Cambridge Law Journal, page 1 of 19 © The Author(s), 2025. Published by Cambridge University Press on behalf of The Faculty of Law, University of Cambridge. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (https://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.
doi:10.1017/S0008197325100883

CONTRACTUAL TRANSFERS OF TITLE

JONAS ATMAZ AL-SIBAIE*

ABSTRACT. *It is well known that, under a contract of sale, title to goods passes when the parties intend, but it is considered unclear whether the same is true of non-sale contracts. This article argues that there is a long line of cases dealing with "vesting clauses" that establishes that title passes when the parties intend under any contract, not just contracts of sale. This has significant implications for how judges should reason through cases dealing with transfers under contracts and how lawyers generally explain various areas of commercial law.*

KEYWORDS: *personal property*, *commercial law*, *transfers*, *contract*, *delivery*, *sale*, *construction*.

I. INTRODUCTION

Under a contract of sale, title to goods is transferred when the parties intend for it to be transferred.[1] The focus of this article is whether the rule that title passes when the parties intend is limited to contracts of *sale* or extends to all contracts. Whether the rule so extends is generally considered unclear.[2] That this uncertainty remains may seem surprising given how fundamental the rule is to English personal property law and the important practical consequences that follow from it. The timing of the passing of title and who has legal title at any given point in time is significant for various private law rules, including who bears the risk of the goods' destruction,[3] who can bring claims in tort against third parties who interfere with the goods,[4] whether a person can

*Shaw Foundation Junior Research Fellow in Law, Jesus College, Oxford. Email address for correspondence: jonas.atmazal-sibaie@jesus.ox.ac.uk. Many thanks to Jordan English, Birke Häcker, Luke Rostill and the anonymous reviewers for helpful comments on earlier drafts. The usual disclaimers apply.

[1] Sale of Goods Act 1979, s. 17.

[2] E.M. Clare Canton, "Sale of Goods and Barter" (1976) 39 M.L.R. 589; A. Bell, *Modern Law of Personal Property in England and Ireland* (London 1989), 323–24; B. Häcker, *Consequences of Impaired Consent Transfers: A Structural Comparison of English and German Law* (Oxford 2013), 135; M. Bridge, "The Contract of Sale of Goods" in M. Bridge (ed.), *Benjamin's Sale of Goods*, 12th ed. (London 2023), at [1-036].

[3] Unless otherwise agreed, the risk is borne by the person that has title to the goods in question: *Martineau v Kitching* (1871–72) L.R. 7 Q.B. 436, 453–54 (Blackburn J.).

[4] Claims in conversion and negligence require a legal title to the goods: *Leigh & Sillivan Ltd. v Aliakmon Shipping Co. Ltd. (The Aliakmon)* [1986] A.C. 785 (H.L.); *MCC Proceeds Inc. v Lehman Brothers International (Europe)* [1998] 4 All E.R. 675 (C.A.); although cf. *Shell UK Ltd. v Total UK Ltd.* [2010] EWCA Civ 180, [2011] Q.B. 86.

grant a security right in respect of the goods[5] and, occasionally, for tax purposes.[6] As such, the rule and its scope are of crucial importance to personal property and commercial law.

Whether the rule that title passes when the parties intend extends to all contracts and is not limited to contracts of sale has taken on even greater significance recently given the narrow construction given to the concept of a "sale" by the Supreme Court in *PST Energy 7 Shipping L.L.C. v OW Bunker Malta Ltd*.[7] In that case, the Supreme Court held that an agreement which provided the intended transferee with a liberty to consume oil before a transfer of title and provided for a transfer of title to any remaining oil was not a contract of sale. The consequence of that decision is that many agreements involving retention of title clauses which may previously have been assumed to amount to contracts of sale are not in fact contracts of sale. While the point did not arise on those facts because title to the oil never passed to the transferee, whether the rule that title passes when the parties intend extends to all contracts is particularly significant for these non-sale agreements.[8]

The aim of this article is to show that there is no such uncertainty concerning the scope of the rule: whether the rule that title passes when the parties intend is limited to contracts of sale or extends to all contracts has long been settled by judicial authority. There is a long line of cases establishing that title is transferred when the parties intend under *any* contract, not just contracts of sale.[9] This line of authority has been overlooked in the existing literature on the topic.[10] It follows from this line of authority that, for the purposes of determining how and when title is transferred, whether the transaction amounts to a sale is irrelevant.

This article is divided into four sections. Section II introduces the line of cases that, it is argued, has established that title passes when the parties intend under any contract. These cases come predominantly from the construction context and deal with clauses that purport to vest title to goods in the transferee ("vesting clauses").[11] Section III argues that the results in cases dealing with vesting clauses cannot be explained as

[5] E.g. *Hart v Porthgain Harbour Co. Ltd.* [1903] 1 Ch. 690 (Ch.).
[6] E.g. *Bennett & White (Calgary) Ltd. v Municipal District of Sugar City (No. 5)* [1951] A.C. 786 (P.C.).
[7] [2016] UKSC 23, [2016] A.C. 1034.
[8] My thanks go to one of the anonymous reviewers for raising this point.
[9] *Reeves v Barlow* (1884) 12 Q.B.D. 436 (C.A.); *Re Keen & Keen, Ex parte Collins* [1902] 1 K.B. 555 (K.B.); *Hart v Porthgain Harbour* [1903] 1 Ch. 690 (Ch.); *Akron Tyre Co. Pty. Ltd. v Kittson* (1951) 82 C.L.R. 477 (H.C.A.); *Davidson v Claffey Constructions Pty. Ltd.* [1958] 60 W.A.L.R. 29 (W.A.S.C.); *Re Cosslett (Contractors) Ltd.* [1998] Ch. 495 (C.A.); *Alstom Power Ltd. v Somi Impianti SRL.* [2012] EWHC 2644 (T.C.C.), [2012] B.L.R. 585.
[10] *Reeves v Barlow* (1884) 12 Q.B.D. 436 (C.A.) or any of the cases which have followed it in this respect are not mentioned in Clare Canton, "Sale of Goods and Barter"; Bell, *Modern Law of Personal Property*, 323–24; Häcker, *Consequences of Impaired Consent Transfers*, 135; Bridge, "Contract of Sale of Goods", at [1-036].
[11] The term "vesting clauses" is used in V. Ramsay and S. Furst, *Keating on Construction Contracts*, 12th ed. (London 2025), Ch. 11(2)(b); and R. Clay and N. Dennys, *Hudson's Building and Engineering Contracts*, 14th ed. (London 2022), Ch. 8.4(2). It has also, on occasion, been used in cases where these clauses have

https://doi.org/10.1017/S0008197325100883 Published online by Cambridge University Press

instances of transfers of title on the basis of a sale or delivery. Section IV considers some significant implications of this formulation of the rule.

