EQUITABLE LIENS FOR THE RECOVERY OF PURCHASE MONEY

BY I. J. HARDINGHAM*

[*In the light of the recent decision of the High Court in* Hewett v. Court *the author looks at the principles relating to equitable liens in general and purchasers' liens in particular. Specific problems relating to purchasers' liens are examined: for example, the position of a purchaser of an unseparated part of a larger whole, the implications of the* Sale of Goods *legislation and the relevance of the concept to contracts of work and labour. The author concludes by submitting that a "purchaser has a lien for the recovery of purchase money provided that a subject-matter exists, referable to the purchaser's entitlement under the contract, over which the lien might fairly be asserted".*]

INTRODUCTION

This article was prompted by the recent decision of the High Court of Australia in *Hewett v. Court*.[1] There the court was called upon to consider whether a purchaser under a contract of work and labour has a lien, for the purchase money paid, over property the product of the work and labour. The court referred to the commonly recognised case of a purchaser's equitable lien over land (see *infra* A) and, while confirming that a purchaser may have an equitable lien over intangible personalty (see *infra* B), left open the question whether a purchaser under a contract of sale governed by the terms of the Sale of Goods legislation may have such a lien over goods (see *infra* C). Then, by a majority, the court concluded that, in the case before it, the purchaser ultimately did obtain an equitable lien over a transportable home which the vendor company had contracted to build for him and affix to his block of land (see *infra* D).

Speaking generally, an equitable lien is a right against property which arises automatically by implication of equity to secure the discharge of an actual or potential indebtedness.[2] It arises by operation of law and depends neither upon contract nor upon possession.[3] Even so, its application or implication may be precluded or qualified by express or implied agreement between the parties.[4] An equitable lien may, in general, be enforced in the same way as any equitable charge, namely, by sale pursuant to court order or, where the lien is over a fund, by an order for payment thereout. The court may appoint a receiver of the property in respect of which the lien is held, pending its sale.[5]

* B.A., LL.M. (Melb.), Ph.D. (Monash), Reader in Law, University of Melbourne.

1 (1983) 57 A.L.J.R. 211.

2 *Hewett v. Court* (1983) 57 A.L.J.R. 211, 221 *per* Deane J.

3 *Hewett v. Court* (1983) 57 A.L.J.R. 211, 213, 215, 216-7, 221.

4 See n. 2; see also *Dean v. Byrnes* (1864) 13 W.R. 299; 16 E.R. 35.

5 *Ibid.*; see also *Halsbury's Laws of England* (4th ed. 1973) vol. xxviii, para. 576. To the extent that an equitable lien may exist in respect of goods (see *infra* C), it will constitute a goods mortgage under, and be enforceable in the manner prescribed by, the Chattel Securities Act 1981 (Vic.).

The distinction between an equitable and a common law lien has been described in the following manner:

> An equitable lien differs from a common law lien in that a common law lien is founded on possession and, except as modified by statute, merely confers a right to detain the property until payment, whereas an equitable lien, which exists quite irrespective of possession, confers on the holder the right to a judicial sale.[6]

Perhaps the best known example of an equitable lien is the lien which equity recognises as arising in favour of a vendor to secure the actual or potential right to payment of the balance of purchase price under a contract for the sale of real estate. A purchaser has a corresponding lien to secure actual or potential rights to repayment of instalments of purchase price. If, under a contract for the sale of land, title has passed and the whole or part of the purchase price remains unpaid, the vendor will, subject to any agreement to the contrary, enjoy the benefit of an equitable lien over the land sold to secure payment to him of the unpaid purchase price. If title has not passed to the purchaser and the purchaser has paid the whole or part of the purchase price, the purchaser will, again subject to contrary agreement, enjoy the benefit of an equitable lien over the land to secure repayment to him of monies properly repayable in the event of the contract going off.[7]

In *Hewett v. Court* Gibbs C.J. rationalised these liens in the following terms:

> A vendor's lien for unpaid purchase money has been said to be founded on the principle that 'a person, having got the estate of another, shall not, as between them, keep it, and not pay the consideration': *Mackreth v. Symmons* (1808), 15 Ves. 329, at p. 340; 33 E.R. 778, at p. 782. The lien of a purchaser for the purchase money that he has paid to the vendor on a sale that has gone off through no fault of the purchaser may perhaps rest on the converse principle that he who has agreed to convey property in return for a purchase price will not be allowed to keep the price if he fails to make the conveyance. At all events, the rule has been said to be founded on 'solid and substantial justice': *Rose v. Watson* (1864), 10 H.L.C. 672, at p. 684; 11 E.R. 1187, at p. 1192.[8]

As Gibbs C.J. observed, a purchaser may assert his lien provided that the sale has gone off through no fault of his own. The vendor may, for example, be in default,[9] or the purchaser may simply have rescinded under a term enabling him to do so.[10]

A purchaser with a lien is regarded by equity as a secured creditor in respect of that part of the purchase price which has been paid, the security being, of course, a lien over the property purchased.[11] It follows that, if the purchaser has no claim against the vendor for the return of purchase monies, having paid them to a stake-holder, for example, there will be no indebtedness between vendor and purchaser and thus no lien to secure any such indebtedness.[12]

There are other equitable liens apart from vendors' and purchasers' liens.[13] Thus it has been remarked that the rules governing the circumstances in which equity

[6] *Halsbury's Laws of England* (4th ed. 1973) vol. xxviii, para. 551.
[7] See *Hewett v. Court* (1983) 57 A.L.J.R. 211, 221 *per* Deane J.
[8] (1983) 57 A.L.J.R. 211, 213.
[9] See, for example, *Hewett v. Court* (1983) 57 A.L.J.R. 211.
[10] *Whitbread & Co., Ltd v. Watt* [1902]1 Ch. 835; see, generally, *Hewett v. Court* (1983) 57 A.L.J.R. 211, 217 *per* Wilson and Dawson JJ.
[11] *Hewett v. Court* (1983) 57 A.L.J.R. 211, 213, 217; *Combe v. Lord Swaythling* [1947] Ch. 625, 628.
[12] *Combe v. Lord Swaythling*[1947] Ch. 625.
[13] See Sykes, E.I., *Law of Securities* (3rd ed. 1978) 164-7; *Halsbury's Laws of England* (4th ed. 1973-) vol. xxviii, paras 566-573.

