SECURITY OVER PERSONALTY: PROPERTY, OBLIGATION AND SPECIFIC PERFORMANCE

1. Introduction

How do you create a consensual equitable charge over personalty? Traditionally the answer comes from Lord Wrenbury's judgment in *Palmer v Carey* [1]. There, he refers to the:

> "familiar doctrine of equity that a contract for valuable consideration to transfer or charge a subject matter passes a beneficial interest by way of property in that subject matter *if the contract is one of which a Court of equity will decree specific performance* [2]."

Despite the occasional doubt [3], this view is now the established orthodoxy [4]. The suggestion in this article is that it is nevertheless wrong. The true rule is a far simpler one. Subject to a couple of exceptions, of which more below, the creation by consensus of an equitable security interest in property requires a valid and enforceable agreement between the parties, and nothing more [5]. Whether we are talking of security over chattels or intangibles, the law of specific performance is an irrelevance.

The next sections seek to make good this claim: first by describing how the doctrine arose, and then describing why it is misguided.

2. The history of an odd idea: how did the reference to specific performance get there?

The idea that the creation by agreement of a valid security interest in personalty rests on the secured party's ability to obtain an order of specific performance is well entrenched. It is nonetheless rather curious, for at least three interconnected reasons.

For one thing, no-one tasked with creating a system of security would ever have spontaneously thought it up. To condition the existence and validity of a consensual proprietary interest in an asset on the availability of a curial remedy, and moreover of a

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1 [1926] A.C. 703.

2 [1926] A.C. 703 at 706-707 (italics supplied).

3 In particular arising from dicta in *Tailby v Official Receiver* (1888) 13 App. Cas. 523 and a number of subsequent cases following them. These are referred to below.

4 Judicial approvals of this statement in *Palmer v Carey* in connection with security over personalty are legion. They include *Swiss Bank Corporation v. Lloyds Bank Ltd* [1982] A.C. 584; [1981] 2 All E.R. 449 at 613 and 453 (Lord Wilberforce) (also Buckley LJ in the CA, [1982] A.C. 584 at 594-596; [1980] 2 All E.R. 419 at 425-426; *Re Charge Card Services Ltd* [1987] Ch 150 at 175; [1986] 3 All E.R. 289 at 308 (Millett J); *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 C.L.R. 407, 423 (Brennan CJ); *Floods of Queensferry Ltd v Shand Construction Ltd* [2002] EWCA Civ 918; [2003] Lloyd's Rep. I.R. 181 at [43]-[45] (Buxton LJ); *Re TXU Europe Group Plc (In Administration)* [2003] EWHC 3105 (Ch); [2004] 1 B.C.L.C. 519 at [31]-[32] (Blackburne J); *Flightline Ltd v Edwards* [2003] EWCA Civ 63; [2003] 1 W.L.R. 1200 at [37]-[43] (Jonathan Parker LJ); *Re Lehman Bros International (Europe) (In Administration)* [2012] EWHC 2997 (Ch); [2014] 2 B.C.L.C. 295 at [43]-[44] (Briggs J); and *Archer v Fabian Investments Ltd* [2017] UKPC 9; [2017] B.C.C. 367 at [19].

5 Cf R.Goode & L.Gullifer, *Goode and Gullifer on* L*egal Problems of Credit and Security*, 6th edn (London: Sweet & Maxwell, 2017), para.2-11.

remedy the grant of which lies in the discretion of the court, is perverse [6], for at least two reasons. The obvious point is that it raises the spectre of serious uncertainty in an area where one would have thought clarity essential. Either the correct formalities have been observed in order to create a particular security interest or they have not: recognition of a security interest should not be a matter of discretion. More importantly, however, it confounds obligation with property transfer on a theoretical level. An agreement for an asset to stand security for a liability falls naturally to be regarded, not so much as a promise to do something (where an order to perform might be understandable), but rather as an agreement aimed at constituting a legal state of affairs, in this case a proprietary interest in the creditor. In the case of agreements of the latter kind, which are well established elsewhere in the law [7], orders to perform make little sense.

Secondly, the doctrine is not of enormous age, and indeed seems to have grown up rather suddenly. Before the decision in *Holroyd v Marshall* [8] in 1862, there was little sign of it, and indeed a good deal of contrary authority that security over personalty could be created by mere agreement [9].

Thirdly, legal theories deserve to be tested against the facts. It is suggestive that, with one possible exception [10], there seems to be no case where a court has actually declined to give effect to a consensual security over personalty because the agreement to create it, while valid, was not specifically enforceable.

How then did this remarkably counter-intuitive idea arise? The answer seems to be largely through inadvertence, as an unintended by-product of two connected land law doctrines: the vendor-purchaser constructive trust, and the associated concept of the equitable mortgage. The reasoning was simple. Long-standing authority held that a specifically-enforceable agreement to sell land gave the buyer an equitable interest in it pending the formal transfer of legal title [11]; by parity of reasoning, an equitable mortgage, and with it an immediate equitable security, arose whenever there was a specifically-enforceable agreement to execute a legal security in favour of the lender [12]. It was true

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6 A point which can also be made, and has been, in connection with the land law doctrine under which estate contracts create a proprietary interest in the buyer: S.Gardner, “Equity, Estate Contracts and the Judicature Acts: Walsh v. Lonsdale Revisited” (1987) 7 O.J.L.S. 60 at 70.

