**AN EXPRESSIVE THEORY
OF POSSESSION**

MICHAEL JOHN ROOKE CRAWFORD

orcid.org/0000-0001-5988-4582

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University of Melbourne

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ABSTRACT

Possession is universally regarded as a keystone concept within the law of property. Yet, it is also notoriously complex and poorly understood. Although it is uncontroversial to say that, at common law, possession is a “root of title”, or way of creating an original property right in a tangible thing, leading scholars agree on little else. The disagreement spreads across several fronts. There is no consensus on whether possession is simply a fact that creates property rights, or whether it also describes a sort of legal interest in an object of property. There is also disagreement about whether possession is a simple, observable fact about physical control or a more complex, and uniquely legal, concept concerned with the particular intention, or *animus*, displayed by the possessor. And this is to say nothing of the broader philosophical argument about why the unilateral act of possession should create a right *in rem* at all. This thesis aims to explain the nature and function of possession in the law and, in doing so, to demonstrate that the concept is far simpler than generations of lawyers have been led to believe. The expressive theory of possession developed in this thesis has important implications for the way in which lawyers conceive of possession in both theory and practice.

This thesis argues that possession is not a right, or other form of jural interest, but a fact that creates original property rights in objects of property. Although this is not in itself controversial, the account offered in this thesis departs from traditional Anglo-Australian explanations in so far as it stresses that the significance of possession has little, if anything, to do with the ability of the possessor to exercise physical control over a tangible thing. Instead, it is argued that possession plays an almost exclusively expressive role within the law of property. That is, certain acts amount to “possession” because, within a particular population, they send a recognized and accepted signal about the intention of some person to stake a claim

to an object that counts as a “thing” within property law. Moreover, drawing on insights from game theory, the theory of possession developed in this thesis departs from influential philosophical explanations in so far as it argues that, despite its obvious and important distributive consequences, possession’s status as the rule that answers the most basic questions of mine and thine cannot be not attributable to some moral quality that is peculiar to acts of possession.

DECLARATION

This thesis comprises only original work undertaken toward the degree of Doctor of Philosophy.

Due acknowledgement has been made in the text to all other materials that have been used.

This thesis is less than the maximum word limit in length, exclusive of tables, maps, bibliographies and appendices.

A handwritten signature in blue ink, appearing to read 'M. J. R. Crawford', is centered on the page. The signature is fluid and cursive, with the first name 'M.' and last name 'Crawford' clearly distinguishable.

M J R Crawford

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INTRODUCTION

I THE POSSESSION PUZZLE

Possession is universally regarded as one of the most important concepts in the law of property, whether personal or real. Holmes commenced his famous treatment of the subject by remarking that, '[p]ossession is a conception which is only less important than contract.'¹ Likewise, the first sentence of Pollock and Wright's seminal work, *An Essay on Possession in the Common Law*, reads:

[p]ossession is a term of common occurrence and no mean significance in the law. It imports something which at an earlier time constantly made the difference between having the benefit of prompt and effectual remedies, or being left with cumbrous and doubtful ones; which in modern times has constantly determined and often may still determine the existence or non-existence of a right to restrain acts of interference with property, the relative priority of the claims of competing creditors, or the incidence of public burdens; and which for centuries has been, and is still capable of being, of critical importance in defining the boundary between civil wrongs and crimes.²

Yet, despite its undoubted significance, possession is notoriously poorly understood and a perennial source of confusion in the law. As Pollock himself went on to remark:

¹ Oliver Wendell Holmes, *The Common Law* (Little, Brown and Company, 1949) 206.

² Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (Clarendon Press, 1888) 1. Please note, *An Essay on Possession in the Common Law* is not a co-authored work but a compilation of three sole-authored essays. All references to this work throughout this thesis will name only the author of the relevant part.

[y]et, as the name of Possession is in these and other ways one of the most important in our books, so it is one of the most ambiguous. Its legal senses (for they are several) overlap the popular sense, and even the popular sense includes the assumption of matters of fact which are not always easy to verify.³

Nor has the mystery been solved in the 129 years since Pollock penned those lines. Indeed, as a leading modern work on the law of personal property recently reminded its readers, it is more or less mandatory to commence any discussion of the concept with Earl Jowitt's lament that '[i]n truth, English law has never worked out a completely logical and exhaustive definition of possession.'⁴ Likewise, Lord Parker complained that, '[t]he term "possession" is always giving rise to trouble.'⁵ Such *dicta* are ubiquitous in the case law. The feeling of intellectual despair aroused by the concept is perhaps best captured by Hickey, who has written that:

[g]enerally, possession is thought to be a hopelessly vague concept, continually changing its content and import with the exigencies of legal practice. Textbook writers have considered it unsusceptible to satisfactory definition, and even the most positive statement of possession in the law retains some sense of apology for its ambiguity.⁶

There is no consensus, for example, on whether possession is simply a fact which, when proven by evidence, creates a property right, or whether it also describes a species of legal right in an object of property that is different from ownership. Even amongst those who agree that

³ Ibid 1.

⁴ *United States of America v Dollfus Mieg et Cie SA* [1952] AC 582, 605, quoted in MG Bridge et al, *The Law of Personal Property* (Sweet & Maxwell, 2013) 55 [2-035].

⁵ *Towers & Co v Gray* [1961] 2 QB 351, 361.

⁶ Robin Hickey, *Property and the Law of Finders* (Hart Publishing, 2010) 162.

possession is a fact and not a right, there is no consensus on whether it describes a simple, observable fact about physical control or a more complex, and uniquely legal, concept concerned with the particular intention displayed by the possessor. And this is to say nothing of the broader philosophical mystery about why the unilateral act of possession should create non-consensual duties *in rem* at all. In short, despite its undoubted importance, possession remains one of the most contested and controversial topics in property law.

II OBJECTIVES AND LIMITS OF THE THESIS

Given the persistent ambiguity and confusion that has surrounded the concept, one may be forgiven for concluding that the best solution to the “possession puzzle” is simply to abandon it altogether. However, this would be a false step. As will become apparent in the analysis that follows, possession is so deeply rooted in our system of private property rights that any attempt to extirpate it from the law of property would be doomed to fail.

Given the importance of possession and the now relative antiquity of Pollock and Wright’s famous work, there remains a need for an account which, unlike briefer treatments in works on personal property law, land law and tort, focuses exclusively on the nature and function of possession in the common law.⁷ The objective of this thesis is to satisfy this need. However,

⁷ In personal property law see, for example, Andrew P Bell, *Modern Law of Personal Property in England and Ireland* (Butterworths, 1989) 33–65; M G Bridge, *Personal Property Law* (Oxford University Press, 4th ed, 2015) 32–43; Bridge et al, above n 4, 55–66 [2–035]–[2–060]; Royston Miles Goode and Ewan McKendrick, *Goode on Commercial Law* (Penguin, 4th ed, 2010) 45–9; Duncan Sheehan, *The Principles of Personal Property Law* (Hart Publishing, 2nd ed, 2017) 10–9. In land law see, for example, E H Burn and John Cartwright, *Cheshire and Burn’s Modern Law of Real Property* (Oxford University Press, 18th ed, 2011) 48–51; Kevin J Gray and Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009) 150–79 [2.1.2]–[2.1.54]; Mark Wonnacott, *Possession of Land* (Cambridge University Press, 2006).

before describing both the methodology and the arguments advanced in this thesis, it is important to clearly articulate the limits of the project being undertaken here.

The term “possession” is ubiquitous within the law.⁸ In the law of landlord and tenant, the question of whether someone has a leasehold or a mere contractual interest in land depends upon whether they have been granted “exclusive possession”.⁹ Possession is also integral to the transfer of legal rights. As Holroyd J stated in *Irons v Smallpiece*, ‘[i]n order to change the property by a gift of this description, there must be a change of possession.’¹⁰ A “delivery” of goods under the various iterations of the *Sale of Goods Act* is defined as a ‘voluntary transfer of possession from one person to another.’¹¹ In the criminal law, the offence of larceny has historically been understood in terms of violations of “possession”. As Wright explained, ‘[t]he ordinary conception of theft is that it is a violation of a person’s ownership of a thing: but the proper conception is that it is a violation of a person’s possession of a thing accompanied with an intention to misappropriate the thing.’¹² In most jurisdictions it is an indictable offence to be in “possession” of a drug of dependence.¹³

This huge diversity in the use of the term has led Harris to write that, ‘[w]e should therefore study the way in which the word “possession” is used in English rules of law; we cannot study the legal concept of possession in the abstract, for the word has no legal meaning apart from these particular rules.’¹⁴ Others have concluded that possession is best viewed as a ‘lump

⁸ D R Harris, ‘The Concept of Possession in English Law’ in A G Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 69, 70–1.

⁹ *Street v Mountford* [1985] AC 809, 816.

¹⁰ *Irons v Smallpiece* (1819) 2 B&A 551, 553; 106 ER 467, 468.

¹¹ See, for example, *Goods Act 1958* (Vic) s 3.

¹² Pollock and Wright, above n 2, 118.

¹³ See, for example, *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 73(1).

¹⁴ Harris, above n 8, 70.

concept'.¹⁵ Although some have observed that there is no principled reason why the meaning of possession should be so context-dependent,¹⁶ the consensus is otherwise. As Dawson J remarked of its use in criminal statutes, 'the technical doctrines of the civil law which separate proprietary and possessory rights in chattels are generally irrelevant for the purposes of the criminal law.'¹⁷

The question of whether or not there is, or perhaps should be, a uniform conception of possession across all areas of the law is not, however, relevant to this thesis. This is because the account developed in this thesis concentrates on possession's core role as, to borrow Pollock's phrase, a 'root of title'¹⁸ or way of creating an original property right in a tangible thing. This enquiry raises other, cognate issues, many of which are addressed in what follows. So, for instance, as is discussed in Chapter II, this thesis considers whether possession also describes a sort of right, other than ownership, in a tangible thing. However, it must be emphasised that the subject matter of this thesis remains carefully circumscribed and that these issues are only addressed to the extent that they are raised by the central question. Thus, it may well be that the conception of possession developed in this thesis explains, for example, the role of possession in larceny or the transfer of legal rights. Alternatively, it may reveal that, contrary to Harris's position noted above, the concept of possession is not context-dependent and that many purported instances of "possession" in the law are in fact unhelpful and unnecessary fictions. However, whether or not such things are true remains a question for another work.

¹⁵ Bridge et al, above n 4, 55 [2-036].

¹⁶ Sheehan, above n 7, 10.

¹⁷ *He Kaw Teh v R* (1985) 157 CLR 523, 599.

¹⁸ Pollock and Wright, above n 2, 22.

However, because this is not a thesis about possession as viewed through the particular lens of personal property law, land law or tort, the account offered here is not constrained by other, traditional, taxonomical boundaries in property law. Most significantly, it deliberately ignores the traditional distinction between real and personal property. As will become apparent, the conceptual uniformity of possession across this traditional boundary is an important aspect of the account presented in this thesis. So far as the objects of property are concerned, the only relevant distinction is that between tangible and ideational things, for the obvious reason that intangibles cannot be possessed in any meaningful sense of the word.¹⁹

Three final limits must be briefly articulated. The first concerns the use of theory. As is discussed in the methodology section, immediately below, this thesis applies interdisciplinary and theoretical insights to the study of law. What must be stressed is that, despite the sometimes extensive use of these materials, this is not a thesis about legal theory or game theory *per se*. It is a thesis about possession and its role in creating property rights. These theoretical and interdisciplinary insights are relevant because they enable us to better understand a concept that is of fundamental importance in property law. Moreover, it is not claimed that these theoretical approaches are either universally accepted or represent the “state-of-the-art” within, for example, evolutionary game theory. Rather, works such as Sugden’s *The Economics of Rights, Co-operation and Welfare*²⁰ have been selected, first, because they are relevant to the topic of possession and, secondly, because they are generally agreed to constitute landmark, though not necessarily uncontroversial, works within their particular fields.

¹⁹ Thus, as Sheehan notes, there is no such thing as “equitable possession”. See Sheehan, above n 7, 10. The scope of the concept of “property” is addressed in Chapter I.

²⁰ Robert Sugden, *The Economics of Rights, Co-Operation, and Welfare* (B. Blackwell, 1986).

The second limit concerns the use of comparative materials. As is discussed in Chapter IV, nineteenth century German jurists were famously preoccupied by the puzzle of possession. In particular, Savigny and Ihering sought to explain the significance of possession in the Roman law. As will become apparent in what follows, there is no in-principle reason why the account of possession developed in this thesis should not apply to any system of law that recognises private property rights. Nevertheless, it should be emphasised that this thesis is not a comparative thesis. Rather, it is concerned with common law systems of property. As a consequence, it makes no formal claims about the role of possession in Roman law or any other non-common law system.

The final caveat concerns a basic aim of the thesis. An important argument advanced in this thesis is that possession does not refer to a peculiarly legal concept, but to a social fact that may change from population to population. This insight is important, not only because it is fundamental to explaining the nature of possession, but also because, as is argued in Chapter III, it highlights the inadequacy of the dominant legal understanding. However, it is important to stress that, whilst this thesis argues that possession is a social fact, it does not attempt to exhaustively describe which particular relationships between people and things amount to acts of “possession” in different interpretive communities. Compilation of such a list would require substantial empirical research and is, consequently, beyond the scope of this work. Nevertheless, it is hoped that some of the arguments presented in this thesis might be of use to, in particular, “Law and Society” scholars who may choose to undertake this sort of empirical work.

III METHODOLOGY

A Methodological Divergence in Modern Private Law Scholarship

As others have observed, there has long been a growing methodological divide in Anglo-American private law scholarship.²¹ Whilst English writers have maintained a primarily, though not exclusively, doctrinal approach to legal analysis, American scholars have enthusiastically applied inter-disciplinary methods to the study of law, most prominently through the use of economic concepts. Whilst this diversity in methodology has undoubtedly enriched our understanding of private law, the gap between the various methodological camps has at times become so wide that one wonders whether members of each are engaged in the same field of intellectual enquiry. So, for instance, it is not entirely clear whether modern “Law and Economics” scholarship is the study of law, of economics or, alternatively, whether it has become a discipline unto itself.

A particular illustration of this phenomenon is furnished by the wonderfully fiery, yet curiously overlooked,²² debate between Simpson, an eminent legal historian, and Coase, an eminent economist, that played out in the pages of the *Journal of Legal Studies*.²³ Simpson criticised Coase’s seminal article, ‘The Problem of Social Cost’,²⁴ for, amongst other things, failing to

²¹ On this issue see Andrew Burrows, ‘Challenges for Private Law in the Twenty-First Century’ in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 29, 34–40; Richard A Posner, ‘The Deprofessionalization of Legal Teaching and Scholarship’ (1993) 91 *Michigan Law Review* 1921, 1923. On the continued importance of doctrinal scholarship in property law see Martin Dixon, ‘A Doctrinal Approach to Property Law Scholarship: Who Cares and Why?’ in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave Macmillan, 2015) 1.

²² David Campbell and Matthias Klaes, ‘What Did Ronald Coase Know About the Law of Tort?’ (2016) 39 *Melbourne University Law Review* 793, 795–6.

²³ A W Brian Simpson, ‘Coase v. Pigou Reexamined’ (1996) 25 *Journal of Legal Studies* 53; Ronald H Coase, ‘Law and Economics and A. W. Brian Simpson’ (1996) 25 *Journal of Legal Studies* 103; AW Brian Simpson, ‘An Addendum’ (1996) 25 *Journal of Empirical Legal Studies* 99.

²⁴ R H Coase, ‘The Problem of Social Cost’ (1960) 3 *Journal of Law & Economics* 1.

understand the nineteenth century nuisance cases, in particular *Sturges v Bridgman*,²⁵ on which he purported to rely.²⁶ Coase, for his part, responded that Simpson's criticisms were of no consequence because 'The Problem of Social Cost' was a paper about economics, and not law.²⁷ Coase argued that Simpson, as a lawyer, failed to understand the economic concepts discussed in the paper.²⁸

As Campbell and Klaes have recently argued, the better view seems to be that both men were right and wrong. That is, Coase did misunderstand the law, but this misunderstanding did not undermine the validity of his ingenious economic argument.²⁹ Perhaps what is most striking about the exchange was Coase's rather intemperate remark that:

[n]otwithstanding the many references to my work in the literature on the economic analysis of law in the last 35 years, I have never attempted to contribute to it. Richard Posner has spoken of my insouciance about the economic analysis of law. But my unwillingness to take part in the discussions of this subject is a result of ... my lack of knowledge of the detailed working of the legal system and my very superficial knowledge of the legal literature. I admit that this lack of knowledge is a deficiency. But it is surely a virtue not to write on a subject of which one is ignorant. I wish Professor Brian Simpson had shown a similar prudence. He writes about economics and economists from the point of view of an historian and a lawyer. It is not

²⁵ (1879) 11 Ch D 852.

²⁶ Simpson, 'Coase v Pigou', above n 23, 88–91.

²⁷ Coase, 'Law and Economics', above n 23, 104.

²⁸ Ibid 104–5.

²⁹ Campbell and Klaes, above n 22, 813–23.

surprising to find that his article contains so many misunderstandings of my position and misstatements about me and my work.³⁰

It is almost certainly not true that Simpson failed to follow Coases's economic argument. After all, the success of Coase's article, at least amongst lawyers, is at least partly attributable to the fact that, in contrast to much modern scholarship in law and economics, it is comprehensible to those who have no formal training in economics and recoil in horror at page after page of dense mathematical equations. This particular issue aside, what is most significant about this exchange is that it reveals that these two eminent scholars, though writing in the *Journal of Legal Studies*, appeared to regard themselves as pursuing essentially different intellectual endeavours.

B Reconciling the Approaches

This issue of continental drift in Anglo-American private law scholarship is not merely one of general interest. It is of central importance in this thesis because possession is a topic that has consistently straddled this transatlantic methodological divide.

Beginning most prominently with Pollock and Wright's *Essay on Possession*, published in 1888, English accounts of possession have tended to be rigorously doctrinal in approach. That is, they have attempted to solve the enduring riddle of possession by analysing those cases in which it has figured prominently. Quite apart from the strongly doctrinal bent in much English

³⁰ Coase, 'Law and Economics', above n 23, 105. In his reply Simpson wrote, 'I am sorry to hear that I appear to have made Professor Coase so cross by raising what seem to be some difficulties in his celebrated article, not all of which he addresses in his reply.' See Simpson, 'An Addendum', above n 23, 99.

private law scholarship, the predominance of this approach must, at least in part, be attributable to the long shadow that the arcane concept of “seisin” has cast over English law.

Leading American accounts of possession have, by contrast, very often approached the issue from a higher level of theoretical abstraction. Whilst they tend to discuss fewer judicial decisions, these accounts carefully analyse the significance of the decided cases in light of insights drawn from fields of enquiry other than law.³¹

It must be emphasised that neither methodological approach is “right” or “wrong”. Rather, each has its own particular advantages and deficiencies. For present purposes, doctrinal accounts have two important virtues. The first is that, in contrast to broad arguments about efficiency or distributive fairness, doctrinal arguments about the law are the very sort of arguments that can be, and are, applied by courts. In other words, doctrinal arguments *are* legal arguments. As McFarlane has recently observed of research methods in property law, ‘an important aspect of the doctrinal approach ... is that it not only examines property law, it also *is* property law: in the sense that it shares its method with that of a judge seeking to interpret a line of cases or statutory provision.’³² Secondly, and relatedly, lawyers who make doctrinal arguments about the basic architecture of the law are playing to their strengths. That is, they are harnessing a form of technical expertise that is unique to those who have undertaken formal training in the law.³³ On the question of the role of theory in property law, Smith is surely correct to observe that, ‘talking about ultimate ends is more glamorous than asking the more engineering-like

³¹ Two very influential accounts are R A Epstein, ‘Possession as the Root of Title’ (1979) 13 *Georgia Law Review* 1221; Carol M Rose, ‘Possession as the Origin of Property’ (1985) 52 *University of Chicago Law Review* 73.

³² Ben McFarlane, ‘Researching Property Law’ (2017) 133 *Law Quarterly Review* 167, 168. Italics in original.

³³ On this issue see Harry T Edwards, ‘The Growing Disjunction between Legal Education and the Legal Profession’ (1992) 91 *Michigan Law Review* 34.

question of how to serve them. But if there is anything legal scholars do better than economists, social-scientists, and philosophers, it is institutional design.’³⁴

However, doctrinal accounts are not without their limitations. There are some circumstances in which conventional legal analysis simply “runs out” or, to put it another way, the law raises questions that it cannot answer by application of its own unique form of reasoning. Appreciating the limits of doctrinal analysis is particularly important for this thesis because the concept of possession is a case in which conventional legal analysis “runs out”. This is because, as is argued in Chapter IV, the possession *rule* of the law cannot be understood in isolation from the spontaneously emergent possession *convention* that operates quite independently of the positive law. As a consequence, doctrinal analyses of possession, though essential, can only ever reveal a part of the larger picture.

However, theoretical explanations are not without their deficiencies either. Whilst moving up the ladder of abstraction may enable one to give a coherent and elegant explanation of the nature and function of possession, it can also obscure anomalies in the substantive rules that can only be appreciated at ground level. As the discussion of the “*bona fide* purchaser rule” in Chapter VII illustrates, the legal rules often reflect *ad hoc* solutions to pressing practical problems. Inconvenient as this might be for the formulation of an overarching theory, it cannot be ignored in any account that purports to explain the role of possession in the law.

³⁴ Henry E Smith, ‘Mind the Gap: The Indirect Relation between Ends and Means in American Property Law’ (2009) 94 *Cornell Law Review* 959, 970.

What is thus required is an account of possession that uses theoretical and interdisciplinary insights as a means of augmenting traditional doctrinal analysis. This sort of approach is not without precedent in property scholarship. Harris's great work *Property and Justice*³⁵ provides a template. Likewise, Penner's *The Idea of Property in Law*³⁶ has been hugely influential amongst both property theorists and doctrinal scholars.

Despite these precedents, recent contributions to the literature on possession demonstrate an ongoing absence of cross-pollination between those occupying either side of this methodological divide.³⁷ A substantial aim of this thesis is thus to attempt to combine the theoretical and interdisciplinary insights of American scholars with the rigorously doctrinal analysis of English writers on the topic. It is hoped that this methodological approach will not only lead to a more satisfactory and coherent explanation of possession and its role in the law, but, in light of the recent resurgence of academic interest in possession after years of comparative neglect,³⁸ will also help this thesis to make an original contribution to what is now a lively field.

³⁵ J W Harris, *Property and Justice* (Clarendon Press, 1996).

³⁶ J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997).

³⁷ Compare, for example, the contributions in Eric Descheemaeker (ed), *The Consequences of Possession* (Edinburgh University Press, 2014) with those in J E Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, 2013) and Yun-chien Chang (ed), *Law and Economics of Possession* (Cambridge University Press, 2015).

³⁸ Some notable recent contributions include Hickey, above n 6; Chang, above n 37; Descheemaeker, above n 37; Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Hart Publishing, 2011).

IV ARGUMENT AND STRUCTURE

A The Central Arguments of the Thesis

Broadly speaking, this thesis aims to answer a “*what?*” question and a “*why?*” question. That is, it attempts to explain, first, the nature and function of possession in the law and, secondly, why possession, as opposed to some other mechanism, fulfils the function of creating original property rights in tangible things.

In answer to the first, “*what?*”, question, it is argued that the concept of possession in the law is far simpler than generations of lawyers have been given to believe. Possession does not describe some distinct form of right, or jural interest, in an object of property. Rather, it describes those relations between people and tangible things which, as a matter of social fact, constitute accepted ways of claiming some form of entitlement to them. What is crucial to understand is that, contrary to standard accounts, both judicial and academic, the significance of those particular relationships between people and things is not to be found in the extent of the putative possessor’s control. Whilst it might be that the higher degree of control, the clearer the “signal”, it remains true that the significance of those relationship lies in the fact that, within particular populations, they constitute legitimate ways of an announcing one’s intention to stake a claim to an object that is capable of being “owned”. In short, in a society that habitually respects property rights, the role of possession is purely *expressive*.