considers that justice requires the recognition of the existence of a lien are not confined to one narrow category; the list of equitable liens may not be a closed one.[14] In *Hewett v. Court*, Deane J. indentified what he considered to be circumstances sufficient for the implication, independently of agreement, of an equitable lien (for example, a purchaser's lien) between parties in a contractual relationship:

> They are: (i) that there be actual or potential indebtedness on the part of the party who is the owner of the property to the other party arising from a payment or promise of payment either of consideration in relation to the acquisition of the property or of an expense incurred in relation to it (see *Middleton v. Magnay*, (1864), 2 H. & M. 233, at p. 237; 71 E.R. 452, at p.453; *Whitbread and Co. Ltd v. Watt* [1901] 1 Ch. 911; *Combe v. Swaythling (Lord)*, [1947] Ch. 625); (ii) that that property (or arguably property including that property: see Pollock, 'Re Wait', *L.Q.R.* (1927) vol. 43, p. 293) be specifically identified and appropriated to the performance of the contract (see per Lord Hanworth M.R., *In re Wait*, [1927] 1 Ch. 606, at pp. 622-625); and (iii) that the relationship between the actual or potential indebtedness and the identified and appropriated property be such that the owner would be acting unconscientiously or unfairly if he were to dispose of the property (or, if it be appropriate, more than a particular portion thereof) to a stranger without the consent of the other party or without the actual or potential liability having been discharged.[15]

His Honour denied that these circumstances or tests constitute a statement of exclusion. They represent a statement of what is sufficient rather than of what is essential in every relevant case.

It has already been observed that a purchaser's lien may arise in relation to contracts other than for the sale of land. Before considering the range of contractual transactions in respect of which such a lien may be relevant, attention must be given to the question whether the availability of the equitable remedy of specific performance is a necessary prerequisite of a purchaser's lien. A majority of the Court in *Hewett v. Court*[16] answered this question negatively.

Deane J. considered the issue in greatest detail. His Honour's reasons for deciding that the remedy of specific performance need not be available before an equitable lien can be established may be summarised as follows:[17]

(a) a purchaser seeking specific performance of a contract of sale is asserting a right of a different kind from that asserted by a purchaser who relies upon an equitable lien: in the first case, the purchaser seeks an order to the effect that the vendor shall perform his promise; in the second case, he seeks an order for the sale of the subject property;

(b) thus the discretionary factors leading to a denial of a decree of specific performance are not necessarily relevant to the question whether a purchaser should have a lien for the return of purchase money; it would be distinctly inequitable if, for example, a decision that a contract for the sale of land should not be specifically enforced, on the ground that specific performance would impose undue hardship on the vendor, automatically meant that a purchaser was also deprived of the benefit of an equitable lien to secure the repayment of instalments of purchase price;

(c) the test of whether a particular contract is one of which specific performance would be decreed is liable to give different answers from time to time by reason of

[14] *Hewett v. Court* (1983) 57 A.L.J.R. 211, 213 *per* Gibbs C.J.
[15] (1983) 57 A.L.J.R. 211, 223.
[16] (1983) 57 A.L.J.R. 211, 215, 221-3.
[17] (1983) 57 A.L.J.R. 211, 221-3.

intervening events which may well have no rational relevance to the question whether a party to the contract should have the benefit of an equitable lien;

(d) an equitable lien is different in character from the equitable estate or interest which passes in anticipation of the performance of a promise for valuable consideration to make a present transfer of property by way of sale or mortgage; in the former case, as has been seen, the interest arises independently of any express or implied promise to grant it; in the latter case, however, it arises as a result of a combination of the maxim that equity regards that as done which ought to be done with the availability of specific performance of a promise to do something (that is, to transfer an interest in property);

(e) authority supports the majority point of view.[18]

Finally, in the following passage, Deane J. summarised his reasoning in these terms:

> Nor, in my view, is there any valid reason in principle why the mere existence of any one of the recognised grounds for refusing specific performance of, for example, a contract for the sale of land should automatically preclude a lien over that land to secure the purchaser's right to be paid instalments of the purchase price of that property. The basis of specific performance lies in the equitable doctrine that personal obligations under a contract should be enforced where damages would be an inadequate remedy. The basis of equitable lien between parties to a contract lies in an equitable doctrine that the circumstances are such that the subject property is bound by the contract so that a sale may be ordered not in performance of the contract but to secure the payment or repayment of money. In the ordinary case of a purchaser who desires the actual performance of his contract with a defaulting vendor, an equitable lien to secure repayment of instalments of purchase price is only of real value if specific performance of the contract would not be decreed.[19]

The minority in *Hewett v. Court*,[20] Wilson and Dawson JJ., asserted, without any detailed reasoning in support, that:

> the considerations which have led equity to regard the vendor of land as being under an obligation to hold it for the benefit of the purchaser in the case of a contract which would be specifically enforced are similar to those which give rise to an equitable lien in favour of the purchaser when he has paid part of the purchase money.[21]

To the extent that their Honours suggest in this passage that the availability of specific performance is prerequisite for a purchaser's lien, it is respectfully suggested that their reasoning was convincingly refuted by Deane J.

A. CONTRACTS FOR SALE OF LAND

A purchaser under such a contract has a lien for the return of purchase money paid pending the transfer to him of title to the land.[22] As well as the limited equitable interest represented by the lien, he may also have an equitable interest of a general nature. The latter arises, as we have seen, as a result of a combination of

[18] See the cases mentioned by Gibbs C.J.: *Middleton v. Magnay* (1864) 2 H. & M. 233, 237; 71 E.R. 452, 453; *Barker v. Cox* (1876) 4 Ch.D. 464; *Levy v. Stogdon* [1898] 1 Ch. 478; although, as his Honour observed, *dicta* indicate a contrary conclusion in relation to vendors' liens: *Capital Finance Co. Ltd v. Stokes* [1969] 1 Ch. 261, 278; *London & Cheshire Insurance Co. Ltd v. Laplagrene Property Co. Ltd* [1971] Ch. 499, 514; *Re Bond Worth Ltd* [1980] Ch. 228, 251.

[19] (1983) 57 A.L.J.R. 211, 221-2.

[20] (1983) 57 A.L.J.R. 211.

[21] *Ibid.* 219.

