the loss of *P*'s goods was entirely justified. If I sell goods that I *know* belong to someone else but claim to be justified in doing so by pointing to some legal document or ruling as giving me warrant for my actions, I must be held to have acted wrongfully if it turns out that the document or ruling does not actually cover the goods I am selling.⁹⁷ Given this, it is no surprise that in cases involving sheriffs selling people's property, the courts were happy to follow Holt CJ in identifying conversion with disposing of another's property when there was no lawful justification for doing so.⁹⁸ The result was that by the time the courts got around – first of all in *Stephens v Elwall*⁹⁹ and then in *Hollins v Fowler*¹⁰⁰ – to considering when a *D* could be held liable for conversion in the case where he had disposed of goods that he believed were *his*, but actually belonged to *P*, the pass had already been sold. It was simply assumed, as Lord Ellenborough CJ said in *Stephens v Elwall*, that:¹⁰¹

97 Compare the position in false imprisonment where the same rule of strict liability applies: *Christie v Leachinsky* [1947] AC 573; *R v Governor of Brockhill Prison, ex parte Evans (No 2)* [2001] 2 AC 19.

98 *Cooper v Chitty* (1756) 1 Burr 20; *M'Combie v Davies* (1805) 6 East 538 (Lord Ellenborough expressly approving Holt CJ's *dictum* in *Baldwin v Cole* (1704) 6 Mod 212; (1704) 87 ER 964 at 540).

99 (1815) 4 M&S 259.

100 (1874–1875) LR 7 HL 757.

101 *Stephens v Elwall* (1815) 4 M&S 259 at 261. Simon Douglas, *Liability for Wrongful Interference with Chattels* (Hart Publishing, 2011) at pp 128–129 says that in *Hollins v Fowler* (1874–1875) LR 7 HL 757 the House of Lords "agreed to revisit the issue" of what the standard of liability should be in conversion cases. However, while some of the judges who advised the law lords addressed this issue (notably at 764, *per* Blackburn J), the law lords themselves seem to have *assumed* that the standard of liability in conversion was strict (at 795, *per* Lord Chelmsford, and at 798–799, *per* Lord O'Hagan) and regarded the case as really turning on the issue

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... a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it.

49 To sum up, the lack of an effective *vindicatio* remedy in the late 1500s does seem to have played a large part in creating our modern-day strict liability in conversion. The lack of such a remedy led plaintiffs to try to claim that a *D* who refused to hand over *P*'s goods was not just guilty of a wrong, but the *same kind of wrong* as a *D* who sold or destroyed *P*'s goods. The courts accepted this claim, and in reflecting on what kind of wrong was committed by a *D* who refused to hand over *P*'s goods identified it with "assuming the right to deal with another's goods". That definition then played a large part in the courts' going on to find that a *D* who sold or destroyed *P*'s goods committed a wrong, irrespective of his state of knowledge in selling or destroying those goods.

of whether the defendants were, in purchasing goods that turned out to belong to the plaintiffs, acting on their own initiative or simply as a "conduit pipe" (at 797, *per* Lord Cairns LC) for others who should consequently be held liable for conversion instead of the defendants.