Philosophers and jurists have long sought to explain why the unilateral act of taking possession of some tangible object has the effect of creating original property rights in it. The argument

advanced in this thesis is that there is no meaningful answer to this second, “*why?*”, question. That is, there is no quality, either moral or instrumental, peculiar to the fact of possession that explains why it, as opposed to some other mechanism, should fulfil the essential function of allocating property rights to those capable of holding them. The important insight of the “spontaneous order” tradition, which commenced with Hume, is that the possession rule is not a product of conscious design but instead arose, quite unconsciously, through the repeated interaction of self-interested individuals. Possession triumphed as the dominant allocative rule, not because it was regarded as morally or instrumentally desirable by those whose behaviour was guided by it, but instead because it was “salient”. That is, for largely inscrutable psychological reasons, the fact of possession appeared, and continues to appear, prominent to those who must decide which objects belong to whom. This is not to say that natural rights-based arguments which appeal to self-ownership or human freedom cannot be deployed in support of the possession convention. It is, however, to say that they cannot explain why possession, as opposed to some other mechanism, came to fulfil the vital function of assigning property rights to particular people. As is discussed in Chapters VI and VII, the answers to these *what?* and *why?* questions have important implications for the way in which we should approach particular doctrinal issues in the law of property.

Perhaps most importantly, the account presented in this thesis challenges the tendency of jurists to view possession exclusively as an intractable technical problem in need of a solution. Whilst the possession rule undoubtedly raises legal and philosophical questions that do not admit of simple answers, it should never be forgotten that, beneath the legal rule, lies a convention that

countless people, without legal or philosophical training, effortlessly adhere to as they successfully navigate the countless coordination problems generated by everyday life.³⁹

B *The Structure of the Thesis*

The thesis begins, in Chapter I, by offering an analytical overview of a property right. Following the “property as exclusion” model, the account offered in this chapter emphasises that the essence of a property right is to be found in the duty that forbids anyone but the owner from physically interfering with its subject matter. For present purposes, the value of the “property as exclusion” model is that it distinguishes “possession” from “exclusion” and thus makes clear that possession does not describe the content of a property right. Contrary to standard formulations, liability in the property torts has nothing to do with interferences with “possession” *per se*. The importance of this observation is that the scope of tortious protection afforded by the common law is not limited to situations in which the right-holder has some degree of control, however attenuated, over the object of the right.

Having separated the distinct concepts of “possession” and “exclusion”, Chapter II continues with this preparatory, ground-clearing exercise. It commences with a summary of both the divergent academic views on the concept of possession and the byzantine nomenclature that has become such a feature of this area of the law. The argument presented in this chapter is that the mistaken tendency to conceive of possession as some species of “right” is a consequence of a failure to distinguish between what Hohfeld described as “jural” and “non-jural” concepts.

³⁹ For a similar observation see Thomas W Merrill, ‘Possession as a Natural Right’ (2015) 9 *New York University Journal of Law and Liberty* 345, 358.

It concludes that, consistently with the argument offered in Chapter I, there is no reason to regard possession in the law as anything other than a fact that creates a property right.

The objective of Chapter III is to give some conceptual substance to this fact. The argument advanced in this chapter is that the concept of “possession” refers to any act that, within a particular population, is an accepted way of conveying one’s intention to stake a claim to an object of property. This “expressive” account of possession challenges the standard “control plus intention” explanation offered by jurists such as Holmes and Pollock and subsequently adopted by the courts. In particular, it rejects the notion that actual control, in the sense of an ability to exclude others, is necessary in order to establish “possession” of some thing.

Chapter IV takes a philosophical turn and investigates the “conventional” origins of the possession rule. It argues that the possession rule is not an example of conscious design but is instead a spontaneously emergent convention that has been adopted, seemingly without modification, by the positive law. If this is true, it follows that all attempts to explain the possession rule by reference to some rationale that is peculiar to the fact of possession fall victim to the same “constructivist” trap; namely, the failure to appreciate that there is no such rationale. The existence of the possession convention cannot be explained on the basis of, for example, the inherent moral significance of acts of possession. Rather, the convention prevailed at the expense of other potential methods of allocating “names to things” because it is “salient”. Crucially, as is discussed in detail in this chapter, there is no necessary connection between the salience of a solution to a “coordination problem” and its desirability, as judged by some external standard such as economic efficiency, moral justifiability, and so on.

Chapter V argues that, whilst the moral desirability of a convention is immaterial to its ability to spread throughout a population, it does not follow that any given convention is therefore unfair. In other words, that a convention is amoral does not mean that it is also immoral. The claim defended in this chapter is that the possession rule, and the convention on which it is based, does indeed satisfy a minimum standard of fairness. In particular, it is argued that the arbitrariness of the possession convention, which appears to make it so morally suspect, in fact turns out to be its strength.

Chapters VI and VII apply the insights of the expressive theory of possession to particular doctrinal issues in the law. Chapter VI considers the implications of applying the theory to the so-called “finders’ cases”, a group of decisions that has been famously resistant to coherent analysis. The conclusion reached in this chapter is that, whilst no one has proposed a compelling reason for departing from the possession rule in cases of finding, it is nevertheless true that the modern cases cannot be explained as particular examples of the possession rule in action. Because one cannot signal her intention to stake a claim to some object of which she is entirely ignorant, the better view is that most cases of finding are actually resolved by the application of a *sui generis* set of rules that are not possessory in nature, but instead turn on the factual circumstances of the find.

Finally, Chapter VII applies the expressive theory of possession to two particularly difficult issues in the law of property, the acquisition of property rights through acts of theft and the position of the good faith purchaser at common law. The argument advanced in this chapter is that these very practical issues reveal the inherent limitations of rules that are, at base, spontaneously emergent conventions. However, it does not follow either that the possession

rule is fundamentally flawed or that these problems are insoluble. Instead, it simply means that their satisfactory resolution depends upon considerations that are independent of the possession rule and its conventional structure.

CHAPTER I

“EXCLUSION” AND “POSSESSION”: AN INTRODUCTION TO PROPERTY RIGHTS

I INTRODUCTION

Bentham famously wrote that property ‘has given to man the empire of the earth’.¹ Given property’s fundamental importance, it is perhaps surprising that there should be so little agreement on what, precisely, it is. Depending on the context, the appellation “property” may describe a tangible thing, a right to a tangible thing, an abstract “bundle of rights”, an “ideational thing”, or a conclusion of law that denotes the existence of a right and correlative duty.² This confusion also extends to doctrinal analyses of the concept. As Swadling notes,³ textbooks on personal property law, for instance, often include both “things in possession”, such as chattels, and “things in action”, such as debts and other contractual rights.⁴ Though both are rights that can be assigned, it is not clear that they should occupy the same conceptual category. Unlike things in possession, things in action have no subject matter capable of being possessed and can only be vindicated by judicial action.⁵ As Swadling writes, ‘a property right in a car and a right to be paid £100 are fundamentally different. Title

¹ Jeremy Bentham, *The Theory of Legislation* (Kegan Paul, 1931) 114.

² Arnold S Weinrib, ‘Information and Property’ (1988) 38 *University of Toronto Law Journal* 117, 120–1.

³ William J. Swadling, ‘The Law of Personal Property’ [2015] *Lloyd’s Maritime & Commercial Law Quarterly* 595, 595.

⁴ See *Colonial Bank v Whinney* (1885) 30 Ch D 261, 285 (Fry LJ).

⁵ *Your Response Ltd v Datateam Business Media Ltd* [2015] QB 41, 48 [13] (Moore-Bick LJ). The inclusion of “things in action” within many standard treatments of personal property law is attributable to the fact that, in Roman law, the category of “things” included debts and other contractual rights. See Barry Nicholas, *An Introduction to Roman Law* (Clarendon Press, 1976) 98–100.

to car can be acquired by taking possession of the car, while it is impossible to take possession of a debt.’⁶

This purpose of this chapter is not, however, to offer a definitive account of property rights. Instead, it has two, more limited, objectives. The first is to introduce principles of property law that form the essential background of the analysis offered in the next seven chapters. The second is to begin to explain the particular structural role that possession fulfils within the overall doctrinal architecture of property law. Following the “property as exclusion” model, it is argued that the law of property describes a system in which the imposition of a strict *in rem* duty of non-interference confers upon the right holder the exclusive power to choose, subject to property limitation rules, between an essentially limitless number of uses in respect of an object that counts as a “thing”.

What is emphasised in both this chapter and those that follow is that if we are to understand the particular role that possession plays within the formal architecture of property law, we must uncouple the concept of “property”, which describes a right to exclude others, from that of “possession”, which describes a fact that creates such a right. The power of the “property as exclusion” model is that it discards the misleading, but widely held, notion that property rights guarantee a “right to exclusive possession”. To describe the content of a property right in these terms is to misunderstand the more limited function that possession fulfils within the law of property. Property rights do not protect an owner’s right to “possess” some thing. Instead, they allow him to choose between alternative uses by the simple expedient of obliging everyone else to “keep off”.

⁶ Swadling, ‘The Law of Personal Property’, above n 3, 596.

II THE (ANALYTIC) PROPERTIES OF PROPERTY

A Core Cases

One source of the pervasive disagreement over the meaning of “property” is a failure to agree on basic paradigms. Even in law journals, the term property is frequently used to describe concepts as disparate as wealth, bodily integrity, rights to artistic expression and bulwarks against state power.⁷ As a consequence, it is often difficult to determine whether the term is being used to denote a legal right, an economic metric, a political concept or something else entirely.

Given this, how might one begin to explain the essence of such a contested concept? Perhaps the only way is to identify a core or archetypal case. Fortunately, the process of identifying such a case is a simple one. We can ignore talk of “ideational things” and “bundles of rights” and concentrate instead on rights to tangible things. This is because tangible things are, by virtue of their tangibility, inherently scarce and scarcity is, as Waldron remarks, ‘a presupposition of all sensible talk about property.’⁸ Thus, just as Birks argued that the law of unjust enrichment ‘is the law of all events materially identical to the mistaken payment of a non-existent debt’,⁹ the term “property” includes all rights that are materially identical to those, such as a freehold interest in land or an ownership interest in chattels, which confer upon their holder an exclusive entitlement to some material thing. For sake of brevity, the

⁷ Charles A Reich, ‘The New Property’ (1963) 73 *Yale Law Journal* 733, 771. On the enduring importance of the concept of property in English political theory see Craig Rotherham, ‘Conceptions of Property in Common Law Discourse’ (1998) 18 *Legal Studies* 41, 51.

⁸ Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1988) 31. See also JW Harris, *Property and Justice* (Clarendon Press, 1996) 24.

⁹ Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005) 3.

account offered in this chapter will, for the most part, concentrate on ownership rights in chattels.

Before proceeding, something must be briefly said about the use of the term “ownership” to describe the greatest possible interest in a chattel. As will be discussed in detail in Chapter II, it is generally believed that the common law does not recognise the concept of ownership. However, because English law does not recognise a system of estates in goods,¹⁰ one cannot describe the greatest possible right in a chattel as a “fee simple absolute in possession.” In the absence of a unique technical term, and as a pragmatic concession to ease of expression, the term “ownership” will be used throughout this thesis.

B Possession and the Creation of Rights

As will be discussed in detail in Chapters III and IV, the position adopted in this thesis is that acts that amount to “possession” create an original property right in favour of the possessor. To borrow Pollock’s famous description, possession functions as a ‘root of title.’¹¹ What is more, acts of possession have this right-creating effect irrespective of whether the object in question is owned or unowned. As will be discussed in Chapter II, the potential of the “possession rule” to create a potentially infinite number of concurrently valid entitlements to some thing is a reflection of the fact that property rights at common law are relative and not absolute.

¹⁰ E L G Tyler and Norman Palmer, *Crossley Vaines’ Personal Property* (Butterworths, 5th ed, 1973) 43–4; William Swadling, ‘Property’ in A S Burrows (ed), *English Private Law* (Oxford University Press, 3rd ed, 2013) 173, 267 [4.130].

¹¹ Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (Clarendon Press, 1888) 22.

A more difficult question is whether possession is the only way of acquiring an original property right in a tangible thing. This question is difficult because, unlike acts of possession, other relevant events occupy a grey area in which property rights are simultaneously created and destroyed. Importantly, the concepts discussed below will be referred to throughout this thesis. For the sake of brevity, this account will focus on rights in chattels.

C Extinguishing Property Rights and the Concept of a “Thing”

There are numerous ways in which an ownership right in a chattel can be extinguished. If a plaintiff sues a defendant in conversion, the plaintiff’s right to the converted goods will be destroyed when the tortfeasor satisfies the judgment debt.¹² Property rights in chattels are also extinguished by the operation of statutes of limitation.¹³ Likewise, the various exceptions to the *nemo dat* principle, discussed in Chapter VII, ensure that good faith purchasers acquire a clear title to goods by destroying the extant property rights of owners. To take one prominent example, the “currency rule” allows a thief, for instance, to pass good title to chattel money if the recipient takes the money for value and without notice of the fact that it was stolen.¹⁴ An ownership right will also be extinguished where the owner evinces a sufficient intention to abandon his right to particular chattels.¹⁵

The event that, at least on its face, most obviously results in the extinguishment of an ownership right in a chattel is the destruction of its corporeal subject matter. As Birks has

¹² *United States of America v Dollfus Mieg et Cie SA* [1952] AC 582, 607 (Earl Jowitt); *Torts (Interference with Goods) Act 1977* (UK) s 5(1).

¹³ *Limitation of Actions Act 1958* (Vic) s 6(2).

¹⁴ *Miller v Race* (1758) 1 Burr 452, 457; 97 ER 398, 401 (Lord Mansfield).

¹⁵ *Arrow Shipping Co Ltd v Tyne Improvement Commissioners* [1894] AC 508, 521 (Lord Watson), 532 (Lord Macnaghten). Although this point may seem elementary, the authorities are not entirely consistent. See A H Hudson, ‘Is Divesting Abandonment Possible at Common Law?’ (1984) 100 *Law Quarterly Review* 110.

written, '[a] right in rem cannot survive the extinction of its *res*.'¹⁶ Whilst Birks's statement is undoubtedly true, it is also deceptively complex. This is because, perhaps unwittingly, it raises complex questions about what counts as a "thing" in property law. Rahmatian has written of this issue that:

[a]n apple does not exist in the normative world of the law by virtue of its mere existence in the material world. For the purpose of the law, the apple 'exists' only because property rights are attached to it, triggering the behaviour of one person exercising power over the thing in question ... and all others respecting such exercise of power by way of non-interference ... Only if and when property rights are attached to the apple does it become typified as 'property' or 'a thing/*res*' and the law is capable of perceiving it and incorporating it into the abstract-normative system of 'persons' and 'things'.¹⁷

Rahmatian advances this argument as part of a broader claim that it is irrelevant whether, for the purposes of property law, a "thing" is tangible or purely ideational. It is not, for present purposes, necessary to engage in that particular debate. What is relevant is Rahmatian's observation that the mere physical existence of some object or substance does not, without more, make it a "thing" for the purposes of the law of property.

This insight is important because, to return to Birks's apparently straightforward observation, corporeal things do not in fact become "extinct", nor are they "destroyed". Depending on the circumstances, they are, instead, more or less fundamentally transformed. So, for example, if you burn my first edition copy of *Bleak House*, I will no longer have a "book", but I will have a pile of ashes. To take a slightly different example, if I heat it to a certain temperature, my

¹⁶ Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985) 49.

¹⁷ Andreas Rahmatian, 'Intellectual Property and the Concept of Dematerialised Property' in Susan Bright (ed), *Modern Studies in Property Law, Volume 6* (Hart Publishing, 2011) 361, 368.

bucket of sand will become glass. The question for property law is not whether there has been some fundamental chemical or physical change in the paper or the sand. Rather, what must be decided is the point at which some object has become so altered that it either becomes a different sort of “thing” or, in extreme cases, ceases to be a “thing” at all. As the discussion below makes clear, this is an exercise that is guided by essentially non-legal intuitions about the nature and function of particular objects.

Determining when some thing ceases to exist, or becomes something else, is of limited importance in land law. Whilst the doctrine of fixtures is concerned with the circumstances in which a chattel merges with land,¹⁸ the concept of land in the law of property has, as Pottage argues, come to be understood as a set of coordinates on a two dimensional map.¹⁹ As a consequence, it cannot be altered beyond legal recognition or destroyed. However, this is not true of chattels. The law of personal property recognises several events that change the legal nature of particular “things”. These events are usually described under the rubric of “accession”, “specification” and “mixing”. For present purposes, the question is whether, like acts of possession, these events actually create, or instead destroy, property rights in moveables.

D Accession, Specification and Mixing

The doctrine of accession is concerned with the proprietary consequences of an event in which one object merges with, and thus becomes part of, a different object. As Birks

¹⁸ *Holland v Hodgson* [1872] LR 7 CP 328, 334 (Blackburn J).

¹⁹ Alain Pottage, ‘The Measure of Land’ (1994) 57 *Modern Law Review* 361, 384.

remarked, accession concerns objects that relate to each other as ‘principal and subsidiary’.²⁰

Accession thus concerns the proprietary consequence of, for instance, attaching a wheel to a car or a button to a blazer. The classic statement of accession is that of Blackburn J, who wrote that:

materials worked by one into the property of another become part of that property. This is equally true, whether it be fixed or movable property. Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship ...²¹

What is important is that, so far as the law of property is concerned, the effect of accession is not to augment the right of the owner of the principal chattel. Rather, it is to alter the nature of the object of that right by holding that the subsidiary chattel no longer exists as a “thing”. To continue with Blackburn J’s illustrations, those who contribute bricks to a wall lose their rights to them because, once they accede to the wall, the bricks cease to exist as objects of property. What is crucial about the effect of accession is that, unlike the event of mixture, discussed below, the erstwhile owner of the bricks does not become an owner, or co-owner, of the wall to which they accede. The general principle was neatly illustrated by Rudden, who remarked that, ‘[i]f B feeds his horse with A’s hay, A owns neither the hay nor a share in the horse.’²²

Accession concerns events in which one thing merges with another, in a very literal sense. However, it is also used in a broader sense to include, *inter alia*, the way in which the law

²⁰ Peter Birks, ‘Mixtures’ in Norman Palmer and Ewan McKendrick (eds), *Interests in goods* (LLP, 2nd ed, 1998) 227, 227.

²¹ *Appleby v Myers* [1867] LR 2 CP 651, 659–60.

²² FH Lawson and Bernard Rudden, *The Law of Property* (Oxford University Press, 3rd ed, 2002) 52.

allocates rights to things that come into existence by natural increase. The law on natural increase is simple and intuitive. Rights to progeny or other “fruits” belong to the owner of the object from which they spring.²³ So, for instance, the owner of a cow will automatically own any of her calves.

Merrill has recently suggested an even broader usage. He argues that rules which, for instance, attribute interest earned on principal to the depositor and internet domain names to the holder of the relevant trademark are best understood as examples of accession at work in the law.²⁴ Merrill explains the difference between possession and accession with the following analogy. Possession decides who is to become the right-holder by means of a race in which the first person to establish physical control gets the prize. Accession, by contrast, operates like a magnet attracting iron pellets. Accession thus allocates rights to unowned things passively by reference to a prominent connection between an owned and an unowned thing.²⁵

If Merrill’s broader usage of accession is correct, then it undermines the claim made above that accession is essentially concerned with the destruction and not the creation of property rights. However, it is submitted that accession should be confined to circumstances in which a subordinate thing merges with, and becomes subsumed within, a dominant thing. To describe natural increase, for instance, as an example of accession is inaccurate. The birth of an animal is not an example of the accession of one thing to another. To the contrary, it is an example of the severance of one thing *from* another. Unlike adding a brick to a wall, natural increase is concerned with the birth of new objects of property. The rule that the owner of a

²³ William Blackstone, *Commentaries on the Laws of England. Book II, Of the Rights of Things* (Oxford University Press, 1st ed, 2016) 274.

²⁴ Thomas W Merrill, ‘Accession and Original Ownership’ (2009) 1 *Journal of Legal Analysis* 459, 464–73.

²⁵ *Ibid* 463, 480–1.

tree also owns its fruit is a sensible solution to what would otherwise be a proprietary vacuum that would allow, amongst other things, people to free ride on the efforts of, for example, primary producers. There is no need to explain this rule as an example of accession. Rather, as Honoré has argued,²⁶ my entitlement to an apple that is lying under a tree is best viewed as an incident of my ownership right in the apple tree from which they fell.

The law, in turn, draws a distinction between accession and the separate event of “specification” or “manufacture”. Birks illustrated the difference between the two events by giving the example of baking a cake. Whereas the transformation of flour, eggs and butter into a cake is an example of specification, the addition of icing to the cake is an example of accession.²⁷ Unlike accession, specification thus concerns the transformation of some object by the application of labour or skill. Despite this subtle conceptual distinction between the two events, the proprietary consequences are the same. If, for instance, A uses B’s resin in the manufacture of chipboard without B’s permission, A will be liable to B in conversion. However, once accession has occurred, B will neither own the resin, which will have ceased to exist as a “thing”, nor will he have become a co-owner in the chipboard created from it.²⁸

The final relevant event is mixture. There are two ways in which to think about the consequences of the mixing of chattels. The first is to consider mixing as an event that gives rise to an evidential problem. If you store one tonne of your wheat in a silo which already contains two tonnes of my wheat, there is an evidential problem about determining whose wheat is whose. The second way is to view mixing as an event that creates new objects of property.

²⁶ AM Honoré, ‘Ownership’ in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107, 117.

²⁷ Peter Birks, ‘Mixtures’, above n 20, 228. The transformation of an egg into an omelette is, perhaps, an even more obvious example of specification.

²⁸ See *Borden (UK) Ltd v Scottish Timber Products Ltd* (1981) 1 Ch 25.

As Hickey has shown,²⁹ the Roman view differed depending on the sort of chattels that were mixed. The Romans distinguished between a mixture of liquids, a *confusio*, and a mixture of solids, a *commixtio*. In the Roman view, a mixture of liquids created new “things”. It thus followed that the correct proprietary response to a *confusio* was to treat the contributors as co-owners in the mixture. By contrast, because, according to the Romans, a *commixtio* did not create a new object of property, the rights of the contributors persisted through the mixture.³⁰

The common law never has never observed this distinction.³¹ Irrespective of the nature of the goods, the common law simply treats each contributor as a co-owner in the mixture in proportion to his contribution.³² That is, each contributor holds an undivided share as tenant in common. The proprietary consequences remain the same even when the mixing occurs as a consequence of the wrongdoing of one of the parties. The only difference is that, in cases of wrongdoing, any evidentiary difficulties concerning relative contributions are resolved against the interests of the wrongdoer.³³ Whilst one might attribute this co-ownership solution to sheer pragmatism, it is also consistent with the view that, at common law, the effect of mixing is to create a new object of property that is different from the sum of its parts.

²⁹ R W J Hickey, ‘Dazed and Confused: Accidental Mixtures of Goods and the Theory of Acquisition of Title’ (2003) 66 *Modern Law Review* 368, 370.

³⁰ *Ibid* 370–1.

³¹ *Ibid* 372.

³² *Spence v Union Marine Insurance Company Ltd* [1868] LR 3 CP 427, 437 (Bovill CJ); *Sandeman & Sons v Tyzack and Branfoot Steamship Co* [1913] AC 680, 695 (Lord Moulton). If relative contributions cannot be ascertained, the default position appears to be that each party is entitled to an undivided half share. See *Buckley v Gross* (1863) 3 B&S 566, 575; 122 ER 213, 216 (Blackburn J).

