

GOODE ON PROPRIETARY RIGHTS AND INSOLVENCY IN SALES TRANSACTIONS

THIRD EDITION

EDITED BY
SIMON MILLS

SWEET & MAXWELL

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FOREWORD

Many years have elapsed since the appearance of the second edition of this book, and having decided not to undertake any future editions of this or my other works I assumed it would fall into oblivion. I was therefore both surprised and delighted when Simon Mills approached me with an offer to undertake a new edition.

Simon has long had an interest in the subject of the proprietary aspects of sale, which features significantly in his busy practice at the Bar, so he has been able to bring to bear not only a deep knowledge of the principles underlying proprietary rights in sale transactions but also his experience in advising on their practical relevance and application. He has updated the whole work, substantially revised the treatment of interests in oil, gas and minerals, and added an entirely new and important section on digital gold currency and gold exchange. In thanking him most warmly for all his endeavours, as well as expressing my appreciation to the publishers Sweet & Maxwell, I feel sure that this new edition will be found as useful to practitioners and others involved in this field as appears to have been the case with previous editions.

Roy Goode
Oxford
November 6, 2009

PREFACE TO THE THIRD EDITION

It is a great honour to have been entrusted with the task of preparing the third edition of *Proprietary Rights*. This is one of a number of works produced by Professor Sir Roy Goode in order to explore and illuminate fundamental legal concepts in various areas of commercial law. His penetrating analysis and brevity of style have ensured that his books occupy the shelves of judges, practitioners, academics and students alike, and I am sure that they will continue to do so for years to come. It is a remarkable testimony to his work that we all continue to reach for and learn so much from his books.

I have approached the original text with a light brush and changed little except as necessarily required due to developments in case law or statute. However, the text has substantially been rewritten to take into account two important statutory developments which have addressed problems previously explored in earlier editions of the book. First, the inability of the pre-paying buyer to acquire a proprietary interest in an undivided bulk, which had been trenchantly criticised in Chapter 1, has now been rectified by the new sections 20A and 20B of the Sale of Goods Act 1979. Secondly, Professor Goode had highlighted the difficulties caused by section 1 of the Bills of Lading Act 1855 which prevented the consignee of goods under a bill of lading from suing the carrier for loss or damage to goods unless he had acquired property in the goods. The 1855 Act was finally repealed by the Carriage of Goods by Sea Act 1924 which divorced the passing of property from rights of suit under the bill of lading. In addition to these welcome statutory developments, I have incorporated the new landscape of the law of tracing, as mapped out by Professor Lionel Smith and adopted by the House of Lords in *Foskett v McKeown* [2001] 1 A.C. 102.

I have sought to stay true to Professor Goode's practice of not overloading the text with vast lists of authorities, as these often confuse, rather than enlighten, the reader. I have also continued his exploration into the application of commercial law in practice, and in this regard there is a new section in Chapter 2 which explores some interesting modern developments in the field of investment in precious metals.

I am indebted to various people who have assisted in the preparation of this work. Primarily, I wish to thank Professor Goode, not only for entrusting his book into my hands and for his unfailing and kind assistance

throughout the last year, but also for producing such a magnificent body of work that has been my constant guide through the minefield of commercial practice. I would also like to thank David Mildon Q.C., for his patience in reading a draft of the chapter on oil and gas law and for giving me the benefit of his expertise in this area of law; Marina Comminos, General Counsel of Electronic Shipping Solutions, for taking the time and trouble to discuss the intricacies of the new ESS-Databridge electronic bill of lading; Donald Chard of The Chamber of Shipping, and Bob Jones and Colin Dunlop of Atlantic Container Line UK Ltd, for discussing various aspects of modern shipping practice; Adrian Ash of BullionVault, who assisted me enormously in understanding the fast-developing world of investing in precious metals; and Professor Norman Palmer for sending me parts of the proofs for the third edition of his magisterial work, *Palmer on Bailment*.