7 Examples are legion. One is a promise for consideration not to sue, or to exempt a person from liability; another, an agreement giving jurisdiction to a court or arbitrator; a third, a gift of a chattel to a donee already in possession of it (*traditio longa manu*). All these agreements have automatic legal *effects*; none falls to be *performed* in any meaningful way. See generally A.Tettenborn, “Literal enforcement of obligations” in R.Halson & D.Campbell (eds), *Research Handbook on Remedies in Private Law*, (Cheltenham: Edward Elgar Publishing, 2019) at p.188 ff.

8 (1862) 10 H.L.C. 191; 11 E.R. 999.

9 Cases in point include *Bucknal v. Roiston* (1709) 1 Prec. Ch. 285; 24 E.R. 136; *Curtis v Auber* (1820) 1 J & W 526 at 531-532; 37 E.R. 468 at 470 (Lord Eldon); *Metcalfe v Archbishop of York* (1836) 1 My & Cr 547 at 557; 40 E.R. 485 at 489 (Lord Cottenham); *Mogg v Baker* (1838) 3 M & W 195 at 198; 150 E.R. 1113 at 1114 (Parke B on chattels in a mortgagor’s hands); see too *Swainston v Clay* (1863) 3 De G, J & S 558 at 568-569; 46 E.R. 752 at 757 (strong suggestion, though no final opinion, from Turner LJ).

10 In one Australian case, *Rolfe v Transworld Marine Agency NV* (1998) 83 F.C.R. 323 at 338-339 Tamberlin J said that in the case of a non-specifically-enforceable contract (there a personal contract of agency), such a contract could not as a matter of law create a valid equitable assignment of a debt owing to one party to it. With respect, it is submitted that this statement is simply wrong. The land case of *Thames Guaranty Ltd v Campbell* [1985] Q.B. 210; [1984] 2 All E.R. 585 might seem to be another instance, but this can be better explained as a case of an agreement explicitly to create a future security: see below.

11 A rule said by Jessel MR to be at least 200 years old even in 1876: *Lysaght v Edwards* (1876) 2 Ch.D. 499 at 506.

12 See e.g. *Russel v Russel* (1783) 1 Bro CC 269; 28 E.R. 1121; *Legard v Hodges* (1792) 1 Ves. Jun. 477; 30 E.R. 447; *Casberd v Ward* (1819) 6 Price 411; 146 E.R. 850; also the later *Tebb v Hodge* (1869) L.R. 5 C.P. 73. As Kindersley V-C put it succinctly in 1853 in *Pryce v. Bury* (1853) 2 Drew. 41 at 42-43; 61 E.R. 633 at 634: “The common rule of this court as to an equitable mortgage by deposit, is this: by the deposit, the mortgagor contracts that his interest shall be liable to the debt, and that he will make such conveyance or assurance as may be necessary to vest his interest in the mortgagee.”

that the vendor-purchaser constructive trust had less part to play as regards personalty, where specific performance of contracts was almost unknown (though an analogous doctrine regularly did raise its head in marriage settlement cases [13]). Nevertheless, when it came to security over personalty, the analogy seemed compelling. An equitable security over personalty must, the argument ran, be in its nature an interest created by an agreement to create a legal security that was susceptible of an order of specific performance.

The culmination of this supposedly logical argument was the 1862 case of *Holroyd v Marshall* [14] (though there had been a very few earlier hints [15]). In brief, Holroyd accommodated a troubled Halifax clothmaker called Taylor with a large cash injection of £5,000. In exchange for this, Taylor agreed in writing to vest in Holroyd as security [16] his then mill contents, plus "all machinery, implements, and things, which, during the continuance of this security, shall be placed in or about the said mill", and agreed in addition to "do all necessary acts for assuring such added or substituted machinery, implements, and things, so that the same may become vested accordingly". Taylor's finances having gone from bad to worse, two of his execution creditors seized some of the replacement machinery. Holroyd sued them, arguing that he had had a pre-existing equitable security that trumped their rights. He won before Stuart V-C [17], lost on appeal [18], but ultimately succeeded in the House of Lords [19]. Although it was accepted on all sides that no legal ownership had passed to him [20], the effect of the contract between himself and Taylor had been to give him a perfectly valid equitable title.

What was important, however, was the reason why this was held to be so. For Lord Chelmsford, the matter could be decided on the simple basis of the agreement between Taylor and Holroyd. Whereas at law it was impossible to transfer property in future assets by mere contract [21], this had (his Lordship said) never been the rule in equity, and the contract had created an impeccable equitable title in Holroyd as soon as Taylor acquired the goods [22]. However Lord Westbury, with whom Lord Wensleydale agreed, took a different tack. He confirmed Holroyd's entitlement to an equitable interest arising from the sale contract. But, having had cited to him a number of the earlier cases concerned with specifically enforceable contracts concerning land, he added to his statement that the contract gave Holroyd an equitable right the vital words "provided the contract is one of which a Court of Equity will decree specific performance" [23].

After *Holroyd* there were therefore two possible views: that contract was enough, or that the contract needed to be a specifically enforceable one. Which was right? A later House of Lords case on equitable security, the classic book-debt case of *Tailby v Official Receiver* [24], unfortunately failed to resolve the issue. Izon, a Birmingham manufacturer, agreed to charge all his future book-debts to a lender named Tyrell. When Tyrell died, his executors transferred both loan and security to Tailby. On Izon's insolvency, Tailby received

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13 See e.g. *Smith v Lucas* (1881) 18 Ch.D. 531 at 543, *Pullan v Koe* [1913] 1 Ch 9 at 14 and *Re Lind* [1915] 2 Ch 345; *Snell's Equity,* 34th edn (London, Sweet & Maxwell, 2020), para.6-051.