As a preliminary matter, it is important to set out some of the terminology that will be used in this article. Personal property law is rife with linguistic disagreements. Delving into these disagreements is beyond the scope of this article and adds nothing to the argument being advanced here. Nonetheless, given this article deals with personal property law, some choices have to be made concerning the language to be used. Most important is the label given to the right to the goods that is being transferred. This is the right to exclusive possession of the goods forever, which has variously been labelled "title",[12] "ownership"[13] and the "general property interest".[14] As will already have been noticed, the term used throughout this article to refer to the right to exclusive possession of goods forever is "title". This is merely for linguistic convenience. It should not be taken to indicate any deeper advantage to the term. Importantly, though, the term "title" is not being used in the otherwise common sense of referring to the strength of the right-holder's right or the relationship between the right-holder and the right.[15] It is merely used to refer to the right to exclusive possession itself.

II. VESTING CLAUSES

The aim of this article is to show that there exists a line of cases that has already determined that the rule that title passes when the parties intend extends to all contracts, not just contracts of sale. This line of cases deals with a particular type of contractual provision known as a "vesting clause". These clauses purport to vest title to goods in another on the happening of some event. They have been a prominent feature of construction contracts, where they purport to vest rights to materials and machines used in construction in the landowner.[16] Today, such clauses feature in several standard form contracts in the construction industry.[17]

been considered (see e.g. the submissions of Simon Mortimer Q.C. in *Re Cosslett* [1998] Ch. 495, 498 (C.A.)).

[12] W. Swadling, "Unjust Delivery" in A. Burrows and A. Rodger (eds.), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford 2006), 280–82; W. Swadling, "Property: General Principles" in A. Burrows (ed.), *English Private Law*, 3rd ed. (Oxford 2013), at [4.131].

[13] B. McFarlane, *The Structure of Property Law* (Oxford 2008), 140; E. McKendrick, *Goode and McKendrick on Commercial Law*, 6th ed. (London 2020), at [2.20]–[2.24].

[14] R. Hickey, *Property and the Law of Finders* (Oxford 2010), 162–68; L. Rostill, "Terminology and Title to Chattels: A Case Against 'Possessory Title'" (2018) 134 L.Q.R. 407, 424.

[15] For examples of this use of the term "title", see G. Battersby and A. Preston, "The Concepts of 'Property', 'Title', and 'Owner' in the Sale of Goods Act 1893" (1972) 35 M.L.R. 268; H.L. Ho, "Some Reflections on 'Property' and 'Title' in the Sale of Goods Act" [1997] 56 C.L.J. 571; McKendrick, *Goode and McKendrick on Commercial Law*, at [2.21]. For a convincing criticism of this use of "title", see Hickey, *Property and the Law of Finders*, 165–66.

[16] *Reeves v Barlow* (1884) 12 Q.B.D. 436 (C.A.); *Bennett & White v Municipal District of Sugar City* [1951] A.C. 786, 813 (P.C.) (Lord Reid); *Re Cosslett* [1998] Ch. 495, 503 (C.A.) (Evans L.J.).

[17] Clay and Dennys, *Hudson's Building and Engineering Contracts*, at [8-085]–[8-089]; P. Barber, "Title to Goods, Materials and Plant Under Construction Contracts" in N. Palmer and E. McKendrick (eds.),

https://doi.org/10.1017/S0008197325100883 Published online by Cambridge University Press

The cases on such clauses show that the rule that title passes when the parties intend extends to all contracts. This was first articulated by the Court of Appeal in the seminal decision in *Reeves v Barlow*.[18] In *Reeves v Barlow*, Barlow contracted with Addie that Addie build 95 houses on Barlow's land. A clause of their contract provided that "all buildings and other materials brought by [Addie] upon the land shall, whether affixed to the freehold or not, become the property of [Barlow]".[19] In performing their contract, Addie brought a large number of bricks to the land. Reeves, a creditor of Addie's, obtained judgment against Addie and, in execution of this judgment, the sheriff of Kent seized the bricks. Interpleader proceedings were brought to determine whether the contract amounted to a bill of sale, so as to require registration under the Bills of Sale Act 1878. If the contract amounted to such a bill of sale, it would be void as against the grantor's creditors for non-registration under the Act.

To understand the arguments made before the Court of Appeal and the judgment the Court gave, it is important to understand the legislative background to the decision. The Bills of Sale Act 1878 had been preceded by the Bills of Sale Act 1854. At least two cases had decided that vesting clauses did not amount to bills of sale under the 1854 Act, and so did not require registration.[20] The 1878 Act altered the definition of a bill of sale so as to include "any agreement ... by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred".[21] The argument before the Court of Appeal in *Reeves v Barlow* turned on whether the vesting clause transferred to Barlow the title to the bricks or only conferred on Barlow an equitable right, so as to fall within the newly introduced language in the 1878 Act. If the former, prior authority settled that the contract was not a bill of sale. If the latter, the Court would have to consider whether the change in the language of the 1878 Act brought the contract within its scope.

The Court of Appeal held that title to the bricks had been transferred to Barlow. The vesting clause did not only confer on Barlow an equitable right to the bricks. Giving the judgment of the whole Court, Bowen L.J. held that, "the moment the goods were brought upon the premises the property in them passed in law, and nothing was left upon which any equity as distinct from law could attach".[22] As such, the Court held that the contract did not amount to a bill of sale so as to require registration under the 1878 Act.

The important upshot of the decision in *Reeves v Barlow* is that title to the bricks passed when the parties intended irrespective of whether their

Interests in Goods, 2nd ed. (London 1998), 369–71, 378–80. See also the submissions of Simon Mortimer Q.C. in *Re Cosslett* [1997] Ch. 23, 26 (Ch.).

[18] (1884) 12 Q.B.D. 436 (C.A.).

[19] Ibid., at 439 (Bowen L.J.).

[20] *Brown v Bateman* (1866–67) L.R. 2 C.P. 272; *Blake v Izard* (1867) 16 W.R. 108.

[21] Bills of Sale Act 1878, s. 4.

