FUNDAMENTALS OF PROPERTY LAW:

POSSESSION, TITLE AND RELATIVITY

by Luke David Rostill

Wadham College

Degree: Doctor of Philosophy in Law

Word count: 100,400

Term Submitted: Trinity Term 2016

Title of thesis: Fundamentals of Property Law: Possession, Title and Relativity
Name of candidate: Luke David Rostill
College: Wadham College
Degree: DPhil in Law
Term and year of submission: Trinity Term 2016

Abstract. This thesis is concerned with the doctrine of title by possession and the doctrine of relative title. Many property lawyers believe that these doctrines are elementary, important and interesting. But, while virtually everyone accepts that possession of land or chattels is a source of title and that titles are relative, the doctrines have long been a focus of debate. The nature of possession, the nature of the possessor's title, and the relationships between possession, relative title and ownership have been particularly contentious. Accordingly, this thesis seeks to provide sound answers to the following questions: (1) what, in this context, is possession? (2) What is the nature of the title that is acquired by taking possession of land or chattels? (3) Does English law recognise landownership and chattel-ownership?—and, if it does, is a person who acquires, by virtue of his or her possession, a title to land or chattels the (or an) owner of the land or chattels? It is argued in Chapter 2 that, for the purposes of the doctrine of title by possession, the general rule is that a person is in possession of land or chattels if and only if she has: (i) a sufficient degree of exclusive physical control; and (ii) an intention to possess. Chapters 3–5 are concerned with the second question. It is argued that, upon obtaining possession, a person acquires, in cases involving land, an estate in fee simple absolute in possession and, in cases involving chattels, a general property interest. Chapter 6 is concerned with the third question. It is argued that English law does recognise landownership and chattel-ownership; and that a person who acquires a title by obtaining possession of land or chattels *owns* the land or chattels *if* her title is supreme but not if it is inferior.

Table of Contents

Table of Cases

Australia

Bahamas

British Ceylon

Canada

England and Wales

Ireland

Singapore

Table of Legislation

1

INTRODUCTION

1. THE AIMS OF THE THESIS

This thesis is primarily concerned with a fundamental doctrine of English property law: the doctrine of title by possession. The core principle of this doctrine is that, if and when a person obtains possession of land or a tangible chattel,[1] he or she acquires a title to the land or chattel. The thesis is also concerned with another fundamental doctrine of English property law, namely, the doctrine of relative title. The core principle of the doctrine of relative title is that, if a title-holder brings an action to recover land, or to obtain compensation for a tortious interference with her land or chattel, it generally suffices that the claimant has a good title *as against the defendant(s)*, notwithstanding that there is some third party who has a better title than the claimant; the claimant is not required to establish that she has a good title as against the whole world.[2] It should be apparent from this description of the doctrine of relative title that the English legal system is what Professor AM Honoré has called

[1] Land, for present purposes, includes the surface layer of the earth, an area of space above and below

[2] Cp. WW Buckland and AD McNair, *Roman Law and Common Law: A Comparison in Outline* (FH Lawson ed, 2nd edn, CUP 1965) 67–68; S Roberts, 'More Lost Than Found' (1982) 45 MLR 683, 686.

a 'multititular system', i.e. a system which permits multiple, independent titles.[3] The general rule, at common law, is that an earlier title takes priority over a later title.

The doctrines have been described as 'fundamental' because they form part of the groundwork of English property law and are of great theoretical and practical importance. Their basic character is evidenced by their relevance to a number of contemporary debates in property law, including the debate as to the nature of the 'title' that a claimant must have in order to successfully bring an action to recover land;[4] the debate concerning the nature and scope of the jus tertii doctrine;[5] and the debate regarding the correctness of the decision of the House of Lords in *Bruton v London & Quadrant Housing Trust*.[6]

The theoretical importance of the two doctrines partly resides in the fact that, arguably,[7] they give English property law, and perhaps the property law of other

[3] AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 107, 136–39. Titles are 'independent' if they are 'not derived from a common source'.

[4] In *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11, [2009] 1 WLR 2780 Baroness Hale maintained (at [35]) that 'the modern possession action is there to protect the right to physical occupation of the land against those who are wrongfully interfering with it.' In *Mayor of London v Hall* [2010] EWCA Civ 817, [2011] 1 WLR 504 Lord Neuberger MR explained (at [22], [26], [27]) that, although he could see 'obvious force' in the point that the law should 'accommodate a claim by anyone entitled to use and control, effectively amounting to possession, of the land in question', he could also see 'real force' in the argument that 'a claim for possession of land, if made by a person who has been out of possession, can only be successfully maintained if that person can establish title of some sort to a legal estate in the land.' It was not necessary in *Hall* to decide which view was correct.

[5] Text to n 58–n 82 in Chapter 5.

[6] *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406 (HL); N Roberts, 'The *Bruton* tenancy: a matter of relativity' [2012] Conv 87; A Goymour, '*Bruton v London & Quadrant Housing Trust* [2000]: Relativity of Title, and the Regulation of the 'Proprietary Underworld'' in S Douglas, R Hickey and E Waring (eds), *Landmark Cases in Property Law* (Hart 2015).

[7] In order to determine whether the claim in question is true, we would need a sound account of the doctrine of title by possession in English law and in other common law systems as well as a sound account of certain aspects of Roman property law and the property law of modern civilian jurisdictions. Of course, it would be naïve to assume that we can draw, in connection with title by possession, a general contrast between 'common law systems' and 'civilian systems', for many jurisdictions are caught by these terms and the differences among civilian systems or among common law systems may well be greater than the differences between a particular civilian jurisdiction and a particular common law system. These matters are beyond the scope of the thesis and, accordingly, the thesis expresses no view on them.

common law jurisdictions, a distinctive structure, which distinguishes the property law of common law systems from the property law of the Romans in the classical period and from modern civilian jurisdictions. WW Buckland and AD McNair, in their classic comparative work on the common law and Roman law, maintained that there is here a 'significant' contrast between the two systems; broadly speaking, '[English] Courts deal with rights to possess where the Roman courts dealt with ownership.'[8] In English law, they claimed, 'any possession is good against a trespasser and there are different degrees of right to possess, so that all the plaintiff has to prove is that he has a better title to possess than the defendant has.'[9] This, they thought, 'is very different from the Roman way of thinking'.[10] In Roman law, 'ownership was absolute', subject to a limited exception, and '[a]part from this there was no question of an ownership good against one but not against another.'[11]

So it has been thought that the doctrine of title by possession and the doctrine of relative title are particularly interesting because they are doctrines of the common law that are not to be found in another great Western legal tradition, the Civilian tradition deriving from Roman law. The doctrines are believed to share something significant with, say, the doctrine of consideration in contract law—they are hallmarks of the Common Law. Among those who take this view, some believe that the doctrines exemplify certain qualities of the Common Law: its practical

[8] Buckland and McNair (n 2) 68. Cp. K Gray, 'Property in Common Law Systems' in GE van Maanen and AJ van der Walt (eds), *Property Law on the Threshold of the 21st Century* (MAKLU Uitgevers 1996); K Gray and SF Gray, *Elements of Land Law* (5th edn, OUP 2009) ch 2; D Fox, 'Relativity of Title at Law and in Equity' (2006) 65 CLJ 330.

[9] Buckland and McNair (n 2) 68.

[10] Ibid 67.

[11] Ibid.

mindedness; its suspicion of abstract theories; and/or its concern with servicing the needs of litigants.[12]

If we do not truly understand the nature of the two doctrines, we can have little confidence in such evaluations, or in the comparisons and contrasts that are drawn between them and the law of other systems. The evaluations are made, the comparisons are drawn; and yet, as we will see, much confusion and uncertainty surround the doctrines.

The two doctrines are also of practical importance. For example, the doctrines can play a decisive role in disputes over the possession of land and disputes concerning interferences with chattels. Suppose that *X* found and took possession of a jewel and, subsequently, the jewel was taken by *Y* while it was in *X*'s possession. *X* acquired a title to the jewel when he took possession of it and the mere fact that a third party has a better title to the jewel than *X* will not prevent *X* from successfully bringing an action against *Y* for the full value of the jewel.

While lawyers largely agree that the two doctrines are important, there is much disagreement over the nature of these doctrines. The disagreements can easily be glossed over. For, at a superficial level, all seems well. No one doubts that a person in possession of land or a chattel has a 'title' in respect of it. No one doubts that in an action for, say, conversion, the claimant may succeed if she has a 'better title' to the relevant chattel than the defendant, whether or not she has the 'best title'. And no one doubts that, if the claimant was in possession before the defendant, she thereby acquired a 'title' that may be good as against him. If, however, one goes beyond these points, one will soon discover a number of puzzles.

[12] Cp. Fox (n 8) 330: 'The relativity of titles to land … proves the pragmatic stuff from which the common law is made.'

The first puzzle concerns the nature of possession. Lawyers and theorists have long debated the nature, importance and role of possession in English law and whether it is possible and desirable to construct what can properly be called a theory of possession in the law.[13] Much confusion has been caused by the fact that 'possession' is used to refer to the *physical control* of a thing as well as to a *right* to such control. As Earl Jowitt has said, '[t]he person having the right to immediate possession is … frequently referred to in English law as being the "possessor".'[14] The vagueness of the term 'possession' has also given rise to problems. There is no doubt that the term is vague, but some judges and scholars have thought that it is *hopelessly* vague. Erle CJ, for instance, maintained that: '[p]ossession is one of the most vague of all vague terms, and shifts its meaning according to the subject matter to which it is applied.'[15] RWM Dias was of the view that, '[t]here is now so much flexibility in the use of this concept [i.e. possession] that certainty over a good part of the law in which it figures has disappeared.'[16] He concluded that 'possession' is 'no more than a device of convenience and policy.'[17]

The second puzzle concerns the nature of the title that is acquired by virtue of being in possession of land or chattels. The 'title' that is so acquired has been described as 'a possessory title';[18] 'a claim arising out of a proprietary interest';[19] 'a

[13] Text to n 1–n 36 in Chapter 2.

[14] *United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England* [1952] AC 582 (HL) 605.

[15] *R v Smith* (1855) 6 Cox CC 554, 556.

[16] RWM Dias, *Jurisprudence* (5th edn, Butterworths 1985) 289.

[17] Ibid 285.

[18] N Palmer, 'Possessory Title' in N Palmer & E McKendrick (eds), *Interests in Goods* (2nd edn, LLP 1998).

[19] Fox (n 8) 333.

claim to a proprietary interest';[20] 'a right to possess';[21] 'a right to possess' coupled with the power to alienate that right;[22] 'a right to exclusive possession forever';[23] and 'ownership'.[24] Which (if any) of these descriptions is accurate and illuminating? What is the nature of the possessor's title? We will see that eminent scholars and senior judges have given different answers to these questions; that there has long been, and continues to be, much disagreement and confusion as to the nature of the title that is acquired by possession.[25]

The third puzzle concerns the relationship between the two doctrines, on the one hand, and ownership, on the other. While it has recently been claimed that the title that a person acquires upon taking possession amounts to ownership,[26] a number of lawyers have thought that the doctrines of title by possession and relative title are incompatible with ownership.[27] Indeed, many distinguished lawyers have thought that English law does not recognise ownership at all.

The primary aim of this thesis is to examine these three puzzles and provide answers to the following three questions (the principal questions):

---

[20] HL Ho, 'Some Reflections on "property" and "title" in the Sale of Goods Act' (1997) 56 CLJ 571, 577.

[21] Buckland and McNair (n 2) 68.

[22] F Pollock and RS Wright, *An Essay on Possession in the Common Law* (Clarendon Press 1888) 93–100.

[23] WJ Swadling, 'Property: General Principles' in A Burrows (ed), *English Private Law* (3rd edn, OUP 2013) para 4.131.

[24] B McFarlane, *The Structure of Property Law* (Hart 2008) 154–56; R Hickey, *Property and the Law of Finders* (Hart 2010) 107–11, 164; S Douglas, *Liability for Wrongful Interferences with Chattels* (Hart 2011) 24–26.

[25] Text to n 3–n 27 in Chapter 3, text to n 1–n15 in Chapter 4.

[26] McFarlane (n 24) 140–56; Douglas (n 24) 20–23.

[27] Text to n 2, n 73 and n 75 in Chapter 6.

1. What is possession for the purposes of the doctrine of title by possession?

2. What is the nature of the title that is acquired by taking possession?

3. Does English law recognise landownership and chattel-ownership? If so, is a person who acquires, by virtue of his or her possession, a title to land or chattels *the* (or *an*) *owner* of the land or chattels?

It is hoped that, by answering these questions, the thesis will significantly advance our understanding of the two doctrines and how they relate to ownership; and that it will thereby illuminate English law's treatment of ownership and possession.

This contribution to property law scholarship concerns land and chattels. By discussing the latter, it seeks to address a deficiency. At the start of the twenty-first century Peter Birks lamented that 'our personal property law is in a bad state'; 'interest [in personal property law] has ebbed away, and with it understanding.... This neglect is making personal property more difficult. Cases still need to be decided, but there is no secure foundation on which to build.'[28] It is in a better condition now. Today, the student of personal property might consult Mr William Swadling's chapter on English property law in *English Private Law* or Professor Ben McFarlane's *The Structure of Property Law*.[29] In addition, several important monographs have

[28] P Birks, 'Personal Property: Proprietary Rights and Remedies' (2000) 11 KCLJ 1, 1–2.

[29] Swadling (n 23); McFarlane (n 24).

appeared in recent years.[30] But more needs to be done. Personal property law remains 'underconceptualized or equivocally conceptualized'.[31]

2. AN OVERVIEW OF THE THESIS

This section outlines the structure of the thesis and provides an overview of each of the remaining six chapters.

Chapter 2 is concerned with the first of the three principal questions. It is not primarily concerned with the nature of possession in general, or with general theories of possession in the law. Rather, it seeks to determine what counts as possession for the purposes of the doctrine of title by possession. It is argued that, for such purposes, a person has (generally speaking) possession of certain land or a certain chattel if and only if she has (1) a sufficient degree of exclusive physical control of the land or chattel; and (2) an intention to possess it.

Chapters 3, 4 and 5 are concerned with the second of the three principal questions. Chapter 3 sets up the enquiry into the nature of the possessor's title by considering the meaning of 'title' and by describing and comparatively analysing several conflicting views of the possessor's title. It mainly focuses on three views. On the *First View*, a possessor of land is merely to be *deemed* (in certain circumstances) to hold the land for an estate in fee simple and a possessor of a chattel is merely to be *deemed* to be the owner of the chattel. On the *Second View*, a possessor has, as long as he is in possession, certain non-alienable rights ('rights of possession') that serve to protect his possession and, in addition, he benefits from what can be called a rule of presumption—in cases involving land, he is to be deemed to hold the land for an

[30] E.g. A Pretto-Sakmann, *Boundaries of Personal Property: Shares and Sub-Shares* (Hart 2005); Hickey (n 24); Douglas (n 24).

[31] Pretto-Sakmann (n 30) 3.

estate in fee simple; and in cases involving chattels, he is to be deemed to be the owner of the chattel. On the *Third View*, a person acquires, upon taking possession of certain land or a particular chattel, an alienable interest, which is not possession-dependent and which comprises a right to non-interference and a right to possession that bind persons in general.

The discussion of the three views highlights two significant disagreements. The first is the disagreement over whether the possessor *actually acquires* a (certain type of) interest in the land or chattel, or is *merely to be deemed to have* a (certain type of) interest. It will be necessary to explore the differences between these two views; for, regrettably, they have been overlooked or misunderstood on many occasions. It will be necessary, also, to carefully examine the view that a possessor is to be deemed to have a (certain kind of) interest; for it has been endorsed by senior members of the judiciary and it is important that we properly understand judicial reasoning.

The second disagreement is a dispute among those lawyers who believe that the possessor actually acquires a right or interest. It is a dispute over the exact nature of the right or interest. The issue is an important one—it concerns the rights and interests that the law recognises and confers and the circumstances in which they are acquired, as well as the relationship between ownership and possession in English law. It will be helpful to consider an example. Suppose that *A* manufactured and then lost a dress; and that *B* subsequently found the dress. According to one view, whereas *A* has ownership, *B* has a 'possessory interest' or 'right to possession' in the dress.[32] If this view is correct, we may draw a distinction between the owner and the possessor. But not everyone is convinced that this is correct. A number of scholars

[32] RH Kersley, *Goodeve's Modern Law of Personal Property* (9th edn, Sweet & Maxwell 1949) 8–9; J Gordley and U Mattei, 'Protecting Possession' (1996) 44 American Journal of Comparative Law 293; M Bridge, *Personal Property Law* (4th edn, OUP 2015) 29, 41, 53–58.

would say that, when *B* obtains possession, *B* acquires the *very same type of proprietary interest* that *A* has. According to some accounts, each of them has a 'possessory right' in the dress, which is the only type of proprietary right in chattels that matters in English law.[33] According to others, each of them has, not a 'possessory interest', but an ownership interest in the dress.[34] If this is right—if possession generally gives rise to an ownership interest—it is misleading to draw a distinction between 'the owner' and 'the possessor': the possessor *is* an owner.

Chapter 4 considers which of the three views is correct insofar as land is concerned. The main conclusion of the chapter is that, in the modern law, the *Third View* is correct. More specifically, it is concluded that, while the orthodox view was that possession is *not* a root of 'freehold title', in the modern law, a person acquires, upon taking possession of land, an estate in fee simple absolute in possession.

Chapter 5 considers which of the three views is correct insofar as chattels are concerned. It is argued that, while some authorities support the view that, in certain circumstances, a possessor is to be deemed to be the owner of the chattel, the *Third View* is correct and a possessor actually acquires an alienable, proprietary interest in the chattel.

Chapter 6 is concerned with the third of the three principal questions. It argues that, contrary to what some distinguished property lawyers have claimed, land and chattels *can* be owned in English law, notwithstanding the existence of the doctrine of title by possession and the doctrine of relative title. It argues that, in *some* circumstances, the title acquired by possession amounts to ownership. If the title that the possessor acquires is the supreme title, then the possessor is the owner of the land or chattel. If, however, the title that the possessor acquires is an inferior title, it is not

[33] S Green and J Randall. *The Tort of Conversion* (Hart 2009) 80–84.

[34] McFarlane (n 24); Hickey (n 24); Douglas (n 24).

correct to regard her as the owner. In short, the title acquired by possession amounts to ownership in some cases but not all.

The thesis is brought to an end in Chapter 7. The chapter summarises the main conclusions of the thesis, explores some of their implications, and briefly considers a significant questions that is raised by, but beyond the scope of, the present enquiry.

2

POSSESSION

The chief aim of this chapter is to provide a sound answer to the first of the three principal questions: what is possession for the purposes of the doctrine of title by possession? The chapter consists of two sections. Section 1 outlines the purpose and scope of the present enquiry. Section 2 provides an answer to the first principal question. It is argued that the general rule is that a person is in possession of certain land or a certain chattel for the purposes of the doctrine of title by possession if and only if she has (1) a sufficient degree of exclusive physical control of the land or chattel; and (2) an intention to possess it; but that special rules apply in certain circumstances which modify or displace this general rule.

1. METHODOLOGICAL PRELIMINARIES

This section provides a more detailed account of the chief aim of this chapter and contrasts it with the aims of certain influential accounts of possession, including Pollock's and Salmond's. It also considers the meanings of 'possession' and the indeterminacy of 'possession' and examines the claim that possession is a useless notion. It consists of three sub-sections: sub-section A ('Generalisation and Particularization'); sub-section B ('Ambiguity, Vagueness and Variation'); and sub-section C ('A Way Through the Thicket').

Why should we begin in this way? Why not simply get on with answering the first of the three principal questions? There are two main reasons for making a methodological detour. The first reason is that Holmes', Pollock's and Salmond's writings on the law of possession have influenced generations of legal scholars, particularly in common law jurisdictions. Their work has cast a shadow over all subsequent work in the area and, accordingly, it is important to explain how this enquiry relates to theirs. The second and more important reason is that a number of influential accounts of possession in the law are marred by two serious shortcomings. The first is a failure to think seriously about the subject matter of the account. This is a failure, and not merely an omission, because it is not as clear as it should be what the subject matter is; what the account is meant to be an account of. And this makes it difficult to know whether the accounts succeed. The second is the adoption or espousal of certain misguided approaches to questions regarding possession in the law. The aims and methodologies of the 19th century writers on possession were largely rejected by scholars in the 20th century. These later scholars appreciated that 'possession' is ambiguous and vague; that its meaning depends upon the context; and there are often good reasons for the law to adopt one meaning in one context and a different meaning in another. These considerations underlie the framing of the first of the three principal questions, which is concerned with what counts as possession in a particular context: the context of the doctrine of title by possession. Once scholars had grasped the significance of these considerations and their implications, the grand theories of possession that had been advanced by Pollock and others no longer seemed credible. But the denunciation of the older writings did not stop there. The sceptical treatment of the older writings led some scholars, in what can be appropriately described as throwing the baby out with the bathwater, to maintain that

possession is a wholly useless notion. This conclusion should be rejected and, in order to see why, we must understand the ambiguity and vagueness of 'possession' and the implications of such phenomena for the law and legal scholarship. So, on this occasion, a discussion of methodology must come first.

A. Generalization and Particularization

The chief aim of this chapter is to provide an account of what counts as possession for the purposes of the doctrine of title by possession. This sub-section contrasts this aim with the aims of the authors of certain influential works on possession and the law, in order to shed some light on the subject matter and scope of the present enquiry and how it differs from other enquiries.

This chapter does not aim to give a comprehensive account of the nature of possession in general. In this respect, the chapter can be contrasted with Sir John Salmond's influential account of possession:

> [A] complete theory of possession falls into two parts: first an analysis of the conception itself, and secondly an exposition of the manner in which it is recognized and applied in the actual legal system. It is with the first of those matters that we are here alone concerned.[1]

Nor does this chapter aim to provide what might be described as a general account of possession in a particular legal system. In this respect, the chapter can be contrasted with Pollock's influential essay on possession.[2] Pollock sought to provide a general account of possession in English law. In the Preface to the *Essay on Possession* Pollock notes that '[t]he want of any systematic account of possession in English law

[1] J Salmond, *Jurisprudence* (7th edn, Butterworths 1924) 295.

[2] F Pollock and RS Wright, *An Essay on Possession in the Common Law* (Clarendon Press 1888). Pollock was responsible for Part I and Part II; Wright was responsible for Part III.

has often been remarked upon'.[3] Pollock intended to fill the gap; he sought to explain the 'native doctrine of possession'—as opposed to any doctrine of Roman law—and 'to show that a fairly consistent body of principles is contained in the English authorities'.[4] Pollock discusses eight rules that, in his view, 'represent, in a general way, the working method of the Common Law with regard to Possession.'[5] We do not need to consider in detail Pollock's discussion of these rules. The point is that he sought to give a *general* account of possession in English law.

The sort of approach taken by Pollock was criticised and rejected by a number of writers in the 20th century. In 1932 Professor Shartel contrasted such approaches with his:

> [W]here the older writers, in line with the logic of their day, have brought as many cases as possible together, on the basis of some feature of similarity among them, and have united them all under one conceptual head ['possession'], I want to break up this concept and to emphasize instead differences between cases and the fact that the differences are, for legal purposes, far more significant than the likeness which constitute the basis of unification under one concept.[6]

Whereas Pollock sought to provide a general account of possession in English law, Shartel favoured an approach that took seriously 'the particularization of problems' and which gave 'particularized form …. to our concepts and terms':[7]

> Instead of attempting to develop a standard act or a standard event to cover all the cases in which proprietary relations arise, or liabilities are imposed, on the basis of dealings with things, instead of trying to define the act of taking or

[3] Ibid v.

[4] Ibid vi.

[5] Ibid 18.

[6] B Shartel, 'Meanings of Possession' (1932) 16 Minnesota LR 611, 612.

[7] Shartel (n 6) 625.

> the act of delivery for all legally significant situations, let us try to frame standard statements more particular in type and narrower in application.[8]

Pollock's approach gives rise to a question that he did not discuss in his essay: what is a general account of possession in the law an account of? What, in other words, is the subject matter of such an account? One might say that the subject matter is 'possession in the law'. But this answer, without more, is problematic, because 'possession' is ambiguous. One might say, in response, that one is concerned with 'possession' in a particular sense in the law, say, possession in the sense of 'physical control'. But this response gives rise to other questions. Is it account of all laws concerning possession (control) in the legal system? If so, what is the point of treating these laws together? And when does a law *concern* possession (control)? The point is not that these questions are unanswerable. Rather, it is that these questions should be considered and discussed if one purports to provide a general account of 'possession in the law'. That, apparently, was Pollock's aim in his famous essay on possession. It is not the aim of this chapter. This chapter, as has been said, aims to provide an account of what counts as possession for the purposes of the doctrine of title by possession.

B. Ambiguity, Vagueness and Variation

'Possession' is ambiguous. Particular senses of 'possession' are vague. And a person might be in 'possession' of a thing for the purposes of one law but not for the purposes of another. It is necessary to consider these points for two main reasons. First, acquiring a greater understanding of them will lead to a greater understanding of possession in the context of the doctrine of title by possession. Secondly, these

[8] Shartel (n 6) 624.

points have given rise to exaggerated worries about the uncertainty that surrounds 'possession' and, consequently, about the uncertainty that results if 'possession' is used to communicate legally authoritative standards; worries that underlie the view that 'possession' is a useless notion.

i. Ambiguity

'Possession' is an ambiguous word: it has multiple meanings.[9] In legal contexts, it is used in two main ways. When 'possession' is used in the first way it means, broadly speaking, 'physical control': to say that a person is in possession, in this sense, of a thing is to say that he has, to a greater or lesser extent, physical control of the thing. This is referred to hereinafter as 'possession (control).' An example of 'possession' being used in this way can be found in the judgment of Lord Denman CJ in *Young v Hichens*.[10] The claimant had almost caught some fish with a net but the defendant disturbed the fish and prevented the claimant from catching them. The claimant brought trespass and the question arose as to whether the claimant was in possession of the fish. Lord Denman CJ said:

> It does appear almost certain that the [claimant] would have had possession of the fish but for the act of the defendant: but it is quite certain that he had not possession…. [T]he question will be whether any custody or possession has been obtained here. I think it is impossible to say that it had, until the party had actual power over the fish.[11]

In this passage of Lord Denman CJ's judgment 'possession' clearly means 'possession (control)'.

---

[9] Many legal scholars, including Pollock, have recognized this: Pollock and Wright (n 2) 1; Shartel (n 6) 612.

[10] *Young v Hichens* (1844) 6 QB 606, 115 ER 228.

[11] (1844) 6 QB 606, 611; 115 ER 228, 230.

Secondly, 'possession' is used to refer to a type of legal interest, an interrelated set of legal rights (claim-rights, privileges, powers, and immunities).[12] Hereinafter, this is called 'possession (interest)'. For example, RH Kersley asserted that there are three types of legal interest that a person may have in goods: '(1) ownership, (2) bailment, (3) mere possession.'[13] In this sentence, 'possession' means 'possession (interest)', not 'possession (control)'.

Pollock distinguished 'de facto possession' from 'legal possession'.[14] According to Pollock, 'de facto possession' is a 'relation between a person and a thing' whereby the person has 'effective occupation or control' of the thing.[15] 'De facto possession' is thus synonymous with 'possession (control)'. But what is 'legal possession'? Pollock describes it as 'the state of being a possessor in the eye of the law.'[16] This statement is itself ambiguous. For '*X* is the possessor in the eye of the law' might mean that, according to the law, *X* has possession (control); or it might mean that, according to the law, *X* has possession (interest).

Now, the law might provide that *X* has possession (control) even if *X* does not have possession (control). Where this is so we can say that *X* has 'fictitious possession (control)'. In such circumstances, the statement—'according to the law, *X* has possession (control)'—is true, but 'X has possession (control)' is false. The term 'possession (control)' has the same *meaning* in each of these statements. Fictitious possession (control) is not a special kind of possession (control); to have fictitious

[12] E.g. JW Bingham, 'The Nature and Importance of Legal Possession' (1915) 13 Mich LR 535, 623, 636–40.

[13] RH Kersley, *Goodeve's Modern Law of Personal Property* (9th edn, Sweet & Maxwell 1949). 9. For another example, see Bingham (n 12) 636–40.

[14] Pollock distinguished both of these from 'rights to possession': Pollock and Wright (n 2) 11–20, 26–28. Cp. Wright's discussion: Pollock and Wright (n 2) 118–19.

[15] Ibid 12, 26.

[16] Ibid 26.

possession (control) is to have possession (control) according to the law, when one does not actually have possession (control). It will be helpful to consider an example. In *Dunwich (Bailiffs) v Sterry* the claimant had a right to possess a barrel of whisky that had washed up on the shore, but he had no physical control of the barrel.[17] Parke J concluded that the claimant did have 'possession' because 'the right to possession draws after it a constructive possession.'[18] As Douglas has explained, Parke J's reasoning involved a legal fiction: his Lordship 'deliberately adopted a description that is "inaccurate as an expression of reality".'[19] Parke J maintained that, in law, the claimant had possession (control) even though the claimant did not actually have possession (control). In other words, the claimant had what we have called fictitious possession (control).

ii. Vagueness

Certain senses of possession are vague. A term is vague if it has borderline cases. A borderline case is one in which it is intrinsically unclear whether the term applies.[20] For instance, 'short' and 'bald' are vague: there are cases in which a person is not clearly short and not clearly non-short; and there are cases in which a person is not clearly bald and not clearly non-bald.

'Possession (control)' is vague. There are cases in which it is clear that a person has possession (control) of a thing. For example, if *X*, an adult of sound mind,

[17] (1831) 1 B & Ad 831, 109 ER 995.

[18] (1831) 1 B & Ad 831, 842; 109 ER 1000. Cp. *Bocardo SA v Star Energy* [2010] UKSC 35, [2011] 1 AC 380, [29]–[31] (Lord Hope).

[19] S Douglas, 'Is Possession Factual or Legal?' in E Descheemaeker (ed), *The Consequences of Possession* (EUP 2014) 56, 71 citing Lon Fuller, 'Legal Fictions' (1930) 25 Illinois LR 363, 371.

[20] There has been much discussion of how to properly characterise borderline cases: see, e.g. R Sorensen, *Vagueness and Contradiction* (OUP 2001) ch 1; TAO Endicott, *Vagueness in Law* (OUP 2000) ch 3.

is alone in a field and knowingly clutching a watch, with the intention of exercising control over it, he is clearly in possession (control) of the watch. There are also cases in which it is clear that a person does not have possession (control) of a certain thing. Presumably, you are not in possession of the Crown Jewels: you do not hold them and they are not held on your behalf—indeed, you have no control over them at all and cannot easily acquire control of them. There are also borderline cases, i.e. cases in which it is not clear whether a person has possession (control) of a thing, as well as second-order borderline cases, i.e. cases in which it is unclear whether the case is a borderline case. Suppose that *B* has collected a suitcase from *A* and is carrying it along the street. The suitcase contains a lethal weapon but *B* does not know this and has no reason to suspect it. Is *B* in possession of the weapon? It seems that it is unclear. Some of the elements that are present in the clear case above are present in this example too. *B* is in fact exercising some physical control over the weapon: his actions are affecting its location in space. However, some of the features of the clear case are missing in this example. *B* has no knowledge of the weapon and does not intend to exercise any control over it.

Judges have recognised that there are borderline cases of possession. For instance, in *Warner v Metropolitan Police Commissioner* Lord Wilberforce distinguished clear cases from borderline cases of possession. His Lordship gave a description of a clear case of possession:

> a possessor of a thing has complete physical control over it; he has knowledge of its existence, its situation and its qualities; he has received it from a person who intends to confer possession of it and he has himself the intention to possess it exclusively of others.[21]

[21] *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 (HL) 309 (Lord Wilberforce).

His Lordship then distinguished such a case from 'borderline cases' in which 'one or more of [those elements] is lacking, or incompletely present'.[22]

The law cannot eliminate the indeterminacies that result from vague rules,[23] but it can reduce them by making the rules more precise.[24] For instance, a rule of law might provide that, for the purposes of the general prohibition on the possession of certain drugs, a person who is carrying a suitcase that contains drugs is not in possession of drugs if he does not know that the suitcase contains drugs and has no reason to suspect that it does. Lord Wilberforce appreciated this in *Warner*. His Lordship noted that, in connection with a borderline case, the law may have determined, or a judge may be required to determine, 'whether the given approximation is such that possession may be held sufficiently established to satisfy the relevant rule of law.'[25]

iii. Variation

As Lord Parker CJ said in *Towers & Co v Gray*, 'the meaning of "possession" depends upon the context in which it is used'.[26] Accordingly, a person might have possession (control) for the purposes of one legal rule but not for another. This becomes apparent when one considers the following question: can a person be in possession of a thing in English law notwithstanding that she has no knowledge of its

[22] Ibid.

[23] This was HLA Hart's view: Hart, *The Concept of Law* (3rd edn, OUP 2012) 126.

[24] For a general discussion see Hart (n 23) 130–132; TAO Endicott, 'Vagueness and Legal Theory' (1997) 3 Legal Theory 37, 60–61.

[25] *Warner* (n 21) 309 (Lord Wilberforce).

[26] [1961] 2 QB 351 (DC) 361 (cited with approval in *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 (HL) 304F (Lord Pearce) and in *Re Atlantic Computer Systems* [1992] Ch 505 (CA) 531 (Nicholls LJ)). In *Gray* the Divisional Court had to decide whether the appellant had certain goods 'in [its] possession' for the purposes of section 2(2) of the Merchandise Marks Act 1887,

existence? The question is problematic because of the unspecified reference to 'possession … in law'. A person who has no knowledge of a thing might be in 'possession' of it for the purposes of some legal rules but not others. In *Warner v Metropolitan Police Commissioner* the House of Lords considered whether the appellant had certain illicit drugs 'in his possession' contrary to section 1(1) of the Drugs (Prevention of Misuse) Act 1964.[27] The drugs were contained in a case that the appellant had collected and transported. The House of Lords held, among other things, that, if a person is in possession (control) of a package or container, he is not 'in possession' of the contents for the purposes of section 1(1) of the 1964 Act if he had no knowledge of the contents and no reasonable opportunity to ascertain what they were.[28] In contrast, if a person has possession of land for the purposes of the doctrine of title by possession, and if he has manifested an intention to exercise control over any chattels that might be on the land, then, for the purpose of the doctrine of title by possession, he is in possession of chattels that are on the land. In such circumstances the possessor of the land is in possession of the chattel (for such purposes) notwithstanding that he has no knowledge of the chattel.[29] Accordingly, the possessor of the land has a better title to the chattel than a licensee who finds it on the land.[30]

The Australian case, *Flack v National Crime Authority*, provides a good example of a person being in possession for the purposes of one rule but not for the

---

[27] *Warner* (n 21). The Drugs (Prevention of Misuse) Act 1964 was repealed by the Misuse of Drugs Act 1971. Section 5(2) of the 1971 Act provides that, subject to certain exceptions, 'it is an offence for a person to have a controlled drugs in his possession.'

[28] *Warner* (n 21) 282 (Lord Reid), 305–306 (Lord Pearce), 310–11 (Lord Wilberforce).

[29] *South Staffordshire Water Co v Sharman* [1896] 2 QB 44 (DC) 47 (Lord Russell CJ); *Parker v British Airways Board* [1982] QB 1004 (CA); *Waverley Borough Council v Fletcher* [1995] QB 334 (CA) 343–44 (Auld LJ).

[30] *Parker* (n 29).

purposes of another.[31] The NCA seized a bag containing money from premises occupied by Mrs Flack. No person was charged in connection with any offence and Mrs Flack asked the NCA to return the bag and money. The NCA submitted that Mrs Flack did not have a sufficient title to sue for it. Hill J held that, for the purposes of the doctrine of title by possession, Mrs Flack was in possession of the bag and money, even though she did not know of the existence of the goods. Hill J accepted that, for the purposes of the statutory crime of being in possession of prohibited imports, a person could not be in 'possession' unless he had knowledge of the goods, but maintained that this did not assist 'at all in throwing light on what is necessary to establish a possessory title'.[32] Thus, Mrs Flack was not in possession of the bag and money for the purposes of certain rules of the criminal law, but she was in possession for the purposes of the doctrine of title by possession.

C. A Way Through the Thicket

The discussion of ambiguity, vagueness and variation in the previous sub-section might lead one to believe that so much uncertainty surrounds 'possession' that, when it is used to communicate legal standards, it provides courts and citizens with no guidance at all, except insofar as its meaning is specified by rules of law. Arguably, this was Professor RWM Dias' view. Dias contended that:

> [t]here is now so much flexibility in the use of this concept that certainty over a good part of the law in which it figures has disappeared. Such certainty as there may be is preserved by the fact that particular rules prescribe in the particular contexts where possession shall reside. It is therefore submitted that all that is needed are these rules, which determine what view should be taken of different situations of facts.[33]

[31] (1997) 80 FCR 137 (Federal Court of Australia).

[32] Ibid 148.

[33] RWM Dias, *Jurisprudence* (5th edn, Butterworths 1985) 289.

Dias concluded that possession is a useless notion—a 'redundant relic', [34] 'superfluous'.[35] He also concluded that, since the law's determination of where 'possession shall reside' is made in accordance with the demands of 'policy and convenience', in English law 'possession is no more than a device of convenience and policy'.[36]

This sceptical view of the utility of 'possession' may well be the result of a mistaken view of the nature and implications of the ambiguity, vagueness and variation that were discussed above, and of a failure to appreciate how the judiciary and others ought to respond to such phenomena.

When, say, a judge is required to interpret a statutory provision or a binding judicial judgment that includes the term 'possession', the judge should consider what 'possession' means in the context of the provision or judgment; and when considering what 'possession' means in a particular context, the judge may be required to consider, among other things, the intentions of the legislature, any applicable general rules of interpretation, and/or any applicable rules that specify the meaning of the term in question. In a given context, it might be clear that 'possession' refers to 'possession (control)' or 'possession (interest)' or both or neither.

When a judge is required to determine whether a particular person, *P*, has, say, possession (control) of a thing for the purposes of a particular rule, it might be clear that *P* does or does not have possession (control). The existence of borderline cases should not cause one to forget that there are many *clear* cases. For example, it

[34] Ibid 289.

[35] Ibid.

[36] Ibid 285. The recognition by certain judges of 'fictitious possession' indicates that that they believe there are some limits to what can actually count as possession.

is clearly the case that you do not have possession (control) of most buildings in the country. If the case before the court involves a borderline case of possession, and if the question as to where to place such a case is not settled for the judge by the law, the judge, in determining whether the case should fall on one side of the line or the other, should consider the considerations that underpin the law in question and other pertinent reasons for or against each view. Lord Wilberforce recognised this in *Warner v Metropolitan Police Commissioner*.[37] His Lordship noted that the law had adopted 'varying solutions' to borderline cases of possession.[38] His Lordship added:

> That the solution adopted ultimately depends upon the need justly and adequately to meet the requirements of the relevant legal rule is well shown in the words of Wills J. in a case about finding on premises – "a contrary decision would … be a great and most unwise encouragement to dishonesty"'.[39]

Lord Wilberforce clearly thought that this is the right approach: he went on to consider how to justly and adequately meet the requirements of the rule that was at the heart of the appeal in *Warner*. Thus, Lord Wilberforce rightly discerned that what counts as 'possession' varies; a person might be in possession for the purposes of one rule but not for the purposes of another. His Lordship also rightly discerned that such variation has in part resulted from the law responding to the reasons that ground the assorted rules; reasons which themselves vary from rule to rule. And perhaps his Lordship rightly discerned that, when a judge is determining in a borderline case what should count as possession for the purposes of a legislative provision or binding judgment, she should be appropriately sensitive to, and her conclusion should appropriately reflect, the reasons upon which the rule is based and other

[37] *Warner* (n 21).

[38] Ibid 310.

[39] Ibid citing *South Staffordshire Water Co v Sharman* [1896] 2 QB 44 (DC) 48 (Wills J).

considerations that properly bear upon the matter, which may include 'policy and convenience' as well as the demands of justice.

So, while 'policy and convenience' may, in some circumstances, properly guide a judicial decision as to whether or not a person is in possession of a thing for particular purposes, the ambiguity, vagueness and variation that we have discussed should not cause us to believe that 'possession' is a useless term or that it is *no more than* a device of policy and convenience.

2. Possession and the Doctrine of Title by Possession

We can now turn to the first of the three principal questions: what is possession for the purposes of the doctrine of title by possession? It is argued in this section that the general rule is: a person, *P*, is in possession of certain land or a certain chattel for the purposes of the doctrine of title by possession if and only if *P* has (1) a sufficient degree of exclusive physical control of the land or chattel; and (2) an intention to possess it. This is referred to herein as 'the general possession rule.' However, this general rule is, in certain circumstances, displaced or modified.

A special rule applies to chattels that are under or attached to land: for the purposes of the doctrine of title by possession, a possessor of land is in possession of chattels that are under or attached to the land. This rule displaces the general possession rule. So if *A* is in possession of certain land, *A* is in possession (for the purposes of the doctrine of title by possession) of chattels that are under or attached to the land, notwithstanding that he has no intention to possess them.

A special rule applies to chattels that are on land: for the purposes of the doctrine of title by possession, a possessor of land, *Q*, is in possession of all chattels that are on the land (except those that are in the possession of another or others)

provided that *Q* has manifested his intention to possess chattels that may be upon it. It is arguable that this rule modifies, but does not displace, the general possession rule.

A. The General Possession Rule

We will see in Chapter 4 and Chapter 5 that the doctrine of title by possession is closely connected to the torts that protect property rights in chattels and land and the law of limitation, including the doctrine of 'adverse possession'.[40] It is to these areas that we must look in order to understand the law concerning what counts as possession for the purposes of the doctrine of title by possession. In *Powell v McFarlane* Slade J considered the meaning of the term 'possession' in the Limitation Act 1939.[41] The relevant provisions of the 1939 Act are largely the same as the relevant provisions of the Act that is presently in force in England and Wales, i.e. the Limitation Act 1980. Slade J explained that, for the purposes of the provisions of the Act, 'possession' bears 'the traditional sense of that degree of physical control, coupled with the requisite intention commonly referred to as *animus possidendi*, that would entitle a person to maintain an action of trespass in relation to the relevant land.'[42] In the leading case on the meaning of 'possession' in the Limitation Act 1980, *J A Pye (Oxford) Ltd v Graham*, Lord Browne-Wilkinson (with whom Lord Bingham, Lord Mackay, Lord Hope and Lord Hutton agreed) explained that he entirely agreed with this statement of the law. Lord Browne-Wilkinson maintained that 'there are two elements necessary for legal possession: (1) a sufficient degree of physical control ("factual possession"); (2) an intention to exercise such control on

[40] Text to n 42 and n 149 in Chapter 4 and n 1–n 14 in Chapter 5.

[41] *Powell v McFarlane* (1977) 38 P&CR 452 (Ch).

[42] Ibid 469.

one's own behalf and for one's own benefit ("intention to possess")."[43] *Powell* and *Pye* are both primarily about the law of limitation, but the same rule applies in the tort context. For example, in *Parker v British Airways Board*, in which a finder of a bracelet claimed that he was entitled to possession of it as against the defendant, Eveleigh LJ was of the view that, '[w]hatever the difficulties which surround the concept of possession in English law, the two elements of control and *animus possidendi* must co-exist.'[44] We will consider the two elements in turn.

i. Exclusive Physical Control

In order for a person to have, in the present context, possession of land or a chattel, it is necessary that the person has, with respect to the object, exclusive physical control. One can have physical control of an object to a greater or lesser degree. What degree of physical control is required in order for a person to have possession? In *Powell*, which involved the adverse possession of land, Slade J answered this question in the following terms:

> Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.[45]

Thus, the question is whether the alleged possessor, at the relevant time, had that degree of control over the thing that a typical owner would have had, i.e. whether she was able to determine, to the extent a typical owner could, whether and how the thing

[43] *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 (HL) [32]. Cp. [2003] 1 AC 419 (HL) [70] (Lord Hope); *Buckinghamshire County Council v Moran* [1990] 1 Ch 623 (CA) 636 (Slade LJ); *Zarb v Parry* [2011] EWCA Civ 1306, [2012] 1 WLR 1240 [37]–[38], [43]–[44] (Arden LJ), [71]–[75] (Lord Neuberger MR); *Greenmanor v Laurence Pilford* [2012] EWCA Civ 756 [27] (Etherton LJ).

[44] [1982] QB 1004 (CA) 1019 (Eveleigh LJ). Cp. *Marsden v Miller* (1992) 64 P&CR 239 (CA).

[45] *Powell* (n 41) 471.

was used or otherwise dealt with and who used or dealt with it. When seeking to answer that question one might consider (1) whether and how she has used and enjoyed the thing; and (2) whether others have used and enjoyed it against her will or whether she has effectively excluded the world at large from it.

Whether a person is in such a position, or, in other words, what amounts to physical control of a thing, and what degree of such control is sufficient, depend in part upon the nature of the thing. For different things admit of different forms and degrees of control. One can hold a jewel in one's hands or wear it on one's person. One can occupy a building and lock the doors in order to keep others out. One can use a field—for games or farming—and erect fences at the borders. Thus, the nature of the object is a relevant factor.[46] In *Chambers v Havering London Borough Council* Lewison LJ cited with approval the following passage of Pollock and Wright's essay:

> it is not possible, as a matter of fact, to possess a house, a wood, or a field in the same manner as we possess the money in our pockets, or the owner of a cart and horse possesses them when he is driving the horse in the cart. There can only be a more or less discontinuous series of acts of dominion. What kind of acts, and how many, can be accepted as proof of exclusive use, must depend to a great extent on the manner in which the particular kind of property is commonly used.[47]

What amounts to exclusive physical control of land can vary and depends, in part, on the nature of the land. In *Red House Farms v Catchpole* the defendant had shot over certain land, and permitted others to shoot over it, for a number of years and claimed that, by virtue of these facts, she was in possession of the land and had thereby

[46] *Lord Advocate v Young* (1887) 12 App Cas 544 (HL) 556 (Lord Fitzgerald); *Powell* (n 41) 470–71 (Slade J); *Pye* (n 43) [41] (Lord Browne-Wilkinson).

[47] *Chambers v Havering London Borough Council* [2011] EWCA Civ 1576, [2012] 1 P&CR 17, [54] citing Pollock and Wright (n 2) 30.

acquired a title to it.[48] The claimant submitted that the defendant was not in possession of the land. The Court of Appeal rejected this submission. Cairns LJ said:

> The authorities make it clear that what constitutes possession of any particular piece of land must depend upon the nature of the land and what it is capable of being used for…. I am quite satisfied that … the only profitable use of this land was for shooting. So … I think that the learned judge was quite right to treat the shooting activity as constituting possession.[49]

Generally speaking, land can be enclosed and the means of access controlled: by taking such measures a person might be in a position to effectively determine whether and how the thing is used, enjoyed and otherwise dealt with. In *J A Pye (Oxford) Ltd v Graham* the first claimant, Pye, was the registered proprietor of a fee simple estate in the disputed land. The defendants argued that Mr and Mrs Graham, who farmed adjoining land ('Manor Farm'), had been in adverse possession of the disputed land for at least 12 years. In order for the Grahams to have been in adverse possession, it was necessary that they had taken possession of the land. Thus, the court had to consider whether the Grahams had a sufficient degree of exclusive physical control. The disputed land consisted of four fields. The land was fully enclosed. It could be accessed with a key that opened a padlocked gate and also by foot over a public footway. Mrs Graham held the key at all material times. From September 1984 until 1999 the Grahams used the land for farming without the permission of Pye: they kept dry cattle and yearlings in a shed on the land; they spread dung; they harrowed and rolled it and fertilised and limed it. Their cattle grazed on it. They trimmed the hedges and maintained the fences and ditches. Lord Browne-Wilkinson concluded without hesitation that the Grahams had a sufficient degree of physical control of the disputed land:

---

[48] *Red House Farms v Catchpole* [1977] 2 EGLR 125.

[49] Ibid 126. Cp. *Umma v Appu* [1939] AC 136 (PC); *Port of London v Ashmore* [2010] EWCA Civ 30.

> The Grahams were in occupation of the land which was within their exclusive physical control. The paper owner, Pye, was physically excluded from the land by the hedges and the lack of any key to the road gate. The Grahams farmed it in conjunction with Manor Farm and in exactly the same way. They were plainly in factual possession.[50]

Pye can be contrasted with *Boosey v Davis*.[51] Mr and Mrs Boosey claimed that the defendant's paper title to a piece of waste land had been extinguished because they (the Booseys) had been in adverse possession of the land for at least 12 years. One issue that the Court of Appeal had to determine was whether Mr and Mrs Boosey had been in possession of the land. They had cleared the land, grazed goats on it and made a fence more secure. The Court of Appeal concluded that Mr and Mrs Boosey did not have a sufficient degree of physical control. Nourse LJ (with whom Mustill LJ agreed) noted that the land was used for grazing goats, but that 'the quantity and the quality of that user were minimal.'[52] The erection of a secondary fence did not make much of a difference: the secondary fence simply reinforced a pre-existing fence and, more importantly, it did not enclose the disputed land.[53]

It should be clear by this stage that whether a person has a sufficient degree of control does not depend only upon how she has acted in connection with the land or chattel, upon whether she has used and dealt with it and, if she has, how she has done so; it also depends upon whether and how other persons have interacted with it. It will be recalled that, in *Powell*, Slade J maintained that the question is not merely whether the claimant has dealt with the thing as an owner might have been expected to, but whether she has dealt with it in that way 'and *no one else has done so*'. A person, *P*,

[50] *Pye* (n 43) [41]. Cp. *Moran* (n 43).

[51] (1988) 55 P&CR 83 (CA).

[52] Ibid 87.

[53] Ibid.

does not have a sufficient degree of control of the thing if, although *P* is making use of the thing, *Q* is also making use of it and dealing with it as she wishes and not at *P*'s direction or on *P*'s behalf.

The case of *Marsden v Miller* provides a good example.[54] The disputed land lay between the claimant's land and the defendants' land. The land had been used for a variety of purposes by the claimant's predecessors in title, and subsequently by the claimant, since the 1940s and by the defendants since 1966. In 1981 the claimant erected a fence around the land and also a notice board, which stated that he claimed the ownership of the land. The defendants protested and removed the fence within 24 hours. The claimant and the defendants continued to use the land as they had done before. In 1984 the claimant brought an action in trespass, claiming a declaration that he was entitled to possession of the land, an injunction to restrain the defendants from entering the land, and damages. The judge dismissed his claim and the Court of Appeal dismissed the appeal. The Court of Appeal held that the claimant did not have a sufficient degree of control of the land and, therefore, did not have possession for the purposes of an action in trespass. Scott LJ (with whom Sir John Megaw agreed) accepted that, in order to obtain or retain possession of land, a person must have 'an appropriate degree of exclusive physical control' and 'an intention to take possession, to the exclusion of all others.'[55] His Lordship accepted that, when the fence was erected, the claimant had the necessary *animus possidendi*. However, his Lordship rejected the submission that the claimant also had a sufficient degree of physical control. His Lordship stated:

> In a case such as this, in which the object land is being used by others, and in which their continued use of the land would be inconsistent with the

[54] (1992) 64 P&CR 239 (CA). Cp. *Simpson v Fergus* (2000) 79 P&CR 398 (CA).

[55] (1992) 64 P&CR 239 (CA) 243.

> possession desired to be obtained, the would-be possessor, not being a person entitled in law to possession, cannot obtain *de facto* possession that the law will recognise unless the acts relied on as constituting the taking of possession are effective to exclude from the land those others.[56]

The defendants had not been effectively excluded from the disputed land by the erection of the fence: they removed the fence within 24 hours and thereafter used the land as they had done before. Accordingly, 'the erection of the fence did not give the [claimant] effective control of the disputed land.'[57]

The fact that it is possible for a person to access the land without the permission of the claimant is not necessarily incompatible with the claimant having a sufficient degree of physical control. In *Greenmanor v Laurence Pilford* the appellant submitted, *inter alia*, that, on the basis of the judge's findings of fact, the judge could not properly have concluded that the respondents had a sufficient degree of control over the disputed land to establish adverse possession.[58] The respondent had maintained a compound on the appellant's land, the south side of which was formed by a fence erected and maintained by the respondents. The respondents constructed a concrete step on the compound land, stored items on it, and altered it by removing grass and creating a driveway. The Court of Appeal rejected the appellant's submission. Etherton LJ (with whom Aikens and Maurice Kay LJJ agreed) said:

> Bearing in mind the nature of the land enclosed within the compound, the nature of the enclosure itself and the use made of the compound by the respondents and their visitors, there was ample material on which the judge was entitled, and right, to reach his conclusion on adverse possession by the respondents.

[56] Ibid.

[57] Ibid 244.

[58] [2012] EWCA Civ 726.

Etherton LJ explained that it was irrelevant that the respondents did not have a greater degree of physical control:

> It was not necessary for the respondents to establish that the compound was enclosed in such a way and to such an extent that no one could gain access save with the permission of the respondents…. The respondents only had to show that their acts were sufficient to amount to physical custody and control bearing in mind the nature of the land.

ii. Intention to Possess

In order for a person to have possession of certain land or a particular chattel, she must have not merely a sufficient degree of physical control; she must have, in addition, an intention to possess. Some eminent property law scholars have maintained that there is not, or should not be, any such requirement.[59] However, in *Pye*, in which the House of Lords maintained that, in the context of adverse possession, 'possession' has the same meaning as in the law of trespass, the law lords forcefully rejected the submission that there was no need to establish an intention to possess. Lord Browne-Wilkinson asserted that 'there has always, both in Roman law and in common law, been a requirement to show an intention to possess in addition to objective acts of physical possession.'[60]

What is the intention to possess?

What is required is an intention to possess, not an intention to own or an intention to acquire ownership of the thing.[61] The intention to possess is an intention to exercise

[59] For example, B McFarlane, *The Structure of Property Law* (Hart 2008) 155.

[60] *Pye* (n 43) [40]. Cp. *Pye* (n 43) [70] (Lord Hope); *Powell* (n 41) 470–1 (Slade J); *Moran* (n 43) 636 (Slade LJ), 644 (Norse LJ); *Parker* (n 29) 1021 (Eveleigh LJ); *Marsden v Miller* (1992) 64 P&CR 239 (CA) 242–43 (Scott LJ); *Greenmanor v Laurence Pilford* [2012] EWCA Civ 756, [25] (Etherton LJ). It is doubtful whether there 'has always been' such a requirement: O Radley-Gardner, 'Civilised Squatting' (2005) 25 OJLS 727.

[61] *Powell* (n 41); *Lambeth LBC v Blackburn* [2001] EWCA Civ 912, (2001) 82 P&CR 39; *Pye* (n 43).

physical control over the object on one's own behalf and for one's own benefit.[62] In *Powell's* case Slade J described the requisite intention—correctly, in Lord Browne-Wilkinson's view—as 'the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.'[63] One may have such an intention notwithstanding that one would be willing to pay a person with a better title for the use of the land if asked.[64]

Proving the intention

In certain circumstances a court may infer that a person had an intention to possess from the person's conduct. As Lord Browne-Wilkinson explained in *Pye*, the intention to possess 'may be, and frequently is, deduced from the physical acts themselves.'[65] Such an inference may be drawn from the fact that the alleged possessor had exclusive physical control of the land or chattel. In *Moran*, for instance, in which the land was enclosed and Mr Moran had placed a new lock and chain on the gate and fastened it, the Court of Appeal held that Mr Moran had an intention to possess. Slade LJ agreed with the following words of the trial judge, Hoffmann J: 'I do not think that if the council, on making an inspection, had found the gate newly padlocked, they could have come to any conclusion other than that [Moran] was intending to exclude everyone, including themselves, from the land.'[66]

---

[62] *Pye* (n 43) [40] (Lord Browne-Wilkinson).

[63] (1977) 38 P&CR 452, 471–2 (Slade J); approved by Lord Browne-Wilkinson (n 43) [43]. Cp. *Moran* (n 43) 640–41 (Slade LJ).

[64] *Ocean Estates Ltd v Pinder* [1969] 2 AC 19 (PC); *Pye* (n 43) [46], [60] (Lord Browne-Wilkinson).

[65] *Pye* (n 43) [40].

[66] *Moran* (n 43) 642 citing *Buckinghamshire CC v Moran* (1988) 86 LGR 472 (Ch) 479 (Hoffmann J).

When should the inference be drawn? Lord Hutton, in his speech in *Pye*, drew a distinction between, on the one hand, cases in which the alleged possessor 'has occupied the land and made full use of it in the way in which an owner would' and in which, accordingly, a court is to infer that the alleged possessor had the intention to possess; and, on the other hand, cases in which the alleged possessor's acts are 'equivocal and are open to more than one interpretation', such acts being 'insufficient to establish the intention to possess'.[67] *Powell's* case is an example of the latter.[68] The disputed land was an enclosed field, which had been used at all material times for agricultural purposes. Mr McFarlane was registered as proprietor of a fee simple estate in the land in 1952. He moved to West Germany in 1955 and stayed there for 11 years. The claimant, Mr Powell, entered onto the land in the summer of 1956, when he was 14 years old. He cut the hay on the land using a tractor and mowing machine. He made the disputed land stockproof by repairing the existing fences and, where necessary, putting up new fences, and then he put a cow to graze on it. He undertook clearance work and cut a number of trees, obtained a water supply for the land, and from time to time shot rabbits and pigeons on the land. Mr Powell continued to take the cow to pasture on the land in 1957 and went on doing so until 1968. He took the hay crop from the land every year until 1971. He undertook some work on the fences and some clearance work from time to time until 1973. He shot on the land from time to time until 1973. He erected a sign on the land advertising his business in 1962 and replaced it with a larger sign in 1963, which remained on the land until 1972. Between 1962 and 1970 he parked vehicles and timber on the land from time to time. Mr and Mrs McFarlane visited the land in 1972 and noticed the new fence and the advertising display board. They paid Mr Powell a visit. It seems

[67] *Pye* (n 43) [76].

[68] *Powell* (n 41).

Mr Powell made it clear to them that he intended to claim the land, while Mr McFarlane made it clear that he regarded himself as the owner.

Slade J outlined certain acts which, in his view, point unquestionably, in the absence of evidence to the contrary, to an intention to possess, including: the ploughing and cultivation of agricultural land, the enclosure of land by a newly constructed fence, and the placing and enforcement of a notice on land warning intruders to keep out.[69] Slade J maintained that Mr Powell's acts 'were of a far less drastic and irremediable nature'.[70] He had taken various profits from the land and carried out repairs to the fencing. Such actions were 'equivocal'. His Lordship concluded that Mr Powell's acts did not 'go far enough to provide the requisite *animus possidendi*'.[71]

Must the intention be manifested?

Must the alleged possessor have manifested his intention to possess the land or chattel? It depends upon what one means by 'manifested'. It is, of course, not sufficient that the alleged possessor had an intention to possess; it is necessary that he also had excusive physical control. To the extent that the intention to possess is manifested by having exclusive physical control, the intention to possess must be manifested.

While the alleged possessor must have exclusive physical control and an intention to possess, there is no additional requirement that the possessor manifests his intention. This point must be emphasised. For a contrary view was advanced by Slade J in *Powell's* case. Slade J drew a distinction between, on the one hand, persons

[69] *Powell* (n 41) 478.

[70] Ibid.

[71] *Powell* (n 41) 480.

who have a right to possession, who 'will be readily assumed [by the courts] to have the requisite intention to possess',[72] and, on the other hand, 'trespassers', who will be required by the courts to provide 'clear and affirmative evidence' that (1) he had the requisite intention to possess *and* (2) that 'he made such intention clear to the world'.[73] If the 'trespasser' 'has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can', then the court is to conclude that he did not have the requisite intention to possess.[74] The trespasser must 'at least make his intentions sufficiently clear so that the owner, if present at the land, would clearly appreciate that the claimant is ... seeking to dispossess him.'[75]

This part of Slade J's judgment is unsatisfactory for a number of reasons. In the first place, the distinction between, on the one hand, persons who have a right to possession and, on the other, trespassers, is unsound. After all, a person, *P*, might have a right to possess certain land as against the world at large and yet his entry onto the land might amount to a trespass as against another, *Q*, who has a better right to possession than *P*.

In the second place, Slade J asserted that, not only must the alleged possessor have exclusive physical control and an intention to possess, he must also 'at least make his intentions sufficiently clear so that the owner, if present at the land, would clearly appreciate that the claimant was seeking to dispossess him.' Although a similar view was expressed by Clarke LJ in *Lambeth LBC v Blackburn*, there is, in

[72] Ibid 472. Cp. *Bocardo* (n 18) [30]–[31] (Lord Hope).

[73] *Powell* (n 41) 472.

[74] Ibid.

[75] Ibid 480. Slade J's endorsement of the view that the trespasser must make his intentions sufficiently clear is based on certain policy considerations, particularly the need to protect landowners.

fact, no such requirement.[76] In *Wretham v Ross* the appellant argued that the deputy solicitor of the Land Registry had applied an incorrect test in determining whether Mr Wretham had been in possession of certain land for over 12 years.[77] It was submitted that the deputy solicitor should not have asked whether the appellant's use of the land had manifested to the 'owner' a clear intention to exclude him. David Richards J agreed. His Lordship correctly noted that the relevant passages from the judgments in *Powell's* case and *Blackburn* were 'not incorporated as part of the test of possession by the House of Lords in *Pye v Graham*. They are not in fact referred to or cited in that case.'[78] While his Lordship accepted that "the requirement that there is a sufficient manifestation of the intention provides protection for landowners",[79] his Lordship maintained that, following *Pye*,

> that protection is not achieved by the application of a test which requires consideration of what would be obvious to the paper owner visiting the property. It is achieved by [considering] objectively whether the squatter was in factual possession and whether he has shown the necessary intention to possess the property.[80]

iii. Presumptions of Possession

We have seen that, for the purposes of the doctrine of title by possession and the law of adverse possession, the general rule is that a person is in possession of certain land or a particular chattel at a certain time, *t1*, if and only if *A* had at *t1* (i) a sufficient degree of exclusive physical control of the thing; and (ii) an intention to possess it.

---

[76] *Lambeth* (n 61) [18] (Clarke LJ).

[77] [2005] EWHC 1259 (Ch).

[78] Ibid [30].

[79] Ibid [31] citing *Lambeth* (n 61) [36] (Clarke LJ).

[80] [2005] EWHC 1259 (Ch) [32].