14 (1862) 10 H.L.C. 191.

15 See e.g. a throw-away line of Wigram V-C in *Langton v Horton* (1842) 1 Hare 549 at 556; 66 E.R. 1149 at 1152.

16 Although on its face a sale of the machinery, the security aspect was made clear by the express right given to Taylor to redeem it by repaying the £5,000 within a fixed period.

17 *Holroyd v Marshall* (1860) 2 Giff. 382; 66 E.R. 159.

18 *Holroyd v Marshall* (1860) 2 De G.F. & J. 596; 45 E.R. 752.

19 (1862) 10 H.L. Cas. 191

20 See *Holroyd v Marshall* (1862) 10 H.L.C. 191 at 210-211 (Lord Westbury).

21 A proposition supported by, for example, *Lunn v Thornton* (1845) 1 C.B. 379; 135 E.R. 587.

22 *Holroyd v Marshall* (1862) 10 H.L.C. 191 at 226-228.

23 See *Holroyd v Marshall* (1862) 10 H.L.C. 191 at 209; also *Re Wait* [1927] Ch 606 at 636 (Atkin LJ).

24 (1888) 13 App. Cas. 523.

payment of a number of his invoices. In what was clearly a test case [25], the Official Receiver acting for the general creditors sued him to recover slightly over £10 paid by one debtor. He lost. Just as Holroyd had owned Taylor's future machinery in equity, so also (it was held) with Tailby and Izon's future book debts.

The actual holding was never seriously in doubt, most of the argument being directed at demolishing the curious view promulgated by the Court of Appeal in the same case that a general assignment of book-debts fell to be treated differently from an assignment of debts arising from a particular business carried on by the creditor [26]. But whereas the Court of Appeal had apparently assumed the existence of the requirement of specific enforceability [27], the reasoning on the point in the House of Lords was evenly balanced. Two Law Lords [28] did not mention the point at all. Lord Herschell dutifully toed the Westbury line [29]. By contrast, however, Lord Macnaghten emphatically embraced the Chelmsford view. "Greater confusion," he said, "would be caused by transferring considerations applicable to suits for specific performance—involving, as they do, some of the nicest distinctions and most difficult questions that come before the Court—to cases of equitable assignment or specific lien where nothing remains to be done in order to define the rights of the parties, but the Court is merely asked to protect rights completely defined as between the parties to the contract." [30] He then removed all doubt when he added: "The doctrines relating to specific performance do not, I think, afford a test or a measure of the rights created." [31]

Since then the point about specific enforceability has remained theoretically open, since in the 140 or so years since *Tailby* it has never come up for final determination. Nevertheless, as stated above, in practice the Westbury view as stated by Lord Wrenbury in *Palmer v Carey* has achieved general acceptance. The overwhelming weight of authority agrees with it [32], as does the most important article on the subject [33], even if a few isolated judgments have downplayed or ignored the role of specific performance [34].

3. Discussion: why the reference to specific performance is problematic

It is suggested that the established view, for all its general acceptance, runs into at least three serious difficulties. These are (a) its dependence on a fallacious analogy between land and personalty; (b) the intractability of the concept of an agreement which the law will specifically enforce; and (c) the lack, in most cases, of anything for a hypothetical remedy of specific enforcement to bite on.

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25 See the remarks of Lord Fitzgerald in *Tailby v Official Receiver* (1888) 13 App. Cas. 523 at 538.

26 See the decision below: *Tailby v Official Receiver* (1886) 18 Q.B.D. 25.

27 See *Tailby v Official Receiver* (1886) 18 Q.B.D. 25 at 29 (Lord Esher MR) and 30 (Lindley LJ).

28 Lords Fitzgerald and Watson. For some unknown reason, it seems that only four Law Lords sat.

29 See *Tailby v Official Receiver* (1888) 13 App. Cas. 523 at 531.

30 See *Tailby v Official Receiver* (1888) 13 App. Cas. 523 at 547.

31 See *Tailby v Official Receiver* (1888) 13 App. Cas. 523 at 548.

32 See *Palmer v Carey* [1926] A.C. 703 and the cases cited at Note 4 above; also *Re Clarke* (1887) 36 Ch.D. 348 at 352, 356 and 357; *Re Wait* [1927] 1 Ch. 606 at 618-622 (Lord Hanworth) and 634-638 (Atkin LJ); *Napier & Ettrick (Lord) v Hunter* [1993] A.C. 713 at 752; [1993] 1 All E.R. 385 at 409 (Lord Browne-Wilkinson).

33 J.Keeler, "Some Reflections on Holroyd v Marshall" (1969) 3 Adelaide L.Rev. 360 and 468; see too S.Worthington, "Proprietary Remedies: The Nexus Between Specific Performance and Constructive Trusts" (1996) 11 J.C.L. 1 and S.Worthington, *Proprietary Interests in Commercial Transactions*, (Oxford, Oxford University Press, 1997) at pp.194-215.