I would also like to record my appreciation to all at Sweet & Maxwell, but particularly Eleanor Norton, Katherine Milburn and Claire Patient for their persistence and patience in putting up with silences and delays caused by me trying to maintain a full-time practice while writing. Thanks are also due to Paula Clifford and Amjed Ghafoor for preparing the index and tables respectively.

Lastly, I wish to thank those close to me: my parents, to whom I owe so much, and my family, Hélène, Estelle and Antoine, who are a constant source of support and encouragement.

I have endeavoured to state the law as at September 18, 2009.

Simon Mills
Temple
October 28, 2009

PREFACE TO THE SECOND EDITION

The first edition of this book represented an attempt to provide a conceptual treatment of ownership and possession in relation to contracts of sale and to analyse the forms of real right capable of being created and the means by which such rights may be acquired and lost. The welcome given to the book indicated that such an analysis was found helpful both to practising lawyers and academic scholars.

In this new edition the structure of the book remains essentially the same but the text has been revised, expanded and updated and includes the most recent developments in this field.

I have taken the opportunity to correct a sprinkling of errors in the first edition, to develop the distinction between real and personal rights and to enlarge the treatment of the legal effect of commingling of goods, on which there have been two important recent decisions, namely *Indian Oil Corp Ltd v Greenstone Shipping SA (The Ypatiana)* [1987] 2 Lloyd's Rep. 286, a decision of the English High Court, and *Coleman v Harvey*, decided by the New Zealand Court of Appeal in March 1989.

The treatment of *Romalpa* clauses has given rise to continued discussions, debate and controversy, reflected in a revision of the text, which also deals with the impact of an administration petition and order under the Insolvency Act 1986 on the enforcement of rights under retention of title agreements. Although there are now a great many reported cases involving proprietary rights under contracts of sale, even the volume of these does not give a true picture of the significance of the subject, which forms part of the staple diet of liquidators, administrative receivers and administrators faced with claims of creditors asserting rights in rem over goods supplied under a contract of sale.

I should like to thank Professor David MacLauchlan of the Victoria University of Wellington for a helpful discussion on a number of points and for drawing my attention to a number of New Zealand cases; to Professor Terence Daintith, Director of the Institute of Advanced Legal Studies, for advising me on developments in oil and gas law; to the various reviewers of the first edition, not only for their kind reception of the book but also for their penetrating comments and criticisms; and, once again, to the publishers Sweet and Maxwell for all their labours in the production of the book.

The law is stated on the basis of materials available to me at May 1, 1989.

Centre for Commercial Law Studies
Queen Mary College
May 4, 1989

R. M. Goode

PREFACE TO THE FIRST EDITION

This book reproduces, with revisions and additions, the fourth series of Commercial Law Lectures, which I delivered at Queen Mary College in January and February 1985.

The contract of sale of goods is at once the most common and the most complex of all contracts, generating a mass of case law and an untold number of unreported disputes. I have taken as my theme the acquisition and loss of proprietary rights under contracts of sale, a subject which is of crucial importance in the light of the present number and magnitude of business insolvencies and which raises some of the most acute conceptual problems the practising lawyer is likely to encounter.

I have ventured into a number of areas on which there has hitherto been a dearth of legal analysis. Among these are: the concept of indirect constructive possession, where the bailor at will holds his rights on behalf of another; the acquisition of proprietary rights under contracts relating to oil, gas and minerals; the legal implications of the indemnity system currently employed to overcome delays in the delivery of bills of lading, and the potential impact of new technology relating to electronic processing of trade data; and the purchase of goods through an agent. I have also endeavoured to give what is, I hope, an accurate presentation of the current law governing reservation of title, rightly characterised by Staughton J., as "a maze if not a minefield" (*Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 2 All E.R. 152 at p.159). The Appendix contains the hitherto unpublished transcript of the important decision of Oliver J. (as he then was) in *The London Wine Company (Shippers) Ltd* (1975).