In some circumstances, it will not be necessary for a person who claims that she was, for certain purposes, in possession of a particular thing to provide evidence in support of this claim. For she might be able to establish that she was in possession, not by providing evidence, but by relying upon a rule of presumption that requires the court to presume that she was in possession. In *Hebbert v Thomas*, which involved an action in trespass, Parke B opined that, if '[i]t is admitted that the soil and freehold of the locus in quo are in the plaintiff,' then 'the possession also must be presumed to be in him until some evidence is given to the contrary.'[81] Similarly, in *Powell v McFarlane* Slade J asserted that,

> in the absence of evidence to the contrary, the owner of the land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.[82]

iv. The Exclusivity of Possession and Dispossession

Possession, in the present context, is exclusive: if a particular person is, or a group of co-possessors are, in possession of certain land or a particular chattel at a certain time and thus have exclusive physical control, then, at that time, no one else can be in possession of the land or chattel. In *Pye* Lord Hope said: 'only one person can be in possession at any one time. Exclusivity is the essence of possession.'[83] It follows that, if one person, *A*, was in possession of a thing when another person, *B*, acquired possession of the very same thing, *A* thereby lost his possession. If *A* did not consent, *A* was *dispossessed* by *B*.[84]

---

[81] (1835) 1 Cr M&R 861, 864; 149 ER 1329, 1330.

[82] *Powell* (n 41) 470. Cp. *Bocardo* (n 18) [30]–[31] (Lord Hope).

[83] *Pye* (n 43) [38] (Lord Browne-Wilkinson), [70] (Lord Hope).

B. Chattels in or on Land

The previous sub-section has provided an account of the general possession rule. We turn now to two special rules, one concerning chattels that are under or attached to land and the other concerning chattels that are on to land. This area of the law has been discussed by a number of commentators and, accordingly, the discussion of it here will be relatively brief.[85]

i. Chattels under or attached to Land

It is a rule of English law that a possessor of land is in possession of chattels that are under or attached to the land. This proposition is supported by *Elwes v Brigg Gas Co*, *Hannah v Peel* and *Waverley Borough Council v Fletcher*.[86]

In *Elwes v Brigg Gas Co* the servants of the defendant, a lessee of certain land, discovered a pre-historic canoe embedded in the clay six feet below the surface.[87] The defendant refused to deliver the canoe to his lessor, the claimant. Chitty J refused to decide whether the boat was part of the soil, a mineral or a chattel, because he thought that, on any of these three views, the lessor would succeed. Interestingly, for present purposes, Chitty J maintained that, if the canoe was a chattel, the lessor had a better title to the canoe than the lessee because he had been 'in possession of the ground, not merely of the surface, but of everything that lay

---

[84] This is how 'dispossession' in sch 1(1) of the Limitation Act 1980 is to be interpreted: *Pye* (n 43) [36]–[38]. Cp. *Zarb v Parry* [2011] EWCA Civ 1306, [2012] 1 WLR 1240.

[85] E.g. AL Goodhart, 'Three Cases on Possession' (1928) 3 CLJ 195; DR Harris, 'The Concept of Possession in English Law' in AG Guest (ed), *Oxford Essays in Jurisprudence* (1961) 67, 80–98; AES Tay, 'Bridges v Hawkesworth and the Early History of Finding' (1964) 8 AJLH 224; AES Tay, 'Possession and the Modern Law of Finding' (1964) 4 Sydney LR 383; R Hickey, *Property and the Law of Finders* (Hart 2010) ch 2.

[86] *Elwes v Brigg Gas Co* (1886) 33 Ch D 562 (Ch); *Hannah v Peel* [1945] KB 509 (KB); *Waverley Borough Council v Fletcher* [1996] QB 334 (CA).

[87] *Elwes v Brigg Gas* (n 86).

beneath the surface down to the centre of the earth, and consequently in possession of the boat.'[88]

In *Hannah v Peel*, in which Mr Hannah, a soldier, found a brooch in a house that had been requisitioned by the army in 1939 but belonged to Mr Peel, Birkett J asserted: 'It is fairly clear from the authorities that a man possesses everything which is attached to or under his land.'[89]

The proposition asserted by Chitty J and Birkett J, that a possessor of land is in possession of chattels that are under or attached the land, was accepted by Auld LJ (with whom Sir Thomas Bingham MR and Ward LJ agreed) in *Fletcher*.[90] The council held certain land (a park) for a freehold estate. Mr Fletcher, a member of the public who was lawfully in the park, found a medieval gold brooch some nine inches under the surface. The Court of Appeal decided that the council had a better title to the brooch than Mr Fletcher. Auld LJ noted that there was 'powerful judicial support' for the proposition that 'a man possesses everything which is attached to or under land which he possesses.'[91] His Lordship accepted that it was correct and applied it to the facts of *Fletcher*.[92] His Lordship concluded, accordingly, that the council had a better title to the brooch because it was in possession of the brooch before Mr Fletcher found it; and, therefore, it had acquired, by virtue of the doctrine of title by possession, a title to the chattel that bound Mr Fletcher. Thus, the Court of Appeal accepted that the council was in possession of the brooch because it was in possession of the land. Accordingly, it was not necessary for the council to establish

[88] Ibid 568.

[89] *Hannah v Peel* (n 86) 520.

[90] *Fletcher* (n 86). An object might be annexed to the land and rendered 'part and parcel' of the land. We are here concerned with objects that are *attached* to the land but *not* part and parcel of the land.

[91] Ibid 342.

[92] Ibid 343–47.

that it had exclusive physical control of the brooch and an intention to possess it. The general possession rule did not apply; it was displaced by the special rule concerning chattels that are under or attached to land.

Professor McFarlane has argued that the reasoning in *Fletcher* is flawed.[93] Nevertheless, the special rule referred to above is, at present, a rule of English law. It is worth noting that, even assuming, *arguendo*, that the possessor of land should acquire, when she takes possession of land, a title to any chattel that is under or attached to the land, there is no need for the special rule that was applied in *Fletcher*. The law, instead of providing that the possessor of land is *in possession of* chattels that are under or attached to the land for the purposes of the doctrine of title by possession, could simply provide that the possessor of land acquires, when she takes possession of the land, a title to chattels that are under or attached to the land.

ii. Chattels on and unattached to Land

A different rule applies to chattels that are found on and not attached to land. The rule is that a possessor of land, *A*, is in possession of all chattels that are on the land, provided that *A* has manifested his intention to possess chattels that may be upon it (except for chattels that are possessed by another person or persons, by virtue of that person or those persons having exclusive physical control of the chattel(s) and an intention to possess).[94]

In *Parker v British Airways Board* Mr Parker found a gold bracelet in the international executive lounge at an airways terminal. He handed it to an employee of the defendant, who was the lessee and occupier of the lounge. The claimant requested that, if the owner did not claim the bracelet, it should be returned to him. No one

[93] McFarlane (n 59) 157–59. Cp. Hickey (n 85) 46–53.

[94] *Parker* (n 29).

claimed it and the defendants sold it and kept the proceeds. The claimant's action for damages succeeded and the Court of Appeal dismissed the defendant's appeal. The Court of Appeal held that the defendant did not have a better title to the bracelet than Mr Parker: it had not manifested an intention to possess chattels that may be in the lounge; and, accordingly, it was not in possession of the bracelet before Mr Parker found it.[95]

One may doubt that the special rule concerning chattels that are on and unattached to land is really a special rule. One might argue that *Parker* did not involve the application of a special rule concerning chattels that are on and unattached to land; rather, it involved the application of the general possession rule to such objects. This view is plausible but mistaken.

What reasons support, or seem to support, the view that there is a special rule concerning chattels that are on and unattached to land? There are two propositions that each entail, if sound, that there is a special rule. It is argued below that, while uncertainty surrounds the first proposition, it is clear that the second is correct.

The first proposition: a possessor of land may establish that she was in possession of any chattels that were on and unattached to the land without establishing that she had exclusive physical control of the chattels that were on the land. If that is right, a special rule applies and, by virtue of this rule, a possessor of land, *A*, in order to establish that she was in possession of a particular chattel that was on and unattached to the land, is not required to establish (in the first instance at least) that she had exclusive physical control of that chattel. One might respond that there is no special rule to this effect. Rather, *A*, by virtue of that possession, has exclusive physical control of chattels that are on the land (except for chattels that are physically

[95] Ibid 1014, 1018–1019 (Donaldson LJ), 1020 (Eveleigh LJ), 1021 (Sir David Cairns). For a powerful critique of Donaldson LJ's leading judgment, see S Roberts, 'More Lost Than Found' (1982) 45 MLR 683. For criticism of the rule that was applied in *Parker*, see McFarlane (n 59) 159.

controlled by another person, who does not hold them on behalf of or at the direction of the possessor of the land); and thus, *A*, by establishing that she has possession of the land, also establishes (subject to certain exceptions) that she had exclusive physical control of chattels that were on and unattached to the land; and, therefore, the first proposition is false.

Parker does not seem to have settled which of these two views is correct. Donaldson LJ maintained that it was a rule of law that '[a]n occupier of a building has rights superior to those of a finder over chattels upon or in, but not attached to, that building if, but only if, before the chattel is found, he has manifested an intention to exercise control over the building and the things which may be upon it.'[96] It is not clear whether his Lordship thought that an occupier of land has, by virtue of his occupation, exclusive physical control of chattels that are on the land. Eveleigh LJ asserted that the defendant had to establish that it was in possession of the bracelet when Mr Parker found it and, in order for the defendant to have been in possession, 'the two elements of control and animus possidendi must co-exist.'[97] This arguably supports the view that the possessor of land must have exclusive physical control of chattels on the land in order to be in possession of them. Sir David Cairns agreed 'with both Donaldson LJ and Eveleigh LJ' that

> the occupier has a better claim than the finder only if he had possession of the article immediately before it was found and that this is only so (in the case of an article not in or attached to the land but only on it) when the occupier's intention to exercise control is manifest.[98]

[96] Ibid 1018.

[97] Ibid 1019.

[98] Ibid 1021.

The second proposition is that a possessor of land may establish that she was in possession of any chattels that were on and unattached to the land *without* establishing that she had an intention to possess the particular chattel that was on and unattached to the land; it suffices that she had (manifested) an intention to possess any chattel that may be on the land.[99] This may be regarded as a rule that—in contrast to the rule concerning chattels under or attached to land—modifies, and does not displace, the general possession rule; it provides that, with respect to the chattels that are on and unattached to the land, a possessor of land has, with respect to such chattels, the requisite intention to possess if she has an intention to possess any chattels that are on the land.

While different rules currently apply to cases involving chattels that are on and unattached to land and cases involving chattels that are under or attached to land, there are no good reasons for distinguishing in this way between chattels that are on and unattached to land and chattels that are under or attached to land. Auld LJ defended the distinction in *Fletcher*;[100] but, for the reasons that have been discussed by Dr Hickey, Auld LJ's defence is unsatisfactory.[101]

C. Possession of Estates and Interests

The account of possession that has been outlined and defended above is one that regards land and (tangible) chattels as the subject matter of possession, not interests or rights that are recognised by the law. One can be in possession of the land known as 221B Baker Street, but not in possession of a fee simple estate. The reason is that

[99] Ibid 1018 (Donaldson LJ), 1020 (Eveleigh LJ), 1021 (Sir David Cairns).

[100] *Fletcher* (n 86) 345–346.

[101] Hickey (n 85) 47–50.

one can exercise physical control over the land known as 221B Baker Street, but not over a proprietary interest.

There is, however, a different view. On this view, it is quite possible to possess a proprietary interest, such as an estate in land. Mark Wonnacott QC has recently defended this view.[102] According to Wonnacott, in English land law, 'possession', in the 'proper, technical' sense, 'describes a relationship between a person and a corporeal estate (a fee simple, a lease, or, stretching the point, a profit à prendre) rather than the relationship between a person and any physical feature of the land.'[103] More specifically, it describes two types of relationship between a person and a corporeal estate. The first is a 'relationship of right': '[a] person has a *right to possess* an estate if he or she has acquired a title to it which is "vested in possession"'.[104] The second is a 'relationship of fact': 'when a person is, as a matter of observable fact, actually enjoying the rights and incidents of an estate in land.'[105] A person 'enjoys' the rights and incidents of an estate, for this purpose, if she exercises and uses them and has the benefit of them.[106] The second type of relationship, the 'relationship of fact', is particularly important for present purposes. For, according to Wonnacott, a person acquires, by virtue of this relationship, 'a presumptive title to an estate in land'.[107]

[102] M Wonnacott, *Possession of Land* (CUP 2006) ch 1.

[103] Ibid 1–2.

[104] Ibid 2.

[105] Ibid 3.

[106] Ibid 2, fn 6 citing *Kenny v Preen* [1963] 1 QB 499 (CA) 511 (Pearson LJ).

[107] Ibid 44.

Lawyers frequently talk of persons being in 'possession of estates'; there are many examples of this usage in the Law Reports and statute books.[108] However, the authorities that have been discussed in this chapter do not support the view that, in the modern law, the relevant question, for the purposes of determining whether a person, *X*, has acquired a title by possession, is, 'was *X* in possession of an estate'? If Wonnacott's view is correct, when a court is required to decide whether *X* was in possession for such purposes, the court must consider whether *X* was exercising the rights and incidents of a particular kind of estate in the land, say a fee simple or a term of years. For the court to be able to properly answer that question, it should consider what the rights and incidents of the various estates are;[109] and it should consider whether the rights and incidents of a particular kind of estate were exercised by *X*.[110] But the law does not require the courts to reason in this way. If the general possession rule is applicable, the relevant question is: 'did *X* have exclusive physical control of the land and an intention to possess it?' It is true that, when considering whether *X* had exclusive physical control of the land, the courts should consider whether *X* was dealing with the land as an occupying owner might have dealt with it;[111] and that the question as to whether *X* was dealing with the land as an occupying owner might have dealt with it is similar to the question as to whether *X* was exercising the rights and incidents of an estate. However, the enquiry that the law requires into whether *X* was dealing with the land as an occupying owner might have

[108] For some recent examples, see *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11, [2009] 1 WLR 2780, [60] (Lord Neuberger MR); Land Registration Act 2002, sch 6.

[109] A court might find it difficult to do this because 'very little is said about what the freeholder is actually entitled to do in respect of his land': S Douglas, 'The Content of a Freehold: A 'Right to Use' Land?' in N Hopkinds (ed), *Modern Studies in Property Law, Volume 7* (Hart 2013).

[110] How can one exercise a right that one does not have? The idea, presumably, is that one acts as though one had, and as though one were exercising, the right.

[111] Text to n 45.

dealt with it is part of an enquiry into whether *X* had *exclusive physical control* of *the land*; not an enquiry into whether *X* was in possession of an *estate*. These are different enquiries, even if the outcome of each enquiry happens to be the same in particular cases.

3. CONCLUSIONS

It was explained in Section 1 that possession has multiple meanings; that the meaning of possession depends upon the context; and, accordingly, that a person might be 'in possession' for the purposes of one rule but not for the purposes of another. The main aim of this chapter, as was emphasised in Section 1, is to explain what counts as possession for the purposes of the doctrine of title by possession. An explanation was provided in Section 2. It was argued that the general rule is that a person is in possession of certain land or a certain chattel for the purposes of the doctrine of title by possession if and only if he or she has (1) a sufficient degree of exclusive physical control of the land or chattel; and (2) an intention to possess it; but that special rules apply in certain circumstances which modify or displace this general rule. We can now turn to the second of the three principal questions. If a person has possession for the purposes of the doctrine, he or she acquires a 'title'; what is the nature of this 'title'?

3

TITLE BY POSSESSION: COMPETING EXPLANATIONS

1. INTRODUCTION

In the previous chapter we explored the nature of possession. We turn now to the legal consequences of being in possession. If a person acquires a title to land or chattels if and when she takes possession of them, what, exactly, is the nature of this title? What is it that the possessor acquires? This chapter, Chapter 4 and Chapter 5, are concerned with these questions. Many answers have been given; the answers are diverse and, in many cases, irreconcilable. The chief aim of this chapter is to set up the enquiry by describing some of these answers and highlighting the most important differences between them. It is neither possible nor desirable to consider the details of all of the many accounts that have been provided. Rather, we will focus on three views (*First View*, *Second View* and *Third View*) and some variations thereof. The three views have been chosen because, taken together, they bring to light two significant contrasts. The first is the contrast between, on the one hand, those accounts that maintain that the law actually confers on a possessor an interest of some kind in the chattel or land and, on the other hand, those accounts that assert that

possessor is *merely to be deemed to have* a certain interest in it. Eminent scholars and members of the judiciary have overlooked or misunderstood the distinction. For this reason, the distinction is emphasised in this chapter. Some scholars appear to have thought that the distinction is illusory. If this were correct, it would undermine our enquiry. Therefore, it will be necessary to examine this claim and explain why it is mistaken.

The second contrast that is highlighted by the three views is the contrast between, on the one hand, those accounts that maintain that the law confers on possessors merely possession-dependent, non-alienable rights that serve to protect present possession ('rights of possession') and, on the other, those accounts that maintain that the law confers on possessors an alienable, non-possession-dependent interest that comprises certain rights (including a right to possession and a right to non-interference). This contrast is, as Professor Honoré has explained,[1] an important one. It is the difference between, on the one hand, 'the protection of mere present possession' and, on the other, the conferral of an alienable right to exclusive possession of a thing.[2]

The main aim of this chapter is to outline the three views of the nature of the possessor's title. It also considers the meaning of 'title'. It seems wise to consider these matters before discussing (in Chapter 4 and Chapter 5) the law and the sources of the law, including the cases. Once we have a good account of the main views and of their similarities and differences, and once we are aware of the ambiguity that surrounds 'title', we will have a better understanding of what to look for in the cases, what is important, what turns on one interpretation or another; and we will be able to

[1] A M Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 107, 114–15.

[2] Ibid 114.

ensure that we are not misled by language and that we avoid the equivocations that blight a number of works in this area.

This chapter consists of three main sections (along with the introductory and concluding sections). In Section 2 we will consider the meaning of the term 'title'. We will then turn, in Section 3, to the three views of the doctrine of title by possession. Each of these views is characterised by it acceptance or rejection of three theses, i.e. the Mere Right of Possession Thesis, the Acquisition of Property Thesis, and the Deemed Property Thesis. Accordingly, we will discuss the three theses before outlining the three views. Section 4 examines and, ultimately, rejects the claim that there is, in fact, no real difference between, on the one hand, the law *conferring* an interest on a possessor and, on the other, the law providing that courts are to *presume* that the possessor has an interest.

2. WHAT DOES 'TITLE' MEAN?

The term 'title' is used in a variety of ways in English legal discourse. Honoré identified three uses of 'title' in his essay on ownership.[3] First, according to Honoré, 'title' 'refers to the conditions of fact which must be fulfilled in order that a person may acquire or lose a claim [i.e. a right] to a thing.'[4] These are sometimes called 'modes of acquisition or loss'. Dr Robin Hickey has noted that '[t]his aligns the meaning of title with'—what Peter Birks called—'causative events',[5] and, we might

[3] Honoré (n 1) 134. Cp. B Rudden, 'The Terminology of Title' (1964) 80 LQR 63, 65.

[4] Honoré (n 1) 134. FH Lawson, *Introduction to the Law of Property* (Clarendon Press 1958) 35; JW Harris, *Property and Justice* (OUP 1996) 39–40, 80–81; N MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP 2007) 139.

[5] R Hickey, *Property and the Law of Finders* (Hart 2010) 165; P Birks, *Unjust Enrichment* (2nd edn, Clarendon Press 2005) ch 1. For Birks' account to be plausible 'event' must be interpreted very loosely and broadly; some conditions of having a legal right are not 'events'.

add, with what some legal theorists have called 'investitive provisions'.[6] Secondly, 'title' refers to a 'right to possession'.[7] Thirdly, 'title' refers to a transmissible interest in a thing that comprises a right to possession, a power of alienation, and perhaps other incidents.[8] In addition, 'title' is used to refer to a 'claim' to a property right in a thing, or a 'claim' to the 'incidents' that a certain (proprietary) interest confers.[9] Hickey has claimed that title (in this sense) is 'purely a juridical notion, occupying a conceptual space between causative event and resultant right.'[10]

One consequence of the fact that 'title' is used in various ways is that lawyers have been able to escape some important controversies. For on many occasions it is no doubt possible to say that someone or other 'has a title' and leave it at that; and thus certain semantic, conceptual and legal disagreements are allowed to remain in the background.

This brings us to an important point. This thesis is not primarily concerned with how 'title' is used in legal discourse, but with the content of the doctrine of title by possession and the doctrine of relative title. Hence it is more concerned with certain legal disagreements—disagreements about the contents of the law of England and Wales—than with disagreements over how 'title' is, or ought to be, used. Of course, the fact that 'title' is used in various ways is not unimportant. We should be aware of the several uses of 'title', not least because ambiguity can lead to

---

[6] J Raz, *The Concept of a Legal System* (2nd edn, Clarendon Press 1980) 175–183; MacCormick (n 4) 139.

[7] Honoré (n 1) 134. Cp. WJ Swadling 'Property: General Principles' in A Burrows (ed), *English Private Law* (3rd edn, OUP 2013) 4.131; WJ Swadling, 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28 OJLS 627, 640.

[8] Honoré (n 1) 134.

[9] For example, HL Ho, 'Some Reflections on "Property" and "Title" in the Sale of Goods Act' (1997) 56 CLJ 571, 573.

[10] Hickey (n 5) 165.

misunderstandings and confusions. But, to a large extent, our interest in this lexicographical work is instrumental; we care about it because it assists us with the chief enquiry, which seeks to correctly identify and describe certain laws of England and Wales.

3. TITLE BY POSSESSION: THREE VIEWS AND THREE THESES

We turn now to the three views of the doctrine of title by possession. Each view is characterised by its acceptance or rejection of (one or more of) three theses. Accordingly, the three theses will be discussed and then the three views will be outlined.

A. The Mere Right of Possession Thesis

The first of the three theses is the Mere Right of Possession ('MRP') Thesis:

> in general, if and when a person (*P*) obtains possession of land or a chattel, *P* acquires a (or some) possession-dependent, non-alienable right(s) ('rights of possession'), including a right to non-interference that binds persons in general.

If the MRP Thesis is true, then English law must contain a law (or a set of laws) that provides that, when a person obtains possession of land or a chattel, he or she acquires a possession-dependent, non-alienable right of possession (or some such rights) in it. We will call this the MRP-law.

According to the thesis, the possessor's rights are 'possession-dependent'. This means that the existence of the right is conditional on the right-holder having

possession. The right ceases if and when the right-holder ceases to be in possession. Moreover, the right cannot be alienated: the right-holder cannot transfer the right of possessession to another person. To say that the *right* cannot be transferred, is, of course, not to say that the possessor cannot effectively relinquish possession to another. For instance, if *X* is in possession of Blackacre, he might permit and facilitate the acquisition of possession by *Y* and, if the MRP Thesis is correct, when *Y* obtains possession, *Y* acquires a right of possession. But, in such circumstances, *Y* acquires, not *X*'s right, but a *new* right; the source of *Y*'s right is *Y*'s possession.

The MRP-law protects present possession. Thus, one might expect the law's justification for conferring the right(s) of possession to have to do with the importance of protecting possession. If this is so, the justification explains why the right is possession-dependent. Consider, for instance, two of the reasons for protecting possession discussed by Pollock and Maitland: (1) the maintenance of the peace and public order;[11] (2) preventing 'invasion[s] of that sphere of peace and quiet which the law should guarantee to every one of its subjects.'[12] These considerations arguably provide reason for persons not to interfere with things that are actually in the possession of another. If these are the law's reasons for conferring a right of possession on a person who has possession of land or chattels, the right should be possession-dependent. The justification for conferring the right has to do with the protection of possession; accordingly, the justification is not applicable if a person does not have possession; and, thus, the right exists only for so long as the right-holder is in possession.

[11] F Pollock and FW Maitland, *The History of English Law Before the Time of Edward I* (2nd edn, CUP 1898) Volume 2, 41.

[12] Ibid 42. Cp. Friedrich Karl von Savigny, *Treatise on Possession* (E Perry trans, 6th edn, Sweet 1848) 27–28.

The account of the law in the last edition of *Goodeve's Modern Law of Personal Property* by RH Kersley effectively endorses the MRP Thesis (insofar as it applies to chattels).[13] According to this account, there are three types of legal interest that a person might have in goods: '(1) ownership, (2) bailment, (3) mere possession.'[14] One who has 'mere possession' has 'largely a negative right, a protection, conferred by the law on a person in conscious control of chattels, from any unauthorised interference with them.'[15] A person acquires 'mere possession' of a chattel by taking exclusive control of it with the intention to exclude all others from it. For example, a person who steals a thing acquires 'possession' because 'he has exclusive control of it and manifestly intends to exclude all others from it.'[16]

Many commentators, including some who do not endorse the MRP Thesis, have accepted that the right or 'title' that a person acquires by taking possession is possession-dependent (unless it is the 'best title'). For instance, Professor Sir Roy Goode has maintained that 'the holder of a purely possessory title loses his real right when he ceases to have possession, and his claim against the person who divested him of possession is a mere personal claim.'[17] Similarly, Dr David Fox has asserted that, in general, 'a relative title to personal property ... only survives so long as [the holder of the title] remains in possession of the chattel.'[18] This, on Fox's view, is to be explained by the fact that the doctrine serves to protect possession. It should be

[13] RH Kersley, *Goodeve's Modern Law of Personal Property* (9th edn, Sweet & Maxwell 1949).

[14] Ibid 9.

[15] Ibid 23.

[16] Ibid 41.

[17] E McKendrick (ed), *Goode on Commercial Law* (4th edn, Penguin 2010) 29. It should be emphasised that Goode's account does not endorse the MRP Thesis. On Goode's account, the interest that a possessor acquires can be alienated.

[18] D Fox, 'Relativity of Title at Law and in Equity' (2006) 65 CLJ 330, 344.

noted, however, that Fox maintains that the possession-dependence rule is (arguably) subject to an important qualification, viz. that a possessory title can be enforced against a defendant who derives her title from the original wrongdoer.[19]

Finally, it should be pointed out that some of those who have maintained that a possessor acquires an interest that is possession-dependent have thought that, nevertheless, the interest *can* be alienated (and, thus, these scholars do not endorse the MRP Thesis). Now, without at this preliminary stage wishing to comment on whether or not this is a correct statement of the law, it should be noted that this is problematic. If the right can be alienated, the existence of the right is *not* conditional on the right-holder being in possession. Suppose that *A* is in possession of a watch. *A* alienates his right of possession to *B* without delivering the watch to *B* and *B* thereby acquires the right. Once the right has been alienated, the right is vested in *B*. In such circumstances, it cannot be said that the existence of the right is conditional on the right-holder, *B*, being in possession, for *B* does not have possession. One response to this is to say that, following the transfer, the existence of the right is conditional on the *transferor* being in possession.[20] This response preserves (in an amended form) the right's 'possession-dependence'. But, if this response is correct, it is difficult to understand why the right should be possession-dependent at all. Why should the existence of the right be conditional on the right-holder *or his predecessor in title* being in possession? The right, it seems, no longer serves to protect present possession and neither the right nor the condition can be justified by considerations that concern the protection of possession.

[19] Ibid 346ff. Cp. J Gordley and U Mattei, 'Protecting Possession' (1996) 44 Am J Comp Law 293, 327.

[20] Goode maintains that, where a person has transferred a 'possessory title' to another but not possession, that other's title is dependent on the *transferor* being in possession: McKendrick (n 17) 36.

B. The Acquisition of Property Thesis

The second thesis is the Acquisition of Property ('AP') Thesis:

> in general, if and when a person (*P*) obtains possession of land or a chattel, *P* acquires an alienable interest in it; an interest that is not conditional on the interest-holder having possession of the thing and that comprises rights, including a right to possession and a right to non-interference, that bind persons in general.

If the AP Thesis is true, then English law must contain a law (or a set of laws) that provides that, when a person obtains possession of land or a chattel, he or she acquires such an interest in it. We will call this the AP-law.

A number of leading property law scholars have effectively endorsed the AP Thesis. For instance, in *English Private Law* Mr Swadling asserts: '[t]he mere act of taking possession bestows a right to exclusive possession, a title good against the whole world save any person with a better title. This is true of all things capable of being physically possessed, viz land and goods.'[21] Some property lawyers think that the interest a person acquires under the AP-law is, in cases involving chattels, ownership.[22] Others believe that the interest a person acquires under those rules is not ownership, or, at any rate, should not be called 'ownership'. Swadling prefers to say that, under the rule(s), a person acquires a 'right to exclusive possession forever.'[23]

[21] Swadling 'Property' (n 7) 4.422. The thesis has also been endorsed, in effect, by Professor Ben McFarlane in his *The Structure of Property Law* (Hart 2008) 154–156) and Dr Simon Douglas in his *Liability for Wrongful Interferences with Chattels* (Hart 2011) 20–30). Hickey has claimed that 'the general trend of the cases does lend some support' to the view that possession generates a 'relatively good property right': (n 5) 111; but he has some reservations: 109–111.

[22] For example, McFarlane (n 21) 140; Hickey (n 5) 122–124, 164; Douglas (n 21) 26.

[23] Swadling 'Property' (n 7) 4.422.

As to land, one view is that a person acquires, upon taking possession of land, a legal fee simple estate.[24] This view is referred to herein as the Acquisition of a Fee Simple ('AFS') Thesis.

If the AP Thesis is correct, there can be numerous interests of the same kind in certain land or a particular chattel. Consider the following two examples.

> *Example 3.1*. *A* was in possession of a jewel. *B*, desiring the jewel for himself, took it without *A*'s consent. Later, *C* took the jewel without *B*'s consent. A short time later, *B* demanded the return of the jewel and *C* refused to return it to *B*.

> *Example 3.2*. *X* held Blackacre for an estate in fee simple absolute in possession and was registered as the proprietor of such an estate. While *X* was abroad, *Y* obtained possession of Blackacre without *X*'s consent and, thereafter, *Z* obtained possession without the consent of *X* or *Y*.

Suppose that, in *Example 3.1*, each of *A*, *B* and *C* had possession of the jewel in turn. When *A* obtained possession, *A* acquired, under the (supposed) AP-law, a title, an alienable interest that entitles him to exclusive control, as did *B* when *B* acquired possession and *C* when *C* acquired possession. Since their interests are not possession-dependent, each of *A*, *B* and *C* has an (independent) interest that comprises (inter alia) a right to non-interference. How do their rights compare? According to the scholars who are committed to the AP Thesis, the rights that one acquires with respect to a thing under the AP-law bind persons generally but not any

[24] For example, McFarlane (n 21) 140.

one with a better interest in the thing.[25] If this rule is considered to form part of the doctrine of relative title, then that doctrine incorporates a doctrine of priority that prioritises the various proprietary interests.[26] The rule partly determines who is bound by the rights that are part of the interest. On this view, *A*'s interest, which arose before *B*'s and *C*'s, is, accordingly, better than theirs, and, as *B*'s interest arose before *C*'s, *B*'s 'title' is better than *C*'s. The result is that, other things being equal, *A*'s rights, including the right to non-interference, bind *B* and *C*, *B*'s bind *C* but not *A*, and *C*'s bind neither *A* nor *B*.

Turning to *Example 3.2*, if the AFS Thesis is correct, then Y acquired, when she obtained possession of Blackacre, a legal fee simple estate. Similarly, *Z* acquired such an estate when *Z* acquired possession. *X*'s estate takes priority over *Y*'s and *Z*'s and, thus, *X* has a right to possession that binds them. Accordingly, *X* could successfully bring an action to recover the land, or an action in trespass, against them. *Y*'s estate takes priority over *Z*'s and *Y* could bring an action to recover the land, or an action in trespass, against *Z*.

On this view, then, a title, for the purposes of the doctrine of title by possession, is a type of alienable interest that entitles the interest-holder, as against persons in general, to possession. The doctrine of relative title, on this view, is, in part, about the priority of competing proprietary interests, and about the bindingness of the rights that are constituents of those interests. Significantly, on this view, there is in principle no limit on the number of 'titles' that may exist with respect to a particular thing and thus several persons might have the *very same type of proprietary interest* in land or chattels. *A*, *B* and *C*, for instance, might each have, with respect to the jewel, the very same type of interest, e.g. a 'right to exclusive possession forever'

[25] See, for example, McFarlane (n 21) 146; Swadling, 'Property' (n 7) 4.427.

[26] McFarlane (n 21) 146; Doulgas (n 21) 24–27.

or a 'legal ownership interest'; and *X*, *Y*, and *Z* might each have, with respect to Blackacre, the very same type of interest in the land, e.g. a fee simple absolute in possession.

C. The Deemed Property Thesis

The Deemed Property ('DP') Thesis consists of the Deemed Ownership ('DO') Thesis and the Deemed Fee Simple ('DFS') Thesis.

> The DO Thesis: if a person, *P*, is or has been in possession of a chattel, the courts, in certain circumstances, are to deem that *P* has or had ownership of it.

> The DFS Thesis: if a person, *P*, is or has been in possession of certain land, the courts, in certain circumstances, are to deem that *P* holds or held the land for an estate in fee simple.

If the DP Thesis is true, then English law must contain a law (or a set of laws) that provide that a person who is or has been in possession of a chattel is to be deemed by the courts to own or to have owned it; and that a person who is or has been in possession of land is to be deemed by the courts to hold (or to have held) the land for an estate in fee simple absolute in possession. We will call this the DP-law.

What is the meaning of the term 'deem'? According to the *OED*, the 'ordinary current sense' of 'deem' is: 'to form the opinion, be of opinion; to conclude, consider, hold.' The fact that a court must be of the opinion, must conclude and hold (i.e. decide) that a certain person is the owner of a chattel or holds land for an estate in fee simple does not make it the case that that person *is* the owner of the thing or holds

land for such an estate. Consider *Example 3.1* again. Suppose that *B* brings an action in conversion against *C* and that, in such circumstances, the DP-law is applicable. Since *B* and *C* have each been in possession of the jewel, a question will arise as to how the DP-law is to apply in such circumstances—is *B* or *C* to be deemed to be the owner? Suppose that the position is that, since *B* was in possession of the jewel when it was taken by *C*, *B* is to be deemed to be the owner as against *C*. This means that, when the court is adjudicating and, accordingly, when it is reasoning, deliberating and deciding, it must *take as true* the proposition that *B* is the owner of the jewel.

It is sometimes said that possession gives rise, in cases concerning chattels, to what has been described as a 'title' or 'claim' to the ownership of the chattel; and, in cases involving land, to 'title' or 'claim' to a fee simple estate. These descriptions appear to be problematic. After all, anyone might *claim* to have a freehold estate in Blackacre or to be the owner of a particular car. What does it mean to say that the possessor acquires a claim to an interest? The DP Thesis provides a way of making sense of these descriptions. For, one who is committed to the thesis may say that the statements, '*B* has a title to the ownership of the jewel' and '*Y* has a title to a fee simple estate in Blackacre' mean, not that *B* and *Y* can merely make a claim to, respectively, the ownership of the jewel and the fee simple in Blackacre, but that the courts are (in certain circumstances) to proceed on the basis that *B* is the owner of the jewel and that *Y* holds Blackacre for an estate in fee simple. Accordingly, one can say that *B* acquired a title—a legally recognised claim—to the ownership of the jewel when he took possession of it. His title, his claim to the ownership, might be better or worse than another title to the ownership. In *Example 3.1*, for instance, *B*'s title is 'good against' *C* but it is not 'good against' *A* and, therefore, *B* is to be deemed (other things being equal) to be the owner of the jewel against *C* but not against *A*.

Thus, on this view, possession can be said to be a 'title', in first sense of 'title' identified by Honoré, inasmuch as a person's 'having possession of a chattel' is a condition of that person being treated as its owner.[27] And when title is reified, when it is regarded as a thing the law confers on persons and so as a thing that persons have, it can be said that possession gives rise to a 'title': a person who obtains possession of a chattel thereby acquires, and so has, a 'title'—a 'legally recognised claim'—to the ownership of the chattel. This way of talking is liable to cause confusion unless it is remembered that, on this view, the statement that *B* in *Example 3.1* has, on the basis of his possession of the jewel, a 'title', or 'claim', to the ownership of it, means that, in certain circumstances, the law is to deem *B* to be its owner.

D. The DP Thesis and Presumptions

One might describe the DP-law as a 'rule of presumption'—as a rule that provides that courts are to *presume* that a possessor of land holds the land for an estate in fee simple and that the possessor of a chattel is the owner. Many legal writers have thought that there is some such rule of presumption in English law. For instance, Fox has claimed that, where *X* has a valid paper title to land under an unregistered fee simple estate and *Y* squats on the land, *Y* acquires by virtue of his possession a title and 'an evidential presumption applies under which [*Y*] is to be treated as holding a fee simple estate in the land.'[28] Similarly, if *B* takes possession of a lost chattel that belongs to *A*, *B* acquires a 'possessory title' to the chattel and 'would be presumed against a wrongdoer to have an ownership interest in it'.[29]

[27] Text to n 4.

[28] Fox (n 18) 331. Cp. M Wonnacott, *Possession of Land* (CUP 2006) 41.

[29] Fox (n 18) 340, 342.

Swadling has asserted that the statement, 'the fact of possession gives rise to a presumption of ownership', involves a misnomer.[30] He has advanced two arguments in support of this claim. First, '[p]resumptions properly-so-called'—or 'true presumptions'—'are methods of proof of facts, and no fact is here in issue, merely a legal inference from facts proved by evidence.'[31] Secondly, the '"presumption" cannot be displaced by adducing evidence showing ... that the claimant is not the "owner". The presumption is irrebuttable, and an irrebuttable presumption ... is nothing but a rule of substantive law.'[32] The premises of both arguments include propositions about the nature of presumptions and the arguments seek to establish that the view that possession gives rise to a presumption of ownership rests on a misunderstanding concerning the nature of presumptions. The first argument, if sound, is particularly troubling for one who takes that view. For, if that argument is correct, then regardless of whether the presumption is rebuttable, the very idea of a presumption of ownership is confused and erroneous. Hickey has advanced a similar argument. He claims that, where the claimant has actually proven, before the court, that he or she was in possession, the issue to be settled concerns

> the legal inference to be drawn from facts *already proven* by evidence. In these circumstances, it is not technically possible for a claimant to benefit from any presumption, and it seems analytically more accurate to regard possession as the source of a definite legal relation.[33]

Thus, on this view, the idea of a 'presumption of ownership' is, at a basic level, wrong-headed and the notion ought to be discarded.

---

[30] Swadling 'Property' (n 7) 4.426.

[31] Ibid.

[32] Ibid.

[33] Hickey (n 5) 110.

Many of the cases that support of the DP Thesis are cases in which judges have maintained that, if a person was in possession of certain land or a particular chattel, then it is to be presumed that he or she had a proprietary interest in the land or chattel.[34] Accordingly, it is necessary to consider whether Swadling is right. We will see that neither of Swadling's arguments succeeds and that, accordingly, Swadling and Hickey have *not* established that the very idea of a presumption of ownership ought to be discarded.

i. The First Argument

The premises of the first argument are: (1) presumptions are methods of proof of facts; and (2) whether or not a person has ownership of a chattel (or holds land for an estate in fee simple) is not a matter of fact. It is argued in this section that, if 'fact' is interpreted in the way the argument interprets it, premise (1) is false and, therefore, the argument is unsound. We will first consider what presumptions are. Then we will consider whether all presumptions are methods of proof of 'facts'.

The authors of *Cross & Tapper on Evidence* state that '[t]he structure of all true presumptions requires first the proof of a basic fact or facts. Different consequences then follow so far as the establishment of the presumed fact is concerned.'[35] The nature of the consequence that follows from the establishment of the 'basic fact' determines whether the presumption is (1) a 'presumption of fact'; (2) an 'evidential presumption'; or (3) a 'persuasive presumption'. If a presumption is a 'presumption of fact' 'the only effect of proving the basic fact is that the presumed fact *may* be found by the trier of fact.'[36] If a presumption is an 'evidential

[34] See, for example, text to n 84–n 113 in Chapter 4 and text to n 15–n 57 in Chapter 5.

[35] C Tapper (ed), *Cross and Tapper on Evidence* (12th edn, OUP 2010) 133.

presumption', then, after proof of the basic fact, 'the presumed fact must be taken to be established in the absence of evidence to the contrary' and an evidential burden is placed upon the opponent of the presumed fact.[37] Finally, if the presumption is a 'persuasive presumption', then, 'after proof of the basic fact, the presumed fact must be taken to be established unless the trier of fact is persuaded to the appropriate standard to the contrary.'[38]

J B Thayer, in his celebrated chapter on presumptions, regards the distinction between 'presumptions of law' and 'presumptions of fact' as 'of no special significance in the law of evidence' because

> all presumptions, other than the mere non-technical recognition, by courts, of ordinary processes of reasoning, are the subject of rules of presumption, and these rules, of whatever varying degrees of stringency and exactness of application they may be, all of them, belong to the law and are rules of law.[39]

This passage indicates that there is a distinction between 'presumptions' and 'rules of presumption', although, regrettably, the distinction is sometimes overlooked by writers on the law of evidence.[40] A 'rule of presumption' provides that, in certain circumstances, a certain matter (the 'presumed fact') may or must be taken as true by the rule-subjects (e.g. legal officials). Presuming is the act of taking a proposition as true. If a judge is bound by a rule of presumption, then, when the rule applies, the judge's reasoning and deliberations, *qua* judge, are to proceed on the basis that the

---

[36] Ibid. It has been claimed that 'presumptions of fact' are not really presumptions at all: R Glover (ed) *Murphy on Evidence* (13th edn, OUP 2013) 711.

[37] Ibid 134. Cp. R Glover (ed) *Murphy on Evidence* (13th edn, OUP 2013) 710.

[38] Ibid. Cp. Glover (n 37) 710.

[39] JB Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown 1898) 339.

[40] E.g. Glover (n 37) 709; JF Stephen, *A Digest to the Law of Evidence* (Macmillan 1876) 2. N Bridge, 'Presumptions and Burdens' (1949) 12 MLR 273, 279 distinguishes 'presumptions' from 'rules of presumption'.

'presumed fact' is true. Hence, as Thayer said, presumptions 'are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some inquiry', and the study of them is part of the study of 'legal reasoning'.[41]

Richard Glover has been asserted that '[t]he theoretical basis for recognizing presumptions' is that the presumed fact would usually 'flow naturally from' the basic fact, 'so that there is such a strong rational connection between the two that it is unnecessary to require evidence of the presumed fact in the absence of unusual circumstances.'[42] However, this is not the basis of *all* rules of presumption. Thayer rightly asserts that rules of presumptions 'may be grounded on general experience, or probability of any kind; or merely on policy and convenience.'[43]

Rules of presumption do not require the rule-subjects to *infer* that the presumed fact is true. As Edna Ullmann-Margalit has said,

> [t]he presumption rule involves no commitment to, nor guarantees the truth of, the truth value of the presumed fact *q*. It makes no claim upon its subjects' cognitive or epistemic systems. The rule entitles one to hold *q* as true for the purpose of concluding one's practical deliberation on the impeding issue; it neither requires nor entitles one to believe that *q*.[44]

Now, suppose that a law ('L1') provides that if, in judicial proceedings, the claimant (*P*) establishes that he was in possession of a tangible chattel when it was taken by the defendant, the court is to take as true that *P* is the owner of the chattel (unless…). No one has claimed that there could not be such a law, and it is difficult to conceive of a convincing argument for such a claim.

---

[41] Thayer (n 39) 314.

[42] Glover (n 37) 709.

[43] Thayer (n 39) 314.

[44] E Ullmann-Margalit, 'On Presumption' (1983) 80 Journal of Philosophy 143, 149.

At this point, Swadling might insist that L1 is not a rule of presumption because rules of presumption prove *facts*. In order to determine whether this claim is true, we need to know what 'facts' are. As far as this author is aware, Swadling has not provided an explanation of the notion of 'fact'. The term is ambiguous, and it is not clear how we should interpret it the context of this argument. Sometimes 'fact' is used broadly to mean 'a true proposition'. If a statement of fact is simply a statement that is true, then all the following statements, if true, are statements of fact: 'the Battle of Hastings took place in 1066'; 'it is wrong to kill an innocent person'; 'it is unreasonable to drive an automobile at a speed of 70 MPH in a residential area.' The argument above clearly should not be interpreted as using 'fact' is this broad sense—for the statement '*P* is the owner of a chattel' could be true.

We get closer, it would seem, to the intended meaning when we recognise that, in the present context, 'fact' designates a contrast class: *fact*, or a *matter of fact*, is contrasted with *law*, or a *matter of law*. What is the nature of the distinction between 'fact' and 'law'? This question is misleading because there is more than one distinction in play here: the terms 'fact' and 'law' are used, like 'objective' and 'subjective', to draw a number of different contrasts.

Lawyers draw a distinction between 'issues of fact' and 'issues of law'. Consider, for instance, the following passage from Professor Ian Dennis's textbook on evidence:

> The division of issues in legal proceedings into questions of fact and questions of law is fundamental. It represents the distinction, in Zuckerman's words, between "the question of what happened and the legal consequences of that which happened." Official adjudication of disputes is founded on the assumption that facts of cases exist independently of the law. Accordingly, it is conceived to be part of the function of the legal process to "find" the

> facts.... This must be done before the law, which states normative rules for certain fact-situations, can be applied to the particular facts of the dispute.[45]

Dennis adds that this requires 'a certain amount of expansion and qualification because the distinction between law and fact is not as sharp and straightforward as first appears'. It should be noted, in particular, that certain issues 'may be stipulated to be ones of law or fact, and the classification may not correspond to Zuckerman's distinction between "what happened" and "the legal consequences of what happened". The classification may be made for reasons of expediency'.[46] What is particularly interesting about this is the suggestion that the distinction between 'law' and 'fact' may itself be a 'question of law', which highlights a point made already, namely, that more than one contrast is drawn by these terms.

Taking as one's point of departure Dennis's claim that facts exist independently of the law, one might seek to draw a general distinction between two kinds of statements: legal statements and non-legal statements. Legal statements, one might say, are statement the truth conditions of which include or consist entirely of the existence or non-existence of laws. Non-legal statements are statements the truth conditions of which do not include the existence or non-existence of laws; their truth or falsity is not conditional on the existence or non-existence of laws. For instance, 'The peak of Mount Everest is 8848m above sea level' is a non-legal statement. Statements of fact, one might say, are true non-legal statements or a sub-set of such statements.

---

[45] IH Dennis, *The Law of Evidence* (3rd edn, Sweet & Maxwell 2007) 4–003, citing AAS Zuckerman, *The Principles of Criminal Evidence* (Clarendon Press 1989) 22.

[46] Ibid. Cp. Malek (n 35) [1–35]–[1–44] and, in particular, the examples of issues of 'mixed fact and law' at [1–43].

Now, the truth of the statement 'in law, P is the owner of this chattel' depends upon the existence of laws. Indeed, if it is true, the statement is what Joseph Raz has called an 'applied legal statement':

> True legal statements are either pure or applied or both. Pure legal statements are those true because the existence or non-existence of laws is sufficient to establish their truth, whereas applied legal statements have other facts among the conditions sufficient to establish their truth.[47]

Accordingly, one could argue that, since the truth of the statement, 'in law, X is the owner of Y', is conditional on the existence of laws, the statement is not a non-legal statement and, therefore, it is not a statement of 'fact'; and, since presumptions are used to prove facts, a statement of that fact must be a statement of fact; and, therefore, 'X is the owner of Y', which is an applied legal statement, is not a fact and cannot be proved by way of presumption.

This argument raises a number of questions. Perhaps the most obvious question is: why must facts that are proved by way of presumption be 'non-legal' in the sense described above? One possible answer is that the law of proof is about the establishment of non–legal facts. This may well be Swadling's answer, for he has maintained that '[p]resumptions properly-so-called form part of the law of proof.'[48] Assuming, for the sake of argument, that the law of proof is about the establishment of non-legal facts, it follows that L1, and the 'presumption' that is required by L1, are not part of the law of proof. But it does not follow that it is not a presumption at all or that L1 is not a rule of presumption. For both of these things to be true, presumptions must in all cases involve a (non-legal) fact and rules of presumption must in all cases concern the proof by way of presumption of (non-legal) facts. Thus, the important

[47] J Raz, *The Concept of a Legal System* (2nd edn, OUP 1980) 218.

[48] WJ Swadling, 'Explaining Resulting Trusts' (2008) 124 LQR 72, 74.

question is whether, in legal contexts, *all* presumptions are necessarily methods of proving non-legal facts—whether presumptions are *confined* to the role of proving (non-legal) facts.

We have seen that presumptions involve taking propositions as true. If that is right, we can account for the role of presumptions as a mechanism for proving non-legal facts *without* confining presumptions to that role. We can say: the proposition that is taken as true might be non-legal *or legal*. If presumptions are not confined to the role of proving non-legal facts, then it seems there is nothing to prevent us from concluding that L1 is a rule of presumption. The rule operates in the same way as those rules of presumption that concern non-legal facts; it requires that, when the rule applies, the rule-subjects take a certain proposition to be true. It differs from such rules in that what is to be taken to be true is a legal statement rather than a non-legal statement.

Interestingly, Thayer argued against the view that presumptions belong solely to the law of proof. Presumptions, he said,

> are ordinarily regarded as belonging peculiarly to [the law of proof]. This appears to be an error; they belong rather to a much larger topic, already briefly considered, that of legal reasoning, in its application to particular subjects .... Presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purposes of some given inquiry ... On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of it, by taking something for granted; by assuming its existence.

Swadling's first objection to the notion of a presumption of ownership relies on the idea that what is 'taken for granted' or 'assumed' when a presumption is in play *must* be a *non-legal* fact. Yet Swadling, and others who advanced this objection, have failed to establish that there is any good reason for this restriction. The ordinary usage

of 'presumption' in legal discourse points in the opposite direction.[49] Accordingly, it is submitted that we should reject Swadling's first objection.

ii. The Second Argument

The second argument that Swadling advances in support of his claim that 'presumption of ownership' is a misnomer is that the '"presumption" cannot be displaced by adducing evidence showing ... that the claimant is not the "owner". The presumption is irrebuttable, and an irrebuttable presumption ... is nothing but a rule of substantive law.'[50] The first point to make is that most scholars who are committed to the DP Thesis would deny that the fee simple presumption and the presumption of ownership are irrebuttable. We cannot determine whether the (alleged) presumptions are rebuttable without considering the authorities and, accordingly, this question will not be pursued here.[51] The second point is that there can be irrebuttable presumptions. The law might provide that, in certain circumstances, legal officials are to take a proposition, *Q*, to be conclusively true. There is no reason to think that there could be no such law and this law, just like L1, requires the rule-subjects to take a certain proposition as true.

Enough has been said to show that the very idea of a 'presumption of ownership' is not conceptually wrong-headed or analytically inaccurate. Neither of Swadling's objections to the notion of a presumption of ownership succeed and it is perfectly acceptable to talk of 'presumptions of ownership' and 'presumed fees simple'.

---

[49] For some illustrations of how judges have used the term, see text to n 84–n 113 in Chapter 4 and text to n 15–n 57 in Chapter 5.

[50] Swadling 'Property' (n 7) 4.426

[51] For a discussion of some cases that support the claim that the fee simple presumption is rebuttable, see text to n 109 in Chapter 4.

E. Three Views of Title by Possession

Now that we have considered the three theses concerning the consequences of being in possession of land or chattels in English law, we are in position to consider the three views of the doctrine of title by possession.

i. The First View

According to the *First View*, the DP Thesis is true but the MRP Thesis *and* the AP Thesis are false. On this view, the possessor does not acquire a non-alienable, possession-dependent right or an alienable proprietary interest. The only 'title' that the possessor acquires is a legally recognised claim to a proprietary interest. If the possessor is in possession of a chattel, she is to be deemed to be the owner of it (in certain circumstances); and, if she is in possession of land, she is to be deemed (in certain circumstances) to hold it for an estate in fee simple.

ii. The Second View

The *Second View* also maintains that the AP Thesis is false. On this view, however, both the DP Thesis and the MRP Thesis are true. The possessor of a chattel has both a (possession-dependent, non-alienable) right of possession and, in addition, she is to be deemed to be the owner (in certain circumstances). But (putting cases involving 'first possession' or *occupatio* on one side) she does not actually acquire ownership or any alienable, proprietary interest. Similarly, the possessor of land has both a (possession-dependent, non-alienable) right of possession and, in addition, it is to be presumed (in certain circumstances) that she holds the land for an estate in fee simple.

But she does not actually acquire, simply by virtue of his possession, such an estate or any other alienable interest in the land.

iii. The Third View

According to the *Third View*, the AP Thesis is true (and, therefore, the MRP Thesis is false). On this view, a person acquires an alienable, non-possession-dependent interest in land, which comprises, inter alia, a right to possession and a right to non-interference that bind persons in general. The *Third View* does not necessarily accept or reject the DP Thesis. Some versions of the *Third View* are compatible with the DP Thesis and some are not. This is because, as we have seen, there are different views as to the exact nature of the interest that a possessor acquires. For example, according to some versions of the *Third View*, a person acquires, generally speaking, a legal fee simple estate if and when she obtains possession of land. If this is correct, then there is obviously no need for a rule that provides that a possessor of land is to be deemed to hold the land for a fee simple estate. This example illustrates that, if the *Third View* is correct, one must consider which particular version of it is correct and whether that version is compatible with the DP Thesis.

	DP Thesis	**MRP Thesis**	**AP Thesis**
First View	✔	✗	✗
Second View	✔	✔	✗
Third View	**?**	✗	✔

Fig 1. *The three theses and the three views*

4. DISTINGUISHNG THE AP THESIS FROM THE DP THESIS

The foregoing discussion of the three views presupposes that there is a distinction between rules that confer a proprietary interest on a person and rules that provide that the courts are to deem/presume that a person has a proprietary interest. Commentators and judges have often overlooked the distinction and this has caused a great deal of confusion. For example, AD Hargreaves, in a seminal contribution, asserts that possession of land is evidence of seisin and '[i]t is only when this evidence is not rebutted that possession can *create* a title by investing the tenant with a freehold estate derived from seisin.'[52] This presupposes that, if a court presumes and decides a case on the basis that a person has a freehold estate, the person thereby acquires such an estate. Either Hargreaves was not aware of the distinction between the AP Thesis and the DP Thesis or he misunderstood it; and, as a result, he did not appreciate, or mistakenly denied, that a court may decide a case on the basis that a person holds land for a freehold estate without thereby making it the case that the person holds the land for such an estate.

One might object to the wedge we have driven between (i) a person having a right or interest and (ii) a person being deemed/presumed to have a right or interest by a court. One might contend that, if a court presumes, and acts on the basis, that, or if it ought to presume and act on the basis that a person has a right or interest, then that person *has* the right or interest. One is an owner if the court acts (or would, or ought to, act) as though one were an owner. If this is correct, the *First View* and *Second View*, which both maintain that the DP Thesis is true and the AP Thesis is false, are fundamentally confused because it is simply not possible for the DP Thesis to be true and, at the very same time, for the AP Thesis to be false.

[52] AD Hargreaves, 'Terminology and Title in Ejectment' (1940) 56 LQR 376, 391.

At least one influential account of title by possession is, it seems, committed to the view outlined in the previous paragraph, namely, Fox's account. Fox is arguably committed to a predictive theory of legal rights according to which one has a legal right if a court of law will make a remedy available to one if one goes to it and claims that one's right has been violated. Given that this view, if it were sound, would undermine our enquiry, it is necessary to examine it and to explain why it is mistaken.

A. An Outline of Fox's Account of Relative Title to Land and Chattels

Fox begins by considering what he calls the 'core case' of relativity of title, which is 'the title to possess generated by a person's being in adverse possession of unregistered land.'[53] He asks us to suppose that one party ("P1") has a valid 'paper title' to Blackacre under an unregistered fee simple estate. A second party ("P2") squats on the land and dispossesses P1. According to Fox:

> [b]y virtue of his possession, P2 acquires a title to the land enforceable against all third parties who cannot prove a title which is positively stronger than his own. His title is sufficient for him to sue any trespasser who interferes with his possession or generally to allow him [to] recover possession from any third party ("P3") who in turn may dispossess him.[54]

What is the nature of the 'title' that, on this view, P2 acquires in Blackacre? According to Fox, we should, to begin with at least, think of 'title' as 'referring to a claim to an asset arising from a proprietary interest.'[55] What, we might ask, is a 'claim to an asset'? And when does a 'claim to an asset' arise from a proprietary interest? It will be convenient to leave those questions to one side for now and to accept the description of 'title' as it stands.

---

[53] Fox (n 18) 330.

[54] Ibid 331.

[55] Ibid 333.

On the view we are considering, then, P2 acquires a 'title' to Blackacre by virtue of his (P2's) possession of Blackacre; and a 'title' is a 'claim to an asset arising from a proprietary interest'. From what proprietary interest is P2's purported 'claim to possess the land' said to arise? The answer is: a fee simple estate. Fox states that English law 'applies a presumption in favour of the person in possession of land that he holds it under a fee simple estate';[56] and, hence, on the facts of Fox's example, 'an evidential presumption applies under which P2 is treated as holding a fee simple estate in the land.'[57]

Turning to personal property law, Fox considers the 'possessory title of a person who finds a lost chattel.'[58] We are asked to suppose that a person, 'Q2', finds and takes into his possession a lost chattel which belongs to another, 'Q1'.[59] We are told that, as against a wrongdoer, 'Q3', who interferes with Q2's possession of the chattel, Q2's possession is 'evidence that he has a title enforceable by action in trespass or conversion'.[60] Here, however, Q2 is presumed to have, as against Q3, not an estate in the chattel, but an 'ownership interest' in it.[61] Thus, 'possessory titles to personal property are explained by rules which are similar to those applying to real property where a squatter is presumed to have a title through a fee simple estate.'[62]

[56] Ibid 335.

[57] Ibid 331.

[58] Ibid 340.

[59] The designations have been modified.

[60] Fox (n 18) 340.

[61] Ibid 342.

[62] Ibid 340.

Q1's 'title', like P1's 'title', 'remains enforceable' so long as he has not alienated it or been divested of it.[63] Fox explains that P1's 'paper title to an estate is treated as continuing independently of, and concurrently with, the equivalent estate of P2.'[64] Hence, 'the presumption allows what are, in effect, multiple fees simple to be created in the same land.'[65] As Fox notes, a system which allows for the creation of multiple valid titles to the same asset needs priority rules to determine the strength of those titles relative to each other. With respect to relative titles to possess land or chattels, 'priority is generally awarded to whichever claimant relies upon the earlier title.'[66] Hence, P1's title is stronger than P2's because it arose earlier in time than P2's and, similarly, since Q1's title arose before Q2's, Q1's title is stronger.[67] Thus, 'the validity of P2's title is relative, in the sense that it is void against P1 but generally valid against any third person ("P3") who interferes with his possession'.[68] 'the English approach allows the possibility that an estate in land'—and, presumably, an 'ownership interest' in a chattel—'can at one time be valid and void, depending on which other claimant's title it is compared with.'[69]

[63] Ibid 332, 340.

[64] Ibid 332.

[65] Ibid 335.

[66] Ibid 337.

[67] Ibid 332, 337.

[68] Ibid 332.

[69] Ibid 335.

B. Fox's Rejection of the Distinction Between the AP and DP Theses

A strong reason for thinking that Fox would reject the distinction that we have drawn between the AP Thesis and the DP Thesis is that, if the distinction is sound, his account appears to be internally inconsistent.

According to Fox, the doctrine of relative title is about the priority of competing 'interests' (of the same type) and the 'claims' to which they give rise. However, there seems to be a tension between this view of the doctrine of relative title and his understanding of the law regarding title by possession. This tension can be illustrated by considering his analysis of a case in which one person (Q2) finds and takes possession of a lost chattel which belongs to another person (Q1). According to Fox, in an action against a person who wrongfully interferes with Q2's possession for trespass or conversion, Q2 is presumed to have an ownership interest in the chattel and, accordingly, a claim to possess which he can enforce by bringing an action in trespass or conversion. Fox does not say that, apart from the rule(s) providing for this 'presumption of ownership and title', there are any rules that would confer on Q2 an 'ownership interest' in the chattel. Q1 is the person to whom the chattel in fact belongs. It is clear that Q1 actually has an 'ownership interest' in the chattel. Q2, however, is (in his action against Q3) merely *presumed* to have an 'ownership interest' (and hence a 'claim' to possess). Now, if this is right, then, *pace* Fox, there are not in fact two (competing) 'ownership interests': there is in fact only one 'interest', viz. Q1's. And if there is just one 'interest', then the situation is not one that involves competing 'interests'; and, therefore, it is not a situation in which an issue arises as to the priority of competing interests.[70]

[70] Curiously, when contrasting the 'absolute title' of the *dominus* in classical Roman law with the 'title' of an estate holder in English law, Fox says (at 335) that the 'presumption allows what are, *in effect*, multiple fees simple to be created in the same land' (emphasis added).

It might be said, in response, that the priority rules only kick in when the presumption is in play in a particular case. The priority rules are applicable when, in a certain case, a judge presumes that the claimant has ownership—because, *at this point*, there are two competing ownerships (and two claims to possess arising from them). This, however, is simply not the case; even at that point, there is actually only one ownership interest (viz. Q1's); Q2 is merely presumed (in certain circumstances) to be the owner by the court. Could it be said that, from the perspective of the court that is presuming that Q2 is the owner (in Q2's action against Q3), there are two competing ownership interests? That is problematic too. For, in the first place, there is authority for the view that, in a case before a court in which the 'presumption of ownership' is to be applied, the court's reasoning is to proceed on the basis that the chattel belongs to the possessor and to 'no other'.[71] So, rather than deciding whether Q1's or Q2's 'ownership' takes priority, the court should reason as though *only* Q2 is the owner. Moreover, if Q1 were to be joined to the action, and if it is established that he is the 'owner' (or, at least, that he has a 'better title') before the court, then Q2 would not be presumed to be the owner against Q3 in any case.

If each of two or more parties to an action claim to be the owner of a particular chattel, and if these claims can be assessed, relative to one another, as 'better' or 'worse', then it may make sense to talk of the 'priority' of competing claims to the ownership of a chattel; a claim, one might say, takes 'priority' over another claim if it is better than it. But clearly this kind of priority dispute is not a dispute about the priority of *competing ownership interests*; rather, it is a dispute as to the priority of competing claims to ownership.

[71] *The Winkfield* [1902] P 42 (CA) 60 (Collins MR).

Therefore, if Fox's account of the doctrine of relative title is correct, the doctrine does not apply, on his account, to the case involving Q2 and Q3. If, like Fox, one regards the doctrine of relative title as a doctrine that serves to determine the priority of competing proprietary interests (of the same type), then the doctrine does not apply to the case involving Q2 and Q3 for, in this case, there are no competing proprietary interests of the same type. For the same reason, it would not apply to his example involving P1, P2 and P3 either. Thus, rather than demonstrating the breadth of the doctrine of relative title, Fox's account leads to the paradoxical conclusion that the doctrine of relative title does not apply to what he terms 'the core case of relativity of title'.