34 Notably Swinfen Eady LJ in *Re Lind* [1915] 2 Ch. 345, 360 (in addition Phillimore LJ at 365-366 and Bankes LJ at 373); also Latham CJ and Dixon J in *Palette Shoes Pty Ltd v Krohn* (1937) 58 C.L.R. 1 at 16 and 26-27, and Deane J in *Hewett v Court* (1983) 149 C.L.R. 639 at 665, who specifically followed Lord Macnaghten in *Tailby v Official Receiver*. See too J.Maxton, "Negative pledges and equitable principles" [1993] J.B.L. 458 at 459 ff.

(a) Land and personalty: a problematic analogy

As mentioned above, Lord Westbury in *Holroyd v Marshall* relied largely on a supposed parallel between contracts dealing with land and personalty. Unfortunately the analogy, while superficially attractive, is less straightforward than it looks. In the case of realty, as the leading analysis of the vendor-purchaser (and by reference the mortgagor-mortgagee) constructive trust points out [35], the justification was a specialised one. The time-consuming formalities needed to transfer legal ownership in land necessitated a means of giving a buyer or mortgagee an immediate interest pending the execution of the necessary transfer. Hence the grant of an interest by way of a trust, subsisting just as long as the purchaser or mortgagee had the right to enforce a conveyance.

However, save for a few specialised cases like shares and some intellectual property rights, where formalities for transfer are laid down [36], none of this applied to personalty, whether tangible or intangible. In sale of goods law there were no cumbersome transfer formalities, since legal ownership could pass by mere contract [37]. (Admittedly this did not work for after-acquired chattels, where until the Sale of Goods Act 1893 changed matters there had to be a further grant [38]: but this was practically immaterial because long before *Holroyd v Marshall* it had been accepted that equitable, as opposed to legal, title could be passed by mere agreement as soon as the chattel was acquired [39]). And so too with intangibles. Although there could in general be no legal transfer at all until 1875 [40], from the eighteenth century on both present and future things in action could be transferred in equity by mere agreement, including transfers intended to take effect by way of security [41]. Importantly, in neither case was specific performance ever mentioned. The reason, it is suggested, was simple: by common consent the agreement did the work on its own, and nothing more was needed. It equally should follow that the cumbersome machinery applicable to transfers of land has little, if any, relevance here.

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35 See S.Gardner, “Equity, Estate Contracts and the Judicature Acts: Walsh v. Lonsdale Revisited” (1987) 7 O.J.L.S. 60 at 74 ff.

36 Though even here they are hardly demanding, requiring only the signature of a document or some cyber-equivalent: see e.g. the Stock Transfer Act 1963 as modified by the Stock Transfer Act 1982, and the Copyright, Designs and Patents Act, s.90(3).

37 Section 17 of the Sale of Goods Act 1893 (now s.17 of the Sale of Goods Act 1979) put the rule in statutory form. But it had been well-established at least from the seventeenth century. See *Sheppard’s Touchstone of Common Assurances* (London, 1648), tit. Bargain and Sale, p.221; *Tarling v Baxter* (1827) 6 B. & C. 360 at 364; 108 E.R. 484 at 486 (Bayley J); and the authorities cited in *Benjamin’s Sale of Goods*, 11th ed (London: Sweet & Maxwell, 2020), para.5-017.

38 See *Lunn v Thornton* (1845) 1 C.B. 379; 135 E.R. 587 and also *Re Lind* [1915] 2 Ch. 345 at 361 (Swinfen Eady LJ); also *Norman v F,C,T,* (1963) 109 C.L.R. 9 at 20 (Menzies J) and Bacon's *Rules and Maximes* (London, 1630), Reg. 14 (“*Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum interveniente novo actu*.”). Section 17(1) of the Sale of Goods Act 1893 (now in the Sale of Goods Act 1979) changed matters by saying that legal property in specific *or ascertained* goods passed when the parties intended it to.

39 As pointed out by Lord Macnaghten in *Tailby v Official Receiver* (1888) 13 App. Cas. 523 at 543 and 546. See also the cases referred to in Note 9 above. A number of twentieth-century cases have also taken the same view: see e.g. *Re Lind* [1915] 2 Ch 345 at 357, 360 (Swinfen Eady LJ) and 375 (Bankes LJ); *Peer International Corp v Termidor Music Publishers Ltd (No.1)* [2002] EWHC 2675 (Ch); [2003] E.M.L.R. 19 at [75]-[82] (Neuberger J) and *Performing Right Society Ltd v B4U Network (Europe) Ltd* [2013] EWCA Civ 1236; [2014] F.S.R. 17 at [26]-[27] (Moses LJ) and [36] (Kitchin LJ).

40 When s.25(6) of the Supreme Court of Judicature Act 1873 (now s.136 of the Law of Property Act 1925) came into force.

41 This is implicit in such cases as *Ex Parte South* (1818) 3 Swans 392; 36 E.R. 907 and *Gorringe v Irwell India-Rubber Works* (1886) 34 Ch. D. 128. See generally *Snell’s Equity,* 34th edn (London, Sweet & Maxwell, 2020), para.3-14, and M.Smith & N.Leslie, *The Law of Assignment*, 2nd ed (Oxford: Oxford University Press, 2018), paras.10-26 – 10-27.

(b) A contract "of which a Court of equity will decree specific performance": an intractable concept.

The second difficulty with the specific performance thesis lies in the fact that, in the context of security over personalty, it has never been easy to make sense of the concept of a contract "of which a Court of equity will decree specific performance".