[22] *Reeves v Barlow* (1884) 12 Q.B.D. 436, 442 (C.A.).

contract amounted to one of sale. Title could pass when the parties intended merely because the contract provided for a transfer of title. In other words, title passed when the parties intended because "[t]he builder's agreement … was … a mere legal contract that, upon the happening of a particular event, the property in law should pass".[23]

The decision in *Reeves v Barlow* that vesting clauses can have the effect of transferring title to goods irrespective of whether they amount to a sale has been followed on a number of occasions.[24] The most notable of these is the decision of the High Court of Australia in *Akron Tyre Co. Pty. Ltd. v Kittson*.[25] In *Akron Tyre Co.*, Vale hired some vehicles under hire-purchase agreements with the plaintiff. Clause 12 of the hire-purchase agreement read: "Any accessories or goods supplied with or for or attached to or repairs executed to the goods shall become part of the goods."[26] After having used the vehicles for some time, Vale removed the tyres that were then on the vehicles and sold them to the defendant, Akron Tyre Co. The plaintiff brought proceedings for conversion of the tyres. The plaintiff was unable to establish that the tyres that Vale removed and sold were those originally affixed to the car by the plaintiff. As such, the plaintiff had to establish that title to the tyres would have passed to them if Vale had affixed new tyres to the car.

The High Court of Australia unanimously held that title to the tyres passed to the plaintiff under the contract on Vale affixing them to the car. All of the judges reached that conclusion on the basis that the scope of the rule that title passes when the parties intend extends to all contracts and is not limited to contracts of sale. In their joint judgment, Williams J. and Kitto J. held:

> [W]e cannot accept the contention that at law a contract can only be effective to pass the property in future chattels where the contract is one of sale or exchange. … The agreement was that if and when any accessories or goods were supplied with or for or were attached to the vehicles, they should become part of the hired property. When Vale placed the tyres on the wheels of the vehicles the happening of this event operated in accordance with the agreement of the parties to pass the property at law and in equity from Vale to the plaintiff company.[27]

In other words, title to the tyres passed when the parties intended simply because there was a contract between the plaintiff and Vale. This was sufficient because the rule that title passes when the parties intend extends to all contracts.

[23] Ibid.
[24] *Re Keen* [1902] 1 K.B. 555 (K.B.); *Re Weibking, ex parte Ward* [1902] 1 K.B. 713 (K.B.); *Hart v Porthgain Harbour* [1903] 1 Ch. 690 (Ch.); *Re Cosslett* [1998] Ch. 495 (C.A.); *Alstom Power v Somi Impianti* [2012] EWHC 2644 (T.C.C.).
[25] *Akron Tyre v Kittson* (1951) 82 C.L.R. 477 (H.C.A.).
[26] Ibid., at 482 (Latham C.J.).
[27] Ibid., at 492–93.

https://doi.org/10.1017/S0008197325100883 Published online by Cambridge University Press

Latham C.J. formulated the rule in substantially the same terms:

> It was argued for the appellant that property in personal chattels could be transferred only by deed, delivery of possession, or contract of sale or exchange. But the cases mentioned establish that the terms of a contract may be such that when a person acquires property and does "some new act" which the contract contemplates, the property in goods may be effectively transferred.[28]

It may be thought from Latham C.J.'s formulation of the rule that a non-sale contract only has the effect of transferring title when the parties intend if it provides for the passing of title on the performance of "some new act".[29] But the reference to the performance of "some new act" is no more than a reference to the doctrine in *Lunn v Thornton*,[30] applicable to transfers of rights to future goods,[31] with which *Akron Tyre Co.* was concerned. That doctrine provides that once the transferor under an agreement to transfer rights to *future* goods acquires those rights, "some new act" is required before the transfer takes effect. That doctrine applies equally to all transfers involving future goods.[32] As such, Latham C.J. is best understood as holding that title passes when the parties intend under any contract, not just contracts of sale.

Of course, *Akron Tyre Co.* is a decision of the High Court of Australia and so although it might show conclusively that the rule that title passes when the parties intend extends to all contracts under Australian law, it is merely persuasive authority in favour of such a rule in England and Wales. However, Latham C.J., Williams J. and Kitto J. reached their conclusions based on the decision in *Reeves v Barlow*. *Reeves v Barlow*, of course, was a decision of an English court applying the law of England and Wales. As such, the significance of the judgments in *Akron Tyre Co.* is that they demonstrate that *Reeves v Barlow* and the cases which have followed it are best understood as supporting the view that the rule that title passes when the parties intend extends to all contracts and is not limited to contracts of sale.

Importantly, that title passes when the parties intend under any contract, not just under contracts of sale, continues to underpin the law on vesting clauses today. When explaining the principles applicable to vesting clauses in *Alstom Power v Somi Impianti*,[33] Akenhead J. held: "In such cases, the question of whether such property or title has been transferred is one of construction or interpretation of the contract between the parties

[28] Ibid., at 484.
[29] Ibid., at 484.
[30] (1845) 1 C.B. 379, (1845) 135 E.R. 587 (C.P.).
[31] "'[F]uture goods' means goods to be manufactured or acquired by the seller after the making of the contract of sale": Sale of Goods Act 1979, s. 61(1).
[32] *Lunn v Thornton* (1845) 135 E.R. 587 (C.P.) itself involved a sale.
[33] [2012] EWHC 2644 (T.C.C.).

https://doi.org/10.1017/S0008197325100883 Published online by Cambridge University Press

whereby the plant, equipment, materials or goods are provided, supplied or delivered by one party to or for the benefit of another."[34] Correctly, no thought is given to whether such clauses amount to a sale.

III. VESTING CLAUSES AND ORTHODOXY

The previous section canvassed the direct support that the decisions on vesting clauses lend to the view that title passes when the parties intend under any contract and not just under contracts of sale. What is, however, perhaps more important than the express support they give to that view is that the results in the cases are incapable of being explained by reference to the orthodox methods of transfer. According to the orthodoxy, title to goods can only be transferred by delivery, deed or sale.[35] But as this section goes on to show, many of the cases on vesting clauses do not feature a delivery or a sale and none of them feature a deed. Nonetheless, title passed when the parties intended in those cases. It follows that the results in the cases on vesting clauses lend unequivocal support to the view that title passes when the parties intend under any contract and not just under contracts of sale.

A. Sale

The first way of attempting to reconcile the results in the cases on vesting clauses with the orthodoxy that any transfer of title requires a delivery, a deed or a sale is to reinterpret the contracts in the cases dealing with vesting clauses as contracts of sale. If they can be reinterpreted as contracts of sale, then the support they lend to the view that title passes when the parties intend under any contract and not just under contracts of sale is greatly diminished.