This paradox is the main reason for believing that Fox would reject the distinction we have drawn between (i) a person having a right or interest; and (ii) a person being presumed to have a right or interest by a court. It seems that Fox believes that, if a court presumes that a person has an interest, then that person has an interest. It is not absolutely certain that Fox takes this view. However, it would explain some of the puzzling features of his account.

Moreover, some passages in the article provide additional support for the claim that this is his view. For instance, Fox regards his essay as illustrating 'the inseparability in common law reasoning of rules of evidence and procedure from the substantive law of property.'[72] As far as the common law's recognition of the existence of property rights is concerned, the distinction between 'rules of evidence in procedural practice' and 'rules of substantive law' is, he tells us, permeable.[73] This is because, in the common law, a 'claimant's right of recovery' is, to a large extent, determined by 'presumptions of evidence'—the presumption that a possessor of land

[72] Fox (n 18) 331.

[73] Ibid 335.

holds it under a fee simple estate, for instance—'rather than any conceptual theory of substantive proprietary interests.'[74]

Further support for the claim can be found in Fox's note on *Costello v Chief Constable of Derbyshire*.[75] Mr Costello had been in possession of a car when the police lawfully seized it. When the purposes for which the police could lawfully retain the car expired, the police refused to return it to Mr Costello because they suspected that it was stolen. Mr Costello, relying on his former possession, brought a claim in conversion against the police. Although it was found as a fact that the car was stolen, so that Mr Costello could not be the 'true owner' of the car, his claim succeeded before the Court of Appeal.[76] For Fox, the result is troubling because a claimant ought to be presumed to be the owner of a chattel only in cases in which the defendant's alleged wrongful interference with the chattel took place while the claimant had it in his *possession*; and Mr Costello was not in possession of the car at the time of the alleged wrong. In a revealing comment on the case, Fox says:

> [t]o say that Costello had a relative ownership interest in the car when he lacked possession simply expresses the conclusion that the court, for pragmatic reasons, was willing [to] allow him an action in conversion against the Police. As has long been true of common law actions, the availability of the remedy determined the existence of Costello's substantive right, not the right of the remedy.[77]

Since Fox does not discuss the claims that are advanced in the quoted passage in much detail, it is uncertain how we should interpret them. There are many plausible candidates. But not all of these would support the claim that, if a court presumes that

[74] Ibid 335.

[75] D Fox, 'Enforcing a possessory title to a stolen car' (2002) 61 CLJ 27; *Costello v Chief Constable of Derbyshire* [2001] EWCA Civ 381, [2001] 1 WLR 1437.

[76] *Costello* (n 75).

[77] Fox (n 75) 29.

a person has an ownership interest, then that person has an ownership interest. For the passage to support that claim, the passage and its presuppositions would have to be interpreted thus: a person has an interest, such as an ownership interest, if a court would (or will) provide a remedy if (or when) the person goes to court with a view to enforcing such an interest; Mr Costello was awarded a remedy when he brought an action against the police for conversion and claimed that he had a proprietary interest in the car; therefore, Mr Costello had a proprietary interest in the car. This argument expresses a commitment to a 'predictive theory' of legal rights, according to which one has a legal right if a court of law will make a remedy available to one if one goes to it and claims that one's right has been violated.

Arguably, this is Fox's view. But, in any case, the view should be rejected. The predictive theory of legal rights described above is a form of what Professor Brian Leiter has called 'conceptual legal realism',[78] and, as HLA Hart persuasively argued, such theories are untenable. In *The Concept of* Law, Hart explained how predictive theories of law, if understood as jurisprudential theories about the nature of law, have absurd implications and cannot account for important features of law.[79] Suppose that a claimant submits before a court that the defendant has violated one of his rights and that, therefore, he (the claimant) ought to receive a remedy. In its deliberations about whether to accept the claimant's submission, the court asks itself: 'does the claimant have the right that the defendant allegedly violated?' It would be absurd and outlandish for the court to answer this question thus: 'the claimant has the right if we (the court) will award a remedy in response to his claim, so the only

[78] B Leiter, 'American Legal Realism' in WA Edmundson and MP Golding (eds), *The Blackwell Guide to Philosophy of Law and Legal Theory* (Blackwell 2004) ch 3. As is the case with most intellectual movements and schools of thought, various views were propounded under the name 'legal realism'. In his chapter, Leiter argues that we should not attribute to many of the central proponents of American Legal Realism the sort of view that is here attributed to Fox.

[79] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 136–147.

question that is left is: will we award such a remedy?' If the court concludes that the claimant is entitled to a remedy on the basis that the claimant had a right which was violated by the defendant, the assertion that the claimant had the right 'constitutes not a prophecy of but part of the *reason* for [its] decision.'[80]

When it is seen that predictive theories of legal rights are untenable, it becomes clear that there is no reason to doubt that there is a distinction between (1) a person having a legal right or interest; and (2) a court presuming (i.e. taking as true the proposition) that a person has a legal right or interest (and thus acting on the basis that he or she has it). Accordingly, legal rules which provide that a person, in certain circumstances, acquires ownership of a certain thing ('investitive ownership rules') can be distinguished from legal rules which provide that, in certain circumstances, a court is to deem/presume that a certain person has ownership of a particular thing ('deemed ownership rules'). Thus, the DP Thesis is not a version of the AP Thesis; being deemed to have is not the same as having.

5. CONCLUDING REMARKS

This chapter has sought to set up and clear the ground for the enquiry that is to follow into the nature of the possessor's title by discussing three competing views and drawing attention to some significant differences between them. In addition, it has sought to ensure that our enquiry will not cause even more confusion in this area, or perpetuate errors that have marred previous discussions, and it has sought to do this by: (1) exploring the meanings of 'title'; (2) explaining why two objections to the notion of a presumption of ownership should be dismissed; and (3) emphasising how the DP Thesis differs from the AP Thesis and defending the claim that these

[80] Ibid 105.

differences are real and important. With all this behind us, we can turn, in the next chapter, to the law and its sources.

4

POSSESSION AND TITLE TO LAND

1. INTRODUCTION

In the previous chapter we considered three views of the doctrine of title by possession. In this chapter, we will consider which (if any) of the three views is correct insofar as land is concerned. We will then turn, in the next chapter, to the law of chattels.

A. Perspectives on Possession and Title to Land

At present, many distinguished property law scholars endorse, in effect, the AFS Thesis.[1] It is argued below that this thesis is correct. But, if AWB Simpson is right, the traditionalist view was that 'mere possession is not a root of freehold title.'[2] On this view, possession and dispossession are to be contrasted with seisin and disseisin. Suppose that Adam was seised of Blackacre for an estate in fee simple when he was disseised by Bill. If the applicable law were the law of the early 19th century, upon the

[1] For example, B McFarlane, *The Structure of Property Law* (Hart 2008) 647; C Harpum, S Bridge, and M Dixon, *Megarry & Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) 4–003; WJ Swadling, 'Property: General Principles' in A Burrows (ed), *English Private Law* (3rd edn, OUP 2013) 4.422. The AFS Thesis is the thesis that a person acquires, upon taking possession of land, a legal fee simple estate: text to n 24 in Chapter 3.

[2] AWB Simpson, *A History of the Land Law* (2nd edn, OUP 1986) 154.

disseisin,[3] Adam, the disseisee, would lose the estate and acquire a mere right of entry.[4] He would no longer be seised of the land for an estate in fee simple, although he would be entitled to be seised for such an estate; he would have a right, a title, to the seisin and a right of entry. His right of entry could not be alienated inter vivos or devised, although it could be inherited.[5] On the other hand, the disseisor, Bill, would acquire, upon the disseisin, the fee simple estate in the land.[6] Preston explained in 1824 that disseisin involves:

> the commencement of a new title, producing that change by which the estate is taken from the rightful owner, and placed in the wrongdoer .... As soon as a disseisin is committed the title consists of two divisions; first, the title under the estate or seisin; and, secondly, the title under the former ownership.[7]

Eminent scholars of land law have agreed with this and contrasted the seisin of a disseisor with the possession of a wrongful possessor. Charles Sweet maintained in 1896 that

> there is this fundamental difference between the seisin of a disseisor and the possession of a wrongful or adverse possessor, that the former gives the disseisor a title in fee simple by wrong which continues until put an end to by the act of the disseisee, while the latter gives the possessor a title which, until it is perfected by the [Real Property Limitation Act 1833], is only co-extensive with his actual possession; if he abandons the actual possession his title is gone.[8]

---

[3] For a discussion of the circumstances in which a 'disseisin' occurred, see JM Lightwood, *Possession of Land* (Stevens & Sons 1894) 42–56.

[4] FW Maitland, 'The Mystery of Seisin' (1886) 2 LQR 481, 482; J Lightwood (n 3) 42, 274.

[5] A right of entry could not be alienated inter vivos before the 1st October 1845: Real Property Act 1845, s 6. And it could not be devised by will before the 1st of January 1838: Wills Act 1837, s 3. For a discussion of these matters see Maitland (n 4) esp. 483–85.

[6] J Williams, *The Seisin of the Freehold* (Sweet & Maxwell 1878) 7–8, cited with approval by James LJ, with whom Baggallay and Bramwell LJJ agreed, in *Leach v Jay* (1878) 9 Ch D 42 (CA) 44–45; Lightwood (n 3) 42–43, 270–1.

[7] R Preston, *Abstracts of Title* (2nd edn, J & W T Clarke 1824) Volume 2, 234–35.

[8] C Sweet, 'Seisin' (1896) 12 LQR 239, 249.

Sweet's view is clearly inconsistent with the AFS Thesis. AD Hargreaves also endorsed a view that is inconsistent with the AFS Thesis.[9] According to Hargreaves, whereas seisin 'creates a title by virtue of the freehold estate which is vested in the tenant so seised', possession 'is not a title and gives no such right of action in ejectment as it does in trespass'; 'and any possession, however short, is deemed to be seisin until the contrary is shown.'[10] More recently, Lord Neuberger MR asserted that 'a claimant's previous possession is *evidence* of his title (or, strictly speaking, of his prior seisin) but it is rebuttable evidence, and if rebutted by other evidence, the right to claim possession dissolves'.[11]

Wiren claimed in 1925 that, at that time, there were two doctrines that were 'equally plausible' and involved in a 'continuous struggle'.[12] The first is 'the Rule in *Doe v Barnard*':[13] a claimant in ejectment must establish his title; proof that he had prior possession amounted to prima facie evidence of seisin ('legal title'; 'ownership'); and the presumption of seisin could be rebutted. This is consistent with the *First View* and the *Second View*.[14] The second doctrine is 'the Rule of *Asher v Whitlock*':[15] a person in possession has a good title against all the world except the 'true owner'; he has an interest in the land which he may transfer or devise; and

[9] AD Hargreaves, 'Terminology and Title in Ejectment' (1940) 56 LQR 376.

[10] Ibid 397.

[11] *Mayor of London v Hall* [2010] EWCA Civ 817, [2011] 1 WLR 504, [25] (emphasis added).

[12] SA Wiren, 'The Plea of The *Ius Tertii* in Ejectment' (1925) 41 LQR 139, 153.

[13] Ibid 139, 140–152.

[14] On the *First View*, the DP Thesis is true and the MRP Thesis and AP Thesis are false. On the *Second View*, the DP Thesis and the MRP Thesis are true, but the AP Thesis is false. On the *Third View*, the AP Thesis is true. The three views are outlined and discussed in Section 3E of Chapter 3.

[15] Wiren (n 12) 139, 153–9.

which may 'harden into legal ownership.' This is consistent with the *Third View* but not the *Second View* or the *First View*.

So there has been much debate over the consequences of possession in English land law. To some extent, the academic controversy reflects, as Simpson has said, 'a loose and confusing terminology'.[16] It also reflects the mutations and unsettledness of the law and certain tensions in the judgments of the higher courts.

B. An Overview of the Chapter's Arguments, Conclusions and Structure

This is a long chapter. Accordingly, this sub-section outlines the structure of the chapter and summaries the chapter's main arguments and conclusions.

- It is argued in Section 2 that it has long been the case that, upon taking possession of land, a possessor acquires a right to non-interference. This right has, for centuries, been protected by the law of trespass. For instance, if *X* acquires possession of Blackacre he thereby acquires a right to non-interference that binds persons in general and, accordingly, persons in general are under a duty not to physically interfere with the land. Hence, if *Y*, a stranger, entered onto the land without *X*'s permission or lawful justification, *X* would be entitled to succeed in an action of trespass against *Y*. This is consistent with the *Second View* and the *Third View*, but not with the *First View*; and, accordingly, the *First View* is mistaken.

- In Section 3 it is argued that possession was not a source of a freehold estate or a right to such an estate in the 18th or early 19th centuries and, therefore, the

[16] Simpson (n 2) 289.

AFS Thesis was false. This is clear from the case law concerning the action of ejectment. It was held in numerous cases that proof of possession of land was evidence, or gave rise to a presumption, that the possessor held the land for an estate in fee simple or, depending on the circumstances, a lesser freehold estate—and, as we have seen, being deemed/presumed to have an interest by a court is not the same as having an interest. It was decided in the middle of the 19th century that possession was sufficient in ejectment as against a wrongful dispossessor. The possessor had rights that were protected by the law of trespass *and* by the law of ejectment: if the possessor, *X*, was wrongfully dispossessed by *Y*, *X* had, as against *Y*, not merely a right to damages, but a right to recover possession by way of judicial proceedings. It might be thought that this is not compatible with the *Second View*, but we will see that a supporter of this view merely needs to clarify, or make a minor alteration to, her view in order to accommodate this development.

- However, we will see in Section 4 that, in the latter half of the 19th century, some senior judges, most notably Lord Cockburn CJ in *Asher v Whitlock*, maintained that the possessor's rights were devisable and that, accordingly, their existence, once acquired, was not necessarily dependent upon the maintenance of possession by the right-holder; this is not consistent with the *Second View*. Shortly thereafter, legal scholars, including Sir Frederick Pollock, maintained that possession gave rise to a 'right to possession' that bound persons in general and that could be conveyed, devised or inherited. In other words, Pollock effectively endorsed the AP Thesis and (therefore) the *Third View*.

- Section 5 considers another piece of the puzzle, viz. the law concerning adverse possession. Following the 1833 reforms to the law of adverse possession, the statutory period of limitation ran, in general, from the moment the title-holder was dispossessed or his possession was discontinued. It had been recommended by the Real Property Commissioners that, upon the expiration of the limitation period, the title should be taken away from the party against whom time had run and vested in the party in possession. But this recommendation was not implemented. The Real Property Limitation Act 1833 provided that, upon the expiration of the limitation period, the title of the party against whom time had run was 'extinguished'. But it said nothing about the acquisition of title by the squatter. Judges thought that the adverse possessor had a title, but they were unsure as to the proper explanation of this state of affairs. Towards the end of the 19th century, and in the early 20th century, judges appealed to the rules of presumption in order to explain the adverse possessor's title. It was said that the possessor was to be presumed to have an estate in fee simple and, when that presumption could no longer be rebutted, his title would, in effect, be 'absolute'. They thus accepted the DFS Thesis. This account had the advantage of reaching what was regarded as the right conclusion by appealing to well-established rules of presumption. But it has an air of artificiality about it and in the latter half of the 20th century it increasingly found itself discarded by commentators and judges in favour of another view. The new explanation was that a possessor acquired a legal fee simple estate upon taking possession; and proponents of this view could, and did, appeal to Cockburn CJ's judgment in *Asher v Whitlock*. This explanation is in line with the *Third View*.

- Section 6 explores the modern authorities that support the AP Thesis. It is argued that the authorities support the proposition that a possessor acquires an alienable interest in the land that is not possession-dependent and which comprises a right to possession and a right to non-interference. Accordingly, while the *Second View* may formerly have been correct, it does not accurately describe the modern law.

- Section 7 considers whether the interest that a person acquires upon taking possession of land is a legal fee simple estate. It is argued that the better view is that the interest is a legal fee simple estate and, therefore, the AFS Thesis is correct. It is not possible to fully understand the modern position, or the debates and uncertainty that have long surrounded it, without understanding the cases that underpin it and the old law from which it has departed. This is why we will begin with the older cases and discuss (in Section 3) the 'old law' according to which possession was not a root of freehold title.

2. POSSESSION AND TRESPASS

Trespass to land consists of the violation of a duty not to deliberately or negligently physically interfere with land.[17] For centuries, a claimant has been entitled to succeed in trespass if the claimant was in possession at the time of the defendant's trespassory conduct.[18] It is argued in this section that this state of affairs is to be explained by the

[17] *Gregory v Piper* (1829) 9 B&C 591, 109 ER 220; *Ellis v Loftus* (1874–75) LR 10 CP 10 (CP); *Network Rail Infrastructure Ltd v Conarken Group Ltd* [2010] EWHC 1852, [2010] BLR 601 (QB) [67] (Akenhead J); *Bocardo SA v Star Energy* [2010] UKSC 35, [2011] 1 AC 380, [6] (Lord Hope).

[18] 'Trespassory conduct' means the conduct of a person (*X*) that would constitute trespass as against any person who has a right that *X* does not trespass.

fact that the law actually confers on a person in possession of land a *right* to non-interference that binds persons in general. The position is the same with respect to chattels.[19] If this is right, the possessor actually acquires rights with respect to the land and it is not the case that, upon taking possession of land, the possessor acquires merely a title (claim) to an estate in the land. Accordingly, the *First View* should be rejected.

The modern tort of trespass to land originated as the action of trespass *quare clausum fregit*. The name of the action derives from the wording of the writ, which required the defendant to show why he broke the plaintiff's close (*quare clausum querentis fregit*). A long line of cases supports the proposition that possession was defeasibly sufficient in trespass *quare clausum fregit*. In *Cary v Holt*, which was decided in 1745, the claimant brought trespass and, according to the report, the King's Bench held that the case 'stands upon the plaintiff's possession, which is enough against a wrong-doer'.[20] In 1764 Lord Mansfield, giving the judgment of the King's Bench in *Harker v Birkbeck*, asserted that '[w]hoever is in possession, may maintain an action of trespass, against a wrong-doer to his possession.'[21]

Why was possession sufficient in trespass against a wrongdoer? Was it because the possessor's possession gave rise to a presumption that the possessor had a title to the land? Some legal writers have given an affirmative answer to the latter question.[22] And there is some judicial support for this view. For instance, in *Brest v Lever*, in which the claimant brought trespass, the defendant pleaded that the land was

[19] Text to n 47–n 49 below and n 1–n 13 in Chapter 5.

[20] *Cary v Holt* (1745) 2 Strange 1238, 93 ER 1154.

[21] *Harker et al v Birkbeck et al* (1764) 3 Burr 1556, 1563; 97 ER 978, 982 (sub nom *Harker v Birkbeck* (1764) 1 Wm Bl 482, 96 ER 279).

[22] For example, JP Taylor, *A Treatise on the Law of Evidence* (JB Matthews and GF Spear eds, 11th edn, Sweet & Maxwell 1920) Volume 1, 131.

his soil and freehold, and the question was whether the defendant had established that it was, Parke B said:

> By the plea of liberum tenementum, the defendant admits that the plaintiff is in possession, and that he himself is, prima facie, a wrong doer; but he undertakes to shew a title in himself, which shall do away with the presumption arising from the plaintiff's possession.[23]

However, the claim that proof of possession is sufficient in trespass only if, and insofar as, it gives rise to a presumption of title is not compatible with a number of cases, including *Graham v Peat* and *Chambers v Donaldson*.

In *Graham v Peat* the King's Bench held that, where a person was in possession of land under a lease that was void as a result of the operation and effect of the Benefices Act 1571 (13 Eliz c 20), the possessor could maintain trespass *quare clausum fregit* against a 'wrongdoer'.[24] The defendant's counsel had argued that 'possession was no further sufficient to ground the action even against strangers than as it was primâ facie evidence of title'; and that, accordingly, possession was sufficient as against the defendant only if nothing appeared to the contrary, and 'it did expressly appear by the plaintiff's own case that his possession was wrongful, for it was a possession in fact against the positive provisions of an Act of Parliament, without any colour of title even against strangers'.[25] The defendant also contended that 'there must not only be possession in fact of land to maintain trespass, but the possession must be lawful at the time.'[26] Lord Kenyon CJ rejected those arguments:

---

[23] *Brest v Lever* (1841) 7 M&W 593, 151 ER 904, sub nom *Grice v Lever* (1841) 9 Dow 246. It was held that a plea of *liberum tenementum* could not be made good merely by establishing prior possession for a period of less than twenty years.

[24] *Graham v Peat* (1801) 1 East 244, 102 ER 95.

[25] (1801) 1 East 244, 244–45; 102 ER 95. The defendant cited *Doe d Crisp v Barber* (1788) 2 TR 749, 100 ER 403 in support of the proposition that, since the claimant could not establish that he had a title, the claimant could not have maintained ejectment against a stranger who evicted him; and the defendant submitted that he could not maintain trespass either.

> There is no doubt but that the plaintiff's possession in this case was sufficient to maintain trespass against a wrong-doer; and if he could not have maintained an ejectment upon such a demise, it is because it is a fictitious remedy founded upon title. Any possession is a legal possession against a wrong-doer.[27]

Graham v Peat suggests that, if a claimant established that he was in possession at the time of the defendant's trespassory conduct, the claimant was, other things being equal, entitled to succeed in trespass as against the defendant even if the claimant cannot establish that he has or is entitled to an estate in the land; and that possession itself is sufficient in trespass against a person who interferes with that possession without legal justification, regardless of the applicability of any rule of presumption of title. This analysis is supported by the decision and reasoning in *Chambers v Donaldson*, in which four judges of the King's Bench considered whether possession was itself sufficient in trespass.

In *Chambers v Donaldson* the claimant brought trespass *quare clausum fregit* and maintained that the defendant had wrongfully entered the claimant's dwelling-house.[28] The defendants pleaded that the house was the soil and freehold of a third party, a Mr Portman, and that the defendants entered the premises as his servants and by his command. The claimant admitted that the house was Portman's 'soil and freehold', but he denied that the defendants were Portman's servants and had entered by his command. The defendants demurred, contending, inter alia, that it did not suffice for the claimant to deny the command and admit that the freehold was in Portman.[29] The defendants submitted that:

---

[26] (1801) 1 East 244, 245; 102 ER 95.

[27] (1801) 1 East 244, 246; 102 ER 95, 96.

[28] *Chambers v Donaldson* (1809) 11 East 65, 103 ER 929.

> Trespass being a possessory action, it is sufficient for the plaintiff to declare in the first instance on his actual possession; but if a superior title in another be pleaded, he must then shew title to his possession. If the plaintiff declared that the soil and freehold was in A., and that B. gave him leave to enter, and that C., the defendant, entered upon him (the plaintiff) and turned him out; the plaintiff would by his own shewing appear to have no title to maintain the action.[30]

In response to this, Bayley J asked: 'Is not actual possession sufficient to maintain the action against a wrong-doer?'[31] The defendants answered that actual possession was sufficient only if, and insofar as, it gave rise to a presumption of title:

> the law presumes the actual possessor to be the rightful one until the contrary be shewn; but here the contrary is shewn; for when title is admitted in another, which entitles him to the possession, the plaintiff himself appears to be a trespasser, and therefore cannot maintain the action on his own wrongful possession.[32]

The claimant, on the other hand, maintained that 'as against a wrong-doer, a plaintiff may maintain trespass whether he have title or not, as in *Graham v Peat*'.[33] And, accordingly, if the claimant traverses the command but admits that the soil and freehold is in another, he 'does not admit that he has no cause of action'; 'the plaintiff may still maintain this action upon his actual possession against a wrong-doer.'[34]

---

[29] The defendant cited *Trevilian v Pyne* (1705) 1 Salk 107, 91 ER 98 the proposition that if, in trespass, the defendant alleges that the freehold is in another by whose command he entered, it did not suffice for the claimant to deny merely the command, for the claimant would thereby 'admit the rest of the plea to be true, namely, that the freehold was in that other, and not in the plaintiff; which would be sufficient to bar the action'.

[30] (1809) 11 East 65, 67; 103 ER 929.

[31] Ibid.

[32] (1809) 11 East 65, 67–8; 103 ER 929.

[33] (1809) 11 East 65, 69; 103 ER 929, 930. The defendants sought to distinguish *Graham v Peat* (1801) 1 East 244, 102 ER 95 on the basis that the claimant in *Peat* had possession by the licence of the person entitled, the rector, whereas in *Chambers v Donaldson* it was admitted that a third party had a better title and the claimant had not established a title in himself.

The King's Bench (Lord Ellenborough CJ and Grose, Le Blanc and Bayley JJ) held that it sufficed for the claimant to admit that a third party had a freehold title and to simply deny that the defendant had entered the land by the command of the third party. Lord Ellenborough CJ opined that

> unless the command be traversable, it will be sufficient for a mere wrong-doer, who had invaded the quiet possession of the plaintiff, to plead title in another, and an authority from him; although that other himself did not question the plaintiff's possession.[35]

Lord Ellenborough thought that, since it was settled that 'trespass may be maintained by a person in possession against a wrong-doer, we are called upon to strip the wrong-doer of this shield.'[36] Accordingly, if the defendant pleaded that the freehold was in a third party, 'he must also shew that he had the authority of that other'.[37]

Le Blanc J also thought that possession was sufficient to maintain trespass against a wrongdoer and that, accordingly, it sufficed for the claimant to deny that the defendants had entered by the command of a person who had a freehold title.[38] Bayley J maintained that 'if the command be not traversable, then every wrong-doer may call on the party in possession to' show his title to that possession; and that trespass is 'a possessory action; but it must cease to be so, if every wrong-doer could in this manner oblige the party in possession to set out his title.'[39]

---

[34] (1809) 11 East 65, 103 ER 929. The claimant noted that *Witham v Barker* (1609) Yelv 147, 80 ER 99, sub nom *Metham v Barker* (1608) 1 Brownl 213, 123 ER 761 was against him, but he submitted that the case 'has been much shaken' by Willes CJ who disapproved of it in *Lambert v Stroother* (1740) Willes 218, 221; 125 ER 1140, 1141, on the ground that 'it is not necessary that a plaintiff in trespass should set forth any title'.

[35] (1809) 11 East 65, 74; 103 ER 929, 932.

[36] Ibid.

[37] (1809) 11 East 65, 75; 103 ER 929, 932.

[38] (1809) 11 East 65, 75–6; 103 ER 929, 933.

[39] (1809) 11 East 65, 77; 103 ER 929, 933.

Chambers v Donaldson supports the proposition that, if a claimant (*A*) brings trespass *quare clausum fregit* against a defendant (*B*) who had entered onto the land without A's consent, then, other things being equal, *A* is entitled to succeed if he was in possession of the land at the time of *B*'s entry, unless *B* had a better right to possession, or entered by the command of a person who had such a right. Of course, *B* would not be liable if there was some other legal justification for his entry; but the plea of jus tertii would not avail him. In other words, *B* could not escape liability by establishing merely that some third party had a good title as against *A*.[40]

Why was proof of possession (conditionally) sufficient in trespass *quare clausum fregit*? *Graham v Peat* and *Chambers v Donaldson* were not decided on the basis of any rule of presumption of seisin and freehold estate; indeed, they demonstrate that it was not necessary for the claimant to establish that he had, or was entitled to, seisin for a freehold estate, or to possession for a term of years.[41] *Graham v Peat* and *Chambers v Donaldson*, as well as many other cases,[42] support the view that, if a person is in possession of land, persons in general owe him a duty not to engage in trespassory conduct in connection with the land and, accordingly, the

[40] Cp. *Harper v Charlesworth* (1825) 4 B&C 574, 593; 107 ER 1174, 1181 (Holroyd J): 'According to the old rule it was an answer to the action of trespass brought against a wrong-doer for the defendant to shew that the right of soil was in a third person.... But that doctrine has been overruled by later cases. The law now is, that an entry on the possession of another cannot be justified, unless it be made by the authority of a person in whom the right of soil is vested.'

[41] Cp. *Harper v Charlesworth* (1825) 4 B&C 574, 585–86 (Bayley J), 593–94 (Holroyd J), 594–95 (Littledale J).

[42] For example, *Harper v Charlesworth* (n 40); *Purnell v Young* (1838) 3 M&W 288, 150 ER 1153; *Browne v Dawson* (1840) 12 Ad & El 624, 113 ER 950; *Allan v Liverpool Overseers* (1873–74) LR 9 QB 180 (QB) 191–92 (Blackburn J); *Bristow v Cormican* (1878) 3 App Cas 641 (HL) 651 (Lord Cairns LC), 657 (Lord Hatherley), 660–61 (Lord Blackburn); *Adams v Naylor* [1944] KB 750 (CA) 755 (Scott LJ); *Delaney v TP Smith* [1946] KB 393 (CA) 397 (Tucker LJ); *Appah v Parncliffe Investments* [1964] 1 WLR 1064 (CA) 1069–70 (Davies LJ); *National Provincial Bank v Ainsworth* [1965] AC 1175 (HL) 1232 (Lord Upjohn); *Marsden v Miller* (1992) 64 P&CR 239 (CA) 242 (Scott LJ); *Bocardo SA v Star Energy* [2010] UKSC 35, [2011] 1 AC 380, [29]–[31] (Lord Hope). Proof of possession can also suffice in nuisance: *Foster v Warblington Urban DC* [1906] 1 KB 648 (CA); *Hunter v Canary Wharf* [1997] AC 655 (HL) 688–89 (Lord Goff), 697 (Lord Lloyd), 703 (Lord Hoffmann), 724 (Lord Hope).

possessor has, as against persons in general, a right to non-interference. The claim that a possessor acquires rights upon taking possession of land (or chattels) has been advanced by senior members of the judiciary. For example, Lord Blackburn asserted in *Bristow v Cormican* that '[a]ctual possession in the *locus in quo* would have been not merely evidence of title, but actually a title [i.e. right to possession] against wrongdoers.'[43] More recently, Lord Hoffmann maintained in *Alan Wibberley Building Ltd v Insley* that '[p]ossession is in itself a good title against anyone who cannot show a prior and therefore better right to possession'.[44] Moreover, it has long been clear that a claimant in ejectment is required to establish that he has, as against the person in possession of the land, a right to possess it and he is required to establish this because the possessor has, by virtue of his possession, a right to remain in possession as against all the world except a person with a better right. As Lord Mansfield explained in *Roe d Haldane and Urry v Harvey*, 'possession gives the defendant a right against every man who can not shew a good title.'[45]

Accordingly, a person acquires, upon obtaining possession of land, a right to non-interference (including a right not to be dispossessed) as against persons in general.[46] Accordingly, the *First View* is mistaken. Since the possessor actually acquires rights with respect to the land, it is not the case that, upon taking possession of land, the possessor acquires *merely* a title (claim) to an estate in land. On the other hand, a supporter of the *Second View*, which endorses the MRP Thesis as well as the DP Thesis, may well maintain that the law discussed in the previous paragraph is

[43] (1878) 3 App Cas 641 (HL) 660.

[44] [1999] 1 WLR 894 (HL) 898.

[45] (1769) 4 Burr 2484, 2487; 98 ER 302, 304. Cp. *Danford v McAnulty* (1883) 8 App Cas 456 (HL) 460 (Lord O'Hagan), 462 (Lord Blackburn), 464–65 (Lord Fitzgerald).

[46] Cp. JD Hill, 'The Proprietary Character of Possession' in E Cooke (ed), *Modern Studies in Property Law, Volume 1* (Hart 2001) 21; S Douglas, 'The Content of a Freehold: A 'Right to Use' Land?' in N Hopkins (ed), *Modern Studies in Property Law, Volume 7* (Hart 2013) 359, 367–69.

perfectly consistent with, and, indeed, supports the MRP Thesis. For, according to that thesis, a possessor acquires, upon taking possession of land or chattels, a 'right of possession' and the supporter might well say that this right of possession consists of or comprises a right to non-interference. The supporter might add that certain cases indicate that the law's justification for conferring or recognising these rights has to do with the importance of protecting possession and this implies that the existence of the right is conditional on the right-holder being in possession. Consider *Rogers v Spence*.[47] The claimant brought trespass, claiming that the defendant had, among other things, entered onto his land and seized his goods. The defendant pleaded that the claimant had become bankrupt after the action had been brought and that the claimant's causes of action became vested in his assignee in bankruptcy. The Court of Exchequer Chamber held that the plea was bad because the principal and essential cause of action was the personal injury to the bankrupt and, accordingly, the cause of action did not pass to the assignee. Lord Denman CJ maintained that the actions of trespass *quare clausum fregit* and trespass to goods

> are given in respect of the immediate and present violation of the possession of the bankrupt, independently of his rights of property—they are an extension of that protection which the law throws around the person, and substantial damages may be recovered in respect of such rights, though no loss or diminution in value of property may have occurred.[48]

Similarly, in *Beckham v Drake* Cresswell J explained that

> In *Clark v Clark*, *Rogers v Spence* and *Brewer v Dew* it was decided that rights of action for trespass to land or goods in the actual possession of a trader do not pass to his assignees if he becomes bankrupt, because those rights of action are given in respect of the immediate and present violation of the possession of the bankrupt, independently of his rights of property, and are

[47] *Rogers v Spence* (1844) 13 M&W 571, 153 ER 239, affd (1846) 12 CL & F 700, 8 ER 1586.

[48] (1844) 13 M&W 571, 581.

> an extension of the protection given to his person, and the primary personal injury to the bankrupt is the principal and essential cause of action.[49]

If the conferral on possessors of a right to non-interference is 'an extension of the protection given to his person',[50] then it would seem that the protection should extend to land (or goods) in the right-holder's possession and that, accordingly, the continued existence of the possessor's rights is conditional on him remaining in possession.

According to the *Second View*, the MRP Thesis is true and the AP Thesis is false; and, thus, a person does not acquire, upon taking possession of a chattel or land, an alienable interest, such as a freehold estate. It is argued in the next section, which considers the law of ejectment, that, in former times, possession (without more) certainly did not give rise to a freehold estate or a right to hold the land for such an estate. We will see that, while possession has long been (conditionally) sufficient in trespass, a claimant in ejectment was required to establish that he had, as against the defendant, a right of entry. Such a right could be derived from a former seisin. Mere possession, however, did not give rise to such a right, although proof of possession could give rise to a presumption of seisin in fee. This is consistent with the *Second View* but not with the *Third View*; and, if the law had not changed, we would be forced to conclude that the *Third View* is incorrect and that the AP Thesis (and, therefore, the AFS Thesis) is false. But, as we will see, the law has changed.[51] It was eventually accepted that the possessor had more than a right of possession; he

[49] *Beckham v Drake* (1849) 2 HLC 579, 613, 9 ER 1213, 1225 citing *Clark v Calvert* (1819) 8 Taunt 742, 129 ER 573; 21 RR 528; *Rogers v Spence* (n 47); *Brewer v Dew* (1843) 11 M&W 625, 152 ER 955. This passage was cited with approval by Collins LJ in *Rose v Buckett* [1901] 2 KB 449 (CA) 455.

[50] Certain judges have maintained that a possessor's action should succeed because it is in the public interest that possession should not be disturbed (except through judicial processes): e.g. *Cholmondeley v Clinton* (1821) 4 Bligh 1, 75; 4 ER 721, 747 (Lord Redesdale); *Jeffries v Great Western Railway Co* (1856) 4 El & Bl 802, 805; 119 ER 680, 681 (Lord Campbell CJ).

[51] Text to n 265–n 307.

acquired an alienable interest in the land that was not possession-dependent. Once this had been accepted, it was a small step to the conclusion that the possessor acquired an estate in land, an inheritable estate that is capable of lasting forever—an estate in fee simple.

3. EJECTMENT, POSSESSION AND TITLE

It is argued in this section that possession was not a source of a freehold estate or a right to such an estate in the 18th or early 19th centuries, although proof of possession of land could give rise to a presumption that the possessor held the land for a freehold estate. This is clear from the case law concerning the action of ejectment. A claimant would succeed in ejectment if he had, as against the defendant, a right of entry. Possession did not itself give rise to such a right, although a claimant might seek to establish that he had such a right by relying upon the aforementioned rules of presumption. But the law did not stand still. It was decided in the middle of the 19th century that possession was itself sufficient in ejectment as against a wrongful dispossessor. This development is important, for it prefigured the emergence of a new view, according to which possession gave rise to an alienable, proprietary interest.

Sub-section A (below) provides an overview of ejectment and sub-section B briefly considers the right of entry. We will then be in a position to argue, in sub-section C, that in the early 19th century the AFS Thesis was false and the DFS Thesis was true. The argument relies on numerous cases in which it was held that proof of possession of land was evidence, or gave rise to a presumption, that the possessor held the land for an estate in fee simple (or, depending on the circumstances, a lesser freehold estate). We will then turn, in sub-section F, to the cases in which it was decided that possession was itself sufficient in ejectment as against a dispossessor.

A. Ejectment: An Historical Introduction

The action of ejectment originated in the 14th century as a form of the writ of trespass, which became known as the writ of *ejectione firmae*.[52] It enabled the lessee for years, for the first time,[53] to recover by way of judicial proceedings a remedy from any person who wrongfully ejected him from the land during the term. As *ejectione firmae* was a form of the writ of trespass, a successful claimant was originally entitled to recover only damages from the defendant.[54] In 1499, however, the Common Pleas decided that the successful claimant in *ejectione firmae* ought to recover, if the term had not expired, not merely damages for trespass, but possession of the land; and the decision was upheld by the King's Bench.[55]

Ejectione firmae was devised in order to provide greater protection for the lessee for years, but it came to play a far greater role in English land law. It became 'a new and final common form for the trial of freehold titles.'[56] The freeholder had the protection of the real actions, but these actions had many undesirable features.[57] The action of ejectment provided a means of recovering possession 'by a form of action

---

[52] JH Baker, *An Introduction to English Legal History* (4th edn, OUP 2002) 299; Simpson (n 2) 74–77.

[53] The older writ of *quare ejecit infra terminum* did not lie against any ejector and protected the lessee only from ejection by the lessor's grantee: FW Maitland, *Equity; also, The Forms of Action at Common Law* (CUP 1910) 351; SFC Milsom, 'Trespass from Henry III to Edward III' (1958) 74 LQR 195, 198–201; SFC Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) 154.

[54] Milsom, *Historical Foundations* (n 53) 156.

[55] *Gernes v Smyth* (1499) JH Baker, *Baker and Milsom Sources of English Legal History: Private Law to 1750* (2nd edn, OUP 2010) 200; AG Sedgwick & FS Wait, 'The History of the Action of Ejectment in England and the United States' in JH Wigmore (ed), *Select Essays in Anglo-American Legal History* (CUP 1907–09) Vol III, 611, 622; Simpson (n 2) 74–75, 92–93, 144–45.

[56] Milsom, *Historical Foundations* (n 53) 161. For an example, see *Gerrarde v Worseley* (1580) Dyer 374a, 73 ER 839; or *Cooper's Case* (1584) 2 Leon 200, 74 ER 477.

[57] Maitland (n 53) 351–2; WS Holdsworth, *A History of English Law* (Methuen & Co 1922–1966) Volume VII, 4–10; Simpson (n 2) 44 –46, 144–45.

free from the technicalities of the writs of entry and the possessory assizes, with the speedy mesne process appropriate to a trespass action, and in which trial was by jury.'[58] Lord Mansfield maintained, accordingly, that ejectment was 'invented under the control and power of the court, for the advancement of justice in many respects; and to force parties to go to trial on the merits, without being entangled in the nicety of pleadings on either side'.[59]

A freeholder, *X*, who sought to recover the possession of land from the person in possession, *Y*, could grant a lease to a friend or lawyer, *Z*, and if *Z* entered onto the land and was ejected from it, *Z* could bring *ejectione firmae*. This was not uncommon. In 1601 Coke asserted that 'at this day all titles of lands are for the greatest part tried in actions of ejectments.'[60]

In the 17th century the courts went a stage further by inventing, as Blackstone put it, 'a new and more easy method of trying titles by writ of ejectment',[61] a method that 'entirely depends on a string of legal fictions: no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title'.[62] The new practice, which has been attributed to Rolle CJ,[63] involved the courts permitting the possessor to defend the action on the condition that he entered into the 'consent rule' by which he agreed to confess at the trial the lease, entry and ouster.[64] For instance, if Adam wanted to recover possession

[58] Baker (n 52) 301.

[59] *Aslin v Parkin* (1758) 2 Burr 665, 668, 97 ER 501.

[60] *Alden's Case* (1601) 5 Co Rep 105b, 77 ER 217.

[61] 3 Bl Comm 202.

[62] 3 Bl Comm 203.

[63] 3 Bl Comm 202–3.

[64] *Anon* (1652) Styles' Reports 368, 82 ER 784; 3 Bl Comm 203–204; Maitland (n 53) 353.

from Bill, an action would be commenced in the name of another (John Doe) against a fourth person (Richard Roe).[65] The declaration would state that Adam granted the land for a term to John Doe; that John Doe entered onto the land; and that Richard Roe (the 'causal ejector') ousted John Doe. The declaration would be delivered to Bill with a notice, signed by Roe, stating that the action had been brought against Roe; that Roe would not defend it; and that, unless Bill defended the action, judgment would be entered against Roe by default and Bill would be ousted from the land. Bill would be permitted to defend the action provided he agreed to confess the lease, entry and ouster.[66] If Bill decided to defend the action, and agreed to confess the lease, entry and ouster, the case (*Doe on the demise of Adam v Bill*) would proceed to trial and, at the trial, Adam would be bound, as Blackstone explained, 'to make out a clear title, otherwise his fictitious lessee [Doe] cannot obtain judgment to have possession of the land for the term supposed to be granted.'[67] If Adam were to establish at the trial that he had a good title as against Bill, judgment would be given for Doe and a writ *habere facias possessionem* would be issued to the sheriff authorizing and requiring the sheriff to put Doe into possession of the land.

The law concerning ejectment and the old real actions was reformed by the Real Property Limitation Act (RPLA) 1833 and the Common Law Procedure Act 1852. The 1833 Act was enacted following the publication of the First Report of the Real Property Commissioners.[68] The Commissioners maintained that 'much

[65] At first the nominal claimant and the nominal defendant, who were referred to in the declaration, were real persons. But this soon changed. The fictitious, nominal claimant was often called 'John Doe' and the fictitious, nominal defendant was often called 'Richard Roe'. But other names were used: e.g. *Fair-claim v Sham-title* (1762) 3 Burr 1290, 97 ER 837.

[66] The defendant was also required to agree to pay the costs of the case and to allow judgment to be entered against the casual ejector, if, in violation of the agreement, he refused to confess the lease, entry and ouster.

[67] 3 Bl Comm 204.

perplexity and confusion have ... been occasioned by ... the incongruous variety of remedies allowed for the recovery of real property'.[69] The Commissioners proposed that the action of ejectment 'alone, with some improvements, should be retained and extended to all cases.'[70] This recommendation was implemented by Section 36 of the Act of 1833, which abolished all real and mixed actions except two writs of dower, *quare impedit*, and ejectment. The Common Law Procedure Act 1852 abolished the fictions in ejectment and introduced a new procedure. Section 168 of that Act provided:

> Instead of the present Proceedings by Ejectment, a writ shall be issued, directed to the Persons in Possession by Name, and to all Persons entitled to defend the Possession of the Property claimed, which Property shall be described in the Writ with reasonable certainty.

Section 169 of the 1852 Act provided:

> The Writ shall state the Names of all the Persons in whom the Title is alleged to be, and command the Persons, to whom it is directed, to appear, within Sixteen Days after Service thereof, in the Court from which it is issued, to defend the Possession of the Property sued for, or such Part thereof as they may think fit.

The claimant was required to state in the writ that he or she was entitled 'to the possession' of the land and 'to eject all other Persons therefrom.'[71] In 1875 the action of ejectment was, strictly speaking, supplanted.[72] As Lord Denning MR has explained, '[b]y the Supreme Court of Judicature Act 1875, the old action of

---

[68] *First Report made to His Majesty by the Commissioners appointed to inquire into the Law of England respecting Real Property* (1829) House of Commons Papers (Paper No 263) Volume X, 1.

[69] Ibid 8.

[70] Ibid 40.

[71] Common Law Procedure Act 1852, s 169, Sch A.

[72] Maitland (n 53) 355.

ejectment was replaced by an action for the recovery of land: but the practice remained the same, although the machinery was different.... The judgment was, as before, that the plaintiff "do recover" possession.'[73]

B. Ejectment and the Right of Entry

Let's return to *Doe (on the demise of Adam) v Bill*, the fictional case that was introduced in the previous section. What must Adam establish in order for his action to succeed? It is clear that, before the enactment of the Common Law Procedure Act 1852, it would not have been sufficient for Adam to have established that he had a right, as against Bill, to be seised of the land: it would have been necessary for him to establish that he had, as against Bill, a right of entry.[74] It might be thought that if the defendant, Bill, were to enter into the consent rule and confess the lease, entry and ouster, it would not be necessary for Adam to establish that he was entitled to make a lease. But that is not correct. In *Doe d Hayne v Redfern* one issue was whether the claimant could maintain ejectment under a demise from the King. It was submitted that '[t]he defendant, by entering into the rule to confess the lease, entry, and ouster, admits that the King has demised.'[75] The court rejected this submission. Le Blanc J explained in argument that '[t]he defendant admits a demise in fact from the King, but he does not admit that the demise is good in law.'[76] Accordingly, the fact that the defendant confessed that the purported lessor had granted a lease to the lessee did not

[73] *McPhail v Persons, Names Unknown* [1975] Ch 447 (CA) 458. For a discussion of the 'machinery' that was introduced in 1875, see *Gledhill v Hunter* (1880) 14 Ch D 492 (Ch) 495–500 (Jessel MR).

[74] *Roe d Haldane and Urry v Harvey* (1769) 4 Burr 2484, 98 ER 302; *Berrington dem Dormer v Parkhurst* (1811) 13 East 489, 495; 104 ER 460, 463 (Lord Hardwicke CJ); *Danford v McAnulty* (1883) 8 App Cas 456 (HL) 465 (Lord FitzGerlad); Maitland (n 53) 354; Hargreaves (n 9); Simpson (n 2) 146, 149; P Bordwell, 'Ejectment Takes Over' (1970) 55 Iowa LR 1089, 1090–93, 1108–09; Milsom, *Historical Foundations* (n 53) 161; Baker (n 52) 302–3.

[75] *Doe d Hayne v Redfern* (1810) 12 East 96, 108; 104 ER 39, 44.

[76] Ibid.

amount to a confession that the purported lessor was entitled to make the lease; and the lessor, who was ex hypothesi out of possession, could not grant a valid lease unless he had a right of entry.

There are three main points to note about the right of entry. First, a right of entry arose in various ways, such as upon an ouster of a freeholder by disseisin, abatement or intrusion.[77] Secondly, a right of entry was enforced either by entry (that is, by entering onto the land) or by action.[78] Thirdly, a right of entry could be 'tolled' (i.e. taken away) in certain circumstances, such as upon a descent cast or discontinuance.[79] A right of entry was also lost upon the expiration of the limitation period under James I's Statute of Limitations.[80] This provided that, in general, no person shall 'make any Entrie' into any land, tenement, or hereditament but within 20 years from the time when his right of entry first descends or accrues to him and, if he fails to enter within that period, he and his heirs 'shall be excluded and disabled from such Entrie'.[81] A claimant who had lost a right of entry, and thus the right to bring ejectment, might nonetheless be entitled to bring one of real actions in order to recover the land. In other words, she might have lost her 'right of entry' but not what was called her 'right of action'.

The law concerning the tolling of rights of entry was amended in 1833. Since ejectment could not be brought without a right of entry, ejectment could not

[77] 3 Bl Comm 175–80. According to Blackstone, '[d]isseisin is a wrongful putting out of him that is seised of the freehold'; 'an abatement is where a person dies seised of an inheritance, and before the heir or devisee enters, a stranger who has no right makes entry, and gets possession of the freehold'; an 'intrusion' is 'the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion': 3 Bl Comm 168, 169.

[78] 3 Bl Comm 175–6.

[79] FW Maitland, 'The Beatitude of Seisin I' (1888) 4 LQR 24, 25; Maitland (n 53) 354; Simpson (n 2) 151; Milsom, *Historical Foundations* (n 53) 159. For an example see *Makepiece v Fletcher* (1734) 2 Com 457, 92 ER 1158.

[80] Statute of Limitations 1623–24 (21 Jac I, c 16); Simpson (n 2) 150.

[81] Statute of Limitations 1623–24 (21 Jac I, c 16).

satisfactorily replace the real actions that were abolished in 1833 unless the rules that tolled rights of entry were also amended. The rules were amended by section 39 of the 1833 Act, which abolished the rule that a right of entry is tolled upon a descent cast or discontinuance.

C. Establishing Title in Ejectment: Possession, Evidence and Presumptions

If a claimant sought to establish that he had a right of entry derived from a former seisin, how could he do it? In a number of cases in the 18th and 19th century judges maintained that, for such purposes, proof that a certain person was in, or had been in, possession of land was *evidence* that that person was seised of the land for a freehold estate, or gave rise to a rebuttable *presumption* that that person was seised of the land for a freehold estate (and, in the absence of evidence that the possessor was seised of a lesser freehold estate, it would be presumed that he was seised for an estate in fee simple). These cases support the claim that the DFS Thesis was true and that the AFS Thesis was false. For, if possession itself had given rise to a fee simple estate, there would obviously have been no need to claim that possession was evidence, or gave rise to a presumption, that the possessor was seised in fee.

Unfortunately, a number of legal commentators,[82] and perhaps some judges, have failed to notice or, at least, to mention that (1) 'proof of possession is evidence of *X*' and (2) 'proof of possession gives rise to a presumption of *X*' might be substantively and not merely verbally different. For, on one interpretation, proposition (2) but not proposition (1), means that the trier of fact is *required* to conclude (other things being equal) that the possessor was seised in fee. There appears to be judicial support for both proposition (2) (thus interpreted) and

[82] For example, Lightwood (n 3) 114–116, 121.

proposition (1), although judges have not always recognised the distinction and the terms 'prima facie evidence' and 'presumption' have been used interchangeably.

i. Possession and Other 'Acts of Ownership' as Evidence of Seisin in Fee

A great number of cases decided in the 18th and early 19th centuries support the proposition that, if it were established that a certain person, *X*, had possession (control) of certain land for any period of time, or that *X* had purported to lease the land and had received the rent, or that *X* had exercised, or purportedly exercised, other 'acts of ownership' over the land,[83] then (other things being equal) the trier of fact would be permitted to find that *X* was seised in fee. Possession, it was said, was prima facie evidence of seisin in fee.

In *Denn ex dim Tarzwell v Barnard*, for instance, the question was whether the claimant, who had brought ejectment against the defendant, ought to be non-suited on the basis that he had not sufficiently made out his title.[84] The (genuine) claimant relied upon evidence that William Tarzwell had been in possession of certain land since his mother's death in 1766. The defendant did not attempt to establish that he had a title. Rather, he argued that this was not good evidence to leave to the jury. Lord Mansfield, giving judgment in the King's Bench, rejected this submission and pointed out that the claimant could rely on the evidence of possession. 'The title', said his Lordship, 'is a possession of 20 years'; and '[i]f no other title appears, a clear possession of 20 years is evidence of a fee'.[85] Accordingly, his Lordship concluded that there 'was very good evidence to leave to the jury.'[86]

[83] Cp. the discussion in Chapter 2, text to n 102–n 110.

[84] *Denn ex dem Tarzwell v Barnard* (1777) 2 Cowp 595, 98 ER 1259.

[85] Ibid.

Similarly, in *Doe d Hall v Penfold*, in which the claimant relied in ejectment upon evidence that one Stroud, from whom the claimant sought to derive a freehold title, had been in possession of the land, Patteson J asserted that '[i]f [Stroud] was in actual possession, that is evidence that he was seised in fee, unless there be something to shew that he had a less estate.'[87]

In *Peacable d Uncle v Watson* the claimant brought ejectment to recover possession of three houses.[88] The claimant claimed the premises by descent from one Robert Farthing. The claimant, in order to establish the seisin of Farthing, sought to rely on the declarations of a deceased occupier regarding the identity of the person from whom he had rented the houses he had occupied. The judge decided that these declarations were inadmissible and, as the claimant could not prove his title without them, the claimant was non-suited. The claimant sought to set aside the judge's ruling and to have a new trial. He argued before the Common Pleas that the evidence, if it were admitted, would have established, among other things, the seisin of Farthing. The court accepted that the declaration of a possessor that he is tenant to another is admissible (subject to certain conditions). Sir James Mansfield CJ said: 'Possession is prima facie evidence of seisin in fee simple: the declaration of the possessor that he is tenant to another, makes most strongly, therefore, against his own interest, and consequently is admissible'.[89] In other words, since 'possession is prima facie evidence of seisin in fee simple', the occupier's assertions that he held under a lease were 'against his own interest' and therefore admissible.[90] Accordingly, his

---

[86] Ibid.

[87] *Doe d Hall v Penfold* (1838) 8 Car & P 536, 537; 173 ER 607, 608.

[88] (1811) 4 Taunt 16, 128 ER 232.

[89] (1811) 4 Taunt 16, 17; 128 ER 232.

Lordship's reasoning supports the proposition that possession or occupation is 'prima facie evidence of seisin in fee.'

In *Doe d Humphrey v Martin* the (genuine) claimant brought ejectment to recover possession of five houses.[91] In March 1841 the claimant's agent had found the door of one of the houses secured by a chain and the defendant inside it. The defendant had told the claimant's agent that the house was his (the defendant's) freehold. At the trial it was proved that in 1840 and 1841 the claimant, through his agent, had received the rents of all five houses for four or five quarters. The defendant submitted that the claimant 'can only recover by the goodness of his own title'; and, although proof of receipt of rent by himself for twenty years would be evidence of title, 'the receipt of rent for four or five quarters is . . . not sufficient.' Lord Denman CJ disagreed. In summing up for the jury the Chief Justice said:

> I think that the [claimant] has given sufficient evidence for me to leave to you, and you are to consider whether this evidence satisfies you, that the lessor of the plaintiff is the owner of this property.... The defendant gives you no evidence of any right in himself, and, for aught that appears in this case, he is a mere wrong doer. You are therefore to say, whether you are satisfied by the evidence that this property really belongs to the lessor of the plaintiffs.[92]

The jury's verdict was for the claimant.

It is notable that in *Doe d Hall v Penfold* it was decided that 'actual possession' for not more than two years was evidence of seisin in fee; and in *Doe d Humphreys v Martin* receipt of the rent for merely four or five quarters was 'sufficient evidence'.

---

[90] Cp. *Doe d Stansbury v Arkwright* (1833) 5 Car & P 574, 172 ER 1105; *Doe d Daniel, Sheriff and Affleck v Coulthred and Baldrey* (1837) 7 Ad & E 235, 112 ER 460; *Doe d Pritchard v Jauncey* (1837) 8 Car & P 99, 173 ER 415.

[91] (1841) Car & M 32, 174 ER 395.

[92] (1841) Car & M 32, 33; 174 ER 395, 396.

ii. Possession and Presumptions of Seisin

A number of cases decided in the 19th century arguably support the view that the law of the time provided: (i) if it is proved that a certain person, *X*, was in possession of land, or had leased the land and received the rent, or had exercised other 'acts of ownership', it is to be *presumed* that *X* was seised unless the presumption is properly defeated; and (ii) if, in accordance with (i), it is to be presumed that *X* had seisin of certain land, it is to be presumed that *X* was seised for an estate in fee simple unless it appears that he was seised for a lesser freehold estate. If this view is correct, then proof that *X* had possession of land was not merely *evidence* that *X* was seised for a freehold estate; rather, the trier of fact was required (other things being equal) to take as true the proposition that *X* was seised for a freehold estate (and, unless it appeared that *X* was seised for a lesser freehold estate, seised in fee simple). It is argued below that there was such a rule of presumption and, accordingly, the DFS Thesis was correct. The language by which the rule was expressed subtly changed in the course of the late 19th and early 20th centuries. Judges began to describe the presumption, not as a presumption of 'seisin in fee', but as a presumption of 'ownership in fee'. The new terminology reflected, perhaps, the diminishing significance of seisin in the law.[93]

Doe d Harding v Cooke is an authority that clearly supports the view discussed in the previous paragraph. In *Cooke*, the claimant in an action of ejectment proved that his father had let the premises and received the rent from 1797 to 1811 and that the claimant had received the rent from 1816 to 1819.[94] The defendant proved that he had been in possession since 1819. A verdict was given for the claimant. The defendant sought a new trial on the ground that the claimant had not

[93] For a discussion of how seisin became less and less important, see Sweet (n 8).

[94] *Doe d Harding v Cooke* (1831) 7 Bing 346, 131 ER 134.

established a title as against one who had been in possession for ten years. The defendant submitted (1) that possession for the last ten years is a 'good primâ facie title as against the preceding twenty'; and (2) that it was for the claimant to show why he had been out of possession for the last ten years.[95] The Common Pleas rejected these submissions. Sir Nicholas Tindal CJ reasoned thus:

> In this case, it was proved that the elder Harding and his son held the premises for twenty-three years, and during that time received and increased the rent, an unequivocal act of ownership, from which the law presumes a seisin in fee. The father died seised; and the lessor of the plaintiff is the only son who is shewn to have survived him. That would be enough, even in a writ of right, to call on the tenant to establish a stronger claim.[96]

With respect to the submission that this was not sufficient as against a defendant who had been in possession for ten years, the Chief Justice said, 'I cannot see why any period short of twenty years should be supposed to raise a counter presumption sufficient to outweigh the presumption arising from the first twenty years.'[97] His Lordship rejected the proposition that it was for the claimant to show why he had been out of possession for ten years on the ground that '[i]n many cases it would be extremely hard to cast on the [claimant] the burden of showing how the defendant came into possession.'[98]

Park J reached the same conclusion.[99] His Lordship maintained that the claimant 'had shewn a presumptive title, arising out of twenty-three years' possession'; and that, as the defendant had proved that he was in possession for ten years after the claimant had been in possession, '[t]here is presumption against

[95] (1831) 7 Bing 346, 347; 131 ER 134.

[96] Ibid.

[97] (1831) 7 Bing 346, 348; 131 ER 134.

[98] Ibid.

[99] Ibid. Bosanquet and Alderson JJ also agreed.

presumption, which throws the Defendant upon establishing, if he can, a title of a higher description.'[100] Park J seems to have regarded the claimant and his father, who had leased the land and received the rent, as being in 'possession' for the purposes of the rule that the court is to presume a title from proof of possession. If this is correct then, for the purposes of that rule, 'possession' is not confined to 'possession (control)'.[101] But there is no need to stretch the meaning of 'possession'. It can be said, instead, that, as well as proof of possession giving rise to a presumption of title, proof that a person or persons had leased the land and received the rent gives rise to a presumption of title. As the Chief Justice said, from 'an unequivocal act of ownership ... the law presumes a seisin in fee.'

Tindal CJ and Park J appear to have been of the view that, if it were proved that the claimant and his father had each leased the land and received the rent, it had to be found that they were seised in fee. Tindal CJ said that 'the earlier presumption ...*must* prevail till a better title is shown';[102] and Park J thought that the presumption 'throws the Defendant upon establishing, if he can, a title of a higher description'.[103]

In *Doe d Smith and Payne v Webber* it was submitted on behalf of the defendant that *Doe d Harding v Cooke* established that 'twenty years' possession of itself, afforded a *presumption* against a defendant who had held for several years subsequently';[104] and Parke J, in response, said: 'it is primâ facie evidence.' There is much support, as we have seen, for the proposition advanced by Parke J—that possession is prima facie evidence of seisin in fee. However, *Doe d Harding v Cooke*

[100] Ibid.

[101] This term is discussed in Chapter 2, text to n 9–n 19.

[102] (1831) 7 Bing 346, 348; 131 ER 134.

[103] Ibid.

[104] *Doe d Smith and Payne v Webber* (1834) 1 Ad & El 119, 120–21; 110 ER 1152, 1153 (emphasis added).

is not the only case that supports the proposition that proof of possession gave rise to a *presumption* of seisin in fee; *Metters v Brown* and *Whale v Hitchcock* also support it.[105]

In *Metters v Brown* the claimant, in his capacity as his mother's administrator, brought ejectment to recover possession of a piece of land. He claimed that the mother held under an unexpired lease for a term of 99 years and that the lease devolved upon him as her administrator.[106] The defendant submitted that the claimant had not shown a title in himself; that, as the mother was in possession in her lifetime, the legal presumption was that she was seised in fee; and that there was not sufficient evidence that she held under a lease. Channell B, giving the judgment of the Court of Exchequer, accepted the first premise of the defendant's argument:

> It appeared that the plaintiff's mother in her lifetime was in possession of the land; that she built upon it two cottages, in one of which she lived, the other she let, and received the rent. There was, therefore, evidence from which it would be presumed that she was seised in fee, unless her title was cut down or explained. It was necessary for the plaintiff to rebut the presumption of a seisin in fee, and shew that his mother had only a chattel interest for a term which subsisted at and after the commencement of the action.[107]

The defendant's argument was ultimately rejected on the basis that 'there was evidence that a term of years existed'.[108] Thus, the court's reasoning involved the proposition that, if it is proved that a person was in possession of the land, had built on it, and had let part of it and received the rents, it is to be presumed that the possessor was seised in fee in the absence of evidence to the contrary. The

[105] *Metters v Brown* (1863) 1 H & C 686, 158 ER 1060; *Whale v Hitchcock* (1876) 34 TR 136.

[106] (1863) 1 H & C 686, 158 ER 1060.

[107] (1863) 1 H & C 686, 692; 158 ER 1060, 1062.

[108] (1863) 1 H & C 686, 693; 158 ER 1060, 1063.

presumption of seisin in fee would not arise if it was not consistent with the facts; and the presumption could be rebutted by the defendant.[109]

Metters v Brown was decided in 1863 and *Whales v Hitchcock* in 1876. Accordingly, it might be thought that, although there are earlier cases that support the view that proof of possession gave rise to a presumption of seisin,[110] in the 1860s and 1870s the rule that 'possession is prima facie evidence of seisin' was finally supplanted by a rule providing that, if it is proved that a person was in possession, it is to be *presumed* that he was seised (unless the presumption is properly defeated). This view must reckon with the fact that senior judges continued to assert that 'possession is prima facie evidence of seisin in fee'. For instance, Mellor J asserted in 1865 that 'the fact of possession is *primâ facie* evidence of seisin in fee.'[111] However, such assertions are not necessarily incompatible with the claim that there was a rule of presumption. Indeed, they might be an inadequate expression of the rule of presumption; the differences might be verbal and not substantive. For instance, it is arguable that, despite the terms used, Mellor J's judgment supports the claim that, upon it being established that a person was in possession of land, it was to be presumed that he was seised in fee. For, in the first place, his Lordship maintained that, upon it being established that the claimant's predecessor in title was in possession of the land, the defendant ought to have established that the predecessor in title was a tenant at will. And his Lordship ended his judgment thus: 'I agree with the Lord Chief Justice in the importance of maintaining, that possession is good against

[109] Cp. *Jayne v Price* (1814) 5 Taunt 326, 128 ER 715; *Doe d Carter v Barnard* (1849) 13 QB 945, 116 ER 1524; *Asher v Whitlock* (1865) LR 1 QB 1 (QB) 6 (Mellor J); Lightwood (n 3) 115–6.