With land, this is not so. An agreement to go through the formalities of creating a valid legal mortgage is specifically enforceable as a matter of course; when we say that an agreement for a mortgage is as good as a mortgage, what is being said is that the secured party gets an equitable interest which will prevail unless and until the agreement becomes ineffective [42]. But things are different with chattels and intangibles. Here as a general rule specific performance is an ancillary remedy; it is available only exceptionally, on a showing that damages are inadequate. This immediately raises the issue: do the words referring to a contract of which a Court of equity "will decree specific performance" mean "may, as a matter of jurisdiction, grant specific performance" (whether or not it actually will), or "will, as a matter of discretion, grant it"? Unfortunately both positions turn out to be fundamentally unsatisfactory.

If it is the former, as suggested by one leading commentator [43], then the problem is that the requirement becomes effectively meaningless. It needs to be remembered that the court's *jurisdiction* to award the remedy of specific performance applies – at least in principle – to all contracts of all kinds, save very exceptional cases where statute forbids it [44]. Hence we might just as well excise the reference to specific performance completely and talk simply of a valid contract.

Unfortunately things get no better if we take the opposite line, and ask whether the case is one where the court *will* give the remedy as a matter of discretion. The point here is that the "adequacy of damages" criterion makes perfect sense with agreements to sell or lease personalty: a disappointed buyer of a picture or lessee of a ship told to be content with damages gets at least something if awarded them. But it makes almost none with agreements to grant security. With an insolvent owner, which is the only time the issue really matters, it would have to be specific performance or nothing, since in almost all cases an award of damages would give the would-be secured party no more than it would have got as an unsecured creditor anyway.

True, theoretically this point could be met by saying that with contracts to give security, damages are automatically regarded as an inadequate remedy, at least once the monies have been advanced, so that specific performance will be available as a matter of course [45]. But if this is right, then the reference to the need for a specifically-enforceable contract once again becomes essentially redundant. We might just as well say that (except

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42 Compare Lord Parker in the land case of *Central Trust & Safe Deposit Co v Snider* [1916] 1 A.C. 266 at 272: "[I]t is tacitly assumed that the contract would in a Court of Equity be enforced specifically".

43 J.Keeler, "Some Reflections on Holroyd v Marshall" (1969) 3 Adelaide L.Rev. 360 at 365-366. Also in *Re Cimex Tissues Ltd* [1994] B.C.C. 626 at 636 it was merely said that the contract had to be "capable of specific performance", suggesting a similar interpretation.

44 See N.Andrews, M.Clarke, A.Tettenborn & G.Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies*, 3rd edn (London: Sweet & Maxwell, 2020), para.20-015. The only clear example of a statutory bar is the ban on such orders against workers under the Trade Union and Labour Relations (Consolidation) Act 1992, s.236: but that is obviously not relevant here.

45 A proposition backed by some authority: e.g. *Hermann v Hodges* (1873) L.R. 16 Eq 18; *Re Clarke* (1887) 36 Ch. D. 348 at 352 and 358 (Cotton and Fry LJJ); and *Folgender Holdings Ltd v Letraz Properties Ltd* [2019] EWHC 2131 (Ch), esp at [38]. See too R.Goode & L.Gullifer, *Goode and Gullifer on* L*egal Problems of Credit and Security*, 6th edn (London: Sweet & Maxwell, 2017), para.2-11, n.60.

to the extent that the recognition of any equitable claim is always ultimately discretionary [46]), all that is required for an effective equitable security is agreement.

But discretion and the adequacy of damages are not the only problems. There is also a further difficulty, this time relating to timing. Assuming the contract must indeed be specifically enforceable (whatever that means), at what point in time must this be so? Is it when it is concluded; when relevant property is acquired (if the agreement relates to subsequently-acquired assets); or when the issue of the validity of the security is raised? None of these three candidates yields a wholly satisfactory answer. The time of conclusion will not work with after-acquired property: a court cannot force someone to do anything with an asset they do not yet own. The time of acquisition seems more promising [47]: but it unfortunately contradicts clear authority. In *Re Lind* [48] a debtor in 1905 agreed with his creditor to charge his prospective interest under his mother's estate. Having been bankrupted in 1908 and discharged in 1910, he came into the estate in 1914. A 1911 incumbrancer with an interest in the property comprised in the estate argued that the 1905 agreement, and with it the security it created, had been annulled by the 1910 bankruptcy discharge and thus could not have been specifically enforced in 1914. The Court of Appeal, however, disagreed. That 1905 agreement had created an automatic future interest in the after-acquired property, which in the words of Swinfen Eady LJ, "does not merely rest in, and amount to, a right in contract, giving rise to an action".[49]

The one remaining possibility, the time when the secured party seeks to rely on the security, is also hard to reconcile with authority, this time in the shape of *Metcalfe v Archbishop of York* [50]. Between 1803 and 1817 it was legally possible for an Anglican clergyman to mortgage his living: before 1803, and again after 1817, it was not. In 1811 W agreed to charge to A any living he might be preferred to; he received the living of Leake in 1814 and some years later became insolvent. In 1832 his sequestrator [51], B, argued that A's interest must be invalid, since by then specific performance of the 1811 agreement was clearly out of the question. Despite its plausibility, B's argument was summarily rejected.

The conclusion seems clear: however plausible the idea may sound, it is difficult, if not impossible, to come up with a workable definition of a contract "of which a Court of equity will decree specific performance".