However, the better view is that they cannot be reinterpreted in this way. There are two reasons for this. First, it is well established that a sale requires that some money or money's worth be given in exchange for title to the goods.[36] So, for a contract to amount to a contract of sale, it must be possible to identify some money or something that has been valued in monetary terms that is being given in exchange for title to the goods. This is simply not possible in some cases dealing with vesting clauses. Take, for example, *Akron Tyre Co*.[37] Here, title to the tyres passed from Vale to the hire-purchase company. In exchange, the hire-purchase company gave Vale possession of the vehicles, a right to remain in

[34] Ibid., at [17].
[35] *Cochrane v Moore* (1890) 25 Q.B.D. 57 (C.A.); McFarlane, *Structure of Property Law*, 168; Swadling, "Property: General Principles", at [4.457]; D. Sheehan, *The Principles of Personal Property Law*, 2nd ed. (Oxford 2017), 33; M. Bridge, "Mortgages of Goods and Title Disputes" [2024] L.M.C.L.Q. 396, 400.
[36] *G. J. Dawson (Clapham) Ltd. v H.&G. Dutfield* [1936] 2 All E.R. 232, 234 (K.B.) (Hilbery J.); Clare Canton, "Sale of Goods and Barter".
[37] (1951) 82 C.L.R. 477 (H.C.A.).

possession of the vehicles for the hire period, and an option to purchase title to the vehicles at the end of the period. The hire-purchase company did not give Vale any money consideration in exchange for title to the tyres and, while what the hire-purchase company conferred on Vale might be valued in monetary terms, this was simply what Vale paid under the hire-purchase contract. There was no separate money's worth given particularly for the titles to be transferred under the vesting clause. It follows that the vesting clause in *Akron Tyre Co.* cannot be reinterpreted as a sale.

The second reason why vesting clauses cannot generally be reinterpreted as sales is that those cases which have considered the proper classification of vesting clauses have held that they do not amount to sales.[38] This was assumed by Lord Reid in *Bennett & White v Municipal District of Sugar City (No 5)*[39] – a construction case involving a vesting clause which purported to transfer title to materials and plant to the Crown, discussed in greater detail below.[40] His Lordship held that "sale of goods is not here in question".[41] As already explained above, the same assumption was made by the High Court of Australia in *Akron Tyre Co*. Latham C.J. rejected the appellant's argument that "property in personal chattels could be transferred only by deed, delivery of possession, or contract of sale or exchange",[42] thereby implicitly rejecting the view that transfers under vesting clauses involve sales. Williams J. and Kitto J. were more explicit, holding that "we cannot accept the contention that at law a contract can only be effective to pass the property in future chattels where the contract is one of sale or exchange. Such a contention is opposed to the decision of the Court of Appeal in *Reeves v Barlow*."[43]

The same view forms the ratio of the decision of the Supreme Court of Western Australia in *Davidson v Claffey Constructions Pty. Ltd*.[44] The case concerned whether a vesting clause in a construction contract rendered the contract a document "by way of sale", thereby falling within the scope of the Bills of Sale Act 1899. If so, the contract would be void for lack of registration as a bill of sale. The Supreme Court of Western Australia unanimously held that "a building contract, as such, does not involve a sale of goods"[45] and the inclusion of a vesting clause did not change this. As Wolff S.P.J. explained, "[t]he purpose of progress payments in a building contract is to provide the builder with some remuneration

[38] *Bennett & White v Municipal District of Sugar City* [1951] A.C. 786 (P.C.); *Akron Tyre v Kittson* (1951) 82 C.L.R. 477 (H.C.A.); *Davidson v Claffey Constructions* [1958] 60 W.A.L.R. 29 (W.A.S.C.).
[39] [1951] A.C. 786 (P.C.).
[40] See Section IV(B)(1).
[41] *Bennett & White v Municipal District of Sugar City* [1951] A.C. 786, 814 (P.C.) (Lord Reid).
[42] *Akron Tyre v Kittson* (1951) 82 C.L.R. 477, 484 (H.C.A.).
[43] Ibid., at 492.
[44] [1958] 60 W.A.L.R. 29 (W.A.S.C.).
[45] *Davidson v Claffey Constructions* [1958] 60 W.A.L.R. 29, 36 (W.A.S.C.) (Wolff S.P.J.).

https://doi.org/10.1017/S0008197325100883 Published online by Cambridge University Press

against heavy liabilities for work performed and materials supplied in reduction of the total sum ultimately payable."[46] Their purpose is not to acquire title to the materials and plant.

B. Delivery

The second way of reconciling the results in the cases on vesting clauses with the orthodoxy that the only methods of transferring title to goods are delivery, deed and sale is by finding a delivery on the facts of those cases. If a delivery can be found on the facts of those cases, then the relevant transfers of title may have taken place pursuant to that delivery. Again, this would substantially reduce the support that these cases lend to the view that title is transferred when the parties intend under any contract. The better view, though, is that no delivery can be identified on the facts of cases dealing with vesting clauses.

In the context of transfers of title, a delivery requires a change of possession.[47] Typically, this requires the transferee to acquire possession of the goods in question.[48] But no such straightforward change of possession takes place in the cases dealing with vesting clauses. Consider, again, *Reeves v Barlow*.[49] Title to the bricks passed to Barlow when the bricks were brought onto the land, but it is difficult to see how Barlow acquired any possession of those bricks at that point in time. The bricks remained in the immediate physical control of the builders who were using them to construct the houses.

Beyond such straightforward changes of possession, symbolic and "constructive" deliveries have also been held to be sufficient for a transfer of title by delivery, despite seemingly not involving any actual change of possession.[50] The rules on what is sufficient for a symbolic or constructive delivery remain unclear,[51] but the exact scope of these rules is not important for present purposes. What is important to note is that for an act to amount to a symbolic or constructive delivery, it must manifest to the rest of the world that the thing is to be the transferee's moving forward.[52] So the handing over of a receipt for an organ might be sufficient because it manifests to the rest of the world that the organ

[46] Ibid., at 34.

[47] *Irons v Smallpiece* (1819) 2 B. & Ald. 551, 553; 106 E.R. 467, 468 (K.B.) (Abbott C.J.); *Cochrane v Moore* (1890) 25 Q.B.D. 57 (C.A.); *Kilpin v Ratley* [1892] 1 Q.B. 582, 584, 585 (Q.B.) (Hawkins J.); *Re Cole (A Bankrupt)* [1964] Ch. 175, 185, 191, 193 (C.A.) (Harman L.J.); *Irene Balding v Peter Robin Ashley* (27 March 1991 (C.A.)).

[48] *Kilpin v Ratley* [1892] 1 Q.B. 582 (Q.B.); *Thomas v Times Book Co. Ltd.* [1966] 1 W.L.R. 911 (Ch.).

[49] (1884) 12 Q.B.D. 436 (C.A.).

[50] E.g. *Rawlinson v Mort* (1905) L.T. 551 (K.B.).