I am indebted to a number of people for information and specimen documents. I should like to express my particular thanks to Francis Reynolds, of Worcester College, Oxford, for drawing my attention to the *Maynegrain* decision; to Julian Armstrong, of Esso Petroleum, Adrian Montague of Messrs Linklaters and Paines, Mike Smith of Lloyd's Bank International, Krystyna Novak of Citibank N.A., Professor Michael Crommelin of Melbourne University, Professor Richard Benthams of the Centre for Petroleum Law Studies, Dundee University and Brian Youngman, former Deputy Legal Adviser to the National Coal Board, for their very helpful information on problems of oil, gas and minerals exploitation; John

Wood of Mundogas, Alan Urbach of SeaDocs and Richard Dale of SITPRO, for enlightenment on the complexities of the indemnity system referred to above; Derek Kirby-Johnson, of Messrs Monier Williams, for valuable information on the operation of string contracts; and Gerry Weiss of Cork Gully and Paul Shipperlee of Stoy Hayward for an insight into the practical problems created by reservation of title clauses. Once again, I should like to express my appreciation to the staff of Sweet & Maxwell for all their work on the production of this book.

The law is stated in the light of the materials available to me as at September 1, 1985.

Centre for Commercial Law Studies,
Queen Mary College.

R. M. Goode
September 1, 1985

TABLE OF CASES

Abbey National Building Society v Cann [1991] 1 A.C. 56; [1990] 2 W.L.R. 832; [1990] 1 All E.R. 1085; [1990] 2 F.L.R. 122; (1990) 22 H.L.R. 360; (1990) 60 P. & C.R. 278; (1990) 87(17) L.S.G. 32; (1990) 140 N.L.J. 477 HL	3.24
Acton v Blundell, 152 E.R. 1223; (1843) 12 M. & W. 324; (1843) 13 L.J. Ex. 289 Ex Ct	2.01
Agip (Africa) Ltd v Jackson [1990] Ch. 265; [1989] 3 W.L.R. 1367; [1992] 4 All E.R. 385; (1989) 86(3) L.S.G. 34; (1990) 134 S.J. 198 Ch D.....	5.30, 5.35
Agnew v Inland Revenue Commissioner. <i>See</i> Brumark Investments Ltd, <i>Re</i>	
Akron Tyre Co Pty Ltd v Kittson (1951) 82 C.L.R. 471	5.18
Albacruz (Cargo Owners) v Albazero (Owners). <i>See</i> Owners of Cargo Laden on Board the Albacruz v Owners of the Albazero	
Aldridge v Johnson (1857) 7 E. & B. 885	1.36
Alicia Hosiery v Brown Shipley & Co [1970] 1 Q.B. 195; [1969] 2 W.L.R. 1268; [1969] 2 All E.R. 504; [1969] 2 Lloyd's Rep. 179; (1969) 113 S.J. 466 QBD	1.32
Aluminium Industrie Vaassen BV v Romalpa Aluminium [1976] 1 W.L.R. 676; [1976] 2 All E.R. 552; [1976] 1 Lloyd's Rep. 443; (1976) 120 S.J. 95 CA (Civ Div) ...	3.08, 5.01, 5.02, 5.03, 5.38, 5.42, 5.50, 5.55, 5.56, 5.57, 5.58, 5.69
Andrabell, <i>Re</i> [1984] 3 All E.R. 407 Ch D	5.55
Ant Jurgens Margarinefabrieken v Louis Dreyfus & Co [1914] 3 K.B. 40 KBD	4.22
Aramis, The; Aramis, The [1989] 1 Lloyd's Rep. 213 CA (Civ Div)	4.13
Armour v Thyssen Edelstahlwerke AG [1991] 2 A.C. 339; [1990] 3 W.L.R. 810; [1990] 3 All E.R. 481; [1991] 1 Lloyd's Rep. 95; 1990 S.L.T. 891; [1990] B.C.C. 925; [1991] B.C.L.C. 28; (1990) 134 S.J. 1337 HL	5.60
Astley Industrial Trust Ltd v Miller [1968] 2 All E.R. 36 Assizes (Liverpool)..	3.13
Atlantic Computer Systems Plc, <i>Re</i> [1992] Ch. 505; [1992] 2 W.L.R. 367; [1992] 1 All E.R. 476; [1990] B.C.C. 859; [1991] B.C.L.C. 606 CA (Civ Div)	5.86
Attorney General v Chambers, 43 E.R. 486; (1854) 4 De G.M. & G. 206 Ct of Chancery	2.09
Attorney General v Emerson (John) [1891] A.C. 649 HL	2.09
Attorney General v Morgan [1891] 1 Ch. 432 CA	2.08
Banner Homes Holdings Ltd (formerly Banner Homes Group Plc) v Luff Developments Ltd (No.2) [2000] Ch. 372; [2000] 2 W.L.R. 772 CA (Civ Div)	3.34
Banque Belge pour l'Etranger v Hambrouck [1921] 1 K.B. 321 CA	5.35
Barber v Meyerstein. <i>See</i> Meyerstein v Barber	
Barclays Mercantile Business Finance Ltd v Sibec Developments Ltd; sub nom. Sibec Developments, <i>Re</i> [1992] 1 W.L.R. 1253; [1993] 2 All E.R. 195; [1993] B.C.C. 148; [1993] B.C.L.C. 1077 Ch D (Companies Ct)	5.87