(c) The function of specific performance: is there anything for the court to enforce?

Aside from the above two problems, there is also a third. The point of an order of specific performance is ordinarily to tell somebody to do something (or, in the case of signing a document, to clear the way for a court official to execute it in lieu[52]). But if we take an agreement aimed at creating security over personalty, an immediate question arises in connection with specific performance: what is a court hypothetically being asked to tell the owner to do? Since there are traditionally two kinds of fixed consensual security over

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46 An instance might be where an equitable secured party acted inequitably by standing by and allowing a third party to take an equitable security in good faith over the same property.

47 And is supported by Keeler: see J.Keeler, "Some Reflections on Holroyd v Marshall" (1969) 3 Adelaide L.Rev. 360 at 371.

48 [1915] 2 Ch 345.

49 See *Re Lind* [1915] 2 Ch 345 at 360; note also Bankes L.J. at 375.

50 (1836) 1 My. & Cr. 547; 40 E.R. 485. See too *Pullan v Koe* [I913] 1 Ch. 9 (not strictly a security case, but still in point: promise to settle after-acquired property held effective to transfer it in equity, even though property acquired over six years earlier and hence claim in contract statute-barred).

51 A church official charged with taking over the profits of a living in the event of an interregnum, or where the incumbent was insolvent.

52 Under s.39 of the Senior Courts Act 1981.

personalty: a charge, and a mortgage [53], the question falls to be dealt with in respect of each. Whichever one chooses, however, it is (as will appear below) easier posed than answered.

(i) Charges

Take first the charge, a super-simple form of non-possessory consensual security interest demanding neither formality (save possibly with equitable interests[54]) nor registration (except where the Bills of Sale Acts apply[55]), but existing merely an agreement for property to stand security[56]. Atkin LJ summed it up in *National Provincial Bank v Charnley* [57]:

> "... [W]here in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of a debt, and that the creditor shall have a present right to have it made available, there is a charge, even though the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right of property, either absolute or special, or any legal right to possession, but only gets a right to have the security made available by an order of the Court."[58]

With such an agreement in place and the money advanced, there is (it is submitted) simply nothing for specific performance to do. The transaction is complete as it is. No formality remains unfulfilled. The security is in place, in precisely the form the parties desire. If the underlying debt remains unpaid, a court sale is available on application. So too with after-acquired property; at least as from the moment of acquisition, it is caught, with the same result. Again, the chargee's interest is ipso facto vested in the chargee, with nothing more needing to be done and hence no remedy necessary to get it done.

(ii) Mortgages

If charges are problematical, what about mortgages? Surely an agreement for a mortgage over a chattel (or a debt) is like an equitable mortgage of land: an undertaking to enter into a legal mortgage on request, specifically enforceable in case of refusal and meanwhile creating a provisional equitable interest? Looked at closely, however, it is suggested that even this analogy falls apart.

For one thing, it does not work with book-debts or things in action [59]. Assignment of debts in equity depends simply on agreement between assignor and assignee, not on any question of specific performance [60]. We know (from *Tailby v Official Receiver*, above) that

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53 For the distinction see *Swiss Bank Corporation v. Lloyds Bank Ltd* [1982] A.C. 584 at 594 (Buckley LJ in the CA).

54 Because of s.53(1)(c) of the Law of Property Act 1925. But even here there may be some doubt, depending on how one reads the effect of *Oughtred v Inland Revenue Commrs* [1960] A.C. 206; [1959] 3 All E.R. 623.

55 Note that although equitable charges created by UK companies are caught by Part 25 of the Companies Act 2006, an unregistered charge remains perfectly valid as between the parties to it, except in cases of insolvency or competing security interests in the same asset.

56 See *Cousins: The Law of Mortgages*, 4th ed (London: Sweet & Maxwell, 2017), para.6-01.

57 [1924] 1 K.B. 431

58 [1924] 1 K.B. 431 at 449-450.

59 In the case of fixed security over a debt a mortgage, rather than a charge, is presumed: see *Tancred v Delagoa Bay Ry Co* (1889) 23 Q.B.D. 239 (holding that an agreement for a debt to stand security for an obligation owed to a third party is presumptively not an assignment "by way of charge only" within what is now s.136 of the Law of Property Act 1925).

60 *Western Wagon & Property Co v West* [1892] 1 Ch 271 at 175 (Chitty J); *Hewett v Court* (1983) 149 C.L.R. 639 at 666 (Deane J).

an agreement to create security over debts causes them to stand assigned as security either immediately, or in the case of future debts when they come into existence or otherwise reach the mortgagor's hands. The agreement, in other words, constitutes the assignment [61]. But if so we are back to the original problem. Just as with a charge, once we have agreement there is nothing more to do, and therefore nothing for specific performance to bite on. Nor, it should be noted, can we escape this bind by positing an implicit agreement for a legal assignment under s.136 of the Law of Property Act 1925. Not only does this possibility not apply to all debts [62]; more to the point, legal assignment was only created by statute in 1876, and the orthodoxy about an agreement having to be specifically performable dates from much earlier, when all assignments were perforce equitable [63].