[51] In relation to symbolic delivery, see A. Diamond, "When Is a Gift . . . ?" (1964) 27 M.L.R. 357, 360. In relation to constructive delivery, see G. McMeel, "Gift and Donatio Mortis Causa" in M. Bridge et al., *The Law of Personal Property*, 3rd ed. (London 2021), at [18-011]–[18-012].

[52] *Rawlinson v Mort* (1905) 93 L.T. 555, 560 (K.B.); *Re Cole* [1964] Ch. 175, 190, 192 (C.A.) (Harman L.J.).

is to be the transferee's moving forward,[53] but a husband purporting to gift title to furniture in the house to his co-occupying wife by showing her around the house and speaking words of gift might not be sufficient because "the acts relied upon are in themselves equivocal – consistent equally with an intention of the husband to transfer the chattels to the wife or an intention on his part to retain possession but give to her the use and enjoyment of them as his wife".[54]

However, it is similarly difficult to identify any conduct on the facts of the cases dealing with vesting clauses which manifest to the rest of the world that the goods are to be the transferee's moving forward. Again, this is true of *Reeves v Barlow*. All that the builder in that case did was to bring the bricks to the land on which the houses were to be built. Bringing the bricks to the land is not like handing over the receipt for an organ. It does not unequivocally manifest to the rest of the world that the bricks are to be the transferee's moving forward. It would, for example, not have been inconsistent with the signal sent to third parties by the placing of the bricks on the land if, subsequently, the builder decided that the bricks were not needed or that they were better used elsewhere.

1. Change in the character of possession

Despite this apparent absence of anything that might amount to a delivery, it has twice been suggested that a delivery can be identified on the facts of cases dealing with vesting clauses. The first of these suggestions can be found in the judgment of Williams J. and Kitto J. in *Akron Tyre Co*.[55] It will be recalled that they decided *Akron Tyre Co.* primarily on the basis that title passes when the parties intend under any contract and not just under contracts of sale. They held that this did not require a delivery, deed or sale.[56] However, Williams J. and Kitto J. also held:

> [I]f contrary to our opinion, delivery of the tyres by Vale to the plaintiff company was necessary to pass the property at law, we are prepared to hold that there was at least a constructive delivery which would be sufficient. It is well established that constructive delivery sufficient to pass the title in chattels may be effected by a change in the character of an uninterrupted custody.[57]

In other words, they held that there may have been a constructive delivery on the facts because the character of Vale's possession changed. On the facts, there was such a change in the character of Vale's possession because:

[53] *Rawlinson v Mort* (1905) 93 L.T. 555, 560 (K.B.).
[54] *Re Cole* [1964] Ch. 175, 192 (C.A.) (Harman L.J.).
[55] (1951) 82 C.L.R. 477 (H.C.A.).
[56] *Akron Tyre v Kittson* (1951) 82 C.L.R. 477, 484 (H.C.A.) (Latham L.J.), 492–93 (H.C.A.) (Williams and Kitto JJ.).
[57] Ibid., at 493–94.

https://doi.org/10.1017/S0008197325100883 Published online by Cambridge University Press

> [w]hen Vale, being the owner of the tyres, attached them to the vehicles, having agreed with the plaintiff company that thereupon they should become part of the vehicles and therefore included in the bailment of them, he ceased to have custody of the tyres in the character of owner, and his custody thereafter was that of a bailee from the plaintiff company.[58]

That a change in the character of the transferor's possession from possessing as owner to possessing as bailee is sufficient for a delivery in the context of transfers of title is not itself without difficulty.[59] However, even if such a change in the character of the transferor's possession were sufficient for a constructive delivery, it is not plausible to suggest that there was such a change on the facts of *Akron Tyre Co.*, nor that this analysis can explain other cases on vesting clauses. To explain why this is the case, a little more must be said about what it means for there to be a change in the character of the transferor's possession.

There are two ways in which the references to a change in the character of the transferor's possession from possessing as owner to possessing as bailee can be understood. The first refers to the manner in which the transferor is generally interacting with the thing: if the transferor is dealing with the goods in a way which is seen as distinctive to the person with the best right to the goods, then they are possessing them as an owner; if they are dealing with the goods in ways which are not seen as distinctive to the person with the best right to the goods, they are possessing them as a bailee. Take, for example, *Winter v Winter*.[60] In *Winter v Winter*, a father wished to make a gift of a barge to his son. Up until the father manifested his desire to transfer his title to the barge to his son, the barge was worked by employees on behalf of the father. When the father manifested his desire to make the gift, the son began to pay the captain's wages and work the barge as his own.[61] This change in how the barge was worked meant that the son went from possessing the barge as a servant to possessing the barge as an owner.

If what is meant by a change in the character of possession is a change in the way in which the possessor deals with the goods in question, it is implausible that there was any such change in the character of Vale's possession of the tyres in *Akron Tyre Co*. Vale did not agree to hold the tyres on the plaintiff's behalf, as often takes place in cases involving a change in the character of possession by attornment. Neither is there any suggestion in the judgment in *Akron Tyre Co.* that the way in which Vale used the tyres changed after he had affixed them to the cars. If anything, the fact that Vale subsequently sold title to the tyres to the defendant shows that Vale continued to possess the tyres in the character of an

[58] Ibid., at 494.
[59] See the rejection of this view in *Valier v Wright and Bull Ltd.* (1917) 33 T.L.R. 366 (K.B.).
[60] (1861) 4 L.T. (N.S.) 639.
[61] *Winter v Winter* (1861) 4 L.T. (N.S.) 639, 640.

owner.[62] Additionally, the same analysis can be applied to other cases dealing with vesting clauses. In *Reeves v Barlow*, there was no further agreement to hold the bricks for Barlow once they were brought onto the land and it is not apparent from the report that the builders began to treat the bricks differently once they had been brought to the land.

The second way in which a reference to a change in the character of the transferor's possession from possessing as owner to possessing as bailee can be understood is as a reference to the rights and duties of the possessor. In this sense, possessing as an owner refers to possessing when one has the best title to the goods in question, whereas possessing as bailee refers to when one has some lesser title to the goods in question, typically acquired by possession, and owes duties to the bailor to keep the goods safe.[63] In the absence of any factual change in the way in which Vale dealt with the thing, the reference to a change in the character of Vale's possession must be understood as a reference to a change in Vale's right to the tyres: upon affixing the tyres to the car, Vale transferred away his best title to the tyres so that he went from possessing as owner to possessing as bailee. But this transfer was the result of the supposed constructive delivery and so also the result of the change in the character of possession. On this view, the reasoning of Williams J. and Kitto J. is straightforwardly circular. It is only because there is a transfer of title that there is a delivery, yet there is only a transfer of title because there is a delivery. It follows from this circularity that their view also cannot adequately explain the transfers of title in other cases dealing with vesting clauses.