³³ *Indian Oil Corp Ltd v Greenstone Shipping SA (Panama)* [1988] QB 345, 370–1 (Staughton J); *Glencore International AG v Metro Trading International Inc* (2001) 1 *Lloyds Law Rep.* 284, 322–3, 330 (Moore-Bick J).

The important point for present purposes is that mixing is an event that both destroys and creates property rights. Property rights in wheat, for example, are extinguished when bushels belonging to different people become mixed and can no longer be identified. However, unlike accession and specification, the law responds to the event of mixing by creating new property rights.

E Conclusion

Whilst there are numerous events that lead to the destruction of an ownership right in a chattel, there are not, on closer inspection, very many events that actually create original rights in things. This is because the rules that apply to accession and specification, in particular, are not rules about the creation of property rights in favour of the owner of the wall or the chipboard. Instead, they are rules about the extinguishment of rights to the bricks and resin. As the foregoing sought to make clear, this extinguishment occurs because, in such cases, the law deems that particular things, though they may continue to exist in the same physical or chemical state, no longer constitute discrete objects of property.

If the analysis above is correct, it is only possession, natural increase and mixture that unambiguously result in the creation of rights in chattels and, of those three, only possession and natural increase do so without also destroying extant rights.

III COMPETING VISIONS OF PROPERTY RIGHTS

A The “Bundle of Rights” vs the “Exclusion” Model

In addition to introducing important concepts that will be referred to throughout this thesis, the foregoing discussion also sought to explain the nature and significance of a “thing” for the purposes of property law. One might think that, however difficult it may be to determine what counts as a “thing” in particular circumstances, “things” are nevertheless central to property law. However, according to a prominent and influential theory of property rights, this is not necessarily true.

As Smith has explained, the central concern of the influential “bundle of rights” conception of property is to replace property as “thing ownership” with property as a pure abstraction that describes any combination of rights, privileges, powers, etc. bundled together in order to serve a particular policy objective.³⁴ This view of property, untethered to the traditional understanding of property as rights to scarce things, has represented the academic orthodoxy for much of the 20th century.³⁵ Merrill and Smith write:

[i]t is a commonplace of academic discourse that property is simply a “bundle of rights,” and that any distribution of rights and privileges among persons with respect to things can be dignified with the (almost meaningless) label “property.” By and large, this view has become conventional wisdom among legal scholars: Property is a composite of legal relations that holds between persons and only secondarily or incidentally involves a “thing”. Someone who

³⁴ Henry E Smith, ‘The Language of Property: Form, Context, and Audience’ (2003) 55 *Stanford Law Review* 1105, 1106.

³⁵ Thomas C Grey, ‘The Disintegration of Property’ in J Roland Pennock and John W Chapman (eds), *Property* (New York University Press, 1980) 69.

believes that property is a right to a thing is assumed to suffer from a childlike lack of sophistication—or worse.³⁶

Conceptually, the bundle of rights picture of property is commonly explained as a sort of farrago, composed of Honoré's standard incidents of ownership mixed with the jural conceptions that together make up Hohfeld's scheme of jural relations.³⁷

The status of the bundle of rights theory as the default explanation of the institution of property has recently come under sustained attack from those who reject the notion that property simply describes any amalgam of rights, whether they pertain to a thing or otherwise.³⁸ According to an alternative conception, property law is not an amorphous bundle of legal entitlements. To the contrary, property is about rights to "things". In contrast to the bundle of rights picture, those who adhere to the "exclusion" model of property do not appeal to metaphor in order to explain the institution. On this view, property rights, quite literally, correlate to an *in rem* duty that forbids anyone and everyone from crossing the physical boundaries of the object of the right. This understanding of property thus shares much with Blackstone's seminal conception of property as that 'sole and despotic dominion which man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'³⁹

³⁶ Thomas W Merrill and Henry E Smith, 'What Happened to Property in Law and Economics?' (2001) 111 *Yale Law Journal* 357, 357–8.

³⁷ J E Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Review* 711, 711–4.

³⁸ Simon Douglas and Ben McFarlane, 'Defining Property Rights' in J E Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, 2013) 219, 219. See also Hanoch Dagan, *Property: Values and Institutions* (Oxford University Press, 2011) 37, 38–9. For a concise history of the trends in contemporary property theory see James Penner and Henry E Smith, 'Introduction' in J E Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, First edition, 2013) xv.

³⁹ Blackstone, above n 23, 1.

B *The Use and Abuse of Hohfeld*

Contrary to the standard explanation given above, the “bundle of rights” is not a concept that can be properly attributed to Honoré, who explicitly rejected the metaphor in his famous essay on ownership.⁴⁰ Even more significantly, it cannot be attributed to Hohfeld either. Given the extensive use of his work by the American Legal Realists this, as Douglas and McFarlane also note, may come as a surprise.⁴¹ Nevertheless, what is crucial to appreciate is that Hohfeld’s central lesson, the importance of distinguishing rights from other sorts of advantage conferred by law, cannot provide the framework for a conception that so conspicuously conflate these discrete concepts. As Douglas and McFarlane have recently demonstrated,⁴² Hohfeld’s insights demonstrate why the bundle of rights picture is analytically misconceived. In order to understand why this is so, it is necessary to give a brief description of his scheme of jural correlatives and opposites.

Hohfeld’s most enduring contribution to jurisprudence was his insistence that the use of the term “right” in most legal discourse is insufficiently discriminating. According to Hohfeld, it is not enough to describe some advantage conferred by law as a “right” because that generic appellation fails to distinguish between four distinct sorts of advantage: “rights”, “liberties”, “powers”, and “immunities”.⁴³ Though an enormous amount can and has been said about both the nature and the implications of Hohfeld’s scheme of jural relations, for present

⁴⁰ Honoré, above n 26, 134.

⁴¹ Douglas and McFarlane, above n 38, 220.

⁴² Ibid.

⁴³ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays* (Yale University Press, 1923) 35–6.

purposes only one element requires further elaboration; the distinction between a “right”, often referred to as a “claim-right”, and a “liberty”.⁴⁴

A true Hohfeldian right signifies that some other legal person is under a correlative legal duty to do or abstain from doing some particular act.⁴⁵ In Hohfeldian terms, “right” and “duty” are “jural correlatives”. To put it another way, in Hohfeld’s exclusively bilateral legal world, one is the jural mirror image of the other.⁴⁶ To say that I have a contractual right to the delivery of a dozen eggs means that some other legal person is under a legal duty to deliver a dozen eggs. To borrow Singer’s pithy phrase, Hohfeldian rights ‘are nothing but duties placed on others to act in a certain manner.’⁴⁷ The slightly perverse point to grasp about a Hohfeldian right is that it never empowers the right-holder to do anything. As Finnis explained, ‘[a] Hohfeldian claim-right can never be to do or omit something: it always is a claim that somebody else do or omit something: A’s claim-right is always to B’s action or omission, never to A’s.’⁴⁸

A “right” is to be contrasted with a “liberty”. In Hohfeld’s scheme, whether some legal person may do or omit to do some particular act is not a matter of “rights” but of “liberties”. I have a “liberty” to engage in certain conduct, not because someone owes me a correlative duty to allow me to do so, but instead because that conduct does not infringe any duty that I owe to anybody else.⁴⁹ In Hohfeld’s words, ‘a privilege is one’s freedom from the right or

⁴⁴ Hohfeld said that a “claim” is synonymous with a “right”: *ibid* 38. However, he never used the compound noun “claim-right”. This was coined by commentators who subsequently discussed his work. Throughout this thesis, the term “right” should be understood as a Hohfeldian claim-right.

⁴⁵ This is the most generally accepted element of his scheme. See *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664, 672 (Gummow J).

⁴⁶ Hohfeld, *above* n 43, 35–8.

⁴⁷ Joseph William Singer, ‘The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld’ (1982) 1982 *Wisconsin Law Review* 975, 987.

⁴⁸ John Finnis, ‘Some Professorial Fallacies about Rights’ (1971) 4 *Adelaide Law Review* 377, 380.

⁴⁹ This is because a ‘liberty’ correlates to a ‘no-right’. See Hohfeld, *above* n 43, 38–9.

claim of another.’⁵⁰ The clearest judicial exposition of the concept of a “liberty” is Cave J’s musing that:

it was said that a man has a perfect right to fire off a gun, when all that was meant, apparently, was that a man has a freedom or liberty to fire off a gun so long as he does not violate or infringe any one's rights in doing so, which is a very different thing from a right the violation or disturbance of which can be remedied or prevented by legal process.⁵¹

The important practical distinction between a right and a liberty is that, though both are advantages conferred by law, I cannot go to court and seek redress in respect of conduct that prevents me from exercising a particular liberty unless that conduct also infringes some duty owed to me. As Williams writes, whether someone can sue ‘depends on his rights, not upon his liberties.’⁵²

IV THE EXCLUSION MODEL OF PROPERTY RIGHTS

A “Exclusive Liberties”

What Hohfeld’s scheme of jural relations demonstrates is that, contrary to the bundle of rights picture, the architecture of a property right is both simple and asymmetrical. A property right consists of a single Hohfeldian right that correlates to a duty of non-interference in respect of some object of property. The imposition of that duty obliquely protects uses that the right-holder may exercise as a matter of legal liberty. To put the same point another way, the reason why a freeholder can, for instance, sing in the shower, paint the door purple or

⁵⁰ Ibid 60. Liberties and rights are thus ‘jural opposites’: at 38.

⁵¹ *Allen v Flood* [1898] AC 1, 29.

⁵² Glanville Williams, ‘The Concept of Legal Liberty’ (1956) 56 *Columbia Law Review* 1129, 1146.

engage in an almost infinite number of other activities besides is not because those activities are directly protected by a legal duty. Instead, it is simply because, in doing so, he does not breach any duty he owes to anyone else. Thus, what is crucial to understand is that, unlike the categories of property right at law, there is no closed list of permissible uses. Any use is permitted so long as it does not infringe on a duty owed to anyone else. To borrow Harris's phrase, the set of these liberties is 'open-ended'.⁵³

One objection to the concept of a Hohfeldian liberty is that it is not in fact a jural conception. Penner, for example, has written that, 'the liberty-no-right correlation is simply a false description of legal relations. The liberty-no-right correlation is a description of the absence of any legal norm, not of the institution of one.'⁵⁴ Likewise, Harris has asked:

what is the point of insisting that every act which the law does not prohibit me from performing correlates with someone's "no-right"? The law permits me to blow my nose. Why describe this situation in terms of multital privileges with every other citizen's "no-right" that I should not do so?⁵⁵

In so far as some act can be performed by anyone, there seems little point in describing it as a legal "liberty". For instance, my ability to gaze at the night sky is not a particularly meaningful example of the "liberty-no-right" jural correlate in action. However, not all liberties are like this. Some liberties are "exclusive" in the sense that they can only be exercised by people who hold a particular right. A use of a thing will constitute an "exclusive

⁵³ Harris, above n 8, 29.

⁵⁴ James Penner, 'Hohfeldian Use-Rights in Property' in J W Harris (ed), *Property Problems: From Genes to Pension Funds* (Kluwer Law International, 1997) 164, 169.

⁵⁵ J W Harris, *Legal Philosophies* (Oxford University Press, 2nd ed, 2004) 88.

liberty” if it is one which, if exercised by anyone but the right-holder, would constitute a breach of duty.

What is crucial to understand about the exclusion model is that the duty of non-interference creates a whole range of use liberties that are exclusive to the right-holder. So, unlike the ability to gaze at the night sky, which is a “non-exclusive liberty” and perhaps of no jural significance at all, singing in the shower and painting the front door are activities that can only be undertaken by the person who holds the property right in that parcel of land.

This emphasis on exclusion at the expense of use has been described as ‘extraordinarily negative and potentially misleading’.⁵⁶ However, this criticism fails to appreciate the distinction between means and ends in property law. As Penner has explained, ‘[n]o one has any interest in merely excluding others from things, for any reason or no reason at all. The interest that underpins the right to property is the interest we have in purposefully dealing with things.’⁵⁷ Exclusion is merely the mechanism that the law employs in order to confer upon the right-holder the exclusive ability to choose between alternative uses. Smith captured the idea by writing that, ‘[t]here is no interest in exclusion per se. Instead, exclusion strategies, including the right to exclude, serve the interest in use; by enjoying the right to exclude through torts like trespass, an owner can pursue her interest in a wide range of uses that usually need not be legally specified.’⁵⁸ To put the same point another way, property law is, to coin a phrase, right-light and liberty-heavy.

Given that property serves the “interest in use”, why not dispense with the cumbersome term “exclusive liberty” in favour of “right”? Indeed, in popular speech, this is precisely what we

⁵⁶ Alison Clarke, ‘Use, Time, and Entitlement’ (2004) 57 *Current Legal Problems* 239, 241.

⁵⁷ J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 70–1.

⁵⁸ Henry E Smith, ‘Property as the Law of Things’ (2011) 125 *Harvard Law Review* 1691, 1693.

do. Despite its awkwardness, “exclusive liberty” remains the more apt description because it makes clear that we are dealing with a species of legal advantage that is incapable of being breached.⁵⁹ To illustrate with a simple example, a freeholder has an exclusive liberty to enjoy the view from her bedroom window. However, her ability to do this is not a right because it does not correlate to a duty. As a consequence, her neighbour will not commit a legal wrong against her if, absent a restrictive covenant or easement, he obscures her view by adding a second story extension onto his house.⁶⁰

B *Exclusion as a Solution to Complexity*

If the aim of private property is to confer on some person the exclusive ability to make decisions about the use of a scarce thing, why has the law sought to achieve this end through the indirect method of exclusion? In other words, why not simply create a system of true use rights?

The first reason is that a system of true use rights would require the law to compile a list of duties that would correlate to every conceivable use. As Smith has written, ‘[a]t the hypothetical extreme, the law would implement a list of use rights holding between all potential pairwise combinations of persons with respect to any ... conceivable activity that has any impact on anyone.’⁶¹ This would, of course, be an impossible task.

⁵⁹ In Douglas’s words, one who has a liberty has no ‘security against interference.’ Simon Douglas, ‘The Content of a Freehold: A “Right to Use” Land?’ in Nicholas Hopkins (ed), *Modern Studies in Property Law*, volume 7 (Hart Publishing, 2013) 359, 366.

⁶⁰ For a concise list of the relevant authorities see *Robson v Leischke* (2008) 72 NSWLR 98, 118 [86] (Preston CJ).

⁶¹ Henry E Smith, ‘Exclusion and Property Rules in the Law of Nuisance’ (2004) 90 *Virginia Law Review* 965, 972.

Secondly, and relatedly, protecting use obliquely through an exclusory duty allows right-holders to use their things as they see fit without imposing an impossible tangle of unknowable duties on everyone else. The exclusion strategy represents, to borrow Smith's explanation, a 'tradeoff between information intensiveness on the one hand and information extensiveness on the other.'⁶² Though a blunt instrument, exclusion has the distinct advantage of imposing minimal information costs upon people who deal with tangible things because the only non-consensual duty to which they are subject is the duty to refrain from physically interfering with things that do not belong to them. If it were otherwise there would, in Waldron's words, 'be no other way of ensuring, in ordinary life, that one abided by the rules except to find out what they were and learn them by heart.'⁶³

Problems of informational complexity created by covert duties *in rem* are by no means theoretical. As Lord Browne-Wilkinson has observed, they have the potential to create "off-balance sheet" liabilities that are hidden from those who were are not parties to the transaction that created them.⁶⁴ The danger they pose to ignorant transferees, in particular, has necessitated the creation of comprehensive registration regimes, such as that regulated by the *Personal Property Securities Act 2009* (Cth), discussed in Chapter VII.

Merrill and Smith have argued that the potential for duties *in rem* to create unmanageable informational complexity explains why there must be a *numerus clausus* or closed-list of

⁶² Smith, 'The Language of Property', above n 34, 1111.

⁶³ Waldron, above n 8, 43.

⁶⁴ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 705. Though his Lordship's comments were directed at equitable property rights, the principle remains the same.

simple and standardised property rights in the law.⁶⁵ As Lord Brougham LC famously observed:

great detriment would arise, and much confusion of right, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed.⁶⁶

This is why complex and fine-grained rules relating to the permissible use of some thing can only, unless they fall within a recognised class of restrictive covenants or easements, take effect as contractual rights that do not bind strangers to their creation.⁶⁷ This inevitable trade-off between the intensiveness and extensiveness of the messages that can be sent about objects of property will be discussed in detail in Chapter III.

V THE EXCLUSION MODEL AND TORT

A Rights, Duties and Torts

As the foregoing section sought to demonstrate, the exclusion model is simple and coherent. Moreover, its fundamental concern with entitlements to “things” means that, unlike the

⁶⁵ Thomas W Merrill and Henry E Smith, ‘The Property/Contract Interface’ (2001) 101 *Columbia Law Review* 773, 776–7; Thomas W Merrill and Henry E Smith, ‘Optimal Standardization in the Law of Property: The Numerus Clausus Principle’ (2000) 110 *Yale Law Journal* 1.

⁶⁶ *Keppel v Bailey* (1834) Coop T Brough 298, 317; 47 ER 106, 114.

⁶⁷ Henry E Smith, ‘Exclusion versus Governance: Two Strategies for Delineating Property Rights The Evolution of Property Rights’ (2002) 31 *Journal of Legal Studies* S453, s 454-5; Merrill and Smith, ‘The Property/Contract Interface’, above n 65, 791.

bundle of rights picture, it also tracks people's intuitive sense of property as an institution. To borrow Ackerman's phrase, it conforms to 'ordinary property talk'.⁶⁸ Quite apart from these advantages, what is most significant about the exclusion model is that, as the law of torts demonstrates, it provides a faithful explanation of the content of core property rights at common law.

The claim that the law of torts confirms the truth of the exclusion model of property rights might, at first blush, appear unlikely. This is because tort law and property law are generally viewed as occupying distinct taxonomical categories within private law. Douglas, for example, has written that, '[t]he Common Law protects property rights relating to chattels through the law of torts, not the law of property.'⁶⁹ If there is indeed a genuine taxonomical division between tort and property, then one would think that the former would have little to say about the content of the latter. However, this distinction is illusory. As Hohfeld demonstrated, a right is nothing more than the correlative of a duty obliging someone to do or refrain from doing some particular thing. If the content of the right is defined by the requirements of the duty, then, as Douglas has also noted, its substantive content must be found in the law of wrongs, or torts.⁷⁰ To put it another way, determining the content of one's *rights* requires one to start at the law of *wrongs* and work backwards. It is thus a curious feature of the common law that if I want to know how rights of property are created, transferred or encumbered I will look for a book entitled "Property". However, if I want to know the content of that right, I will have to look on another shelf for a different book entitled "Tort".

⁶⁸ Bruce A Ackerman, *Private Property and the Constitution* (Yale University Press, 1977) 97.

⁶⁹ Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Hart Publishing, 2011) 4.

⁷⁰ Simon Douglas, 'Kuwait Airways Corporation v Iraqi Airways Company [2002]' in Simon Douglas, Robin Hickey and Emma Waring (eds), *Landmark Cases in Property Law* (Hart Publishing Ltd, 2015) 205, 214.

B *The Gist of Liability in Tort*

What, then, does the law of tort reveal about the content of core property rights such as an ownership interest in goods? Is there some golden thread that runs through the torts of trespass, conversion, detinue and negligence that supports the central claim of the exclusion model? The traditional view has been that the gist of liability in the property torts, particularly conversion, was extremely difficult to discern. Indeed, Lord Nicholls was moved to observe that, '[c]onversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible.'⁷¹ However, Douglas has challenged this conventional wisdom. He has persuasively argued that the central criterion for tortious liability in respect of moveables is that of "interference", and by interference the law means, with few exceptions, physical interferences of the most literal kind.⁷²

If Douglas's account is correct, then there is no need to draw complex and artificial distinctions about whether the plaintiff had "actual possession", "constructive possession" or an "immediate right to possession".⁷³ Rather, the only necessary distinction is that between deliberate acts, in which case liability is strict, and inadvertent acts, in which case liability is fault-based.⁷⁴ It is thus possible, and indeed desirable, to combine the strict liability torts of

⁷¹ *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1084 [39] ('*Kuwait Airways*').

⁷² Douglas, *Liability*, above n 69, 24, 65-7, 116-7.

⁷³ This would resolve the issue of standing that has plagued the action of trespass to goods. Douglas argues, based on the authority of *Lotan v Cross* (1810) 2 Camp 464; 170 ER 1219, that actions in trespass do not require actual possession: Douglas, *Interference*, above n 69, 32-3. However, at least in Australia, it remains true that a plaintiff must show immediate possession. See *Hampton v BHP Billiton Minerals Pty Ltd (No 2)* [2012] WASC 285, [299] (Edelman J).

⁷⁴ Douglas, *Liability*, above n 69, 115, 206-8.

conversion, trespass and detainee into a single tort that need only be distinguished from the fault-based tort of negligence.⁷⁵

The decision in *Club Cruise Entertainment and Travelling Services Europe BV v Department for Transport*⁷⁶ affords an illuminating example of this argument. The case concerned a decision made by the defendant to issue an invalid statutory detention notice to the owners of a cruise ship on which there had been an outbreak of the highly contagious norovirus. Whilst there was no doubt that, by issuing the notice, the defendants prevented the claimant from using its ship, the issue was whether, as Douglas notes, the act of handing the claimant the piece of paper on which the detention notice was printed constituted a conversion.⁷⁷ Flaux J did not doubt that, had the defendant chained the ship to the quayside, it would have committed a trespass to goods.⁷⁸ However, after reviewing the leading authorities, Flaux J concluded that service of the invalid notice did not amount to a conversion, holding that:

even on the basis that the Detention Notice was invalid, nothing the MCA did here amounted to an assumption of ownership or of dominion over the ship. The intention of the Detention Notice was merely to prevent the Claimant from using the ship in a particular way ... for a short period of time. That was not conversion.⁷⁹

As Douglas has recently discussed,⁸⁰ the result in *Club Cruise* is perfectly consistent with Bramwell B's illustration of the boundaries of conversion:

⁷⁵ Ibid 137–8.

⁷⁶ [2008] EWHC 2794 (Comm) ('*Club Cruise*').

⁷⁷ Douglas, *Liability*, above n 69, 67.

⁷⁸ *Club Cruise* [2008] EWHC 2794 (Comm), [50].

⁷⁹ Ibid [53].

⁸⁰ Simon Douglas, 'Kuwait Airways', above n 70, 222–3.

[a] man is going to fight a duel, and goes to a drawer to get one of his pistols. I say to him, “You shall not take that pistol of yours out of the drawer,” and hinder his doing so. Is that a conversion of the pistol by me to my own use? Certainly not. Or, again, I meet a man on horseback going in a particular direction, and say to him, “You shall not go that way, you must turn back;” and make him comply. Who could say that I had been guilty of a conversion of the horse?⁸¹

To say that conversion almost always requires some form of physical interference is not to say that all acts of physical interference therefore amount to a conversion. As Alderson B remarked in the famous case of *Foulde v Willoughby*, ‘[s]cratching the panel of a carriage would be a trespass; but it would be a monstrous thing to say that it would be a ground for an action of trover’.⁸² What the decision in *Club Cruise* neatly illustrates is, once again, the distinction between means and ends in property law. That is, whilst the objective is to confer upon the right-holder the exclusive ability to make decisions concerning use, that objective is achieved through the simple expedient of obliging the world-at-large to “keep off”. Although, as the claimant in *Club Cruise* argued,⁸³ the rough proxy of exclusion may create occasional lacunae in legal protection, this is the price that must be paid for the system’s epistemic simplicity.

As is discussed in the following section, the conceptual purity of the exclusion model is, at least in land law, challenged by the ill-defined tort of nuisance. Nevertheless, Douglas’s argument about the primacy of physical interference also finds support in real property law. This is illustrated by the decision in *Victoria Park Racing and Recreation Grounds v*

⁸¹ *England v Cowley* [1873] LR 8 Exch 126, 129.