[110] For example, *Jayne v Price* (n 109).

[111] *Asher v Whitlock* (n 109) 6.

all but the rightful owner.'[112] All this suggests that his Lordship thought that, upon it being established that the claimant's predecessor in title had possession of the land, the court (or jury) was *required* to take as true that he was seised of the land in fee (unless the presumption was rebutted by, say, proof that the predecessor in title was a tenant at will).

In the late 19th and early 20th centuries, judges asserted that proof of possession gave rise to a presumption, not of 'seisin in fee', but of 'ownership in fee'. For instance, in 1883 Lord FitzGerald, in his speech in *Lyell v Kennedy (No 1)*, maintained that 'the possession of land has ever been regarded by the law with some degree of favour, as primâ facie evidence of ownership in fee'.[113] This appears to be merely a semantic change. The rule remained that a possessor was to be presumed in the first instance to hold the land for an estate in fee simple.

iii. Possession for 20 Years

In *Doe d Harding v Cooke* it was submitted on behalf of the claimant that '[t]wenty years' possession gives a primâ facie right to bring ejectment';[114] and two cases were cited in support of this proposition: *Stokes v Berry*;[115] and *Denn ex dem Tarzwell v Barnard*.[116] Such statements might be regarded as indicating that, if a claimant in ejectment sought to rely on the fact of possession and take advantage of the rule of

[112] Ibid 7.

[113] (1883) 8 App Cas 217 (HL) 232. Cp. *Re Atkinson and Horsell's Contract* [1912] 2 Ch 1 (CA) 9 (Cozens-Hardy MR).

[114] (1831) 7 Bing 346, 347; 131 ER 134.

[115] *Stokes v Berry* (1699) 2 Salk 421, 91 ER 366; Holt KB 264, 90 ER 1044; sub nom *Stocker v Burny* Ld Raymd 741, 91 ER 1396.

[116] *Denn ex dem Tarzwell v Barnard* (1777) 2 Cowp 595, 98 ER 1259.

evidence or presumption, it was *necessary* for him to prove a possession for a period of not less than twenty years.[117]

However, the authorities are overwhelmingly against the claim that possession was only to be regarded as evidence of seisin in fee if it had been established that it lasted for a period of twenty years or more. The authorities that support the claim that proof of possession gives rise to a presumption of seisin in fee (discussed above) do not support the view that it was necessary for such purposes that the possession lasted for a period of *not less than twenty years*.[118] Moreover, the view that it was necessary that the possession lasted for at least twenty years is not compatible with *Doe d Carter v Barnard* in which Patteson J, giving the judgment of the Queen's Bench, maintained that the claimant would have 'established her case, if she had shewn nothing but her own possession for thirteen years' because 'such possession is prima facie evidence of title, and, no other interest appearing in proof, evidence of seisin in fee.'[119] In *Allen v Roughley* four members of the High Court of Australia, after an extensive review of the cases, rejected the appellant's submission that possession for a period of less than twenty years was not, in general, prima facie evidence of seisin in fee.[120]

---

[117] Sir William Holdsworth maintained that, subject to two exceptions, proof solely of possession for a period of less than twenty years raised no inference of title at all; and that, accordingly, if a claimant in ejectment sought to rely solely on his own possession, it was (subject to the aforementioned exceptions) necessary for him to show that he had been in possession for a period of not less than twenty years; and, therefore, a claimant in ejectment had to establish that he had an 'absolute right', a right that was good against the world: Holdsworth, *A History of English Law* (Methuen & Co 1922–1966) Volume VII, 60–75. Holdsworth's thesis was forcefully criticized by Hargreaves (n 9) 386–393; and by Bordwell: (n 74) 1106–7, 1110–11, 1139–40.

[118] E.g. *Metters v Brown* (n 105); *Whale v Hitchcock* (n 105)

[119] *Doe d Carter v Barnard* (1849) 13 QB 945, 953; 116 ER 1524, 1527. Cp. Lightwood (n 3) 114–5.

[120] *Allen v Roughley* [1955] 94 CLR 98 (HCA) 108–11 (Dixon CJ), 128–31 (Fullagar J), 137–38 (Kitto J), 144–45 (Taylor J). On the other hand, Williams J (114–15) accepted the appellant's submission.

D. Ejectment and the DFS and AFS Theses

The discussion hitherto clearly supports the claim that in the early 19th century the DFS thesis was true and that the AFS was false; and, accordingly, it supports the *Second View*. We turn now to another set of cases that support this view. Hargreaves, in order to establish the truth of his claim that 'possession is never a title', discussed a number of cases in which a claimant had been in possession of land and lost because, or partly because, in the circumstances of the case the rule of presumption of seisin for a freehold estate was inapplicable.[121] In many of these cases the disputed land was Crown land; and, accordingly, the rule that the Crown cannot be disseised was applicable and the rule of presumption was inapplicable. This was made clear by the Privy Council in *Doe d Devine v Wilson* and *Emmerson v Maddison*—albeit that, in line with what was said above regarding the diminishing importance of seisin, their Lordships refer to the 'presumption of seisin in fee' in the former and to the 'presumption of ownership' in the latter.

In *Doe d Devine v Wilson* the claimant proved that Devine had been in possession of a farm for at least thirty years; that Devine was in possession of the farm when he died in 1830; and that the claimant, who had brought an action of ejectment within twenty years of Devine's death, was Devine's heir-at-law. Their Lordships, after noting these facts, maintained that 'if the evidence had stopped here, such a *prima facie* case of seisin in fee and dying seised on the part of Nicholas Devine, and of heirship on the part of the [claimant], was made out, as would have called on the Defendants for an answer, and proof of a better title.'[122] But the

[121] Hargreaves (n 9) 383–6, 391. The cases referred to include: *Johnson v Barret* (1646) Aleyn 10, 82 ER 887; *Doe d Crisp v Barber* (n 25); *Goodtitle d Parker v Baldwin* (1809) 11 East 488, 103 ER 1092; *Harper v Charlesworth* (n 40); *Doe d Devine v Wilson* (1855) 10 Moo & P 502, 14 ER 581; and *Emmerson v Maddison* [1906] AC 569 (PC).

[122] (1855) 10 Moo & P 502, 523; 14 ER 581, 589.

evidence did not stop there. The clamant also provided evidence of two grants of the land by the Governors of the Colony, on behalf of the Crown, to Devine; and the defendant argued that these grants were void for uncertainty. In light of this additional evidence, the claimant

> could not avail himself of the presumptive seisin in fee of Nicholas Devine arising from his possession, which the Plaintiff himself had shown to be unlawful in the beginning and throughout the third years of possession: or, at most, that Nicholas Devine was only tenant at will to the Crown, and so had no estate that could descend to his heir.[123]

The land was Crown land and the presumption of seisin was inapplicable. This is consistent with the DFS Thesis. For, if this thesis is correct, the possessor is to be presumed to have a fee simple estate *in certain circumstances*.

Emmerson v Maddison was primarily concerned with the proper construction of the Intrusions Act 1623.[124] Emmerson, the claimant, had been in possession of a piece of land in New Brunswick, which belonged to the Crown. He was in possession for a period of 56 years (from 1839 to 1895). If Emmerson had been in possession for sixty years then the Crown's right against him would have been barred by statute.[125] The Crown granted the land to Maddison, the defendant, in 1895 and, during the temporary absence of Emmerson, Maddison entered onto the land and occupied it. Emmerson brought ejectment against Maddison in 1902. The claimant submitted that, where a stranger had possession of Crown land for more than twenty years, the Intrusions Act 1623 prevented the Crown from making a valid grant of the land unless the Crown first established its title by information of intrusion.

---

[123] (1855) 10 Moo & P 502, 523–4; 14 ER 581, 589.

[124] *Emmerson* (n 121); Intrusions Act 1623 (21 Jac I c 14).

[125] The relevant legislation provided that an action by the Crown was barred by adverse possession for a period of sixty years.

The Privy Council (Lord Macnaghten, Lord Dunedin, Lord Atkinson, Sir Arthur Wilson and Sir Alfred Willis) rejected this submission. It held that, in the circumstances, the Crown could make a valid grant of the land without first establishing its title by information of intrusion and that, accordingly, judgment had been rightly entered for the defendant. It explained, in its judgment, that the rule of presumption would not assist a claimant if the land in question was Crown land:

> [Emmerson] had no title to the land, and was a mere trespasser upon it. A plaintiff in ejectment must recover on the strength of his own title, and assuming in his favour that evidence of uninterrupted possession for many years, unanswered and unqualified by any other circumstances, would have entitled him to succeed, *the moment that it appeared that the land belonged to the Crown, and had not been occupied adversely to the Crown for sixty years, the presumption of ownership from occupation was gone*.[126]

Thus, if the claimant proved that he or someone under whom he claimed had merely a prior possession this could suffice in ejectment only if, and in so far as, it was evidence of, or gave rise to a presumption of title (e.g. an estate in fee simple). The same point was made by Patteson J in *Doe v Barnard*.[127] In his Lordship's view, proof that the claimant had been in possession for thirteen years could suffice in ejectment; '[t]he ground however for saying so would not be that possession alone is sufficient in ejectment (as it is in trespass) to maintain the action; but that such possession is prima facie evidence of title and, no other interest appearing in proof, evidence of seisin in fee.'[128] On his Lordship's view, then, the DFS Thesis is true and the AFS Thesis is false.

---

[126] *Emmerson* (n 121) 575 (emphasis added).

[127] (1849) 13 QB 945, 116 ER 1524.

[128] (1849) 13 QB 945, 953; 116 ER 1524, 1527. Cp. *Nagle v Shea* (1874) 8 IrRCL 224.

E. Contrasting Trespass and Ejectment

The discussion hitherto establishes that, whereas possession has long been (conditionally) sufficient in trespass, a claimant in ejectment was required to establish that he had, as against the defendant, a right of entry. Possession did not itself give rise to such a right, nor did it give rise to a right to be seised for a freehold estate, although proof of possession could give rise to a presumption of seisin in fee and this, in turn, could enable the claimant to establish a right of entry. Accordingly, there was an important contrast to be drawn between trespass and ejectment, as was explained in 1825 by Holroyd J in *Harper v Charlesworth*:

> The plaintiff took no legal estate from the Crown ... and he could not, therefore, maintain an action of ejectment, because he could not make any lease to vest an interest in the nominal plaintiff. The action of ejectment, and the action of trespass are very different in their nature. It is clearly established with respect to private property, that trespass may be brought by a person in the actual possession against a wrong doer, or a person who has no right to enter upon the land, or to do any act which is an injury to the actual possession.[129]

It should now be clear that Holroyd J properly described the position in 1825 and that, at that time, the DFS Thesis was true, as was, it seems, the MRP Thesis; but the AFS Thesis was false. The law regarding the sufficiency of possession in ejectment and trespass was not, however, to subsist without alteration. While the modern cases confirm that possession is defeasibly sufficient in an action for trespass to land,[130] we will see in the next sub-section that in the latter half of the 19th century it was decided that proof of mere possession was also sufficient in ejectment as against a 'dispossessor', quite apart from any rule of presumption. The party who was

[129] (1825) 4 B&C 575, 592; 107 ER 1174, 1180. In *Harper v Charlesworth* the question for the court was whether a person who was in possession of Crown land with the consent of the Crown, but without a valid grant from the Crown, could maintain trespass *quare clausum fregit* against a person who had trespassed upon the land. The court held that the claimant could maintain the action.

[130] n 42.

dispossessed had a right to recover possession from the dispossessor and this right could be enforced by an action of ejectment.

F. Ejectment and Dispossessions

Suppose that *A* was in possession of Blackacre until he was dispossessed by *B*, that is to say, *B* took (and *A* lost) possession of the land. If *A* brought ejectment against *B*, would the law of ejectment require *A* to establish that he has, as against *B*, a right of entry? The discussion hitherto might lead one to think that an affirmative answer should be given to this question. However, it was decided in the 19th century that, in such circumstances, *A* is entitled to succeed in ejectment as against *B* (unless *B* has, or claims or defends under, a better right to possession). It appears that, at one time, the courts used, or could plausibly be regarded as using, the rules of presumption discussed above in order to reach this result. In the latter half of the 19th century, however, it was decided that proof of prior possession is itself sufficient in ejectment as against a dispossessor (unless *B* has, or claims or defends under, a better right).

This development is important for two reasons. In the first place, it undermines Hargreaves' claim that, in the modern law, a claimant, in an action to recover land, must establish, in order to succeed, that he is entitled to be seised for an estate in fee simple or is entitled to possession under a chattel interest. This is not merely an academic point. In the recent case of *Mayor of London v Hall* Lord Neuberger MR maintained that there was 'real force' in the submission that an action to recover land 'could only be maintained by someone who could establish a legal estate in the land'.[131] In the second place, JM Lightwood regarded some of the relevant cases, in combination with others, as having brought about a more

[131] *Mayor of London v Hall* [2010] EWCA Civ 817, [2011] 1 WLR 504, [23], [26].

fundamental change whereby it became established as law that a possessor acquires, simply by virtue of her possession, an alienable interest in the land, which comprises a right to possession and a right to non-interference that bind persons generally. According to Lightwood's account, then, the AP Thesis and (therefore) the *Third View* are correct.

i. The Case Law

In *Doe d Hughes v Dyeball* the defendant had forcibly taken possession of a room from the claimant and the claimant brought ejectment to recover possession. The claimant proved a lease to him of the house and a year's possession. The defendant submitted that the claimant had not proved that the demising parties to the lease had a title. The court rejected this submission. According to one of the reports Lord Tenterden CJ, in response to the defendant's objection, said: 'That does not signify; there is ample proof; the plaintiff is in possession, and you come and turn him out: you must shew your title.'[132] According to a different report of the case, Lord Tenterden said: 'That is sufficient proof of title as against a man who comes and takes forcible possession at three o'clock in the morning.'[133]

Dyeball is entirely consistent with the rule that a claimant in ejectment must establish a title: the Chief Justice maintained that, in the circumstances, proof of a year's possession was, in the circumstances, sufficient proof of title.[134] The outcome is not inconsistent with earlier cases, such as *Peacable d Uncle v Watson*, in which it was said that possession is prima facie evidence of seisin in fee. Accordingly, it might

[132] *Doe d Hughes v Dyeball* (1829) M&M 346, 173 ER 1184.

[133] *Doe d Hughes v Dyeball* (1829) 3 Car & P 610.

[134] Cp. *Doe d Humphrey v Martin* (1841) Carr &M 32; 174 ER 395, discussed above, text to n 91.

be thought that the case is another authority for the rule of presumption discussed above. Some legal scholars have taken this view.[135]

In the latter half of the 19th century, however, it was decided that proof that the claimant was in possession when the defendant took possession is itself sufficient in ejectment.[136] In *Davison v Gent*, for instance, the claimants (Davison, Mrs Coates and Mr Coates) brought ejectment to recover possession of a house and three closes (Garth, Mire Flat, and Firth).[137] In 1842 the Dean and Chapter of Durham had demised the premises to Sherwood for a term of 21 years. In 1849 the Dean and Chapter leased the same premises to Mr Wood for 21 years. Mr Wood took possession of the premises and died in possession of them in 1853. Mr Wood devised his chattels real to his wife, Mrs Wood, on certain trusts. In 1856 Mrs Wood obtained a renewed lease for 21 years from the Dean and Chapter. The premises were let to Robinson for a period but he left on 12th February 1856, two days before his term expired. The defendant then forcibly entered and remained in possession of the house and Garth. On the 16th of February 1856, Mrs Wood married Mr Coates and Mr Coates then let all the premises to Davison who entered and took possession of Mire Flat and Firth. The defendant, Gent, forcibly turned Davison and his cattle out of possession of Mire Flat and Firth.

Gent argued before the Court of Exchequer that there was no evidence to go to the jury that Sherwood's lease had been surrendered and that, therefore, the claimants had not established a good title. The claimants' primary submission was

---

[135] For example, Lightwood (n 3) 114, 117.

[136] It seems that, in such circumstances, the defendant could not successfully defend the action by establishing that a third party has a better right to possession than the claimant unless (1) the defendant claims under the third party or (2) acted or defends under the authority of the third party: *Roberts v Taylor* (1845) 1 CB 117, 126 (Cresswell J); *Asher v Whitlock* (1865) LR 1 QB 1.

[137] *Davison v Gent* (1857) 1 H&N 744, 156 ER 1400; 3 Jur NS 342; 26 LJ Ex 122; 28 LT OS 291.

that there was evidence to be left to the jury that Sherwood's lease had been surrendered. The court decided that there was evidence that Sherwood had assented to the grant of a new lease and that if a tenant assents to a lease being granted to another, and gives up his possession to the new lessee, that is a surrender by operation of law.

The claimants also advanced a second argument. They contended that, whether or not there was evidence that the lease had been surrendered, evidence of possession at the time of Gent's entry was sufficient in an action to recover possession from him because '[t]he defendant is a mere trespasser, and cannot, by taking possession forcibly, put the [claimants] to the necessity of proving their title';[138] and they cited *Allen v Rivington* and *Doe d Hughes v Dyeball*.[139]

The Court accepted that the claimants could rely on their 'possession'. Pollock CB maintained that the claimants were entitled to rely on their 'prior possession as against a mere wrongdoer' and were not prevented from doing so merely because they had attempted to establish a lease.[140] Bramwell B noted that it 'was scarcely disputed on the part of the defendant that he either entered tortiously or came in under [Robinson]. In either case the plaintiffs would be entitled to a verdict on proof of those facts alone.'[141] Watson B thought that the 'contention that, having set up a title, the [claimants] cannot rely on mere possession as against the defendant, is not well founded.'[142]

On what basis was 'prior possession' sufficient? It seems to have been relevant that the defendant was a person who took possession of land from the

[138] (1857) 1 H&N 744, 748; 156 ER 1400, 1402.

[139] *Allen v Rivington* (1669) 2 Saund 111, 85 ER 813; *Doe d Hughes v Dyeball* (n 132).

[140] (1857) 1 H&N 744, 750; 156 ER 1400, 1403.

[141] Ibid.

[142] (1857) 1 H&N 744, 752; 156 ER 1400, 1404.

claimants. The claimants' counsel referred to *Dyeball* and submitted that a 'mere trespasser ... cannot, by taking possession forcibly, put the plaintiffs to the necessity of proving their title'.[143] More importantly, Pollock CB regarded the defendant as a 'mere wrongdoer' and Bramwell B thought that, if the defendant did not enter under Robinson, he entered wrongfully and was a 'mere intruder'. It is not absolutely certain what their Lordships meant by 'mere wrongdoer' or 'mere intruder'. The term 'wrongdoer' generally referred to someone who interfered, without lawful justification, with a thing that was in the possession of another even though he did not have, as against the possessor, a good title to it.[144] Gent had entered the premises, and took possession, when the claimants had possession of the land. None of the judges in *Davison v Gent* explained why possession was sufficient as against a 'wrongdoer' or 'intruder'. We can be reasonably sure, however, that the decision on this point was not based on any rule of presumption of freehold title. No such rule is mentioned in the judgments. And it was not contended in argument that proof of possession gave rise to a presumption that the possessor was seised of the land for a freehold estate. This is not surprising. Davison claimed under the sublease and Mr and Mrs Coates claimed under the demise from the Dean and Chapter; and, accordingly, there was no question of the claimants being seised of the land for a freehold estate.

It is not surprising that *Davison v Gent* has divided commentators. Hargreaves disapproved of it on the grounds that a claimant in ejectment *must* establish a right of entry derived from seisin or a right to possession under a chattel interest (e.g. a term of years)—nothing less will do.[145] It is true that in *Doe d Carter v Barnard*, which was decided shortly after *Davidson v Gent*, the claimant was in possession of land

[143] (1857) 1 H&N 744, 748; 156 ER 1400, 1402.

[144] Chapter 5, n 9.

[145] Hargreaves (n 9) 391–93.

until the defendant, who showed no title in himself, 'turned her out' and the claimant's action did *not* succeed. Patteson J held that 'possession is prima facie evidence of title' and that, since the claimant had proven that her husband was in possession before, she had 'by her own shewing proved the title to be in another'.[146] However, a number of cases decided after *Barnard* made it clear that, in an action for the recovery of possession of land, the claimant must have, as against the defendant,[147] a right to possession;[148] and there is an abundance of support for the view that the claimant has such a right, as against the defendant, if the claimant was in possession when the defendant obtained possession.[149]

ii. Ejectment, Dispossessions and the Second View

We have seen that, where *B* has dispossessed *A*, *A* is entitled to recover possession by way of judicial proceedings from *B*. What reasons support the view that, in these circumstances, *A* should be able to recover possession by way of judicial proceedings from *B*? And are these reasons, and the laws that they support, compatible with the *Second View*?

---

[146] *Doe d Carter v Barnard* (1849) 13 QB 945, 953; 116 ER 1524, 1527. In *Perry v Clissold* [1907] AC 73 (PC) Lord Macnaghten, delivering their Lordships' judgment, maintained (at 79) that 'it is difficult, if not impossible, to reconcile [*Barnard*] with the later case of *Asher v Whitlock*'.

[147] This point, that the claimant must have a right to possession *as against the defendant*, was overlooked by the majority in *Manchester Airport v Dutton* [2000] QB 133 (CA). Cp. WJ Swadling, 'Opening the Numerus Clausus' (2000) 116 LQR 354, 358–59.

[148] *Asher v Whitlock* (1865) LR 1 QB 1; *Allan v Liverpool Overseers* (n 42) 191–92 (Blackburn J); *Wiltshire CC v Frazer* (1983) 83 LGR 313 (CA) 321 (Stephenson LJ); *Manchester Airport v Dutton* (n 147) 142, 144 (Chadwick LJ), 147 (Laws LJ), 150–51 (Kennedy LJ); *Countryside Residential (North Thames) v A Child, Persons Unknown* (2001) 81 P&CR 2 (CA) [12] (Waller LJ); *Alamo Housing Co-operative v Meredith* [2003] EWCA Civ 495, [2003] HLR 62, [42]; *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11, [2009] 1 WLR 2780, [26]–[36] (Baroness Hale).

[149] *Asher v Whitlock* (n 148) 5–6 (Cockburn CJ); *Allan v Liverpool Overseers* (n 42) 191–92 (Blackburn J); *Bristow v Cormican* (n 42) 651 (Lord Cairns LC), 657 (Lord Hatherley), 660–61 (Lord Blackburn); *Delaney v TP Smith* (n 42) 397 (Tucker LJ); *National Provincial Bank v Ainsworth* (n 42) 1232 (Lord Upjohn).

We will consider the former question first. If *A* brings judicial proceedings to recover possession, and if the applicable rule is that *the claimant* must establish that he has (apart from his possession) an estate in the land that entitles him to possession as against *B*, *A* must establish that he has such a title or lose; and, if he cannot establish that he has such a title, *B* may well be able to remain in possession. This rule effectively rewards the dispossessor, *B*, by requiring the person who has been dispossessed, *A*, to establish a title against the dispossessor in order to recover possession by way of action. Such a rule may well encourage dispossessions and discourage recourse to the machinery of civil justice in order to resolve disputes over the possession of land.[150] This is undesirable for a number of reasons. One of these is that, while dispossessions do not necessarily involve the use of force, there is a real risk that a dispossession or attempted dispossession will involve the use of unreasonable force and even violence. Thus, one reason for seeking to deter dispossessions is to reduce the risk of the use of unreasonable force (including violence). If the law, rather than requiring the party who has been dispossessed, *A*, to establish a title as against the dispossessor, *B*, were, instead, to allow the dispossessee, *A*, to recover possession from the dispossessor, *B*, the law rewards those who use the machinery of civil justice at the expense of those who do not and it thereby deters dispossessions and reduces the risk of unreasonable force. In this way, the civil law compliments the criminal law concerning forcible entries.[151]

These considerations support the proposition that, where *B* has dispossessed *A*, *A* should be entitled (other things being equal) to recover possession by way of

[150] Cp. *McPhail v Persons, Names Unknown* [1973] Ch 447 (CA) 457 (Lord Denning MR): '[a]lthough the law thus enables the owner to take the remedy into his own hand, that is not a course to be encouraged. In a civilised society, the courts should themselves provide a remedy which is speedy and effective: and thus make self-help unnecessary'. This passage was cited with approval by Baroness Hale in *Meier* (n 148) [30].

[151] See, for example, the Criminal Law Act 1977, part II (as amended).

judicial proceedings from *B*. Is this proposition compatible with the *Second View*? It depends on how it is interpreted. For, according to that view, the MRP Thesis is correct and the possessor's rights are possession-dependent. But if the dispossessee, *A*, has a right to recover possession from the dispossessor, *B*, then *A* has a right that is clearly not possession-dependent. Now, a supporter of the *Second View* may well concede all this but add that it is consistent with her view. The possessor's rights, she might say, are *in general* possession-dependent, but, if the possessor is wrongfully dispossessed, the possessor has a right to recover possession from the dispossessor.[152] But while the supporter of the *Second View* might, in this way, reconcile that view with the decision in *Davison v Gent* and the later cases that show that a dispossessee is entitled to recover possession from a dispossessor, the supporter will not be able to reconcile the *Second View* with the modern cases that establish that the AP Thesis is correct; that a possessor acquires an alienable proprietary interest that comprises rights that bind persons in general and are not possession-dependent. We will consider, in the next section, the emergence in the 19th century of the view that this was indeed the law.

4. THE EMERGENCE OF A NEW VIEW

It should now be clear that, at one time, the possessor acquired, by virtue of her possession, a right to possession and a right to non-interference, and that, due to the rule that possession gives rise to a presumption of seisin in fee, the possessor also acquired, by virtue of her possession, what might be described as a 'title' or 'claim' to the fee simple. But the possessor did not acquire, simply by virtue of her possession, a freehold or leasehold estate in the land. All this is consistent with the *Second View*

[152] Cp. J Gordley and U Mattei, 'Protecting Possession' (1996) 44 Am J Com L 293, 327: 'There was … no ancient English doctrine of relativity of title. Asher v Whitlock did not adopt one. It merely allowed the heir of a prior possessor to recover the property from a dispossessor.'

but not with the *Third View*. The law, however, did not remain the same. Following the decision of the Queen's Bench in *Asher v Whitlock*, distinguished commentators took the view that a possessor had, simply by virtue of her possession, an interest in the land, which comprised a right to possession that bound persons in general and which she could alienate inter vivos or upon her death. This section outlines the views of two eminent commentators, viz. Sir Frederick Pollock and JM Lightwood, before discussing *Asher v Whitlock*.

A. Pollock's View

In 1888 Pollock articulated and endorsed a view that was, in effect, committed to the AP Thesis. Since Pollock's views and arguments, and his influence, have been much discussed by scholars,[153] and since we are chiefly concerned with whether the authorities support any of the three views discussed in the previous chapter, it will suffice here to briefly describe Pollock's view. Pollock maintained that 'possession confers more than a personal right to be protected against wrongdoers; it confers a qualified right to possess, a right in the nature of property which is valid against every one who cannot show a prior and better right.'[154] He asserted that this right is a 'transmissible' and capable of being inherited, devised or conveyed.[155] 'Possession', he concluded, 'is a root of title.'[156]

---

[153] E.g. Gordley and Mattei (n 152) 300–305; R Hickey, *Property and the Law of Finders* (Hart 2010) 106–10; R Hickey, 'Possession as a Source of Property at Common Law' in E Descheemaeker (ed), *The Consequences of Possession* (EUP 2014) 77, 87–91.

[154] F Pollock and RS Wright, *An Essay on Possession in the Common Law* (Clarendon Press 1888) 93 (Pollock authored Parts I and II, Wright authored Part III). Oliver Wendell Holmes Jr had asserted in 1881 that 'rights of ownership … are substantially the same as those incident to possession …. The owner is allowed to exclude all, and is accountable to no one. The possessor is allowed to exclude all but one, and is accountable to no one but him.': Holmes, *The Common Law* (Little, Brown 1881) 246.

[155] Pollock and Wright (n 154) 22, 93.

[156] Ibid.

B. Lightwood's View

JM Lightwood maintained in 1894 that possession gives rise to a 'right to possession' which was a 'species of property' and transmissible.[157] Lightwood thought that *Davison v Gent* involved the application of this new doctrine.[158] It is worth quoting in full his account of the new doctrine and its sources:

> In the absence of perfect title, the plaintiff was allowed to rest upon his mere possession. It is submitted that there is only one way to account for the introduction of this perfectly new principle. The legal consequences of possession have been changed both directly and indirectly by the Real Property Limitation Act, 1833. They have been changed directly, inasmuch as mere untitled possession is now sufficient to make the statute run against the owner. Formerly there must have been an adverse possession, and this practically meant an adverse seisin. But in changing the nature of an inchoate title under the statute, the Legislature have also changed the nature of possession to which legal protection is afforded. As a matter of history, so far as concerns the recovery of possession, seisin is everything, bare possession nothing. In actual life seisin is no longer entitled to this pre-eminence. The right of possession, consequently, which the common law has always recognized, has, by the [1833 Act], been impliedly placed on a more extended basis. It rests now on mere possession, and not on seisin alone. This is the real principle which underlies *Davison v Gent*. To say, as was there said, that a plaintiff is entitled to rely on possession as against a mere wrongdoer, is equivalent to giving him a right of possession against strangers, and this right of possession ranks ... as a species of property. In other words, it is a possessory title which is capable of devise and which, if not devised, will in general devolve upon the heir.[159]

Lightwood's account of the effect of the 1833 Act is not satisfactory.[160] The provisions of the Act and their effect are considered below.[161] What is of interest here is Lightwood's account of the effect of *Davison v Gent*. The case, as we have seen, is an authority for the proposition that, if the possessor was dispossessed by another, the

[157] Lightwood (n 3) 124.

[158] Ibid 123.

[159] Ibid 123–24.

[160] Cp. Simpson (n 2) 289.

[161] Text to n 186.

former possessor is entitled to recover possession from the dispossessor (unless the dispossessor had a better title); and that proposition is perfectly compatible with the MRP Thesis. However, Lightwood's account of the affect of the decision in *Davison v Gent* goes beyond this. He maintained that the possessor's interest is a 'species of property' that can be devised or inherited; he effectively rejected the MRP Thesis and accepted the AP Thesis. There is nothing in *Davison v Gent* itself that supports this view. Lightwood also cites *Asher v Whitlock*, in which the Queen's Bench considered whether a person who had enclosed and occupied a piece of land had a devisable interest in the land.[162]

C. *Asher v Whitlock*

This sub-section expounds and analyses the reasoning of the judges and the decision of the court in *Asher v Whitlock*.[163] It is widely regarded as a landmark case and as the leading decision in this area. So, although it has been discussed on many occasions, it is necessary to discuss it in some detail.

In many ways, *Asher v Whitlock* is a highly unsatisfactory authority for the AP Thesis.[164] The case was decided in the Queen's Bench by three judges (Cockburn CJ and Mellor and Lush JJ); only two of the judges provided reasons and, although they were in agreement as to the result, their reasoning is significantly different.[165] The report tells us that the third judge, Lush J, simply 'concurred'. Moreover, although the Lord Chief Justice's judgment does support the claim that possession gives rise to an alienable right to possession, his Lordship simply asserted that this

[162] Lightwood (n 3) 124– 26; *Asher v Whitlock* (n 148)

[163] *Asher v Whitlock* (n 148).

[164] Cp. Hickey, 'Possession as a Source of Property at Common Law' (n 153) 84–87.

[165] Cp. Hickey, *Property and the Law of Finders* (n 153) 104.

was so and did not establish, or even attempt to establish, that this claim was justified as a matter of authority or principle. The justificatory basis and scope of the alleged rule has been debated ever since. Nevertheless, the case has been remarkably influential and it has been cited with approval on a number of occasions.[166]

Mr and Mrs Asher brought ejectment against Whitlock to recover possession of certain land that included a cottage and garden. Mr Williamson had enclosed he disputed land from the waste of a manor. He enclosed part of it in 1842 and the rest in 1850. Mr Williamson occupied the land until his death in 1860 and devised it, by his will, to his wife for so long as she remained unmarried and, upon her death or second marriage, whichever occurred first, to his only child, Mary Williamson. Following Mr Williamson's death his widow remained in possession with the daughter and, in 1861, married Mr Whitlock. The three of them then occupied the land. Mary Williamson died in 1863 and the widow died later the same year. Mr Whitlock continued to occupy the land and, in 1865, Mary Williamson's heir-at-law, Mrs Asher, issued a writ. At the trial Cockburn CJ directed a verdict for Mr and Mrs Asher, the claimants, with leave to move to enter the verdict for the defendant on the ground that the testator had no devisable interest in the land.

The case came before the Queen's Bench in 1865. Markby, on behalf of the claimants, submitted, first, that 'the authorities are conclusive to shew that a person in peaceable possession of land has, as against every one but the true owner, an interest capable of being inherited, devised, or conveyed'.[167] He cited *Doe v Jauncey*;[168] *Doe*

[166] For example, *Perry v Clissold* [1907] AC 73 (PC) 79–80; *St Marylebone Property Co v Fairweather* [1962] 1 QB 498 (CA) 529 (Pearson LJ); *Hunter v Canary Wharf* [1997] AC 655 (HL) 703 (Lord Hoffmann); *Alan Wibberley Building Ltd v Insley* [1999] 1 WLR 894 (HL) 898 (Lord Hoffmann).

[167] *Asher* (n 163) 2–3.

[168] *Doe d Pritchard v Jauncey* (n 90).

v Barnard;[169] and *Doe v Birchmore*.[170] Markby's second submission was that the claimants were not required to establish a title as against the defendant because he had entered by the daughter's permission and was therefore estopped from disputing her title.

Merewether, on behalf of the defendants, submitted that, first, the defendants were not estopped from disputing the claimant's title because the defendant entered as a wrongdoer; and, secondly, that 'the case is that of two trespassers, and in such a case, the one last in possession is entitled to keep the land until the person having title ejects him; and the devise of the first confers no title on his devisee';[171] and, in support of this second point, Merewether cited *Doe v Barnard* and *Dixon v Gayfere*.[172]

The Queen's Bench decided that the claimants were entitled to recover possession as against the defendant. The three judges were in agreement as to the result. But Mellor J's reasoning differed from Cockburn CJ's. Mellor J reasoned as follows:[173] (1) 'the fact of possession is prima facie evidence of seisin in fee'; (2) the testator, Mr Williamson, was in possession; (3) therefore, Mr Williamson was, prima facie, seised in fee; (4) if it were shown that the testator was not seised in fee (because, say, he was a mere tenant at will) the evidence or presumption of seisin would be defeated and the defendant would have succeeded; (5) but the defendant did not defeat the evidence or presumption of seisin in fee; (6) therefore, the court is to proceed on the basis that the testator was seised of the land for an estate in fee simple;

[169] *Doe d Carter v Barnard* (n 109).

[170] *Doe d Willis v Birchmore* (1839) 9 Ad & El 662, 112 ER 1363.

[171] *Asher* (n 163) 4.

[172] *Doe d Carter v Barnard* (n 109); *Dixon v Gayfere* (1853) 17 Beav 118, 51 ER 1097.

[173] This account of Mellor J's reasoning combines the propositions articulated by his Lordship in his judgment with a number of propositions that he impliedly accepted.

(7) the testator's interest, his fee simple estate, was of course devisable and inheritable; (8) the fee simple estate was acquired by Mary Williamson when the testator's widow remarried; (9) Mrs Asher is Mary Williamson's heir-at-law; (10) therefore, Mrs Asher is entitled to the land for an estate in fee simple and, accordingly, she has a good title as against the defendant.[174] It should be emphasised that Mellor J's reasoning is consistent with the case law discussed in Section 3 and (thus) with the DP Thesis.

The Lord Chief Justice took a different approach. His Lordship maintained (1) that possession gave rise to a right to possession that is 'good against all the world except a person who can show a good title'; and (2) that this right can be devised and inherited.[175] Let us consider in turn his Lordship's explanation of each of these propositions.

(1) 'possession is good against all the world except a person who can shew a good title'. The Chief Justice thought that this doctrine was 'clearly established'. His Lordship noted that in *Doe v Dyeball* it was decided that one year's possession was 'good against a person who came and turned him out; and there are other authorities to the same effect.'[176] He maintained that, if the defendant, Whitlock, had taken possession of the land when the testator, Mr Williamson, had been in possession of it, 'ejectment could have been maintained by the [the testator] against the defendant.'[177] Thus, his Lordship accepted, in line with *Dyeball* and *Davison v Gent*, that if *A* is in possession of land and *B* takes possession and *A* then brings ejectment against *B*, *A*'s possession is sufficient as against *B*. Having considered the position of the testator,

[174] *Asher* (n 163) 6–7.

[175] Ibid 5–6.

[176] Ibid 5.

[177] Ibid.

the Chief Justice asked: 'What is the position of the devisee?' This brings us to the second proposition.

(2) '[The testator's] right of possession being passed by will to his daughter, she could have maintained ejectment, and so therefore can her heir, the female plaintiff.'[178] The Chief Justice, by advancing this claim, went beyond the trespass cases, beyond *Doe v Dyeball* and *Davison v Gent*, and well beyond anything that might be justified by a policy of discouraging dispossessions. His Lordship did not explain why the testator's 'right of possession' was devisable. He simply asserted that there 'can be no doubt that a man has a right to devise that estate, which the law gives him against all the world but the true owner.' [179]But if, as it seems, that 'estate' is a right to possession and a right to non-interference, it is not unreasonable to doubt whether it is devisable. If the possessor's rights are justified by a concern to protect possession and to discourage dispossessions, it would seem to follow that the right is possession-dependent: the right is lost if and when the possessor loses possession, although if he loses possession by reason of a dispossession then he has a right to recover possession as against the dispossessor. Now, if the possessor's right to possession is in this way possession-dependent, why should the right be alienable? Why should it be devisable? Cockburn CJ did not provide answers to these questions. Of course, a possessor might relinquish possession to another and the second possessor will acquire, upon taking possession, a right to possession. But that right will arise by virtue of, and in order to secure, the second possessor's possession.[180] Cockburn CJ does not discuss these considerations. Indeed, his Lordship failed to attend to many of the relevant authorities and the principles on which they are based.

[178] Ibid 6.

[179] Ibid.

[180] Text to n 20 in Chapter 3.

He cites *Doe v Dyeball* but failed to recognise the limits of the decision in that case. And his Lordship did not provide additional principles or reasons in support of his apparent view that the right to possession was devisable.

One might contend that Cockburn CJ thought that the testator's interest in the land was not merely a right to possession; that it consisted of a freehold estate of inheritance. This interpretation of Cockburn CJ's judgment would at least explain why there could be 'no doubt' that the testator's interest was devisable. But, as we have seen, the jurisprudence of the 18th and early 19th centuries is incompatible with the view that *mere possession* gave rise to a freehold estate. A diseissor, in contrast, did acquire a fee simple estate in the land.[181] The Chief Justice did refer, both in argument and in his judgment, to the 'old law' of disseisin and noted that 'the diseissor's title was good against all but the disseisee'. It was not argued that the testator in *Asher* was a disseisor; and the court did not decide that he was.[182] The defendant's counsel, in response to the Chief Justice's references to seisin and disseisin, asserted that '[t]his is not the case of a disseisor'. However, his Lordship's references to the 'old law' of disseisin and his statement that a 'possessor' has a 'good title against all the world' except a person with a better title, might suggest that his Lordship thought wrongful or adverse possession, or simply possession, had become a root of freehold title.

Thus, the claim that possession of land gives the possessor an alienable interest in the land was advanced by just one of the judges in the case, Cockburn CJ; and his Lordship did not consider the justificatory basis of this purported (new) rule, its scope, or the exact nature of the interest acquired.[183] Moreover, the court's

[181] n 6 and text thereto.

[182] Cp. Lightwood (n 3) 111, 124–5.

decision is entirely compatible with an orthodox account of the law; indeed, Mellor J's judgment relied on the well-established rules of presumption. As Wiren has said, the case is 'quite consistent ... with the decisions that possession is prima facie evidence of title.... The only difficulty is a certain wideness of language in the judgment of Cockburn CJ.'[184]

However, many other cases,[185] all decided post-*Asher*, support the claim that a person in possession acquires an alienable interest in the land, which comprises (inter alia) a right to possession; these cases support the AP Thesis. Some of these cases support the version of that thesis that we have labelled the AFS Thesis, according to which the possessor acquires, under the doctrine, a fee simple estate. The cases do not speak with one voice and it is necessary to examine the leading cases in some detail. But, before doing so, another piece of the puzzle must be introduced, viz. the Real Property Limitation Act 1833 and its successors.

5. THE LIMITATION ACTS AND THE SOURCE OF A SQUATTER'S TITLE

The Real Property Limitation Act 1833 and the law of limitation are important elements that must be included in any account of the emergence of the modern doctrine of title by possession. For it is arguable that the 1833 Act was the impetus for the emergence and acceptance of Cockburn CJ's view. This is supported by the following two considerations. First, while the Act provided that, where time was running under the Act against a person who was entitled to recover the land, then, upon the expiration of the limitation period, that person's 'right and title' would be

[183] Cp. Hickey, 'Possession as a Source of Property at Common Law' (n 153) 85.

[184] Wiren (n 12) 156.

[185] E.g. *Ex p Winder* (1877) 6 Ch D 696 (Ch); *Rosenberg v Cook* (1881) 8 QBD 162 (CA); *Perry v Clissold* [1907] AC 73 (PC). Cp. *Allen v Roughley* [1955] 94 CLR 98 (HCA); *Wheeler v Baldwin* (1934) 52 CLR 609 (HCA).

'extinguished',[186] the Act did not confer a title on the person in whose favour time was running. Judges did not doubt that such a person had a title. So the judiciary encountered a question that was not answered by the Act: what is the source of a squatter's title? Secondly, the Act of 1833 introduced the rule that the claimant's right to recover the land must be exercised within twenty years from the moment when the defendant (or his predecessor in title) acquired possession. As Simpson has explained, 'in computing the period of limitation the acquisition of simple possession by the defendant, or his predecessor in title, is the only matter to be considered; whether he obtained seisin or not and when he obtained seisin became wholly irrelevant.'[187]

A. The Limitation Acts

The RPLA 1833 was enacted following the publication of the First Report of the Real Property Commissioners.[188] The Commissioners concluded that the law of limitation as it applied to land was 'very unsystematic and very defective'.[189] The Commissioners' chief complaint was that the various actions for the recovery of real property were subject to different limitation periods. The Commissioners could see

> no reason why there should not be for each kind of property one uniform period of limitation, depending upon the length of adverse enjoyment, and not upon the form of remedy selected by the claimant, or upon any act of the party in possession for the purpose of abridging it.[190]

[186] Real Property Limitation Act 1833 (RPLA 1833) s 34.

[187] Simpson (n 2) 153.

[188] *First Report* (n 68).

[189] Ibid 39.

[190] Ibid.

Accordingly, the Commissioners maintained that the period of limitation should be 20 years, subject to a few qualifications and exceptions.[191]

Many of the Commissioner's recommendations regarding actions for the recovery of land and the limitation of such actions were implemented by the Real Property Limitation Act 1833. Section 2 established the general rule: 'no person shall make an Entry or ... bring an Action to recover any Land or Rent but within Twenty Years next after the Time at which the Right to make such Entry ... or to bring such Action shall have first accrued'. A number of the Act's provisions concerned the determination of the date of accrual of rights to make an entry or to bring an action to recover land.[192] It is not necessary to fully consider these provisions here. It is enough to note that section 3 of the Act provided, among other things, that

> when the Person claiming such Land or Rent, or some Person through whom he claims, shall, in respect of the Estate or Interest claimed, have been in Possession... or in Receipt of such Rent, and shall while entitled thereto have been dispossessed, or have discontinued such Possession or Receipt, then such Right shall be deemed to have first accrued at the Time of such Dispossession or Discontinuance of Possession, or at the last Time at which any such ... Rent ... was received.

What consequences followed upon the expiration of the statutory limitation period? Importantly, for present purposes, the Commissioners had recommended that 'wherever by the provisions aforesaid all remedy is barred, the right shall be considered as extinguished to the party out of possession, and absolutely vested in the party in possession.'[193] However, this recommendation was not fully implemented. The Act of 1833 did not provide that, upon the expiration of the limitation period,

---

[191] Ibid 42, 44–5, 77–8.

[192] For discussion of the law regarding the determination of the date of accrual of the right to make an entry or bring action under the RPLA 1833 (as amended), see Lightwood (n 3) 180–247.

[193] *First Report* (n 68) 81.

'the right', which the Commissioners elsewhere referred to as 'the title',[194] of the person against whom time had run would be 'absolutely vested in the party in possession.' Rather, section 34 provided:

> at the Determination of the Period limited by this Act to any Person for making an Entry or Distress, or bringing any Writ of Quare impedit or other Action or Suit, the Right and Title of such Person to the Land, Rent, or Advowson for the Recovery whereof such Entry, Distress, Action, or Suit respectively might have been made or brought within such Period, shall be extinguished.

The Real Property Limitation Act 1874 amended, abolished or replaced a number of provisions in the Act of 1833, but it did not wholly abolish or replace the earlier Act. It is not necessary to consider these changes in detail, although it is worth mentioning that section 1 of the 1874 Act replaced the period of 20 years in the general rule with a period of 12 years.[195]

The Real Property Limitation Acts were repealed by, and replaced with, the Limitation Act 1939.[196] The 1939 Act contained provisions that were similar to section 1 of the 1874 Act and sections 3 and 34 of the Act of 1833. But there is an important difference between the 1939 Act and the earlier Acts. The Act of 1939, unlike the earlier Acts, used the term 'adverse possession' and adopted (in ss10(1) and 10(2)) a principle that had long been recognised at common law, [197] namely, that, in order for the statutory limitation period to run against a right-holder, there must be a person 'in whose favour or for whose protection the Act could operate.'[198]

---

[194] Ibid 52.

[195] Real Property Limitation Act 1874, s 1.

[196] Limitation Act 1939, sch.

[197] *M'Donnell v M'Kinty* (1847) 10 Ir LR 514; *Smith v Lloyd* (1854) 9 Ex 562, 156 ER 240; *Agency Co v Short* (1888) 13 App Cas 793 (PC).

[198] *M'Donnell v M'Kinty* (1847) 10 Ir LR 514, 526 (Blackburne CJ).

The Limitation Act 1939 was itself repealed by, and replaced with, the Limitation Act 1980, which contains provisions that are materially the same as ss. 10(1) and 10(2) of the 1939 Act.[199] The modern equivalent of section 1 of the 1874 Act is Section 15(1) of the Act of 1980: '[n]o action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some other person through whom he claims, to that person.' Sch 1(1) of the Act of 1980 provides:

> Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action shall be treated as having accrued on the date of the dispossession or discontinuance.

And Section 17 of the 1980 Act provides that 'at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.'[200]

The Land Registration Act 2002 radically altered the law of adverse possession insofar as it concerns registered land. Most notably, for our purposes, a form of statutory transfer operates in the context of registered land.[201] But, insofar as unregistered land is concerned, the law of adverse possession has not fundamentally changed since 1833. In particular, the 'extinction of title' provision that is in force today is very similar to the provision enacted in 1833.

---

[199] Limitation Act 1980 (LA 1980) Sch 1, paras 8(1), 8(2).

[200] Section 18 of the LA 1980 concerns trusts of land and settled land. Before the enactment of the Land Registration Act 2002, section 17 was also subject to Section 75 of the Land Registration Act 1925.

[201] Land Registration Act 2002 (LRA 2002) ss 96–98, sch 6. Sch 6, para 1(1) provides: 'A person may apply to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of ten years ending on the date of application.' In certain circumstances, the adverse possessor, if he makes an application and has been in adverse possession for a period of ten years within the meaning of Sch 6, para 1(1), is entitled to be registered as the new proprietor of the estate: Sch 6, paras 4, 5.

B. Possession and the Squatter's Title

Many judges have accepted that the person in whose favour time has run has a title to the land. But there has been much disagreement over the nature and source of that title. The disagreement and uncertainty have been fuelled by a number of factors. First, as Simpson has said, 'there was nothing in the statute of 1833 or in any later statute which expressly abrogated the old common-law rule that mere possession is not a root of freehold title'.[202] This led conservative writers to assert that possession is not itself the source of an estate in the land; and that, since a disseisor acquires an estate in fee simple,[203] a possessor will acquire such an estate if he was a dissessor, but not if he was a mere possessor.[204] But—and this is the second fact—it is widely believed that seisin is obsolete. It is certainly a notion that is largely unfamiliar to modern lawyers. Accordingly, there is much to be said today in favour of Sweet's contention that 'to treat [seisin] as having a practical bearing on the modern law of adverse possession is to keep "With Phantoms an unprofitable strife", and to add unnecessary difficulties to a subject which has sufficient difficulties of its own'.[205] Thirdly, in the modern law of adverse possession, time does not run for the purposes of the limitation statute unless there is a person in possession; the running of time and, consequently, the extinction of title, depend upon possession, not seisin.[206] Fourthly, various explanations of the source of a squatter's title have been proposed and adopted by different judges at different times in different courts. And fifthly, the

[202] Simpson (n 2) 154.

[203] Cp. *Leach v Jay* (1878) 9 Ch D 42 (CA).

[204] Hargreaves (n 9).

[205] C Sweet (n 8) 251 citing P B Shelley, *Adonaïs: An Elegy on the Death of John Keats* (1821).

[206] *Nepean v Doe d Knight* (1837) 2 M&W 894, 911; 150 ER 1021, 1028 (Denman CJ); *Culley v Doe d Taylerson* (1840) 11 Ad & El 1008, 113 ER 697; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 (HL) [33]–[35] (Lord Browne-Wilkinson). Cp. Simpson (n 2) 154.

term ‘title’ is, as we saw in Chapter 3, ambiguous; one cannot always be sure what a judge means when he or she says that ‘possession is a root of title’.

What, then, is the source and nature of the title of a person in adverse possession? It is argued below that, in the modern law, the *Third View* is correct and a squatter acquires a fee simple estate simply by virtue of her possession. But this has not always been so and, if we are to understand the confusion that has surrounded the doctrine of title by possession, we must understand some alternative answers and how these have been treated by the judiciary. In this sub-section we will examine three answers. The first is the so-called Parliamentary conveyance theory. The second is the so-called commensurate estate theory. The third is what has been referred to herein as the *Second View*, which accepts the DFS Thesis and the MRP Thesis and rejects the AP Thesis (and, therefore, the AFS Thesis).

i. The Parliamentary Conveyance Theory

For some time after the enactment of the Act of 1833, lawyers toyed with the so-called ‘parliamentary conveyance theory’. On this view, upon the expiration of the statutory limitation period, the estate of the person against whom time has run is conveyed to the person in possession. Parke B maintained in *Doe d Jukes v Summer* that the effect of the RPLA 1833 was ‘to make a parliamentary conveyance of the land to the person in possession’.[207] If Parke B had been required to defend this claim, his Lordship might well have pointed out that the view taken by the Real Property Commissioners was that the title of the person against whom time had run should be transferred, upon the expiration of the limitation period, to the person in possession.

[207] *Doe d Jukes v Sumner* (1845) 14 M&W 39, 42; 153 ER 380, 381. Cp. *Incorporated Society v Richards* (1841) 1 Dru & War 258, 289 (Lord St Leonards); *Scott v Nixon* (1843) 3 Dru & War 388, 407; 6 Ir Eq Rep 8, 17 (Lord St Leonards); *Dawkins v Lord Penrhyn* (1877) 6 Ch D 318 (CA) 323 (Jessel MR).

Nevertheless, the parliamentary conveyance theory was unanimously rejected by the Court of Appeal in *Tichborne v Weir* and that decision has been reaffirmed on a number of occasions.[208] The Court held that, if a lessee's title is extinguished by the effect and operation of the Real Property Limitation Act, the lease is not thereupon transferred to the party who had possession of the land; and that, accordingly, the party in possession was not liable under the covenants in the lease. The major weakness of the 'theory' is that it is not supported by the wording of the Act of 1833 or its successors. In *Tichborne v Weir* Lord Esher MR explained that section 34 of the 1833 Act 'merely says that the right "shall be extinguished." If that is all, the right of the man out of possession is extinguished so that he cannot eject the man in possession, but nothing is given to the latter by the statute.'[209] Similarly, section 17 the Act of 1980 provides that, upon the expiration of the limitation period, 'the title ... to the land' of the person against whom time has run 'shall be extinguished.'

Indeed, it would seem that the wording of these provisions contradicts the parliamentary conveyance theory: for a title cannot be transferred if it has been extinguished by the Act.[210] If *A*'s title has been extinguished by the Act then *A* no longer has a title that can be transferred to *B*, or so the argument goes. The argument would appear to be logically flawless. However, whether it is true that '*A* no longer has a title that can be transferred to *B*' depends on what it means for *A*'s 'title' to be 'extinguished'; and, where *A* is a lessee, 'extinguished' means 'extinguished relative to the adverse possessor, *B*.' This was made clear by the House of Lords in

[208] *Tichborne v Weir* (1892) 67 LT 735 (CA); *Dalton v Fitzgerald* [1897] 2 Ch 86 (CA) 89–90 (Lindley LJ); *Re Atkinson and Horsell's Contract* [1912] 2 Ch 1 (CA) 9 (Cozens-Hardy MR), 17 (Fletcher Moulton LJ); *Taylor v Twinberrow* [1930] 2 KB 16 (KB); *Fairweather v St Marleybone* [1963] AC 510 (HL) 535 (Lord Radcliffe) 544 (Lord Denning) 553 (Lord Morris); *Buckinghamshire CC v Moran* [1990] Ch 623 (CA) 644 (Nourse LJ).

[209] *Tichborne v Weir* (n 208) 736.

[210] Cp. AC Meredith, 'A paradox of Sugden's' (1918) 34 LQR 253, 255: 'Extinguishment imports annihilation; transfer imports continued existence.'

Fairweather v St Marylebone, in which their Lordships were required to consider the meaning of the 'extinguishment' provision in the Limitation Act 1939.[211] The point at issue was whether a tenant under a 99-year lease, whose title had been 'extinguished' as a result of twelve years' adverse possession by a squatter, could surrender the lease to the lessor so that the lessor became entitled to possession as against the squatter. The House of Lords held (Lord Morris dissenting) that the tenant's lease was not extinguished as against his lessor; that the lessee had a lease that he could and did surrender to his landlord; that the surrender determined the lease and the lessor thereupon became entitled to possession as against the squatter. The majority rejected the contention that, where the person against whom time was running was a lessee, the lessee's estate or interest was to be extinguished 'for all purposes and in all relations'.[212] Lord Denning observed that, if that contention were correct, time would start to run against the freeholder when the lessee's lease was extinguished and he maintained that it 'would be completely wrong if the title of the freeholder could be eroded away during the lease without his knowledge.'[213] Accordingly, the majority took the view that, at least where the 'title' was a lease, the effect of the 'extinction' provision was to destroy the lessee's estate *as between the lessee and the squatter*, but not to destroy it *as between the lessee and the lessor*.[214] As Sir William Wade put it, extinguishment, in this context, is relative.[215]

[211] *Fairweather v St Marylebone* [1963] AC 510 (HL); Limitation Act 1939, s 16.

[212] Ibid 538–540 (Lord Radcliffe), 543 (Lord Guest); 543–4 (Lord Denning).

[213] Ibid 543–4.

[214] Ibid 540 (Lord Radcliffe); 543 (Lord Guest); 545 (Lord Denning).

[215] HWR Wade, 'Landlord, Tenant and Squatter' (1962) 78 LQR 541, 545.

ii. The Commensurate Estate Theory

According to this theory, an adverse possessor, upon the expiration of the limitation period, acquires an estate that is 'commensurate' with, and has the same legal character as, the interest that has been extinguished. If Lord Denning is right, Darby and Bosanquet devised this theory.[216] Darby and Bosanquet were of the view that, although section 34 of the 1833 Act did not directly transfer the title to the adverse possessor,

> yet the title by such possession being limited by rights yet remaining unextinguished is clearly commensurate with the interest which the rightful owners have lost by the operation of the statute, and must therefore, it is apprehended, have the same legal character, and be freehold, leasehold, or copyhold accordingly.[217]

However, section 34 of the 1833 Act, and the equivalent provisions in the later Acts, do not support the commensurate estate theory. The theory has been forcefully criticised by legal commentators.[218] And Lord Radcliffe, Lord Guest and Lord Denning rejected it in *Fairweather v St Marleybone*. Lord Radcliffe said:

> [a squatter] has not the title or estate of the owner or owners whom he has dispossessed nor has he in any relevant sense an estate 'commensurate with' the estate of the dispossessed. All that this misleading phrase can mean is that, since his possession only defeats the rights of those to whom it has been adverse, there may be rights not prescribed against ... which are no less enforceable against him in respect of the land than they would have been against the owners he has dispossessed.[219]

---

[216] *Fairweather v St Marylebone* (n 211) 544.

[217] JGN Darby and FA Bosanquet, *A Practical Treatise on the Statutes of Limitations in England and Ireland* (W Maxwell & Son 1867) 390.

[218] For example, W Hayes, *An Introduction to Conveyancing* (5th edn, Sweet 1840) Vol I, 269–70; Wade (n 215) 543–45; N Curwen, 'The Squatter's Interest at Common Law' [2000] Conv 528, 532–33.

[219] *Fairweather v St Marylebone* (n 211) 536.

It is clear, then, that a person in adverse possession of (unregistered) land does not acquire, upon the expiration of the limitation period, an estate that is commensurate with the interest that has been extinguished. Interestingly, the position under the Land Registration Act 2002 is closer to the position depicted by the 'commensurate estate theory'. Where a squatter has been in adverse possession as against the proprietor of a registered lease and becomes entitled to be entered into the register by virtue of his adverse possession, the squatter will be registered as proprietor of the lease;[220] and the title that he acquired by virtue of his possession will be extinguished.[221]

If, with respect to unregistered land, an adverse possessor does not acquire the estate or interest of the person against whom time has run, or a commensurate estate or interest, what, if anything, does she acquire? And when and how does she acquire it? Some judges and commentators, when answering this question, have turned to the case law and rules of presumption that we considered in Section 3C. This brings us to the third explanation of a squatter's title.

iii. The Squatter's Title and the Second View

According to the third explanation of a squatter's title, although a person in possession (whether or not the possession is adverse) does not in fact acquire an estate in the land or any other alienable, proprietary interest in it by virtue of her possession, the possessor may take advantage of the many benefits that flow from her possession. First, the possessor, for so long as he is in possession, has a right to non-interference that is protected by the law of trespass; and if the possessor is dispossessed, she can recover the land from the dispossessor.[222] Secondly, the

[220] LRA 2002, Sch 6.

[221] LRA 2002, Sch 6, para 9(1).

possessor might rely, if and when it is applicable, on the rule that proof of possession gives rise to a presumption that the possessor held the land for an estate in fee simple—and, accordingly, the possessor may be said to have a 'good claim' or 'title' to a fee simple.[223] Thirdly, if the possessor is in adverse possession, upon the expiration of the statutory limitation period, the title of the person against whom time has run is 'extinguished'. In *Tichborne v Weir* Lord Esher MR thought that, since 'no one can turn out the man in possession, his possession is the same in effect ... as if he had a title conveyed to him.'[224] Of course, it will rarely be possible to know whether anyone is entitled to 'turn out the man in possession.'

It is arguable that an account along these lines was adopted by the Court of Appeal in *Re Atkinson and Horsell's Contract,* in which the court had the opportunity to consider the effect of Section 34 of the RPLA 1833.[225] In that case, a contract for the sale of land in 1911 provided that the title should commence with a general devise of the property contained in the will of a testator who died in 1842. In fact, the vendor derived a title from Lady Colquhoun who was not entitled under the testator's will. In 1874 there had been a question as to who was entitled as the testator's heir-at-law and the view was taken (erroneously) that Lady Colquhoun was entitled as heir-at-law rather than the person who was the true heir. Accordingly, Lady Colquhoun took possession of the land and the title-deeds in 1874. Her Ladyship, and those claiming under her down to the vendor, remained in uninterrupted possession up to the date of the contract. The mistake had not come to light at the date of the contract, so the fact that the title was partly 'possessory' was not mentioned therein. The purchaser sought

---

[222] Text to n 42 and n 149.

[223] Text to n 113.

[224] *Tichborne v Weir* (n 208).

[225] *Re Atkinson and Horsell's Contract* (n 208).

a declaration that the vendor had not shown a good title in accordance with the contract. The vendor claimed that she had shown a good title up to 1874 and a good 'possessory title' since that date; and the purchaser objected that he was not bound to take a 'possessory title'. The Court of Appeal held (Fletcher Moulton LJ dissenting) that the vendor had shown a good title and that it could be forced on the purchaser.

The vendor had argued that in 1886 the title of the heir was barred as Lady Colquhoun had been in possession for twelve years, 'and the effect of the Statute of Limitations was to execute a conveyance of the property to Lady Colquhoun'.[226] The purchaser disagreed: '[t]here is no statutory conveyance at all. The effect of the Act is merely to extinguish adverse rights: *Tichborne v Weir*.'[227] Cozens-Hardy MR accepted that there was no 'statutory conveyance':

> my present view is that the phrase "statutory conveyance", and so on, is a loose metaphorical term, and that the true view is this, that whenever you find a person in possession of property that possession is prima facie evidence of ownership in fee, and that prima facie evidence becomes absolute when once you have extinguished the right of every other person to challenge it. That is the effect of s. 34 of the Real Property Limitation Act, and that explains how the person who has been in possession for more than the statutory period does get an absolute legal estate in the fee, and there is nobody who can challenge the presumption which his possession of the property gives.[228]

The main point to be determined was whether the vendor's title was one that could be forced on the purchaser.[229] The Master of the Rolls thought that it could be and Buckley LJ agreed.[230] Fletcher Moulton LJ took a different view: the vendor's title 'is not one which satisfies the contractual obligations which [the vendor] took upon

[226] Ibid 8.

[227] Ibid citing *Tichborne v Weir* (n 208).

[228] *Re Atkinson and Horsell's Contract* (n 208) 9.

[229] Ibid.