Batut v Hartley (1871–72) L.R. 7 Q.B. 594; (1872) 26 L.T. 968 QB.....	4.09
Biddle v Bond, 122 E.R. 1179; (1865) 6 B. & S. 225 KB.....	4.09
Bishopsgate Investment Management Ltd (In Liquidation) v Homan [1995] Ch. 211; [1994] 3 W.L.R. 1270; [1995] 1 All E.R. 347; [1994] B.C.C. 868; (1994) 91(36) L.S.G. 37; (1994) 138 S.J.L.B. 176 CA (Civ Div).....	5.23
Blyth Shipbuilding & Dry Docks Co Ltd, Re (No.3); sub nom. Forster v Blyth Shipbuilding & Dry Docks Co Ltd; Blyth Shipbuilding & Dry Docks Co Ltd, Re [1926] Ch. 494; (1926) 24 Ll. L. Rep. 139 CA.....	1.49
Bocardo SA v Star Energy UK Onshore Ltd; sub nom. Star Energy UK Onshore Ltd v Bocardo SA [2009] EWCA Civ 579; [2009] 2 P. & C.R. 23; [2009] 25 E.G. 136 (C.S.); [2009] N.P.C. 78.....	2.05
Bolton Partners v Lambert (1889) L.R. 41 Ch. D. 295 CA.....	3.45
Bolus & Co Ltd v Inglis [1924] N.Z.L.R. 164.....	3.08
Bond Worth Ltd, Re [1980] Ch. 228; [1979] 3 W.L.R. 629; [1979] 3 All E.R. 919; (1979) 123 S.J. 216 Ch D.....	3.21, 5.42, 5.55, 5.61
Borden (UK) Ltd v Scottish Timber Products Ltd [1981] Ch. 25; [1979] 3 W.L.R. 672; [1979] 3 All E.R. 961; [1980] 1 Lloyd's Rep. 160; (1979) 123 S.J. 688 CA (Civ Div).....	5.42, 5.45
Borealis AB (formerly Borealis Petrokemi AB and Statoil Petrokemi AB) v Stargas Ltd (The Berge Sisar); Berge Sisar, The [2001] UKHL 17; [2002] 2 A.C. 205; [2001] 2 W.L.R. 1118; [2001] 2 All E.R. 193; [2001] 1 All E.R. (Comm) 673; [2001] 1 Lloyd's Rep. 663; [2001] C.L.C. 1084; (2001) 98(20) L.S.G. 43; (2001) 145 S.J.L.B. 93.....	1.23
Borrowman Phillips & Co v Free & Hollis (1878–79) L.R. 4 Q.B.D. 500 CA..	1.47
Borys v Canadian Pacific Railway Co [1953] A.C. 217; [1953] 2 W.L.R. 224; [1953] 1 All E.R. 451; (1953) 97 S.J. 78 PC (Can).....	2.01