⁸² (1841) 8 M&W 540, 549; 151 ER 1153, 1157.

⁸³ [2008] EWHC 2794 (Comm), [50].

Taylor.⁸⁴ In *Victoria Park*, the plaintiff, the owner of a race course, sought an injunction restraining the defendants from broadcasting the results of horse races that they observed from a platform erected on neighbouring land for that very purpose. The plaintiff argued that the defendants' particular use of the neighbouring property constituted, *inter alia*, an actionable nuisance. By a majority of three to two, the High Court refused the injunction. The majority did not deny that the defendants' conduct was injurious to the plaintiff's economic wellbeing; they simply denied that Anglo-Australian law recognises any duty *in rem* that prevents people from observing and describing phenomena occurring on someone else's freehold. Latham CJ stated that:

[t]he court has not been referred to any authority in English law which supports the general contention that if a person chooses to organize an entertainment or to do anything else which other persons are able to see he has a right to obtain from a court an order that they shall not describe to anybody what they see.⁸⁵

Gray attempts to explain the outcome in *Victoria Park* on the ground that the spectacle of the horserace, like a beam of light from a lighthouse, cannot be, to borrow his nomenclature, "propertised" because it is not "excludable". That is, 'it is not feasible for a legal person to exercise regulatory control over the access of strangers to the various benefits inherent in the resource.'⁸⁶ He writes that, 'for purely physical reasons it was simply unrealistic in *Victoria Park* to attempt a comprehensive exclusion of unauthorised strangers from the benefits of the spectacle provided on the plaintiff's land.'⁸⁷

⁸⁴ (1937) 58 CLR 479 ('*Victoria Park*').

⁸⁵ Ibid 496. See also Dixon J at 507.

⁸⁶ Kevin Gray, 'Property in Thin Air' (1991) 50(2) *The Cambridge Law Journal* 252, 268.

⁸⁷ Ibid 269.

This is not a convincing explanation. Legal duties attach to many assets over which it is difficult to exercise effective “regulatory control”. For instance, the number of people who, with apparent impunity, illegally download the latest episode of *Game of Thrones* demonstrates that, like spectacles such as horse races, artistic works protected by copyright are not readily “excludable” assets. Nevertheless, copyright in television shows such as *Game of Thrones* continues to exist. Moreover, it is by no means impossible to formulate the sort of *in rem* duty that the plaintiff claimed the defendants had breached and, as Rich J noted, the boundaries of nuisance are not set in stone.⁸⁸

The best explanation for the outcome in *Victoria Park*, and that given by the majority, is simply that the law does not recognise as an incident of an interest in land a right that forbids others from observing and reporting on spectacles taking place on it.⁸⁹ The outcome in *Victoria Park* is thus best understood as an uncontroversial example of Lord Camden CJ’s famous dictum that, ‘the eye cannot by the law of England be guilty of a trespass’.⁹⁰

Analysing cases such as *Victoria Park* through the lens of tort demonstrates, once again, why it is vital to make the distinction between rights and exclusive liberties. The ability of the owner of land to use it as a race track is a liberty that he alone may exercise. Nevertheless, it is not an activity that is directly protected by a legal duty. Because property rights correlate to duties of non-interference, a plaintiff who sues to vindicate a property right, whether over

⁸⁸ *Victoria Park* (1937) 58 CLR 479, 501.

⁸⁹ *Ibid* 494 (Latham CJ), 510 (Dixon J), 527 (McTiernan J).

⁹⁰ *Entick v Carrington* (1765) 19 St Tr 1030, 1066. See also *Tapling v Jones* (1865) 11 HL Cas 290; 11 ER 1344, 1350 (Lord Westbury LC), 1353 (Lord Cranworth), 1355 (Lord Chelmsford). Thus it is not tortious, for instance, to create an image of someone else’s property or a spectacle taking place on it. See *Bathurst City Council v Saban* (1985) 2 NSWLR 704, 706 (Young J); *Hickman v Maisey* (1900) 1 QB 752, 756 (A L Smith LJ); *Sports and General Press Agency Ltd v ‘Our Dogs’ Publishing Company Ltd* (1916) 2 KB 880, 883–4 (Horridge J).

land or chattels, will only succeed if he can demonstrate that the impugned conduct involved some physical interference with the *res*.

As a consequence, a landlord's act of disconnecting the utilities, though it may amount to a breach of contract and substantially reduce the amenity of his tenants, does not amount to a trespass for want of any 'interference with any part of the demised premises.'⁹¹ Likewise, though the construction of a tall building may diminish the ability of the neighbours to enjoy their own land, such construction does not, without more, constitute an actionable nuisance.⁹² Equally, if A negligently damages a cable that provides electricity to B's factory, though B can recover compensation for damage to the plant and equipment caused by the power outage, he cannot recover losses caused by his inability to operate, i.e. use, the factory during the outage.⁹³

Once again, these examples demonstrate that, in analysing the doctrinal architecture of property law, we must always be vigilant in separating the ends the law seeks to achieve from the formal jural structures it employs to achieve them.⁹⁴ In particular, what must be emphasised is that, whatever interest justifies the imposition of the legal duty, the correlative right of property is no more, and no less, than a right to exclude.

⁹¹ *Perera v Vandiyar* (1953) 1 WLR 672, 676 (Romer J).

⁹² *Hunter v Canary Wharf Ltd* [1997] AC 655, 685 (Lord Goff) ('*Hunter*').

⁹³ *Spartan Steel & Alloys Ltd v Martin & Co Ltd* [1973] QB 27, 39 (Lord Denning MR). See also Douglas, 'Kuwait Airways', above n 70, 223-4.

⁹⁴ Henry E Smith, 'Mind the Gap: The Indirect Relation between Ends and Means in American Property Law' (2009) 94 *Cornell Law Review* 959, 963-5.

VI PROPERTY LIMITATION RULES

A The Limits of Liberties

As was explained above, the “exclusion model” of property insists that the use to which a freeholder may put his land is a matter of selecting from an “open-ended” set of use liberties. What is important to stress is that “open-ended” is not synonymous with “unlimited”.

In some circumstances, the exercise of liberties will be run up against duties owed to others. Harris describes the rules that impose these duties as “property limitation rules”, ‘whereby *prima facie* normative claims founded on the prevailing ownership conception are overridden.’⁹⁵ Property limitation rules thus prevent right-holders from using their things in ways that society regards as unduly prejudicial to the interests of others. Examples of such rules include planning and environmental laws and, historically most significantly, the tort of nuisance.

True property limitation rules are to be contrasted with what Harris calls ‘property-independent prohibitions’.⁹⁶ Unlike the former, the latter presuppose no right or ownership interest in the thing whose range of uses the law restricts. So, for example, the sorts of civil and criminal prohibitions that prevent me from assaulting someone with a baseball bat are “property-independent prohibitions” because they do not presuppose that I have any interest in the bat. This distinction reflects the fact that, as Waldron has observed, ‘[t]he concept of property does not cover all rules governing the use of material resources, only those

⁹⁵ Harris, above n 8, 34.

⁹⁶ Ibid 32–3.

concerned with their allocation. Otherwise the concept would include almost all rules of behaviour.’⁹⁷

B The Place of Nuisance in the Exclusion Model

The importance of this discussion of property limitation rules is not simply to highlight the obvious truth that a right-holder’s use-liberties are not without restriction. It is to draw attention to an aspect of the tort of nuisance that appears to challenge the key claim of the exclusion model of property, namely, the normative primacy of boundary crossing.

In his classic article on the subject, Newark described nuisance as ‘a tort directed against the plaintiff’s enjoyment of rights over land’.⁹⁸ Nuisance protects ‘the interest of liberty to exercise rights over land in the amplest manner.’⁹⁹ To continue with the Hohfeldian language, nuisance is a tort which restricts unreasonable uses of land by A in order to ensure that B can select from amongst the widest possible range of exclusive liberties in respect of his own land. This principle of “reasonable user” at the heart of nuisance is, as Lord Goff put it, a ‘principle of give and take as between neighbouring occupiers of land’.¹⁰⁰

Historically, the distinction between trespass and nuisance depended on whether the wrongful conduct occurred on or off the plaintiff’s land. In the former case, the appropriate action was trespass; in the latter, the plaintiff had to sue in nuisance.¹⁰¹ As a consequence of its historical

⁹⁷ Waldron, above n 8, 32.

⁹⁸ F H Newark, ‘The Boundaries of Nuisance’ (1949) 65 *Law Quarterly Review* 480, 482.

⁹⁹ Ibid 489. This definition was quoted with approval by Lord Goff in *Hunter* [1997] AC 655, 687–8. See also *Lawrence v Fen Tigers Ltd* [2014] AC 822, 830 [2] (Lord Neuberger).

¹⁰⁰ *Cambridge Water Co v Eastern Counties Leather plc* (1994) 2 AC 264, 299.

¹⁰¹ Newark, above n 98, 481–2.

origins, claims for nuisance most often arise from emanations from the defendant's land such as noise, dirt, dust, fumes and vibrations.¹⁰²

The challenge that the tort of nuisance poses to the exclusion model is that it appears to transcend the simple boundary-crossing model by imposing liability for non-physical incursions such as those made by sound waves or vibrations. In this respect, nuisance seems to amount to a concession that the rough and ready proxy of physical interference does not always strike an adequate balance between the often competing interests of right-holders and other members of the community.¹⁰³

One might attempt to reconcile nuisance with the exclusion model by arguing that, like trespass, nuisance is also concerned with acts of boundary crossing.¹⁰⁴ On this account, common sources of nuisance such as noise, noxious odours and vibrations should be conceived of as waves and particles crossing the boundary of the freeholder or leaseholder's land. Thus, the only difference between conventional trespasses and nuisance is that, in the latter case, the particular act of boundary-crossing cannot be readily perceived by the eye. Unsurprisingly, some have found this boundary-crossing explanation of nuisance implausible.¹⁰⁵ However, whether or not it is a convincing explanation of the tort does not matter for the purposes of the account being offered here. This is because, whatever the basis of liability, the tort of nuisance presupposes the existence of the plaintiff's property right. As Lord Goff stressed in *Hunter*, liability in nuisance is not predicated on an interference with

¹⁰² *Hunter* [1997] AC 655, 685 (Lord Goff).

¹⁰³ See Smith, 'Property as the Law of Things', above n 58, 1714; See also Smith, 'Exclusion and Property Rules in the Law of Nuisance', above n 61.

¹⁰⁴ Douglas, 'Content of a Freehold', above n 59, 368–9; Richard A Epstein, 'Nuisance Law: Corrective Justice and Its Utilitarian Constraints' (1979) 8 *Journal of Legal Studies* 49, 56.

¹⁰⁵ Donal Nolan, "'A Tort Against Land': Private Nuisance as a Property Tort' in Donal Nolan and Andrew Robertson (eds), *Rights and private law* (Hart Publishing Ltd, 2012) 459, 466–7.

the plaintiff's enjoyment of land but instead with his enjoyment of his *rights* over land.¹⁰⁶ As a consequence, an action for private nuisance can only be brought by a plaintiff who can demonstrate some right in the land that is subject to the nuisance.¹⁰⁷

As Merrill has written, '[g]ive someone the right to exclude others from a valued resource ... and you give them property. Deny someone the right and they do not have property.'¹⁰⁸ It is only once the law has conferred upon someone the right to exclude, enforceable in the tort of trespass, that it can begin to refine the outer boundaries of the institution. As a tort against land, private nuisance is clearly a property tort. However, because it presupposes the existence of the "primary" torts, such as trespass, it is best regarded as a "secondary" tort that sits on the foundation created by the right to exclude.

VII UNCOUPLING "PROPERTY" AND "POSSESSION"

A Is There a "Right" to "Exclusive Possession"?

According to the account offered so far, a property right correlates to a duty that forbids others from interfering with the object to which the right pertains. So far as the content of the right is concerned, the concept of "possession" simply does not enter the picture. However, many standard treatments do not observe this conceptual distinction. So, for instance, Swadling has written that, '[t]o all intents and purposes, the fee simple absolute in possession gives its holder a *right to the exclusive possession* of land forever.'¹⁰⁹ Likewise, he has written of rights to chattels that, '[t]he starting point ... is that the interest which a person can

¹⁰⁶ *Hunter* [1997] AC 655, 688.

¹⁰⁷ *Ibid.*

¹⁰⁸ Thomas W Merrill, 'Property and the Right to Exclude Essay' (1998) 77 *Nebraska Law Review* 730, 730.

¹⁰⁹ William Swadling, 'Property', above n 10, 184 [4.38]. Italics supplied.

have in respect of, say, a car or a coat is single and indivisible, a *right to exclusive possession forever*.¹¹⁰ Indeed, Swadling argues that the word “title” is derived from “entitlement”, the entitlement being to “exclusive possession”.¹¹¹ This language is also found in the case law. So, to take a prominent example, what distinguishes a lease, a form of property right, from a licence, a mere contractual right, is that the former confers on its holder a right to “exclusive possession”, but the latter does not.¹¹²

It is easy to appreciate why the content of a property right is often formulated in this way. As argued above, rights correlate to duties. If we want to know the content of a right, we need to know what it demands of others. In turn, we discover this by asking what particular conduct constitutes a legal wrong, or tort. Although, as Douglas has convincingly argued, liability in tort is overwhelmingly predicated on physical interference, the property torts are very often described in terms of interferences with possession. So, for example, trespass has been described as a ‘wrong to possession.’¹¹³ Likewise, it has been said that the tort of conversion is concerned with conduct that excludes an owner from ‘use and possession of the goods’,¹¹⁴ and that the ‘essence of conversion is dealing with a chattel in a manner repugnant to the immediate right to possession of the person who has the property or the special property in the chattel.’¹¹⁵ Similarly, a leading academic account of conversion states that, ‘[s]imply stated, conversion protects the current superior possessory interest in personal property.’¹¹⁶

¹¹⁰ Ibid 208 [4.131]. Italics supplied.

¹¹¹ Ibid; William Swadling, ‘Unjust Delivery’ in Peter Birks, AS Burrows and Alan Rodger of Earlsferry (eds), *Mapping the law: essays in memory of Peter Birks* (Oxford University Press, 2006) 278, 280.

¹¹² *Radaich v Smith* (1959) 101 CLR 209, 222 (Windeyer J); *Street v Mountford* [1985] AC 809, 816 (Lord Templeman).

¹¹³ *Penfolds Wine Pty Ltd v Elliot* (1946) 74 CLR 204, 225 (Dixon J) (‘*Penfolds*’).

¹¹⁴ *Kuwait Airways* [2002] 2 AC 883, 1084 (Lord Nicholls).

¹¹⁵ *Penfolds* (1946) 74 CLR 204, 229 (Dixon J).

¹¹⁶ Sarah Green and John Randall, *The Tort of Conversion* (Hart Publishing, 2009) 46.

B Distinguishing Possession and Exclusion

If the exclusion model of property rights developed in this chapter is correct, then these formulations are, at the very least, misleadingly inaccurate. It is not true to say that a property right is best understood as a right to exclusive possession of some thing. If property is concerned with the imposition of an *in rem* duty of non-interference, then possession, which might be preliminarily described as effective control over some thing,¹¹⁷ does not accurately capture the content of the right. For present purposes, what is significant is that describing a property right as a “right to exclusive possession” obscures two important truths about the basic architecture of property law.

The first concerns the sort of conduct that amounts to a contravention of the right. In particular, what should be made clear is that conduct that merely prevents a right-holder from exercising control over some object is not, in itself, tortious. As was discussed in relation to the *Club Cruise* decision, such conduct would only amount to a tort if it involved some form of physical interference with the object itself. So, for instance, if A were to take B’s mobile phone from her pocket, A will have committed a conversion, not because he has denied B possession of her phone *per se*, but instead because he has physically interfered with it. Conversely, if A prevented B from exercising control over her phone by physically restraining her, though he will have committed a tort against the person, he will not have breached her property right in the phone. Likewise, as Douglas notes, if A is kidnapped by B, A will be unable to use his land or chattels. However, although B has undoubtedly breached A’s “personality rights”, he has not breached A’s property rights.¹¹⁸ To the extent that

¹¹⁷ See, for example, Honoré, above n 26, 113. A definition of possession is developed in Chapter III of this thesis.

¹¹⁸ Douglas, 'Kuwait Airways', above n 70, 218–9.

possession involves some form of physical interaction between the right-holder and the *res*, acts of possession are best described as “exclusive liberties”.

It may well be that there are relatively few circumstances in which A can prevent B from exercising physical control over some object without also physically interfering with that object. Nevertheless, there is a second reason why it is important to sharply distinguish between possession and exclusion. To describe a property right as a right to exclusive possession gives the misleading impression that the existence of the right depends upon some ongoing relationship of factual control over its subject matter. This is not correct. One does not need to be at home in order to enjoy the protection of the tort of trespass to land. Likewise, one does not need to be sitting in one’s locked car in order to enjoy the protection of the torts of conversion and trespass to goods. The converse of this principle is also true, namely that conduct which involves some physical interference with the *res* will be tortious even if that conduct does not disturb the right-holder’s physical control over it. As the cases on apparently harmless interferences with airspace demonstrate, a freeholder or leaseholder need not be “dispossessed” or “ousted” in order to bring a claim in trespass.¹¹⁹ Any act of boundary crossing, no matter how ephemeral, constitutes a breach of duty.

This point is of some significance because, as will be discussed in more detail in Chapter II, it is the hallmark of mature systems of property that property rights do not require the continuous exercise of control over their subject matter. To the contrary, a right to a thing that is dependent on “actual possession” does not fall within the law of property, but the law of wrongs against the person. Unfortunately, as is also discussed in Chapter II, the law’s reluctance to make this conceptual leap of faith from possession to property has resulted in

¹¹⁹ *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490, 487 (Hodgson J); *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464, 468–9 (Bryson J); *Anchor Brewhouse Developments Ltd v Berkley House (Dockland Developments) Ltd* (1987) 2 EGLR 173, 176 (Scott J).

the widespread emergence of unhelpful fictions such as the concept of “constructive possession”.

VIII CONCLUSION

Gray commenced his well-known article by provocatively asserting that:

Proudhon got it all wrong. Property is not theft – it is fraud. Few other legal notions operate such gross or systematic deception. Before long I will have sold you a piece of thin air and you will have called it property. But the ultimate fact about property is that it does not really exist: it is mere illusion. It is a vacant concept – oddly enough rather like thin air.¹²⁰

If Gray meant no more than that property rights are not a natural condition of humankind then he was essentially restating Bentham’s insistence that there is no property without law.¹²¹ If, however, he was suggesting that the concept of property in law is so hopelessly amorphous as to border on intellectual fraud, then the exclusion model of property suggests that he is wrong. Although there is much controversy about the boundaries of property, its core is clear. Property describes any system of rules, whether customary or legal, that responds to the problem of scarcity by appointing one person as the sole decision-maker in respect of some resource that constitutes an object of property. In common law systems, property law allows such a person to have the first and final say about the use of some object of by the simple expedient of conferring on her the right to exclude others from it, for any reason, or no reason at all.

¹²⁰ Gray, above n 86, 252.

¹²¹ Bentham, above n 1, 113.

The purpose of the account of property rights given in this chapter is not only to introduce concepts that will form the backbone of the analysis presented in the following chapters. This discussion of the exclusion model of property also highlights two important truths about the particular role that possession plays in the basic structure of property law. The first is that possession does not describe the content of a property right. Contrary to many standard accounts, a right-holder cannot complain about conduct that interferes with her “possession”. Irrespective of whether it impairs her ability to exercise physical control over some object, conduct will only amount to a legal wrong if it involves some physical interference with that object. The second, and related, truth is that a duty-owner *will* infringe a property right simply by physically interfering with an object of property that does not belong to him. Regardless of whether it prevents the right-holder from exercising control over the object in question, any form of physical interference will constitute a legal wrong. As is argued in Chapter II, what is important to appreciate is that property rights are not predicated on some ongoing relationship of control over the *res*.

In his famous essay on ownership, Honoré described possession as the, ‘the foundation on which the whole superstructure of ownership rests’.¹²² As the foregoing analysis endeavoured to show, this widely held view about possession and its role in property law is incorrect. The argument made in this chapter is that the right to exclude, and not to possess, is the foundation on which the whole superstructure of ownership rests. Possession describes those acts that create property rights, and not the content of the rights so created.

¹²² Honoré, above n 26, 113.

CHAPTER II

FACTS, RIGHTS AND OTHER THINGS: LAYING THE CONCEPTUAL FOUNDATIONS

I INTRODUCTION

The previous chapter provided an overview of property rights at common law in order to begin to describe the particular role that possession plays within that system. It advanced two main arguments. First, at its core, property law is a very simple system that confers on right-holders the first and final say about how some “thing” is to be used by the simple expedient of demanding that everyone else “keep off”. Secondly, and relatedly, despite standard formulations that suggest otherwise, property rights do not guarantee a right to “possess” but, rather, a right to “exclude”. Possession is significant because it generates property rights, not because it describes their content.

If property law concerns rights to exclude others from tangible things created by acts of possession, then one might expect the concept of possession in the law to describe the simple notion of, to use Honoré’s definition as a convenient starting point, ‘the exclusive physical control of a thing.’¹ However, this is not the case. To the contrary, explanations of possession have become so esoteric and riddled with technical distinctions that any attempt to explain possession must begin with an embarrassing admission of conceptual failure. As was noted in

¹ A M Honoré, ‘Ownership’ in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107, 113.

the Introduction, this usually takes the form of the mandatory recitation of Earl Jowitt's lament that, '[i]n truth, English law has never worked out a completely logical and exhaustive definition of possession.'²

In Chapter III it will be argued that the concept of possession is not inherently complex. However, before explaining why possession is much simpler than generations of lawyers have been led to believe, it is first necessary to outline the divergent views on the topic and to attempt to explain why common lawyers have failed to settle on anything approaching a consensus on the nature and function of possession in the law.

The argument made in this chapter is that the controversy surrounding possession cannot be explained on the ground that the concept is intrinsically complex. Unlike the broader notion of "property" discussed in the previous chapter, possession is not an "inherently contested concept" and can be adequately defined. The persistent disagreement is instead attributable to two errors. The first is the tendency to conflate rights with facts or, in Hohfeldian terms, to confuse jural and non-jural concepts. The second is the persistent misunderstanding of the significance, or lack thereof, of "ownership" in a system of property in which titles are relative and not absolute.

It will be concluded that if we disentangle jural and non-jural concepts and appreciate the limited conceptual significance of ownership in a system in which titles to property are relative then, consistently with the conclusion of Chapter I, there is no need for possession to denote anything other than a relationship of fact that creates a right to exclude.

² *United States of America v Dollfus Mieg et Cie SA* [1952] AC 582, 605.

II WHAT IS POSSESSION? SOME VIEWS FROM THE ACADEMY

A Fact or Right?

The essential problem plaguing the concept of possession in the law was summarised by Pollock in the following terms: '[i]t has constantly been asked: Is possession a matter of fact or of right?'³ One of the vital questions that any account of possession must answer is whether possession is an observable, factual relationship between a person and a tangible thing that, when proven by evidence, creates a property right, or whether it instead describes a distinctive jural interest in a particular object of property.

This relatively simple question raises many others. For example, if possession is a fact, then what sort of fact does it describe? Is it limited to the familiar notion of physical control, or does it have a peculiarly legal meaning that is concerned less with actual physical dominion and more with the intention of the possessor? If, on the other hand, possession is a species of right or other jural interest, what sort of right does it describe, and how does the content of that right differ from that of the generic ownership right described in Chapter I? These questions have elicited a range of answers from leading commentators.

³ Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (Clarendon Press, 1888) 10. See also Oliver Wendell Holmes, *The Common Law* (Little, Brown and Company, 1949) 213; Simon Douglas, 'Is Possession Factual or Legal?' in Eric Descheemaeker (ed), *The Consequences of Possession* (Edinburgh University Press, 2014) 53, 53.

B A Simple Fact?

At one end of the spectrum, some argue that possession in the law is no more than the concept of physical control over some tangible thing. Bell, for example, has written that possession ‘is not itself an interest but rather a state of affairs’.⁴ Similarly, McFarlane argues that, ‘[t]he concept of physical control is a simple one. The only difficulties it causes are factual ones, and arise only in unusual situations.’⁵ According to McFarlane, this basic insight has been obscured by the importation into the common law of complex Roman law rules about intention.⁶ Indeed, he has gone so far as to argue that the term possession has become so bedeviled by unnecessary technical refinements that it is best avoided altogether.⁷

For scholars such as Douglas and McFarlane, there is no such thing as a “possessory right” or a “possessory title”. The juridical significance of possession is limited to its role in creating original rights to tangible things. Douglas argues that, ‘[w]hilst there may be good justification for the existence of a limited “possessory right”, it is suggested that it does not exist. The better view is that possession is not a type of property right that one can have in a chattel, but simply a way of independently acquiring “ownership” of a chattel.’⁸ This view is consistent with the picture of property rights presented in Chapter I because it draws a sharp distinction between the basic, observable fact of possession and the abstract, non-factual right of exclusion which that relationship of fact creates in the law.

⁴ Andrew P Bell, *Modern Law of Personal Property in England and Ireland* (Butterworths, 1989) 33.

⁵ Ben McFarlane, *The Structure of Property Law* (Hart Publishing, 2008) 155.

⁶ Ibid. On this point see Oliver Radley-Gardner, ‘Civilized Squatting’ (2005) 25 *Oxford Journal of Legal Studies* 727, 738.

⁷ McFarlane, above n 5, 155.

⁸ Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Hart Publishing, 2011) 31.

C A Complex Legal Concept?

Pollock wrote that, '[p]ossession in fact, with the manifest intent of sole and exclusive dominion, always imports possession in the law.'⁹ No one dissents from the view that the fact of possession is juridically significant. However, not everyone agrees that the significance of possession is limited to a simple fact about physical control. Gray and Gray, for example, argue that possession bears a 'heavily specialised meaning in English law'.¹⁰ In particular, they stress that possession is not a matter of mere occupancy but is rather 'an inherently behavioural phenomenon which incorporates a particular mindset.'¹¹ In a similar vein, but in the context of personal rather than real property law, Gleeson writes that:

[a]lthough title is in essence a legal issue to be determined as a matter of law, possession appears to be an issue of fact. However, it is not. The question of whether a man possesses a thing is a complex legal issue in its own right, and the rules for determining it are far more complex than a simple assessment of relative location.¹²

Likewise, the authors of a leading work on the tort of conversion argue that:

[p]ossession means a different thing to lawyers than it does to everyone else. The essence of legal possession, also referred to as constructive possession or the right to immediate possession, lies in the element of control exercised over an asset. More specifically, it is the cognitive element of control which is of the greatest relevance to legal possession, as opposed

⁹ Pollock and Wright, above n 3, 20.

¹⁰ Kevin J Gray and Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009) 153 [2.1.6].

¹¹ Ibid 153 [2.1.7].

¹² Simon Gleeson, *Personal Property Law* (FT Law and Tax, 1997) 24.

to the manual control which characterises actual possession ... legal possession is rights-based, not facts-based.¹³

Others have adopted a sort of hybrid position. Pollock, for example, used the term possession to describe both a fact capable of generating a property right *and* a distinctive legal interest in a thing.¹⁴ He wrote that, '[p]ossession in law is most easily understood as associated with possession in fact'.¹⁵ However, Pollock also argued that the '[l]aw takes this popular conception as a provisional groundwork, and builds upon it the notion of possession in a technical sense'.¹⁶ As a consequence, legal possession ought to be regarded as 'a definite right or interest'¹⁷ and that right 'exists and has legal incidents and advantages apart from the true owner's title.'¹⁸

Rather more recently, the authors of *The Law of Personal Property* have written that, '[n]ecessarily the starting-point is the common sense "factual" notion of possession'¹⁹ but go on to conclude that, 'possession as an interest in goods is a legal right to possession, being any interest in goods inferior to ownership.'²⁰ Likewise, Worthington argues that:

[t]he layman's definition of possession is based on the notion of intentional physical control of an asset. The law's definition is not quite the same. The law distinguishes between the right to possess a thing physically and the package of advantages or rights which the law gives to possessors. This package of rights defines the possessory interest in property.²¹

¹³ Sarah Green and John Randall, *The Tort of Conversion* (Hart Publishing, 2009) 86.

¹⁴ Pollock and Wright, above n 3, 22.

¹⁵ Ibid 17.

¹⁶ Ibid 2.

¹⁷ Ibid 17.

¹⁸ Ibid 19.

¹⁹ M G Bridge et al, *The Law of Personal Property* (Sweet & Maxwell, 2013) 55 [2-036].

²⁰ Ibid 66 [2-060].

²¹ Sarah Worthington, *Personal Property Law: Texts and Materials* (Hart Publishing, 2000) 51.

For those who adhere to this view, possession is not merely a fact about physical control, but a particular form of legal interest in a thing that is exigible against other legal persons.²² How, if it all, this right or “package of advantages” differs in content from the property right discussed in Chapter I is not, however, clear.

D The Candidates Categorised

The foregoing summary aims to provide a representative survey of opinion amongst eminent scholars who have a particular interest in this complex area of the law. From this survey, one can detect three basic, though not necessarily discrete, positions. The first is that possession is a “no frills” fact about physical control of some sort. On this view, the significance of possession is limited to the creation of property rights of the type discussed in Chapter I. The second position is that possession is a fact, but one that is defined by peculiarly legal rather than social rules. According to this view, the legal concept of possession is a sort of extrapolated version of the lay notion and is less concerned with physical act of possession and more with the particular intention with which it is carried out. The third, and final, position is that possession is not a fact about physical control, but describes, in Worthington’s words, “a package of advantages” in respect of a thing, whatever those advantages may be.

It should be stressed that these positions are not necessarily mutually exclusive. Although one cannot argue both for and against the proposition that possession is a distinct form of jural interest in a thing, it is possible to hold that possession is both a complex fact and a sort of right

²² M G Bridge, *Personal Property Law* (Oxford University Press, 4th ed, 2015) 30; Thomas Merrill, ‘Ownership and Possession’ in Yun-chien Chang (ed), *Law and Economics of Possession* (Cambridge University Press, 2015) 9, 24–6.

in a thing. Likewise, it is perfectly consistent to argue that possession is a fact, the function of which is limited to the creation of property rights, whilst also maintaining that its significance lies more in the possessor's intention than his ability to effectively control some object by excluding others from it. Indeed, a version of this position will ultimately be endorsed in Chapter III.

III PLAYING WORD GAMES: THE LANGUAGE OF POSSESSION

A More is Not Necessarily Better

If it has done nothing else, this inability to agree upon the nature of possession in the law has spawned a vast and, at times, baffling lexicon of synonyms, antonyms and hybrid terms.²³ Though coined in an attempt to distinguish discrete concepts and states of affairs,²⁴ these terms do not so much resolve the confusion as serve as a constant reminder of the law's inability to determine what possession means and why it matters.²⁵

Before proceeding, a note should be made about the source of this language. The summary of the relevant nomenclature offered here is largely drawn from Pollock and Wright's work, *An Essay on Possession in the Common Law*. There are two reasons for this. First, whatever its faults, it remains the most thoroughgoing attempt to elucidate the concept of possession in common law systems. Secondly, due in large part to the eminence of its authors, it remains the most influential work on the topic. Indeed, it was described by Hickey as the 'origin of our

²³ See also Duncan Sheehan, *The Principles of Personal Property Law* (Hart Publishing, 2nd ed, 2017) 10–9.

²⁴ See also Mark Wonnacott, *Possession of Land* (Cambridge University Press, 2006) 161.

²⁵ See also A E S Tay, 'The Concept of Possession in the Common Law: Foundations for a New Approach' (1963) 4 *Melbourne University Law Review* 476, 476–7; Jonathan Hill, 'The Proprietary Character of Possession' in Elizabeth Cooke (ed), *Modern Studies in Property Law, volume 1* (Hart Publishing, 2001) 21, 24.

modern theory of possession'.²⁶ Unsurprisingly then, its description of the relevant terminology has taken on the status of a near-authoritative lexicon.²⁷

B A Summary of the Nomenclature

To begin with the simplest case, when the law wishes to describe the relatively simple fact of physical control over some tangible thing it uses terms including, but not limited to, “*de facto* possession”, “occupation”, “actual possession”, “detention”, “custody” “bare possession” and “physical possession”.²⁸ Generally speaking, these terms describe an observable fact and are not terms of art. Because terms such as “actual” or “*de facto* possession” simply denote the existence of a fact, they do not, in and of themselves, imply that the possessor has also acquired a property right in the object possessed. To borrow Wonnacott’s description, these terms are synonymous with possession in the ‘vulgar’ sense.²⁹

However, whilst “*de facto* possession” describes a particular fact that exists quite apart from the law, it is apt to be conflated with a form of legal relation. This is because, as Pollock wrote, it is ‘almost inevitable, when once we are in the presence of an apparent *de facto* possessor, to ascribe to him possession in law so far and so long as nothing appears to the contrary.’³⁰ Consequently, when the law wishes to make clear that it is referring to a factual relationship of physical control that does *not* create a right, it uses a different set of terms, including “custody”, “detention” or “bare possession”.³¹ The most common and striking example of this is the

²⁶ Robin Hickey, *Property and the Law of Finders* (Hart Publishing, 2010) 97.

²⁷ For examples of its use in leading textbooks see E L G Tyler and Norman Palmer, *Crossley Vaines’ Personal Property* (Butterworths, 5th ed, 1973) 47–55; Bell, above n 4, 35; Bridge et al, above n 19, 58 [2-042]; Royston Miles Goode and Ewan McKendrick, *Goode on Commercial Law* (Penguin, 4th ed, 2010) 46–7.

²⁸ Pollock and Wright, above n 3, 26–8, 118–9.

²⁹ Wonnacott, above n 24, 6.

³⁰ Pollock and Wright, above n 3, 18.

³¹ Ibid 18, 27–8. This applies equally to land law. See; Gray and Gray, above n 10, 153 [2.1.7].

master-servant rule, which attributes “custody” of some object to the servant and “possession” to his master.³²

Where the law wishes to indicate the existence of something more than a mere fact, it uses another set of terms. As a general rule, terms such as “possession in law” or “legal possession” are employed in order to indicate the existence of some legal interest.³³ Contrary to what their names might suggest, it is possible for someone to have “legal possession” or “possession in the law” despite not having, or never having had, actual control over the object in question.³⁴ So, to borrow Pollock’s example,³⁵ if A, the owner of a coat, is wearing it, he has both actual possession and legal possession. If A gives it to his servant, B, who takes it to the tailor for alterations, A loses actual possession but retains legal possession of the coat.

It should not be assumed that legal possession also means “lawful possession”.³⁶ It is perfectly possible for a wrongdoer to acquire legal possession. So, to take a simple example, a squatter clearly acquires legal possession of a parcel of land even though the act by which he acquired that possession was, and continues to be, a trespass.³⁷

The separation of actual from legal possession is often, though not invariably, indicated by another cluster of terms, including “right to possession”, “immediate right to possession” and “constructive possession”.³⁸ These terms do not, of themselves, indicate whether the loss of factual possession occurred through conduct that was tortious. A freeholder, for example, has

³² *Ward v Macauley* (1791) 4 TR 489, 490; 100 ER 1135, 1135 (Buller J).

³³ Pollock and Wright, above n 3, 16.

³⁴ *Ibid* 145.

³⁵ *Ibid* 26–7.

³⁶ *Ibid* 20.

³⁷ Joshua Williams, *The Seisin of the Freehold* (H. Sweet; C.F. Maxwell, 1878) 7–8. The relevant passage was cited with approval by Dixon J in *Wheeler v Baldwin* (1934) 52 CLR 632, 632.

³⁸ Pollock and Wright, above n 3, 27.

an immediate right to possession as against a trespassing squatter who has acquired both actual and legal possession of the land. Likewise, the victim of a conversion, though she no longer has actual possession, has an immediate right to possession against the tortfeasor who has, though his act of conversion, acquired actual and legal possession of the converted chattel.³⁹

These terms can also be applied to consensual arrangements such as gratuitous bailments.⁴⁰ Likewise, a purchaser of goods to whom title has passed but who has not yet taken delivery has an immediate right to possession of those goods. The term constructive possession is perhaps most often associated with those situations in which the separation of fact and right occurred with the right-holder's consent. To take the archetypal example, whilst a bailee at will has actual possession, his bailor retains constructive possession of the goods.⁴¹ Constructive possession is also apt to describe the transfer of title to goods by way of the delivery of some documentary intangible, such as a bill of lading.⁴²

“Possessory title” is another term that is also employed in several different senses. Most generally, it is used to describe a property right created by an act of possession.⁴³ More specifically, it is often used to distinguish the newer title of the possessor from the older title of the “paper owner”.⁴⁴ So, for instance, a squatter who is on her way to obtaining a clear title by adverse possession is frequently described as having a “possessory” title.⁴⁵ Likewise, the qualification “possessory” is often applied to the title acquired by the finder of a lost chattel.⁴⁶ Similarly, and particularly when applied to squatters and other wrongdoers, to describe a title

³⁹ Ibid.

⁴⁰ *Lotan v Cross* (1810) 2 Camp 464, 465; 170 ER 1219, 1219 (Lord Ellenborough).

⁴¹ *Ancona v Rogers* [1876] 1 Ex D 285, 292 (Mellish LJ). See also Goode and McKendrick, above n 27, 47.

⁴² Bridge, above n 22, 35.

⁴³ *Russel v Wilson* (1923) 33 CLR 538, 546 (Isaacs and Rich JJ).

⁴⁴ Robert Chambers, *An Introduction to Property Law in Australia* (Thomson Reuters, 3rd ed, 2013) 58 [6.40].

⁴⁵ *Tower Hamlets LBC v Barrett* (2006) 1 P&CR 9, 137 [18] (Neuburger LJ). See also Robert Megarry et al, *The Law of Real Property* (Sweet & Maxwell, 7th ed, 2008) 86–7 [4–003]–[4–004].

⁴⁶ *Parker v British Airways Board* [1982] QB 1004, 1019 (Eveleigh LJ).

as possessory indicates that it is fragile because it is subject to the superior right of the owner or paper title holder. In *Buckley v Gross*, for example, Cockburn CJ sought to emphasise the limited right of the plaintiff, who had purchased melted tallow from someone who had no right to sell it, by saying that he ‘had nothing but bare naked possession’.⁴⁷

However, the term possessory title is not used exclusively in circumstances in which the loss of possession was involuntary or the act by which possession was obtained was wrongful. It can also denote the right of someone who came into possession with the consent of the owner. So a bailee, for example, has a possessory title in the bailed goods. Thus, it has been said that:

[i]nterests in a chattel can be shared and it is this fact that has given rise to the distinction between proprietary and possessory title. Thus where an earlier possessor (the bailor) grants possession to a subsequent possessor (the bailee) on terms that reserve to the bailor a reversionary interest in the chattel, the bailor can be said to enjoy a “proprietary title” and the bailee a “possessory” title in the chattel.⁴⁸

In this sense, possessory title is synonymous with constructive possession or “special property”, a term that is contrasted with “general property”, and which describes possession that is ‘subject to the claims of other persons’.⁴⁹

Quite differently again, possessory title can also refer to the entitlement of someone who, though not an “owner”, can nevertheless recover substantial damages for the loss or destruction of goods. For example, in *The Aliakmon* Lord Brandon famously said that:

⁴⁷ *Buckley v Gross* (1863) 3 B&S 566, 572; 122 ER 213, 215 (Cockburn CJ).

⁴⁸ *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2009] QB 22, 32 [16] (Lord Phillips CJ).

⁴⁹ *Webb v Fox* (1797) 7 TR 391, 398; 101 ER 1037, 1041 (Lawrence J).

in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.⁵⁰

The most striking example of this is the right of a bailee, such as a carrier of goods, to sue and recover the full value of the bailed goods despite not being liable to his bailor for their value.⁵¹

IV JURAL AND NON-JURAL CONCEPTS

A A Clean Slate

Although the foregoing discussion has been purely expository, it demonstrated two things. First, that Earl Jowitt's lament is justified and, secondly, that the common law will never solve the possession puzzle by creating an ever more complex lexicon of technical terms. The truth of this latter claim is surely evident in Latham CJ's attempt to explain the apparently anomalous position of the servant or agent at common law. His Honour wrote that, '[t]he *possession* of a servant or agent is the *possession* of the master or principal ... who therefore is regarded as having *actual possession* and not only a *right to possession*'.⁵² Although this statement of the law is not "wrong" in a doctrinal sense, it reveals a body of law that is riddled with confusing fictions and conceptual elision. If this thesis is to succeed in offering a coherent explanation of

⁵⁰ *Leigh & Sullivan Shipping Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785, 809.

⁵¹ *The Winkfield* [1902] P 42, 54 (Collins MR).

⁵² *Penfolds Wine Pty Ltd v Elliot* (1946) 74 CLR 204, 216 ('*Penfolds*'). Italics supplied.

the nature and function of possession in the law, it is first necessary to untangle these conceptual knots.

B Facts and Rights

Perhaps the most obvious source of confusion in the foregoing summary is the failure to distinguish between facts, non-jural concepts, and rights, purely jural concepts. Fortunately, much of what will be covered here was introduced in Chapter I and, as in that chapter, the discussion will continue to borrow from the analytical framework created by Hohfeld.

The distinction between a right and a fact can be stated succinctly. For present purposes, to describe something as a “fact” is to say that it is a state of affairs that exists in the world independently of any particular legal system. Though a fact may have legal significance, its existence is not dependent on, nor is its content defined by, the constituent rules of that particular legal system.⁵³

Hohfeld drew a distinction between two different sorts of fact, which he described as “operative” and “evidential”.⁵⁴ An operative fact has a particular significance in a legal system because, whether by itself or in a particular combination with other such facts, it gives rise to jural relations.⁵⁵ So, for example, that two people are *sui juris* and that one has made an “offer” and the other has “accepted” it are the operative facts that together create a contract.⁵⁶

⁵³ This is the basis of the distinction between questions of fact and questions of law, on which see J D Heydon and Rupert Cross, *Cross on Evidence* (LexisNexis Butterworths, 10th Australian edition, 2015) 371–2 [11005].

⁵⁴ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays* (Yale University Press, 1923) 32–5. See also Arthur L Corbin, ‘Legal Analysis and Terminology’ (1919) 29 *Yale Law Journal* 163, 164.

⁵⁵ “Operative facts” thus describe what evidence lawyers describe as “facts in issue”. See Colin Tapper and Rupert Cross, *Cross and Tapper on Evidence* (Oxford University Press, 12th ed, 2010) 29.

⁵⁶ Hohfeld, above n 54, 32.

An evidential fact, by contrast, is one that constitutes the evidence from which we can infer the existence of an operative fact, but which does not itself create jural relations.⁵⁷ The existence of some written instrument is an evidential fact. This is because, whilst a piece of paper does not itself create a contract, it provides the evidence from which we can infer the existence of an offer by the promisor and its acceptance by the promisee. To take another example, s 53(1)(b) of the *Property Law Act 1958* (Vic) provides that, '[a] declaration of trust respecting land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such a trust or by his will.' The writing, whether a brief note on the back of a napkin or an exhaustively drafted deed, is an evidential fact from which we can infer the existence of an operative fact, namely, the particular declaration that gives rise to a trust.

What, then, is a "right"? Rights, or to use the Hohfeldian nomenclature, "jural relations",⁵⁸ are abstract bilateral relations that obtain exclusively between entities that are capable of enjoying legal rights and bearing legal duties. Unlike facts, rights are predicated on the existence of other legal persons and thus cannot exist independently of a legal system. Hohfeld summarised the distinction in the following terms:

[a] man may indeed sustain close and beneficial *physical* relations to a given *physical thing* ...

But, obviously, such purely *physical* relations could as well exist quite apart from ... the law of organized society: physical relations are wholly distinct from jural relations. The latter take

⁵⁷ Ibid 34.

⁵⁸ Ibid 36.

their significance from the law; and since the purpose of the law is to regulate the conduct of human beings, all jural relations must...be predicated of such human beings.⁵⁹

Hohfeld abjured that Latin term *in personam* because it gives the erroneous impression that there can be rights against entities other than natural and juridical people.⁶⁰ Although far more could be said about the concept of a right, an appreciation of this basic distinction between facts and rights, or non-jural and jural relations, will suffice for present purposes.

It is uncontroversial to say that, whatever else it may be, possession is a fact. As Pollock himself wrote, '[p]ossession in fact – the effective and exclusive control of a thing – is prior to ownership and indeed to every legal rule and idea. The facts which we will call actual or physical possession would still exist in a society where there was no recognition of individual property.'⁶¹ As the foregoing summary of the nomenclature clear, concepts such as “legal possession” are confusing because they do not require the possessor to exercise physical control over the *res*. So, for example, if I create a gratuitous bailment by lending you my car for the weekend, the law continues to credit me with possession even after I hand you the keys.

If, following Honoré and Pollock, we take as our starting point the notion that possession is a fact about the effective and exclusive control of some thing, then it is clear that many uses of the term possession are, to a greater or lesser degree, fictions. Epstein has written of this issue that:

⁵⁹ Ibid 75. Italics in original. For a similar observation, see Hans Kelsen, *Pure Theory of Law* (University of California Press, 1967) 130.

⁶⁰ Hohfeld, above n 54, 75.

⁶¹ Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law* (Macmillan & Co, 5th ed, 1923) 181.

all legal systems for obvious reasons of convenience (i.e. efficiency) have adopted the convention of continuous possession: possession once obtained is retained until it is lost by the actions of some other person or natural event. Thus the initial occupant who has marked the borders of his land does not return that land to the state of nature when he leaves it to hunt or trade.⁶²

Likewise, Harris has observed that:

[o]nce the facts which justify the application of the possessory rule arise in the first place, they need not necessarily continue to exist in the same form, degree or intensity. The court will continue to apply the word “possession” to the plaintiff’s relationship with the object until the law recognizes that changed facts operate to divest the plaintiff of his possessory right.⁶³

As an observation of what the law does, these statements are undoubtedly true. However, the more interesting question is *why* the law has thought it necessary to persist with such a manifest fiction. Why do we need a “convention of continuous possession” when we have the concept of a property right, a purely jural concept that does not depend upon an ongoing, factual relationship between a person and a thing?

The argument made here is that this highly abstract, if not entirely artificial, concept of possession is a product of the law’s failure to distinguish rights from facts; jural from non-jural relations. As Hohfeld said, it is necessary to ‘emphasize the importance of differentiating the purely legal relations from the physical and mental facts that call such relations into being.’⁶⁴

⁶² Richard A Epstein, ‘Possession’ in Peter Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Macmillan Reference, 1998) vol III, 62, 63.

⁶³ D R Harris, ‘The Concept of Possession in English Law’ in A G Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 69, 73. See also *Bird v Fort Francis* [1949] 2 DLR 791, 799–800.

⁶⁴ Hohfeld, above n 54, 27.

Once we appreciate that possession, as an operative fact, merely creates and does not define the amalgam of purely abstract jural relations that we call a property right, it becomes clear that there is simply no need to deem that owners invariably possess. To do so is to conflate fact with right; possession with ownership.

C Distinguishing Ownership from Possession: A Medieval Legacy?