[230] Ibid 9–12, 17–20.

herself by the conditions of sale, and ... it is not one that can be forced on the purchaser.'[231] However, Fletcher Moulton LJ expressed his 'entire agreement' with Cozens-Hardy MR's explanation of the operation of the Statute of Limitations:

> I think it was both accurate and extremely happily expressed. Possession is prima facie evidence of right, and that evidence becomes conclusive when the rights of all other people are extinguished. That is the effect of the statute. The metaphor in *Scott v Nixon* used by Lord St. Leonards of its being analogous to a conveyance is a very dangerous metaphor, the danger of which was pointed out in *Tichborne v Weir*. The true explanation is that which has been given by the Master of the Rolls.[232]

However, the Master of the Rolls' explanation contains an error. For it purports to explain 'how the person who has been in possession for more than the statutory period does get an absolute legal estate in the fee.' It was pointed out in the previous chapter that the fact that a person is to be *presumed* to have a certain interest does not mean that she *has* that interest;[233] a person might be treated by the courts as having an interest that she does not in fact have and it does not follow from the fact that the courts are to treat her as having a certain interest that she in fact has it. Of course, the practical result of treating a person as having an interest for a certain purpose might be the same as if the person in fact had that interest. But this does not justify the conflation. If the error is corrected, then the Master of the Rolls' explanation comes to this: possession gives rise to a presumption that the possessor has 'ownership in fee'; the presumption cannot be defeated unless there is a person who has a better title; and, accordingly, if—as a result, say, of the operation of section 34 of the 1833 Act— there is no person with a better title, the presumption cannot be defeated and the possessor is to be treated as having 'ownership in fee' as against the whole world.

[231] Ibid 17.

[232] Ibid citing *Scott v Nixon* (n 207) and *Tichborne v Weir* (n 208).

[233] Text to n 52 in Chapter 3.

Such a squatter has, in effect, an 'absolute title', a proprietary right that binds the world.[234] This explanation supports the *Second View* and, in particular, the DFS Thesis.

Can it be said that Cozens-Hardy MR's judgement supports the *Second View*? The problem with saying this is that there is, as we have seen, a tension in his Lordship's judgment between the claim that the squatter 'gets an absolute legal estate in the fee' and the claim that he is to be 'presumed' to have a freehold estate. The same tension appears in the judgment of Holroyd Pearce LJ in *St Marylebone Property Co v Fairweather*:[235]

> Title to land is pragmatic. It is true if and so long as it works. It works if it only comes up against a weaker title. But if it is challenged by a stronger title, it ceases to be a true title, and must give way. "Whenever you find a person in possession of property," said Cozens-Hardy M.R. in *In re Atkinson and Horsell's Contract,* "that possession is prima facie evidence of ownership in fee, and that prima facie evidence becomes absolute when once you have extinguished the rights of every other person to challenge it." Thus even a fee simple is only good as long as no better title can be shown. If, however, the stronger title does not assert itself against adverse possession by the weaker during the statutory period, it becomes extinguished, and thereby the weaker title prevails. In such circumstances, the squatter obtains a pragmatic or defeasible fee simple. If the title which the squatter has destroyed is the true immediate fee simple, then he has in practice acquired the best available title, and he will prevail against all. If, however, the title that he has destroyed is not the true immediate fee simple, but some lesser title, he is still vulnerable, for he can be ejected when he is subsequently challenged by a stronger immediate title. While that stronger title is only a title in reversion, he is safe, but when the reversion comes into possession, the reversioner's right to eject him arises.

The problem with the claim that Cozens-Hardy MR or Holroyd Pearce LJ effectively endorsed the DFS Thesis (or, alternatively, the AFS Thesis) is that their Lordships

---

[234] Cp. *Tichborne v Weir* (n 208) 737 (Bowen LJ); *Taylor v Twinberrow* (n 208) 23 (Scrutton LJ); *Allen v Roughley* (1955) 94 CLR 98 (HCA) 139–40 (Kitto J).

[235] [1962] 1 QB 498 (CA) 513.

seem to have overlooked the point that being deemed to have *X* is not the same as having *X*.

6. THE MODERN LAW AND THE *THIRD VIEW*

It has been claimed that a person in possession of land acquires an alienable, proprietary interest in the land. For instance, in *Allen v Roughley* Taylor J of the High Court of Australia said:

> It is not disputed that the testator was in possession of the land in question for a period of fifteen years, nor that the inchoate interest which resulted from this circumstance was an interest which might have been assigned or, as actually occurred, devised by the testator.[236]

His Honour cited *Asher v Whitlock* and *Perry v Clissold* and added: 'Upon his death, therefore, the testator's interest in the land, whatever it may have been, vested in his executors upon the trusts declared by his will.' The claim that a possessor acquires an alienable interest has been combined with the claim that a possessor is to be presumed to have an estate in fee simple. For instance, in *Hawdon v Khan* Ferguson J said:

> Possession is prima facie evidence of seisin in fee. There is a presumption that a person in possession of land has an estate in fee simple, that he is the true owner.... Then the possession of land has another important effect of a different kind. It is not merely evidence of title, it actually confers a title upon the possessor — a substantive right in the nature of property. By mere virtue of his possession he has a title to the land effective against everybody except the real owner, a title of which he can make a valid conveyance, and which will pass like other property under his will or intestacy.[237]

It is argued in this Section that the English jurisprudence supports the claim that the AP Thesis and (therefore) the *Third View* are correct and that a person acquires, upon

[236] *Allen v Roughley* [1955] 94 CLR 98 (HCA) 145.

[237] (1920) 20 SR (NSW) 703 (NSWSC) 712–13. Cp. (1920) 20 SRNSW 703, 707 (Cullen CJ).

obtaining possession of land, an interest in the land that is alienable and not possession-dependent.

A. Alienability

The cases usually cited for proposition that a possessor has an alienable interest are *Asher v Whitlock*, *Perry v Clissold*, *Ex parte Winder*, and *Rosenberg v Cook*.[238] We have already seen that Cockburn CJ maintained in *Asher v Whitlock* that a person in possession has a right to possession that binds the whole world except a person with a better right to possession and that this right could be devised. Shortly afterwards, Cockburn CJ's view was adopted by the Irish Court of Queen's Bench in *Clarke v Clarke*.[239] A testator had devised lands to his son, *A*, but, if *A* took up with a Roman Catholic or died without a lawful heir, the lands were to go to *B*. *A* took up with a Roman Catholic and died without a lawful heir and, after his death, *B* brought ejectment against *A*'s devisee, *C*. *B* submitted that *A* had no devisable interest, but the court rejected this. Lord Whiteside CJ, delivering the judgment of the court, said: 'the case of *Asher v Whitlock* proves that a person in possession of land, without any other title than such as [*A*] had, after condition broken, has a devisable interest.'[240]

The decision of the Privy Council in *Perry v Clissold* is an authority—although not, of course, a binding one—for the proposition that a person in possession of land 'in the assumed character of owner' has a 'good title'.[241] The claimants were the trustees of Clissold's will and his executors, and the point in issue

[238] *Asher v Whitlock* (1865) LR 1 QB 1 (QB); *Ex parte Winder* (1877) 6 Ch D 696 (Ch); *Rosenberg v Cook* (1881) 8 QBD 162 (CA); *Perry v Clissold* [1907] AC 73 (PC). Cp. *Doe d Pritchard v Jauncey* (1837) 8 Car & P 99, 173 ER 415.

[239] *Clarke v Clarke* (1868) IR 2 CL 396 (QB).

[240] Ibid 401.

[241] *Perry v Clissold* (n 238).

was whether a prima facie case for compensation had been disclosed given that Clissold was in possession of certain land in New South Wales when the land was resumed by the Minister under the Land for Public Purposes Acquisition Act 1880. The Act enabled the Crown to acquire private land for certain purposes by appropriately declaring that the land had been 'resumed'. The Act provided that the estate and interest of every person entitled to the land so resumed is deemed to be conveyed to the Minister;[242] and that every person, upon asserting his claim and making out his title in respect of any portion of the resumed land, is entitled to compensation.[243] The Act also provided that, where a person claimed compensation in accordance with the procedure described in the Act, the Minister should, unless no prima facie case for compensation had been disclosed, cause a valuation of the land or of the estate or interest of the claimant to be made.[244] It appeared that Clissold had entered into possession of the land, which was vacant, and thereafter remained in possession of it, enclosed it, and let it to different tenants and received the rents. A decade after Clissold's death, his executors served notice of their claim to compensation in respect of the resumed land. They claimed as 'the executors of F. Clissold, who at the date of resumption was in possession as owner and in receipt of rents, and had a title thereto by possession.' The Minister refused to entertain the claim to compensation. Accordingly, the question to be determined was whether the claimants had disclosed a prima facie case for compensation.

The Supreme Court of New South Wales held, by a majority, that there was no prima facie case for compensation because the executors had shown no title. The Minister relied on *Re Paling* in which Martin CJ had said: 'It cannot be that the

[242] Land for Public Purposes Acquisition Act 1880, s 11.

[243] Ibid.

[244] Ibid s 12.

promoters of the Act ever contemplated such an absurdity as for a person deliberately to take a piece of land that did not belong to him and then ask for compensation.'[245]

The Privy Council (Earl of Halsbury LC, Lord Macnaghten, Lord Davey, Lord Robertson, Lord Atkinson, Sir Ford North, and Sir Arthur Wilson) rejected the Supreme Court's analysis. It held that Clissold had a possessory title that was good against all but the 'rightful owner'; and, accordingly, that a prima facie case for compensation had been made out for the purposes of the Act of 1880. Lord Macnaghten, on behalf of the Board, said:

> It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title.[246]

So the Privy Council decided that Clissold had a 'good title' and that the claimants had a prima facie case for compensation.[247] However, the case did not concern the transfer of Clissold's title, which was lost when the land was resumed. And the case does not shed much light on the nature of the possessor's 'title'. What did their Lordships mean by (a) 'a perfectly good title' and (b) 'an absolute title'? One might think that their Lordships used the word 'title' to designate a 'right to possession'.[248] There is reason to think that this is correct. For their Lordships referred to Cockburn CJ's judgment in *Asher v Whitlock*. It will be recalled that Cockburn CJ maintained

---

[245] *Re Paling* (1886) 3 NSWWN 41.

[246] *Perry v Clissold* (n 238) 77.

[247] Ibid.

[248] Cp. T Cyprian Williams (ed), *Principles of the Law of Real Property* (17th edn, Sweet & Maxwell 1892) 531: 'To have a good title to land is to have the essential part of ownership, namely, the right to maintain or recover possession of the land as against all others.'

that a possessor had right of possession and that this right was devisable. It would seem, then, that their Lordships' view was that Clissold was in possession of the land and therefore had a right to possession, and that this right was 'good against' everyone except the holder or holders of a better title.

In *Ex parte Winder*, Hall VC maintained that, where *A* held a piece of land for an estate in fee simple, and where *B* took possession of the land and remained in adverse possession for 19 ½ years, *B* 'acquired a title by possession of this property for nearly the time which would have operated as a bar to a claim by anybody else'; and '[n]obody could doubt for a moment that … [*B*] had a most valuable right and interest which could have been sold in the market, although he had not yet the full statutory title.'[249] In Hall VC's view, then, the possessor's 'right and interest' could be alienated.

In *Rosenberg v Cook* the claimant entered into a contract of sale with the defendant whereby the claimant agreed to purchase certain 'freehold building land' from the defendant.[250] The defendant had purchased the land from a railway company, which had no power to sell it. The contract of sale between the claimant and defendant contained a number of conditions of sale. One condition was that the title should commence with the conveyance from the company and that the purchaser shall not make any objection in respect of such conveyance; and another was that the

[249] *Ex parte Winder* (n 238) 700–701. A railway company agreed to purchase for £600 the fee simple estate in certain lands from *B*, who was in possession of them, although *A* had a better title than *B*. When the company discovered that *B* had only a 'possessory title', the company paid the £600 into court, under the Land Clauses Consolidation Act 1845, to the account of 'the party interested' therein. The company then took possession of the land and executed a deed-poll under section 77 of the 1845 Act. The deed-poll recited that the company desired that the land in question 'should vest absolutely in them for all the estate and interests of' *B* and declared that the land should vest in the company in fee simple. Two persons claiming under *B* presented a petition for the payment out to them of the £600. An assignee of *A* claimed that he was entitled to the land or to the £600. Hall VC held that the two petitioners, who claimed under *B*, were entitled to the £600. Lindley LJ approved of the decision in *Gedye v Commissioners of HM's Work and Public Buildings* [1891] 2 Ch 630 (CA) 638.

[250] *Rosenberg v Cook* (n 238).

purchaser should send any objections that he might have to the title within seven days from the delivery of the abstract. The claimant made no objection in respect of the title until after the expiration of seven days, when he objected that the conveyance was void because the company had no power to sell. The claimant brought an action to recover the deposit. Lindley J, at the trial, gave judgment for the claimant, having decided that the conveyance from the company to the defendant was void; that the defendant had purported to sell a freehold but had only sold a revocable licence, if even that, so that there was no identity between the thing offered for sale and the thing sold.

The defendant argued before the Court of Appeal that the claimant was barred by the conditions of sale from objecting to the title after seven days had expired. The claimant argued that the 'conditions as to time apply to objections as to the degree of the title: here there is a want of title altogether, and a total failure of consideration.'[251] He submitted that he did not have what he purported to sell because he purported to sell 'freehold building land ... quite ready for building operations', but he had merely a revocable licence. The Court of Appeal (Jessel MR, Brett and Cotton LJJ) rejected the claimant's argument and held that the claimant's objection was an objection to the title and, accordingly, it was within the scope of the relevant condition of sale; and that, therefore, the claimant was not entitled to recover the deposit.

Sir George Jessel MR said: 'the title of the disseisor is in this country a freehold title, and therefore, although the vendor had a very bad title, and a title liable to be defeated, he had still a title good against all the world, except against those who might be proved to have a better one.'[252] It has been said, already, that a disseisor acquired seisin for a freehold estate. But it was not decided that the vendor was a

[251] Ibid 164.

[252] Ibid 165.

disseisor and the Master of the Rolls ended his judgment as follows: '[t]he simple fact is that the vendor had a possession in this case, so that a fair sale of that possession is perfectly good.'[253]

Brett LJ regarded the vendor as having 'possession of all the land above the tunnel'.[254] The defendant, in his Lordship's view, 'had a possession of some kind and he assumed to sell it [ie his possession] by a right similar to that of a disseisor or trespasser'.[255] Therefore, the objection 'was an objection to title, and was taken too late.'[256]

Cotton LJ asked: 'did the vendor propose to convey what the particulars describe'? His Lordship thought that, 'if the particulars stood alone he probably did not'; however, 'looking to the reference to the conveyance from the railway company ... there was sufficient description, and what the vendor proposed to convey was the physical possession of the land'.[257] The defendant, said his Lordship, 'had an actual possession, and there is nothing in the statute to say that he had not a saleable possession'.[258]

Their Lordships' judgments do not illuminate the nature of the vendor's interest as well as they might have done. But their Lordships agreed that the vendor, who had taken possession of the land, had an interest in the land that was conveyed to the purchaser; and the case thus supports the claim that, where a person has gone into

[253] Ibid.

[254] Ibid.

[255] Ibid 166.

[256] Ibid.

[257] Ibid.

[258] Ibid.

possession of land under a void conveyance, the possessor has an alienable interest in the land. It thus supports the AP Thesis.

The case law discussed in this section supports the claim that the possessor's interest is alienable and the AP Thesis is correct. Thus, these cases are not compatible with the *First View* or the *Second View* of the doctrine of title by possession, but they are compatible with the *Third View*.

B. Possession-dependence?

If the possessor's interest is alienable, then, strictly speaking, it cannot be possession-dependent. Suppose that *A* takes possession of Blackacre and then purports to convey his 'title' to *B*. If B thereby acquires an interest in Blackacre, the continued existence of that interest is obviously not dependent on the right-holder being in possession—for the transferee, *B*, is not in possession. Consider *Asher v Whitlock*.[259] If, as Cockburn CJ maintained, Williamson's right to possession was ultimately inherited by Mrs Asher, Mrs Asher had a right to possession as against persons in general and the continued existence of that right was obviously not dependent on Mrs Asher being in possession, for Mrs Asher had never been in possession.

Gordley and Mattei have contended that *Asher* supports a set of propositions that are significantly narrower:

> *Asher v Whitlock* … established … that even the prior possessor who clearly did not have title could recover *against a dispossessor*; that it did not matter if he was dispossessed by force or by occupation of the property without force; and that the rights of the prior possessor could pass by will, and presumably, by contract.[260]

[259] *Asher v Whitlock* (n 163).

[260] Gordley and Mattei (n 152) 326 (emphasis added).

With respect, this cannot be right. There was no dispossession. The testator, Williamson, was not dispossessed; the defendant did not enter until after Williamson had died. The testator's devisee, Mary, was not dispossessed; she was in possession with the testator's widow and the widow's husband, Whitlock, until she died. And Mary's heir, Mrs Asher, was not dispossessed; she had never been in possession. Rather, in Cockburn CJ's view, the testator had a right to possession that was 'good against *all the world* except the person who can shew a good title' and this right was devised to Mary and thereafter inherited by Mrs Asher. Thus, Mrs Asher, who had never been in possession, acquired a right to possession that was 'good against all the world except the person who can shew a good title'.

There is also more recent authority for the proposition that the possessor's rights are not possession-dependent. In *Ezekiel v Fraser* Ryehurst Ltd was the registered proprietor of a freehold estate in certain land.[261] The company was dissolved in 1998 and, accordingly, the freehold vested in the Crown. The claimants, Ezekiel, had been in possession of the land for approximately sixteen years ending in 1999. Thereafter, squatters took possession of the land. In 2000, Fraser went into possession and Ezekiel brought possession proceedings in 2001. HHJ Rich QC maintained that the claimants 'are entitled to rely on their prior possession as entitling them to claim to be restored to possession against an intruder with no right, and the jus tertii of the Crown ... is irrelevant.'[262] He did 'not see how the possibility, as a matter of fact, that the claimants had already been dispossessed by squatters could make any difference.'[263]

[261] [2002] EWHC 2066 (Ch).

[262] Ibid.

[263] Ibid.

A remark made by Lord Macnaghten in *Agency Co v Short* might have encouraged the view that an adverse possessor's title is possession-dependent.[264] His Lordship, delivering the Board's advice, said, '[t]he possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose.'[265] However, this statement must be read in the context of the decision in that case, which was that, for the purposes of the Limitation Act, time does not continue to run if an adverse possessor relinquishes possession before the limitation period has elapsed.

C. Summary of Interim Conclusions

The modern authorities support the proposition that a possessor acquires an interest, which comprises (inter alia) a right to possession, that is alienable and not possession-dependent. Therefore, insofar as land is concerned, the *Third View* is correct and, accordingly, the *First View* and the *Second View* must be rejected.

7. THE MODERN LAW AND THE AFS THESIS

If a possessor acquires, upon obtaining possession, an alienable interest in the land, what is the nature of that interest? It is argued in this Section that the authorities support the contention that it is a fee simple absolute in possession. In other words, the authorities support the AFS Thesis.

'A man cannot have a more large or greater estate of inheritance than fee simple.'[266] The word 'fee' signifies two things: that the estate is capable of lasting forever and that the estate is an estate of inheritance, that is to say, an estate that is

[264] *Agency Co v Short* (1888) 13 App Cas 793 (PC) Cp. Gordley and Mattei (n 152) 328.

[265] *Agency Co v Short* (n 264) 799.

[266] T Littleton, *Tenures* (E Wambaugh ed, Washington DC 1903) s 11.

capable of devolving to the grantee's heirs. The word 'simple' signifies that the class of heirs to which the estate can descend is *general*. Following the enactment of section 1 of the Law of Property Act 1925 (LPA 1925), the only kind of freehold estate that can exist at law is a 'fee simple absolute in possession.'[267] A fee simple is *absolute* if it is not conditional or determinable, although certain conditional fee simples are 'absolute' for the purposes of sub-section 1.[268] A fee simple is *in possession* if it entitles its holder to immediate possession of the land to which it relates.[269]

The AFS Thesis can be contrasted with the old law of seisin and disseisin. We have seen that, under the old law, if *A* was seised of land for an estate in fee simple, and if *A* was subsequently disseised by *B*, the disseisor (*B*) thereby acquired the fee simple estate and *A*, the disseisee, thereby lost the fee simple and acquired, instead, a right of entry.[270] Curwen argued at the start of the 21st century that the old law was preferable to any of the modern accounts of the squatter's title.[271] However, the inescapable truth is that the law concerning seisin and disseisin has long been obsolete.[272] To revive it now—to reintroduce these notions into our law—would give rise to a great deal of uncertainty, not least with respect to the circumstances in which a disseisin will occur. The AFS Thesis does not utilise the notions of seisin or disseisin; nor does it postulate that the adverse possessor acquires another's fee

[267] LPA 1925, s 1(1).

[268] LPA 1925, s 7.

[269] *Long v Tower Hamlets LBC* [1998] Ch 197 (Ch). For such purposes, 'possession' includes the receipt of rents and profits or the right to receive the same.

[270] Text to n 7.

[271] Curwen (n 218).

[272] Sweet (n 8).

simple. It maintains, rather, that a person acquires a new legal estate in fee simple upon taking possession of the land.

In this Section we will consider the arguments and authorities that support the view that the AFS Thesis is sound and we will also examine two objections to the thesis.

A. The Content of the Interest

We have seen that the possessor acquires an interest that comprises a right to possession, a right to non-interference and a power to devise the interest by will or to convey it *inter vivos*. The interest is not possession-dependent. It can be transmitted indefinitely and is not 'for a term': it is capable of lasting forever. These considerations indicate that the possessor has an estate in fee simple.

B. The Law of Property Act 1925

Section 1(1) and section 1(2) the LPA 1925 Act provide that the *only* 'estates', 'interests' and 'charges' in or over land that are capable of 'subsisting or of being conveyed or created at law' are the 'estates', 'interests' and 'charges' indicated in those subsections, which include an estate in fee simple absolute in possession, a term of years absolute, an easement, and a charge by way of legal mortgage. Section 1(3) provides that '[a]ll other estates, interests, and charges in or over land take effect as equitable interests.' Accordingly, the interest that the possessor of land acquires—if, as has long been assumed, it is a legal interest—must be one of the interests referred to in section 1 of the 1925 Act unless it is falls within the terms of section 14.

Section 14 provides that Part 1 of the Act 'shall not prejudicially affect the interest of any person in possession or in actual occupation of land to which he may

be entitled in right of such possession or occupation.' It is unclear what the intended purpose of this provision was. In *City of London BS v Flegg* Lord Oliver opined that 'the ambit of section 14 is a matter which has puzzled conveyancers ever since the Law of Property Act was enacted.'[273] His Lordship thought that, if the purpose of section 14 was to 'make it clear that the provisions of Part I were not prejudicially to affect the rights of occupiers of land who either had or, by virtue of their occupation, were in the process of acquiring title by adverse possession,' then the section was 'unnecessary'.[274] His Lordship accepted a different explanation of the purpose of the section:

> section 14 was designed to preserve the principle, exemplified by *Hunt v Luck* [1902] 1 Ch 428, that a purchaser will have constructive notice of any rights reasonably discoverable from inspection of the property and, in particular, from inquiry of any occupier as to his interest and the terms on which he holds it.[275]

If Lord Oliver's interpretation of s14 is correct, then the interest of the possessor of land must, if it is legal, be one of the interests identified in s1(1) and s1(2). The only plausible candidate is the interest referred to in s1(1)(a), viz. an estate in fee simple absolute in possession.

It might be thought that section 1(1) actually *prevents* two parties from each having, independently, a legal fee simple estate.[276] If *A* holds Blackacre for an estate in fee simple absolute in possession and *B* takes possession of Blackacre and thereupon acquires a (new) fee simple, one might doubt whether *A* has a fee simple

[273] [1988] AC 54 (HL) 80.

[274] Ibid.

[275] Ibid.

[276] Cp. B Rudden, 'The Terminology of Title' (1964) 80 LQR 62, 68–69.

absolute *in possession*.[277] However, a fee simple is *in possession* if the owner of the estate has a *right* to immediate possession of the land, and there is no reason to think that *A* does not have a right to immediate possession.[278]

C. The Case Law

Once one is aware of the differences between the AFS Thesis and the DFS Thesis, one will find that judicial support for the AFS Thesis is not as strong as the textbooks might lead one to believe. But there is, as the following discussion demonstrates, some judicial support for the thesis.

Those who claim that the AFS Thesis is true typically cite *Asher v Whitlock*. But, as the discussion of the case above shows, the most that can be said is that one of the three judges, Cockburn CJ, effectively endorsed the thesis. Nevertheless, the Chief Justice's view that the testator, who had taken possession of the wasteland, had an interest in the land that entitled him to possession as against all the world except those who had a better title, an interest that was inheritable and devisable, is directly relevant. For supporters of the AFS Thesis are at one with the Chief Justice inasmuch as they think that a possessor acquires an alienable interest that comprises, as against all the world except any person with a better title, a right to possession.

In *St Marylebone v Fairweather* Lord Radcliffe approved of the view that 'it was a misunderstanding of the legal effect of 12 years' adverse possession under the Limitation Acts to treat it as if it gave a title whereas its effect is "merely negative"';[279] and Lord Radcliffe added that this statement 'needs only one qualification: a squatter does in the end get a title by his possession and the indirect

[277] Ibid 69.

[278] Cp. *Long v Tower Hamlets LBC* (n 269).

[279] [1963] AC 510 (HL) 535 quoting *Taylor v Twinberrow* (n 208) 22 (Scrutton LJ).

operation of the Act and he can convey a fee simple.'[280] *Nemo dat quod non habet* is a general (but not absolute) principle of English property law. Hence, Lord Radcliffe's statement indicates that a squatter has an estate in fee simple, although the statement is equivocal and it says nothing about how the title is acquired.

Furthermore, the Chief Land Registrar has recently accepted the AFS Thesis, as did Roth J in the High Court. In *Turner v Chief Land Registrar* the claimant, Mr Turner, who had resided in his caravan and thereby been in adverse possession of certain unregistered land for three years, applied to the Registrar to register a caution against first registration in respect of the land under section 15 of the LRA 2002.[281] The Registrar refused the application. The question to be determined by the High Court was whether Mr Turner was entitled under section 15 to lodge a caution against first registration by virtue of his interest in the land. Under the provisions of section 15, a person may lodge a caution against first registration if (inter alia) he is the owner of a legal estate in the land to which the caution relates. However, section 15(3) provides that no caution may be lodged by virtue of ownership of a 'freehold estate in land'. The Registrar accepted that Mr Turner had an 'estate in land'. But he argued that it is a 'freehold estate in land'; and that, therefore, section 15(3) precludes registration of a caution. Roth J held that, if Mr Turner had an estate in land at all, it could only be an 'estate in fee simple absolute in possession'; that such an estate is a 'freehold estate in land' for the purposes of s 15(3); and that, therefore, the lodging of a caution was precluded by s 15(3). It should be emphasised that it was not necessary for Roth J to determine whether Mr Turner actually had a legal estate in land: for the Registrar conceded that Mr Turner had such an estate. However, Roth J quoted with

[280] Ibid.

[281] [2013] EWHC 1382 (Ch), [2013] 2 P&CR 12.

approval a passage from *Megarry & Wade* and a passage from *Gray and Gray* that support the AFS Thesis.[282] Here is an extract of the passage in *Megarry & Wade*:

> S [a squatter]'s possession at once gives him all the rights and powers of ownership, at least for the purposes of the civil law. S has, in fact, a legal estate, a fee simple absolute in possession. But so also has O [the owner], until such time as his title is extinguished by limitation. There is thus no absurdity in speaking of two or more adverse estates in the land, for their validity is relative.[283]

There is, then, some judicial support for the AFS Thesis, although in none of the cases that we have considered has it been authoritatively determined that a possessor acquires, by virtue of her possession, a fee simple absolute in possession.

D. Objections to the AFS Thesis

If—as Cockburn CJ thought in *Asher*, Hall VC thought in *Winder*, and the Court of Appeal maintained in *Rosenberg v Cook*—a possessor has an interest in the land that comprises a right to remain in possession and a right to exclude that are good against persons in general, an interest that can be conveyed or devised—what reason is there for maintaining that the possessor does *not* have a fee simple estate in the land? There are two objections to the AFS Thesis that may lead one to accept the AP Thesis (and thus the *Third View*) but to deny that the possessor acquires a fee simple. These objections will be considered in turn.

[282] Ibid [15]–[16] citing *Megarry & Wade* (n 1) paras 4-008–4-009; K Gray and SF Gray, *Elements of Land Law* (5th edn, OUP 2009) para 2.1.40.

[283] *Megarry & Wade* (n 1) paras 4-008–4-009.

i. The First Objection

The first objection to the AFS Thesis is that, although a fee simple estate cannot ordinarily be abandoned,[284] there is authority for the proposition that a 'possessory title' can be abandoned.[285] The leading case is *Mount Carmel v Thurlow*.[286] In *Thurlow* an adverse possessor, *R*, had taken adverse possession of certain land in 1970 and remained in adverse possession until at least 1974. *R* permitted the defendants to go into exclusive occupation of the premises in 1974 and then left the country. In 1984 *R* assigned all the estate, rights and title he had in the land to the claimant and the claimant issued a writ seeking possession. The judge rejected the claim for possession and the Court of Appeal upheld the judge's decision. The Court of Appeal accepted the defendant's argument that *R* abandoned the property to her and relinquished all interest in the property. The Court of Appeal decided that, in the 1970s, *R* had 'abandoned any rights to possession which he might have had.'[287] The court, in reaching this conclusion, relied on the following facts: *R* had fled abroad; *R* did not subsequently make any claim to the land or bring possession proceedings; *R* assigned his rights for a nominal sum; *R* thought that it was 'unnecessary' for him to execute the assignment. Now, there was no suggestion in the judgment that *R* had acquired a legal fee simple estate. Indeed, if he did have such an estate, it is difficult to make sense of the decision that he had abandoned his interest in the land. A person who holds land for an estate in fee simple absolute in possession cannot, ordinarily at

[284] *Ironmonger v Bernard International* (CA, 9 February 1999).

[285] *Mount Carmel Investments v Thurlow* [1988] 1 WLR 1078 (CA); *Site Developments v Cuthbury* [2010] EWHC 10 (Ch), [2011] Ch 266, esp. [173]–[178].

[286] *Mount Carmel* (n 285).

[287] *Mount Carmel* (n 285) 1088.

least, abandon that estate. As Millett LJ explained in *Ironmonger v Bernard International*:

> there is no concept in English law of the abandonment of title to land. Land may be left vacant and unoccupied for years; the owner does not thereby lose his title. He cannot lose it unless some other person has been in adverse possession of the property for more than twelve years.[288]

How, then, is the decision in *Thurlow* to be explained? According to Stephen Jourdan QC and Oliver Radley-Gardner, the decision in *Thurlow* can

> only be explained on the basis that the title created by *R*'s possession for less than the limitation period was of a different quality to a paper title. Because *R* in reality had no title, and his rights depended on possession, he lost all his rights when he ceased to have the *animus possidendi*, and so possession.[289]

An interesting aspect of this explanation is that it invokes the proposition that the adverse possessor, *R*, 'in reality had no title' and the rights *R* had 'depended on possession.' Now, this involves a rejection of the AFS Thesis, which posits that a possessor or adverse possessor acquires a fee simple estate. But it fits well with the *Second View*. *R*, it might be said, had abandoned his possession and thereby lost the rights that depended upon his possession as well as his title (claim) to the fee simple.[290]

Does *Thurlow* compel us to abandon the AFS Thesis? It does not. At least three responses to *Thurlow* are available to one who wants to hold on to the AFS Thesis. The first two of these pursue a strategy of acceptance and reconciliation. The first response is to say that there is a fundamental distinction between 'estate' and

[288] *Ironmonger v Bernard International* (CA, 9 February 1996) as cited in in S Jourdan & O Radley-Gardner, *Adverse Possession* (2nd edn, Bloomsbury 2010) para 20–58.

[289] Jourdan & Radley-Gardner (n 288) para 20–59.

[290] But, as we have seen, the interest that a possessor acquires is *not* possession-dependent: text to n 261.

'title'; that a possessor (or adverse possessor) acquires a possessory title to an estate in fee simple; and that such a person has an ordinary fee simple absolute in possession: it is the title that is 'possessory' and can be abandoned. But, as a means of defending the AFS Thesis, this is not convincing. For if a person loses the fee simple estate if and when he loses his 'possessory title', and if the 'possessory title' can be lost by abandonment, then, ultimately, the fee simple estate can be abandoned.

A second, more transparent response is to say that the possessor or adverse possessor acquires a special kind of fee simple, that is, a fee simple that can be abandoned. But why should the fee simple have this feature? The law has not provided a good answer to this question. Jourdan and Radley-Gardner maintain that, if a squatter has lost the *animus possidendi*, the intention to possess, and another person has the *animus*, it seems right to treat the squatter's possessory title as extinguished. But their view is premised on the explanation discussed above, which involves the proposition that a squatter 'in reality' has no title and that his rights depend on possession. This explanation is plainly not consistent with the AFS Thesis, which maintains that a possessor actually acquires an estate in fee simple.

A third response is to reject the reasoning in *Thurlow*. This response is the better one, at least if one is committed to the AFS Thesis. For, in the first place, the Court of Appeal in *Thurlow* did not give due consideration to the nature of a possessor's interest. The reasoning of the court does not proceed on the basis that the possessor has a fee simple absolute in possession. Indeed, it does not engage with this view at all. It seems that the court did not appreciate the true nature (according to the thesis) of *R*'s interest. If *R* had a fee simple absolute in possession, the court should not have so readily and so lightly concluded that R could abandon his estate. If the AFS Thesis is sound, *Thurlow* should be reconsidered and, better still, overruled.

ii. The Second Objection

The second objection to the AFS Thesis maintains that the thesis is not compatible with the doctrine of tenure. Tenure is the relationship of lord and tenant whereby the tenant holds land of the lord. In English law tenure is universal: all land (except the Royal demesne) is held of a lord and ultimately of the Crown.[291] 'The grand and fundamental maxim of all feudal tenure', Blackstone maintained, is 'that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown.'[292] Blackstone thought that the proposition that 'all lands were originally granted out by the sovereign' is 'fundamental' and yet, nevertheless, a 'mere fiction'.[293] It is, in other words, a postulate of the theory of tenure. This point has been judicially recognized. In *Attorney-General v Brown*, for instance, Sir Alfred Stephen CJ said:[294]

> It was maintained, that this supposed property in the Crown was a fiction. Doubtless, in one sense it is so. The right of the people of England to their property, does not in fact depend on any royal grant; and the principle, that all lands are holden mediately or immediately of the Crown, flows from the adoption of the feudal system merely…. That principle, however, is universal in the law of England; and we can see no reason why it shall not be said to be equally in operation here. The sovereign, by that law, is (as it is termed) *universal occupant*. All property is supposed to have been, originally, in him.

---

[291] F Pollock and FW Maitland, *The History of English Law Before the Time of Edward I* (2nd edn, CUP 1898) Vol I, 232–33; *Attorney-General (Ontario) v Mercer* (1883) 8 App Cas 767 (PC) 771–72 (Earl of Selborne LC); *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HCA) 46 (Brennan J), 80–81 (Deane and Gaudron JJ). Today, almost all mesne lordships are untraceable and the courts have been prepared to assume that land is held directly of the Crown: *Megarry & Wade* (n 1) para 2–030; *Re Lowe's Will's Trust* [1973] 1 WLR 882 (CA) 886 (Russell LJ).

[292] 2 Bl Comm 53. Cp. Co Litt 65a: 'all lands within this realm were originally derived from the Crown.'

[293] 2 Bl Comm 51.

[294] (1847) 1 Legge 312 (NSWSC) 318.

Similarly, in *Mabo v Queensland (No 2)* Brennan J (with whom Mason CJ and McHugh J agreed) said: 'whatever the fact, it is the fiction of royal grants that underlines the English rule' that tenure is universal.[295]

Is Blackstone's 'fundamental maxim' compatible with the AFS Thesis? Suppose that *A* holds Blackacre for an estate in fee simple absolute in possession and that *B* takes possession of the land and thereupon acquires an estate in fee simple. Who is *B*'s lord? Clearly, the Crown has not granted the land to *B* or to a predecessor in title of *B* and, thus, *B* does not derive his title from a Crown grant. The law has two options. It must either recognise that *B* does not derive his estate from a Crown grant and does not hold the land of a lord and mediately or immediately of the Crown; *or* it must maintain (fictitiously) that *B* derives his estate from a Crown grant and that, accordingly, B holds of the Crown. It might be thought that the latter option is not available because it is clear that *B* does not derive his title from a Crown grant.[296] But to think this is to misunderstand the nature of the 'fundamental maxim'. It is, as we have seen, a postulant of the theory of tenure and therefore it is applied notwithstanding that it is a fiction. Therefore, the second objection to the AFS Thesis must be rejected.

E. The Scope of the Acquisition Rule

In what circumstances does a person acquire, upon taking possession of land, a fee simple estate? One view is that the possessor acquires, or should acquire, a legal fee

[295] *Mabo* (n 291) 47.

[296] Curwen has argued that 'if a fee simple exists, then the Crown is powerless to grant a competing fee simple to a squatter because it has nothing out of which a fee simple can be carved …. It is a case of *nemo dat quod non habet* and the presumption in favour of a Crown grant is rebutted': Curwen (n 218) 538. This argument presupposes that, in order for the law to maintain that a person, *X*, derives his title from a Crown grant, the facts must be compatible with *X* deriving his title from a Crown grant; but this presupposition is at odds with the fact that it had long been recognized that the universality of tenure is underpinned by the *fiction* of Royal grants.

simple estate only if the possessor is in *adverse* possession. The term 'adverse possession' has caused some confusion—and, for this reason, it was criticised by Lord Browne-Wilkinson in *J A Pye v Graham*. But, thanks in part to Lord Browne-Wilkinson's speech in *Pye*, the meaning of the term in the modern law is clear. A person, *X*, is in 'adverse possession' if *X* is in possession of land and the limitation period is running in *X*'s favour.[297] The limitation period will run whenever a person, *X*, takes or remains in possession of land without the consent of a person, *O*, who has, as against *X*, an estate in the land that entitles *O* to immediate possession. Is the acquisition rule confined to the adverse possession context? It is argued in this section, first, that it is not *always* the case that a person acquires a legal fee simple estate upon taking possession of land. But, secondly, that the authorities support the claim that, subject to that qualification, a person acquires a fee simple estate if and when he acquires possession of land.

The following point is clearly correct: it is not the case that whenever a person takes possession of land she thereupon acquires a legal fee simple estate. If that were so, then every time a freeholder went in and out of possession the freeholder would acquire another fee simple estate, which would be absurd. Accordingly, the law does not confer a legal fee simple estate on a possessor if the possessor already has such an estate.

It seems that, subject to the qualification discussed in the previous paragraph, a person acquires a legal fee simple estate upon obtaining possession of land and that, accordingly, the rule does not apply only to adverse possessors. The discussion of the authorities in Section 6 supports this view. For instance, Cockburn CJ, in his influential judgment in *Asher v Whitlock*, accepted that, upon taking possession of

[297] *Powell v McFarlane* (1977) 38 P&CR 452, 469 (Slade J); *J A Pye v Graham* [2002] UKHL 30, [2003] 1 AC 419, [32]–[38] (Lord Browne-Wilkinson, with whom Lord Bingham, Lord Mackay, Lord Hope and Lord Hutton agreed).

land, the possessor acquired a right to possession and a 'right to devise that estate, which the law gives him against all the world but the true owner'.[298] And the discussions of the possessor's interest in *Perry v Clissold*,[299] *Ex p Winder*,[300] and *Rosenberg v Cook* were not expressly confined to the possessor whose possession is adverse.[301]

One advantage of the view that acquisition rule is not confined to the adverse possession context is that the position of the possessor is clear and certain, and this may benefit the possessor, potential and actual purchasers, and the courts. For, under the rule, the possessor, the purchaser and the courts do not need to enquire into whether or not the possessor's possession is adverse in order to determine whether he has acquired a fee simple estate. By way of contrast, if the law were to provide that a possessor acquires a legal fee simple estate only if his possession is adverse, possessors, potential and actual purchasers, and the courts might not know whether the possessor has acquired a fee simple estate. For they may not know, and may not be able to discover, whether someone has a right, as against the possessor, to recover the land; and, in such circumstances, they would not know, and would not be able to discover, whether time was running under the Limitation Act and, therefore, whether the possessor's possession was adverse.

8. CONCLUSIONS

In 1925 Wiren concluded his discussion of title by possession thus: 'we can only await what we trust shall prove the considered and exhaustive judgment of some high

[298] *Asher v Whitlock* (n 238) 6.

[299] *Perry v Clissold* (n 238).

[300] *Ex p Winder* (n 238).

[301] *Rosenberg v Cook* (n 238).

tribunal.'[302] Wiren would surely have been disappointed to learn that, over 90 years later, we are still waiting. It has been argued in this Chapter that the authorities that we do have support the view that, while it was formerly the case that 'possession was not a root of freehold title' and that, therefore, the AFS Thesis was false, the *First View* and the *Second View* are now mistaken and those versions of the *Third View* that are committed to the AFS Thesis are correct. In short, possession is now a root of freehold title. This is so whether the land in the possessor's possession is registered or unregistered and, accordingly, it should not be thought that our conclusion is of limited importance following the enactment of the Land Registration Act 2002. If the land is registered, and if the possessor is in adverse possession, the possessor might become entitled to be registered as proprietor of the estate that is held by the person against whom time would have been running under the Limitation Act 1980.[303] If she is registered as the proprietor of that estate, she will have a registered title to that estate and the title that she acquired by virtue of her possession will be 'extinguished'.[304] But, unless and until she is so registered as the proprietor of that estate, she will have, by virtue of her possession, a legal fee simple absolute in possession.

[302] Wiren (n 12) 158.

[303] LRA 2002, ss 96, 97 and sch 6. Section 96(1) provides that '[n]o period of limitation under Section 15 of the Limitation Act 1980 … shall run against any person, other than a charge, in relation to an estate in land'. Sch 6, para 11(1) provides that, for the purposes of Sch 6, '[a] person is in adverse possession of an estate in land … if, but for section 96, a period of limitation under section 15 of the Limitation Act 1980 would run in his favour in relation to the estate.'

[304] LRA 2002, sch 6, para 9(1).

5

POSSESSION AND TITLE TO CHATTELS

1. INTRODUCTION

It was concluded in the previous chapter that the law confers on a person who obtains possession of land a legal fee simple estate (provided the possessor does not already have an estate in the land). We turn now to the law of chattels. Granted that a person acquires, upon obtaining possession of a chattel, a 'title' to that chattel, what is the nature of that title? It is argued that there is some support in the case law for the *Second View* of the doctrine of title by possession (insofar as chattels are concerned). On this view, the MRP Thesis and the DP Thesis are correct and the AP Thesis is false. But, while there is some support for *Second View* in the case law, it is argued that it is, in fact, erroneous and the *Third View*, which endorses the AP Thesis, is correct. The law provides that, if and when a person obtains possession of a chattel, she will acquire, if she does not have one already, a 'general property interest' in the chattel; this interest is not possession-dependent and it comprises (inter alia) a right to possession and power to alienate the entire interest. Thus, the position with respect to chattels is very similar to the position with respect to land.

2. POSSESSION, DEEMED OWNERSHIP AND THE CHATTEL TORTS

It has long been maintained that, in the chattel torts, possession is sufficient against a wrongdoer.[1] This maxim, and many of the cases in which it has been asserted and applied, are examined in this Section. We will see that these cases support both (1) the proposition that a possessor has a right to possession and (2) the proposition that the DO Thesis is correct. To this extent at least, the cases support the *Second View* of the doctrine of title by possession (insofar as it concerns chattels). However, the *Second View* is also committed to the claim that the AP Thesis is false and thus, even if one were to establish that (1) and (2) are correct, one should not conclude that the *Second View* is correct without considering whether the AP Thesis is false. This is considered in Section 3.

The chattel torts are torts that necessarily involve a wrongful interference with a chattel. There are currently three main species: (1) trespass to goods; (2) conversion of goods; and (3) negligence that causes damage to, or the destruction of, goods.[2] We are not at present concerned with the nature of these three torts, although this is certainly not unimportant and we will return to it;[3] rather, we are at this stage

[1] E.g. *Webb v Fox* (1797) 7 TR 391, 397; 101 ER 1037, 1040 (Lord Kenyon CJ); *Sutton v Buck* (1810) 2 Taunt 302, 309; 101 ER 1094, 1096 (Lawrence J); *Buckley v Gross* (1863) 3 B&S 566, 573; 122 ER 213, 216 (Crompton J) 3 B&S 566, 574; 122 ER 213, 216 (Blackburn J); *Jeffries v Great Western Railway Co* (1856) 5 El & Bl 802, 805; 119 ER 680, 681 (Lord Campbell CJ); *The Winkfield* [1902] P 42 (CA) 54 (Collins MR).

[2] What about reversionary injury to chattels, detinue, rescous, pound-breach and replevin? The better view is that reversionary injury to chattels is not a distinct tort and reversionary interests are protected by trespass, conversion and negligence: see JW Salmond, 'Observations on Trover and Conversion' (1905) 21 LQR 43, 53–4; S Douglas, *Liability for Wrongful Interferences with Chattels* (Hart 2011) 38. Professor Tettenborn regards 'reversionary damage' as consisting of three separate torts ('quasi-trespass', 'quasi-conversion', and 'quasi-negligence'), which would give us six main chattel torts: A Tettenborn, 'Reversionary Damage to Chattels' (1994) 53 CLJ 326, 330. It is submitted that these labels are unhelpful and that the introduction of these labels—when we have not long eschewed 'quasi-contract'—and the doubling of the number of torts, is unnecessary. As to detinue, Section 2(1) of the Torts (Interference with Goods) Act 1977 abolished the category. For a discussion of the consequences of the enactment of this provision, see S Douglas, 'The Abolition of Detinue' [2008] Conv 30. And rescous, pound-breach and replevin have all but disappeared: see MA Jones et al, *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014) paras 17-151–17-153.

[3] Text to n 187–n 204 below.

concerned with the ability of a possessor to successfully maintain an action in respect of them. So, for the sake of convenience, let us refer to the perpetration of any of the three chattel torts referred to above as 'a tortious interference with a chattel' and let us say that the conduct of a person (*X*) amounts to a potentially tortious interference with a chattel, *C*, if the conduct would constitute a tortious interference with *C* as against any person who has a right that *X* does not commit such a tort with respect to *C*.[4]

It is clear that an action in respect of a tortious interference with a chattel is to succeed—subject to the defendant successfully setting up a defence—if the claimant was in possession of the chattel at the time of the defendant's potentially tortious interference with the chattel, unless the defendant had, as against the claimant, a better right to possession. An early example is *Basset v Maynard*.[5] The defendant had taken away certain trees that had been cut down by the claimant. The claimant brought an action in trover, maintaining that he was entitled to the trees under a grant from a third party. The defendant argued that this grant was void and that, therefore, the claimant did not have a good title to the trees. The Queen's Bench held that the grant was not void, but according to *Croke's Reports*, Lord Popham CJ and Gawdy and Clench JJ maintained that, even if the grant had been void, the claimant would still be entitled to bring trover because 'although the plaintiff had not a good title, yet his having possession of them, being cut down, sufficeth.'[6] Similarly, in *Carter v Johnson*, in which the claimant brought an action in trespass and claimed (inter alia)

[4] Cp. the definition of 'wrongful interference with goods' in Section 1 of the Torts (Interference with Goods) Act 1977.

[5] *Basset v Maynard* (1600) Cro Eliz 819, 78 ER 1046. For more recent authorities, see n 1.

[6] *Basset v Maynard* (1600) Cro Eliz 819, 820; 78 ER 1046, 1047.

that the defendant had seized goods that were in his possession,[7] Lord Abinger CB maintained that 'mere possession in the plaintiff is enough against a wrongdoer'.[8] What, in this context, is the meant by 'wrongdoer'? The answer, it seems, is that a defendant is a 'wrongdoer' if: (1) he interferes, without lawful justification, with a chattel that is in the possession of another; and (2) he does not have, as against the possessor, a good title to it.[9]

Do the cases discussed in the previous paragraph establish that a possessor of a chattel has, simply by virtue of her possession, a *right* concerning the chattel? One who is committed to the *First View* could maintain that the reason why the possessor can successfully bring an action in respect of a potentially tortious interference with the chattel in his possession is that the possessor is to be *regarded as* the owner of the chattel and thus as a person who has the rights, powers etc. of an owner, including a right to possession and a right to non-interference. In order to determine how plausible this contention is, one must consider why, according to the law, a possessor is able to successfully bring an action in the chattel torts; one must consider the reasons and arguments of the law. The case law supports the proposition that a possessor really does acquire, simply by virtue of her possession of certain land or a certain chattel, a right to non-interference; and, therefore, the *First View* is untenable.[10] A possessor acquires a right to non-interference and persons in general

[7] *Carter v Johnson* (1839) 2 M & Rob 263, 174 ER 283.

[8] (1839) 2 M & Rob 263, 265; 174 ER 283, 284. Cp. *Giles v Glover* (1832) 9 Bing 128, 265–66; 131 ER 563, 615 (Lord Tindal CJ): 'any person who has the legal possession of goods, though not the property, may maintain [trespass or trover] against a wrongdoer.'

[9] *Bourne v Fosbrooke* (1865) 18 CB (NS) 515, 525; 144 ER 545 (CP) 549 (Erle CJ): 'A person who takes away and disposes of an article with the authority of the owner cannot be a wrong-doer: but one who does so without any colour of title or authority is a wrong-doer, and is liable to an action at the suit of the party whose possession is so invaded'; *Jeffries* (n 1) 805 (Lord Campbell CJ): 'one who takes [goods] from [the possessor], having no title in himself, is a wrongdoer'. Cp. *Russell v Wilson* (1923) 33 CLR 538 (HCA) 548–49 (Isaacs and Rich JJ).

are under a duty not to engage in 'trespassory conduct' with respect to chattels in her possession. If that right is violated the possessor is entitled to recover damages to compensate her for the interference with, or loss of, possession.[11]

But the possessor may recover much more than this. If she has been deprived of the chattel and successfully brings an action in trespass, conversion or negligence in respect thereof, she is entitled to recover the *full value* of the chattel. A great number of authorities support this proposition.[12] *Wilson v Lombank* provides a clear example. The claimant had taken a car to a garage for repairs.[13] The defendants took the car from the garage, thinking that it belonged to them. The defendants subsequently discovered that the car was not theirs and delivered it to a third party, who had a better title to the car than the claimant. The claimant brought an action in trespass against the defendants and Hinchcliffe J held that the claimant was in possession of the car when the defendants took it; that the taking amounted to a wrong as against the claimant; and that the claimant was entitled to recover the full value of the car.

Why, according to the law, is a claimant who has been deprived of goods that were in her possession entitled to recover the full value of the goods? Once again, we must consider the law's reasons and arguments. A number of cases support the view that, if a claimant establishes that she was in possession of a chattel at the time of the defendant's potentially tortious interference with it, the court is to proceed (in the first instance) on the basis that the claimant was, at that time, the legal owner of the

---

[10] Text to n 41–n 49 in Chapter 4; text to n 167–n 170 below.

[11] Cp. text to n 41–n 49 in Chapter 4.

[12] E.g. *Armory v Delamirie* (1721) 1 Str 505, 93 ER 664; *Jeffries* (n 1); *Bourne v Fosbrooke* (n 9); *The Winkfield* (n 1).

[13] *Wilson v Lombank* [1963] 1 All ER 740 (Assizes).

chattel. In other words, this line of cases supports the DO Thesis and (thus) the *Second View*.[14] *Jeffries v Great Western Railway Co* and *The Winkfield* are the most important of these cases. We will first consider the earlier case, *Jeffries*.

A. *Jeffries v GWR*: Possession and Presumptions of Ownership

In *Jeffries* the claimant had been in possession of some trucks, which he claimed as his own under an assignment from one Owen. The defendants, who also claimed that the trucks were their own under an assignment from Owen, seized the trucks. The claimant brought an action in trover, the action from which the modern tort of conversion derives. The defendants pleaded that, since Owen had become bankrupt before the claimant took possession of the trucks, Owen's interest in them had vested in his assignee-in-bankruptcy and, therefore, the claimant was not entitled to the trucks. The judge refused to permit this defence, and, on a motion for a new trial, the Queen's Bench upheld the judge's decision.

Judgments were delivered by Lord Campbell CJ and Wightman and Crompton JJ. A passage from the Lord Chief Justice's judgment captures the essence of the decision:

> I am of the opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him having no title in himself, is a wrongdoer, and cannot defend himself by shewing that there was title in some third person; for against a wrongdoer possession is a title.[15]

The question at issue in *Jeffries* was whether the defendants could successfully defend the action by establishing that the goods 'were not the plaintiff's' because

[14] Cp. L Rostill, 'Relative Title and Deemed Ownership in English Personal Property Law' (2015) 35 OJLS 31.

[15] *Jeffries* (n 1) 805.

Owen's interest in them had vested in the assignees.[16] The Lord Chief Justice's view was that, since the defendants were 'wrongdoers', they could not.[17] It was explained above that it is a necessary (although not a sufficient) condition of a person being a 'wrongdoer' that that person has taken the goods out of another person's *possession*.[18] This is important. For his Lordship's reason for believing that a 'wrongdoer' 'cannot defend himself by shewing that there was a title in some third person' has to do with the importance of protecting possession: 'I think it most reasonable law, and essential for the interests of society, that peaceable possession should not be disturbed by wrongdoers'.[19] This reasoning proceeded on the basis that, as the Lord Chief Justice put it, 'against a wrongdoer, possession is a title';[20] that, in trover, as in trespass, 'the presumption of law is that the person who has possession has the property.'[21]

A critic of the *Second View* might point out, first, that the Lord Chief Justice said that 'the law is that a person possessed of goods as his property *has a good title* as against every stranger',[22] and, secondly, that Wightman J referred to the 'primâ facie right arising from possession'.[23] Do these statements support the AP Thesis and cast doubt on the view that the judgments should be regarded as supporting the DO Thesis? They do not. Wightman J spoke not simply of the 'right arising from possession', but of the '*primâ facie* right'. And, for two reasons, we should not automatically equate the term 'good title' in the Lord Chief Justice's statement with

[16] Ibid 802.

[17] Ibid 805.

[18] Text to n 9.

[19] *Jeffries* (n 1) 805.

[20] Ibid 805.

[21] Ibid 806.

[22] Ibid 805 (emphasis added).

[23] Ibid 806.

'property right'. First, at the end of the very same sentence, his Lordship asserted that 'against a wrongdoer, possession is a title'—not, as Pollock did in 1888, that possession is a '*root of* title'.[24] His Lordship's statement that 'possession *is* a title' reads awkwardly if one takes 'title' to mean 'property' or 'property right'. The same is true of Wightman J's assertion, in argument, that 'against a wrongdoer possession is title'.[25] So it seems that their Lordships were using the term 'title' to refer to 'the conditions of fact which must be fulfilled in order that a person may acquire or lose a claim to a thing.'[26] If this is right, then we should not assume that his Lordship, in saying that a person who is possessed of goods (*animo domini*) has a title, meant that such a person had a property right. Secondly, his Lordship did use the term 'property'. But he used it only once, and that was when he referred to the 'presumption of law' that 'the person who has possession has the property.'[27] His Lordship's view was not that the claimant *had* 'the property' in the trucks, but that it should be *presumed* that he had it.

Considering Lord Campbell CJ's judgment holistically, then, it seems that it was his Lordship's view that the claimant's possession of the trucks was a 'title', at least 'against a wrongdoer'.[28] Thus, it could be said that the claimant had a title to the trucks, and this meant that, in the first instance at least, the law would 'presume' that the claimant had 'the property' in the trucks.[29] And because the defendant was a 'wrongdoer', the defendant was not permitted to show that, by reason of some third

[24] F Pollock and RS Wright, *Possession in the Common Law* (Clarendon Press 1888) 22.

[25] *Jeffries* (n 1) 805.

[26] AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 107, 134. 'Title' is used in various ways: text to n 3 in ch 3.

[27] *Jeffries* (n 1) 806.

[28] Ibid 805.

[29] Ibid 805, 806.

party having a better title, the goods 'were not the plaintiff's', for it is 'essential for the interests of society, that peaceable possession should not be disturbed by wrongdoers.'[30]

Wightman and Crompton JJ also thought that Pollock CB's decision was correct. Wightman J maintained that the defendants ought not to be able to 'defeat the primâ facie right arising from possession' by 'shewing title ... in a stranger against whom they would be wrongdoers'.[31]

Interestingly, all three judges referred with approval to Serjeant John Williams' note to Sir Edmund Saunders's report of *Wilbraham v Snow*: 'possession with an assertion of title, or even possession alone, gives the possessor such a property as will enable him to maintain this action against a wrongdoer; for possession is primâ facie evidence of property'.[32] The assertion here that possession gives the possessor 'property' for the purposes of an action against a 'wrongdoer' might be regarded as supporting the AP Thesis. But one should not overlook Williams' reason: 'possession', he claimed, 'is primâ facie *evidence* of property'. This is the 'prima facie' position. It is defeasible: the possessor is not to be taken to have 'property' come what may. This meshes well with Wightman J's reference to 'the primâ facie right arising from possession', and with Lord Campbell CJ's assertion that there is a 'presumption' that 'the person who has possession has the property.'

[30] Ibid 805.

[31] Ibid 806.

[32] *Jeffries* (n 1) 805 (Lord Campbell CJ), 806 (Wightman J), 808 (Crompton J) citing note (1) to *Wilbraham v Snow* (1668) 2 WMS Saund 47, 85 ER 624, 628.

In *Jeffries*, the claimant was, as Crompton J noted, himself a 'wrongdoer'.[33] This fact was not overlooked by JF Clerk. He argued in 1891 that the claimant could recover full damages, and the defendant was not permitted to rely on the jus tertii, because the claimant 'was himself a wrongdoer as towards the assignees' and 'was consequently liable to the assignees in trover'; although he noted, rightly, that 'none of the judges rested their judgments on this ground.'[34] This view, that the claimant's liability to a third party is, at least in some circumstances, a necessary condition of, and a ground of, the claimant's entitlement to sue a defendant in tort for wrongful interference with goods, was supported by a decision of the Queen's Bench in 1882. In *Claridge v South Staffordshire Tramway Co* a horse was delivered to the claimant, an auctioneer, for sale.[35] The bailor granted the claimant permission to use the horse until it was sold. The defendant's negligence caused the horse to be injured while the claimant's servant was driving it along a highway. It was held that the claimant could not recover because he was under no liability to his bailor for the injury to the horse. Hawkins and Wills JJ rejected the claimant's submission that, since he was in possession of the horse at the time of the accident, he was entitled to recover damages for the injury to the horse.

However, the reasoning in *Claridge* was decisively rejected, and the reasoning in *Jeffries* was adopted and extended, by the Court of Appeal in *The Winkfield*.[36] This may well be regarded as the leading case in this area; it provided a clear answer to a

[33] Jeffries (n 1) 807.

[34] JF Clerk, 'Title to Chattels by Possession' (1891) 7 LQR 224, 237. Cp. R Hickey, '*Armory v Delamirie* (1722): Possession, Obligation, and the Evolution of Relative Title to Goods' in S Douglas et al (eds), *Landmark Cases in Property Law* (Hart 2015) 131 esp. 133, 139–40, 147.

[35] [1892] 1 QB 422 (QB).

[36] [1902] P 42 (CA).

question that had plagued the law for some time, and it has been cited with approval on numerous occasions by the Privy Council and by the House of Lords.[37]

B. *The Winkfield* and Beyond

In *The Winkfield*, two steamships, the Mexican and the Winkfield, were involved in a collision, as a result of which the Mexican sank with a portion of the mails that she was carrying at the time. The Postmaster-General brought a claim in negligence to recover the value of letters and parcels lost on board the Mexican. Sir FH Jeune P disallowed the claim on the basis that the Postmaster-General was not under any liability to the parties interested in the lost letters and parcels in respect of which the claim was made. The Court of Appeal rejected the reasoning in *Claridge* and allowed the claimant's appeal.

Sir Richard Collins MR, in a judgment with which Stirling and Mathew LJJ concurred, said that it 'is well established in our law' that 'possession is good against a wrongdoer and that the latter cannot set up the jus tertii unless he claims under it'.[38] In his Lordship's view, a long series of authorities established this in actions of trover and trespass at the suit of the possessor, and, 'the principle being the same', the possessor can 'equally recover the whole value of the goods in an action on the case' for their loss through the negligent conduct of the defendant.[39] A bailee's entitlement to sue does not, in his Lordship's view, rest on the ground that the bailee is liable to the bailor for the loss of the goods converted or destroyed.

---

[37] E.g. *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405 (PC) 410–11; *Eastern Construction Co v National Trust Co Ltd* [1914] AC 197 (PC) 210; *Morrison Steamship Co Ltd v Greystoke Castle* [1947] AC 265 (HL) 278 (Lord Roche), 293 (Lord Porter), 302 (Lord Simonds), 309 (Lord Uthwatt); *The Albazero* [1977] AC 774 (HL) 846 (Lord Diplock); *The Jag Shakti* [1986] AC 337 (PC) 346–8; *Alfred McAlpine Construction Ltd v Panatown Ltd (No 1)* [2001] 1 AC 518 (HL) 581 (Lord Millett).

[38] *Winkfield* (n 1) 54.

[39] Ibid.

In reaching these conclusions, the Master of the Rolls considered, firstly, the position of a 'mere finder' who, since *Armory v Delamirie,*[40] may, he said, recover against a wrongdoer the full value of the thing converted. In his Lordship's view that decision involved the principle that, as between possessor and wrongdoer, the 'presumption of law' is that the person who has possession has the property;[41] "against a wrongdoer possession is a title";[42] and 'it is not open to the defendant, being a wrongdoer, to inquire into the nature or limitation of the possessor's right'.[43] Collins MR could see no reason why this should not apply in the case of a bailee. His Lordship referred to several cases that, in his view, supported this view;[44] and concluded that *Claridge* could not be supported. Importantly, the Master of the Rolls then set out the principle that underpinned his conclusions:

> [T]he root principle of the whole discussion is that, as against a wrongdoer, possession is title. The chattel that has been converted or damaged is *deemed* to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss.... As between bailee and stranger possession gives title – that is, not a limited interest, but absolute and complete ownership.... As between bailor and bailee the *real interests* of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it.[45]

There can be no doubt that this supports the DO Thesis. In the Court of Appeal's view, a claimant who had possession of chattel is, other things being equal, to be *deemed*, as against a wrongdoer, to have 'absolute and complete' ownership of the

[40] (1721) 1 Strange 505, 93 ER 664. *Armory* is discussed below: text to n 106.