[22] *Rose v. Watson* (1864) 10 H.L.C. 672; 11 E.R. 1187.

the maxim that equity deems as done that which ought to be done with the availability of the remedy of specific performance of the vendor's promise to sell his land to the purchaser. The purchaser will rely upon his limited equitable interest (that is to say, upon his lien) when, without any fault on his part, the contract of sale goes off. He will then seek to recover, as secured creditor, so much of the purchase price as has been paid to the vendor.

Neither type of equitable interest is affected by the subsequent bankruptcy of the vendor: *Re Bastable*.[23]

B. CONTRACTS FOR THE SALE OF INTANGIBLE PERSONALTY

1. Contracts for the sale of existing intangible personalty

Here it is accepted that the purchaser has an equitable lien over the subject of the contract (be it shares, debentures or other choses in action) for the return of purchase money paid in the event of the contract going off through no fault of his own.[24]

2. Contracts for the sale of future or unascertained intangible personalty

Once the relevant property is acquired or ascertained, the purchaser will have a lien over it for purchase money paid, whether that money is paid before or after acquisition or ascertainment.[25]

3. Contracts for the sale of intangible personalty unseparated from a larger mass[26]

There appears to be no reason in principle why a purchaser ought not to have an equitable lien for the recovery of purchase money in the circumstances under consideration. The lien would affect the mass from which it was envisaged that the subject of the contract would be separated. Imposing a lien over the total mass in order to secure repayment of consideration paid for a part of that mass would not necessarily entail undue hardship or unfairness to the vendor,[27] nor, it is suggested, would it give rise to undue commercial inconvenience.[28]

No case purports to deny a purchaser an equitable lien for the return of his purchase money in the circumstances under consideration. The two leading modern authorities concerning the rights of a purchaser of an unseparated part of a

[23] [1901] 2 K.B. 518.

[24] *Barker v. Cox* (1876) 4 Ch.D. 464; *Imperial Ottoman Bank v. Trustees, Executors and Securities Insurance Corp.* (1895) 13 R. 287; *Levy v. Stogdon* [1898] 1 Ch. 478; *Hannam v. Lamney* (1926) 43 W.N. (N.S.W.) 68; *Hewett v. Court* (1983) 57 A.L.J.R. 211, 213, 217, 221.

[25] *Hewett v. Court* (1983) 57 A.L.J.R. 211 (note that the lien in this case covered the deposit which had been paid before any subject had emerged to which a lien could attach).

[26] For example, a vendor contracts to sell a purchaser 500 of his 1,000 shares in X Co. Ltd.

[27] Compare the willingness of equity to declare a charge for payment over a larger mass in the context of tracing.

[28] Compare the comments of Atkin and Sargant L.JJ. in *Re Wait* [1927] 1 Ch. 606, 640, 656 respectively.

larger whole are, it is submitted, distinguishable. Before turning to a consideration of those authorities, however, it is necessary to look briefly at a subject with which they were very much concerned: equitable assignments for value.

Most of the cases of interest in this area involve purported assignments for value of future property. Equity treats a purported assignment of future property as a promise to assign the property in question once it is actually acquired by the assignor. Provided the purchaser has paid the purchase price in full, equity deems him to be assignee of the property as soon as it is acquired and is capable of being identified as the subject of the contract. It was established by the land-mark decision of the House of Lords in *Tailby v. Official Receiver*[29] that it is immaterial whether or not the promise to assign is specifically enforceable at the time of the future property's acquisition.[30] Two factors combine to make equity treat the assignment as complete at that time: first, the maxim that equity deems that as done which ought to be done; and secondly, given that the subject of the assignment can be identified in the vendor's hands, and that the purchaser has fully paid for it, nothing further need be done to define the parties' rights — that is to say, given that the vendor is in receipt of the relevant property and that the purchaser has paid for it, there is no obstacle standing in the way of equity's acknowledgement of the purchaser's ownership.

In his important judgment in *Tailby v. Official Receiver*, Lord Macnaghten observed:

> It is difficult to suppose that Lord Westbury [in *Holroyd v. Marshall* (1862) 10 H.L.C. 191; 11 E.R. 999] intended to lay down as a rule to guide or perplex the Court, that considerations applicable to cases of specific performance, properly so-called, where the contract is executory, are to be applied to every case of equitable assignment dealing with future property . . . Greater confusion still, I think, 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, or to give effect to such rights either by granting an injunction or by appointing a receiver, or by adjudicating on questions between rival claimants. The truth is that cases of equitable assignment or specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done if that principle is applicable under the circumstances of the case. The doctrines relating to specific performance do not, I think, afford a test or a measure of the rights created.[31]

Speaking in *Re Lind*,[32] a particularly vivid illustration of the importance of the distinction that is drawn between an equitable interest arising under a specifically enforceable executory contract and such an interest passing by way of assignment, Swinfen Eady L.J. commented:

> It is clear from these authorities that an assignment for value of future property actually binds the property itself directly it is acquired — automatically on the happening of the event, and without any further act on the part of the assignor — and does not merely rest in, and amount to, a right in

[29] (1888) 13 A.C. 523, rejecting dicta of Lord Westbury to the contrary in *Holroyd v. Marshall* (1862) 10 H.L.C. 191, 211; 11 E.R. 999, 1007 and cases, like *Belding v. Read* (1865) 3 H. & C. 955; 159 E.R. 812, decided in reliance on those *dicta*.

[30] *Cf.* Keeler, J. F., 'Some Reflections on Holroyd v. Marshall' (1969) 3 *Adelaide Law Review* 360.

[31] (1888) 13 A.C. 523, 547-8.

[32] *Re Lind; Industrials Finance Syndicate, Ltd v. Lind* [1915] 2 Ch. 345.

> contract, giving rise to an action. The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for.[33]

Thus it is accepted that, where there is a contract to sell future or unascertained property, an equitable assignment of that property takes place upon (a) payment of the contract price by the purchaser; (b) acquisition or ascertainment of the property by the vendor; and (c) identification of the acquired or ascertained property as that with which the contract of sale is concerned.[34]

There is no reason in principle why an equitable assignment should not also arise out of a contract of sale of existing, ascertained property provided that, once again, the purchaser has paid the contract price.[35]

The two leading cases concerning the rights of a purchaser of an unseparated part of a larger whole are *Re Wait*,[36] a decision of the Court of Appeal, and *King v. Greig; Rechner*,[37] a decision of the Full Court of the Supreme Court of Victoria. Both dealt with the following question: once the purchaser of an unseparated part of a mass of personalty has paid the contract price therefor, is he regarded in equity as assignee and thus as entitled to an interest, presumably by way of charge or lien over the mass to secure the performance by the vendor of his obligation to appropriate and to transfer? We have noted that it is not of critical importance here that the contract be specifically enforceable; in each case it was held not to be so. But we have also noted that the subject of the contract must be identifiable as the very thing to be transferred so that nothing remains to be done in advance of physical assignment and the court may simply give effect to completely defined rights.