The consequence of this analysis is that neither account of what it means for there to be a delivery by a change in the character of possession is an adequate explanation of the transfer of title on the facts of *Akron Tyre Co.* or of the transfers in other cases dealing with vesting clauses. As such, Williams J. and Kitto J.'s attempt to find a delivery on the facts should be discounted in favour of the primary ground on which they decided *Akron Tyre Co.*: that title to the tyres passed under the contract.

2. Delivery on land owned and occupied by the transferee

The second attempt to identify a delivery on the facts of the cases dealing with vesting clauses was made by Lord Reid in the decision of the Privy Council in *Bennett & White v Municipal District of Sugar City (No 5)*.[64] In *Bennett & White*, the Canadian Government entered into a contract

[62] Selling goods was seen as evidence of possessing a thing as an owner in *Chaplin v Rogers* (1800) 1 East 192, 195; 102 E.R. 75, 76, although that case dealt with the Statute of Frauds, s. 17.

[63] *Morris v CW Martin & Sons Ltd.* [1966] 1 Q.B. 716, 738 (C.A.) (Salmon L.J.); *East West Corp. v DKBS AF 1912 A/S and another* [2003] EWCA Civ 83, [2003] Q.B. 1509, at [28] (Mance L.J.); N. Palmer, "Bailment" in Burrows (ed.), *English Private Law*, at [16.02].

[64] [1951] A.C. 786 (P.C.).

https://doi.org/10.1017/S0008197325100883 Published online by Cambridge University Press

with Bennett & White to construct some diversion and irrigation tunnels. The contract contained a vesting clause which provided that all equipment and plant provided by the contractor "shall be the property of His Majesty for the purpose of the said works".[65] Bennett & White provided the plant and equipment required for the works. Thereafter, in accordance with legislation in force at the time, an assessor assessed the plant and equipment, and tax was levied on Bennett & White in accordance with its value. Bennett & White contested the assessment, arguing that title to the plant and equipment was, for the relevant period, vested in the Crown.

Lord Reid, giving the advice of the Privy Council, held that "the Crown was at all material times the owner of the articles in question."[66] In outlining how title to the plant and equipment passed from Bennett & White to the Crown, Lord Reid held that there was a delivery of the goods to the Crown. His Lordship held that "in the present case there was delivery on a site owned and occupied by the building owner – the Crown – and on the English cases this has been held sufficient".[67] This suggests that it is sufficient for a transfer if there is a delivery to, or on, land owned and occupied by the transferee. Despite the transfer of title to the Crown, Lord Reid held that Bennett & White were still assessable for the plant and equipment as legal possessors of the goods.[68]

There are three problems with Lord Reid's reasoning. First, contrary to His Lordship's view, there are no decisions that hold that it is sufficient for a transfer of title that a delivery be made to or on land "owned and occupied" by the transferee. The cases Lord Reid refers to – *Brown v Bateman*,[69] *Blake v Izard*,[70] *Reeves v Barlow*,[71] *Re Keen*[72] and *Hart v Porthgain Harbour*[73] – make no reference to delivery as a means of transfer. Rather, they are all cases dealing with vesting clauses, in which the courts assume that title is transferred by virtue of the contract.

The second problem with Lord Reid's view is that it is inconsistent with a straightforward application of the cases on delivery as a means of transfer to the facts of *Bennett & White*. As was explained above, a delivery typically requires that the transferee acquire possession of the goods in question. However, all that happened on the facts of *Bennett & White* was that goods were brought to land which the Crown occupied and had title to. But one does not possess something simply because one has title to and

[65] *Bennett & White v Municipal District of Sugar City* [1951] A.C. 786, 792 (P.C.).
[66] Ibid., at 813.
[67] Ibid., at 814.
[68] Ibid., at 815.
[69] (1866–67) L.R. 2 C.P. 272.
[70] (1867) 16 W.R. 108.
[71] (1884) 12 Q.B.D. 436 (C.A.).
[72] [1902] 1 K.B. 555 (K.B.).
[73] [1903] 1 Ch. 690 (Ch.).

occupies the land the thing happens to be on. As was made clear by the Court of Appeal in *Parker v British Airways Board*,[74] to acquire possession of goods on one's land without taking physical control of them, one must sufficiently manifest an intention to exclude the rest of the world from goods on the land generally.[75] Not only was there no enquiry as to whether the Crown manifested such an intention on the facts of *Bennett & White*, but had there been, it is unlikely that such a manifested intention would have been found. There is no suggestion in the judgment in *Bennett & White* that the Crown exercised any real control over the land or, at the very least, that any of the acts which the Court of Appeal in *Parker* thought might demonstrate such an intention, such as searching for lost articles, took place.[76] The same is true of other cases dealing with vesting clauses.

The third and final problem with Lord Reid's reasoning is that, even if it is true that the bringing of the materials and plant on to the land amounted to a delivery to the Crown, His Lordship's reasoning cannot explain the results in some other cases, such as that in *Akron Tyre Co*.[77] As was outlined above, *Akron Tyre Co.* involved tyres being affixed to a vehicle that was the subject of a hire-purchase agreement containing a vesting clause. The High Court of Australia held that the vesting clause had the effect of transferring title to the tyres to the plaintiff. Lord Reid's reasoning cannot explain the outcome in *Akron Tyre Co.* because there was no delivery by the hirer of the replacement tyres to the plaintiff or to any land to which the plaintiff had a title.

3. Inconsistency with delivery generally

There are two further aspects of the cases on vesting clauses that are incapable of being explained by reference to a delivery on the facts. First, in addition to vesting title to the goods in the transferee, such clauses also sometimes have the effect of revesting title to any goods not used up in the construction process in the original titleholder.[78] For example, in *Hart v Porthgain Harbour*,[79] Farwell J. held that the vesting clause in question "vest[ed] the property in the materials in the company at law subject to a condition".[80] That condition was the construction

[74] [1982] Q.B. 1004 (C.A.).
[75] *Parker v British Airways Board* [1982] Q.B. 1004, 1018–19 (C.A.) (Donaldson L.J.); *Waverley Borough Council v Fletcher* [1996] Q.B. 334, 339–40 (C.A.) (Auld L.J.).
[76] *Parker v British Airways Board* [1982] Q.B. 1004, 1018–19 (C.A.) (Donaldson L.J.).
[77] (1951) 82 C.L.R. 477 (H.C.A.).
[78] Whether the contract is to be construed as revesting title in the transferor upon the performance of some condition is always a matter of interpretation: *Re Keen* [1902] 1 K.B. 555, 561 (K.B.) (Bigham J.). It is also sometimes said that a distinct clause is implied to this effect: Clay and Dennys, *Hudson's Building and Engineering Contracts*, at [8-082].
[79] [1903] 1 Ch. 690 (Ch.).
[80] Ibid., at 694.

https://doi.org/10.1017/S0008197325100883 Published online by Cambridge University Press

required under the contract. If the condition is satisfied title revests in the contractor. That revesting is difficult to explain as resting on some delivery.[81] Typically there is no further event that may be pointed to as an instance of delivery upon completion of the builder's obligations under the contract.