[41] *The Winkfield* (n 1) 55.

[42] Ibid, quoting Lord Campbell CJ in *Jeffries* (n 1) 806.

[43] *The Winkfield* (n 1) 55.

[44] *Sutton v Buck* (n 1); *Burton v Hughes* (1824) 2 Bing 173, 130 ER 272; *Turner v Hardcastle* (1862) 11 CB (NS) 683, 142 ER 964; *Swire v Leach* (1865) 18 CB (NS) 479, 144 ER 531 (CP).

[45] *Winkfield* (n 1) 60–61 (emphases added).

chattel for the purposes of an action in trespass, conversion or in negligence for damage to, or the destruction of, goods. The Master of the Rolls endorsed and relied upon that principle. The principle does not provide that a possessor acquires, in virtue of his or her possession, ownership (or some other property right); rather, it provides that a possessor is to be treated, at least for the purposes of an action in trespass, conversion or negligence, as if he were the owner. Collins MR's judgment recognises and articulates the distinction, which we discussed in Chapter 3, between, on the one hand, a rule of law which provides that, in certain circumstances, a person has or acquires ownership of a thing, and, on the other hand, a rule of law which provides that, in certain circumstances, a court is to treat a person as if he has or had ownership.

The Court of Appeal's reasoning in *The Winkfield* was approved by the Privy Council in *Glenwood Lumber Co v Phillips*, *Eastern Construction Co v National Trust Co*, and *The Jag Shakti*.[46] In *Eastern Construction v National Trust* the claimants, who had been granted a lease and patent (respectively) by the Crown, brought an action in conversion against Eastern Construction, which had removed felled timber from the land that was subject to the lease and patent. The Crown, which had, as against the claimants and defendant, a proprietary interest in the timber, consented to Eastern Construction keeping the timber as their own. The Privy Council rejected the claimants' arguments. Lord Atkinson, delivering their Lordships' judgment, doubted whether the claimants ever had possession of the felled timber, but thought that, if they did, they had it as the bailees of the Crown. Their Lordships thought that, in such circumstances, *if* nothing further had occurred, the claimants might have been able to recover the full value of the timber felled,

[46] *Glenwood Lumber* (n 37); *Eastern Construction* (n 37); *The Jag Shakti* (n 37).

> *not because they had in truth and fact any proprietary right in, or title to, the property* in the trees or in the ties into which they were manufactured, but because, to use the words of Lord Campbell in *Jeffries v Great Western Ry. Co.*, as "against a wrong-doer possession is title".[47]

That, according to their Lordships, is 'no new doctrine': it was decided in 1721 in *Armory v Delamirie* that the finder of a jewel has such a property as will enable him to keep it against all but the rightful owner, and, consequently, may maintain trover.[48] Their Lordships, having noted that the principle was applied to bailees in *The Winkfield*, and that both *Jeffries* and *The Winkfield* were approved by the Privy Council in *Glenwood Lumber*, asserted that the principle 'must be now taken as conclusively established.'[49]

However, their Lordships thought it 'obvious' that where the bailor—in this case, the Crown—has clothed the wrongdoer with the ownership of the goods before the bailee has brought an action against the wrongdoer, the bailee cannot recover from him.[50] In these circumstances, the defendant would be setting up, not a jus tertii, but, as donee or assignee of the tertius, a jus sui. The Crown had consented to the defendant retaining the timber as their own, and appropriating it as its owners, and, accordingly, their Lordships rejected the claimants' claim for damages.

The nature of the apparent right to reparation, for a tortious interference with a chattel, that might accrue to a person that has had possession of a chattel was also considered by Lord Millett in his speech to the House of Lords in *Panatown v Alfred*

---

[47] *Eastern Construction* (n 37) 209–210 (citation omitted, emphasis added).

[48] Ibid 210 citing *Armory v Delamirie* (n 40).

[49] *Eastern Construction* (n 37) 210.

[50] Ibid.

McAlpine[51] and by the Court of Appeal in *R v Allpress*.[52] In *Panatown,* Lord Millett considered whether the right of a bailee in possession to recover for loss or damage to his bailor's goods, even though he would have had a good defence to an action by the bailor, constituted an exception to the rule that a party to a contract, apart from nominal damages, can recover for its breach only such actual loss as he himself sustained. Lord Millett said:

> [t]he principle here is that *as between bailee and stranger possession gives a complete title* and entitles the bailee to damages for the loss or injury to the property itself, whereas between bailee and bailor the *real interests* of each must be ascertained.[53]

'This', said his Lordship, 'is not a true exception to the rule; *so far as the wrongdoer is concerned,* the bailee has full ownership and recovers damages for his own loss'; 'the fact that the contracting party is *not the full owner* of the property which has been lost or damaged is *disregarded* in ascertaining the extent of the wrongdoer's liability.'[54] Lord Millett's assumption here, that the person who is deemed to have 'full ownership' does *not* in fact have it, seems safe given the context: he was concerned with bailees. But, in principle, a person who, under the doctrine we are considering, is deemed to have ownership of a chattel for some purpose or other, might or might not in fact be the 'full owner'.

In *R v Allpress*, one question for the Court of Appeal was whether a defendant who had acted as a courier or custodian of cash or goods for another was a person who had obtained 'property' for the purposes of certain provisions of the Proceeds of

---

[51] *Panatown* (n 37).

[52] *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58.

[53] *Panatown* (n 37) 581 (emphases added).

[54] Ibid (emphases added).

Crime Act 2002.[55] What is important here is not the fact that the Court of Appeal decided that the defendants did not have 'property' for the purposes of the relevant provisions of the 2002 Act,[56] but some of the court's reasons for rejecting the Crown's submission that the defendants had 'property' for those purposes. In response to the Crown's reliance on the fact that a bailee can maintain an action for the value of the goods against a third party who interferes with his possession, Toulson LJ, giving the judgment of the court, explained that

> [t]he reason is that as a matter of policy the law will not allow a wrongdoer to enquire into the nature or limitation of the possessor's right, but as between the possessor and the wrongdoer the law will *presume* "that the person who has the possession has the property", in the words of Lord Campbell in *Jeffries*.... That is far removed from the question whether a mere custodian has a right to possession so as to have an interest in property for the purposes of s84(2) [of the 2002 Act].[57]

In the Court of Appeal's view, then, the fact that a person who was in possession of a chattel may maintain an action against a person who tortiously interferes with the goods and may thereby recover the full value of a chattel, does *not* support the claim that such a person 'has a right to possession so as to have an interest in property' for

[55] *Allpress* (n 52). Section 84(2)(b) of the 2002 Act provides that 'property is obtained by a person if he obtains an interest in it'; and section 84(2)(h) provides that 'references to an interest, in relation to property other than land, include references to a right (including a right to possession)'.

[56] The five appeals all concerned confiscation orders made against defendants who had been involved in various ways with safeguarding or transferring money which represented the proceeds of crime. Four of the defendants had acted as a courier or custodian for certain drug traffickers. It was clear that the confiscation legislation was intended to deprive defendants of benefits they had gained from their criminal conduct. The main issue on the appeals concerned the nature and extent of the benefits that the defendants had obtained from their criminal conduct and, in particular, whether, where a defendant receives possession of cash or goods in connection with an offence, the defendant is liable to a confiscation order in the amount of the cash (or, in cases involving goods, the market value of the goods). For instance, Ms Allpress had carried a sum of cash with a total value of £156,210 and received £3,600 by way of payments and costs. She admitted that she had benefitted in the sum of £3,600, but denied that the £156,210 was also a benefit that she had obtained. The Court of Appeal held that, if the defendant's only role with respect to the cash or goods connected with his criminal conduct was to act as a courier or custodian on behalf of another, then the defendant is not liable to a confiscation order in the amount of the cash (or, in cases involving goods, the market value of the goods).

[57] *Allpress* (n 52) [76] (citation omitted) (emphasis added).

the purposes of the 2002 Act. For, in its view, the reason that such a person may successfully sue is that, as between that person and a 'wrongdoer', the law will 'presume' that the possessor 'has the property'.

These cases support the claim that the law is that, at least for the purposes of an action in respect of a tortious interference with a chattel, a person who was in possession of a chattel is to be deemed to have ownership of it against a person who does not have, and who is not able to rely on, a better title. They thus support the DO Thesis.

C. The *Second View* and the Jus Tertii

It is claimed in this sub-section that, insofar as chattels are concerned, the *Second View* is compatible with the law concerning the jus tertii, that is, the law concerning whether and when a defendant to an action in respect of a tortious interference with a chattel is to succeed by establishing that a third party has a better title to the chattel than the claimant.

The claim that the *Second View* is compatible with the law concerning the jus tertii may well be controversial. For a critic of the *Second View* might maintain that this view is undermined by the fact that, at common law, a defendant to an action for tortious interference with chattels cannot, in general, successfully defend the action by setting up the jus tertii. Suppose that *B* brings an action in conversion against *C*, claiming the full value of a chattel, and *C* seeks to reduce her liability or avoid it entirely on the basis that *A* has a better title than *B*. If *B* had possession of the chattel at the time of *C*'s alleged tortious act, *B* would be able to recover the full value of it from *C* even if *C* were to establish that *A* has a better title than *B* to the ownership of the chattel and that, therefore, *B* cannot be the owner. The critic might ask: if *B* is

merely deemed or presumed to be the owner of chattel, why is *C* not able to avoid liability by establishing that *B* cannot be the owner of the chattel because *A* has a better title to the ownership? The critic might add that the (purported) fact that a defendant cannot, in general, escape liability for the full value by relying on the jus tertii makes perfect sense if, contrary to what the *Second View* asserts, the AP Thesis is true. For: if the claimants actually had a proprietary interest in the chattel, it would seem quite irrelevant that some other party has a better interest than the claimant.[58]

It is argued below that this criticism of the *Second View* is mistaken in two main respects. First, the authorities do not support the critic's claim that, at common law, a defendant cannot in general avoid liability by setting up the jus tertii. Secondly, the propositions of law that *are* supported by the authorities are perfectly compatible with the *Second View*. We will consider these two points in turn.

i. The Jus Tertii and the Common Law

When may a defendant to an action for tortious interference with chattels successfully set up the better title of a third party (jus tertii)? There is authority to support the view that a defendant can avoid liability by setting up the jus tertii if the defendant acted or defends under the authority of the third party, or if the third party took the thing from the defendant.[59] This point has been largely accepted.[60] But there has been much

[58] Cp. R Chambers, *An Introduction to Property Law in Australia* (3rd edn, Lawbook Co 2013) para 7.65: 'mere proof that the plaintiff does not have the best right is irrelevant. The defendant's interference with the plaintiff's right to possession is *still wrong*, even if the plaintiff is liable to a third person with an even better right' (emphasis added).

[59] *Shelbury v Scotsford* (1601) Yelv 23, 80 ER 17; *Biddle v Bond* (1865) 6 B&S 225, 122 ER 1179 (QB); *Blades v Higgs* (1865) 11 HLC 621, 11 ER 1474 (HL); *Rogers Sons & Co v Lambert & Co* [1891] 1 QB 318 (CA); *Eastern Construction v National Trust* (n 37); *Kahler v Midland Bank* [1950] AC 24 (HL). Cp. CD Baker, 'The Jus Tertii: A Restatement' (1990–1) 16 The University of Queensland Law Journal 46, 48–49.

[60] There has, however, been some disagreement over the exact circumstances in which a defendant may avoid liability by establishing that he is defending under the authority of a third party with a better

debate as to whether a defendant can avoid liability by setting up the title of a third party where the defendant does not claim that he acted or defends under the authority of the third party or that he was evicted by a third party. A number of distinguished lawyers, including AV Dicey,[61] Sir Frederick Pollock,[62] Sir William Holdsworth,[63] and Sir John Salmond,[64] have maintained that, in these circumstances, the answer depends on whether or not the claimant was in possession at the time of the defendant's alleged tort. This view, which will be referred to hereinafter as 'Pollock's view', was endorsed by the Law Reform Committee in 1971; a committee that comprised a number of distinguished lawyers, including Lord Pearson, Lord Diplock, Buckley and Orr LJJ, and Megarry J.[65] On Pollock's view, if the claimant was in possession at the time of the alleged tort, then the jus tertii will not avail the defendant; but if the claimant was not in possession, then it will.[66] Consider the following example.

---

title or that a third party with a better title took the thing from him: Baker (n 59) 48. There is no doubt that, where the action concerns chattels that the claimant has bailed to the defendant, then the defendant may set up the title of a third party if the defendant defends the action under the authority of the third party or if the third party took the thing from him: *Shelbury v Scotsford* (n 59); *Biddle v Bond* (n 59). There are good reasons for thinking that the rule should not be confined to cases concerning bailment: Baker (n 59) 48–9.

[61] AV Dicey, *A Treatise on the Rules for the Selection of Parties to an Action* (W Maxwell & Son 1870) 356–57.

[62] Pollock and Wright (n 24) 91–92. Baker maintained that this view originated with Pollock: Baker (n 59) 46. But the treatise in which Dicey outlines and endorses the view was published in 1870, long before Pollock's *Essay on Possession*.

[63] WS Holdsworth *A History of English Law* Vol VII (Methuen & Co 1922–66) 421–31.

[64] JW Salmond, *The Law of Torts* (2nd edn Stevens and Haynes 1910) 319.

[65] Law Reform Committee, *Eighteenth Report (Conversion and Detinue)* (Cmd 4774, 1971) paras 51–53.

[66] Holdsworth (n 63) asserts (at 426) that 'if a plaintiff in an action of trover is relying, not on his possession, but on his right to possess, the defendant could, like a defendant in ejectment in similar circumstances, meet his claim by proving a jus tertii'; and (at 429) that in *Leake v Loveday* (1842) 4 M & G 97, 134 ER 399 'the defence of a jus tertii was allowed on principle to be always admissible in cases when the plaintiff is relying only on his right to possess.'

Example 5.1. A had possession of a violin until it was taken by *B* without *A*'s consent. Thereafter, *B* was in possession of it until it was taken by *C*. *C* took the violin with the intention of keeping it for himself. C remained in possession of it until it was taken by *D*, who also took it with the intention of keeping it for himself.

If *B* brings an action in conversion against *C* for the full value of the violin, then, as *B* was in possession at the time of *C*'s tort, *C* may *not* avoid liability by establishing that *A*, who was in possession of the violin before *B*, has a better title to the violin than *B*. But, on Pollock's view, if *B* brings an action in conversion against *D*, then, as *B* was not in possession at the time of *D*'s tort, *D* may avoid liability to *B* by establishing that *A* has a better title to the violin than *B*.

There can be no doubt that, if the claimant was in possession at the time of the defendant's alleged tort, the defendant cannot avoid liability for the full value of the chattel by establishing that a third party has a better title (unless he claims or justifies under it).[67] But it is far less clear what the position is where the claimant was *not* in possession at the time of the alleged tort. Some of the cases appear to support Pollock's view. Consider *Butler v Hobson*.[68] The claimant, Butler, was the assignee in bankruptcy of Bakewell. He brought an action in trover against Hobson, who had seized certain goods when Bakewell was in possession of them. The Common Pleas held that the defendant could establish, in answer to the claim, that the goods had been allowed to remain in the order and disposition of the bankrupt, Bakewell, by the consent and permission of the claimant, and therefore had passed under certain

[67] *Nelson v Cherrill* (1832) 8 Bing 316, 131 ER 415; *Carter v Johnson* (1839) 2 M &Rob 263, 174 ER 283; *Jeffries v Great Western Railway* (n 1); *The Winkfield* (n 1); *Wilson v Lombank* (n 13).

[68] *Butler v Hobson* (1838) 5 Scott 798; 4 Bing NC 290, 132 ER 800.

legislation to the assignee of the insolvent debtors court, a third party. The claimant had submitted that 'it is not … competent to the defendant to set up the jus tertii'. According to *Scott's Reports*, Tindal CJ said: 'I am not aware of any rule of law, or any authority, to preclude a defendant from setting up the jus tertii, where the plaintiff is out of possession at the time';[69] and similar statements were advanced by Vaughan, Bosanquet and Coltman JJ.[70]

However, it has been argued by Professor Atiyah, and more recently by Professor Battersby and CD Baker, that the cases do not in fact support Pollock's view.[71] The argument advanced by Atiyah and his followers is premised upon a particular view of the nature of the jus tertii doctrine, which involves drawing a distinction between two categories of cases. On this view, we should draw a distinction between, on the one hand, cases in which the defendant attempts to show that the claimant had *no title (i.e. right to possess the goods) at all* ('Category 1'); and, on the other, cases in which the defendant attempts to show, not that the claimant had no title to the goods at all, but that *some third party had a title (i.e. right to possess the goods) that was better than the claimant's* ('Category 2').[72] *Butler v Hodson*, which was discussed above, is an example of a Category 1 case, as is *Leake v Loveday*,[73] one of the cases that has often been regarded as providing authority for Pollock's view. In *Leake*, the claimant had bought some furniture from one Cox who

[69] (1838) 5 Scott 798, 820.

[70] Ibid 822 (Vaughan J), 822–23 (Bosanquet J), 823 (Coltman J).

[71] P Atiyah, 'A Re-Examination of the *Jus Tertii* in Conversion' (1955) 18 MLR 97, esp. 100–102; G Battersby, 'The Present Status of the *Jus Tertii* Principle' (1992) Conv 100, esp 106–110; Baker (n 59) esp. 51–57. Dr Simon Douglas has also endorsed this view: S Douglas, *Liability for Wrongful Interferences with Chattels* (Hart 2011) 26–27: 'The better view is that the common law never allowed a defendant to plead the *jus tertii*.'

[72] Atiyah (n 71) 100. Cp. Battersby (n 71) esp. 109.

[73] *Leake v Loveday* (1842) 4 M&G 972, 134 ER 399.

remained in possession. Cox became bankrupt, and the furniture was later seized by the defendant who sold the furniture and handed over the proceeds to the assignees in bankruptcy. The claimant's action in trover against the defendant was dismissed. According to the headnote, the court held 'that, under the plea of not possessed, the sheriff might set up the title of the assignees.' But the claimant had no title to the goods at all: he had never been in possession and the title that had been assigned to him was lost as a result of Cox's bankruptcy. Maule J said: 'Here, the defendant says that the plaintiff has no right to the goods at all. The evidence given by them was offered, not to show the right of third persons, but to prove that the goods were not the property of the plaintiff.'[74]

Atiyah claimed that it is *only* in Category 2 cases that the defendant seeks to rely on the jus tertii properly so called. In other words, a defendant seeks to rely on the jus tertii if and only if he seeks to establish, not that the claimant had no title at all, but that a third party has a title is better than the claimant's.[75] Professor Battersby has endorsed this view.[76] Battersby accepts that the cases, including *Leake v Loveday* and *Butler v Hobson*, support the claim that a claimant's action in respect of a tortious interference with a chattel is to fail if the defendant establishes that the claimant had *no title to the chattel at all* at the time of the alleged tort because (i) the claimant never had a title to the goods as he was never in possession and had not acquired title from a person who had title;[77] or (ii) the claimant had divested himself of, or had been

[74] (1842) 4 M&G 972, 986; 134 ER 399, 404.

[75] Atiyah (n 71) 100. By 'title' Atiyah means 'right to possess that binds the world': Atiyah (n 71) 107.

[76] Battersby (n 71) 106–110. Battersby maintains, at 109, that '[n]one of these cases is concerned with the' *jus tertii* that interests him in his article, namely that 'which arises where the plaintiff has some title (usually a possessory title) to the goods, a title which is better than the defendant's, but some third party has a better title than either of them.'

[77] For example, *Dockwray v Dickinson* (1697) Skin 640, 90 ER 287.

divested of any title that he had (as in *Leake v Loveday*).[78] However, Battersby, following Atiyah, thinks that in these cases, the defendant, strictly speaking, was *not* seeking to rely on the jus tertii.

On this view, the jus tertii is a defence in the sense described by Dr James Goudkamp in his book on defences in tort law. Goudkamp explains that, for the purposes of his book,

> the word "defence" refers only to rules that, when enlivened, result in a verdict for the defendant even though all of the ingredients of the tort in which the claimant sues are present.... Denials of elements of the tort in which the claimant sues do not qualify as defences when the word 'defence' is used in this way.[79]

Goudkamp notes that this definition of 'defence' 'brings into focus the fundamental difference between rules that defines torts and rules that release from liability a defendant whose conduct constitutes a tort.'[80] According to Atiyah, a claimant who seeks to rely on the jus tertii properly so called, does not claim that the claimant's action in tort for, say, conversion fails on the ground an essential element of the alleged tort is missing. Rather, the defendant claims that, although the claimant has established the elements that make up the tort, he (the defendant) should not be liable to the claimant because some third party has a better 'title' (i.e. right to possess) than the claimant. On Atiyah's view, then, the jus tertii, strictly speaking, is a defence in the sense described by Goudkamp.

The characterisation of the jus tertii (properly so called) as a defence in the sense described by Goudkamp is a crucial move in Atiyah's and Battersby's arguments. For it enables them to put on one-side cases such as *Butler v Hodson* and

[78] *Leake* (n 73). Cp. *Buckley v Gross* (n 1); *Richard v Jenkins* (1886) 17 QBD 544 (QB).

[79] J Goudkamp, *Tort Law Defences* (Hart 2013) 6–7.

[80] Ibid 7.

Leake v Loveday. In these cases, they assert, the defendant was not seeking to set up the jus tertii.

Not all commentators have accepted that the jus tertii is invoked in Category 2 cases but not in Category 1 cases. Mr Anthony Jolly, for instance, has disputed it. Indeed, on Jolly's view, Atiyah's distinction between Category 1 cases and Category 2 cases is wholly misleading. This is because, on Jolly's view, if the law allows a defendant to rely on the jus tertii to defeat a claimant's action, then, the reason for the defendant's success in such a case is that, by showing that someone else has a better title (i.e. right to possess), the defendant shows that the claimant had no right to possess the thing, that right being (it is said) the legal ground, and a condition of, the claimant's right to reparation. According to Jolly, '[t]he *jus* which the defendant puts forward is not something superior to the plaintiff's right yet compatible with it. It is something which by its very incompatibility disproves the plaintiff's right.'[81] In other words, the defendant, by establishing that a third party has a better title, removes the basis of the claimant's action. He shows that the claimant does not in fact have a title; and (other things being equal) the claimant's action must fail. For, if the claimant did not have a title, the defendant, in interfering with the chattel, has *not wronged the claimant*.

Now, these competing explanations of the nature of the jus tertii are related in a number of ways to the competing accounts of the doctrine of title by possession set out in Chapter 3. For instance, whether one thinks that in *Example 5.1 D*'s claim that *A* has a better title than *B* amounts to a defence should depend on whether one endorses the *Second View* or the *Third View* of the doctrine of title by possession. If one believes that the *Second View* is correct, then one might maintain that in *Example*

[81] A Jolly, 'The Jus Tertii and the Third Man' (1955) 18 MLR 371. Atiyah, in his reply to Jolly, appears to *accept* this point: (1955) 18 MLR 595. Baker has rightly pointed out that this 'seems wholly inconsistent with the views expressed' by Atiyah in his article: Baker (n 59) 61 fn 68.

5.1, if the court were to accept *D*'s submission that he should not be held liable because *A* has a better title to the ownership of the violin, then *D*, by establishing than *A* has a better title than *B*, establishes that *B* was not in fact the legal owner after all. *D* would *not* be setting up a defence in the sense described by Goudkamp. Rather, he would establish that one of the crucial elements of the alleged tort is missing. On the other hand, if one believes that the *Third View* is correct, then one will maintain that in *Example 5.1 B* and *D* each have a property right in the violin and that *D*'s submission, properly construed, amounts to a defence (in the sense described above).[82]

If *B* brought an action in conversion against *D*, could *D* win by establishing that *A* has a 'better title' than *B*? It is submitted that the claim advanced by Atiyah, Battersby and Baker is correct: it seems that there is no authority for the proposition that *D* could avoid liability by establishing that a third party, *A*, has a better title than *B*. However, there are some cases that, *if* the *Second View* is correct, might be relied upon as part of an argument from analogy. The argument runs thus: just as the defendants in *Butler v Hobson* and *Leake v Loveday* were able to avoid liability by establishing that the respective claimants were not truly entitled to the chattels, *D* in *Example 5.1* should be able to establish that *B* is not truly entitled to the violin because *A* has a better title to the ownership of it.

The cases, then, do not provide much support for the view that *D could* win by establishing that *A* has a better title than *B*. On the other hand, the cases do not clearly support the claim that *D could not* win by establishing that *A* has a better title than *B*.

[82] Accordingly, it should come as no surprise that Atiyah's account of the jus tertii doctrine, which regards it as a defence, is one that effectively endorses the AP Thesis (or a very similar thesis). Atiyah maintains that, in general, a person acquires, if and when he or she obtains possession of a chattel, a right to possess it that is not possession-dependent and that binds persons in general: Atiyah (n 71) 107.

Atiyah maintained that *Bridges v Hawkesworth* and *Hannah v Peel* support this claim.[83] But, as Baker has observed, 'no reliance on jus tertii was placed by the defendants in those cases, nor was it considered as a possible defence in the judgments.'[84] Moreover, in both of those cases the person with the 'better title' was unknown;[85] and it seems that, to rely on the jus tertii, a defendant must *identify* the holder of the better title. This point was made against Atiyah by Jolly,[86] and Baker, who accepts it,[87] has noted that it was also assented to by Holdsworth and is supported by the following statement of Lord Esher MR in *Rogers, Sons & Co v Lambert*: 'if a bailee defends in that way [ie by relying on the jus tertii], he must defend on behalf of a third party *whom he names*. It is not enough for him to allege the right of a third person; he must allege it and prove it.'[88] Professor Getzler has suggested that 'with the decision in *Costello*,'—which is discussed below—'Atiyah may finally now have the authority he needs ... to alert the textbook-writers of today to a possible need to rethink the distinction between actual possession and rights to possession in relation to the jus tertii defence.'[89] But if the point that Jolly advanced against Atiyah with respect to *Hannah v Peel* is sound, it applies also to *Costello*, for in *Costello*, too, the owner of the chattel was unknown.[90]

---

[83] *Bridges v Hawkesworth* (1851) 15 Jur 1079, 21 LJQB 75; *Hannah v Peel* [1945] KB 509 (KB). These cases are discussed below: text to n 111, n 117.

[84] Baker (n 59) 61.

[85] The same may be said in connection with *Parker v British Airways Board* [1982] QB 1004 (CA).

[86] Jolly (n 81) 373.

[87] Baker (n 59) 61–2.

[88] [1891] 1 QB 318 (CA) 324 (emphasis added).

[89] J Getzler, 'Unclean hands and the doctrine of *jus tertii*' (2001) 117 LQR 565, 570. For a discussion of *Costello*, see text to n 123.

In conclusion, the law in this context is unsettled. The point at the heart of the controversy—whether, in general, a defendant in a case that falls within Category 2 and in which the claimant was not in possession at the time of the alleged tort can avoid liability by establishing that a third party has (respectively) a better right to possession or a better title (claim) to the ownership—has not been decided.

ii. The Jus Tertii and the Second View

Now that we have considered the case law concerning the jus tertii, we are in a position to determine whether the common law rules concerning the jus tertii are compatible with the *Second View* of the doctrine of title by possession. It is argued that they are compatible.

As we have seen, where a claimant brings an action in respect of a tortious interference with a chattel, claiming the full value of it, and the claimant was in possession at the time of the defendant's potentially tortious interference, the claimant's action (other things being equal) is to succeed and the defendant cannot avoid liability by establishing that a third party has a better title. According to Toulson LJ, 'as a matter of policy the law will not allow a wrongdoer to enquire into the nature or limitation of the possessor's right.'[91] What is the policy behind the rule? In cases where the claimant had possession of a chattel at the time of the defendant's alleged tort, one reason that judges have given for the law's refusal to allow defendants to avoid liability by establishing a jus tertii has to do with the importance of protecting possession. The protection of possession, and ensuring the security of

[90] *Costello v Chief Constable of Derbyshire* [2001] EWCA Civ 381, [2001] 1 WLR 1437 (CA). Lightman J, giving the leading judgment, said: 'the police cannot identify any third party with a better title than the claimant' ([15]).

[91] *Allpress* (n 52) [76].

possession, is not regarded by the law as serving only the interests of possessors; it is regarded as also serving the interests of the community at large. In the seminal case of *Jeffries v Great Western Railway* Lord Campbell CJ, having asserted that, as against wrongdoers, possession is title, went on to say: 'I think it most reasonable law, and essential for the interests of society, that peaceable possession should not be disturbed by wrongdoers.'[92] The worry, it seems, is that to permit persons generally to disturb peaceable possession, without a good reason—and so to fail to provide sufficient legal protection for possessors—would be likely to 'lead to an undignified scramble for possession – might would be right';[93] 'chattels', as Donaldson LJ put it in *Parker v BAB,* 'would be subject to a free-for-all in which the physically weakest would go to the wall.'[94] One could debate whether that would be the case or not; but the important point for present purposes is that such reasoning is plainly compatible with the *Second View*.

Finally, it should be noted that the *Second View* is clearly compatible with the law established by the Torts (Interference with Goods) Act 1977. Section 8(1) of the Act provides that a defendant to an action for 'wrongful interference with goods'[95] is 'entitled to show, in accordance with rules of court,[96] that a third party has a better right than the plaintiff as respects all or any part of the interest claimed by the plaintiff, or in right of which he sues and any rule of law ... to the contrary is

[92] *Jeffries* (n 1) 805.

[93] Baker (n 59) 50.

[94] *Parker v British Airwards Board* [1982] QB 1004 (CA) 1009.

[95] Section 1 of the 1977 Act defines "wrongful interference" as '(a) conversion of goods (also called trover), (b) trespass to goods, (c) negligence so far as it results in damage to goods or to an interest in goods, (d) ... any other tort so far as it results in damage to goods or to an interest in goods.'

[96] CPR 19.5A.

abolished.'[97] The *Second View* fits well with the fact that a claimant's action will fail if a defendant successfully relies on the jus tertii in accordance with section 8(1). Of course, this does not *demonstrate* that the AP Thesis is false and the *Second View* is correct. The point is that a defendant's ability to escape liability in certain circumstances by relying on the jus tertii is easily explained, and makes perfect sense, if one accepts the *Second View*. The defendant, by establishing that a third party has a better title, shows that the claimant was not, in fact, the true legal owner.[98] His 'ownership' has been exposed for what it is: a fiction; and he has been exposed as someone who is not entitled to recover the full value of the chattel.

3. TITLE, POSSESSION AND ALIENABILITY

The discussion hitherto supports the claim that, with respect to chattels, a possessor acquires, by virtue of her possession, a right to possession and that, in addition, the possessor is to be deemed to be the owner as against a wrongdoer. To the extent that the cases support these propositions, they also support the *Second View* of the doctrine of title by possession. However, the *Second View* claims more than this. It will be recalled that, according to this view, the rights that a person acquires by taking possession are *possession-dependent and non-alienable*. Thus, on this view, the AP Thesis is false. It is argued in this section that the case law is not compatible with these claims. Rather, it supports the *Third View*, the view that a possessor acquires, simply by virtue of his possession, an interest that entitles him (inter alia) to possession, that is alienable, and that is not possession-dependent. We will first

[97] In order for the defendant to be able to rely on this provision, the third party must be identified: CPR 19.5A; *Costello* (n 90) [15] (Lightman J); and there is some support for the view that the third party must be joined: *de Franco v Commissioner of Police* (1987) Times Law Reports, May 8 (CA).

[98] The claimant might have a 'limited interest' in the chattel or no interest at all.

consider whether the interest that a possessor acquires is possession-dependent and then we will consider whether it is alienable.

A. Possession-dependence?

As we saw in Chapter 3,[99] a number of leading scholars have endorsed the view that the subsistence of a 'possessory title' is (in general) conditional on the title-holder being in possession of the thing.[100] For instance, Professor Sir Roy Goode QC has maintained that 'the holder of a purely possessory title loses his real right when he ceases to have possession';[101] 'only an indefeasible title ... survives the loss of possession'.[102] Similarly, Dr David Fox has argued that, subject to an important qualification, a possessory title lasts only so long as the possessor has possession.[103] The qualification is that a possessor has a good title as against a defendant deriving title from the original wrongdoer.[104]

On the other hand, some commentators have maintained that a person, *B*, acquires rights by taking possession of a chattel and these rights survive the loss of possession of that thing by the right-holder (*B*) and can be relied upon against persons

[99] Text to n 17 in Chapter 3.

[100] Discussions of this point are hindered by the ambiguity that surrounds 'possession' (Chapter 2, text to n 9). 'Possession' is used herein to refer to the possession described in Chapter 2, Section 2.

[101] E McKendrick (ed), *Goode on Commercial Law* (4th edn, Penguin 2010) 29. Goode maintains (at 46) that possession is 'control, directly or through another, either of the asset itself or of some larger object in which it is contained or of land or buildings on or beneath which it is situated, with the intention of asserting such control against others, whether temporarily or permanently.'

[102] Ibid 36.

[103] D Fox, 'Relativity of Title at Law and in Equity' (2006) 65 CLJ 330, 346ff. For a discussion of Fox's account, see text to n 53 in Chapter 3.

[104] Ibid. Cp. J Gordley and U Mattei, 'Protecting Possession' (1996) 44 Am J Comp Law 293, 327: 'In no case of which we are aware … has an English court allowed a prior possessor, on the strength of his prior possession alone, to recover against a later possessor who neither dispossessed him nor claims the land through someone who did.'

generally, not only those who derive title from a person who committed a wrong against *B* before *B* lost possession. Atiyah took this view:

> Possession itself, even wrongfully or feloniously acquired, confers a possessory title [i.e. a right to possession that binds persons generally]. This title avails against *all* later possessors even if they are not trespassers against the plaintiff. The whole law of possessory titles seem to be based on this assumption and it is ... inherent in the well-known cases of *Bridges v Hawkesworth* and *Hannah v Peel*.[105]

We can test the view that the title acquired by taking possession, if it is not the 'best title', is possession-dependent in the way described by Fox by considering cases in which the possession of a thing has *lawfully* passed to a party other than the title-holder and seeing whether or not the title-holder's inferior title has survived the transfer of possession to, or assumption of possession by, that other party. In applying that test, this sub-section is primarily concerned with two types of case. In the first the possessor *gives possession* of a chattel to another. In the second the chattel is *lawfully taken* from the possessor by another person but the taker's authority subsequently runs out. *Armory v Delamirie*, *Bridges v Hawkesworth*, and *Hannah v Peel* are examples of the first type of case. *Webb v Chief Constable of Merseyside Police* and *Costello v Chief Constable of Derbyshire Constabulary* are examples of the second type of case. The main conclusion of this sub-section is that these cases support Atiyah's view—a possessor acquires, by virtue of her possession, an interest in the chattel, including a right to possession and, whether it is the 'best title' or not, this interest is not possession-dependent and it does not bind *merely* 'wrongdoers' or persons who derive their title from a 'wrongdoer'; it binds all persons except those who have a better right.

[105] Atiyah (n 71) 107.

i. Delivery by Possessor

In *Armory v Delamirie*,[106] a chimneysweep's boy found a jewel which he took to the defendant goldsmith's shop in order to find out what it was. He handed it to an apprentice who, under the pretence of weighing it, took out the stones. The apprentice called to the master to let him know that it came to three halfpence and the master offered the boy the money. The boy refused to take it and insisted on having the thing back again. The apprentice delivered to the boy the socket without the stones. The boy later brought an action in trover against the master. Pratt CJ ruled that the 'finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner and consequently may maintain trover.'[107] The court decided that the boy could maintain trover—this, at least, cannot be disputed. But why did the boy succeed? In particular, did the Chief Justice think that the boy had a property right in the jewel? The matter is not as straightforward as it may seem. The statement that the boy did not have an 'absolute property' suggests that the 'property' that he had was 'special property', and a number of lawyers have maintained that 'special property' meant simply possession or lawful possession.[108] Now, whether that is correct or not, it does suggest that if one wants to claim that *Armory* supports the AP Thesis, one needs to consider the Chief Justice's use of the term 'property'. And if one does so, one will encounter the problem that the judgment is frustratingly short, with the result that one cannot know exactly *why* Pratt CJ thought that the boy had 'property'. The

[106] *Armory v Delamirie* (1722) 1 Stra 505; 93 ER 664.

[107] Ibid (emphasis added).

[108] O W Holmes, *The Common Law* (Little, Brown and Co 1881) 242: 'special property did not mean anything more' than possession; N Curwen, 'General and special property in goods' (2000) 20 LS 181, esp. 181–83.

basis of Pratt CJ's decision has been much debated.[109] The important point, for present purposes, is that *Armory* has been authoritatively interpreted as a case that held that possession is, or gives rise to, 'title' as against a wrongdoer.[110] Was the continued existence of the boy's 'property' dependent upon him remaining in possession? It was not, for he no longer had exclusive physical control at the time of the wrong. Indeed, his claim depended upon—and the violation of his right was constituted by—the fact that the goldsmith refused to relinquish physical control of the stones. In other words, the conversion, the wrongful act, did not take place until after the boy had given up his possession.

Atiyah, in taking the view that the possessor's title avails against *all* later possessors, relied upon two cases. The first is *Bridges v Hawkesworth*, in which the claimant noticed and picked up on the floor of the defendant's shop a parcel which was found to contain banknotes.[111] The claimant requested the defendant to keep the notes until 'the owner' claimed them. After three years no one had claimed the notes, and the claimant applied to the defendant for the return of the notes. When the defendant refused to return the notes, the claimant brought an action against him. At trial the judge decided in favour of the defendant, but found as a fact that the claimant, when he handed the notes over to the defendant, did not intend to divest

[109] Hickey has argued that 'the key to understanding the decision in *Armory* comes not from the report itself, but from the treatment of the case in contemporaneous legal materials' and that these materials, and other considerations, give us reason to believe that the case supports the proposition that 'trover was available, not on the basis of possession alone, but only where the possessor was recognized as being under some obligation to deal with the goods on behalf of someone else': Hickey (n 34) 133, 135. Cp. R Hickey, 'Possession as a Source of Property at Common Law' in E Descheemaeker (ed), *The Consequences of Possession* (Edinburgh UP 2014) 77, 79–81. It should be noted, however, that some earlier cases support the view that trover was available on the basis of possession alone. For example, in *Basset v Maynard* (n 6) 820 it was maintained that 'although the plaintiff had not a good title, yet his having possession of [the trees], being cut down, sufficeth'. In the modern law, possession is undoubtedly sufficient in conversion: n 1, n 5, n 7 and text thereto.

[110] *The Winkfield* (n 1) 55. Cp. *Sutton v Buck* (n 1) 309 (Lawrence J); *Bourne v Fosbrooke* (n 9) 525 (Erle CJ); *Eastern Construction* (n 37) 210.

[111] *Bridges v Hawkesworth* (1851) 15 Jur 1079, 21 LJQB 75.

himself of any title that he might have had to them. The Divisional Court allowed the claimant's appeal. Patteson J, delivering the judgment of the court, said:

> if [the claimant] once had the right, the case finds that he did not intend by delivering the notes to the defendant, to waive the title (if any) which he had to them, but they were handed to the defendant merely for the purpose of delivering them to the owner, should he appear.[112]

In passing the notes to the defendant, did the claimant part with possession? This question was not considered. The defendant did not contend that the claimant, by delivering the goods to him, had parted with possession and thereby lost his title; he contended that the circumstance of the notes being found in his shop gave him (the defendant) the right to have the notes as against the plaintiff who found them. The Court rejected this, concluding: 'We find ... no circumstances to take this case out of the general rule of law that the finder of a lost article is entitled to it as against all persons, except the real owner.'[113] On Atiyah's view, this result is easily explained. The claimant acquired a title to the notes when he took possession of them. The delivery of the notes to the defendant did not divest the claimant of that title. The defendant did not have a better title to the notes than the claimant, and therefore, the defendant was bound by the claimant's title. The claimant was entitled to have the notes returned to him and the defendant's failure to do so was, therefore, tortious.

Now, it could be argued that *Armory* and *Bridges* do not support the contention that a possessor's title is not possession-dependent because in both cases the claimants *were in possession* at the time of the tort.[114] However, in neither case

---

[112] (1851) 15 Jur 1079, 1082.

[113] Ibid. Cp. the discussion of the rule concerning objects on or in land in Chapter 2: text to n 85.

[114] Goode claims that, where one person is in possession under a bailment at will, possession (in law) is shared by those two persons: McKendrick (n 101) 47. If the refusal to return was the wrong, then Goode could maintain that, at the time of the wrong, the claimant/bailor was in possession. Cp. EH

were the claimants in exclusive physical control of the chattels at the relevant time. Alternatively, it might be argued that, due to the rule that a bailee is estopped from denying the title of his bailor,[115] the apprentice in *Armory* and the shopkeeper in *Bridges* could not deny that the claimants had a good title.[116] The problem with this argument, however, is nothing in the reports supports the claim that the decisions were based on an estoppel analysis.

The second case cited by Atiyah is *Hannah v Peel*.[117] In that case, the defendant had acquired the freehold of a house that he never occupied. The house was requisitioned, and the claimant, whilst stationed at the house in August 1940, found a brooch in the crevice of a window-frame. He took it and later handed it over to the police. In August 1942, the owner not having been found, the police handed the brooch to the defendant, who sold it in October 1942 for £66. In that same month, the claimant's solicitors demanded the return of the brooch from the defendant. He did not return it, and in October 1943 the claimant issued a writ claiming the return of the brooch or its value, and damages for detention. The claimant's counsel submitted that the claimant, as the finder of the brooch, was entitled to its possession as against all persons other than the true owner, who was unknown. Counsel for the defendant submitted that the defendant was entitled to the possession of the brooch because

---

Warren, 'Qualifying as Plaintiff in an Action for a Conversion' [1935–1936] 49 Harvard LR 1084, 1087.

[115] *Biddle v Bond* (n 59). In the modern law, however, the bailee can, in certain circumstances, deny the title of his bailor: Torts (Interference with Goods) Act 1977, section 8(1).

[116] It seems this would be Goode's view: McKendrick (n 101) 46, fn 123. Professor Palmer has said that the bailee's estoppel 'might also have been (but was not) applied in *Parker v British Airways Board* ... and in *Bridges v Hawkesworth*.... It seems also to afford an explanation for *Armory v Delamirie* itself': N Palmer 'Bad Applies and Blighted Windfalls: Finding, Bailment and the Fruits of Crime' in F Meisel and PJ Cook (eds), *Property and Protection* (Hart 2000) 1, 12. Cp. R Hickey (n 24) 112–18.

[117] *Hannah v Peel* [1945] KB 509 (KB).

when it was found it was on his land. Birkett J held that the claimant was entitled to the possession and awarded him damages of £66.

The issue of whether or not Mr Hannah was still in possession, even though he had handed the brooch to the police, who some years later delivered it to the defendant, was not discussed in argument, and it is not discussed in Birkett J's judgment. One might claim that the police merely detained the brooch, whilst possession remained with Mr Hannah (the claimant). However, Mr Hannah did not claim against the police; he claimed against Mr Peel, to whom the police had delivered the brooch. The claimant's solicitors had demanded the return of the brooch from Mr Peel, but he did not return it. This failure to return the brooch was the tortious act and it is clear that the claimant was not in possession of the brooch at the time of the failure to return. Thus, *Hannah v Peel* is a case in which a former possessor of goods, who was not the 'true owner' (ie the holder of the best title), was able to bring an action for wrongful detention of the goods at a time when he did not have possession of them. We have here a case in which the subsistence of a possessor's right to possession was *not* dependent upon the continuation of his possession. The view that the possessor's rights are not possession-dependent is also supported by cases involving the lawful taking of a chattel from another's possession, to which we now turn.

ii. Lawful Seizures

In *Webb v Chief Constable of Merseyside Police*,[118] Roy Webb claimed against the defendant Chief Constable the delivery up of £36,000, or damages for conversion in the same amount, plus exemplary damages and interest, in respect of the failure of the

[118] *Webb v Chief Constable of Merseyside Police* [2000] QB 427 (CA).

police officers employed by the defendant to return to him an equivalent sum previously taken by them from him and his brother. The police had lawfully seized the money on suspicion that it constituted the proceeds of drug trafficking. But Roy Webb and his brother were not prosecuted to conviction for drug trafficking offences. On the issue of entitlement to possession, the basis of the Chief Constable's case was that Roy Webb was not the true owner because the money was the proceeds of drug trafficking. The Court of Appeal rejected the Chief Constable's submissions on this point. May LJ considered the Chief Constable's contention, that the police were entitled to retain the money until the true owner was found, to be 'fanciful'. May LJ referred to the judgment of Macfarlan J in *Field v Sullivan*.[119] His Lordship summarised Macfarlan J's view thus:

> [I]f goods are in the possession of a person, on the face of it he has the right to that possession. His right to possess may be suspended or temporarily divested if the goods are seized by the police under lawful authority. If the police's right to retain the goods comes to an end, the right to possess of the person from whom they were seized revives. In the absence of any evidence that anybody else is the true owner, once the police right [*sic*] of retention comes to an end, the person from whom they were compulsorily taken is entitled to possession.[120]

May LJ stated that it was not in issue that, apart from drug dealing, Roy Webb was entitled to possession of the money. No one else claimed to be entitled to it. In particular, Roy Webb's brother had disclaimed any entitlement. The fact that the first instance judge had rejected Roy Webb's evidence as to how he acquired the cash was 'not in point' as Roy Webb 'did not have to establish where the money came

[119] [1923] VLR 70 (Supreme Court of Victoria) 84–87. In *Sullivan* the police had lawfully seized goods from a house that the claimant occupied on suspicion that they had been stolen. The claimant was discharged in subsequent criminal proceedings relating to the goods and she sought their return from the police. The claimant succeeded.

[120] *Webb* (n 118) 448.

from.'[121] Therefore, May LJ thought that there was no proper basis for remitting the question of entitlement to possession for further consideration. Pill LJ agreed. His Lordship said:

> [The Chief Constable] has no continuing right to retain the money in the face of a better claim by Roy Webb to possess it, notwithstanding the finding of the assistant recorder in the Webb action that, on the balance of probabilities, the money was the proceeds of dealing in drugs.[122]

Hale LJ agreed with the judgments of both Pill and May LJJ. Roy Webb's right to possess was one that survived the seizure of the money by the police. The police had custody of the money, and arguably possession. They refused to return it and that refusal was held to be wrongful: Roy Webb was entitled, as against the police, to possession. Assuming that the police, when they seized the notes, acquired possession of the notes, Roy Webb had a right to possess that survived his loss of possession. Was his title the best one? We do not know. But Webb did not need to establish that it was. He only had to show that he had a better right to possess than the defendant, the police, and he was able to do that by showing that he had possession of the money before the police seized it.

The *Webb* case was considered and relied upon by the Court of Appeal in *Costello*.[123] Mr Costello sued the police for conversion of a car. The police seized the car from Mr Costello when he was in possession of it. The police were entitled under section 22 of the Police and Criminal Evidence Act 1984 to retain the car for the statutory purposes until those purposes were exhausted. The question was whether they continued to be entitled to retain it thereafter. The police submitted: (1) that the

[121] Ibid.

[122] Ibid, 449–450.

[123] *Costello v Chief Constable of Derbyshire* [2001] EWCA Civ 381; [2001] 1 WLR 1437 (CA).

car was to the knowledge of the claimant stolen; and (2) that, on that ground, and though the true owner was not known, they (the police) were entitled to refuse to return the car to the claimant. At first instance, Judge Styler held that the car was to the knowledge of the claimant stolen and that this fact in law precluded the claimant from maintaining his claim to the car. In the Court of Appeal, Lightman J, in a judgment with which Robert Walker and Keene LJJ agreed, said that the judge was fully entitled to reach the conclusion that the car was to the knowledge of the claimant stolen; on the issue of fact, Judge Styler's decision was not open to question.[124] But, on the issue of law, that is, whether the claimant, who had possession of the car when it was seized by the police, was entitled to its return and damages for wrongful detention, the Court of Appeal disagreed with Judge Styler. Lightman J opined that '[t]he fact of possession of a chattel of itself gives to the possessor a possessory title and the possessor is entitled to rely on such title without reference to the circumstances in which such possession was obtained '.[125] And, although the police's statutory power to seize goods and retain them for as long as is necessary in all the circumstances 'places in suspension or temporarily divests all existing rights to possession over the period of the detention', it 'does not otherwise affect those rights or vest in the police any permanent entitlement to retain the property'.[126] As Mr Costello was in possession of the car when it was seized by the police, he had a possessory title to it and, given Lightman J's account of the law in the passages quoted, it would seem that, when the right of the police to retain the car expired, they could not lawfully refuse to return it to Mr Costello. But the police

[124] Ibid [8].

[125] Ibid, [14].

[126] Ibid.

sought to rely on two purported exceptions or qualifications, namely (1) that no title in stolen property vests in the thief or a subsequent receiver of stolen property, so that when the police seized the stolen property they became 'possessory owners' and therefore, though the police would be under an obligation to restore it to the 'true owner' if he is ascertained, they are not under an obligation to return it to the person from whom they seized it;[127] and (2) even if a possessory title vests in the thief or receiver of a stolen chattel, there are exceptions to the rule requiring it to be restored to the person 'entitled to a possessory title' and those exceptions extend to the restoration of the chattel to a thief or receiver.[128] Taking the second alleged exception first, Lightman J accepted that there are exceptions to the rule requiring goods to be restored to the person 'entitled to a possessory title'; but, in his view, such exceptions must be 'confined to cases where it would be unlawful for any reason for the police to transfer the property to the claimant or it would be unlawful for the claimant to be in possession of it.'[129] Lightman J also rejected the submission that no title in a stolen chattel vests in the thief or a subsequent receiver of it.[130] Accordingly, Lightman J concluded that the claimant was entitled to the return of the car at the time when the statutory purposes under which the police retained it were exhausted, and that he was entitled to an order for its delivery up and for damages for the wrongful failure to deliver it up to him since that time.[131]

[127] Ibid, [17].

[128] Ibid, [32].

[129] Ibid, [34]. E.g. where the claimant seeks to recover drugs that are 'controlled drugs' for the purposes of Section 2(1) of the Misuse of Drugs Act 1971.

[130] Ibid, [31].

[131] Ibid, [35].

Webb and *Costello* provide authority for the proposition that, where a person, *A*, is in possession of goods, and the police lawfully seize those goods and have a temporary right to retain them, *A* is entitled to possession of the goods when the police's right to retain them comes to an end.[132] After the police's right to retain the goods expired, Mr Webb and Mr Costello were *entitled to possession*; they had a right to possess, but they did not actually have possession. Indeed, their claims were based on the fact that the police had wrongly refused and were wrongly refusing to return the goods to them, that, in other words, the police had violated their entitlement or right to possess by detaining, in one case, the money and, in the other, the car. It is notable that in neither case was there any detailed argument or consideration as to whether Mr Webb or Mr Costello had possession of the goods after the police's right to retain them had expired. It seems that it was assumed on all sides that they did not or that it did not matter. The judgments in each case make it clear that Mr Webb and Mr Costello had a right to possession and that, by continuing to detain the goods, the police were wrongfully denying them possession. And it is equally clear that in order for Mr Webb and Mr Costello to prove an 'entitlement to possession', they only had to show that they had possession of the goods when they were (lawfully) seized by the police. These are cases, then, in which a claimant, by virtue of his former possession alone, had a right to possess goods that were being detained by the police. Furthermore, in *Costello* the judge found that the goods were stolen and, therefore, there was someone out there with a title to the goods that was better than Mr Costello's. Thus, Mr Costello did not have the best title to the car; but, nonetheless, by virtue of his former possession of the car, he had a right to possession.

[132] Cp. *Russell v Wilson* (1923) 33 CLR 538 (HCA) 546 (Isaacs and Rich JJ).

The foregoing discussion is in line with Park J's interpretation of *Webb* and *Costello* in *Gough v Chief Constable of the West Midlands Police*.[133] In a judgment with which Carnwath and Potter LJJ agreed, Park J said that some of the consequences of *Webb* and *Costello* are:

> [1] that if the police are holding property which they have seized from some other person who was *previously* in possession of it, they can only resist a civil claim by *the former possessor* for its return if they can identify a statutory power to retain it;[134] [2] that a civil claim by the *former possessor*, brought under the Torts (Interference with Goods) Act 1977 , is determined by common law principles deriving from the law of detinue and conversion, and thus rests on the *right of possession*; [3] that, if the police do not have a continuing statutory power or right to retain the property, *the former possessor's right of possession is superior to theirs*; and ... [4] that it is no defence for the police to argue that the former possessor, the claimant in the civil action, is not the true owner of the property.[135]

In *Gough* the police seized car parts from the claimant on suspicion that they were stolen. After the police had decided not to pursue criminal proceedings against the claimant they continued to detain some of the car parts. The claimant claimed the delivery up of the car parts and damages. At first instance, the judge held that the police were lawfully in possession of the goods so that the claim for damages failed. The Court of Appeal allowed the claimant's appeal. The court accepted the claimant's submission that, although the police were lawfully entitled to take possession of the goods, their entitlement to retain possession had expired long ago.

According to Fox, a person who has a lesser title can enforce it "only against third parties who wrongfully dispossess him of the chattel or who derive title through such a person."[136] With respect, this cannot be right. In *Costello* (as in *Webb* and

---

[133] *Gough v Chief Constable of the West Midlands Police* [2004] EWCA Civ 206, [2004] Po LR 164.

[134] Although note that, as aforesaid, there are exceptions to this rule.

[135] *Gough* (n 133) [15] (emphases added).

[136] Fox (n 103) 348.

Gough) the seizure of the goods was *lawful*. And, as aforesaid, it was taken for granted that Mr Costello lost possession of the goods when the police seized them. In *Gough*, Park J said that the police, having seized the goods, were in possession of them.[137] In these cases, then, the claimants were lawfully divested of possession. In each case, the defendant's wrong consisted in a refusal to return the goods when its right to retain them had expired—at a time, that is, when the police, and not the claimant, had possession of the goods. *Contra* Goode, the police did *not* unlawfully divest Mr Costello of possession; they *lawfully* divested him of possession. The wrong came later, when, after their right to retain the car expired, they continued to detain and refused to return the car in violation of Mr Costello's right to possess.

It is true, however, that Lightman J, in stating the legal position at the time when the police's right to retain the goods had expired, asserts that Mr Costello is 'entitled to possession'[138] and, in other places, that he is 'entitled to a possessory title.'[139] Depending on how the term 'possessory title' is interpreted, this might suggest that, in his Lordship's view, possessory title *is* dependent upon possession. Now one might say that 'possessory title' means 'the title of a person in possession' so that, by definition, one cannot have a possessory title unless one has possession. If that is what the term means, then of course a person does not have a 'possessory title' to a thing unless he possesses it. Perhaps this is what Lightman J meant. But this does not negate the important point that Mr Costello had a right to possession that outlived his possession. If Mr Costello's right was sufficient to found an action for tortious interference with chattels against the police then, so long as he had that right, it would

[137] *Gough* (n 133) [6], [9]; but the point was not in issue.

[138] *Costello* (n 123) [34], [35].

[139] Ibid, [32].

have enabled him to bring such an action against anyone else who did an act that, as against a person with such a right, would be a wrongful act. Thus, Mr Costello had, at a time when the police were in possession of the car, a right that persons generally do not commit such an act. And that right was not lost when Mr Costello lost possession: Mr Costello, like Mr Webb and Mr Gough, had, after he was lawfully divested of possession, a right to possess in respect of the thing that bound persons in general.

Further support can be derived from the case of *R v D'Eyncourt and Ryan*.[140] In that case, the police took possession of £108 from an accused person (one Mary Ryan) as money obtained by false pretences, but only £8 was "charged". The magistrate ordered the police to deliver the balance of £100. The question was whether the magistrate had jurisdiction under the Metropolitan Police Courts Act 1839 to direct the delivery of chattels which were seized by the police but which were not the subject of any charge to the person from whom they were seized. The court held that the magistrate had no jurisdiction under the Act to make any order in relation to goods that were not charged. Wills J added: 'As to the [£100] now in the hands of the police authorities, it seems clear, upon the facts stated to us, that it ought to be given up to Mary Ryan; and it is clear that *the possession she once had* would give her *the right to recover the money from any one who could not shew a better title*.'[141]

There are two cases that may provide some support for the view that a possessor's rights are possession-dependent. In *Buckley v Gross*[142] the claimant had purchased some tallow from a purchaser who had taken it after it had flowed into a river. The police took it from the claimant and he was charged before a magistrate.

[140] *R v D'Eyncourt and Ryan* (1888) LR 21 QBD 109 (QB).

[141] Ibid, 125 (emphases added).

[142] (1863) 3 B&S 566, 122 ER 213.

The magistrate dismissed the charge against him, but ordered the tallow to be detained under the Metropolitan Police Courts Act 1839. Section 29 of that Act provided that, if 'the owner cannot be ascertained', the magistrate could lawfully 'make such order with respect to such goods or money as to such magistrate shall seem meet'. Section 30 provided that, if a magistrate ordered goods to be delivered to the receiver of the metropolitan police force, 'it shall be lawful for the receiver, after the expiration of twelve calendar months, during which no owner shall have appeared to claim the same, to sell' the goods. The tallow was detained by the police, but it became a nuisance and the police sold it to the defendants before the twelve months had expired. The defendants refused to deliver the tallow to the claimant on his demand, and the claimant brought an action in conversion. The claimant's action failed: it was held that he had no property at the time of the alleged conversion. The reports of the judgments vary in such a manner as to cast doubt upon the reliability of the various reports.[143] According to Best and Smith's Report, Crompton J maintained that '[t]his action must be founded on possession; here the possession was divested out of the plaintiff.'[144] One interpretation of Crompton J's view is that the rights that are acquired by virtue of taking possession are lost if and when the possessor loses possession. However, it should be recalled that in *Buckley v Gross* the magistrate had made an order under s29 of the 1839 Act. For Cockburn CJ this was crucial:

> it appears to me plain that, by virtue of the authority vested in him by the statute, an order was made by the justice, within the scope of his authority and jurisdiction, with respect to dealing with this tallow, and whether the police were or were not warranted in selling it within twelve months is immaterial. The plaintiff, who had nothing but bare naked possession (which would have been sufficient against a wrongdoer) had it taken out of him *by virtue of [the magistrate's] enactment*.[145]

[143] Cp. *Costello* (n 123) [22] (Lightman J).

[144] *Buckley v Gross* (1863) 3 B&S 566, 573; 122 ER 213, 216.

Thus, according to the Chief Justice, the claimant's rights were extinguished, not by virtue of the fact that the police had seized and thereby taken possession of the tallow from the claimant, but by virtue of the magistrate's order under the statute. Subsequent cases support Cockburn CJ's view. In *Betts v Metropolitan Police* the police had taken from the claimant's house certain cloth, which they believed to have been stolen from a firm of carriers, Carter Paterson.[146] The police delivered the cloth to Carter Paterson, although no order had been made by a magistrate under section 1 of the Police Property Act 1897 (which is materially the same as section 29 of the 1839 Act). The claimant brought an action against Carter Paterson (as well as the Receiver) claiming damages in detinue and conversion and du Parcq J held that, as the defendants had failed to establish that the cloth in question was stolen from Carter Paterson and as the delivery had been made *without any order under the Act*, the claimant's action against Carter Paterson was entitled to succeed.

Moreover, Cockburn CJ's reasoning in *Buckley v Gross* was adopted and applied by the Court of Appeal in *Irving v National Provincial Bank Ltd*.[147] In *Irving*, a magistrate made an order under s1 of the Police (Property) Act 1897 for the delivery of money to the defendant. The money had been taken from the claimant by the police when he was arrested on suspicion of breaking and entering. The claimant later claimed the money from the defendant bank. The Court of Appeal upheld the county court judge's decision rejecting that claim: it was held that the effect of the order under s1 of the 1897 Act was to divest the claimant of any possessory title he

---

[145] (1863) 3 B&S 566, 572; 122 ER 213, 215 (emphasis added). Cp. the discussion above of *Leake v Loveday*: text to n 73.

[146] [1932] 2 KB 595 (KB).

[147] [1962] 2 QB 73 (CA).

might have had. Holroyd Pearce LJ said that the Act 'could have preserved the prior rights of possession in the former possessor. But it has not done so'. This case does not only support the view that, in *Buckley*, the claimant's rights were extinguished, not by virtue of the fact that the police had seized and thereby taken possession of the tallow from the claimant, but by virtue of the magistrate's order under the statute. It also supports the more general argument advanced in this sub-section: if loss of possession itself extinguishes a possessor's rights then their Lordship's reasoning would have been superfluous. For there would have been no need to determine whether the magistrate's order extinguished the claimant's rights. It appears that their Lordships thought that the claimant would *not* have lost his rights had the order not been made, notwithstanding the fact that the claimant had lost possession of the money. It was the magistrate's order, not the claimant's loss of possession, that extinguished the claimant's rights.[148]

Is the proposition that the foregoing discussion supports—that a possessor of goods has a right to possession that, in general, survives the loss of possession—confined to the special context of these cases, that is, cases in which the police have lawfully seized goods from a possessor? Or is the principle a more general one? If the analysis of *Hannah v Peel* above is correct, there is a good case to be made for the view that *Webb* and *Costello* involve the application of a general principle to cases in which the police seized and retained goods pursuant to statutory powers that gave

[148] In *R v Lushington* [1894] 1 QB 420 (DC) Wright J, in a judgment with which Kennedy J concurred, relied upon *Buckley v Gross* to support a slightly broader proposition of law. In *Lushington,* the claimant's goods were produced at a magistrate's hearing under a *subpoena duces tecum* and, later, the claimant sought an order directing the magistrate to deliver the goods to him. The court refused to make the order. One ground for the decision was that the claimant's possessory title had been 'lawfully divested by reason of the goods passing out of his possession under the direction of the Court' ([1894] 1 QB 420 (DC) 424–5). But this case does not provide any support for the claim that a possessor's rights are extinguished whenever the title-holder (and, where his transferor is still in possession, the transferor) loses possession; it only supports the more limited claim that a possessory title is lost where the title-holder loses possession *under the direction of a court*. It is doubtful that even this narrower claim can be maintained following *Costello* and *Irving*.

them a temporary right to retain the goods. The general principle is this: a possessor of goods acquires, simply by virtue of his possession, an interest that comprises (inter alia) a right to possess the goods that binds persons in general and which is not conditional upon the right-holder being in possession.

iii. Possession-dependence: Conclusions

It should now be clear that the interest that is acquired by taking possession, even if it is not the 'best title', binds persons generally and is *not* extinguished if and when possession is lost. The case law supports the view that, in general, a person who takes possession of a chattel acquires an interest that comprises (inter alia) a right to possession that binds persons generally, and a person with such a right will not necessarily be divested of it if and when he loses possession of the chattel.