In both *Re Wait*[38] and *King v. Greig*,[39] it was held that, in the circumstances under consideration, there is inadequate identification before separation or appropriation and that, therefore, no equitable assignment can take place before that process is complete. (Contrary *dicta* in *Holroyd v. Marshall*[40] and in *Hoare v. Dresser*[41] were rejected. *Re Wait* was severely criticised by Frederick Pollock in a note in (1927) 43 *L.Q.R.* 293 as was *King v. Greig* by Arthur Dean in (1932) 5 *A.L.J.* 289. Nevertheless, as Meagher, Gummow and Lehane note,[42] *Re Wait* and *King v. Greig* represent the present state of the authorities and it now seems unlikely that they will be overruled.)

In *Re Wait*,[43] only Atkin L.J. considered whether the purchaser may, in the circumstances, have a lien for the return of purchase money. His Lordship rejected

[33] *Ibid.* 360. See also *Palette Shoes Pty Ltd v. Krohn* (1937) 58 C.L.R. 1, 16 *per* Latham C.J., 26-7 *per* Dixon J.

[34] See, generally, Meagher, R. P., Gummow, W. M. C., and Lehane, J. R. F., *Equity — Doctrines and Remedies* (2nd ed. 1984) 174ff.

[35] *Ibid.* 158.

[36] [1927] 1 Ch. 606.

[37] [1931] V.L.R. 413.

[38] [1927]1 Ch. 606.

[39] [1931] V.L.R. 413.

[40] (1861) 10 H.L.C. 191, 209; 11 E.R. 999, 1006.

[41] (1859) 7 H.L.C. 290, 317; 11 E.R. 116, 127.

[42] *Op. cit.* 189.

[43] [1927] 1 Ch. 606, 637.

the idea on a construction of the Sale of Goods legislation applicable to the facts of the case before him. Of course, the Sale of Goods legislation is not relevant to contracts for the sale of intangible personalty.

In *King v. Greig*,[44] the Court was not concerned to ascertain whether a purchaser obtains a lien over the larger mass for the return of purchase money; the Court was concerned to determine whether a document embodying a contract of sale of an unseparated part of a mass (namely, 7,000 tons out of 9,000 or 11,000 tons of timber situated on a particular property) amounted to a bill of sale which required filing in order to create and preserve its validity.[45] In order to amount to a bill of sale the document had to be an assurance, legal or equitable, of personal chattels, that is to say, a document whereby either the property in the timber passed at law to the purchaser, or equitable title to it passed to him.

In his leading judgment, Cussen A.C.J., with whom Mann J. concurred, concluded that the *document* did not operate to pass any interest, legal or equitable, in the wood to the purchaser. Passing of property at law was governed by the relevant provisions of the Sale of Goods legislation. These provisions had not been satisfied. No equitable interest arose by way of charge or lien over the whole as a consequence of the specific enforceability of any of the obligations which the document created. Those obligations were not specifically enforceable for 'there is no right to specific performance in the usual meaning of that expression in the case of ordinary commodities'.[46] Nor did the document give rise to an assignment in equity in favour of the purchaser — or, more precisely, to an equitable charge or lien over the whole in order to secure the performance of the vendor's obligation. As explained, although the purchase price had been paid, there had been insufficient identification of the subject of the contract — something remained to be done to define the rights of the parties — for equity to recognise an assignment in favour of the purchaser.

Thus Cussen A.C.J. concluded that

> In the case of what may be called an assignment of unascertained chattels, part of a larger specified or ascertained whole, there is until ascertainment no passing of the property at law or of an equitable interest properly so called, and, according to the weight of authority, no creation of an equitable lien or charge on the whole, though there may arise an executory right giving the assignee equitable remedies [*i.e.* by way of injunction] to prevent interim interference with his possible future rights and interests.[47]

It is important to note that Cussen A.C.J. was referring to 'an equitable lien or charge on the whole' in a particular sense. He meant a lien or charge by way of implementation or effectuation of an equitable assignment. Cussen A.C.J. was not referring to a purchaser's equitable lien for the recovery of purchase price paid. He did not consider the existence of such a lien being pre-occupied with the question whether, arising out of the written agreement, the vendor could be seen to have given and the purchaser to have received legal title to the timber or a general

[44] [1931] V.L.R. 413.
[45] Because of the nature of this inquiry, the case was not directly governed by the Sale of Goods legislation. See now Goods Act 1958 (Vic) s. 5(1).
[46] [1931] V.L.R. 413, 439.
[47] [1931] V.L.R. 413, 446.

equitable entitlement to it. He was not concerned with the possible existence of a special equitable interest, arising by operation of law,[48] entitling the purchaser to request an order for sale of the timber with a view to the restitution to him of his purchase money.

In *Re Wait*,[49] Lord Hanworth M.R. had reached the same conclusion as Cussen A.C.J. Again, his Lordship was concerned only with cases of 'equitable assignment or *specific* lien'; he did not deal specifically (as did Atkin L.J.) with purchasers' liens for the recovery of purchase money.

Is there any inconsistency in the proposition that, while a purchaser has no lien over a mass of personalty in furtherance of an equitable assignment of part of that mass to him, a purchaser does have a lien over a mass of personalty for the return of money paid for the acquisition of part of that mass? If, prior to appropriation of the part from the mass, equity is unwilling to allow the purchaser a lien over the mass in furtherance of an assignment of the part to him, does it follow that equity would also be unwilling to allow the purchaser a lien over the mass for the recovery of money paid for the relevant part? It is submitted that both questions ought to be answered negatively.

As we have seen, in the case of a purchaser's lien, rights arise independently of any express or implied promise to grant them; but in the case of an assignment, the interest which passes in anticipation of the performance of a promise for valuable consideration to transfer personalty, arises as a result of a combination of the maxim that equity regards that as done which ought to be done with the circumstance that the relevant property is identified and paid for, that there is no obstacle standing in the way of equity's acknowledgement of the purchaser's ownership.