What about chattels, where (in contrast to the position with intangibles) a legal mortgage is, and always always has been, possible? Unfortunately the specific enforcement thesis is difficult here too, for at least two reasons. One is that, although parties *could* stipulate for the future grant of a legal mortgage there is no reason why they necessarily *should*. They might merely agree on an equitable mortgage (which, after all, would in most cases serve their purpose perfectly well) [64]. But there is another more substantial point too. As we know, with a few exceptions [65] a common law chattel mortgage takes effect as a transfer of legal ownership, coupled with a duty in the secured party to retransfer it on discharge of the debt [66]. The difficulty here is that with goods already owned by the mortgagor [67] (the only relevant situation, since there can it seems be no legal mortgage of future goods), the necessary transfer of ownership can take effect by mere agreement [68], as with sales of goods [69], thus again leaving the specific remedy with nothing to do. The agreement itself here, indeed, creates not only an equitable but potentially a legal, mortgage [70].

Technically we could rescue the specific performance analysis if we widened the meaning of "specific performance" to cover not only telling a defendant to do something, but also "automatic" enforcement as a matter of law, as is the case with agreements to create security [71]. But this takes us little further [72]. It not only stretches legal language to

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61 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] A.C. 454 at 461-462 (Lord Macnaghten). See too *Re Williams* [1930] 2 Ch 378 at 382-383 (Farwell J).

62 Part of a debt, for example, remains unassignable at law to this day: *Re Steel Wing Co Ltd* [1921] 1 Ch. 349.

63 Moreover, this is not a problem limited to book-debts proper. Exactly the same argument may apply to other obligations: see, for example, life insurance policies, where prior to the Policies of Assurance Act 1867 a legal assignment was impossible and hence an equitable assignment was all the assignee could ever expect.

64 Thus explaining Lord Cottenham's down-to-earth comment in *Metcalfe v Archbishop of York* (1836) 1 My. & Cr. 547 at 557; 40 E.R. 485 at 489: "It was then said, for the Defendants, that all equitable charges rest on specific performance. This is by no means so. The equitable incumbrancer has totally different remedies. What right has an equitable mortgagee by a deposit of deeds to ask for a legal mortgage?"

65 For example, UK-registered ships: see the Merchant Shipping Act 1995, Sched. 1, para.10(a).

66 On the nature of a mortgage of chattels see e.g. M.Bridge, *Personal Property Law*, 4th edn (Oxford: Oxford University Press, 2015), Chap.8.

67 There can it seems be no legal mortgage of unascertained or future goods because of *Lunn v Thornton* (1845) 1 C.B. 379; 135 E.R. 587, holding that legal title to future goods cannot pass by mere agreement. *Lunn*'s case has been statutorily reversed in the case of sales (see Sale of Goods Act 1979, s.18, Rule 5(1), specifically referring to unascertained goods): but it remains good law where the Act does not apply, as in the case of agreements where the real intention is to create a security.

68 See *Flory v Denny* (1852) 7 Ex 581 at 584-585; 155 E.R. 1080 at 1081-1082 (Pollock CB).

69 Sale of Goods Act 1979, s.17.

70 And even if it does not, there seems to be no objection to an agreement to create an equitable mortgage as such, without any obligation to go further and create a legal one.

71 As has sometimes been suggested. See e.g. Deane J in *Hewett v Court* (1983) 149 C.L.R. 639 at 665 (necessity of specific performance "must be understood as meaning not merely specific performance in the primary sense of the enforcing of an executory contract by compelling the execution of an assurance

breaking point, but turns out ultimately vacuous. Instead of saying that an agreement for consideration to create a security interest has that effect provided that it is an agreement to which the law gives effect, we might as well simply remove specific performance from the equation altogether.

4. Taking stock: the true rule

If the above is correct, then for charges over personalty in general it is hard to see how a requirement for a specifically enforceable agreement can make any serious sense. Admittedly not all the arguments outlined above apply to every form of personalty. Some types of personal property, for example, do bar transfer by agreement because of stipulated formalities for legal transfer: notably, securities such as shares or debentures [73], life insurance policies [74], statutory intellectual property rights [75] (other than copyright [76]), and possibly a few others.[77] In such cases the arguments at (a) and (c) above cannot apply. There are formalities to be gone through which are not self-executing; and there would at least be some function served by an order to (say) a would-be mortgagor to execute, or have executed for them by the court, a deed of transfer, stock transfer form, written assignment, or whatever. But this is not enormously important, since the equally formidable arguments at (b) – the difficulty in making sense of the concept of a contract of which specific performance would be granted – continue to obtain.

In short, it is submitted that the true rule as regards security over personalty is the simple one we suggested at the beginning of the article: equitable securities are purely and simply consensual interests. Just as at common law the owner of a chattel can pass title to it by a mere contract of sale, so also the owner of an asset can in equity create a charge or mortgage over it by merely agreeing to do so. The "familiar doctrine of equity" in *Palmer v Carey* [78] can thus be rewritten as providing simply that any contract for valuable consideration to charge a subject matter passes a beneficial interest by way of security. The only further condition such interests are subject to is any statutory requirement for registration of security interests, for example under the bills of sale legislation or Part 25 of the Companies Act 2006: but if these do not apply, agreement suffices on its own.

5. Qualifications

Although the general rule is the one just stated, it is nevertheless (it is suggested) subject to two qualifications.

First, it has thus far been assumed that the parties did indeed intend their agreement to create an automatic equitable interest in relevant personalty, either

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to complete it but also the protection by injunction or otherwise of rights acquired under a contract"); also the earlier Australian decision in *King v Greig* [1931] V.L.R. 413 at 435.