B. Title by Possession and Alienability

It was argued in Chapter 4 that a person acquires an alienable interest by taking possession of land. It is argued in this sub-section that, similarly, a person who obtains possession of a chattel thereby acquires an alienable interest. We will focus on the law of sale. For the case law and legislation concerning the sale of goods make it clear that, when a person obtains possession of a chattel, she thereby acquires an interest that she can alienate by way of sale. This is consistent with the *Third View*.

Section 2 of the Sale of Goods Act 1979 defines three of the law of sale's key terms: 'contract of sale', 'sale', and 'agreement to sell'. A 'contract of sale' is, according to section 2(1), 'a contract by which the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price.'[149]

[149] Cp. the Consumer Rights Act 2015, s 5.

A ‘contract of sale’ is either a ‘sale’ or an ‘agreement to sell’: it is a ‘sale’ if, under the contract of sale, ‘the property in the goods is transferred from the seller to the buyer’;[150] it is an ‘agreement to sell’ if, under the contract of sale, ‘the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled’.[151] An agreement to sell ‘becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred’.[152] Thus, a ‘sale’ involves not only a contract but a transfer or conveyance of the ‘property’ in the goods.[153]

What does the term ‘property’ in these provisions mean? The Act defines ‘property’ as ‘the general property in goods, and not merely a special property.’[154] One view is that ‘the general property in goods’ means ‘the true ownership of goods’ or ‘the best title to the ownership of goods’. It is arguable that Atkin LJ’s judgment in *Rowland v Divall* supports this view.[155] For his Lordship maintained there that ‘[t]here can be no sale at all of goods which the seller has no right to sell.’[156]

---

[150] Sale of Goods Act 1979 (SGA 1979) s 2(4).

[151] SGA 1979, s 2(5).

[152] SGA 1979, s 2(6).

[153] M Bridge (ed), *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) 1-027; *Colley v Overseas Exporters* [1921] 3 KB 302 (KB) 310 (McCardie J).

[154] SGA 1979, s 61(1). Cp. the Consumer Rights Act 2015, s4(1).

[155] *Rowland v Divall* [1923] 2 KB 500 (CA). In *Rowland* the claimant had taken possession of a car that he had bought from the defendant and used it for several months. It came to light that the car was stolen by the person from whom the defendant had purchased the car. The claimant brought an action to recover the price he had paid. The Court of Appeal held that the claimant was entitled to recover the price as the consideration had totally failed. For an illuminating discussion of the case, see G Battersby and AD Preston, ‘The Concepts of “Property,” “Title” and “Owner” Used in the Sale of Goods Act 1893’ (1972) 35 MLR 268, esp. 272–75.

[156] *Rowland v Divall* [1923] 2 KB 500 (CA) 506. But see Tiplady (1988) 51 MLR 240, 243: ‘Atkin LJ, while addressing himself to the basic purpose of a contract of sale, was simply indicating that, generally speaking, this purpose cannot be achieved if the seller is not entitled to pass property. He did not suggest—indeed it would have been preposterous to have done so—that an agreement in which this right or power is lacking could not be a sale. If that conclusion had followed, there would have

Battersby and Preston have advanced a very convincing argument against that view;[157] and this argument has been endorsed, and lucidly described, by Professor Sir Roy Goode.[158] Accordingly, it will suffice here to briefly outline some of the key points. In the first place, if 'the general property' means 'the best title' then there could never be a breach of the implied undertaking as to title in section 12 of the Act; 'section 12 becomes redundant.'[159] The implied term, in the case of a sale (as opposed to 'an agreement to sell'), is that the seller has 'a right to sell the goods' and, as Goode has rightly said,

> [i]f every sale by definition involves a transfer of the best title, then the implied condition can never become operative on a sale; for if the seller *has* the best title, the implied condition is redundant; and if he has not, then *ex hypothesi* the purported transfer is not a sale and s 12(1) does not apply.[160]

Secondly, section 5(1) provides that '[t]he goods which form the subject of a contract of sale may be either existing goods, owned *or possessed* by the seller, or . . . future goods'.[161] Thirdly, section 55 provides that the parties may 'negative or vary' any 'right, duty or liability' arising under a contract of sale of goods by implication of law; and the view that a sale necessarily involves the transfer of a best title 'requires us to read into section 55 an exception in favour of section 12.'[162] Fourthly, sections

---

been no room for discussion regarding section 11 and section 12 of the Sale of Goods Act, around which the judgments in *Rowland v Divall* in fact turned.'

[157] G Battersby and A D Preston, 'The Concepts of "Property," "Title" and "Owner" Used in the Sale of Goods Act 1893' (1972) 35 MLR 268.

[158] McKendrick (n 101) 218–220. Battersby and Preston's reference to 'a possessory title to an absolute interest' and Goode's account of 'possessory title to legal ownership' and 'best title to legal ownership' are discussed below: text to n 185.

[159] Battersby and Preston (n 157) 274.

[160] McKendrick (n 101) 219.

[161] SGA 1979, s 5(1) (emphasis added). Cp. Battersby and Preston (n 157) 274.

[162] Battersby and Preston (n 157) 274.

24 and 25 of the Act enable a person who does not have the best title, by delivering goods '*under any sale*', to pass a title that is better than his; and these provisions would not make sense if there could not be a sale of a lesser title.[163]

There are three conclusions to be drawn. First, the term 'property' in Section 2 of the Sale of Goods Act does not mean 'the best title to legal ownership'. Secondly, 'titles' that are not the best—what we might call 'inferior general property interests'—count as 'property' for the purposes of the provisions of the Sale of Goods Act. Thirdly, such an interest may be transferred by way of sale.

These conclusions are supported by the case law. In *National Employers' Mutual General Insurance Association Ltd v Jones*, for instance, the House of Lords implicitly accepted that a possessor acquires, by virtue of her possession, an interest that can be transferred by way of sale.[164] In *Jones* a car had been stolen from a Ms Hopkins and purportedly sold by the thief to one Lacey. Thereafter, it was (purportedly) sold a number of times before being (purportedly) sold by a company ('M Ltd') to the defendant, who bought it in good faith. Ms Hopkins' insurers, who had bought out her interest, asked the defendant to return the car and, when the defendant refused to do so, they brought an action against him, claiming delivery up of the car or, alternatively, damages. The defendant, relying on section 9 of the Factors Act 1889 and section 25(1) of the Sale of Goods Act 1979, submitted that he had acquired a good title to the car. Section 25(1) of the 1979 Act (which is substantially the same as section 9 of the 1889 Act) provides that, where a person has bought or agreed to buy goods and obtains, with the consent of the seller, possession of the goods, 'the delivery or transfer by that person ... of the goods ... under any sale, pledged or other disposition thereof' to a bona fide third party 'shall have the same

[163] McKendrick (n 101) 219.

[164] [1990] 1 AC 24 (HL).

effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods with the consent of the owner.' The defendant submitted that, as M Ltd had purchased the car from A Ltd and M Ltd had obtained, with the consent of A Ltd, possession of the car, the delivery of the car under a sale to the defendant, who was in good faith, had the same effect *as if* M Ltd were a mercantile agent in possession of the goods with the consent of 'the owner', i.e. Ms Hopkins; and that, therefore, the defendant took a good title to the car as against her and her insurers. The House of Lords rejected this analysis and, in particular, the submission that term 'the owner' in Section 9 of the 1889 Act and Section 25(1) of the 1979 Act meant 'the true owner'. Rather, the effect of these provisions was to divest the title of the person who had entrusted the factor or agent with the goods or documents and, therefore, the provisions did not enable a bona fide purchase for value to override the title of a person from whom goods had been stolen where the factor or agent had been entrusted with the goods or documents by a thief (or a purchaser from a thief).

How does the reasoning of the House of Lords support the three conclusions outlined above? Well, if the thief and his successors in title did not have a general property interest in the goods, section 9 of the 1989 Act and section 25(1) of the 1979 Act would *not have applied at all*. For, as Battersby has pointed out, these provisions 'can be invoked only where the subsequent transaction is a sale, i.e. brings about the transfer of the seller's property in the goods to the buyer. If the seller has no property at all, the transaction cannot be a sale'.[165] Therefore, their Lordships implicitly accepted that the thief had acquired 'property' in the car and that this interest was ultimately transferred to the defendant;[166] and the thief must have acquired that

[165] G Battersby, 'Acquiring Title by Theft' (2002) 65 MLR 603, 605. Cp. *National Employers' Mutual General Insurance Association Ltd v Jones* [1990] 1 AC 24 (CA) 50 (Sir Denys Buckley).

[166] Cp. Battersby (n 165) 605.

interest upon taking possession. Thus, the decision of the House of Lords supports the view that a possessor acquires an interest—a 'general property interest'—that, whether or not it is the 'best' such interest, counts as 'property' for the purposes of Section 2 of the Sale of Goods Act and which can be transferred by way of sale.

4. THE *SECOND VIEW* AND THE *THIRD VIEW*: AN APPRAISAL

The discussion in Section 3 supports the claim that a person acquires, upon taking possession of a chattel, a 'title' that is alienable and not possession-dependent. It would seem that the conclusion to be drawn is that the *Third View* of the doctrine of title by possession is correct; and that the *Second View*, like the *First View*, is erroneous and ought to be rejected.

It could be argued, however, that the true lesson to be learnt from the discussion in Section 3 is *not* that a possessor acquires a 'general property interest', an interest that can be alienated, that is not possession-dependent and which entitles its holder to possession; but, rather that the possessor acquires *a legally recognised claim to the legal ownership* that is alienable and not possession-dependent and is, accordingly, *to be treated as though he were the true owner* as against a person who does not have a better title. This argument seeks to save the *Second View* by extending the scope of the deemed ownership doctrine in order to accommodate the case law discussed in Section 3. As the argument extends the scope of the deemed ownership doctrine, it will be referred to as 'the broad version of the *Second View*'. It is not unimportant that, according to this version, the distance between the *Second View* and the *Third View* is very small indeed: according to the latter, the possessor actually acquires what we have called a 'general property interest', an interest that is alienable and not possession-dependent; and, according to the former, while the

possessor does not *actually acquire* such an interest, she is to be presumed to have full legal ownership as against persons generally and her *claim* to the ownership is alienable and not possession-dependent.

Two objections can be advanced against the broad version of the *Second View*. In the first place, the case law discussed in Section 3 indicates that a possessor *actually acquires* a general property interest, which comprises a right to possession and is not possession-dependent. In the second place, the case law concerning deemed ownership, which was discussed in Section 2, does *not* support the broad version of the *Second View*.

A. The First Objection

It is clear from the judgments in a number of cases that the judges' reasoning did not involve the proposition that the claimant is to be *presumed* to be the true owner because he has established that he was formerly in possession; it involved, rather, the proposition that the claimant acquired an interest, including a right to possession, when she obtained possession and that, accordingly, the claimant was entitled to possession as against everyone except a person with a better right (provided she has not been divested of that interest). In *Bridges v Hawkesworth*, for instance, Patteson J, giving the judgment of the Queen's Bench, maintained that a 'finder' who had taken possession of bank notes had acquired a 'right' to them 'as against all the world, except the true owner'.[167] Similarly, in *Parker v British Airways Board* Donaldson LJ maintained that 'a finder of a chattel, whilst not acquiring any absolute property or ownership in the chattel, acquires a *right to keep it* against all but the true owner or those in a position to claim through the true owner or one who can assert a prior right

[167] *Bridges v Hawkesworth* (1851) 15 Jur 1079, 1082 (emphasis added).

to keep the chattel'.[168] In *R v D'Eyncourt and Ryan*, in which the police had seized money when Ryan was in possession of it, Wills J asserted: 'it is clear that the possession [Ryan] once had would give her *the right to recover* the money from any one who could not shew a better title.'[169] Similarly, in *Gough v Chief Constable of the West Midlands Police* Park J, in a judgment with which Carnwath and Potter LJJ agreed, maintained that 'if the police do not have a continuing statutory power or right to retain the property, the *former possessor's right of possession* is superior to theirs.' [170]

B. The Second Objection

The reasoning in *Jeffries v Great Western Railway* and *The Winkfield*, which, as we saw in Section 2, supports the DO Thesis, does not support the broad version of the *Second View* that we are currently discussing. A central aspect of the reasoning in those cases is that a claimant is to be treated as the true owner as against a person who interferes with a thing *in the claimant's possession* because, in the words of Lord Campbell CJ, it is 'essential for the interests of society that peaceable possession should not be disturbed by wrongdoers'.[171] Yet, in many of the cases discussed in sub-section A of Section 3, it was held that a claimant who had *formerly* been in possession of a chattel was entitled to possession as against a defendant who had *not* unlawfully interfered with a thing in the claimant's possession—a defendant who was *not a 'wrongdoer'*. The reasoning in *Jeffries* and *The Winkfield* does not support the application of the deemed ownership rule in such cases.

[168] *Parker v British Airways* (n 94) 1017 (emphasis added).

[169] *R v D'Eyncourt and Ryan* (n 140) 125 (emphasis added).

[170] *Gough* (n 133) [15] (emphasis added).

[171] *Jeffries* (n 1) 805.

Now, one might say in response to this that we must keep in mind certain other reasons for treating persons who have or had possession as though they were owners, reasons that concern our knowledge deficit and the difficulty and costs of proving ownership. After all, the history of most chattels is not only unknown, or only partially known, but, to some extent at least, unknowable; and since whether or not someone has a property right in law partly depends on *what has happened*, our lack of knowledge is likely to make an assessment of the legal position difficult. It seems that it must frequently be the case that all a claimant to an action concerning a tortious interference with a chattels can establish with certainty is that a chattel was in his or her possession at some point in the past (or in the possession of his or her predecessor in title). Allowing claimants to such actions to succeed, subject to certain conditions and qualifications, by establishing that they were in possession makes it possible for more claimants who actually have a proprietary interest in a chattel to obtain a remedy from a person who has tortiously interfered with their goods.[172] Moreover, in a society in which most people generally abide by the law, and in which things are typically in the possession of their owners, it is reasonable to presume, in the first instance at least, that a possessor of a chattel is its owner.[173] And since, even if the history of a chattel is known and provable, it may be difficult and costly to prove it, it is convenient to allow claimants to rely simply on the fact that they had possession.

[172] Cp. *Chambers v Donaldson* (1809) 11 East 65, 76; 103 ER 929, 933 (Le Blanc J). The German jurist, Rudolf von Jhering, argued that Roman law protected possessors for a similar reason: H Bond, 'Possession in the Roman Law' (1890) 6 LQR 259, 260–5.

[173] Pollock thought that, 'for the very reason that possession in fact is the visible exercise of ownership, the fact of possession, so long as it is not otherwise explained, tends to show that the possessor is owner': Pollock and Wright (n 24) 25.

However, even if one assumes that these are, or should be, grounds of the doctrine of deemed ownership, these considerations do *not* support the application of that doctrine in cases such as *Costello* in which a claimant who had been in possession of a thing was held to be entitled to succeed as against a defendant who was not a wrongdoer *even though it was clear that the claimant was not the true owner* (the holder of the best title). It will be recalled that, in *Costello*, the Court of Appeal accepted that Mr Costello was not 'the owner' of the car, that there was someone out there with a title to the car that was better than Mr Costello's. But Mr Costello's action against the police succeeded nonetheless.

Now, one could reject *Costello*. One could claim that *Costello* was wrongly decided because the court did not appreciate the proper limits of the doctrine of deemed ownership. The problem with this response to *Costello* is there are many cases that support the claim that, in an action for tortious interference with goods, the claimant is entitled to succeed if he proves that, at some point in the past, he was in possession, notwithstanding (1) the defendant is not a 'wrongdoer'; and (2) it is clear that the claimant is not the true owner.[174] These cases, as we have seen, support the claim that a person actually acquires, simply by virtue of her possession of a chattel, an *interest* in the chattel that is not possession-dependent and that comprises (inter alia) a right to possession which can be asserted against a person who is not a 'wrongdoer' even when it is clear that the right-holder is not the 'true owner'. If this is right, the *Second View*, which maintains that the AP Thesis is false, cannot be correct.

[174] E.g. *Bridges v Hawkesworth* (n 111); *Buckley v Gross* (n 1); *Hannah v Peel* (n 117); *Parker v British Airways Board* (n 94); *Webb v Chief Constable* (n 118); *Gough v Chief Constable* (n 133).

C. The *Second View* and the *Third View*: Conclusions

It was argued in Section 3 that a person acquires, by obtaining possession of a chattel, a title that can be alienated and is not possession-dependent. We have considered in this section the claim that this conclusion does not necessarily undermine the *Second View*, which asserts that a possessor acquires a (possession-dependent and inalienable) right to possession and a title (claim) to the legal ownership. For a supporter of that view might maintain that the title to legal ownership is itself alienable and not possession-dependent. However, it has been argued that this broad version of the *Second View* is incompatible with the case law and that the better view is that in English law, a person acquires, upon taking possession of a chattel, an interest—'a general property interest'—that is not possession-dependent, that comprises a right to possession and a right to exclude, and that is alienable; and that, therefore, the *Third View* is correct but the *Second View*, like the *First View*, is erroneous and ought to be rejected.

What does this conclusion mean for the case law concerning deemed ownership that was discussed in Section 2? Those cases support two main propositions: (1) if the claimant was in possession of a chattel at the time of the alleged tort, the claimant is to be deemed to be the true owner of the chattel and (thus) entitled to recover full damages; and (2) if the claimant was in possession at the time of the alleged tort, the defendant cannot avoid liability entirely, or reduce the extent of his liability, by establishing that a third party has a better title. Are these propositions compatible with the *Third View*?

As to proposition (1), one might, as we saw in Chapter 3, claim that the *Third View* is correct *and* that the DO Thesis is correct; a possessor, one might say, acquires an interest in the chattel *and* is to be deemed to be the true owner (and thus the holder

of the best title). This is arguably Professor Sheehan's view.[175] According to Sheehan, '[p]ossession generates a rebuttable presumption of ownership, *and also* a relative legal title to the asset'.[176] Similarly, Professor Chambers, writing about the Australian common law, asserts (a) possession 'is itself a property right'; (b) 'possession of a thing can generate a separate right to possession'; and (c) 'possession provides evidence of ownership'.[177] These statements give rise to a question as to *when it is necessary* for a claimant to establish that she is the true owner. One might claim (in line with proposition (1)) that, where a possessor is deprived of the chattel by a tortfeasor, the possessor must establish that he is the true owner (e.g. by relying on the presumption of ownership) in order to recover the full value of the chattel. Since, however, the possessor actually acquires, by virtue of his possession, a general property interest, it seems there is no need to *presume* that she is the 'true owner' (i.e. the holder of the best title) in order for her to recover the full value of the chattel from a person who does not have a better right. For a person who has a right to possession is entitled to recover the full value. This was Salmond's view.[178] And, although the Law Reform Committee doubted whether it was correct,[179] it was affirmed by the Privy Council in *The Jag Shakti*.[180] Lord Brandon, giving the judgment of their Lordships, maintained that

[175] D Sheehan, *The Principles of Personal Property Law* (Hart 2011) 13.

[176] Ibid.

[177] Chambers (n 58) para 6.25.

[178] Salmond (n 64) 327–330.

[179] Law Reform Committee (n 65) para 55.

[180] *The Jag Shakti* (n 37). For a detailed and critical discussion of the case, see N Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell 2009) 4-123–4-133. Palmer's discussion may well be premised, in effect, on the view that the DO Thesis is true and the AP Thesis is false.

> where one person, A, who has *or is entitled to* have possession of goods, is deprived of such possession by the tortious conduct of another person, B, whether such conduct consists in conversion or negligence, the proper measure in law of the damages recoverable by A from B is the full market value of the goods at the time when and the place where possession of them should have been given.[181]

Accordingly, if a person, *A*, acquires possession of a chattel and it is thereafter taken and appropriated by a person, *B*, who does not have a better right, *A* would be entitled to recover, in an action for tortious interference, the full value of the chattel *by virtue of her general property interest*, which comprises a right to possession; and this would be so even if her general property interest is inferior, that is to say, even if someone else has a general property interest that is better (because older) than hers. Therefore, there is *no need* for the possessor to rely upon the presumption of ownership in this context and, insofar as it relies upon that presumption, the reasoning in *Jeffries* and *The Winkfield* must be amended.

As to proposition (2), this is perfectly compatible with the *Third View*, although, as we have seen, Section 8 of the Torts (Interference with Goods) Act 1977 modified the rule that was applied in *Jeffries* and *The Winkfield*. When we discussed the jus tertii in Section 2 we left open the question as to whether the effect of successfully establishing that a third party has a better title than the claimant is that the basis of the claimant's claim is removed or whether it operates as a defence. Now that we have concluded that the *Third View* of the doctrine of title by possession is correct, we are in a position to answer that question: in such circumstances, the jus tertii is a defence (in the sense described in Section 2).

[181] *The Jag Shakti* (n 37) 345 (emphasis added). Cp. *Minichiello v Devonshire Hotel* (1977) 79 DLR (3d) 656 (Rae J) affirmed [1978] 4 WWR 539 (British Columbia Court of Appeal); *Smith Kline and French Laboratories Ltd v Long* [1988] 3 All ER 887 (CA) 893 (Slade LJ).

5. THE NATURE OF THE INTEREST

We have concluded that the *Third View* of the doctrine of title by possession is, insofar as chattels are concerned, correct and that a possessor actually acquires, upon taking possession of a chattel, an alienable interest that entitles him to possession. As Hickey has maintained, it is reasonable to refer to this interest as a 'general property interest'.[182] This is the language used in the Sale of Goods Act and it signifies that the interest can be transferred by way of sale and is not a lesser (or 'special') proprietary interest.[183]

Where there is more than one general property interest in a particular chattel, the general rule is: *prior in tempore potior in iure*: first in time, greater in law. Thus, the priority of the interests is to be determined by reference to the points in time at which the interests arose. The older the interest, the better. Accordingly, the *oldest* interest takes priority over all later interests and can thus be described as 'supreme'. All other general property interests in the chattel are inferior to this one.

The interest that is acquired by taking possession, if it is not supreme, is often described as a 'possessory title'.[184] For instance, Battersby and Preston, in their influential article, maintain that, where, say, *A* is the true owner of a chattel and *B* unlawfully takes possession of it, *B* has a 'possessory title to an absolute interest' in the chattel.[185] Similarly, Goode would say that *A* has the 'best title to the ownership interest' and *B* has a 'possessory title to the ownership interest' in the chattel.[186]

---

[182] Hickey (n 24) 166–68.

[183] SGA 1979, s 61(1). Cp. *Sewell v Burdick* (1884) 10 App Cas 74 (HL) 92–93 (Lord Blackburn). Pledges and liens are examples of lesser (or special) proprietary interests: Douglas (n 72) 36–39.

[184] Cp. *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785 (HL) 809 (Lord Brandon).

[185] Battersby and Preston (n 157) 273.

[186] McKendrick (n 101) 36.

These descriptions raise two questions. First, in what sense(s) (if any) is an inferior general property interest 'possessory'? Secondly, what is the relationship between the interest acquired by taking possession and ownership? The first question is considered in this Section. The second is discussed in the next Chapter.

When a right or interest is described as 'possessory', one or more of four things might be meant: (i) the right or interest subsists only for so long as the title-holder is in possession; (ii) the right or interest cannot be transferred unless the transferor loses and the transferee obtains possession; (iii) the right or interest is acquired by taking possession; or (iv) the interest consists solely of a right to possession.

The first and second of these can be dealt with briefly. We saw in Section 3A that the interest that a person acquires from possession (whether it is the best or not) survives a loss of possession by the person in whom the interest is vested; the interest-holder does not lose his interest if and when he loses possession. Therefore, an inferior general property interest is not 'possessory' in sense (i). Turning to (ii), we saw in Section 3B that the interest (whether it is supreme or inferior) may be transferred by way of sale and thus *without* possession being conferred on the transferee. Therefore, the inferior general property interests are not possessory in sense (ii). The rest of this Section considers whether this interest is possessory in sense (iii) or (iv). It is claimed that the interest is not possessory in either of these senses. Accordingly, it is misleading to describe inferior general property interests as 'possessory'. *B*, like *A*, has a general property interest and neither *B*'s interest or *A*'s interest is 'possessory'. However, this does *not* mean that there are no important differences between *A*'s position and *B*'s. We will see in the next chapter that, on the contrary, there are some very important differences. These can be signified by

describing *A*'s interest as the '*supreme* general property interest' and *B*'s as 'an *inferior* general property interest'.

A. Possession as the Mode of Acquisition

We have seen that in English law a person acquires, by taking possession of a thing, a general property interest in it. The interest that the possessor acquires may or may not be the best such interest in the chattel: if, at the time one obtains possession of a chattel, there is no pre-existing general property interest in it, then one's interest will be supreme; if, however, there is one or more such interest in it when one obtains possession then one will be bound by that (or those) pre-existing interest (or interests) and one will acquire, not the supreme general property interest, but an inferior general property interest. Accordingly, both the supreme general property interest and inferior general property interests can be acquired through possession, and so, to the extent inferior general property interests are 'possessory' in sense (iii), supreme general property interests are *also* 'possessory'. Therefore, *pace* Goode, the distinction between 'possessory titles' and 'best titles' is, in this respect at least, misleading.

Furthermore, although inferior general property interests can be acquired through possession, they can also be acquired in other ways. We have seen that general property interests, whether or not they are supreme, may be acquired under a contract of sale without possession itself being transferred. Since a person may acquire an inferior general property interest in a chattel without obtaining possession of it, there is no necessary connection between the acquisition of a such an interest and possession.

Therefore, inferior general property interests are not possessory in sense (iii) and the modes in which such interests can be acquired do not provide a sound basis

for describing such interests as 'possessory' or for distinguishing between inferior general property interests and supreme general property interests.

B. The Right to Possession

This section considers whether (inferior) general property interests consist solely of a right to possession. It is argued in this section that it is not true that the interest consists solely of a right to possession and that, therefore, a general property interest (whether supreme or inferior) is not possessory in sense (iv).

We must begin by considering the meaning of 'right to possession'. This might refer to a right not to be dispossessed (if the right-holder is in possession) and a right to obtain possession (if the right-holder is not in possession). It is necessary to define, for the purposes of the following discussion, the notion of a right not to be dispossessed and a right to obtain possession. A right not to be dispossessed is a right not to be deprived of possession. So, where *A* has possession of a chattel and a right to possess it against *B*, *C*, *D*..., those persons (*B, C, D...,*) owe *A* a duty not to deprive *A* of his possession of that chattel; in other words, *B*, *C*, *D*... owe *A* a duty not to dispossess *A*. The notion of a right to obtain possession is more complicated. Where *A* is not in possession of a chattel but has a right to possess it against the current possessor (*B*), then (i)(a) *B* owes *A* a duty to surrender possession to *A* or (i)(b) *A* has the power to place *B* under such a duty; and/or (ii)(a) *B* owes a duty to put *A* into possession or (ii)(b) *A* has the power to place *B* under such a duty.

If 'right to possession' is defined as 'a right not to be dispossessed (if in possession) and a right to obtain possession (if not in possession)', then the holder of a general property interest, *X*, has, as against persons in general, a right to possession (unless he has granted it away). If *X* is in possession, a dispossession, by a person

who does not have a better right to possession, will amount to a trespass.[187] Thus, persons in general owe *X* a duty not to deprive him of possession. Moreover, if *X* is not in possession, he may well have a right to obtain possession from the current possessor: if the current possessor does not have a better general property interest (or a lesser interest that entitles him to possession as against *X*), then *X* has the power (by demanding the return of the thing) to place the current possessor under a duty to surrender possession to him: a refusal to give up possession of the thing would be a conversion.[188]

However, *X* does not *merely* have a right not to be dispossessed and/or a right to obtain possession. His interest, which entitles him to possession, is protected by the tort of trespass.[189] The tort of trespass protects against interferences with a chattel that

[187] It seems that there is no need for damage: *Transco Plc v United Utilities Water Plc* [2005] EWHC 2784 (QB); and hence trespass is said to be actionable *per se.* The orthodox view is that the interference must be 'direct': *Clerk & Lindsell* (n 2) para 17–131. But recently this 'directness' requirement has been doubted: Douglas (n 71) 107–110.

[188] *Howard E Perry & Co Ltd v British Railways Board* [1980] 1 WLR 1375 (Ch). In *Perry* the defendant's depots contained consignments of steel awaiting delivery to the claimant, to whom the steel belonged. The claimant sought permission from the defendants to collect the steel themselves, but the defendant board, fearing further industrial action by its employees, refused the request. It was held that the defendants, by refusing to release the claimant's goods during the steelworkers' strike, were denying the claimant most of the rights of ownership, including the right to possession, for an indefinite period and that the fear of further industrial action was not a justification for denying the claimant those rights; and that, therefore, the board committed the tort of conversion. But a title-holder does not have the right that the present possessor deliver the thing to him: *Capital Finance Co Ltd v Bray* [1964] 1 WLR 323 (CA). In *Bray* the defendant entered into a hire-purchase agreement with a finance company in respect of a car. After the defendant fell behind with the installments, the company demanded the return of the car to one of three addresses and payment of the outstanding installments. The defendant did not comply with the demand, and the company brought a claim in contract and detinue. The County Court dismissed the claim in contract but upheld the claim in detinue. The Court of Appeal allowed the defendant's cross-appeal in respect of the claim in detinue. It held that the demand was not a good one such as to found a claim in detinue. Lord Denning MR, in a judgment with which Harman LJ agreed, asserted that '[t]here is no obligation on a person who has another person's goods to return them to him, except by contract': [1964] 1 WLR 323 (CA), 329.

[189] It is true that scholars disagree about whether or not a person who, at the time of an alleged trespass, had a 'right to possession' but not possession is able to bring an action in trespass. The matter is complicated by (1) the occasional use of the term 'possession' to mean 'right to possession'; and (2) the complexity of the law on possession; and (3) the presumption that the holder of a right to possession is in possession. A common view is that possession is necessary subject to the following exceptions: (1) trustees may sue for trespass to goods in the hands of the beneficiary; (2) the title of executors or administrators relates back to the death of the deceased, and this entitles them to sue for a

do not divest the claimant of possession. Accordingly, a person may tortiously interfere with his chattel without depriving the right-holder of possession and, thus, without violating any duty not to dispossess. For example, if *A* intentionally scratches *B*'s car, it is probable that *A* has committed a trespass,[190] and *B* will be able to sue *A* and recover damages accordingly. But in this instance, *A* has certainly *not* deprived *B* of possession. *B* had possession at the time of the wrong; and *A*'s wrong did not deprive *B* of that possession. So *A* has not violated his duty not to deprive *B* of possession.

Turning to the tort of conversion, *A* may convert *B*'s goods, and accordingly be liable in the tort of conversion without dispossessing *B*. That has long been the case, but it was settled beyond doubt by the House of Lords in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 & 5)*.[191] In that case the Iraqi Government directed the defendant to fly ten of the claimant's aircraft to Iraq. On 17 September 1990, Resolution 369 was adopted by the Revolutionary Command Council of Iraq. The Resolution purported to dissolve the claimant and transfer the claimant's assets to the defendant. Thereafter, the defendant incorporated the aircraft into its own fleet and used them for its own flights. The claimant brought proceedings against the Republic of Iraq and the defendant, claiming the return of its aircraft or payment of their value

---

trespass between the date of the death and the date of the grant; (3) the owner of a franchise (eg to take wreck) can sue in trespass anyone taking the goods before he could seize them; (4) where a bailment is determinable at will, the bailor is entitled to sue third parties in trespass. This view is taken, for instance, by Professor Tettenborn in *Clerk & Lindsell* (n 2) para 17–137. However, the better view is that a person who does not have possession of a thing, but who does have a right to possession, is protected by the law of trespass: Douglas (n 71) 31–33. In *Bocardo SA v Star Energy* [2010] UKSC 35, [2011] 1 AC 380, [29]–[31], Lord Hope (with whom, on this issue, Lord Walker, Lord Brown, Lord Collins and Lord Clarke agreed) maintained that Bocardo, which, at the relevant time, had a right to possession but was not in possession, was entitled to succeed in trespass, although his Lordship's conclusion was based on the proposition that the holder of a right to possession is to be deemed to be in possession.

[190] In *Fouldes v Willoughby* (1841) 8 M&W 540, 549; 151 ER 1153, 1157 Alderson B said (obiter): 'Scratching the panel of a carriage would be a trespass'. According to Tettenborn, 'there is no need for a physical removal: any unpermitted physical interference suffices': *Clerk & Lindsell* (n 2) 17–131.

[191] *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 & 5)* [2002] UKHL 19, [2002] 2 AC 883.

and damages. One issue that their Lordships were required to consider was whether the defendant's acts were such as to be tortious in English law. The claimant submitted that the defendant's acts amounted to a tortious conversion of the aircraft.[192] The defendant, however, claimed that nothing it did after 17 September 1990 amounted to a conversion.[193] The defendant relied upon the definition of conversion provided by the 15th edition of *Clerk & Lindsell on Torts*:[194] 'conversion is an act of deliberate dealing with a chattel in a manner inconsistent with another's right whereby that other is deprived of the use and possession of it.'[195] The defendant stressed, in particular, the idea that the claimant's acts must *deprive* the claimant of the use and possession of the thing; and, the defendant submitted, none of the defendant's acts deprived the claimant of the use or possession of the aircraft. In particular, the defendant did not take the aircraft from the claimant; the government of Iraq took the aircraft from the claimant in exercise of its sovereign authority before 17 September 1990. Their Lordships rejected these submissions. Lord Nicholls said:

> The flaw in [the defendant's] argument lies in its failure to appreciate what is meant in this context by "depriving" the owner of possession. This is not to be understood as meaning that the wrongdoer must himself actually take the goods from the possession of the owner. This will often be the case, but not always. It is not so in the case of successive conversions. For the purposes of this tort an owner is equally deprived of possession when he is excluded from possession, or possession is withheld from him by the wrongdoer. Whether the owner is excluded from possession may sometimes depend upon whether the wrongdoer exercised dominion over the goods. Then the intention with which acts were done may be material.[196]

---

[192] Ibid, 1071–72.

[193] Ibid, 1068, 1074.

[194] Ibid, 1071–72.

[195] M Brazier (ed) *Clerk & Lindsell on Torts* (17th edn, Sweet & Maxwell 1995) para 13–12. Cp.*Clerk & Lindsell* (n 2) 17–06.

[196] *Kuwait Airways* (n 191) [40]–[41].

The detention of another's goods, for instance, is not necessarily a conversion:

> To constitute conversion detention must be adverse to the owner, excluding him from the goods. It must be accompanied by an intention to keep the goods. Whether the existence of this intention can properly be inferred depends on the circumstances of the case. A demand and refusal to deliver up the goods are the usual way of proving an intention to keep goods adverse to the owner, but this is not the only way.[197]

On the facts, the defendant was in possession and control of the ten aircraft on and after 17 September 1990. And the defendant believed the ten aircraft were its property and acted accordingly: 'It intended to keep the goods as its own. It treated them as its own. It made such use of them as it could in the prevailing circumstances .... In so conducting itself [the defendant] was asserting rights inconsistent with [the claimant's] rights as owner.'[198] Lord Hoffmann agreed with Lord Nicholls.[199] Lord Hope expressed his agreement with what Lord Nicholls had said on this particular issue (among others).[200] Lord Steyn also rejected the defendant's submission on this issue and opined that the defendant's acts would amount to a conversion under English law.[201]

Kuwait Airways was a case, like many others, in which the claimant had already lost possession of a chattel before the defendant tortiously interfered with it and where the defendant's wrong did not consist in dispossessing the claimant. Accordingly, a person, *A*, may commit either the tort of trespass or the tort of conversion as against *B* without depriving *B* of possession. In his speech in *Kuwait Airways* Lord Nicholls explained that, in the context of conversion, the central feature

[197] Ibid, [42].

[198] Ibid, [43].

[199] Ibid, [125].

[200] Ibid, [169].

[201] Ibid, [119].

of a 'deprivation' is not divestment but exclusion;[202] and such an exclusion does not require the wrongdoer to deprive another of possession or to acquire possession of the chattel himself. Although his Lordship's speech preserved the notion of a 'deprivation of possession', it is clear that one might convert another's goods without divesting that other of possession or obtaining possession oneself. Accordingly, there may be a conversion without a violation of the duty not to dispossess or the duty to surrender possession to another or to put another into possession.

Accordingly, a general property interest does not merely consist of a 'right to possession' (as defined above). Generally speaking, persons owe the holder of the interest a duty not to interfere with the thing, to exclude themselves from it.[203] Of course, one may adopt a broader definition of a right to possession. For instance, one could say that a 'right to possession' is the right to exclusive physical control and that such a right *comprises a right to exclude*.[204] If one accepts that the right to possession comprises a general right to non-interference, then the claim that the interest is possessory in sense (iv) is plausible. However, even if one accepts this definition of the right to possession, the interest does not consist solely in that right. For the interest also comprises a number of legal powers, including, as we have seen, a power to alienate the entire interest by way of sale. Therefore, the better view is that the interest is not possessory in sense (iv).

[202] Cp. Douglas (n 71) 74–76.

[203] Cp. S Douglas and B McFarlane, 'Defining Property Rights' in JE Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 219, 223–26.

[204] Honoré's 'right to possession' comprises a right to exclude: Honoré (n 26) 113–14.

C. 'Possessory Title': Conclusions

An inferior general property interest is not 'possessory' in any of the four senses outlined above. Possession is a mode, but certainly not the only mode, of acquiring such an interest. Moreover, the subsistence of such interests is not tied to the interest-holder's (or anyone else's) possession and the interest-holder has the power to transfer his title to another without transferring possession itself. Finally, the interest does not consist solely of a right to possession. Accordingly, it is misleading and unhelpful to describe the interest as 'possession',[205] a 'possessory title' or 'possessory interest',[206] a 'possessory title to an ownership interest'.[207] These labels should be discarded. Rather, we should we refer to the interest that is acquired by taking possession as a general property interest and we should recognize it might be supreme or it might be inferior to other such interests.

6. CONCLUSIONS

The main conclusion of this chapter is that the law confers on a person who is in possession of a chattel a general property interest (provided she does not already have such an interest), an interest that is not 'possessory' and comprises (inter alia) a right to possession and a power to alienate the entire interest. This conclusion has two important implications.

In the first place, the position with respect to chattels, insofar as the doctrine of title by possession is concerned, is very similar to the position concerning land. Just as there is some support in the case law concerning land for the DFS Thesis,

[205] *Pace* RH Kersley, *Goodeve's Modern Law of Personal Property* (9th edn, Sweet & Maxwell 1949) 8–9.

[206] *Pace* Lord Brandon in *The Aliakmon* [1986] AC 786 (HL) 809; S Green and J Randall, *The Tort of Conversion* (Hart 2009) 86–88; M Bridge, *Personal Property Law* (4th edn, OUP 2015) ch 2.

[207] *Pace* Battersby and Preston (n 157) 273; McKendrick (n 101) 35–37.

there is some support in the case law concerning chattels for the DO Thesis. However, with respect to both land and chattels, the *Third View* of the doctrine of title by possession is in fact correct; a possessor acquires, upon taking possession of certain land or a certain chattel, an alienable proprietary interest in it, that is not possession-dependent and that comprises (inter alia) a right to possession. The law concerning chattels is not exactly the same as the law concerning land. In cases involving land, the possessor acquires a legal fee simple estate and the law regards him as holding the land of a lord. In contrast, in cases involving goods the possessor acquires a general property interest and the doctrine of tenure is not applicable.

Secondly, some leading accounts of the law of personal property are gravely erroneous. For instance, according to *Goodeve's Modern Law of Personal Property* there are three interests that a person may have in a tangible chattel under English law: (1) 'absolute ownership', (2) 'possession' and (3) 'bailment'.[208] On this view, if *A* manufactures a new thing and *B* takes possession of it without *A*'s consent, *A* has 'absolute ownership' and *B* has 'possession'. If the main conclusion of this chapter is correct, it is a mistake to regard *B* as having 'possession'. The subsistence of his interest is not conditional on him being in possession and he can alienate his entire interest by way of sale. The better view is that *B*, like *A*, has a general property interest and that *B*'s general property interest is inferior to *A*'s. This is not to say that their positions are in all material respects the same or that both of them are 'owners'. On the contrary, their positions are, in some important respects, different and there are good reasons to think that *A* has ownership and *B* does not—or so it is argued in the next chapter.

[208] Kersley (n 205). See also: N Palmer and ELG Tyler (eds), *Crossley Vaines' Personal Property* (5th edn, Butterworths 1973) ch 4; M Bridge, L Gullifer, G McMeel, S Worthington, *The Law of Personal Property* (OUP 2013) ch 2.

6

OWNERSHIP AND RELATIVE TITLE IN ENGLISH PROPERTY LAW

1. INTRODUCTION

This chapter provides an answer to the third of the three principal questions: does English law recognise landownership and chattel-ownership? If so, is a person who acquires, by virtue of his or her possession, a title to land or chattels the (or an) owner of the land or chattels?

Distinguished legal scholars have maintained that English law does not recognise landownership or chattel-ownership.[1] If that is right, then the title that is acquired by possession cannot amount to ownership. The thought seems to be that the doctrine of relative title, and the actions by which proprietary interests are protected, are incompatible with landownership and chattel-ownership. It has been thought that, in connection with land, the doctrines of tenure and estates provide (additional or alternative) grounds for the proposition that, in English law, land cannot be owned. It would be remarkable if English law did not recognise landownership or chattel-ownership. However, it is argued in Section 2 that English law does recognise

[1] For some examples, see n 3 and n 58.

landownership and chattel-ownership and that, accordingly, land and chattels can be owned in English law.

It is argued in Section 3 that if, by taking possession, the possessor acquires the supreme fee simple or the superior general property interest, then the possessor has ownership of, respectively, the land or chattel. But if she acquires an inferior fee simple or an inferior general property interest, then she does not have ownership.

2. OWNERSHIP AND ENGLISH PROPERTY LAW

According to a number of distinguished English lawyers, ownership has no place in English property law. For instance, according to *Megarry & Wade*,[2] a leading text on English Land Law:

> English law knows no abstract ownership, as opposed to the right to recover possession.... O may be "owner" of Blackacre, but it is always theoretically possible for someone to come forward and prove a better title, as by proving that he owns the reversion on a long term of years which has now expired.[3]

Unfortunately, such opinions have not been expressed as clearly as they ought to have been. What does it mean to say that English law 'knows no abstract ownership'? According to one interpretation, the claim is that English law does not recognise landownership and that, accordingly, land cannot be owned in English law. If that is what is meant, the argument is invalid and unsound. When the authors claim that 'it is always theoretically possible for someone to come forward and prove a better title', they mean, it seems, that *for all anyone knows*, someone might have a better title than O. But it does not follow from the proposition 'it is not possible for anyone to know

[2] C Harpum, Bridge S, and Dixon M, *Megarry & Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012).

[3] Ibid 4-012. Cp. WJ Swadling, 'Unjust Delivery' in A Rodger and A Burrows (eds), *Mapping the Law* (OUP 2006) 277, 281–82.

who has the best title to land' that 'land cannot be owned in England and Wales'. Thus, the argument is invalid. It is also unsound. In order for the argument to work, the following premise must be added—'land can be owned only if it is possible for someone to know who has the best title to it'; but this premise is plainly false.

Some writers have taken issue, not with the recognition of landownership or with the possibility of knowing or proving who the landowner is, but with the appropriateness and utility of the language of ownership.[4] The claim is that, not only can the legal position be described without using the term 'ownership', but that, whereas it is possible to fully state the legal position in precise terms, the use of the term 'ownership' unnecessarily introduces ambiguity and imprecision; and, accordingly, the term 'ownership' should be eschewed.

These remarks suggest that, if progress is to be made in this area, it must be appreciated that there are a number of distinct but related issues and that, accordingly, it is necessary to distinguish the following questions:

1. Does English law recognise landownership and chattel-ownership?

2. If English law does recognise landownership and chattel-ownership, is it ever possible to *know*, and is it ever possible to *prove*, that a person is, in law, the owner of land or goods?

3. What, from the lawyer's point of view, is the utility of the language of ownership—of expressions such as 'ownership of land' and 'ownership of goods'—in discussions of English land law?

[4] n 76.

4. What role, if any, has the concept of ownership played in judicial reasoning?

It is not necessary to discuss all of these questions here.[5] But it is necessary to provide an answer to the first question. We will also briefly discuss the third question. We must begin, however, with a philosophical question. For we cannot determine whether English law recognises landownership or chattel-ownership, without knowing what ownership is. Accordingly, the next sub-section briefly considers the nature of ownership.

A. Ownership in General

The subject of the present enquiry is not the 'ownership' that is conferred by a particular legal system, but ownership in general, ownership wherever it is to be found. Are there any propositions about the nature of ownership in general that are true? Any instance of ownership necessarily involves at least one person (owner) and at least one ownership-object. In other words, wherever and whenever there is ownership, there is an owner and a thing that is owned. But this does not get us very far; it does not tell us what it is for a person to have ownership of a thing.

The most influential contemporary account of ownership—the full, liberal concept of ownership—in English is Professor AM Honoré's.[6] It is argued below that Honoré's account is largely correct and has great explanatory power, although some

[5] For a discussion of certain issues raised by these questions and particularly the fourth, see JW Harris, 'Ownership of Land in English Law' in N MacCormick and P Birks (ed), *The Legal Mind* (Clarendon Press 1986); JW Harris, *Property and Justice* (OUP 1996) ch 6: JW Harris, 'Reason or Mumbo Jumbo: The Common Law's Approach to Property' (2002) 117 Proc of Brit Acad 445.

[6] AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 107. The essay has been discussed on many occasions and many philosophers and jurists have largely adopted it: e.g. LC Becker, *Property Rights: Philosophic Foundations* (1977) ch 2; J Waldron, *The Right to Private Property* (OUP 1988) ch 2; SR Munzer, *A Theory of Property* (CUP 1990) ch 2; JW Harris, *Property and Justice* (OUP 1996) ch 8.

key aspects of his thinking have been misunderstood and, moreover, the account is incomplete in at least one significant respect.

Honoré maintains that the full liberal concept of ownership comprises eleven incidents. These include rights to possess, use and manage, rights to the income of the thing and to the capital, and the incidents of transmissibility, absence of term and residuarity. We shall briefly consider each of these. Before doing so, we should consider the nature of the enterprise—Honoré's aims and methodology.

Honoré's essay is philosophical. The subject matter is ownership in general; 'a type of interest with common features transcending particular [legal] systems.'[7] Sir Isaiah Berlin remarked that one of the tasks of philosophy 'is to extricate and bring to light the hidden categories and models in terms of which human beings think'.[8] Honoré's essay seeks to extricate and bring to light our concept of ownership. The aim, he tells us, is to 'analyse the concept of ownership' in order to give us 'a clear idea of what ownership is'.[9]

Honoré provides an account of the 'standard incidents of ownership, i.e. those legal rights, duties, and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a mature legal system.'[10] He first describes the incidents of ownership in 'simple cases' in which one would not hesitate to say '*X* owns that thing'.[11] By doing so, he provides an account of the

[7] Honoré (n 6) 107, 108. In connection with this point, consider the curious treatment of the essay, which seems to presuppose that it is an authoritative account of 'legal ownership and possessory title' in English law, in *Yearworth v North Bristol NHS Trust* [2008] LS Law Medical 535 (County Court), [2009] EWCA Civ 37, [2010] QB 1.

[8] I Berlin, 'The Purpose of Philosophy' in his *Concepts and Categories: Philosophical Essays* (Henry Hardy Ed, Pimlico 1999) 1, 10.

[9] Honoré (n 6) 107, 108.

[10] Ibid 107.

[11] Ibid 110.

basic model in which a single person owns, in the full, liberal sense, a single material thing. It is only after describing the incidents that are present in the basic model that Honoré considers more complicated cases, such as where a person grants a long lease of a house to another. The existence of such complicated, peripheral cases of ownership does not mean that there is no point delineating the basic model; '[o]n the contrary, such a delineation is essential in order that it may be possible to assess the strength of the analogies in the peripheral cases.'[12] Indeed, the reason for proceeding in the way that he does—i.e. first providing an account of the simple case of ownership—is that 'once the standard case of full ownership has been depicted, the variants and possible alternatives stand out more clearly in contrast, and are easier to understand and assess.'[13] The more complicated cases, including cases of split or fragmented ownership, 'diverge, to a greater or lesser extent, from the standard instances' and the 'final picture is that of a set of related institutions of great complexity which are best studied against the background of the basic model – a single human being owning, in the full liberal sense, a single material thing.'[14]

Some of the complicated cases that Honoré refers to are borderline cases of ownership in which it is not possible to determine whether one person is to be called 'the owner'.[15] Thus, alongside the basic model, there are (a) peripheral cases of

[12] Honoré (n 6) 111. Contrast the approach of SN Glackin, 'Back to Bundles: Deflating Property Rights, Again' (2014) 20 Legal Theory 1, 4: 'Who, then, is "the owner" of some particular piece of property? The question … involves something like what Gilbert Ryle would have termed a "category error". Since the number and kind of such interests in the property, all vested in different individuals, may be almost unlimited depending on the legal jurisdiction, it makes little intuitive sense to pick out any one interest bearer as "the" owner. No particular interest or right, and moreover no particular combination of those interests and rights, is either necessary or sufficient to establish ownership' (emphasis removed).

[13] Honoré (n 6) 107–108.

[14] Ibid 147.

[15] Ibid 111.

ownership in which some of the incidents are missing;[16] (b) borderline cases in which whether a person does or does not have ownership is indeterminate;[17] and (c) cases in which a person clearly does not have ownership of a thing even though some of the incidents are present. To some minds, it is regrettable that there are borderline cases of ownership and that the boundaries of our concept of ownership are in this way imprecise.[18] But, if this is a defect, it is the concept of ownership itself that it defective and not Honoré's account. As Aristotle explained, 'our discussion will be adequate if it has as much clearness as the subject-matter admits of'.[19] To describe the boundaries as being sharper than they are is not to provide a better account of ownership, but to misdescribe it.

Are the eleven standard incidents necessary conditions for a person to be the owner of a thing? Honoré rightly gives a negative answer to this question:

> They may be regarded as necessary ingredients in the notion of ownership, in the sense that, if a system did not admit them, and did not provide for them to be united in a single person, we would conclude that it did not know the liberal concept of ownership, though it might still have a modified version of ownership…. But the listed incidents are not individually necessary, though they may be together sufficient, conditions for the person of inherence to be designated 'owner' of a particular thing in a given system…. [T]he use of 'owner' will extend to cases in which not all the listed incidents are present.[20]

[16] Ibid 111.

[17] Ibid. Honoré does not actually use the term 'borderline case' but he does refer to cases in which 'no obvious linguistic convention governs the answer' to whether a person is the owner.

[18] It has also been thought that the indeterminacy renders the concept of ownership useless: see the discussion in JE Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLA LR 711, 769. There is no reason to think that the concept is so indeterminate as to be entirely useless insofar as political and legal discourse and scholarship are concerned. Cp. Munzer (n 6) 31–36.

[19] Aristotle, *Nicomachean Ethics* (WD Ross trans, OUP 1954) 1094b13–14.

[20] Honoré (n 6) 112–113.

Dr Campbell has maintained that this is 'tantamount to' an admission 'that the concept of ownership is incapable of complete analysis' and that 'such defeatism is unwarranted'.[21] Both claims are problematic. The problem with the former claim is that it invokes an unduly narrow understanding of 'complete analysis'. As to the latter, Campbell tries to show that it is true by advancing an alternative account, which maintains (roughly) that 'X owns P if, and only if, X has a property right in P and there is no-one who simultaneously has any greater property right in P than X.'[22] But, if this is meant to be a definition of the full, liberal concept of ownership that Honoré discusses, there is a fatal objection to this thesis, viz. it 'would lead us to identify 'owners' in even the most collectivist systems.'[23]

The aspects of Honoré's view that have been described in the previous two paragraphs have been misunderstood by some thinkers and, as a result, certain claims have been attributed to Honoré, or he has been associated with certain claims, that he has not endorsed. Accordingly, it is necessary to distinguish some claims that Honoré has advanced from others that that he has not.

Firstly, one should not conflate Honoré's claim that the incidents are not individually necessary for a person to have ownership of a thing with the claim that the presence, with respect to a particular person and a particular thing, of *any* of the eleven incidents, or *any* combination thereof, is sufficient for the person to have ownership of the thing. That claim is clearly false. For it follows from this claim that, if, with respect to a person, *O*, and a thing, *T*, all the incidents of ownership are present and *O* grants a liberty to use the thing to *P*, then *P* is the owner of *T*. But

[21] K Campbell, 'On the General Nature of Property Rights' (1992) 3 KCLJ 79, 91.

[22] Honoré (n 6) 93.

[23] J Waldron 'What is Private Property?' (1985) 5 OJLS 313, 335. Waldron's article was published before Campbell's and, in the quotation, Waldron is not referring to Campbell's view but to a similar one.

anyone who, in such circumstances, described *P* as the owner of *T* would be misusing the term 'ownership' and if, when this were pointed out, they insisted that *P* was the owner of *T*, then we would rightly say that they do not understand what ownership is, that they lack our concept of ownership.

Dr Glackin has observed that '[o]pinions differ as to whether Honoré … can properly be grouped with the 'bundle theorists' of ownership and property.'[24] These theorists, he maintains, claim (inter alia) that to ask who is the owner of a thing involves something like a category error and that, since the number and kind of interests in things may be almost unlimited, it makes 'little intuitive sense to pick out one of them as 'the' owner'. But Honoré does *not* endorse this view. His essay should lead us to recognise that, while in *some* cases it might be pointless or impossible to identify one person (or a group of persons) as the owner of a thing, it often is neither impossible nor pointless. When reflecting on the nature of ownership, the existence of complicated cases, in which a number of persons have an interest in a thing, should not cause us to overlook the many straightforward cases in which such complexity is not present. Even in the modern world, it is not difficult to find instances of the basic model in which a single human being owns, in the full, liberal sense, a single material thing. Consider the position in connection with tangible chattels such as laptops, mobile phones, clothes, books, pens and toothbrushes. Honoré claims, rightly, that, when analysing ownership, these simple cases should be prioritised. For by coming to understand the simple cases and elucidating the basic model, we can gain a better understanding of the more complicated cases.

[24] Glackin (n 12) 3, fn 7.

Let us turn to the eleven standard incidents of ownership, the incidents that are present in the simple, uncomplicated case in which one would not hesitate to say '*X* owns that thing'.

The first incident, which Honoré calls 'a right to possess' or 'a right to exclude',[25] is 'a right to exclusive physical control of a thing, or to have such control as the nature of the thing admits.'[26] This right, which binds persons in general,[27] comprises a right to be put into exclusive physical control of a thing, if the right-holder does not have such control; and, if he does, a right to remain in exclusive control.[28] The right grounds a duty on persons in general not to interfere with the thing: persons must exclude themselves from it.[29]

The second incident is the liberty or privilege 'to use the thing at one's discretion.'[30] This means that the owner is generally permitted to use (or not use) the thing as she sees fit. The uses that the owner may make of the thing are open-ended.[31] This is not incompatible with the existence of rules that place limitations on how things may be used, provided that the restrictions are fairly narrow.

The third incident, the right to manage, is 'the right to decide how the thing shall or may be used and who may use it.' Legally, this right consists of a 'cluster of powers' including powers to license acts that would otherwise be unlawful and powers of contracting. Honoré considers, by way of example, the sphere of

[25] Honoré (n 6) 113. Cp. the reference to 'the entitlement to exclude' on pg. 114.

[26] Ibid.

[27] Ibid 114.

[28] Ibid 113.

[29] Ibid 113–115. Cp. JE Penner, *The Idea of Property in Law* (OUP 1997) 71.

[30] Honoré (n 6) 116.

[31] Ibid. Cp. Harris, *Property and Justice* (n 5) 31; S Bright, 'Of Estates and Interests: A Tale of Ownership and Property Rights' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998) 529, esp. 534–36.

management of the owner of a deckchair; the owner may 'validly license others to sit in it, lend it, impose conditions on the borrower, direct how it is to be painted or cleaned, contract for it to be mended in a particular way'.[32] This example brings out an important point; the owner's legal powers are largely undirected,[33] that is, not coupled with legal duties regulating their exercise.

The fourth incident, the right to income**,** is a right to the fruits or rents or profits that may be derived from the thing. For instance, a landowner, if he has full liberal ownership, is entitled to the fruits of the land and to the rents that can be derived from leasing the land.

The fifth incident, the right to capital, consists of 'a power to alienate the thing and the liberty to consume, waste, or destroy the whole or part of it.'[34] The owner of a painting has the power to alienate it to another or, indeed, to destroy it. The power of alienation 'comprises the power to alienate during life or on death, by way of sale, mortgage, gift or other mode, to alienate a part of the thing and partially to alienate it.'[35]

The sixth incident, the right to security, is a right that one's ownership is not lost without one's consent. Generally speaking, the owner is to remain the owner unless he consents to losing his ownership. Honoré explains that, in law, 'this is in effect an immunity from expropriation, based on rules which provide that, apart from bankruptcy and execution for debt, the transmission of ownership is consensual.'[36] Again, the right is a general right and is perfectly consistent with the state having

[32] Honoré (n 6) 116.

[33] J Raz, 'The Inner Logic of the Law' in his *Ethics in the Public Domain* (OUP 1994) 238, 241.

[34] Ibid 118.

[35] Ibid.

[36] Ibid 119. Cp AM Honoré, 'Rights of Exclusion and Immunities Against Divesting' (1959–60) 34 Tulane LR 453, 464–68.

powers to expropriate property in certain circumstances for certain purposes in the public interest.

The seventh and eighth incidents are, respectively, the incident of transmissibility and absence of term. Ownership is indefinitely transmissible: no limit is placed on the possible number of transmissions.[37] And ownership's duration is not limited to a certain term: it can last forever.[38]

The ninth incident is, according to Honoré, the prohibition of harmful use: 'an owner's liberty to use and manage the thing owned as he chooses is in mature systems of law … subject to the condition that uses harmful to other members of society are forbidden.'[39] It seems, however, that the prohibition of harmful use should not be regarded as an incident of ownership. For the prohibitions that Honoré has in mind have nothing to do with ownership as such. They apply to persons in general whether they are owners or not. Honoré states: 'I may use my car freely but not in order to run my neighbours down, or to demolish his gate'. True, but this has nothing to do with him being the owner of the car; no one may use the car to run persons down. Accordingly, Waldron has proposed that 'a better approach is to treat prohibitions on harmful behaviour as *general* constraints on action, setting limits to what may be *done* in a given society.'[40]

Honoré's tenth incident is the liability to execution and the eleventh is ownership's residuary character. The liability to execution is 'the liability of the owner's interest to be taken away from him for debt, either by execution of a

[37] Ibid 121.

[38] Ibid.

[39] Ibid 123.

[40] Waldron (n 23) 320–21. Cp Harris, *Property and Justice* (n 5) 32–33.

judgment debt or on insolvency.'[41] As to the eleventh incident, Honoré maintains that it is 'characteristic of ownership that an owner has a residuary right in the thing owned' and, immediately or ultimately, the extinction of a lesser interest enures for his benefit.[42]

There is one feature of full, liberal ownership that Honoré does not emphasise in the essay, but which he has discussed in other writings.[43] It is what Professor Harris calls 'self-seekingness'.[44] In the standard case, the full, liberal owner may, when exercising and/or taking advantage of the rights, privileges, and powers of ownership, pursue her own interests (provided she complies with the general law). In this respect, the full, liberal owner can be contrasted with a person who, under English law, holds a proprietary interest on trust for a beneficiary. The trustee, unlike the full, liberal owner, is under a duty to act in the best interests of another person (i.e. the beneficiary).

Honoré's account of the standard incidents of ownership is largely correct. It is true that, in the simple case in which we would not hesitate to say that a person is the owner of a thing, the incidents of ownership are present. Moreover, the account has great explanatory power. For instance, it elucidates the differences between, and enables us to explain in clear terms the differences between, basic and peripheral cases of ownership and it thus casts light on why, in some cases, we might be unsure as to whether a person is the owner of a thing. Suppose that *L*, who holds Blackacre for an estate in fee simple, grants Blackacre to *T* for a term of 1000 years. Is *T* the (or

[41] Honoré (n 6) 123.

[42] Ibid 127, 128. It seems that aspects of Honoré's account of the incident of residuarity should be modified for the reasons advanced by Campbell (n 21) 93–94. But, as was said above, we should not accept Campbell's definition of ownership.

[43] AM Honoré, 'Property and Ownership: Marginal Comments' in TAO Endicott, J Getzler and E Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (OUP 2006) 129, 136–37.

[44] Harris (n 32) 5.

an) owner of Blackacre? Honoré's account enables us to account for the relationship between this case and the basic model and, thus, to explain why there is room for debate over whether *T* owns Blackacre. We can say: *T*'s interest in Blackacre comprises many of the incidents of full, liberal ownership, including the right to exclusive control, the liberty to use, the right to manage and the right to security, but it departs from the basic model because it lacks some incidents or aspects thereof, such as absence of term and the liberty to waste (which, on Honoré's account, is an aspect of the right to the capital).

However, Honoré's account does not explain with sufficient completeness or in sufficient depth how the various incidents (and aspects thereof) are related to one another; nor does it explain the relative significance of the various incidents. The essay is not entirely silent on these matters. For instance, we are told that the first incident, the right to exclusive control, is 'the foundation on which the whole superstructure of ownership rests'.[45] But it must be admitted that it is not altogether clear what this means; it may well raise more questions than it answers.

That there are certain connections between the incidents is obvious and certainly not denied by Honoré. For instance, an owner might restrict her liberty to use the thing by exercising her right to manage (e.g by conferring a lesser interest on another person) or she might remove a person's duty not to interfere with the thing by granting a licence.

However, other claims concerning the relations among the incidents are more contentious and have been much debated. The issue is complex due to: (1) the variety of the incidents; (2) the variety of the possible types of relations (logical, conceptual, justificatory and so forth) between and among the incidents; and (3) the variety of

[45] Honoré (n 6) 113. Honoré also states (at 116) that the second, third and fourth incidents 'overlap' and (at 113) that the concentration in the same person of the liberty to use, the right to exclude, the power to alienate and an immunity from expropriation 'is a cardinal feature of ownership'.

instances of ownership. It is not possible to fully explore the issue here. However, it is worth considering some popular views of certain relations among the incidents in order to show that they are defective and that, contrary to what some scholars have thought, they do not undermine Honoré's analysis of ownership.