In *Hewett v. Court*[50] Deane J. identified the central policy issue affecting the existence of a purchaser's lien as being whether the relationship between the vendor's indebtedness (by way of obligation to repay) and the relevant property is such that the vendor would be acting unconscientiously or unfairly if he were to dispose of the property to a stranger without the consent of the purchaser or without the indebtedness having been discharged. It is submitted that *prima facie* it would be unconscientious or unfair for a vendor who has received money for an undertaking to appropriate and transfer part of a mass to a purchaser, to dispose of the mass, without first obtaining the purchaser's consent or restoring his money to him.

C. CONTRACTS FOR THE SALE OF GOODS

Such contracts are, of course, within the scope of the Sale of Goods legislation. The extent of a purchaser's equitable rights under a contract for the sale of goods is very largely dependent upon the meaning and effect which one assigns to that legislation.

[48] See 'Introduction' *supra*.
[49] [1927] 1 Ch. 606, 622.
[50] (1983) 57 A.L.J.R. 211, 223. At p. 223 Deane J. left the question now under consideration unanswered. See also at p. 217 *per* Wilson and Dawson JJ.

1. Contracts for the sale of specific or ascertained goods

Before giving consideration to the question whether a purchaser has a lien for the recovery of purchase money paid over specific or ascertained goods the subject of a contract of sale, the expressions 'specific goods' and 'ascertained goods' should be defined. The former is defined in the legislation as meaning 'goods identified and agreed upon at the time a contract of sale is made'.[51] The latter means goods 'identified in accordance with the agreement *after* the time a contract of sale is made'.[52]

A number of arguments may be put in support of the view that a purchaser of specific or ascertained goods ought *not* to have a lien over them for the return of purchase money. But none of them, it will be submitted, is valid.

The first argument turns on section 4(2) of the Goods Act 1958 (Vic.) and its counterparts.[53] It provides that:

> The rules of the common law including the law merchant save in so far as they are inconsistent with the express provisions of this Part and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause shall continue to apply to contracts for the sale of goods.

It has been held that the expression 'common law' in section 4(2) refers to the common law as distinct from principles of equity. Thus, by implication, the principles of equity in so far as they applied to contracts for the sale of goods before the enactment of the legislation do not continue to apply thereafter.[54] Even if the expression 'common law' is read in the wider sense of judge-made law, it has nevertheless been suggested that the rules of equity had no application at all to contracts for the sale of goods. So only rules of common law, using that expression in its narrower sense, were continued under section 4(2).[55]

If either of these contentions is accepted, it would follow that there is no place for the purchaser's equitable lien in relation to contracts for the sale of goods.

A variant of the arguments so far considered is to be found in the judgment of Atkin L.J. in *Re Wait*:[56] the Sale of Goods legislation constitutes an exclusive code of the legal (in the sense of existing in equity as well as at common law) relations arising out of a contract for the sale of goods. Purchasers' liens are not mentioned in the Act; therefore they are not relevant. Atkin L.J. expressed his argument in the following manner:

> The total sum of legal relations (meaning by the word 'legal' existing in equity as well as in common law) arising out of the contract for the sale of goods may well be regarded as defined by the Code. It would have been futile in a code intended for commercial men to have created an elaborate structure of rules dealing with rights at law, if at the same time it was intended to leave, subsisting with the legal rights, equitable rights inconsistent with, more extensive, and coming into existence earlier than the rights so carefully set out in the various sections of the Code. The rules for transfer of

[51] Vic.: Goods Act 1958 s. 3(1); N.S.W.: Sale of Goods Act 1923 s. 5(1); Qld: Sale of Goods Act 1896 s. 3(1); W.A.: Sale of Goods Act 1895 s. 60(1); Tas.: Sale of Goods Act 1896 s. 3(1); S.A.: Sale of Goods Act 1895-1972 s. 60(1).

[52] Sutton, K. C. T., *Sales and Consumer Law in Australia and N.Z.* (1983) 54, 445.

[53] N.S.W.: s. 4(2); Qld: s. 61(2); W.A.: s. 59(2) Tas.: s. 5(2); S.A. s. 59(2).

[54] *Riddiford v. Warren* (1901) 20 N.Z.L.R. 572; *Watt v. Westhoven* [1933] V.L.R. 458; see also *King v. Greig* [1931] V.L.R. 413, 431 *per* Cussen A.C.J.

[55] *Riddiford v. Warren* (1901) 20 N.Z.L.R. 572 *per* Denniston J.; *Watt v. Westhoven* [1933] V.L.R. 458 *per* Lowe J.

[56] [1927] 1 Ch. 606.

> property as between seller and buyer, performance of the contract, rights of the unpaid seller against the goods, unpaid seller's lien, remedies of the seller, remedies of the buyer, appear to be complete and exclusive statements of the legal relations both in law and equity. They have, of course, no relevance when one is considering rights, legal or equitable, which may come into existence dehors the contract for sale. A seller or a purchaser may, of course, create any equity he pleases by way of charge, equitable assignment or any other dealing with or disposition of goods, the subject-matter of sale; and he may, of course, create such an equity as one of the terms expressed in the contract of sale. But the mere sale or agreement to sell or the acts in pursuance of such a contract mentioned in the Code will only produce the legal effects which the Code states.[57]

Less radically it may be argued that, even if it is permissible to resort to principles of equity, particular provisions of the Act may be so expressed that, as a matter of construction, they can be read as an exclusive statement of the relevant law. Thus in *Transport and General Credit Corporation v. Morgan*,[58] Simonds J. denied that 'in the case of an ordinary sale of a commercial article under a commercial agreement there can be any other vendor's lien than that possessory lien which the statute itself provides'.[59] Adopting this more limited argument, it may thus be contended that the Act, in defining the remedies of the buyer, provides a complete and exhaustive statement of the buyer's remedial entitlements, both at law and in equity, and so excludes the possibility of the buyer relying upon or asserting a purchaser's lien.

Finally, it may be argued that, in the absence of direct authority, it is now too late for a court to enforce a purchaser's lien for the return of purchase price in respect of goods the subject of a contract of sale.

It has already been suggested that none of these arguments is compelling and that a purchaser under a contract for the sale of goods does have an equitable lien over them for the return of price paid.