But what explains this tendency to elide the right of ownership with the operative fact of possession? The most obvious answer is that liability in the property torts is expressly predicated on interferences with “possession”, a formulation which suggests that, in order to sue, an owner must also possess. As Chapter I explained, this formulation is misleading because liability in the property torts requires nothing more than simple physical interference with something by someone other than the right-holder. If someone steals my unchained bicycle from outside the front of my house I can sue him for conversion even though I left the bicycle unchained and was on holiday in Iceland at the time of its conversion. Given that my ownership right in my bicycle, which is purely jural, obviously does not depend on a fact about my actual control over it, why are the property torts framed in terms of interferences with possession?

One answer is that this distinction between facts and rights was not always so obvious. Honoré remarked that, ‘[t]o have worked out the notion of “having a right to” as distinct from merely “having” ... was a major intellectual achievement.’⁶⁵ According to Maitland, this inability to distinguish between “things”, which one can possess, and “rights”, which one cannot, was a characteristic feature of the medieval law of property. He described the failure to make this

⁶⁵ Honoré, above n 1, 115.

vital distinction as a sort of ‘mental incapacity’,⁶⁶ and remarked that a ‘very large part of the history of Real Property Law seems to me the history of the process whereby Englishmen have thought themselves free of that materialism which is natural to us all.’⁶⁷ Likewise, Pollock observed that, ‘our ancestors simply couldn’t understand owning anything one does not actually possess (“Give me the handle of the church door,” says the grantee [of] an advowson)’.⁶⁸ In the old common law, property without possession was ‘feeble and precarious.’⁶⁹

In fairness to the medieval mind, this inability to distinguish facts from rights was not entirely due to a “mental incapacity”, but also to a deliberate policy decision, made in the interest of public order, to strictly forbid disseisees from retaking control of their land through potentially violent acts of self-help.⁷⁰ This is strikingly demonstrated in the old learning on the assize of novel disseisin. Take the following example. Arthur is lawfully seised of land and is wrongly disseised by Henry. Four days later, Arthur attempts to regain possession by making a physical re-entry on to the land. Though dispossessed, the modern mind would continue to regard Arthur as the owner of the land and, as a consequence, entitled to re-enter the land and eject Henry and, if necessary, to use reasonable force in doing so.⁷¹ However, this was not so. If Arthur attempted to re-enter the land four days after being disseised, Henry, who was now seised, could bring the assize of novel disseisin against Arthur. The striking feature of the assize during the early to mid-thirteenth century was not merely that it put Henry, a vicious disseisor, back into possession of land. Rather, it was that the defendant was precluded from setting up his title

⁶⁶ F W Maitland, ‘Mystery of Seisin’ (1886) 2 *Law Quarterly Review* 481, 489.

⁶⁷ *Ibid* 490.

⁶⁸ Mark De Wolfe Howe (ed), *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932* (Harvard University Press, 1941) vol II, 186.

⁶⁹ Pollock and Wright, above n 3, 5.

⁷⁰ Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (Liberty Fund, 2nd ed, 2009) vol II, 55.

⁷¹ *McPhail v Persons Unknown* [1973] Ch 447, 456–7 (Lord Denning MR).

as a defence to the action.⁷² In Maitland's words, 'the true owner, despite his title, may be compelled by a court of law to yield possession to a disseisor.'⁷³

The law ultimately did come to place less emphasis on the fact of possession, however obtained, and greater emphasis on title, whether accompanied by possession or not. To once again borrow from Maitland, 'English law having once given up the attempt to protect mere possession against ownership, stumbled forward towards the "good sense" (if such it be) of never giving any civil remedy against a person who, being entitled to possession, takes possession.'⁷⁴

For the purpose of this thesis, what is important to stress is that any system that restricts the ambit of its protection to those in actual possession of some object does not create property rights as we presently recognise them. This is because, as Austin has recently remarked, the hallmark of property is, in a very literal sense, the ability to put something down and pick it up again later.⁷⁵ As Penner has written:

[a] system in which ownership depended on continuing factual possession might reasonably be characterized as having a deficient concept of ownership. Title derived in that way would restrict the right to the use of a thing to those uses which counted as possessory. In other words, 'ownership' would merely be a right not to be interfered with so long as one maintained a certain, positive, engagement with a thing.⁷⁶

⁷² F W Maitland, 'Beatitude of Seisin I' (1888) 4 *Law Quarterly Review* 24, 33–6; FW Maitland, 'Beatitude of Seisin II' (1888) 4 *Law Quarterly Review* 286, 286–7.

⁷³ Maitland, 'Beatitude of Seisin I', above n 72, 36. Holmes was thus wrong when he wrote that English law 'always had the good sense to allow title to be set up in defence to a possessory action.' See Holmes, above n 3, 210.

⁷⁴ Maitland, 'Beatitude of Seisin II', above n 72, 298.

⁷⁵ Lisa M Austin, 'Possession and the Distractions of Philosophy' in J E Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, First edition, 2013) 182, 189.

⁷⁶ J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 147.

We might go further than this and argue that such a system has no concept of ownership at all. This is because a system that requires a right-holder to maintain possession as a condition of trespassory protection goes no further than to replicate torts, such as assault and battery, that prevent interferences with the person. As Lord Denman CJ observed long ago, rights of action that arise from interferences with the right-holder's actual possession are simply 'an extension of that protection which the law throws around the person.'⁷⁷

According to Holdsworth, Lord Denman's famous dictum was not an anomaly but was 'merely putting explicitly what had been implicit in the judgments and dicta of his predecessors from the earliest days of the common law.'⁷⁸ Trespass, as opposed to trover, or conversion as it is now called, always required a direct interference with possession. Hence the rule that "possession", as opposed to a "right to possession", is necessary in order to maintain an action for trespass to goods.⁷⁹ In a passage cited with approval by Dixon J in his influential judgement in *Penfolds*,⁸⁰ Wright observed that, 'it is difficult to see how there can be a forcible and immediate injury *vi et armis* to a mere legal right; and there are some parts of the law of trespass and theft which are inexplicable on such a view.'⁸¹

Fortunately, the tort of trespass is but one weapon in an owner's armoury. Because our law has long since taken the intellectual leap of faith necessary to break the bonds of "materialism", an owner can sue for conversion of his goods irrespective of whether he is in possession of them.

⁷⁷ *Rogers v Spence* (1844) 13 M&W 571, 581; 153 ER 239, 243. See also *Penfolds* (1946) 74 CLR 204, 241 (Williams J).

⁷⁸ Sir William Holdsworth, *A History of English Law* (Meuthen & Co, 1966) vol VII, 467.

⁷⁹ *Penfolds* (1946) 74 CLR 204, 226–7 (Dixon J); *Hampton v BHP Billiton Minerals Pty Ltd (No 2)* [2012] WASC 285, [299], [304]–[306] (Edelman J) ('*Hampton*').

⁸⁰ *Penfolds* (1946) 74 CLR 204, 227.

⁸¹ Pollock and Wright, above n 3, 145. It was not until the 1350s that courts abandoned the requirement that writs of trespass allege that the wrong was committed "with force and arms". See John H Baker, *An Introduction to English Legal History* (Oxford University Press, 4th ed, 2007) 60–1.

The conceptual difference between the torts of trespass and conversion was famously described by Lord Kenyon in the following terms: '[t]he distinction between the actions of trespass and trover is well settled: the former is founded on possession: the latter on property.'⁸²

D Fictional Uses of Possession

Although Lord Kenyon was able to confidently assert this proposition in 1791, the common law has been unwilling to fully dispense with the notion that owners must also possess. Instead of embracing what might be described as the “completed disaggregation” of the operative fact of possession from the right of ownership, it has instead settled on an awkward, and unnecessary, compromise in which owners are *deemed* to possess. The consequence of this unsatisfactory halfway-house position is a proliferation of confusing fictions.

In *Wilson v Lombank Ltd*⁸³ the plaintiff left his car at a garage for repairs. After the repairs were completed the car was left on the forecourt of the garage to be collected. A representative of the defendant, operating under the mistaken belief that the car belonged to the defendant company, then took it away. In holding that the defendants were liable to the plaintiff in trespass, Hinchcliffe J said of the plaintiff that, ‘in my judgment the plaintiff was in possession of the car; not only did he have the right to immediate possession, but I do not think in the circumstances of the case he ever lost possession of the car.’⁸⁴ With respect, this conclusion is nothing more than a convenient fiction designed to enable the plaintiff to bring his claim within the tort of trespass, which was itself made necessary by the way in which the plaintiff chose to

⁸² *Ward v Macauley* (1791) 4 TR 489, 490; 100 ER 1135, 1135. See further *Hampton* [2012] WASC 285, [305] (Edelman J).

⁸³ *Wilson v Lombank* (1963) 1 WLR 1294.

⁸⁴ *Ibid* 1297–8. The plaintiff's ability to sue was based on Hinchcliffe J's finding that the garage owner did not have a common law lien over the car. For a case in which a vendor's lien did prevent a purchaser from suing in conversion see *Lord v Price* [1874] LR 9 Exch 54, 55–6 (Bramwell B).

plead the case. If I drop my car off at a garage and hand the mechanic the key, it is quite clear that, though I remain the owner, I have nevertheless relinquished possession.

Similarly, take the following statement from Mellish LJ:

[i]t seems to us that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or furniture warehoused at the Pantechnicon, would, in a popular sense, as well as in a legal sense, be said to be still in his possession, and we see no valid ground for holding that they are not still in his possession within the meaning of the Bills of Sale Act.⁸⁵

This is also a fiction. If I deliver plate or jewellery to be stored in a bank vault it is perfectly clear that the bank takes possession of those items. After all, the bank's ability to exercise almost complete control over objects within its vault is the very reason why I chose to deposit valuable items with it. That I may resume control of my plate or jewels upon request does not demonstrate that I have retained possession of them. Instead, it demonstrates that my right to do so does not depend on the fact of possession.

One can readily appreciate why courts strain the meaning of possession in these sorts of circumstances. As Epstein has written, '[i]f an owner entrusts his car to a parking attendant from whom it is taken by a thief, it is far better that the legal remedy be given to the party with the permanent interest in the property than to one who has at most momentary custody over the object.'⁸⁶ However, once we appreciate that the purely jural concept of ownership, whilst created by an act of possession, does not depend upon an ongoing relationship of control, we

⁸⁵ *Ancona v Rogers* (1876) 1 Ex D 285, 292.

⁸⁶ Epstein, above n 62, 67.

can achieve the same sensible remedial ends without persisting with the fiction that owners invariably possess.

V OWNERSHIP AND RELATIVE TITLE

A Relative Title

The authors of *The Law of Personal Property* describe “possession” as a legal interest in a chattel that embraces ‘all proprietary interests in goods short of outright ownership.’⁸⁷ This statement is misleading because it implies that there are two distinct forms of proprietary interests in goods; a greater right called “ownership” and a lesser right called “possession”. As the discussion below will demonstrate, the erroneous notion that there are two distinct sorts of property rights is attributable to a failure to appreciate that the principle of relativity of title is unrelated to the content of a property right.

English law allows that a potentially infinite number of people can hold valid and enforceable property rights in the same thing at the same time.⁸⁸ It does so by recognising that property rights at common law are not absolute but are relatively weaker or stronger as they are more or less recently created. This notion is captured by phrases such as “first in time, better in right” or “first in time prevails”.⁸⁹ The principle of relativity of title is, as Rostill notes,⁹⁰ generally regarded as an important and unique feature of property rights at common law.

⁸⁷ Bridge et al, above n 19, 56 [2-038].

⁸⁸ For a recent challenge to the orthodox view see Luke Rostill, ‘Relative Title and Deemed Ownership in English Personal Property Law’ (2015) 35 *Oxford Journal of Legal Studies* 31.

⁸⁹ Bell, above n 4, 516.

⁹⁰ Rostill, above n 88, 32.

What is most important to appreciate about relativity of title is that it is concerned with the range of exigibility of property rights and not their content.⁹¹ The holder of a newer, and thus weaker, right has precisely the same *sort* of right as the holder of an older, and thus stronger, right. In each case, the right correlates to an *in rem* duty of non-interference. The only difference between the two rights is simply that the holder of the newer right can enforce it against anyone *except* a person with an older right. The practical consequence of relativity of title is that, in resolving a property dispute, courts are only ever required to determine which of the parties to the action has the best right *inter se*.⁹² As Lord Diplock explained:

the court is only concerned with the relative strengths of title proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or occupation of the land.⁹³

The principle of relativity of title applies equally to personal property,⁹⁴ and does so regardless of whether possession has been acquired by finding,⁹⁵ consensually under a bailment,⁹⁶ or wrongfully through conduct that constitutes a tort.⁹⁷

The necessary corollary of the concept of relative title is, as Lord Diplock suggested, that a defendant cannot deny liability by demonstrating that some party, not before the court, has a

⁹¹ Douglas, above n 8, 26.

⁹² *Asher v Whitlock* [1865] LR 1 QB 1, 5 (Cockburn CJ) ('*Asher*').

⁹³ *Ocean Estates Ltd v Pinder* (1969) 2 AC 19, 25.

⁹⁴ Although this view is not universally shared. See David Fox, 'Relativity of Title in Law and in Equity' (2006) 65 *The Cambridge Law Journal* 330, 344.

⁹⁵ *Armory v Delamirie* (1722) 1 Str 505 ('*Armory*'); 93 ER 664; *Parker* [1982] QB 1004.

⁹⁶ *The Winkfield* [1902] P 42, 54–5 (Collins MR); *Panatown v Alfred McAlpine* (2001) 1 AC 518, 581 (Lord Millett).

⁹⁷ *Jeffries v Great Western Railway Co* (1856) 5 EL&BL 802, 805; 119 ER 680, 681 (Lord Campbell CJ) ('*Jeffries*'); *Sutton v Buck* (1810) 2 Taunt 302; 127 ER 1094, 1096 (Mansfield CJ), 1096 (Lawrence J), 1097 (Chambre J). See also *Russel v Wilson* (1923) 33 CLR 538, 546–7 (Isaacs and Rich JJ).

property right that is older and therefore better than that of the plaintiff. This is best illustrated with a simple example. Imagine that Jane steals Tom's bicycle, and that Sarah then steals the bicycle from Jane. In a dispute between Sarah and Jane, Sarah cannot be heard to say that Jane ought not to succeed because the bike in fact belongs to Tom. In formal terms, Sarah cannot raise the *jus tertii* as a defence to an action in trespass or conversion.⁹⁸

B Does the Law Recognise "Ownership"?

Throughout this thesis, the term "owner" has been and will continue to be used to describe the holder of a property right of the sort described in Chapter I. The sheer ubiquity of the term and the dearth of alternatives makes it too difficult to do otherwise. Indeed, as Hickey has noted, personal property law would become much simpler if common lawyers reclaimed "ownership" as a technical term.⁹⁹

Despite the frequency with which both lawyers and laymen refer to the "owner", some scholars insist that the concept of ownership has no place in a system in which property rights are relative and not absolute. Swadling, for example, insists that:

[d]espite what the layman might think, there is no concept of ownership in English law. The proof of that proposition lies in the fact that English law provides no form of protection to anyone we might describe as the "owner" of goods greater than that provided to someone who simply finds them in the street ... all who sue in respect of interferences with goods have to

⁹⁸ *Jeffries* (1856) 5 EL&BL 802, 805; 119 ER 680, 681 (Lord Campbell CJ). However, a statutory version of the *jus tertii* exists in the United Kingdom. See *Torts (Interference with Goods) Act 1977* (UK) s (8)1.

⁹⁹ Hickey, above n 26, 164.

bring their claims within the ambit of certain torts, and the only thing which those torts protect is the right to possession.¹⁰⁰

Swadling is not the only scholar to have made this observation. Tyler and Palmer have written that, '[i]t is possible, and, perhaps, even desirable, to write a treatise on English law without defining ownership or mentioning it as a juridical concept.'¹⁰¹ Likewise, Green and Randall remark that, "[o]wnership" is a term ill at ease in the common law; historically there was no such thing, and modern use of the term is inconsistent and often unhelpful in a legal context.'¹⁰²

If the concept of ownership is inherently exclusive in the sense that it demands that, at any given time, there can only be one such person, then it is true to say that the common law, unlike the classical Roman law,¹⁰³ has no concept of ownership or *dominium*, but only of superior and inferior rights to things.¹⁰⁴

However, the notion that the common law does not recognise ownership is subject to two caveats. First, given that one cannot use the technical nomenclature of estates to describe interests in personal property,¹⁰⁵ one is forced to use the term "ownership" to describe the greatest legally recognised interest in a chattel for want of an alternative. Secondly, although the common law does not recognise a *dominus*, such a person does, in effect, exist in English law. This is because, whilst there may be several owners, there is always someone who holds the oldest right. This person is, in practical terms, the *owner*. To borrow Fox's terminology,

¹⁰⁰ William Swadling, 'Unjust Delivery' in Andrew Burrows and Alan Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2006) 278, 281.

¹⁰¹ Tyler and Palmer, above n 27, 39.

¹⁰² Green and Randall, above n 13, 80.

¹⁰³ Fox, above n 94, 335.

¹⁰⁴ This idea is most often invoked in land law. See, for example, *Hunter v Canary Wharf Ltd* [1997] AC 655, 703 (Lord Hoffman) ('*Hunter*').

¹⁰⁵ William Swadling, 'Property' in A S Burrows (ed), *English Private Law* (Oxford University Press, 3rd ed, 2013) 173, 207–8 [4.130].

whilst it may not be possible to have an “absolute” title, it is still possible to have the “best” title.¹⁰⁶

The most obvious example of someone who is, for all intents and purposes, an owner is a person who takes possession of a wild animal, or anything else that is *res nullius*. However, we need not confine ourselves to ownerless things. The common law contains numerous rules that have the effect of transforming mere right-holders into owners, in the sense used above. For example, as will be discussed in Chapter VII, every “good faith purchase” exception to the *nemo dat* principle ensures that vendors are, in effect, owners so far as good faith purchasers are concerned. Likewise, the law of adverse possession clears away titles that pre-date the limitation period, thus transforming someone with a weak title into an owner by operation of statute.¹⁰⁷ To take a final example, the doctrines of accession and specification, discussed in Chapter I, ensure that the purchaser of a car or a cake does not have to investigate whether someone has a pre-existing right to the tyres or the flour. Thus, when used in this more limited sense to indicate the “best” title, it is indeed possible to “own” something at common law.

Despite this, the substance of Swadling’s position is both correct and important to appreciate. Whilst in many, if not most cases, it will be perfectly possible to identify a person with the best right to some thing, it remains true that, in a system of property in which titles are relative, it is unnecessary to do so. In McFarlane’s terms, this is simply a matter of substituting the phrase *an owner* for *the owner*.¹⁰⁸ As between competing claimants, the only relevant question is, “whose right is best?”, and no one gets additional points for demonstrating that their right is

¹⁰⁶ Fox, above n 94, 335–6.

¹⁰⁷ *Limitation of Actions Act 1958* (Vic) s 18.

¹⁰⁸ McFarlane, above n 5, 145.

the best possible right. This is why, as Lord Millett observed, the common law is perfectly happy for an admitted squatter to maintain a claim for trespass.¹⁰⁹

C Does the Law Recognise a “Possessory Right”?

The foregoing discussion of relative title was necessary in order to make the following simple, yet important, point. That is, if the term “possessory title” does no more than to indicate that the right in question is not the oldest right, then it does not describe a distinct sort of interest in an object of property. As was argued in Chapter I, the content of a right is determined by what the correlative duty demands of those who owe it. If a “possessory right” is a distinct sort of *in rem* right, then it must be because the right of the possessor correlates to a duty that demands of duty-owners something other than the simple *in rem* duty of non-interference. As security rights such as liens and pledges demonstrate, the property right described in Chapter I is not the only sort of *in rem* right that one may have in respect of a tangible thing. Nevertheless, there is no distinct form of entitlement known as a “possessory right” within the *numerus clausus* of property rights at common law.¹¹⁰

To describe possession as a form of legal interest in a chattel that embraces ‘all proprietary interests in goods short of outright ownership’¹¹¹ is not to describe a distinct sort of property right. Rather, it is *de facto* recognition of the fact that property rights in common law systems are relative and not absolute. This observation applies equally to the interest of a bailee. Whilst there might be an argument about whether particular sorts of bailment have proprietary or

¹⁰⁹ *London Borough of Harrow v Qazi* [2004] 1 AC 983, 1015.

¹¹⁰ See also Douglas, above n 8, 30–1.

¹¹¹ Bridge et al, above n 19, 56 [2-038].

merely contractual consequences,¹¹² there is no suggestion that, in so far as a bailee has a proprietary right, it correlates to anything other than a duty of non-interference, enforceable through the normal property torts.

It may well be argued that, particularly when applied to squatters or finders, the term “possessory right” usefully indicates the existence of an older and thus better title. However, its tendency to suggest that the right of a finder or a squatter is substantively different from that of an owner or paper title holder means that it should nevertheless be avoided.

VI CONCLUSION

The argument made in this chapter is that the persistent confusion that surrounds possession is not attributable to any complexity inherent in the concept. Instead, it is the result of two basic errors. The first is the failure to heed Hohfeld’s warning of the need to distinguish the jural concept of a right from the non-jural concept of a fact. The second is the tendency to draw a false distinction between “ownership” and other, “lesser”, forms of property right. In a system in which property rights are relative and not absolute, priority of creation, though important in a dispute between any two right-holders, does not alter the content of the correlative duty. The substance of the right remains the same.

The conclusion reached in this chapter is that, so far as the formal architecture of property law is concerned, there is simply no need for possession to denote anything other than a fact that, when proved by evidence, creates the sort of property right described in Chapter I. Positing the

¹¹² See, for example, Bridge, above n 22, 41–3; William Swadling, ‘The Proprietary Effect of a Hire of Goods’ in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (LLP, 2nd ed, 1998) 491.

existence of a “possessory right” adds nothing to our picture of an owner as an exclusive gatekeeper. To the contrary, such a right detracts from it in so far as it suggests that the existence of her right is dependent upon her occupying the gatehouse at all times. Thus, one might argue that the only consequence of insisting on the existence of a possessory right is to tether the modern law to a period, long since passed, in which people could not conceive of owning something that they did not also possess.

This argument presented thus far is that the legal significance of possession is confined to its role as an operative fact that creates property rights. However, this does not put an end to the enquiry. As noted at the beginning of this chapter, if we conclude that possession is indeed a fact, we then need to consider the further question; what sort of factual relationships between people and things count as possession for the purposes of the law? The answer to this question is the topic of the next chapter.

CHAPTER III

AN EXPRESSIVE THEORY OF POSSESSION

I INTRODUCTION

In Chapter II it was argued that the concept of possession in the law does not describe a distinctive sort of jural relation. Possession is simply a fact which, when proved by evidence, creates original property rights in things that are capable of being possessed. However, as was observed in the conclusion to the previous chapter, this tells us nothing about the nature of that fact or, in other words, what sorts of relationships between people and things count as “possession”.

Using Honoré’s simple definition as placeholder, Chapter II proceeded on the preliminary basis that possession describes, more or less, an observable fact about effective control over some tangible thing. The aim of this chapter is to give a definition of possession. Building on theories developed by Hegel and Rose, the account offered here emphasises possession’s expressive function. It will be argued that if we are to understand the nature of possession then we must abandon the notion that its significance, so far as the creation of rights is concerned, lies in the ability of the possessor to exercise physical mastery over the *res*. Whilst it is undoubtedly true that physical control, or something approximating it, constitutes a core case of possession, the concept is best understood as a collection of acts that function as recognised and accepted signals about one’s intention to stake a claim to some tangible thing.

II WHAT COUNTS AS “POSSESSION”?

A “Social Facts”

Chapters I and II concluded that the significance of possession in the law is confined to its status as a fact that creates property rights. The task for the present chapter is to attempt to define that fact. Before doing so, it is necessary to briefly discuss a further category in the taxonomy of facts.