Brandt v Liverpool Brazil & River Plate Steam Navigation Co Ltd; sub nom. Brandt & Co v River Plate Steam Navigation Co Ltd [1924] 1 K.B. 575; [1923] All E.R. Rep. 656; (1923–24) 17 Ll. L. Rep. 142 CA.....	1.25, 4.13
Braymist Ltd v Wise Finance Co Ltd; sub nom. Wise Finance Ltd v Braymist Ltd [2002] EWCA Civ 127; [2002] Ch. 273; [2002] 3 W.L.R. 322; [2002] 2 All E.R. 333; [2002] B.C.C. 514; [2002] 1 B.C.L.C. 415; [2002] 9 E.G. 220 (C.S.); (2002) 99(13) L.S.G. 25; (2002) 146 S.J.L.B. 60; [2002] N.P.C. 25 CA (Civ Div).....	3.47
Bridges & Salmon Ltd v Owner of The Swan (The Swan); Marine Diesel Service (Grimsby) Ltd v Owner of The Swan; Swan, The [1968] 1 Lloyd's Rep. 5; (1968) 118 N.L.J. 182 PDAD.....	3.46
Brooks Robinson Pty Ltd v Rothfield [1951] V.L.R. 405.....	1.36
Brumark Investments Ltd, Re; sub nom. Inland Revenue Commissioner v Agnew; Agnew v Inland Revenue Commissioner [2001] UKPC 28; [2001] 2 A.C. 710; [2001] 3 W.L.R. 454; [2001] Lloyd's Rep. Bank. 251; [2001] B.C.C. 259; [2001] 2 B.C.L.C. 188 PC (NZ).....	1.37, 5.52
Buckley v Gross, 122 E.R. 213; (1863) 3 B. & S. 566 QB.....	5.20
Butler Machine Tool Co v Ex-cell-o Corp (England) [1979] 1 W.L.R. 401; [1979] 1 All E.R. 965; (1977) 121 S.J. 406 CA (Civ Div).....	5.73
CKE Engineering Ltd (In Administration), Re [2007] B.C.C. 975.....	5.25
Caledonian Railway Co v Glenboig Union Fireclay Co; sub nom. Caledonian Railway Co v Glenboig Union Fireclay Co Ltd [1911] A.C. 290; 1911 S.C. (H.L.) 72; 1911 1 S.L.T. 416 HL.....	2.01
Capital and Counties Bank Ltd v Warriner (1896) 1 Com.Cas. 314.....	4.20
Cardigan (Earl of) v Armitage 107 E.R. 356; (1823) 2 B. & C. 197 KB.....	2.06
Carlos Federspiel & Co SA v Charles Twigg & Co Ltd [1957] 1 Lloyd's Rep. 240 QBD (Comm).....	1.49, 4.29