Second, cases dealing with vesting clauses usually do not enquire into whether there has been anything like a delivery on the facts. The question of whether title has passed is determined exclusively by reference to the terms of the contract. This is evident from Akenhead J.'s summary of principles in *Alstom Power v Somi Impianti*.[82] There, Akenhead J. outlined the following principles as applicable to vesting clauses:

> (a) A primary way (but not the only way) of property in or title to plant, equipment, materials or goods being transferred in a construction context is by way of contract.
>
> (b) In such cases, the question of whether such property or title has been transferred is one of construction or interpretation of the contract between the parties whereby the plant, equipment, materials or goods are provided, supplied or delivered by one party to or for the benefit of another.
>
> (c) Where there is clear wording in effect that ownership is or is intended permanently to be passed, that will be the result.[83]

So, even if some cases dealing with vesting clauses can be explained by reference to a delivery on the facts, this does not reflect the reasoning in these cases, and it is the reasons judges give, rather than solely the outcomes of cases, that make up the law.[84]

C. Accession

A final way of reconciling the outcomes in cases dealing with vesting clauses with the orthodox view that all transfers of title require a delivery, deed or sale, is by reference to the doctrine of accession. Not all vesting clauses purport to transfer title to the goods to the transferee. Instead, some vesting clauses purport to render the materials etc. fixtures to the land or the goods to which they are to be attached. As may be recalled, this was the form of the clause in *Akron Tyre Co.*, which provided that any accessories attached to the vehicles "shall become part of the goods."[85]

[81] Lord Reid described such a redelivery as "notional" in *Bennett & White v Municipal District of Sugar City* [1951] A.C. 786, 815 (P.C.).
[82] [2012] EWHC 2644 (T.C.C.).
[83] Ibid., at [17]. See, similarly, the treatment of vesting clauses in Ramsay and Furst, *Keating on Construction Contracts*, at [11-020].
[84] L. Rostill, *Possession, Relative Title, and Ownership in English Law* (Oxford 2021), 41.
[85] See also *Brown v Bateman* (1866–67) L.R. 2 C.P. 272.

On their face, these clauses purport to invoke the doctrine of accession, whereby the accessory "loses its identity as a separate thing and falls into the proprietary status of that to which it accedes."[86] But this is not the way in which these clauses have been interpreted. Despite the language of the clause in *Akron Tyre Co.*, the High Court of Australia held that it did not need to consider the doctrine of accession because the effect of the clause was to transfer title to the tyres to the plaintiff, rather than extinguishing the separate proprietary status of the tyre.[87] The same inclination to interpret such clauses as providing for a transfer, rather than invoking the doctrine of accession, can be found in the English decisions on the matter.[88] The consequence is that few, if any, cases dealing with vesting clauses will be capable of being explained on the basis of the doctrine of accession.

Even if some vesting clauses might be interpreted as attempting to invoke the doctrine of accession, rather than providing for a transfer of title, the better view is that the reasoning and outcomes in the cases would not be capable of being explained by the doctrine of accession. This is because the doctrine of accession generally has no regard for the agreement of the parties.[89] Whether the doctrine of accession operates turns solely on "circumstances which [show] the degree of annexation and the object of such annexation which [are] patent for all to see".[90] A mere contract between the parties is not public in this required manner. It follows that, without more, vesting clauses, even when formulated as fixture clauses, cannot have the effect of rendering goods fixtures to land.

IV. SIGNIFICANCE

It was already mentioned at the outset that when title passes and where title is located at any given point in time is significant for a number of private law doctrines, including who bears the risk of the goods' destruction, the availability of tort claims against third parties, the ability to grant security rights, and tax issues. Since whether title can pass when the parties intend under a contract will affect when title to the goods passes to the transferee, the scope of the rule has important commercial consequences for all of the aforementioned private law doctrines. Nonetheless, there are three further specific implications arising from the

[86] Swadling, "Property: General Principles", at [4.472].
[87] *Akron Tyre v Kittson* (1951) 82 C.L.R. 477, 483 (H.C.A.) (Latham C.J.), 496 (H.C.A.) (Williams and Kitto JJ.).
[88] See the treatment of *Brown v Bateman* (1866–67) L.R. 2 C.P. 272, which involved a fixture clause, in *Reeves v Barlow* (1884) 12 Q.B.D. 436 (C.A.).
[89] *Hobson v Gorringe* [1897] 1 Ch. 182 (C.A.); *Melluish (Inspector of Taxes) v BMI (No. 3) Ltd.* [1996] A.C. 454 (H.L.); *Elitestone Ltd. v Morris* [1997] 1 W.L.R. 687 (H.L.). Although these cases deal with intentions to leave the goods as chattels, the language of the judges suggests that the reasoning applies equally to intentions to render the goods fixtures.
[90] *Hobson v Gorringe* [1897] 1 Ch. 182, 193 (C.A.) (Smith L.J.).

rule that title passes when the parties intend under any contract that are worth highlighting here.

The first of these is that the restricting of the rule that title passes when the parties intend to cases of sale has for long forced judges and commentators to find forced explanations for various doctrines.[91] These doctrines become straightforwardly explicable once it is accepted that title passes when the parties intend under any contract. A well-known example of such a doctrine is the revesting of title in the seller when the buyer rejects goods after title has already passed to them.[92] This typically arises in the context of c.i.f. (cost, insurance and freight) sales, where title to the goods passes to the buyer on payment against presentation of the bills of lading, but the buyer has the opportunity to inspect the goods only at a later point when they arrive.[93] If the goods are sufficiently defective so as to give the buyer a right to reject them, the effect of rejecting the goods is that title is re-vested in the seller. This reconveyance of title from the buyer to the seller has attracted a variety of different explanations. In *Hardy & Co. v Hillerns and Fowler*, Atkin L.J. expressed the view that, if the goods are defective, "the property does not pass to the purchaser upon his taking up the documents"[94] until they have had an opportunity to inspect the goods. In *Kwei Tek Chao v British Traders and Shippers*, Devlin J. rejected this explanation because of the difficulties it would impose on a buyer trying to pledge the goods.[95] Instead, Devlin J. expressed the view that this revesting was explained by the title acquired by the buyer being subject to a condition subsequent that the goods conform to the contract.[96] More recently, Professor Robert Stevens has attempted to explain this revesting as a "re-sale", whereby the buyer sells the goods back to the original seller.[97]

All of this conceptual work is unnecessary once it is recognised that title can pass when the parties intend whenever a contract provides for such a transfer. There is no need to conceptualise such reconveyances as involving some limit on the right conveyed or as providing for a re-sale. Rather, title is reconveyed simply because the contract provides the

[91] For two recent examples, see R. Stevens, *The Laws of Restitution* (Oxford 2023), 195; and Bridge, "Mortgages of Goods and Title Disputes", 400.