As was discussed in Chapter II, Hohfeld drew an important distinction between facts that create jural relations and those that do not. He described the former as “operative” and the latter as “evidential”. His taxonomy is thus concerned with the legal significance of particular facts. However, this is not the only important distinction that must be drawn between different sorts of fact. Another distinction, the significance of which is not confined to the role of facts in a legal system, is that between what will be called “hard facts” and “social facts”.

The difference between “hard” and “social” facts can be briefly stated. Hard facts are of the sort, “water is composed of two hydrogen atoms bonded to one oxygen atom”. Social facts, by contrast, are of the sort, “Sarah is dependable” or “Robert is rude”. Social facts are not based on immutable laws or objective truths about the universe but are constructs, albeit ones that have important and generally accepted meanings. To draw on Hart’s analysis of legal concepts, social facts are, like conclusions of law, best understood as conclusions arrived at

by the application of a particular body of rules to particular events.¹ That is, they are ‘rule defined.’² The statement “Robert is rude” is a conclusion based upon the application of generally accepted non-legal rules about the meaning of “rudeness” to “hard” or empirical facts about Robert’s behaviour.

Though not peculiarly legal, many social facts play significant roles in legal systems. Certain criminal offences may, for example, require a court to determine whether the accused’s conduct was “insulting”.³ Whether or not certain behaviour is “insulting” is, as Endicott has written, ‘undoubtedly a fact. A *social* fact, no doubt, not a *juridical* fact. If “insulting” were used as a standard in a statute, we could decide whether [certain] behaviour was insulting without any reference to the law.’⁴ The law is full of such questions of social fact. As noted in Chapter II, the law of contract requires courts to determine whether an “offer” has been made by the promisor and whether it has been “accepted” by the promisee before it is satisfied that a contract has been created.

The argument advanced in this section is that whether or not someone has possession of some object is also a question of social fact because it depends upon the application of particular social rules to hard and empirically verifiable facts about control, physical proximity, the

¹ Hart famously illustrated this concept by reference to a cricket umpire’s statement ‘He is out’. See HLA Hart, ‘Definition and Theory in Jurisprudence’ (1954) 70 *Law Quarterly Review* 37, 42, 53–4.

² A W B Simpson, ‘The Analysis of Legal Concepts’ (1964) 80 *Law Quarterly Review* 535, 543–4.

³ *Brutus v Cozens* [1973] AC 854.

⁴ Timothy A O Endicott, ‘Questions of Law’ (1998) 114 *Law Quarterly Review* 292, 311. Emphasis in original.

nature of the object, and so on.⁵ Possession is, to adapt Hart's terminology, inevitably 'open-textured'⁶ and will thus, on occasion, be subject to interpretive disagreement.

However, it does not follow from this that possession is therefore a hopelessly vague or indeterminate concept. As Waldron has observed, 'we must not assume in advance that the imprecision or indeterminacy which frustrates the legal technician is fatal to the concept in every context in which it is deployed.'⁷ For every marginal case, there are any number of cases in which the application of the concept is clear and decisive. However, that uncontroversial cases do not, for obvious reasons, make it into the pages of the law reports tends to obscure this basic fact.⁸

B Examples of Possession in the Law

With the foregoing discussion of "social facts" in mind, it is now appropriate to give a brief summary of the diverse sorts of factual relationships between people and things that have been held to amount to "possession" for purposes of the law.

Possession of real property does not require the exercise of complete physical control over every square metre of some parcel of land for the obvious reason that, particularly in the case of large tracts of land, this is impracticable if not impossible.⁹ As Pollock wrote, '[a]cts of

⁵ For a similar observation see F H Lawson and Bernard Rudden, *The Law of Property* (Clarendon Press, 2nd ed, 1982) 41.

⁶ HLA Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 128.

⁷ Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1988) 31.

⁸ See also Frederick F Schauer, *Thinking like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press, 2009) 20–3.

⁹ *Powell v McFarlane* (1977) 38 P&CR 452, 471 (Slade J). ('Powell').

dominion over part of the thing in dispute may be evidence of *de facto* possession of the whole.’¹⁰ What will constitute possession of land will differ according to its particular characteristics.¹¹ As cases on adverse possession make clear, acts of enclosure, though not always necessary,¹² are very often sufficient to establish possession.¹³

Due to their size, location or the fact that they may be living creatures, many chattels are also difficult, if not impossible, to control. As McCarthy J noted in *Popov v Hayashi*, ‘[i]t is impossible to wrap one’s arms around a whale, a fleeing fox or a sunken ship’.¹⁴ Nevertheless, the law grants that it is possible to possess such things. Thus, a salvage team can be in possession of a ship wrecked in open water even though, because of its size and location, the members of that team do not and cannot exercise complete physical dominion over it.¹⁵ To take another, and very famous example, whilst a huntsman in hot pursuit of his quarry will not be in possession of it, the law does not require actual bodily seizure. Possession is established by the infliction of a mortal wound.¹⁶ Fish, on the other hand, are subject to a slightly different rule. Fish are not within the possession of a fisherman unless and until they are securely entrapped in his net. Thus, a fisherman cannot bring an action in trespass against a rival fisherman who deliberately startles a school of fish so that they take fright and evade his rapidly closing net.¹⁷ In the case of whales the question is more complex. As will be discussed in greater detail later in this chapter, the question of whether the captain

¹⁰ Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (Clarendon Press, 1888) 31.

¹¹ *Murnane v Findlay* [1926] VLR 80, 87 (Cussen J).

¹² *Wuta-Ofei v Danquah* (1961) 1 WLR 1238, 1243 (Lord Guest).

¹³ *Buckinghamshire County Council v Moran* [1990] Ch 623, 641–2 (Slade LJ) (*‘Buckinghamshire CC’*); *George Wimpey & Co v Sohn* [1967] Ch 487, 506–8 (Harman LJ), 511 (Russell LJ).

¹⁴ 2002 WL 31833731 (Cal Super 2002), 5 (*‘Popov’*).

¹⁵ *The Tubantia* (1924) 1 P 78, 90 (Sir Henry Duke).

¹⁶ *Pierson v Post* 3 Cai R 175 (NY Sup Ct 1805), 177–8 (Tompkins J) (*‘Pierson’*); *Churchward v Studdy* (1811) 14 East 249, 251; 104 ER 596, 597 (Lord Ellenborough CJ).

¹⁷ *Young v Hichens* (1844) 6 QB 606, 611; 115 ER 228, 230 (Lord Denman CJ).

of a whaling ship is in possession of, and thus has property in, a whale does not depend merely on determining which of the rival ships' harpoons first lodged in the whale, but instead turns on the application of particular customary rules which differ from fishery to fishery.¹⁸

III THE EXPRESSIVE THEORY OF POSSESSION

A Possession's Expressive Function

It is apparent from the examples given above that the law does not actually demand that a possessor demonstrate complete control over the object in question in the sense that she is able to exclude third parties who might meddle with it. The orthodox conclusion drawn from this observation is that possession in the law means 'possession of that character of which the thing is capable'¹⁹ and that this is, in turn, established by an 'appropriate degree of physical control'.²⁰ Sheehan has summarised the position in the following terms:

It is quite possible to be in actual possession of a thing without physically holding it in your hands. What is required is that there be factual control of it. When I come to work therefore I do not relinquish possession of my furniture at home. Nor do I have to physically hold my car in my hands; it's just too big. *The corpus possessionis therefore consists of the power to*

¹⁸ See *Fennings v Lord Grenville* (1808) 1 Taunt 241 246-7; 127 ER 825, 827-8 (Lord Mansfield CJ).

¹⁹ *Lord Advocate v Young* [1887] 12 App Cas 544, 556 (Lord FitzGerald).

²⁰ *Powell v McFarlane* (1977) 38 P&CR 452, 470 (Slade J) ('*Powell*'), cited with approval in *J A Pye (Oxford) Ltd v Graham* (2003) 1 AC 419, 436 (Lord Browne-Wilkinson). ('*Pye*').

*factually control to the exclusion of others. The degree of factual control required will depend on the nature of the asset in question.*²¹

The argument made in this chapter is that the italicised portion of this statement is only partially true. This is because, whilst it is undoubtedly true that what counts as “possession” does indeed depend upon the characteristics of the object in question, this has little to do with an appropriate degree of physical control in the sense of the possessor’s actual ability to exclude other people. On the account developed in this chapter, the significance of the physical act lies instead in its expressive function. Certain acts qualify as “possession” for the reason that, whether or not they amount to actual control, they send the recognised signal by which someone communicates his intention to claim a stake in some thing. Lest this point be misunderstood, it must be stressed that this account does not argue that physical control is irrelevant. Rather, it argues that its relevance is confined to the clarity of the signal that such acts send to the relevant audience.

This distinction between possession as physical control and possession as an expressive act was perhaps first articulated by Hegel. According to Hegel, there are three ways of taking possession of some object. He wrote that, ‘[t]aking possession is partly the simple bodily grasp, partly the forming and partly the marking or designating of the object.’²² The concept of “bodily grasp” is the familiar notion of physical control, and described by Hegel as ‘corporeal possession’.²³ “Forming”, by contrast, is what lawyers describe as *specificatio* or manufacture, discussed in Chapter I. According to Hegel, ‘[t]he fashioning of a thing is the

²¹ Duncan Sheehan, *The Principles of Personal Property Law* (Hart Publishing, 2nd ed, 2017) 11. Italics supplied.

²² Georg Wilhelm Friedrich Hegel, *Philosophy of Right* (Batoche, 2001) 63 [54].

²³ Ibid 64 [55].

kind of active possession which is most adequate to the idea, because it unites the subjective and the objective.’²⁴

Finally, and most interestingly for present purposes, Hegel described possession by “marking”. He wrote that, ‘[t]he kind of possession, which is not literal but only representative of my will, is a mark or symbol, whose meaning is that it is I who have put my will into the object. Owing to the variety of objects used as signs, this kind of possession is very indefinite in its meaning.’²⁵ He went on to explain that:

[o]f all kinds of possession this by marking is the most complete, since the others have more or less the effect of a mark. When I seize or form an object, in each case the result is in the end a mark, indicating to others that I exclude them, and have set my will in the object. The conception of the mark is that the object stands not for what it is, but for what it signifies. The cockade, e.g., means citizenship in a certain state, although its colour has no connection with the nation, and represents not itself but the nation. In that man acquires possession through the use of a sign, he exhibits his mastery over things.²⁶

This is the essence of the argument developed in this chapter. What is important about possession is not control *per se*, but the message that particular factual relationships between people and objects of property send to other members of a particular interpretive community who are capable of bearing legal duties.

²⁴ Ibid 65 [56].

²⁵ Ibid 67 [58].

²⁶ Ibid.

The argument that possession is best understood as a signal or statement of intention has more recently been developed by Rose.²⁷ In her seminal paper on possession, she made the important claim that:

[p]ossession as the basis of property ownership ... seems to amount to something like yelling loudly enough to all who may be interested. The first to say, "This is mine," in a way that the public understands, gets the prize, and the law will help him keep it against someone else who says, "No, it is mine."''²⁸

More recently, Rose has emphasised that the significance of possession in the law has little to do with the ability of the *de facto* possessor to exclude others. She offers the following typical neighbourhood scene by way of illustration:

[t]he realist definition of possession would have it that the owner/possessor is one who is in a position to exclude all others by physical force. That is not what the neighbours see. The person who lives in the house is not there at all times. She goes to the grocery store. She goes to work. She takes the kids to school. She locks the doors, but she may not. She is not even close to excluding others through personal strength, threat and intimidation. If she can exclude unwanted interlopers, it is because she can call neighbours and the police, and those third parties will help her keep out intruders.²⁹

²⁷ Carol M Rose, 'Possession as the Origin of Property' (1985) 52 *University of Chicago Law Review* 73, 77.

²⁸ *Ibid* 81.

²⁹ Carol M Rose, 'The Law Is Nine-Tenths of Possession: An Adage Turned on Its Head' in Yun-chien Chang (ed), *Law and Economics of Possession* (Cambridge University Press, 2015) 40, 48.

A significant, though perhaps implicit, feature of Rose's argument is her underlying assumption that lawyers and laymen do in fact have a shared conception of possession. Rose is not the only legal scholar to argue that the dichotomy between the "lay" and "legal" understandings of possession is a false one. Tay, for instance, has written that:

the lawyer no more invents the characteristics of possession or control than the zoologist invents the characteristics of animals. In seeking to classify, both are no doubt forced to recognize complexities which few laymen have recognized – to that extent their use of terms like 'possession' or 'animal' displays a degree of sophistication not found in the layman's use and may diverge from it in a significant way. But there is not a lay animal and a zoological animal, just as there is not a lay possession and a legal possession in the common law.³⁰

What both accounts of possession have in common is their insistence that there is only one concept of possession, albeit that its substance may turn out to be more complex than the definition found in a dictionary. Nevertheless, there is an important point of distinction between them. On Tay's definition, possession is 'the present control of a thing, on one's own behalf and to the exclusion of all others.'³¹ By contrast, Rose emphasises that the concept of possession has nothing to do with control over the *res* or the ability of the possessor to exclude others. On her account, '[p]ossession for the law means *acting like an owner*.'³²

³⁰ A E S Tay, 'The Concept of Possession in the Common Law: Foundations for a New Approach' (1963) 4 *Melbourne University Law Review* 476, 492.

³¹ *Ibid* 490.

³² Carol M Rose, 'Nine-Tenths', above n 29, 49. Italics in original. This language of "acting like an owner" is also found in the case law. See, for example, *Powell* (1977) 38 P&CR 452, 471 (Slade J); *Buckinghamshire CC* [1990] Ch 623, 641 (Slade LJ).

It may well be that the difference between these two accounts of possession is as much a matter of emphasis as it is of substance.³³ However, this emphasis is very important to the account of possession being offered here. It is submitted that, in so far as it does not require the possessor to exercise any form of physical control, Rose's "signalling" account provides a better explanation of the law. This is because, as discussed above, the law allows that individuals can possess things that are not susceptible to the slightest degree of physical control. To reinforce the point, take, as an obvious example, the Kidman & Co cattle station. This station occupies an area of land in excess of 100,000 square kilometres. If possession requires even a *de minimus* level of physical control, in the sense of an actual ability to exclude non-invitees, then, even allowing that possession is a "social fact" with fuzzy boundaries, the Kidman & Co cattle station is incapable of being possessed. Indeed, precisely the same argument could be made about whales and wrecked ships. Yet, as the foregoing made clear, large tracts of land, whales and wrecked ships can be satisfactorily possessed so far as the law is concerned.

So why is this? Contrary to the dominant understanding, it is not because the possessor has demonstrated an "appropriate degree of physical control" over these things. It is instead, as Rose correctly argues, because certain factual relationships between people and things send the *appropriate sort of signal* to others. To put it another way, so far as property entitlements are concerned, the importance of a fence is not that it actually keeps people out. Instead, its importance is that it sends a recognised signal about someone's claim to a piece of land and,

³³ As Tay observed, if possession amounted to no more than detention, it would be 'practically useless as a fundamental concept on which to build a structure of rights and duties': Tay, above n 30, 490.

in addition, communicates the territorial extent of that claim.³⁴ As Rose has written, even the most modest fence ‘says pretty clearly, “This is *mine*”’.³⁵

B A Lay and a Legal Meaning of Possession?

On this account of possession, the significance of a fence enclosing a piece of land is that, irrespective of whether it is effective in excluding would-be trespassers, it sends a signal that is both understood and accepted by lawyers and laymen alike. Those who are not steeped in the common law tradition of possession understand that “possession” in this claim-staking sense does not depend upon some form of physical control or dominion. Pollock was undoubtedly correct when he observed that, ‘[w]e have no difficulty in saying that the tenant of a farm containing many score acres is in possession of the whole’.³⁶ Though it is seldom if ever discussed in the literature, an important insight flows from this unremarkable observation about land ownership: that neither lawyers nor laymen ever really conceived of possession as a blunt fact about the degree of actual control that a person exercises over a some thing.

Put briefly, the oft-noted dichotomy between “lay” and “legal” conceptions of possession is an invention of lawyers who have foisted upon laymen the sort of literal and functionally inert definition that the latter never recognised. When non-lawyers use the term possession, they almost never do so in order to indicate a state of actual control over a thing or, as

³⁴ As Ellickson has noted, visual signals are preferable to non-visual cues for this reason. See Robert C Ellickson, ‘The Inevitable Trend toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose’ (2010) 19 *William & Mary Bill of Rights Journal* 1015, 1028–9.

³⁵ Carol M Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview Press, 1994) 1.

³⁶ Pollock and Wright, above n 10, 12.

Gleeson suggests, its relative location.³⁷ Though the noun “possession” is frequently used as a synonym for “goods” or moveables more generally, the verb, “to possess”, contrary to what standard legal accounts suggest, almost never features in ordinary speech. Instead, it is reserved for those instances in which someone wishes to indicate that they have some sort of entitlement to an object. In other words, the argument advanced here is that there is only one concept of possession and that that concept concerns factual relationships between persons and things that function as recognisable claims to them.³⁸ As is argued in Chapter IV, it must always be remembered that the possession rule is, first and foremost, not a legal construct but an extra-legal convention that the law has incorporated into its formal system of rights and duties.

C Possession’s Mental Element

Perhaps one of the most vexed issues in this area of the law concerns the role of intention in the concept of possession. As will be recalled from the summary of academic opinion given in Chapter II, there is substantial disagreement on this question. On the one hand McFarlane, for example, argues that:

[p]hysical control is often referred to as “possession”. However, that term is best avoided: it is often given a refined, technical definition ... Certainly it is true to say that, to have physical control of a thing, B must be aware of its existence. Apart from that, however, such technical refinements of the core concept of physical control ... are misleading. In English law, the test is a simple one: B independently acquires a property right *if and only if* he takes physical

³⁷ Simon Gleeson, *Personal Property Law* (FT Law and Tax, 1997) 24.

³⁸ Even the dictionary definition of ‘possess’ reads, ‘[h]old as property; have belonging to one; own’. Lesley Brown, Angus Stevenson and William R Trumble (eds), *Shorter Oxford English Dictionary on Historical Principles* (Oxford University Press, 5th ed, 2002) vol II, 2294.

control of a thing. There is no need for B to show he also had an intention, on his own behalf, to exclude others from that thing.³⁹

On the other hand, Green and Randall argue that, ‘it is the cognitive element of control which is of the greatest relevance to legal possession’.⁴⁰ Although always a feature of Roman law,⁴¹ the question of whether the so-called *animus possidendi* is indigenous to, or was introduced into, English law is a matter of academic debate.⁴² Questions of provenance aside, it is clear that the modern common law requires that the physical element or *corpus* be accompanied by the relevant intention or *animus*. Lord Browne-Wilkinson, for example, has authoritatively stated that:

there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). What is crucial is to understand that, without the requisite intention, in law there can be no possession.⁴³

That the formal definition of possession should include a mental element is not at all surprising. As will be discussed further in Chapter VI, because possession describes a purposeful act, it would be absurd to suggest that one can possess some thing in ignorance of its very existence. As Lord Parker CJ remarked, ‘if something were slipped into your basket

³⁹ Ben McFarlane, *The Structure of Property Law* (Hart Publishing, 2008) 155.

⁴⁰ Sarah Green and John Randall, *The Tort of Conversion* (Hart Publishing, 2009) 86.

⁴¹ Barry Nicholas, *An Introduction to Roman Law* (Clarendon Press, 1976) 112–4.

⁴² Oliver Radley-Gardner, ‘Civilized Squatting’ (2005) 25 *Oxford Journal of Legal Studies* 727, 734–6, 747.

⁴³ *Pye* (2003) 1 AC 419, 435. See also *Parker v British Airways Board* [1982] QB 1004, 1019 (Eveleigh LJ) (*‘Parker’*); Oliver Wendell Holmes, *The Common Law* (Little, Brown and Company, 1949) 216; Pollock and Wright, above n 10, 13.

and you had not the vaguest notion it was there at all, you could not possibly be said to be in possession of it.’⁴⁴ Similarly, in *Merry v Green* it was held that there could be no transfer of possession of an object if its existence was unknown to both the vendor and purchaser.⁴⁵ The common law is not alone in holding this position. The Romans also recognised that possession of a vessel did not necessarily amount to possession of its contents. Paul wrote that, ‘[a] person possessing a building as a whole is not deemed to possess the individual things in the building. The same applies to a ship and to a cupboard.’⁴⁶

The “claim-staking” account developed here goes much further than this. On this theory, intention is the *sine qua non* of possession because the very purpose of any act that amounts to possession is to send a recognised signal about one’s *intention* to claim some object for oneself.

D Distinguishing “Possession” from “Custody”

This thesis has criticised the sprawling nomenclature that has become such an unfortunate feature of this area of property law. However, although it is argued that possession is a unitary concept, the expressive theory does demand one semantic distinction. That is the distinction between *possession* and *custody*. This distinction reflects the fact that not all observable, factual relationships with things constitute *possession* because, however they may

⁴⁴ *Lockyer v Gibb* (1967) 2 QB 243, 249. See also *Chairman, National Crime Authority v Flack* (1998) 86 FCR 16, 30 (Tamberlin J) (*‘Flack’*).

⁴⁵ *Merry v Green* (1841) 7 M&W 622, 632; 151 ER 916, 920 (Parke B). See also *Moffatt v Kazana* (1969) 2 QB 152, in which it was held that the purchaser of a house was not entitled to a biscuit tin containing almost £2000 in cash that the vendor had stored in the chimney and subsequently forgotten about.

⁴⁶ Theodor Mommsen, Paul Krueger and Alan Watson (eds), *The Digest of Justinian* (University of Pennsylvania Press, 1985) vol IV, 41.2.30pr. See also JA Borkowski and Paul J du Plessis, *Textbook on Roman Law* (Oxford University Press, 3rd ed, 2005) 164. At common law, it has been said that a person in possession of a receptacle is “presumed” to be in possession of its contents. See *Grafstein v Holme* (1958) 12 DLR 2d 722, 738 (LaBel JA).

appear to third parties, not all are intended to send the sort of “claim-staking” signal discussed above.

Imagine, for example, that you see me admiring your particularly fine watch and you offer to let me try it on. I gratefully accept your offer, place the watch over my wrist and close the buckle on the strap. In doing so I am entering into a factual relationship resembling, more or less, physical control over the watch. Nevertheless, on this account, I do not therefore become a *possessor* because I have no intention to claim it for myself. Instead, it is my intention, after admiring the watch, to hand it directly back to you. The distinction between acts of physical control that create rights and those which do not is familiar to the law. As was discussed in Chapter II, acts of *corpus* that do not constitute operative facts are often described as “mere possession”, “custody” or “occupancy”. In order to reflect this important distinction, physical interactions between people and things undertaken without the requisite intention should be described as examples of “custody”.

Although simple to appreciate in theory, the distinction between possession and custody is often difficult to apply in practice. This is not attributable to some peculiar feature of property law but is an example of the difficulty inherent in proving mental states. To borrow Bowen LJ’s famous quip, ‘the state of a man’s mind is as much a fact as the state of his digestion.’⁴⁷ However, unlike other sorts of facts, mental states can only ever be inferred. As Lord Hope remarked, ‘acts of the mind can be, and sometimes can only be, demonstrated by acts of the body. In practice, the best evidence of intention is frequently found in the acts which have

⁴⁷ *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 483.

taken place.’⁴⁸ In the present context, that means inferring an intention from a potentially equivocal factual relationship between a person and a thing.