TABLE OF CASES

Cassaboglou v Gibb; sub nom. Cassaboglou v Gibbs (1882–83) L.R. 11 Q.B.D. 797 CA	3.08, 3.27
Chapman Bros v Verco Bros & Co Ltd (1933) 49 C.L.R. 306	5.06
Charge Card Services Ltd (No.2), Re [1989] Ch. 497; [1988] 3 W.L.R. 764; [1988] 3 All E.R. 702; (1988) 4 B.C.C. 524; [1988] B.C.L.C. 711; [1988] P.C.C. 390; [1988] Fin. L.R. 308; (1989) 8 Tr. L.R. 86; (1988) 85(42) L.S.G. 46; (1988) 138 N.L.J. Rep. 201; (1988) 132 S.J. 1458 CA (Civ Div) ..	3.07
Chattock v Muller (1878) L.R. 8 Ch. D. 177 Ch D	3.34
Chow Yoong Hong v Choong Fah Rubber Manufactory [1962] A.C. 209; [1962] 2 W.L.R. 43; [1961] 3 All E.R. 1163; (1961) 105 S.J. 1082 PC (Federated Malay States)	2.38
Clough Mill Ltd v Martin [1985] 1 W.L.R. 111; [1984] 3 All E.R. 982; (1985) 82 L.S.G. 1075; (1985) 82 L.S.G. 116; (1984) 128 S.J. 850 CA (Civ Div) ..	2.38, 5.06, 5.40, 5.48, 5.59
Cock v Taylor, 104 E.R. 424; (1811) 13 East 399 KB	4.13
Coleman v Harvey (1989) 1 N.Z.L.R. 723	5.09
Collen v Wright, 120 E.R. 241; (1857) 8 El. & Bl. 647 Ex Ct Chamber	3.46
Commissioner for Railways v Valuer General [1974] A.C. 328; [1973] 2 W.L.R. 1021; [1973] 3 All E.R. 268; (1973) 117 S.J. 165 PC (Aus)	2.05
Compaq Computer Ltd v Abercorn Group Ltd (t/a Osiris) [1991] B.C.C. 484; [1993] B.C.L.C. 603 Ch D	5.64
Costello v Chief Constable of Derbyshire [2001] EWCA Civ 381; [2001] 1 W.L.R. 1437; [2001] 3 All E.R. 150; [2001] 2 Lloyd's Rep. 216; [2001] Po. L.R. 83 CA (Civ Div)	1.15
Cotronic (UK) Ltd v Dezonie (t/a Wendaland Builders Ltd) [1991] B.C.C. 200; [1991] B.C.L.C. 721 CA (Civ Div)	3.47
Customs and Excise Commissioners v Everwine Ltd; sub nom. Everwine Ltd v Customs and Excise Commissioners [2003] EWCA Civ 953; (2003) 147 S.J.L.B. 870	1.65
DF Mount v Jay & Jay (Provisions) Co [1960] 1 Q.B. 159; [1959] 3 W.L.R. 537; [1959] 3 All E.R. 307; [1959] 2 Lloyd's Rep. 269; (1959) 103 S.J. 636 QBD	4.24
Dawber Williamson Roofing Ltd v Humberside County Council (1979) 14 B.L.R. 70	1.36, 1.37, 5.67
Dearle v Hall, 38 E.R. 475; (1828) 3 Russ. 1 Ch D	5.63, 5.64, 5.65, 5.66
Diplock's Estate, Re. See Ministry of Health v Simpson	
Dracachi v Anglo-Egyptian Navigation Co (1867–68) L.R. 3 C.P. 190 CCP ..	4.11
Dublin City Distillery Ltd v Doherty [1914] A.C. 823 HL (UK-Irl)	1.22, 1.25
E Bailey & Co v Balholm Securities [1973] 2 Lloyd's Rep. 404 QBD (Comm)	3.08
E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbutnot Factors Ltd [1988] 1 W.L.R. 150; (1987) 3 B.C.C. 608; [1987] B.C.L.C. 522 QBD	5.58, 5.64
ED&F Man Ltd v Nigerian Sweets & Confectionery Co [1977] 2 Lloyd's Rep. 50 QBD (Comm)	3.07
EE & Brian Smith (1928) Ltd v Wheatsheaf Mills Ltd [1939] 2 K.B. 302; (1939) 63 Ll. L. Rep. 237 KBD	1.47
East West Corp v DKBS 1912; Utaniko Ltd v P&O Nedlloyd BV; sub nom. East West Corp v Dampskibsselskabet AF 1912 A/S; P&O Nedlloyd BV v Utaniko Ltd; Dampskibsselskabet AF 1912 A/S v East West Corp [2003] EWCA Civ 83; [2003] Q.B. 1509; [2003] 3 W.L.R. 916; [2003] 2 All E.R. 700; [2003] 1 All E.R. (Comm) 524; [2003] 1 Lloyd's Rep. 239; [2003] 1 C.L.C. 797; (2003) 100(12) L.S.G. 31	1.23, 4.11
Eastgate Ex p. Ward, Re [1905] 1 K.B. 465 KBD	1.33