In only two cases has the first argument, based upon the meaning of the expression 'the rules of common law' contained in section 4(2) of the Goods Act 1958 (Vic.),[60] been accepted: *Riddiford v. Warren*,[61] a decision of the Court of Appeal in New Zealand, and *Watt v. Westhoven*,[62] a decision of the Full Court of the Supreme Court of Victoria. Both cases raised the question whether the rules of equity in regard to misrepresentation apply to contracts for the sale of goods. In both it was held that those rules had no role to play: equitable rules were not continued after the enactment of the Sale of Goods legislation because the expression 'rules of common law' must mean rules of common law as distinct from rules of equity; equitable rules never applied to contracts for the sale of goods anyway and so could not have been meant to be continued under section 4(2).

Riddiford v. Warren[63] has been rejected in New Zealand: *Thomas Borthwick & Sons (Australasia) Ltd v. South Otago Freezing Co. Ltd*.[64] There the Court of Appeal denied that equity had *never* played a role in relation to contracts for the sale of goods — it remarked that there was a well-established equitable jurisdiction

[57] *Ibid.* 635-6.
[58] [1939] Ch. 531, 546.
[59] See also *Timmerman v. Nervina Industries (International) Pty Ltd* [1983] 1 Qd. R. 1.
[60] See n. 53.
[61] (1901) 20 N.Z.L.R. 572.
[62] [1933] V.L.R. 458.
[63] (1901) 20 N.Z.L.R. 572.
[64] [1978] 1 N.Z.L.R. 538 ('*Borthwick v. SOFCO*')

to grant the remedy of injunction to restrain breaches of negative undertakings in contracts for the sale of goods — and concluded that the New Zealand counterpart of section 4(2) was intended to preserve *all* rules of substantive law on matters not covered by the express provisions of the Act.

Perhaps the most comprehensive judicial consideration of the issues contained in *Riddiford v. Warren*[65] and *Watt v. Westhoven*[66] is contained in *Graham v. Freer*,[67] a decision of the Full Court of the Supreme Court of South Australia. In his leading judgment in that case, Zelling J. considered a number of instances in which it had been assumed that equitable rules do apply to contracts for the sale of goods and concluded that they demonstrate that there is nothing inherent in the contract for the sale of goods which takes it outside the scope of equitable principle.[68] His Honour also noted extra-judicial criticism of the reasoning in *Riddiford v. Warren* and *Watt v. Westhoven*[69] and dwelt upon Professor Treitel's rejection of the assignment of any narrow connotation to the expression 'rules of the common law' in section 4(2):

> Treitel: *The Law of Contract* 4th ed. (1975) 246-247 submits that the view held in the New Zealand case is untenable on four grounds: first, that the Act is not a complete code, secondly, that s. 61(2) of the English Act [i.e. section 4(2) of the Goods Act 1958 (Vic.)], saves the rules of 'common law . . . relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause.' As the learned author points out, misrepresentation is here regarded as an invalidating cause distinct from fraud and mistake. At common law a wholly innocent misrepresentation did not invalidate a contract for the sale of goods unless it induced a fundamental mistake. Accordingly the author submits that the saving of the rules as to the effect of misrepresentation could only refer to the rules of equity and he goes on to comment that it would be strange if the *Sale of Goods Act* saved the comon law but not the rules of equity relating to mistake and agency. Thirdly, he refers to three English cases culminating in *Goldsmith v. Rodger*, to which I shall return,[70] and fourthly, he points out that if a contract for the sale of goods cannot be rescinded for innocent misrepresentation the injured party would have no remedy at all for an innocent misrepresentation not incorporated in the contract and that such an unjust result ought not to be reached in the absence of express provision to that effect in the *Sale of Goods Act*.[71]

The court finally concluded that the rules of equity concerning innocent misrepresentation apply to contracts for the sale of goods.

The reasoning in cases like *Borthwick v. SOFCO*[72] and *Graham v. Freer*[73] is, it is submitted, compelling and seems to represent what is now the generally

[65] (1901) 20 N.Z.L.R. 572.
[66] [1933] V.L.R. 458.
[67] (1980) 35 S.A.S.R. 424.
[68] See *Goldsmith v. Rodger* [1962] 2 Lloyd's L.R. 249 (rescission for misrepresentation); *Leaf v. International Galleries* [1950] 2 K.B. 86, 90 (rescission for misrepresentation); *Frederick E. Rose (London) Ltd v. William H. Pim Jnr & Co. Ltd* [1953] 2 Q.B. 450 (rectification); *James Jones and Sons Ltd v. Earl of Tankerville* [1909] 2 Ch. 440 (injunction), *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminimum Ltd* [1976] 1 W.L.R. 676 (tracing); see also *Borthwick v. SOFCO* [1978] 1 N.Z.L.R. 538 (injunction); *Leason Pty Ltd v. Princes Farm Pty Ltd* [1983] 2 N.S.W.L.R. 381 (rescission for misrepresentation); *Hewett v. Court* (1983) 57 A.L.J.R. 211, 218 *per* Wilson and Dawson JJ. (note their Honours' discussion of *Swainston v. Clay* (1863) 3 De G. J. & S. 558; 46 E.R. 752); Spry, I. C. F., *Equitable Remedies* (2nd ed. 1980) remarks (at p. 54) that 'Doubtless equitable relief in such cases is not commonly sought; but this is so because often it is there found that damages provide an adequate remedy . . .'
[69] See especially Fleming J. G., 'Misrepresentation and the Sale of Goods' (1951) 25 *Australian Law Journal* 443; Treitel, *The Law of Contract* (4th ed. 1975) 246-7 See now (6th ed. 1983) 285-6.
[70] *Leaf v. International Galleries* [1950] 2 K.B. 86; *Long v. Lloyd* [1958] 1 W.L.R. 753; *Goldsmith v. Rodger* [1962] 2 Lloyds L.R. 249.
[71] (1980) 35 S.A.S.R. 424, 434-5.
[72] [1978] 1 N.Z.L.R. 538.
[73] (1980) 35 S.A.S.R. 424.

accepted understanding of the inter-relation between equity and contracts for the sale of goods. Contrary reasoning in *Riddiford v. Warren*[74] and *Watt v. Westhoven*[75] no longer represents an acceptable analysis of that inter-relation.