One view, which has recently been defended by Glackin, is that 'the "right" of a property owner is separable into a series of component right-parts' and these 'rights or "sticks"' have 'no substantive, essential connection to each other. To the extent that any two or more of them tend to accompany each other, their conjunction is contingent rather than intrinsic.'[46] On one interpretation, this is a claim about the logical and conceptual possibility of each of the incidents existing without the others. It is not clear whether Glackin thinks that this claim applies to Honoré's eleven incidents or only to the incidents that are rights.[47] If he thinks that it applies to the eleven incidents, his view is problematic. It is certainly possible, insofar as *some* of the incidents are concerned, for each of the incidents to be present without any of the others—although where this is so the person does not necessarily have ownership of the thing.[48] For instance, a person might have, with respect to a certain thing, merely a liberty to use it (and this is obviously not sufficient for him to be the owner of the thing). However, it is difficult to make sense of the claim that the seventh, eighth, or tenth incidents could each be present without any of the others. Consider the eighth incident, absence of term. This is a quality that is predicated of something else. How can the incident be present without there being something, some interest—some right

[46] Glackin (n 12) 4.

[47] Glackin's expression of the claim refers to the bundles of 'rights or "sticks"' and, when discussing Honoré's essay he maintains (pg 9) that Honoré's eleven incidents 'now form the canonical list of sticks in each bundle' and 'we may for most purposes and for the sake of convenience speak of these "incidents" as the sticks or judicial "atoms"'.

[48] Text to n 24.

or power—of which it can said that it is capable of lasting forever? The thought that it could be is not supported by Honoré's essay.

So much for the view that each of the incidents can exist independently of every other incident. A different view is that one of the incidents (or a certain combination thereof) is logically primary. This is Professor Merrill's view.[49] He maintains that the 'right to exclude'—which, as defined by Merrill, is not the same as Honoré's 'right to possession'—is logically primary because

> if one starts with the right to exclude, it is possible to derive most of the other attributes commonly associated with property through the addition of relatively minor clarifications about the domain of the exclusive right. On the other hand, if one starts with any other attribute of property, one cannot derive the right to exclude by extending the domain of that other attribute; rather, one must add the right to exclude as an additional premise.[50]

Merrill defines the 'right to exclude' as a 'gatekeeper power': if *A* has a right to exclude others from Blackacre 'A can forbid other persons from entering onto [or encroaching on] Blackacre'; 'alternatively, A can consent to other persons entering onto or encroaching on Blackacre.'[51] How does Merrill seek to 'derive' from this 'the other attributes conventionally associated with property'? He proposes to do so by 'adding minor qualifications about the domain of this right'. We will consider , by way of example, Merrill's attempt to derive what he calls the 'right to use' from the 'right to exclude'.[52]

---

[49] TW Merrill, 'Property and the Right to Exclude' (1998) 77 Nebraska LR 730. Merrill's main thesis is that the right to exclude is the sine qua non of 'property'. It is not entirely clear how Merrill's 'property' relates to Honoré's 'ownership' (Honoré's essay is discussed at 736–37). Merrill has recently defended his view: TW Merrill, 'Property and the Right to Exclude II' (2014) 3 Brigham-Kanner Property Rights Conf Journal 1.

[50] Ibid 740.

[51] Ibid. As Merrill notes, Penner's account of the 'right to property' is, in this respect at least, very similar: Penner (n 29) esp. 68–87.

Merrill asserts that, where A has the right to exclude others from Blackacre (in the sense described above)

> it would seem but a very small step from this to conclude that A also has the right to determine the use of Blackacre. [1a] If A can exclude B, C, D … N from Blackacre, then [1b] A is in a position to determine that no one other than A or those given permission by A may enter onto Blackacre or encroach on Blackacre. [2a] A's power as gatekeeper allows A to determine [2b] who may remain on Blackacre and [2c] what activities they may engage in there.[53]

If [1b] means 'A can (by refusing to grant any permissions) place everyone else under a duty not to enter onto Blackacre', then [1a] and [1b], taken together, amount to no more the claim that 'if A has a right to exclude (as defined), then A has a right to exclude'; they amount, in other words, to a tautology. If, on the other hand, [1b] means 'A is free to use (i.e. is not under a duty not to use) Blackacre', it is not at all clear how [1b] is entailed by [1a]. For it is logically possible for A to have the 'right to exclude' and, at the same time, to not be legally free to use Blackacre. Similarly, since it is logically possible for A to have the power to forbid or permit persons to enter onto Blackacre without having the power to determine what activities they may or may not undertake on Blackacre (excepting, of course, the activity of 'entering onto Blackacre'), [2c] is not logically entailed by [2a]. Thus, it is not possible to logically derive the 'right to use' from 'the right to exclude'.[54]

Merrill might maintain that his point is not that one can logically derive the right to use from the right to exclude, but that one can qualify the definition of the 'right to exclude' in such a way that it comprises or leads to the 'right to use'. If this

---

[52] Merrill's 'right to use' seems to consist of a liberty to use a thing and a right to determine how others may use it; and it thus comprises Honoré's second incident and aspects of the third.

[53] Merrill (1998) (n 49) 741.

[54] A similar argument has been advanced by Professor Henry Smith: HE Smith, 'The Thing About Exclusion' (2014) 3 Brigham-Kanner Property Rights Conf Journal 95.

is what he is doing, then his account is not one that *derives* the other incidents from the right to exclude, but one that makes a series of refinements to the definition of the 'right to exclude'. Of course, one can *define* the 'right to exclude' in such a way that it comprises what Honoré calls a right to exclusive control, a liberty to use, and a right to manage. There are, however, two points to be made about this. First, when this definitional process comes to an end, one can stand back and analyse the 'right to exclude'; and the analysis will reveal that the 'right to exclude' *comprises* a right to non-interference, a liberty to use, a right to manage and so forth. Indeed, when one *analyses* Merrill's 'right to exclude' or Penner's 'right to exclusive use' one finds that these rights actually comprise most of Honoré's incidents. Secondly, it is difficult to see how one can establish that the 'right to exclude' is logically primary by defining the 'right to exclude' in such a way that it comprises those other incidents. It is possible that Merrill's answer is that, within the definitional process, it is primary because, if one starts with the definition of the 'right to exclude' that he provides, one can make 'minor qualifications' to that definition in order to end up with a definition of the right according to which it comprises the other incidents (or some of them). But this simply will not do if, as it seems, one could just as well start with Honoré's description of one of the (other) incidents and make similarly 'minor qualifications' to it so as to produce a definition of the 'incident' according to which it comprises the other incidents.

A more significant question, and one that we have not yet touched on, is as to the justificatory relationships between the rights, powers, etc. that Honoré discusses. Are some of them part of the justificatory basis of others? Are we to locate the incidents in a nested justificatory structure? These questions raise more general questions about the justification of ownership. Honoré does not discuss these matters

in any depth in his essay. Penner, as is well known, has discussed them. He argues that the 'right to property' is grounded by a single interest, viz. 'the interest in exclusively determining the use of things'.[55]

It is not necessary to fully discuss this issue here. But it is should be pointed out that there are, it seems, two overlapping interests that should be considered. The first is our interest in personally using things in ways that are valuable (good) for us. The second is our interest in determining, and being free to determine, whether and how things are accessed, used, dealt with and so forth and who accesses, uses and deals with them. Suppose that *O* has full, liberal ownership of *T*. Assuming that there are some ways in which *T* can be used by *O* personally that are valuable for *O*, the law recognises *O*'s interest in personally using *T* in ways that are valuable for him by permitting *O* to personally use and consume *T*.[56] This interest is also served by *O*'s right to exclusive control and the right to security, as these seek to safeguard the use of the thing by *O*. *O*'s interest in determining, and being free to determine, whether and how the thing is used etc. is served by *O*'s right to manage, including his (largely) undirected powers of licensing, and by his power to alienate the thing and his liberty to waste or destroy it.

These remarks obviously do not amount to a full exploration of the relationship between our interests in things and the basic model of ownership, still less to an examination of the justifications of ownership.[57] However, the aim of this section is not to provide a comprehensive account of ownership, but to say enough

[55] Penner (n 29) 49. Penner (at 152) defines the 'right to property' as a right to determine the use or disposition of a separable thing . . . in so far as this can be achieved or aided by others excluding themselves from it, and includes the rights to abandon it, to share it, to license it to others (either exclusively or not), and to give it to others in its entirety.

[56] It is also served by his right to the income.

[57] Such an examination must consider, besides many other things, the fact that by conferring ownership of a thing on a person, other persons are, as a result, under a general duty to exclude themselves from the thing.

about its nature to enable us to determine whether English law recognises landownership and chattel-ownership. It is argued below that English law does recognise landownership and chattel-ownership and this argument can be made without fully discussing the grounds of ownership and the justificatory relationships between the incidents of ownership.

We need a good account of ownership in order to answer the third principal question. This sub-section has sought to defend the claim that Honoré's influential account of ownership is largely successful. It has been argued that the analysis is, for the most part, accurate and the account sheds much light on, and thereby enhances our understanding of, the concept of ownership. Our strategy was to provide examples of its explanatory power, to distinguish certain claims that can properly be attributed to Honoré from some that should not be, and to identify some issues that are not discussed in the essay. There is much more that can and should be said about ownership, but enough has been said to enable us to return to English law and the third of our three principal questions.

B. English Law and the Recognition of Ownership

It is argued in this sub-section that English law recognises landownership and chattel-ownership; that, according to English law, land and chattels can be and, in some cases, are owned. Suppose that, under English law, *X* holds Blackacre for an estate in fee simple absolute in possession and that *X* is in possession of the land. Suppose, also, that *X* is the only person with such an estate in Blackacre; that there are no lesser estates in it; and that *X* holds directly of the Crown. The view that *X* is indeed the owner is supported by the fact that this accords with our ordinary usage of the term 'ownership' and, more importantly, by the fact that all of the standard incidents of

ownership are present. *X* has a right to possess the land: he is entitled to exclusive physical control of the land and persons in general owe him a duty to exclude themselves from it. Moreover, *X* may, subject to some fairly narrow restrictions, use the land as he wishes. He also has a right to manage it—to decide how the land may be used and who may use it. He may, for instance, grant a licence. In addition, he has a right to the income, a right to the capital, and a right to security. He is entitled to the fruits and rents, has the power to alienate, and is at liberty to waste. His interest possesses the incidents of transmissibility and absence of term: it can be transmitted to successors indefinitely and it is capable of lasting forever. His interest also has the characteristic of residuarity: ultimately or immediately, the extinction of lesser interests would enure for his benefit (although it can be argued that the *ultimate* residual right is vested in the Crown, not *X*).

The position with respect to chattels is similar. Suppose that *Y* has the supreme general property interest in a car and that, accordingly, there is no general property interest in the car that is better than *Y*'s. In such circumstances, all of the standard incidents of ownership are present.

What reasons are there, then, for thinking that land or chattels cannot be owned in England and Wales? A search of the literature will reveal that four features of English land law have been thought to undermine the claim that land can be owned: (1) the doctrine of tenure; (2) the doctrines of estates; (3) the doctrine of relative title; and (4) the lack of an action that protects ownership and only ownership. It has been thought that the third and fourth of these mean that chattels cannot be owned either. In fact, not one of these features supports the view that land or chattels cannot be owned in English law.

i. Landownership and Tenure

According to AD Hargreaves, '[I]f tenure exists, then the tenant cannot be the 'owner' of the land.'[58] This is not an uncommon view.[59] Why do these eminent writers believe that it follows from the fact that, under the doctrine of tenure, *X* is a tenant that *X* cannot own the land? To put the question in more general terms, why is it thought that tenure is incompatible with landownership? In order to answer this question, we must consider what tenure is and how it affects the legal position of a person who has an estate in land.

The doctrine of tenure was developed in what may be called a feudal society. 'Feudalism' refers to a form of social organisation. The essential or central features of this form of social organisation have been much debated.[60] It will suffice for our purposes to say that a feudal society involves *dependent land holding*, that is to say, the holding of land in return for the provision of services.[61] There are two aspects to this. First, there is the personal relationship between the lord and the lord's man, whereby the lord provides protection and the lord's man provides services. And, secondly, there is the granting of a piece of land to be enjoyed by the lord's man so long as the services are properly performed. The word 'tenure' refers to the relationship of lord and tenant whereby the tenant holds land of a lord.

---

[58] AD Hargreaves, 'Terminology and Title in Ejectment' (1940) 56 LQR 376. Cp. AD Hargreaves, *An Introduction to the Principles of Land Law* (1936 Sweet & Maxwell) 55.

[59] See, e.g., K Gray and SF Gray, *Elements of Land Law* (5th edn, OUP 2009) para 1.3.3; M Wonnacott, *Possession of Land* (CUP 2006) 39.

[60] Cp. TFT Plucknett, *A Concise History of the Common Law* (3rd edn, Butterworth 1940) 450–51; MLB Bloch, *Feudal Society* (LA Manyon trans, Routledge 2014) ch XXXII.

[61] AWB Simpson, *A History of the Land Law* (2nd edn, OUP 1986) 2.

As we have seen, tenure is universal: *all* land (except the Royal demesne) is held of a lord and directly or indirectly of the Crown.[62] As Pollock and Maitland have said,

> Every acre of English soil and every proprietary right therein have been brought within the compass of a single formula, which may be expressed thus: - *Z* tenet terram illam de ... domino Rege. The king himself holds land which is in every sense his own; no one else has any proprietary right in it; but if we leave out of account this royal demesne, then every acre of land is 'held of' the king. The person whom we may call its owner, the person who has the right to use and abuse the land, to cultivate it or leave it uncultivated, to keep all others off it, holds the land of the king either immediately or mediately.[63]

The Crown is Lord Paramount. 'The King', Coke tells us, 'was sovereign Lord, or Lord paramount, either mediate or immediate, of all and every parcel of land within the realm'.[64] The Lord Paramount is, of course, not a tenant and this presumably explains why Megarry J maintained that '[i]t is fundamental to English land law that nobody save the Crown owns any land'.[65] But this presupposes that Hargreaves' claim is correct; that one who is a tenant is not—cannot be— an owner.

The doctrine of tenure governs the relationship between lord and tenant; it governs *how* the land is held. More specifically, it governs the rights and other advantages, and the obligations, of the lord and the tenant. The rights and obligations and so forth that attach to tenure are called the *incidents of tenure*. The incidents of a particular tenure depend upon the tenure's type: different types of tenure have different incidents.

---

[62] Text to n 291 in Chapter 4.

[63] F Pollock and FW Maitland, *The History of English Law Before the Time of Edward I* (2nd edn, CUP 1898) Vol I, 232–33.

[64] Co Litt 65a.

[65] *Lowe v J W Ashmore Ltd* [1971] Ch 545 (Ch) 554.

Tenures have been classified in different ways.[66] Feudal tenure was either free or unfree. There were various kinds of free and unfree tenure. The most important kind of unfree tenure is what eventually became known as 'copyhold tenure'. We do not need to discuss the types of feudal tenure in detail. For, today, there is just one kind that is of any importance, namely socage. All the other kinds of tenure were (with one possible, minor exception) abolished by the Tenures Abolition Act 1660 and the 1925 legislation.[67] In addition, there is one kind of *non-feudal* tenure that is of importance in the modern law, namely, leasehold tenure. Leasehold tenure is the tenure of a lessee. It is non-feudal in the sense that it grew up outside the feudal system.

The incidents of tenure, the rights and obligations that existed as between the lord and the tenant, typically varied according to the type of tenure. However, some incidents were common to all tenures. For instance, the tenant was under an obligation to render certain services; and different kinds of tenure involved the provision of different kinds of services. Another incident that was common to all (feudal) tenures was 'escheat': if the tenant's interest in the land, his estate, determined (i.e. came to an end) the land 'escheated' to—returned to—the immediate lord.

By the 16th century the feudal services of tenure were unimportant. The requirement to provide actual services had been replaced by a requirement to pay a sum of money, a rent. And in time this money payment became valueless as a result of inflation and was no longer collected. Furthermore, the Tenures Abolition Act

[66] Pollock and Maitand (n 63) 239.

[67] Lawyers have debated whether frankalmoin has been abolished. It seems the 1660 Act was intended to abolish it, but it has been said that, due to poor drafting, it did not actually abolish it. It is claimed in *Megarry & Wade* that sch 2, pt 1 of the Administration of Estates Act 1925 abolished it: *Megarry & Wade* (n 2) para 2–019, fn 39.

1660 converted certain tenures, including knight-service, into free and common socage, which is a type of tenure that is *free from services*. Thus, the tenant's obligation to provide services to the lord has either been extinguished by statute or, if it has not been abolished by statute, it has been forgotten about and has practically disappeared.

The practical importance of the incidents of tenure was further reduced by the 1925 legislation. The legislation treated free tenure differently from copyhold tenure and so it is necessary to discuss these separately. In 1925 the only remaining incident of free tenure that was of any importance was escheat. Now the importance of escheat was reduced by the 1925 legislation. For it abolished one of the most common forms of escheat, namely, escheat on the death of the tenant intestate and without heirs.[68] However, escheat was not entirely abolished. It still occurs whenever a fee simple estate is determined, such as where the tenant files for bankruptcy and his trustee in bankruptcy disclaims the land.[69]

Where, prior to the coming into force of the Law of Property Act 1922, land had been held by copyhold tenure, the 1922 Act preserved indefinitely a number of the rights and obligations that had attached to copyhold tenure.[70] These incidents include any rights of the lord or tenant to mines and minerals and any obligation of the lord or tenant to maintain bridges and seawalls. The Act preserved these rights unless and until they are abolished by way of written agreement between the lord and tenant.

---

[68] Administration of Estates Act 1925 ss 45, 46.

[69] *Scmlla Properties v Gesso Properties* [1995] BCC 793 (Ch). Cp. I Williams, 'The Certainty of Term Requirement in Leases: Nothing Lasts Forever' (2015) 74 CLJ 592, 599–600.

[70] Law of Property Act 1922, ss 128(2), 138, sch 12 paras (4)–(6).

We can now return to *X* and his interest in Blackacre. Clearly, *X* is a tenant. He holds the land of the Crown. But how is that at all incompatible with him being an owner? Whatever the answer that ought to be given to this question when the applicable law is the common law of the medieval period,[71] it is difficult to see how tenure and landownership are, in all cases, incompatible in the modern law. In the example, all of the eleven incidents are present and, therefore, it is correct to regard *X* as the owner of the land. It is true that the land might escheat to *X*'s lord, the Crown. But this would occur only in very limited circumstances and it is not incompatible with *X* being the owner of the land. Accordingly, we should reject the contrast that Hargreaves drew between tenure and ownership. *X* is a tenant in fee simple. *X* is also the owner of the land. As Waldron put it, 'the *forms* of a feudal system of collective property have been adapted by the English law to express the modern *reality* of private property in pieces of land.'[72]

ii. Estates and Relative Title

It might be thought, as there can be several different estates in land, each with a different owner, *estates* in land can be owned but not *land*.[73] For instance, *P* might hold Blueacre in fee simple absolute in possession; *Q* might hold it for a term of 1000 years; *R*, a sub-lessee, might hold it for a term of 99 years (and so on). Who is the

[71] This is a controversial issue and one that has divided legal historians: F Pollock and FW Maitland, *The History of English Law Before the Time of Edward I* (2nd edn, CUP 1898) Vol II, ch 4; SFC Milsom, *The Legal Framework of English Feudalism* (CUP 1976).

[72] Waldron (n 23) 324.

[73] Cp. FH Lawson, *The Law of Property* (Clarendon Press 1958) 9: The 'fragmentation of ownership … is … the most characteristic feature of the English law of property…. Although the resulting fragments of the composite relation which we have called ownership are themselves only simple relations between persons and corporeal or incorporeal things, yet English lawyers often think of those simples relations as themselves constituting abstract things and so as being capable of being owned; and they attach ownership to them rather than to the corporeal or incorporeal things the enjoyment or management of which they exist to serve.'

owner of the land—*P*, *Q* or *R*? Moreover, not only can there be, in certain land, one fee simple and multiple lesser estates, there can be, as we have seen, *more than one fee simple absolute in possession* in it at the same time. Suppose that *X*, who holds Blackacre for an estate in fee simple absolute in possession, is dispossessed by *Y*. *Y* would thereby acquire a fee simple absolute in possession under the doctrine of title by possession. *X* has a better title and his estate binds *Y*. Who, then, is the owner of the land? These are interesting questions. We will consider in Section 3 below whether, in such circumstances, *Y* has ownership of the land. But we are here concerned with whether English law recognises landownership *at all*. The fact that there can be multiple estates in the land, including multiple fees simple, is not at all inconsistent with the view that persons can and do own land in English law. For, *even if* it were the case that, in our example involving X and Y, *neither* X nor Y has ownership of the land, that would not mean that *X* is not the owner in the simple case in which he alone holds the land for an estate in fee simple. As Honoré has asserted, the argument that, in view of such complicated cases, it would be better not to speak of ownership of land at all, 'ignores the many straightforward cases in which there is a single tenant in fee simple and no competing title.'[74] A similar argument can be made in connection with the possibility of multiple titles to chattels.

iii. Actions Protecting Ownership

It has been thought that chattels or land are not objects of ownership in English law because there are no actions in English law that protect (only) ownership. It is arguable that this is Swadling's view. According to Swadling,

[74] Honoré (n 6) 140.

> there is no concept of ownership in English law. The proof of this proposition lies in the fact that English law provides no form of protection to anyone we might want to describe as the 'owner' of goods greater than that provided to someone who simply finds them in the street.… [A]ll who sue in respect of interferences with goods have to bring their claims within the ambit of certain torts, and the only thing which those torts protect is the right to possession.[75]

But, with respect, this is a non sequitur. Suppose that *A* has the supreme general property interest in a chattel that is found in the street by *B*. As we have seen, *B*, upon taking possession of the chattel, would acquire a general property interest in the chattel, which would be inferior to *A*'s. One might say that the recognition of such concurrent titles is incompatible with any of the title-holders being the (or an) owner. This point concerns the relationship between the doctrine of title by possession and ownership, which is discussed in Section 3 below. We are here concerned, not with the possibility of concurrent titles, but with the fact that the law affords *the same protection to* the title-holders. What does this mean? One might say: *A*'s and *B*'s interests are protected by the torts of trespass, conversion and negligence, which is to say that, if a third party, *C*, tortiously interferes with the chattel, *A* or *B* would be entitled to successfully bring an action against *C* in trespass, conversion or negligence. This is true, but it is difficult to see why the fact that *the same protection* is afforded to *A* and *B* means that neither of them is 'the owner'. In so far as *A* and the chattel are concerned, all of the standard incidents of full, liberal ownership are present. In such circumstances, it is correct to regard *A* as the owner and it is quite simply irrelevant that *A* is not afforded a special form of protection.

One might make a different point about the actions that protect interests in land and chattels. One might say that in an action for recovery of possession of land, or in an action for trespass to land or trespass to goods (etc), the claimant, in order to

[75] Swadling (n 3) 281–82.

succeed, does not need to establish that she is the owner. Again, this is correct but irrelevant. For the fact that it is not *necessary to prove* that one is the owner does not mean that one *is not* the owner.

iv. Conclusion

We should reject the claim that land or chattels cannot be owned in English law. On the contrary, English law does recognise landownership and chattel-ownership. But, of course, that does not mean that it is always possible for a title-holder to *know* whether she is the owner or that it is always possible for a title-holder to be able to provide *sufficient proof* that she has ownership.

C. The Language of Ownership, Terms of Art and Vagueness

Before considering the relationship between the doctrine of title by possession and ownership, it is necessary to briefly discuss the third question that we identified in the introduction. What is the utility of the language of ownership for the lawyer?

'Ownership' is, for many purposes, too imprecise to be of great service to the lawyer. Of course, one might make it more precise; one might stipulate that the word 'ownership' or 'ownership interest' is, for certain purposes, to mean 'such and such'. But this does not undermine the claim that the term, as ordinarily used, is vague and, in some contexts, too vague. Hargreaves maintained in the 1950s that 'words such as "ownership" and its derivatives are not part of the language of land law'.[76] He regarded it as 'dangerous' to 'replace the language of estates by the language of ownership' and he encouraged lawyers to favour 'the language of precise thought'

[76] AD Hargreaves, 'Modern Real Property' (1956) 19 MLR 14, 18.

over 'the ambiguity of popular phrases.'[77] There is some exaggeration here. But he does have a point. Consider the following case. Suppose that *X* holds land for an estate in fee simple absolute in possession. He grants the land for a term of 200 years to *Y*. Who is the owner—*X* or *Y*? Alternatively, suppose that *X* holds his estate in fee simple absolute in possession on trust for *Y*. Who is the owner? Now, perhaps in these cases one of the parties really is the owner. But the point is that the issue is debatable. In both cases, one could forcefully argue that either X or Y, or both, has ownership. Accordingly, if the term 'ownership' is used in legal discourse doubts may arise as to whether it encompasses *X* or *Y* or both. Uncertainty can be avoided, to some extent and on some occasions, by using, instead, the technical language of the law.

The examples involving *X* and *Y* also show that one should *not* equate the fee simple absolute in possession with ownership. The holder of such an estate *might* be the owner of the land. But he might not be. His estate might be subject to a term of 3000 years. Or he might hold it on trust.

3. OWNERSHIP AND TITLE BY POSSESSION

We are now in a position to consider the relationship between the possessor's title and ownership. Does the title acquired by a person under doctrine of title by possession amount to ownership? It will be helpful to consider the following two examples:

[77] Ibid 19–20.

Example 6.1. *A* manufactures a new thing out of some materials he has acquired, say a bag from leather. *B* then steals the bag from *A*. *B* loses the bag and *C* finds it and keeps it.

Example 6.2. *X*, who holds Blackacre in fee simple, is dispossessed by *Y*.

B and *C* each acquired a general property interest in the bag when they obtained possession of it.[78] Similarly, *Y* acquired, upon taking possession of Blackacre, an estate in fee simple.[79] Is it correct to say that each of *A*, *B*, and *C* owns the bag and that each of *X* and *Y* owns the land? On the view taken by a number of property law scholars, including Professor Ben McFarlane and Dr Simon Douglas,[80] it is correct to say that *A* is an owner of the bag, *B* is an owner of the bag, and *C* is the owner of bag. On McFarlane's view, it is also correct to say that *X* is an owner of Blackacre and *Y* is an owner of Blackacre.[81] This chapter endorses a different view. It is argued that there is an important distinction between, on the one hand, persons who have the *supreme* fee simple in land or the *supreme* general property interest in a chattel and, on the other hand, persons who have an inferior fee simple in land or an inferior general property interest in a chattel. If, by taking possession, the possessor acquires the supreme fee simple or the supreme general property interest, then the possessor has ownership of, respectively, the land or chattel. But if she acquires an inferior fee

[78] Text to n 99–n 208 in Chapter 5.

[79] Text to n 236–n 301 in Chapter 4.

[80] B McFarlane, *The Structure of Property Law* (Hart 2008) 140–56; S Douglas, *Liability for Wrongful Interferences with Chattels* (Hart 2011) 20–33. Cp. R Hickey, *Property and the Law of Finders* (Hart 2010) 122–24.

[81] McFarlane (n 80) 647.

simple or an inferior general property interest, then she does *not* have ownership and, accordingly, she is not an owner.

A. Supreme Fees Simple and Supreme General Property Interests

When *A*, in *Example 6.1*, manufactured the bag, he acquired the supreme general property interest in it. There can be no doubt that *A* was the owner of it. Did he cease to be the owner when *B* took possession of the bag and thereby acquired an inferior general property interest? There is no reason to think that, in such circumstances, *A* would cease to have ownership. Insofar as *A* and the bag are concerned, all of the incidents of ownership are present.

It is not unimportant that the example in the previous paragraph involved the creation of a new thing. For, in such circumstances, it is possible to know who has the best title to the thing. But, of course, with respect to many chattels and most land it is simply not possible to know or prove who has the best title.

B. Inferior Fees Simple and Inferior General Property Interests

When, in *Example 6.1*, *B* took possession of the bag and *B* acquired an inferior general property interest in the bag, did *B* become an owner of the bag? If so, did *C* also become an owner of the bag when he obtained possession? If so, there would be three distinct ownership's—*A*'s, *B*'s and *C*'s. Similarly, if *X*, in *Example 6.2*, had the supreme fee simple estate, and if *Y*, when *Y* acquired a legal fee simple estate in Blackacre, became an owner of Blackacre, there would be two distinct ownership's—*X*'s and *Y*'s. According to Honoré, *Y*, in such circumstances, 'has every incident of ownership except security against divesting' and that 'there is much to be said' for treating *X* and *Y* as 'independent owners rather than as persons sharing a single split

ownership.'[82] However, while it is true that *Y* does not have the right to security (for *X*'s estate has priority and, accordingly, *X* has a right to possession as against *Y*), it is *not* true that *Y* has *every other* incident of ownership. For *Y* does not have the liberty to use Blackacre (as against *X*). And, insofar as the land can be destroyed or consumed, *Y* does not have the liberty to consume or destroy it. Similarly, in *Example 6.1*, *B* and *C* do not have (as against *A*) the liberty to use the bag or the liberty to destroy it.

As we have seen, the second incident of ownership is the liberty 'to use the thing at one's discretion.'[83] This means that the owner is generally permitted to use (or not use) the thing as she sees fit. The fifth incident is the right to the capital, which comprises the liberty to consume, waste or destroy the thing or any part of it. While, in *Example 6.1*, *A* is generally permitted to use the bag or destroy it (or any part of it), and while *X* (assuming that he has the supreme fee simple) is generally permitted to use Blackacre or damage, consume or destroy it (or any part of it), *B* and *C* are not generally permitted to use the bag or to destroy it or any part of it, and *Y* is not generally permitted to use Blackacre or to consume or destroy it or any part of it.

The reason that *B*, *C* and *Y* do not have these liberties is because, in contrast to *A* and *X*, they have an inferior title rather than the best title and, therefore, they owe duties to the holder of the best title.

To elaborate, *A*, *B* and *C* each have a general property interest in the bag, which comprises a right to possession and to non-interference.[84] *A*'s interest has priority over *B*'s and *C*'s and so they are bound by *A*'s rights. Therefore, *B* and *C* owed and owe *A* a duty *not to interfere with the bag*, whereas *A* does not and never

[82] Honoré (n 6) 140.

[83] Honoré (n 6) 116.

[84] Text to n 167–n 170, n 189–n 204 in Chapter 5.

did owe such a duty (or duties) to anyone. Indeed, *C* owed (and owes) such a duty to both *A* and *B*; *B* himself owed (and owes) such a duty to *A*. *B* was under a duty not to take the bag in the first place: taking it with the intent to keep it would amount to a conversion,[85] and, in any event, the mere taking of it was probably a trespass.[86] *C* was not under a duty not to pick up the bag when he found it; but when *C* took it, he was under a duty not to convert it: he ought not to use it as his own.[87] So, for instance, he ought not to sell and deliver it to a third party,[88] pledge it,[89] destroy it,[90] nor refuse to let *A* take it if and when he demands it.[91] *A*, on the other hand, was not and is not under a duty not to do any of these things. *A*'s position is thus significantly different to *B*'s and *C*'s: *A* is generally permitted in law to use the bag; he has the liberty to use the bag. He is also permitted to destroy it. Therefore, *A* has the liberty to use the bag and the liberty to destroy it, but *B* and *C* do not. The position of *X* and *Y*, in *Example 6.2* can be analysed in a similar way.

The adoption and deployment of certain Hohfeldian axioms might conceal the differences between the position of *A*, on the one hand, and *B* and *C*, on the other.[92] This is an important point, for Douglas and McFarlane have recently advanced a Hohfeldian analysis of property rights and concluded that 'the special feature of a

[85] *Lancashire & Yorkshire Railway v MacNicoll* (1918) 88 LJKB 601 (KB). But a defendant need not have intended to permanently deprive the claimant of his goods in order be liable in conversion: see MA Jones et al (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014) para 17–09.

[86] Text to n 190 in Chapter 5.

[87] *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 & 5)* [2002] UKHL 19, [2002] 2 AC 883.

[88] *Hollins v Fowler* (1874–75) LR 7 HL 757 (HL); *Martindale v Smith* (1841) 1 QB 389, 113 ER 1181.

[89] *Parker v Godin* (1728) 2 Strange 813, 93 ER 866.

[90] *Heald v Carey* (1852) 11 CB 977, 138 ER 762.

[91] *Howard E Perry & Co Ltd v British Railways Board* [1980] 1 WLR 1375 (Ch).

[92] W Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16, (1917) 26 Yale LJ 710.

property right lies not in any liberties it affords [the holder of a property right] to make use of a resource, but rather in the duty, owed to A, that it imposes on the rest of the world.'[93] The potential for a Hohfeldian analysis to conceal the differences between the position of *A*, on the one hand, and *B*, on the other, is inherent in the logic of a Hohfeldian analysis. A Hohfeldian relation is a three-place relation between one person, *X*, another person, *Y*, and an act-description.[94] On a Hohfeldian analysis of *Example 6.1*, *A* has (for instance) a claim-right against *C* that *C* does not sell and deliver the bag to a third person.[95] Since the correlative of a claim-right is a duty, if the previous proposition is correct then it must also be true that *C* owes *A* a duty not to sell and deliver the bag to a third person. And since the opposite of a duty is a liberty, since *C* owes *A* a duty not to sell the bag to a third person, *C* does *not* have a liberty *as against A* to sell and deliver the bag to a third person. But now let us consider the position as between *C* and a fourth party, *D*. To be clear, it is supposed that there is no special relation between *C* and *D* such as to alter what is ordinarily the position between two strangers where one party (in this case, *C*) has a general property interest in (and thus a right to possess) a chattel that binds the other (*D*). In this case, *ex hypothesi*, *C* is not under a duty, as against *D*, not to sell and deliver the thing to a third party. Applying the logic of the scheme, *C* has, *as against D*, a liberty

[93] S Douglas and B McFarlane, 'Defining Property Rights' in JE Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (OUP 2014) 219, 219–20.

[94] As Professor Finnis has said, '[*e*]*ach Hohfeldian relation* (for example of claim-right: duty, or of privilege: no-right) *concerns only one activity of one person*': J Finnis, 'Rights: Their Logic Restated' in his *Collected Essays: Volume IV, Philosophy of Law* (OUP 2011) 375, 378 (emphasis in original); and 'to assert a Hohfeldian right is to assert a three-term relation between one person, one act-description, and one other person': J Finnis, *Natural Law and Natural Rights* (OUP 1980).

[95] *Martindale v Smith* (n 88). But it seems that a sale without delivery is not a conversion unless it operates to destroy the claimant's title: *Lancashire Wagon Co v Fitzhugh* (1861) 6 H & N 502, 158 ER 206; *Fowler v Hollins* (1871–72) LR 7 QB 616 (Ex Chamber) 627 (Brett J); *Consolidated Co v Curtis & Son* [1892] 1 QB 495 (QB) 498 (Collins J).

to sell and deliver the bag to a third person; indeed, in the ordinary case, *C* will have such a liberty as against everyone except *A* and *B*.

But, even though it is the case that, on a Hohfeldian analysis, *C* has a liberty to sell and deliver the bag *as against D*, it is also the true that *all things considered C* is *not* at liberty to sell and deliver the bag. In law, *C* is *not* at liberty to sell and deliver the bag: *C* will commit a legal wrong if he sells and delivers it. In contrast, *A is* at liberty to sell and deliver the bag. *A* will commit no tort, indeed, no legal wrong, if *A* does so. On a Hohfeldian view, as we have seen, a legal relationship, such as a liberty–no-right relationship, is always a three-place relation between one person, *X*, another person, *Y*, and an act-description. A person always has (or does not have) a liberty to act in a certain way (*Q*) *relative to* some other person. Thus, it is not possible to say, on a Hohfeldian view, simply that one has a general liberty to *Q*; that, all things considered, one is not under a legal duty not to *Q*. But the question whether, all things considered, one is permitted to *Q* is not unimportant. We can see this by considering how *A* and *C*, in *Example 6.1*, should act. Assuming that *A* and *C* should follow the law, since, in law, *C* is under a duty not to sell and deliver the bag to a third person, *C* should *not* sell and deliver the bag to a third person (without *A*'s permission). On the other hand, since *A* is not under a legal duty, *A* may sell the bag.

There is thus an important difference between the legal positions of the holder of the supreme general property interest in the bag, *A*, and any person who acquires an inferior general property interest in the bag. The holder of the supreme general property interest, *A*, is legally at liberty to do things with the bag that the holder of an inferior general property interest may not lawfully do. On the other hand, persons who have an inferior general property interest, such as *B* and *C*, are not at liberty to

use the thing for their own benefit, to pledge it, to sell and deliver it, to refuse to return it to *A*.

Thus, where a person has an *inferior* general property interest, the liberty to use the thing is severely restricted. Indeed, the extent of the restrictions are such that it seems correct to deny that the second incident of ownership, which Honoré rightly describes as 'a cardinal feature of ownership', is present. Thus, not only does the holder of an inferior general property interest lack the right of security, which is an important feature of ownership, he is also not generally at liberty to use the thing as he sees fit. Furthermore, he lacks the liberty to destroy the thing, which is an aspect of the right to the capital.

Given that two important incidents (i.e. the right to security and the liberty to use) are absent altogether and aspects of the right to the capital are also absent, and given the centrality of the interest in using and freely determining the use of the thing, the conclusion to be drawn is that *B* and *C* are *not* owners of the bag. The holder of an inferior general property interest in a chattel does not have ownership of, and so is not an owner of, the chattel. Similarly, the holder of an inferior fee simple in certain land does not have ownership of, and so is not an owner of the land. If this is right, it is not correct to equate the possessor's title with 'ownership'.

4. CONCLUSIONS

In conclusion, the following answer should be given to the third of the three principal questions. English law does recognise landownership and chattel-ownership and, accordingly, land and chattels can be, and in some circumstances are, owned. But the title acquired by possession cannot be *equated with* ownership. It does not amount to ownership in all cases. If, by taking possession, the possessor acquires the supreme

fee simple in certain land, then (other things being equal) the possessor has ownership of the land. Similarly, if the possessor acquires the supreme general property interest in a particular chattel, he is (other things being equal) the owner of the chattel. But if, on the other hand, one acquires an inferior fee simple, one is not the (or an) owner of the land; and, if one acquires an inferior general property interest, one is not the (or an) owner of the chattel.

7

CONCLUSIONS AND FURTHER QUESTIONS

For some time there has been much discussion of, and much disagreement over, the contents of the doctrine of title by possession and the doctrine of relative title. The nature of possession, the nature of a possessor's title, and the relationships between possession, relative title, and ownership, have been particularly contentious.[833] If the lack of consensus about these matters is not surprising, the depth and scope of the disagreement is surely remarkable. The unsettledness and fluctuations of the law,[834] the lack of a stable terminology, and the indeterminacy of terms of such importance as 'possession',[835] 'title',[836] and 'ownership',[837] have played no small part in fuelling the debates.

'Possession' was considered in Chapter 2. We saw that, while 'possession' is vague, it is not hopelessly vague, and while policy and convenience may in some circumstances properly guide a judicial decision as to whether a person is in

[833] Text to n 1–n 36 in Chapter 2, n 1–n 15 in Chapter 4, n 2–n 3, n 58–59 in Chapter 6.

[834] See, for example, text to n 129–n 185 in Chapter 4.

[835] Text to n 20–n 25 in Chapter 2.

[836] Text to n 3–n 10 in Chapter 3.

[837] Text to n 15–n 19 in Chapter 6.

possession of a thing, it does not follow, and it is not the case, that possession is no more than a device of policy and convenience.[838] We also saw that a person might have possession for the purposes of certain laws but not for the purposes of others,[839] and that the pertinent question in this thesis was as to the nature of possession in the context of the doctrine of title by possession. It was concluded that, in general, a person has possession of certain land or a particular chattel, for the purposes of the doctrine, if and only if he or she has (1) exclusive physical control of the land or chattel and (2) an intention to possess it.

We then turned, in Chapters 3–5, to the nature of the title that is acquired by obtaining possession. The plethora of competing accounts of the possessor's title meant that it was necessary to determine in Chapter 3 which views were to be examined. Three views were outlined. These views were selected because a comparative analysis of these three views reveals two important lines of disagreement: first, the disagreement over whether a possessor's title consists of a right of possession that serves to protect possession *or* whether the possessor has a greater interest, which can be alienated and which does not cease if and when the possessor loses possession; and, secondly, the disagreement over whether a possessor is to be *deemed* to have a certain kind of interest *or* whether a possessor *actually acquires* a certain kind of interest. It was necessary to emphasise the latter distinction, for the conflation of 'being deemed/presumed to have an interest' with 'having an interest' has been a persistent and widespread source of confusion and error. Eminent legal scholars and senior members of the judiciary—including Lord Cozens-Hardy and Lord Justice Holroyd Pearce—have overlooked or misunderstood the

[838] Text to n 33–n 39 in Chapter 2.

[839] Text to n 26–n 32 in Chapter 2.

distinction.[840] It was also necessary to describe—and, in subsequent chapters, to examine—the Deemed Ownership Thesis, for the thesis has effectively been endorsed in a number of cases and it is, of course, important that the opinions and reasoning of judges are properly understood.[841]

Armed with an account of the three views and the main divisions among them, we turned in Chapter 4 to the authorities and considered which of the three views is correct insofar as land is concerned. Following a long and detailed discussion of the legal sources, it was concluded that, while the *Second View* was, it seems, formerly correct,[842] the *Third View* and, more specifically, the AFS Thesis are correct at the present time (insofar as land is concerned).[843] In other words, it was formerly the case that a person acquired upon obtaining possession of land a right to non-interference and a right to possession and, in addition, a title (a legally recognised claim) to a freehold estate; but the possessor did *not* actually acquire, simply by virtue of her possession, a freehold estate in the land. In contrast, possession, in the modern law, is a source of a legal fee simple estate; if and when a person obtains possession of land, she acquires a fee simple absolute in possession (provided she does not already have such an estate).

Chapter 5 considered the law of chattels. It was argued that, while certain members of the higher courts have effectively endorsed the Deemed Ownership Thesis,[844] a possessor in fact acquires an alienable interest (a general property interest), which comprises a right to non-interference that binds persons in general

[840] Text to n 228–n 235 in Chapter 4.

[841] Text to n 84–n 113 in Chapter 4 and text to n 15–n 57 in Chapter 5.

[842] Text to n 129 in Chapter 4.

[843] Text to n 266–n 301 in Chapter 4.

[844] Text to n 15–n 57 in Chapter 5.

and is not lost if and when the interest-holder ceases to be in possession;[845] and that, while many scholars have maintained that the title that is acquired upon obtaining possession is 'possessory', this description of the interest that is thus acquired is misleading and should be discarded.[846] It was concluded, accordingly, that, with respect to both chattels and land, the *Third View* is correct and the *First View* and the *Second View* must be rejected; in the modern law, a person acquires, upon obtaining possession of land or chattels, an alienable interest, which comprises a right to non-interference and a right to possession, and the continued existence of this interest is not conditional on the interest-holder remaining in possession.

Chapter 6 considered whether a possessor's title amounts to ownership. It was necessary to begin with a discussion of the place of ownership, and the language of ownership in English property law more broadly, and this, in turn, necessitated a discussion of the nature of ownership in general. It was concluded that, in English law, land and chattels can be owned;[847] and that a person who acquires a title upon obtaining possession of land or chattels will have ownership of the land or chattels if her interest is supreme but not if it is inferior.[848]

It is not inconsequential that in many respects our answers to the three principal questions apply uniformly to chattels and land. The general conditions of having possession are the same with respect to both land and chattels. Moreover, the title that is acquired upon taking possession of land has a great deal in common with the title that is acquired upon taking possession of chattels: both titles comprise rights to non-interference and to possession that bind persons in general; both titles are

[845] Text to n 99–n 181 in Chapter 5.

[846] Text to n 182–n 208 in Chapter 5.

[847] Text to n 58–n 75 in Chapter 6.

[848] Text to n 78– n 95 in Chapter 6.

alienable; and, in both cases, the continued existence of the title is not conditional on the title-holder remaining in possession. There is, however, at least one important difference: whereas, in cases concerning land, the possessor acquires an estate in fee simple absolute in possession, the possessor acquires a general property interest in cases concerning chattels. The difference is not merely formal. The contents of the interests differ. For example, the holder of an estate in fee simple, unlike the holder of a general property interest, has the power to grant an easement over the land.

The main conclusions of this thesis give rise to a number of questions that cannot be answered here. The most important of these is whether the conferral by the law of a general property interest or legal fee simple on a possessor is, all things considered, *justified*. This question has not been properly considered, let alone conclusively answered, in this thesis. An examination of the literature will reveal that a number of arguments have been advanced in support of the view that the law should confer a 'title' on a possessor. For example, Battersby has said:

> [a] major virtue of the common law position is that it finds a resting place for property where the true owner is unknown; if the rights of prior possessor are removed, some other resting place needs to be found, since a proprietary vacuum needs to be avoided.[849]

Whatever the merits of this point insofar as chattels are concerned, it has limited force in the context of registered land; the existence of the register means that the 'proprietary vacuum' is avoided. Dr Fox has advanced a number of reasons in support of the doctrines of relative title and title by possession.[850] One relevant consideration, in Fox's view, is that 'it may be difficult for a claimant to prove that he

[849] G Battersby, 'Acquiring Title by Theft' (2002) 65 MLR 603, 610. Cp. L Katz, 'The Relativity of Title and *Causa Possessionis*' in JE Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013).

[850] D Fox, 'Relativity of Title at Law and in Equity' (2006) 65 CLJ 330, 338–40.

has the best title to the disputed asset.'[851] A similar point was advanced by Pollock and Maitland: '[t]o prove ownership is difficult, to prove possession comparatively easy.'[852] In addition, the doctrines, according to Fox, discourage 'the social disruption that comes when one person unjustifiably interferes with the settled possession of another';[853] and, furthermore, 'the fact that proceedings to determine property rights operate *in personam* makes it practically impossible to reach a determination binding on the world at large that a particular claimant has the best title to an asset.'[854] One cannot properly examine whether these considerations, or any others, justify the conferral by the law of a title on a person who has possession of land or chattels unless one knows what possession and title are. Similarly, there has recently been much interest in the economic function of ownership, possession and relative title,[855] but an economic analysis of the law must be based on a sound account of the law. The doctrinal questions have to be tackled first. This thesis has sought to tackle some of the most troubling doctrinal questions.

AD Hargreaves maintained that 'every system of property law … must stand or fall by its treatment of the basic problems of ownership, possession and incumbrances.'[856]. It is hoped that this thesis, by examining the nature of possession, the nature of a possessor's title, and the relationships between title by possession, relative title and ownership, has advanced our understanding of how English law has treated the basic problems of ownership and possession.

---

[851] Ibid 338.

[852] F Pollock and FW Maitland, *The History of English Law Before the Time of Edward I* (2nd edn, CUP 1898) 43.

[853] Fox (n 18) 339.

[854] Ibid.

[855] E.g. Y Chang (eds), *Law and Economics of Possession* (CUP 2015).

[856] AD Hargreaves, 'Modern Real Property' (1956) 19 MLR 14, 16.

Bibliography

Aristotle, *Nicomachean Ethics* (WD Ross trans, OUP 1954)
Atiyah P, 'A Re-Examination of the *Jus Tertii* in Conversion' (1955) 18 MLR 97
— — 'The Jus Tertii and the Right of Reply' (1955) 18 MLR 595
Austin J, *The Province of Jurisprudence Determined* (Murray 1832)
Baker CD, 'The Jus Tertii: A Restatement' (1990–1) 16 The University of Queensland Law Journal 46
Baker JH, *An Introduction to English Legal History* (4th edn, OUP 2002)
— — *Baker and Milsom Sources of English Legal History: Private Law to 1750* (2nd edn, OUP 2010)
Battersby G, 'The Present Status of the *Jus Tertii* Principle' (1992) Conv 100
— — 'A Reconsideration of "Property" and "Title" in the Sale of Goods Act' (2001) JBL 1
— — 'Acquiring Title by Theft' (2002) 65 MLR 603
— — and Preston AD, 'The Concepts of "Property," "Title" and "Owner" Used in the Sale of Goods Act 1893' (1972) 35 MLR 268
Becker LC, *Property Rights: Philosophic Foundations* (Routledge & Kegan Paul 1977)
Bell AP, *Modern Law of Personal Property in England and Ireland* (Butterworths 1989)
Berlin I, 'The Purpose of Philosophy' in Berlin I *Concepts and Categories: Philosophical Essays* (Henry Hardy Ed, Pimlico 1999)
Bingham JW, 'The Nature and Importance of Legal Possession' (1915) 13 Mich LR 535, 623
Birks P, 'Personal Property: Proprietary Rights and Remedies' (2000) 11 KCLJ 1
— — *Unjust Enrichment* (2nd edn, Clarendon Press 2005)
Blackstone W, *Commentaries on the Laws of England* (first published 1765–69, W Prest ed, OUP 2016)
Bloch MLB, *Feudal Society* (LA Manyon trans, Routledge 2014)
Bond H, 'Possession in the Roman Law' (1890) 6 LQR 259
Bordwell P, 'Ejectment Takes Over' (1970) 55 Iowa LR 1089
Brazier M (ed), *Clerk & Lindsell on Torts* (17th edn, Sweet & Maxwell 1995)
Bridge M (ed), *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014)
— — *Personal Property Law* (4th edn, OUP 2015)
— — and Gullifer L, McMeel G, Worthington S, *The Law of Personal Property* (OUP 2013)
Bridge N, 'Presumptions and Burdens' (1949) 12 MLR 273
Bright S, 'Of Estates and Interests: A Tale of Ownership and Property Rights' in Bright S and Dewar J (eds), *Land Law: Themes and Perspectives* (OUP 1998)
Buckland WW and McNair AD, *Roman Law and Common Law: A Comparison in Outline* (FH Lawson ed, 2nd edn, CUP 1965)
Campbell K, 'On the General Nature of Property Rights' (1992) 3 KCLJ 79
Chambers R, *An Introduction to Property Law in Australia* (3rd edn, Lawbook Co 2013)
Chang Y (ed), *Law and Economics of Possession* (CUP 2015)
Clarke A, 'Use, Time and Entitlement' (2004) Current LP 239
Clerk JF, 'Title to Chattels by Possession' (1891) 7 LQR 224

Coke E, *Commentary upon Littleton* (C Butler ed, J & WT Clarke 1823)
Curwen N, 'The Squatter's Interest at Common Law' [2000] Conv 528
—— 'General and special property in goods' (2000) 20 LS 181
—— 'Title to Sue in Conversion' [2004] Conv 308
Darby JGN and Bosanquet FA, *A Practical Treatise on the Statutes of Limitations in England and Ireland* (W Maxwell & Son 1867)
Dennis IH, *The Law of Evidence* (3rd edn, Sweet & Maxwell 2007)
Dias RWM, *Jurisprudence* (5th edn, Butterworths 1985)
Dicey AV, *A Treatise on the Rules for the Selection of Parties to an Action* (W Maxwell & Son 1870)
Douglas S, 'The Abolition of Detinue' [2008] Conv 30
—— *Liability for Wrongful Interferences with Chattels* (Hart 2011)
—— 'The Content of a Freehold: A 'Right to Use' Land?' in N Hopkins (ed), *Modern Studies in Property Law, Volume 7* (Hart 2013)
—— 'Is Possession Factual or Legal?' in E Descheemaeker (ed), *The Consequences of Possession* (Edinburgh UP 2014)
—— and McFarlane B, 'Defining Property Rights' in Penner JE and Smith HE (eds), *Philosophical Foundations of Property Law* (OUP 2013)
Endicott TAO, 'Vagueness and Legal Theory' (1997) 3 Legal Theory 37
—— *Vagueness in Law* (OUP 2000)
Finnis J, *Natural Law and Natural Rights* (OUP 1980)
—— 'Rights: Their Logic Restated' in Finnis J, *Collected Essays: Volume IV, Philosophy of Law* (OUP 2011)
Fox D, 'Enforcing a possessory title to a stolen car' (2002) 61 CLJ 27
—— 'Relativity of Title at Law and in Equity' (2006) 65 CLJ 330
Fuller L, 'Legal Fictions' (1930) 25 Illinois LR 363
Getzler J, 'Unclean hands and the doctrine of *jus tertii*' (2001) 117 LQR 565
Glackin SN, 'Back to Bundles: Deflating Property Rights, Again' (2014) 20 Legal Theory 1
Glover R (ed), *Murphy on Evidence* (13th edn, OUP 2013)
Goodhart AL, 'Three Cases on Possession' (1928) 3 CLJ 195
Gordley J and Mattei U, 'Protecting Possession' (1996) 44 Am J Com L 293
Goudkamp J, *Tort Law Defences* (Hart 2013)
Goymour A, '*Bruton v London & Quadrant Housing Trust* [2000]: Relativity of Title, and the Regulation of the 'Proprietary Underworld'' in S Douglas, R Hickey and E Waring (eds), *Landmark Cases in Property Law* (Hart 2015)
Gray K, 'Property in Common Law Systems' in van Maanen GE and van der Walt AJ (eds), *Property Law on the Threshold of the 21st Century* (MAKLU Uitgevers 1996)
—— and Gray SF, *Elements of Land Law* (5th edn, OUP 2009)
Green S and Randall J, *The Tort of Conversion* (Hart 2009)
Hargreaves AD, *An Introduction to the Principles of Land Law* (1936 Sweet & Maxwell)
—— 'Terminology and Title in Ejectment' (1940) 56 LQR 376
—— 'Modern Real Property' (1956) 19 MLR 14
Harpum C, Bridge S, and Dixon M, *Megarry & Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012)
Harris DR, 'The Concept of Possession in English Law' in AG Guest (ed), *Oxford Essays in Jurisprudence* (1961)
Harris JW, 'Ownership of Land in English Law' in MacCormick N and Birks P (eds),

The Legal Mind (Clarendon Press 1986)
—— *Property and Justice* (OUP 1996)
—— 'Reason or Mumbo Jumbo: The Common Law's Approach to Property' (2002) 117 Proc of Brit Acad 445
Hart, HLA, *The Concept of Law* (3rd edn, OUP 2012)
Hayes W, *An Introduction to Conveyancing* (5th edn, Sweet 1840)
Heuston RFV, *Salmond on the Law of Torts* (15th edn, Sweet & Maxwell 1969)
Hickey R, *Property and the Law of Finders* (Hart 2010)
—— 'Possession as a Source of Property at Common Law' in E Descheemaeker (ed), *The Consequences of Possession* (EUP 2014)
—— '*Armory v Delamirie* (1722): Possession, Obligation, and the Evolution of Relative Title to Goods' in Douglas S, Hickey R and Waring E (eds), *Landmark Cases in Property Law* (Hart 2015)
Hill JD, 'The Proprietary Character of Possession' in E Cooke (ed), *Modern Studies in Property Law, Volume 1* (Hart 2001) 21
Ho HL, 'Some Reflections on "property" and "title" in the Sale of Goods Act' (1997) 56 CLJ 571
Hohfeld W N, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16
—— 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale LJ 710
Holdsworth WS, *A History of English Law* (Methuen & Co 1922–66) Vol VII
Holmes OW, *The Common Law* (Little, Brown and Co 1881)
Honoré AM, 'Rights of Exclusion and Immunities Against Divesting' (1959–60) 34 Tulane LR 453
—— 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961)
—— 'Property and Ownership: Marginal Comments' in TAO Endicott, J Getzler and E Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (OUP 2006)
Jolly A, 'The Jus Tertii and the Third Man' (1955) 18 MLR 371
Jones MA et al (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014)
Jourdan S & Radley-Gardner O, *Adverse Possession* (2nd edn, Bloomsbury 2010)
Katz L, 'The Relativity of Title and *Causa Possessionis*' in Penner JE and Smith HE (eds), *Philosophical Foundations of Property Law* (OUP 2013).
Kersley RH, *Goodeve's Modern Law of Personal Property* (9th edn, Sweet & Maxwell 1949)
Law Reform Committee, *Eighteenth Report (Conversion and Detinue)* (Cmd 4774, 1971)
Lawson FH, *Introduction to the Law of Property* (Clarendon Press 1958)
Leiter B, 'American Legal Realism' in WA Edmundson and MP Golding (eds), *The Blackwell Guide to Philosophy of Law and Legal Theory* (Blackwell 2004)
Lightwood JM, *Possession of Land* (Stevens & Sons 1894)
Littleton T, *Tenures* (E Wambaugh ed, Washington DC 1903)
MacCormick N, *Institutions of Law: An Essay in Legal Theory* (OUP 2007)
Maitland FW, 'The Mystery of Seisin' (1886) 2 LQR 481
—— 'The Beatitude of Seisin I' (1888) 4 LQR 24
—— *Equity; also, The Forms of Action at Common Law* (CUP 1910)
McFarlane B, *The Structure of Property Law* (Hart 2008)
McKendrick E (ed), *Goode on Commercial Law* (4th edn, Penguin 2010)
Meredith AC, 'A paradox of Sugden's' (1918) 34 LQR 253
Merrill TW, 'Property and the Right to Exclude' (1998) 77 Nebraska LR 730

— — ‘Property and the Right to Exclude II’ (2014) 3 Brigham-Kanner Property Rights Conf Journal 1.
Milsom SFC, ‘Trespass from Henry III to Edward III’ (1958) 74 LQR 195
— — *The Legal Framework of English Feudalism* (CUP 1976)
— — *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981)
Munzer SR, *A Theory of Property* (CUP 1990)
Palmer N, Possessory Title’ in Palmer N & McKendrick E (eds), *Interests in Goods* (2nd edn, LLP 1998)
— — ‘Bad Applies and Blighted Windfalls: Finding, Bailment and the Fruits of Crime’ in Meisel F and Cook PJ (eds), *Property and Protection: Essays in Honour of Brian W Harvey* (Hart 2000)
— — *Palmer on Bailment* (3rd edn, Sweet & Maxwell 2009)
— — and Tyler ELG (eds), *Crossley Vaines’ Personal Property* (5th edn, Butterworths 1973)
Penner JE, ‘The “Bundle of Rights” Picture of Property’ (1996) 43 UCLA LR 711
— — *The Idea of Property in Law* (OUP 1997)
Plucknett TFT, *A Concise History of the Common Law* (3rd edn, Butterworth 1940)
Pollock F and Wright RS, *An Essay on Possession in the Common Law* (Clarendon Press 1888)
— — and Maitland FW, *The History of English Law Before the Time of Edward I* (2nd edn, CUP 1898)
Preston R, *Abstracts of Title* (2nd edn, J & WT Clarke 1824)
Pretto-Sakmann A, *Boundaries of Personal Property: Shares and Sub-Shares* (Hart 2005)
Radley-Gardner O, ‘Civilised Squatting’ (2005) 25 OJLS 727
Raz J, *The Concept of a Legal System* (2nd edn, Clarendon Press 1980)
— — ‘The Nature of Rights’ in Raz J, *The Morality of Freedom* (OUP 1986)
— — ‘The Inner Logic of the Law’ in Raz J, *Ethics in the Public Domain* (OUP 1994)
Real Property Commissioners, *First Report made to His Majesty by the Commissioners appointed to inquire into the Law of England respecting Real Property* (1829) House of Commons Papers (Paper No 263) Volume X, 1.
Roberts N, ‘The *Bruton* tenancy: a matter of relativity’ [2012] Conv 87
Roberts S, ‘More Lost Than Found’ (1982) 45 MLR 683
Rostill L, ‘Relative Title and Deemed Ownership in English Personal Property Law’ (2015) 35 OJLS 31
Rudden B, ‘The Terminology of Title’ (1964) 80 LQR 62
Sacks V, ‘Torts (Interference with Goods) Act 1977’ (1978) 41 MLR 713
Salmond JW, ‘Observations on Trover and Conversion’ (1905) 21 LQR 43
— — *The Law of Torts* (2nd edn Stevens and Haynes 1910)
— — *Jurisprudence* (7th edn, Butterworths 1924)
Savigny FK von, *Treatise on Possession* (E Perry trans, 6th edn, Sweet 1848)
Sedgwick AG and Wait FS, ‘The History of the Action of Ejectment in England and the United States’ in JH Wigmore (ed), *Select Essays in Anglo-American Legal History* (CUP 1907–09) Volume III
Shartel B, ‘Meanings of Possession’ (1932) 16 Minnesota LR 611
Sheehan D, *The Principles of Personal Property Law* (Hart 2011)
Simpson AWB, *A History of the Land Law* (2nd edn, OUP 1986)
Smith HE, ‘The Thing About Exclusion’ (2014) 3 Brigham-Kanner Property Rights Conf Journal 95

Sorensen R, *Vagueness and Contradiction* (OUP 2001)
Stephen JW, *A Digest to the Law of Evidence* (Macmillan 1876)
Swadling WJ, 'Opening the Numerus Clausus' (2000) 116 LQR 354
— — 'Unjust Delivery' in Rodger A and Burrows A (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006)
— — 'Explaining Resulting Trusts' (2008) 124 LQR 72
— — 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28 OJLS 627
— — 'Property: General Principles' in Burrows A (ed), *English Private Law* (3rd edn, OUP 2013)
Sweet C, 'Seisin' (1896) 12 LQR 239
Tapper C (ed), *Cross and Tapper on Evidence* (12th edn, OUP 2010)
Tay AES, 'Bridges v Hawkesworth and the Early History of Finding' (1964) 8 AJLH 224
— — 'Possession and the Modern Law of Finding' (1964) 4 Sydney LR 383
Taylor JP, *A Treatise on the Law of Evidence* (JB Matthews and GF Spear eds, 11th edn, Sweet & Maxwell 1920)
Tettenborn A, 'Reversionary Damage to Chattels' (1994) 53 CLJ 326
Thayer JB, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown 1898)
Tiplady D, 'When is a Seller not a Seller?' (1988) 51 MLR 240
Ullmann-Margalit E, 'On Presumption' (1983) 80 Journal of Philosophy 143
Wade HWR, 'Landlord, Tenant and Squatter' (1962) 78 LQR 541
Waldron J, 'What is Private Property?' (1985) 5 OJLS 313
— — *The Right to Private Property* (Clarendon Press 1988)
Warren EH, 'Qualifying as Plaintiff in an Action for a Conversion' [1935–1936] 49 Harvard LR 1084
Williams I, 'The Certainty of Term Requirement in Leases: Nothing Lasts Forever' (2015) 74 CLJ 592
Williams J, *The Seisin of the Freehold* (Sweet & Maxwell 1878)
Williams T C, (ed), *Principles of the Law of Real Property* (17th edn, Sweet & Maxwell 1892)
Wiren SA, 'The Plea of The *Ius Tertii* in Ejectment' (1925) 41 LQR 139
Wonnacott M, *Possession of Land* (CUP 2006)
Worthington S, *Personal Property Law: Text, Cases and Materials* (Hart 2000)
Zuckerman AAS, *The Principles of Criminal Evidence* (Clarendon Press 1989)