[92] E. *Hardy & Co. (London) Ltd. v Hillerns & Fowler* [1923] 2 K.B. 490, 498–99 (C.A.) (Atkin L.J.); *Kwei Tek Chao (t/a Zung Fu Co.) v British Traders & Shippers Ltd.* [1954] 2 Q.B. 459, 480, 487 (Q.B.) (Devlin J.); J. *Rosenthal & Sons Ltd. v Esmail (t/a HMH Esmail & Sons)* [1965] 1 W.L.R. 1117, 1131 (H.L.) (Lord Pearson); *Tradax Export S.A. v European Grain & Shipping Ltd.* [1983] 2 Lloyds Rep. 100, 107 (Comm. Ct.) (Bingham J.); *Gill & Duffus S.A. v Berger & Co. Inc.* [1984] 1 A.C. 385, 395 (H.L.) (Lord Diplock); D. O'Sullivan, S. Elliott and R. Zakrzewski, *The Law of Rescission*, 3rd ed. (Oxford 2023), at [1.24].

[93] Ibid.

[94] *Hardy v Hillerns & Fowler* [1923] 2 K.B. 490, 499 (C.A.).

[95] *Kwei Tek Chao v British Traders and Shippers* [1954] 2 Q.B. 459, 487 (Q.B.).

[96] Ibid. See also *Rosenthal v Esmail* [1965] 1 W.L.R. 1117, 1131 (H.L.) (Lord Pearson); *Gill & Duffus v Berger* [1984] 1 A.C. 385, 395 (H.L.) (Lord Diplock).

[97] Stevens, *Laws of Restitution*, 195.

buyer with a power to reject and such a rejection necessarily involves a reconveyance. Accepting that title passes when the parties intend under any contract thus makes other areas of law simpler to explain.

Second, in addition to simplifying some doctrines, once it is accepted that title passes when the parties intend under any contract, it becomes clear that cases that have assumed otherwise are wrongly reasoned. This applies, in particular, to the decision of the Court of Appeal in *Koppel v Koppel*[98] and the decision of the Supreme Court of Ireland in *Flynn v Mackin*.[99] In *Koppel v Koppel*, a husband agreed to transfer title to the contents of his house to his wife in exchange for her agreeing to look after the house and their children. The Court of Appeal held that title to the contents of the house passed when the parties intended for title to pass. Importantly, Harman L.J. held that title passed because the transfer amounted to a sale. In His Lordship's view, the agreement to transfer title to the contents of the house was made "for money or moneysworth [*sic*]".[100] The finding that the agreement amounted to a sale has long been criticised as implausible.[101] But once it is accepted that title passes when the parties intend under any contract, there is no longer any need to find a money consideration given in exchange for the goods on the facts of *Koppel v Koppel*.[102] Title to the contents of the house passed because the contract provided that it would, irrespective of whether the wife's services had been valued in monetary terms.

The existence of the rule that title passes when the parties intend for it to do so under any contract also shows that *Flynn v Mackin*[103] is wrongly reasoned. *Flynn v Mackin* involved a contract of barter under which the parties agreed to exchange title to two cars. The cars were not valued in monetary terms. On the way to exchange the cars, Mahon crashed into a vehicle in which the plaintiff was a passenger. The plaintiff brought a claim in negligence against the defendant, who was to receive title to the car under the contract with Mahon. It was assumed before the Supreme Court of Ireland that whether the defendant was liable turned on whether title to the car had passed to the defendant before delivery of the car. The Supreme Court of Ireland held that title to the car did not pass before delivery. Walsh J., with whom Fitzgerald C.J. and Budd J. agreed, held that title to goods could only pass without delivery by sale or deed and there was no sale or deed on the facts.[104]

As the cases on vesting clauses have shown, insofar as the law of England and Wales was the same as Irish law at the time at which *Flynn v Mackin* was

[98] [1966] 1 W.L.R. 802 (C.A.).
[99] [1974] I.R. 101 (I.E.S.C.).
[100] *Koppel v Koppel* [1966] 1 W.L.R. 802, 811 (C.A.).
[101] Clare Canton, "Sale of Goods and Barter", 592; Bridge, "Contract of Sale of Goods", at [1-036].
[102] [1966] 1 W.L.R. 802 (C.A.).
[103] [1974] I.R. 101 (I.E.S.C.).
[104] Ibid., at 111–12.

https://doi.org/10.1017/S0008197325100883 Published online by Cambridge University Press

decided, this was incorrect. Title can pass before delivery under any contract, not just contracts of sale. As such, it was, in principle, possible for title to the car to have passed before the crash on the facts of *Flynn v Mackin*.[105]

The third important consequence of the analysis presented in this article relates specifically to vesting clauses. The analysis presented in this article shows that whether title is transferred pursuant to a vesting clause does not require any investigation into whether there has been a delivery on the facts. The references to a "delivery on a site owned and occupied by the building owner" in *Bennett & White*[106] and to a "change in the character of an uninterrupted custody" in *Akron Tyre Co.*[107] are unnecessary and misleading. All that is required to determine when title passes under a vesting clause is a determination as to what a reasonable person would understand the vesting clause to mean.

V. CONCLUSION

This article has argued that it is a rule of the law of England and Wales that, whenever a contract provides for a transfer of title to goods, title is transferred when the parties intend, irrespective of whether the contract is one of sale or not. It has done this by reference to cases dealing with clauses that purport to vest title to goods in the transferee. These clauses appear to have the effect of transferring title to the transferee without a delivery, deed or sale. They are best understood as providing that title passes when the parties intend under any contract. This method of transfer (which may be termed "contract") entirely subsumes the category of sale. The consequence of this analysis is that the three methods of transferring title to goods are delivery, deed and contract.

[105] On the facts, the parties did not intend for title to pass until delivery: *Flynn v Mackin* [1974] I.R. 101, 110–11 (I.E.S.C.).
[106] [1951] A.C. 786, 814 (P.C.) (Lord Reid).
[107] (1951) 82 C.L.R. 477, 494 (H.C.A.) (Williams and Kitto JJ.).