The flaw in Atkin L.J.'s contention in *Re Wait*[76] that the Sale of Goods legislation constitutes an exclusive code which was not intended to be augmented or qualified in any way by existing judge-made law is that it tends to overlook or ignore the existence of provisions like section 4(2) which express precisely the opposite point of view: that the rules of the common law do apply to contracts for the sale of goods save in so far as they are inconsistent with the express provisions of the Act (in Victoria, of Part I of the Act).

As a matter of construction, however, can it be contended that the Act, in defining the remedies of the buyer, provides a complete and exclusive statement of the buyer's remedial entitlements both at law and in equity? It is thought not. Injunctive relief is available to a buyer although this type of remedy is not expressly mentioned in the Act.[77] But, perhaps more significantly, the remedies of the buyer listed in the Act are appropriate to the enforcement of the seller's contractual obligation — damages, specific performance — whereas the remedy with which this article is overridingly concerned, namely, the purchaser's lien, is essentially restitutionary. That is to say, the purchaser, in asserting his lien, is not seeking to be put in the position in which he would find himself upon fulfilment by the seller of his obligations; he is seeking a return to the pre-contractual *status quo*. The equitable recourse of rescission for innocent misrepresentation may be viewed similarly.

Finally, it may be argued that, in the absence of direct authority, it is too late for it now to be suggested that a purchaser of goods has an equitable lien over them for the recovery of money paid. But as Gibbs C.J. remarked in *Hewett v. Court*[78] in reply to substantially the same argument:

> The fact that there is no authority precisely in point does not mean that in the present circumstances no lien can arise. The rules of equity are not so rigid and inflexible that it is necessary to discover precise authority in favour of the existence of a lien before one can be held to have been created.[79]

2. *Contracts for the sale of future goods*

'Future goods' are 'goods to be manufactured or acquired by the seller after the making of the contract for sale'.[80] When future goods, the subject of a contract of

[74] (1901) 20 N.Z.L.R. 572.
[75] [1933]V.L.R. 458.
[76] [1927] 1 Ch. 606.
[77] See the discussion of this topic in *Borthwick v. SOFCO* [1978] 1 N.Z.L.R. 538; see also *James Jones and Sons Ltd. v. Earl of Tankerville* [1909] 2 Ch. 440.
[78] (1983) 57 A.L.J.R. 211, 215. The question now under consideration was left open in *Hewett v. Court*: see at p. 213 *per* Gibbs C.J.; at p. 217 *per* Wilson and Dawson JJ.; at p. 221 *per* Deane J.
[79] At the time of contracting, a purchaser of specific goods may receive legal title to them: see Vic.: s. 23, r.l; N.S.W.: s. 23, r.l; Qld: s. 21, r.l; W.A.: s. 18, r.l.; Tas.: s. 23, r.l.; S.A.: s. 18, r.l. This, however, ought to be irrelevant to the question whether the purchaser has an equitable lien for the return of purchase money in the event of his being able to rescind.
[80] Vic.: s. 3(1); N.S.W.: s. 5(1); Qld: s. 3(1); W.A.: s. 60(1); Tas.: s. 3(1); S.A.: s. 60(1).

sale, are ascertained, the considerations set out above in relation to ascertained goods are relevant. If purchase money has been paid, the purchaser will have a lien over the goods.

3. Contracts for the sale of a quantity of goods unseparated from a larger mass[81]

In any consideration of the question whether a purchaser under such a contract has an equitable lien over the larger mass for the return of purchase money, two issues arise: first, the Sale of Goods legislation apart, may the purchaser assert such a lien?; second, is the purchaser's position particularly affected by the Sale of Goods legislation?

It was argued in relation to intangible personalty that, in the circumstances under consideration, a purchaser does have a lien for the recovery of purchase money. And it was argued in relation to specific or ascertained goods that nothing in the legislation prevents a purchaser from asserting a lien over such goods for the return of purchase money. It follows, therefore, that a purchaser of goods unseparated from a larger existing mass should have an equitable lien over the mass for price paid. *Re Wait*[82] stands against this conclusion. In that case, however, only Atkin L.J. expressly argued against the existence of a purchaser's lien, relying on the exhaustive nature of the legislation, and predicting commercial inconvenience in the event of a contrary result. The former ground has already been criticised in this article; as for the latter ground, there is, it is submitted, little basis for the fear expressed in it.

D. CONTRACTS OF WORK AND LABOUR

In arguably the only decision in point, the High Court of Australia ruled in *Hewett v. Court*[83] that a purchaser under a contract of work and labour has an equitable lien for price paid over the product of the work and labour once it has become identified as the subject of, or is appropriated to, the contract. (*Swainston v. Clay*[84] was relied upon by the purchaser. Gibbs C.J. and Deane JJ. held that it was in point; Murphy J. refused to rely upon it; Wilson and Dawson JJ. distinguished it on the basis that it involved an express lien and perhaps a contract for the sale of goods. The case does look very much like an example of an express lien.)

Hewett v. Court[85] was a majority decision of the High Court. The majority judges, Gibbs C.J., Murphy and Deane JJ., could see no reason why the equitable principles relating to purchasers' liens should not apply to contracts of work and labour. Any want of authority directly in support of this view does not, it was held, detract from the general applicability of the relevant principles.

The minority judges, Wilson and Dawson JJ., pointed to a lack of authority to the contrary when they expressed their view that a purchaser's lien is not available

[81] For example, a vendor contracts to sell a purchaser 500 tons of wheat from a cargo consisting of 1,000 tons of wheat.
[82] [1927] 1 Ch. 606.
[83] (1983) 57 A.L.J.R. 211.
[84] (1863) 3 De G.J. & S. 558; 46 E.R. 752.
[85] (1983) 57 A.L.J.R. 211.

in respect of a contract of work and labour. Their Honours advanced three arguments in support of their conclusion: contracts of work and labour are, by their nature, not specifically enforceable; it is arbitrary to treat a purchaser as a secured creditor the moment the subject of the contract of work and labour is appropriated to the contract, but as an unsecured creditor the moment before; and a contrary view would produce unnecessary complexity and so lead to the destruction of that certainty which is the basis of sound commercial practice.

None of these arguments, it is respectfully submitted, is unanswerable. The question of whether specific enforceability is a prerequisite of a purchaser's lien has already been considered. The issue of arbitrariness is dealt with in due course but here it may be pointed out that it is not disputed that a purchaser under a contract of sale of future or unascertained intangible personalty has a lien at the moment of acquisition or ascertainment, and yet it is not suggested that it is arbitrary to treat him as an unsecured creditor at one moment but as a secured creditor the next. Finally, there appears to be no evidence — and certainly none can have been apparent to the majority judges — to support the view that a purchaser's lien in respect of the product of a contract of work and labour will create such a level of uncertainty as to have a detrimental effect upon commercial practice.