Enichem Anic SpA v Ampelos Shipping Co Ltd (The Delfini); Delfini, The [1990] 1 Lloyd's Rep. 252 CA (Civ Div)	4.02, 4.11, 4.14
Evergreen Marine Corp v Aldgate Warehouse (Wholesale) Ltd [2003] EWHC 667 (Comm); [2003] 2 Lloyd's Rep. 597	4.11
Fairfax Gerrard Holdings Ltd v Capital Bank Plc [2007] EWCA Civ 1226; [2008] 1 All E.R. (Comm) 632; [2008] 1 Lloyd's Rep. 297; [2007] 2 C.L.C. 896; [2008] B.P.I.R. 332	1.11
Farenco Shipping Co Ltd v Daebo Shipping Co Ltd (The Bremen Max); Bremen Max, The [2008] EWHC 2755 (Comm); [2009] 1 All E.R. (Comm) 423; [2009] 1 Lloyd's Rep. 81	4.50
Farina v Home, 153 E.R. 1124; (1846) 16 M. & W. 119 Ex Ct	4.07
Fashoff (UK) Ltd (t/a Moschino) v Linton [2008] EWHC 537 (Ch); [2008] B.C.C. 542; [2008] 2 B.C.L.C. 362	5.86
Foskett v McKeown [2001] 1 A.C. 102; [2000] 2 W.L.R. 1299; [2000] 3 All E.R. 97; [2000] Lloyd's Rep. I.R. 627; [2000] W.T.L.R. 667; (1999-2000) 2 I.T.E.L.R. 711; (2000) 97(23) L.S.G. 44 HL 3.35, 5.20, 5.27, 5.28, 5.30, 5.32, 5.35	5.35
Four Point Garage Ltd v Carter [1985] 3 All E.R. 12 QBD	1.18
Future Express, The; Future Express, The [1993] 2 Lloyd's Rep. 542 CA (Civ Div)	1.23, 1.24, 4.05
Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd (1987) 61 A.L.J.R. 415	1.18
Gill and Duffus (Liverpool) v Scruttons [1953] 1 W.L.R. 1407; [1953] 2 All E.R. 977; [1953] 2 Lloyd's Rep. 545; (1953) 97 S.J. 814 Assizes (Liverpool)	5.20
Ginzberg v Barrow Haematite Steel Co and McKellar [1966] 1 Lloyd's Rep. 343; 116 N.L.J. 752 QBD	4.30
Glencore International AG v Metro Trading International Inc (No.2); sub nom. Glencore International AG v Metro Trading International Inc (formerly Metro Bunkering & Trading Co) (No.2) [2001] 1 All E.R. (Comm) 103; [2001] 1 Lloyd's Rep. 284; [2001] C.L.C. 1732 QBD (Comm)	4.41, 5.12, 5.24, 5.48
Glyn Mills Currie & Co v East and West India Dock Co (1881-82) L.R. 7 App. Cas. 591 HL	4.58
Goldcorp Exchange Ltd (In Receivership), Re; sub nom. Kensington v Liggett; Goldcorp Finance Ltd, Re [1995] 1 A.C. 74; [1994] 3 W.L.R. 199; [1994] 2 All E.R. 806; [1994] 2 B.C.L.C. 578; [1994] C.L.C. 591; (1994) 13 Tr. L.R. 434; (1994) 91(24) L.S.G. 46; (1994) 144 N.L.J. 792; (1994) 138 S.J.L.B. 127 PC (NZ) ... 1.13, 1.26, 1.33, 1.42, 1.45, 1.52, 1.60, 1.65, 1.73, 1.75, 5.23	1.65, 1.73, 1.75, 5.23
Gowan v Christie (1870-75) L.R. 2 Sc. 273 HL	2.06
Grange & Co v Taylor (1904) 9 Com.Cas. 223, (1904) 20 T.L.R. 386	4.42
Greenwood v Bennett [1973] Q.B. 195; [1972] 3 W.L.R. 691; [1972] 3 All E.R. 586; [1972] R.T.R. 535; (1972) 116 S.J. 762 CA (Civ Div)	5.20
Hallett's Estate, Re; sub nom. Knatchbull v Hallett (1879-80) L.R. 13 Ch. D. 696 CA	3.35, 5.02, 5.35, 5.36
Halt v Griffin (1833) 10 Bing. 246	3.16
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