72 This view does have one possible advantage: namely, that it acknowledges the difference between contract and conveyance by accepting that something, however insubstantial, has to happen in order to turn a promise into a proprietary interest. But this is of largely theoretical and abstract interest.

73 See the Stock Transfer Act 1963 (as adjusted by the Stock Transfer Act 1982).

74 See the Policies of Assurance Act 1867.

75 See e.g. Patents Act 1977, s.30; Trade Marks Act 1994, s.24.

76 Copyright is an exception because of the effect of s.91 of the Copyright, Designs and Patents Act 1988.

77 One such further example being bills of lading: cf *Lutscher v Comptoir D'escompte de Paris* (1876) 1 Q.B.D. 709, esp at 812. To these might have to be added, according to one's view of *Oughtred v Inland Revenue Commrs* [1960] A.C. 206, equitable interests arising under trusts and wills, in so far as s.53(1)(c) of the Law of Property Act 1925 would require writing to perfect the necessary transfer of the equitable interest.

78 [1926] A.C. 703 at 706; above, note 2.

immediately (in the case of existing property) or on acquisition (in the case of future-acquired assets). In practice, this will nearly always be the case. At least once money has been advanced against an agreement for security, the inference is likely to be almost irresistible that the parties intended an immediately effective security interest, since otherwise the lender would effectively be at the borrower's mercy. However, the operative word is "almost". It must be at least theoretically possible to enter into a contract that is not intended to create any automatic security (whether now, or on acquisition in the case of future-acquired assets), but rather to remain a matter of obligation only, requiring the execution of a security *in futuro* [79]. If so, then the question of specific enforceability must logically remain relevant, since this is the only way the contract can be meaningfully given effect. Admittedly, one suspects a court would be likely to be loath to refuse an order once money had been advanced: but that does not alter the point in the text.

Secondly, there are some agreements which, whatever the parties' intent, cannot in the nature of things create an immediate equitable security interest. One example, which may explain some of the older cases, is where an agreement specifies that a security is to be created but does not adequately specify what property is to be encumbered. In such a case any automatic interest is obviously out of the question; unless and until the debtor selects and charges particular assets, an order of specific performance may be necessary to put the security in place [80]. A variant on this situation, of more contemporary significance [81], is where A agrees with B that A will at some time in the future create a security in favour not of B but of a third party C: here too it is suggested that no immediate interest can be created unless and until A formally constitutes it [82], either voluntarily or at the suit of B – or possibly C, on the basis of the Contracts (Rights of Third Parties) Act 1999 [83]. A fortiori, the same will apply if A agrees with C to procure a third party B, such as a bank or insurer, to create a security over B's property in C's favour [84]. C's only remedy here, in the absence of voluntary constitution by B, is an order of specific performance against A.

6. Conclusion

The conclusion to this article can be swiftly stated. As regards personalty the law of specific performance is irrelevant to the creation of a valid consensual equitable security. The only significantant exceptions are where there is a genuine agreement to do some act in the future such as to create a security arising only *ex tunc*, with no security arising until then, or alternatively where for some other reason there is no possibility of an immediate

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79 See the land case of *Thames Guaranty Ltd. v Campbell* [1985] Q.B. 210 at 218-219 (Mann J) (an appeal to the CA being dismissed). Another example, it is suggested, is the early case of *Re Gregory Love & Co* [1916] 1 Ch 203 (agreement by company to give debenture to director on a contingency: no immediate charge, even inchoate). See especially Sargant J in the latter case at p.211.

80 Cf the land settlement case of *Fremoult v Dedire* (1718) 1 P Wms 429; 24 E.R. 458 (promise to settle unspecified lands of £60 p.a.: no equitable interest created). A similar case is *Mornington (Lord) v Keane* (1858) 2 De G & J 292; 44 E.R. 1001, as explained by Lord Macnaghten in *Tailby v Official Receiver* (1888) 13 App.Cas. 523 at 548.

81 For example, where a charterer in a shipping contract agrees to provide security to a third party in the event of the vessel being arrested: on which see, e.g., *Harmony Innovation Shipping Pte Ltd v Caravel Shipping Inc* [2019] EWHC 1037 (Comm); [2020] 1 Lloyd's Rep. 206.

82 This conclusion seems to follow from cases such *Re D'Angibau* (1880) 15 Ch. D. 228, denying any right in a stranger to enforce a covenant to settle in equity.

83 Which specifically permits specific performance at the suit of the third party: see s.1(5).

84 Which, in a suitable case, is fairly ready available: e.g. *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd* [2020] EWHC 726 (Comm). An analogous situation would be where B, the party by whom the security was to be provided, was a company controlled by A. An order of specific performance would present no particular difficulties here (e.g. *Jones v Lipman* [1962] 1 W.L.R. 832; [1962] 1 All E.R. 442): but clearly there could be no immediate security interest.

interest being created. Assuming neither of these applies, the true rule is that equity allows the creation of a security interest in personalty by simple agreement between the parties, provided three requirements are satisfied. The first is that the agreement refer to property or assets sufficiently defined for the security to attach. The second is that the agreement is intended to create such an interest automatically without the need for any further action by the chargor. The third is that any relevant statutory requirements are satisfied, such as those of the Bills of Sale Acts. No other requirement is justified, and none exists. To that extent the law of security can be stated a good deal more simply than appears in many of the books, not to mention the decided cases.

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