The facts of *Hewett v. Court*[86] were as follows: the vendor company undertook to construct a transportable home for the purchaser. Title to the home, it was agreed, would not pass to the purchaser until he had made payment in full. On practical completion, the home was to be taken by the vendor to a site appointed by the purchaser; there it was to be placed on stumps and totally completed. The total price was $34,116. Twenty per cent ($6,823) was payable upon entry into the contract and $13,646 was payable on the pitching of the roof. These sums had been paid by the purchaser who had inspected a building which had been identified as his own. He had also chosen tiles. Before the home reached the stage of practical completion, however, the company became insolvent. Thereupon, a revised arrangement was entered into: the purchaser agreed to pay an extra sum representing the difference between the value of the home at its present stage of construction and the sum of monies already paid. He was then to remove the home from the vendor's premises.

Liquidators were appointed at about the time that the purchaser removed his home. They argued that the disposition of the structure to the purchaser amounted to a preference and thus was void as against themselves. The purchaser was preferred to the extent of $20,469, that is, to the extent of the purchase price paid at the time of the company's insolvency. The purchaser, the liquidators suggested, should be required to prove for the recovery of these monies along with other general creditors. He should not have been preferred by receiving restitution in full in the form of a partially completed building.

On the other hand, the purchaser argued that he had an equitable lien over the building for purchase money paid when the company became insolvent. As a secured creditor, he had received no preference.

[86] *Ibid.*

The central issue for determination in *Hewett v. Court*[87] was, therefore, whether the purchaser did have, at the material time, an equitable lien for the recovery of purchase money.

The majority accepted that the purchaser had an equitable lien once his home was identified and appropriated to the contract. The title clause did not prevent the purchaser from acquiring a lien pending the transfer of title (*i.e.* pending payment in full). Further, it was immaterial that some purchase money (namely, the deposit) had been paid prior to identification and appropriation, or that monies received were actually employed by the vendor in constructing the home.

Arguments of the minority, based on general principle, have been considered. In addition, the minority judges denied that an equitable interest such as that claimed by the purchaser could, consistently with the title clause, be acquired pending payment in full; they denied that a purchaser's lien would ever include or encompass payments made prior to the coming into existence of a subject-matter to which the lien could attach; and, finally, they denied that any particular structure had ever been appropriated to the contract — the vendor could, quite consistently with its contractual obligations, have delivered *any* home answering the contractual specifications to the purchaser and was never obliged to deliver the home which had actually been inspected (and removed) by the purchaser.

These arguments seem, however, to have been satisfactorily dealt with by the majority judges: the title clause contemplated the passage of general title and was not concerned with special interests such as purchasers' liens; there is no reason in principle why a purchaser's lien should not extend to payments made towards the acquisition, but prior to the identification, of the subject of the contract; and, finally, the terms of the contract in *Hewett v. Court*[88] suggested that the vendor company did in fact become obligated to complete and deliver *a* particular structure, namely, the one which the purchaser had inspected and assumed to be his own.

ACCORDING A PURCHASER A MEASURE OF PRIORITY ON THE SELLER'S BANKRUPTCY

At times it has been properly asked why a purchaser should be given priority over general creditors on a seller's bankruptcy. Atkin L.J. asked this question in *Re Wait*,[89] after noting that, if a seller of goods delivers them to a buyer before payment, trusting to receive payment in due course, and the buyer becomes bankrupt, the seller is restricted to a proof and can assert no beneficial interest in the goods. And, in *Hewett v. Court*,[90] the dissenting members of the Court, Wilson and Dawson JJ., thought it arbitrary that those purchasers 'whose houses had reached a particular point of construction, such as the pitching of the roof, should be preferred in the realisation and distribution of the company's assets, to those whose contracts with the company had been performed to a lesser extent'.

[87] *Ibid.*
[88] *Ibid.*
[89] [1927] 1 Ch. 606, 640.
[90] (1983) 57 A.L.J.R. 211, 219.

It is submitted that arguments based upon the arbitrariness or unfairness of conceding some purchasers (but not others) *under a particular type of transaction* priority on bankruptcy will never be completely resolved given the fundamental requirement that before a lien can exist there must be property to which it can attach. Overall arbitrariness may be reduced, however, if a substantially uniform approach is taken to purchasers *under different types of transaction*. That is to say, arbitrariness is best reduced if a general approach is taken to all types of contract of purchase. Even if this is done, it may still be argued that, within a particular transaction (for example, a contract of work and labour), an arbitrary result is produced by denying a purchaser a lien at one moment but allowing him one the next. But any arbitrariness involved in the latter situation must be explained on the basis that a lien can arise only when a subject matter exists to which it can attach.

In this article it has been argued that a purchaser has a lien for the recovery of purchase money irrespective of whether the contract is for the sale of land, for the sale of intangible personalty, for the sale of goods, or is for work and labour. Of course, in each case there must be a subject-matter to which the lien can attach. So, under a contract for work and labour, a purchaser will not have a lien prior to the emergence of a subject-matter referable to the contract and, under a contract for the sale of future personalty, a purchaser will have no lien before the personalty in question is actually acquired.

It has also been argued that a purchaser is not to be denied a lien merely because the subject of the contract, although in existence, forms an unseparated part of a larger mass; in such a case his lien will attach to the mass.

So the following conclusions emerge: *any* purchaser has a lien for the recovery of purchase money provided that a subject-matter exists over which the lien might fairly be asserted; it will suffice that a subject-matter exists, a defined part of which is referable to the purchaser's entitlement under the contract.

It follows from these conclusions that it would be arbitrary to deny one sort of purchaser, namely, a purchaser under a contract for the sale of goods, a lien simply because a seller under such a contract has no lien for unpaid purchase money.[91] Again, to refer once more to *Hewett v. Court*[92] and the observations of the dissentients in that case, it would be arbitrary to deny all purchasers under contracts of work and labour purchasers' liens merely because not all will be in a position to enjoy them.

[91] *Cf.* Atkin L.J.'s comments in *Re Wait* [1927] 1 Ch. 606, 640.
[92] (1983) 57 A.L.J.R. 211.