In some cases, general social knowledge will make it relatively easy for a third party-observer to distinguish between possession and custody. As Pollock has said of the master-servant rule:

[i]t may be observed however that a servant’s custody is often so manifestly exercised not on his own account but on his master’s that it has no colour of apparent ownership. If we regard acts according to their apparent intent and effect, as measured by the common knowledge of mankind, we can hardly say that a groom exercising his master’s horse is even in *de facto* possession of the horse. He is in appearance as much as in fact, in fact as much as in law, the master’s instrument for exercising the master’s power. There is no appearance of acting on his own behalf which could mislead a man of ordinary judgment.⁴⁹

However, as the watch example demonstrates, this will not always be the case. It is undoubtedly true that if some third party who watched me attach the watch to my wrist were apprised of the details of the interaction she would appreciate that I was not staking a claim to the watch and that my legal interest was limited to a non-contractual licence. However, in the absence of any context, she may well draw a “false positive” about the nature of my claim. In this sense, possession is a very rough and ready system.

⁴⁸ *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, 446 (‘Pye’). See also *Tecbild v Chamberlain* (1969) 20 P&CR 633, 643 (Sachs LJ).

⁴⁹ Pollock and Wright, above n 10, 18.

On the other hand, it should be noted that arriving at the truth in situations such as these is a very time and information-intensive process. As will be discussed in Chapter VII, though possession may be a “rough and ready” way of announcing an ownership claim, its corresponding advantage is that it is a cheap and quick means of establishing title in high-volume, low-value transactions.⁵⁰ This benefit would be entirely negated if third parties were required to interrogate people about why they stood in particular relations to particular things.

E Possession as a Vocabulary of Signals

As was discussed above, it is frequently emphasised that whether some particular relationship between a person and a thing amounts to possession will depend upon the nature of the *res*. The account of possession being offered in this chapter is consistent with the notion that what constitutes possession may depend upon the circumstances, including the nature of the thing to be possessed. However, what the expressive theory stresses is that possession is not solely about exercising the greatest possible degree of control over some object. Instead, it is about sending an intelligible signal. Whilst in many cases it may be that the greater the control, the clearer the signal, this will not invariably be true. On the account presented here, possession is a sort of vocabulary, and what constitutes possession in any given case is a question of social fact to be determined by ordinary observers within a particular interpretive community.

Custom furnishes numerous instances of this. In his influential paper, *Towards a Theory of Property Rights*, Demsetz cites anthropological studies that describe the way in which native tribes in North America demarcated exclusive hunting zones by marking or ‘blazing’ their

⁵⁰ Henry E Smith, ‘The Elements of Possession’ in Yun-chien Chang (ed), *Law and Economics of Possession* (Cambridge University Press, 2015) 65, 67–9.

crests on particular trees.⁵¹ Similarly, Sugden described a custom in a Yorkshire fishing village, according to which the first person to arrive on the beach after a storm could gather as much driftwood as he wished without interference from subsequent arrivals. The custom provided that, so long as the wood was gathered into piles and marked with two stones, that person was entitled to leave it *in situ* and return to collect it at a time of his choosing.⁵² To take a more recent example, Rose and Epstein report on a parking custom in Chicago according to which, in wintertime, a resident who clears snow from a curb-side car park and then marks the space with a chair or other object is entitled to the exclusive use of it until the snow thaws.⁵³ One can think of other, analogous, customs. It is generally acknowledged, for example, that placing one's towel down on the beach confers an entitlement to that area of sand for the duration of the day.⁵⁴ Likewise, the same sort of claim-staking rule applies to coats draped over the back of seats in a cinema or busy train.⁵⁵

What these examples demonstrate is that, although instances of physical control may represent archetypal cases of possession, they do not exhaust the ways in which someone can send a recognised signal about a claim to some tangible thing. Purely symbolic acts, such as placing one's coat on the back of a cinema seat during a trip to the snack bar, can and do send a recognised, and respected, message about one's intention to claim an entitlement, no matter how limited, to some thing. Possession should thus not be viewed as a conceptual monolith but instead as a set of signals that, being sensitive to subject matter and context, develop by a process of creative analogy with the core case of physical control.

⁵¹ Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57 *The American Economic Review* 347, 352.

⁵² Robert Sugden, 'Spontaneous Order' (1989) 3 *Journal of Economic Perspectives* 85, 85.

⁵³ Rose, 'Origin of Property', above n 27, 81; Richard A Epstein, 'The Allocation of the Commons: Parking on Public Roads The Evolution of Property Rights' (2002) 31 *Journal of Legal Studies* S515, S528-33.

⁵⁴ This example also appears in Epstein, above n 53, S527-8.

⁵⁵ See also Thomas Merrill, 'Ownership and Possession' in Yun-chien Chang (ed), *Law and Economics of Possession* (Cambridge University Press, 2015) 9, 13.

Although the biological evidence, which is briefly discussed in Chapter IV, suggests that an appreciation of the significance of possession might, at least to some degree, be hard-wired, it is also true that what counts as “staking a claim” to some thing is a form of cultural knowledge that is learned by exposure and imitation.⁵⁶ In any case, the important point is that questions of possession do not invariably turn on the sole criterion of physical control.

IV LIMITING THE VOCABULARY OF POSSESSION

A Too Many Signals?

This chapter has argued that possession should be regarded as an expressive concept that is not dependent on a possessor’s ability to exclude others. As was discussed in the foregoing section, an important element of this expressive definition is that the particular acts that convey this claim-staking signal may differ depending on the context and target audience.

The benefit of uncoupling “possession” from the cruder, and larger illusory, concept of physical control is that it allows a theory of possession to explain how and why purely symbolic acts, such as placing a coat on a seat, can come to constitute valid property claims. However, uncoupling “possession” from “control” does raise a potential problem. That is, if the concept of possession is not moored to an observable act of physical control, or its closest approximation, what binds the concept together and ensures that possession remains a sort of universal language comprehensible to all? To put the same question another way, if what

⁵⁶ See also *ibid* 27–8.

constitutes possession is to be determined on an audience-by-audience basis and there are a huge number of potential audiences, what prevents the *law* of property from fragmenting into a series of *laws* of property intelligible only to the particular in-group to which they apply?

In order to answer this question, it is first necessary to discuss the ways in which small groups, or in the language of this thesis “small audiences”, do in fact tailor basic property rules to better suit their particular circumstances.

B Rules for Small Groups

Ellickson has advanced the argument that small, “close-knit” groups will, if left to their own devices, develop efficient, or “welfare-maximising”, extra-legal property norms.⁵⁷ On his definition, a rule is welfare-maximising when it minimises the objective sum of deadweight losses and transaction costs.⁵⁸ Ellickson supports his thesis by reference to rules developed by whalers operating in different fisheries in the eighteenth and nineteenth centuries.

For the purposes of this thesis, what is important about Ellickson’s account is his description of the way in which the possession rule was modified by whalers in response to the defining characteristics of particular fisheries. So, for example, British whalers operating in the Greenland fishery adopted the so-called “fast-fish, loose-fish” rule, according to which property in the whale, whether dead or alive, was awarded to the first ship to harpoon it, but

⁵⁷ Robert C Ellickson, ‘A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry’ (1989) 5 *Journal of Law, Economics & Organization* 83; Robert C Ellickson, *Order without Law: How Neighbors Settle Disputes* (Harvard U. P, New ed, 1994) chs 10-11.

⁵⁸ Ellickson, ‘A Hypothesis of Wealth-Maximizing Norms’, above n 57, 87.

only for so long as it remained tethered to the ship. In the event that the whale broke free then it, or its carcass, effectively became *res nullius* and was thus fair game for other ships.⁵⁹

The “fast-fish, loose-fish” rule has the virtue of simplicity and clarity in application. However, an obvious shortcoming is that, by allowing rival ships to lay claim to a dead or wounded whale without participating in the most difficult and dangerous part of the hunt, it could encourage free-riding. However, as Ellickson explains, the “fast-fish, loose-fish” rule was in fact well adapted to the conditions of the Greenland fishery because the Right Whale, the species of whale primarily hunted within it, is relatively docile and thus unlikely to break free from the ship that harpooned it. As a consequence, the first ship to successfully land a harpoon was usually rewarded with the prize.⁶⁰ The whalers within that fishery were thus able to employ a low-cost, “bright-line” rule, but without the risk of incurring deadweight losses resulting from free-riding.

What, then, about a fishery in which the principal whale species is aggressive and likely to break free of the boat that landed the first harpoon? On Ellickson’s theory, we would expect to see the bright-line rule described above replaced by one which, though more complicated to interpret, obviates the risk of free-riding by removing the requirement that the whale remain tethered to the ship. According to Ellickson, this is precisely what happened. In fisheries in which the faster, more aggressive Sperm Whale predominated, whalers employed a rule called “iron-holds-the-whale”, which provided that the first ship to lodge a harpoon in a whale acquired a property right which, unlike under the “fast-fish, loose-fish” rule, persisted even if the whale broke free. However, in order to place some limit on that entitlement,

⁵⁹ Ibid 89.

⁶⁰ Ibid 89–90.

custom required that the ship from which the harpoon was launched remain in “fresh pursuit.”⁶¹ Although, due to the additional requirement of “fresh-pursuit”, the “iron-holds-the-whale” rule was not as simple as the “fast-fish, loose-fish” rule, it reduced the potential for free-riding whilst providing sufficient incentive for others to pursue whales that managed to escape the clutches of the original ship.⁶²

Ellickson also discusses a third rule, the so-called “waif holds the whale” rule. The rule applied in Pacific fisheries and allowed whalers to plant a flag, known as a “waif”, into the carcass of a dead or mortally wounded whale as a means publicising their claim.⁶³ By foregoing the tethering requirement, the rule allowed whalers to maximise their catch, particularly when hunting Sperm Whales, which typically swim in large schools.⁶⁴ Unlike the rules discussed above, the “waif holds the whale” rule required neither physical control nor fresh pursuit. The “waif holds the whale rule” was thus, in all material respects, identical to draping one’s coat over a cinema seat.

One of the most significant features of Ellickson’s account of bottom-up whaling rules is the way in which he discusses the concept of possession. He writes that:

[a]n easily administered rule would be one that made the possession of a whale carcass normatively decisive. According to this rule, if Ship *A* had a wounded or dead whale on a line, Ship *B* would be entitled to attach a stronger line and pull the whale away. A possession-decides rule of this sort would threaten severe deadweight losses, however, because it would

⁶¹ Ibid 90–1.

⁶² Ibid 92.

⁶³ Ibid 91.

⁶⁴ Ibid.

encourage a ship to sit back like a vulture and freeload on others' efforts in the early stages of the hunt. Whalers never used this norm.⁶⁵

Ellickson is here using possession in what Rose described as the “realist” sense; that is, as the actual ability to exclude others. Thus, for Ellickson, “possession” appears to require something like “carcass on the ship”. This usage is inconsistent with the account being advanced in this thesis. On the theory being developed in this chapter, planting the waif in the whale carcass, though a purely symbolic act, constituted a sufficient act of possession in the fisheries in which that rule prevailed. Thus, contrary to Ellickson’s claim in the passage above, the possession rule was in fact “normatively decisive” in all the cases that he describes. It is simply that what counted as possession was not uniform across all fisheries.

As Ellickson has argued, the wealth-maximisation calculus that he describes requires that particular communities grapple with the tension between rules that are intelligible and simple to administer, and thus create minimal transaction costs, and those that are complex and difficult to administer, but ensure that any individual’s share in the spoils is proportionate to her contribution to them.⁶⁶ The optimal compromise between these competing considerations will depend upon material features of the “environment”, used here in its broadest sense, in which the rule is to operate. The argument made in this section is that this balance is struck, at least in part, by altering what acts count as possession in particular circumstances.

This point can be illustrated by references to the examples described above. In fisheries in which the “iron-holds-the-whale” rule applied, possession was established by successfully lodging a harpoon in a whale. Where the “waif-holds-the-whale” rule applied, possession was

⁶⁵ Ibid 87.

⁶⁶ Ibid; Ellickson, *Order without Law*, above n 57, 172–4.

established by the act of planting a flag in the whale. This is not to say that the form of entitlement created by these acts of possession was identical to that of a generic ownership right, as described in Chapter I. This is because, unlike such a right, the duty that the other whalers owed to the right-holder was either dependent upon some ongoing act, such as fresh pursuit, or only survived for so long as was reasonably required to collect the dead or wounded whale.

These two rules can, in turn, be contrasted with the “fast-fish, loose-fish” rule, according to which a right of non-interference only persisted for so long as the whale was tethered to the ship from which the harpoon was successfully launched. Under this rule, the whaler’s entitlement to the whale is not a true property right because it does not have the quality of “disaggregation”, described in Chapter II. Rather, it more closely resembles one’s right, protected by torts that prevent interferences with the person, that a stranger not physically wrest some chattel from my grasp.⁶⁷ However, as Ellickson noted, the relatively paltry protection offered by this rule is explained by the fact that it was very unlikely that a Right Whale would escape once harpooned.

Ellickson’s analysis of whaling industry norms is relevant because it demonstrates that, although possession is a unitary concept, the acts that count as possession can and do change depending on the features of the environment in which the norm must operate and the knowledge of the audience to whom the claim-staking signal is sent. This raises a further, and important, question: what prevents the possession rule from devolving into an ever-more

⁶⁷ Some commentators have described these sorts of ‘personality’ rights as ‘superstructural’ or ‘background’ rights. See, for example Arianna Pretto-Sakmann, *Boundaries of Personal Property Law: Shares and Sub-Shares* (Hart Publishing, 2005) 98–9; McFarlane, above n 39, 133–4. One presumes that, where the “fast fish, loose fish” rule applied, whalers did acquire a fully-fledged property right if they managed to return to port with their quarry attached to the ship.

specialised series of “dialects” that are only intelligible to those who have been initiated into the ways of a particular group?

C The Cost of Communication

Ellickson has stressed that his welfare-maximising theory only applies to the sorts of small populations that he describes as “close-knit” groups.⁶⁸ He is agnostic about its application to larger groups because, so he argues, the emergence of bottom-up cooperative norms is dependent upon the existence of a ‘social network whose members have credible and reciprocal prospects for the application of power against one another and a good supply of information on past and present internal events.’⁶⁹

This reasoning is based on the insights of game theorists who have demonstrated that a necessary precondition for the emergence of cooperation in situations that share the structure of the Prisoners’ Dilemma is that participants must interact in the knowledge that they will meet again in the future.⁷⁰ This knowledge gives each participant a reason to hope that cooperation will be met with cooperation and a fear that defection will be met with retaliation. This may well explain why it is that only small groups can manipulate their basic property rules in this way. However, it does not, nor was it intended to, explain what prevents a sort of systemic balkanization in which every in-group develops a possessory “dialect”

⁶⁸ Ellickson, *Order without Law*, above n 57, 177.

⁶⁹ Ibid 181.

⁷⁰ This Prisoners’ Dilemma is a two person, non-zero sum game that famously highlights a paradox of human rationality. This is because, though mutual “cooperation” represents a better outcome than mutual “defection”, the payoff structure of the game is such that each player will nevertheless choose to defect. In game-theoretic terms, the choice to defect is “strictly dominant”. However, in a famous study, Axelrod demonstrated that cooperation can emerge spontaneously between self-interested players in an indefinitely repeated game if each gives the other reason to believe that present cooperation will be rewarded with future cooperation. See Robert M Axelrod, *The Evolution of Cooperation* (Basic Books, 1984).

which, though suitable to its particular needs, is incomprehensible to non-members. The answer to this question lies in the information costs of certain types of communication.

To understand precisely why this is, it is useful to briefly recapitulate an important element of the expressive theory of possession. The expressive theory does not deny that effective physical control, or something approximating it, constitutes a paradigm case of possession. Its claim is instead that possession, like all rule-defined “social facts”, has a clear core, based on something like effective control, which shades into an ever-more diffuse penumbra. These outer boundaries of the concept expand because, over time, non-core cases are drawn into the core by a process of analogy. So, for example, everyone would accept that erecting a razor-wire fence or digging a moat around a plot of land is a clear case of possession. Likewise, everyone would also accept that erecting a simple chicken-wire fence also constitutes a clear case of possession despite the fact that, unlike razor wire or a moat, chicken-wire does not actually prevent acts of trespass. The crucial point is that, once we realise that erecting a chicken-wire fence is a largely symbolic act, we can appreciate that purely symbolic markers, such as a winter coat left on a cinema seat, can constitute acts of possession. However, the important point for present purposes is that, although we can discern the existence of a golden thread that connects castle moats with winter coats, it should not be assumed that the move from the former to the latter is a costless exercise.

As will be recalled from Chapter I, Smith and Merrill have demonstrated that there is an inevitable trade-off between the intensiveness of a message and its extensiveness. One can communicate a complex message to a small audience. However, if one wants to reach a very broad audience, one’s message must be simple. Rights that correlate to duties *in rem* thus must deliver a very simple message, and that message, as Smith and Merrill argue, is to “keep

off'. Importantly for the purposes of the argument being made here, this trade-off between the intensiveness and extensiveness of a particular message is not limited to the content of a property right. It applies with equal force to the sort of acts that constitute a property claim. This is best illustrated by reference to what is perhaps the most famous possession case in any common law jurisdiction, *Pierson v Post*.⁷¹

As was briefly noted above, *Pierson* concerned a dispute over a dead fox. Post, who was riding to hounds, was in pursuit of the fox. However, before he could capture it Pierson, an interloper intent on disrupting the hunt, killed it and carried it off.⁷² The question for the court was whether Pierson had, by killing and removing the fox, breached a duty he owed to Post. In order to answer this question, the Court was faced with the anterior question of whether Post, by virtue of being in hot pursuit, had acquired a property right in the fox. In the language of this thesis, was the act of pursuing the fox sufficient to establish possession?

The enduring interest that legal scholars have shown in *Pierson* is not attributable to the substantive outcome but instead to the divergence between the majority opinion and the dissent. The majority held that, although actual bodily seizure was not required, hot pursuit was nevertheless insufficient. At a minimum, possession required mortal wounding. Tompkins J, delivering the opinion of the majority, wrote that:

actual bodily seizure is not indispensable to acquire a right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since thereby the

⁷¹ 3 Cai R 175 (NY Sup Ct 1805).

⁷² For an illuminating historical account of the case see Bethany R Berger, 'It's Not about the Fox: The Untold History of *Pierson v. Post*' (2005) 55 *Duke Law Journal* 1089.

pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control.⁷³

The majority argued that the test of mortal wounding was necessary:

for the sake of certainty, and preserving peace and order in society. If the first seeing, starting or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.⁷⁴

Livingston J, in dissent, argued that this ‘knotty point’⁷⁵ ought not to have come before the Court, and should have instead been ‘submitted to the arbitration of sportsmen.’⁷⁶ In other words, it should have been a matter determined by in-group norms peculiar to those who engage in the sport of riding to hounds. However, given that the dispute was not resolved by an appeal to local custom, the court had to determine what particular act constituted possession in the circumstances. Perhaps appropriately, in light of the foregoing discussion of whaling rules, Livingston J was concerned that a requirement of actual seizure would encourage free riding and thus reduce the incentive to eradicate an animal that was considered to be vermin. In a memorably, but apparently typically, florid phrase, his Honour asked rhetorically:

⁷³ *Pierson v. Post* 3 Cai R 175 (NY Sup Ct 1805), 178.

⁷⁴ *Ibid* 179.

⁷⁵ *Ibid* 180.

⁷⁶ *Ibid* 180. However, given that *Pierson* was a “saucy intruder” whose aim was to disrupt the hunt, it is not clear why the dispute should have been determined by the “in-house” rules of fox hunting. As Berger has demonstrated, neither party cared about the fox or its pelt. The legal action was the culmination of a long-simmering feud between two local families over the use of the commons. See Berger, above n 72, 1126–33.

[b]ut who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and ... pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honors or labors of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit?⁷⁷

Thus Livingston J held that it is possible to acquire a property right in a wild animal ‘without bodily touch ... provided the pursuer be within reach, or have a reasonable prospect ... of taking what he has thus discovered’.⁷⁸ This test was satisfied on the uncontested facts of the case.

Rose has given an extremely influential account of *Pierson*. On her account, *Pierson* should be understood as a case in which the majority and minority held differing opinions about which particular group constituted the relevant audience. In contrast to the majority, who regarded the relevant audience as people generally, Livingston J believed that it was sufficient if the import of the act was understood by those who engaged in the pastime of riding to hounds.⁷⁹ In other words, the relatively small audience enabled possession to be established by an act or symbol that may not have been universally intelligible.⁸⁰ Rose’s audience-based explanation of the dissenting judgment in *Pierson* thus complements Ellickson’s analysis of whaling rules.

⁷⁷ *Pierson* 3 Cai R 175 (NY Sup Ct 1805), 180–1.

⁷⁸ *Ibid* 182.

⁷⁹ Rose, ‘Origin of Property’, above n 27, 82, 85.; According to Epstein, huntsmen in the region did in fact follow the “hot pursuit” rule. R A Epstein, ‘Possession as the Root of Title’ (1979) 13 *Georgia Law Review* 1221, 1231.

⁸⁰ Rose, ‘Origin of Property’, above n 27, 85. See also Henry E Smith, ‘The Language of Property: Form, Context, and Audience’ (2003) 55 *Stanford Law Review* 1105, 1117–8.

This does not, of course, tell us which approach is more desirable. According to Smith, the answer is that we should prefer the act whose meaning and import is comprehensible to the widest possible audience. He writes that:

[t]he choice of whose symbols count implicates information intensiveness and the nature of the audience. One way to frame the question is to note that a rule that control is required for possession is appropriate for a wide audience and for a wide range of cases. It can apply to many resources without relying much on detailed information about those resources; and, because of its lack of detail, the rule is correspondingly easy to communicate to the world. These two reasons – lack of detail and ease of broadcasting – are related in the sense that having one general norm rather than many specific ones reduces what someone who interprets the acts of possession needs to know.⁸¹

In other words, moving from core to penumbral cases of possession requires that we assume more and more background knowledge on the part of the audience. However, if, as is very often the case, we want to make a general claim to a large and diffuse audience, background knowledge is something that we cannot assume. Smith goes on to write that:

[p]ossession, however, relates to how we define objects for purposes of ownership, which involves the widest set of anonymous interactions among the most heterogeneous audience that the law addresses. What is needed is a determinate rule that will not lead to multiple interpretations, even by those without detailed background knowledge. The occupancy or certain-control test does achieve these goals, as long as the certain control is apparent to the relevant audience, which, in the case of possession, is prototypically the entire world.⁸²

⁸¹ Smith, 'Language of Property', above n 80, 1118.

⁸² Ibid 1119.

Smith's argument is not that property claims are limited to acts by which the putative right-holder demonstrates some degree of physical control over the *res*. His argument is instead that because basic property claims are very often made to large and heterogeneous audiences, the acts or symbols which are used to communicate that claim cannot be specialised in the sense that they demand a high degree of background knowledge.⁸³

It follows from this that we would expect to see the emergence of a standardised set of claim-staking acts or symbols that are universally intelligible. Indeed, this very claim has been made by Ellickson. He argues that, 'humans have been developing, over the past several millennia, a *universal sign language* (i.e. a set of nonverbal visual clues) for asserting claims to tangible property',⁸⁴ and that this tendency towards convergence is only being accelerated by the forces of globalisation.⁸⁵ For the purpose of this part of the thesis, the importance of Smith and Ellickson's arguments is that, whilst there is no need to confine the concept of possession to acts of obvious physical control, the imperative that one's claim-staking signal be comprehended by a large and potentially heterogeneous audience will naturally limit the size of the "vocabulary" of possession.

D A Dialogue, not a Monologue

The essence of the expressive theory discussed in this chapter is that acts of "possession" are those acts, or symbols, which have the effect of signalling one's intention to stake a claim to some tangible thing. As was discussed extensively in the foregoing section, this means that a necessary condition for any symbol or gesture to count as an act of possession is that it be

⁸³ See also Henry E Smith, 'Community and Custom in Property Community and Property' (2009) 10 *Theoretical Inquiries in Law* 5, 24–5.

⁸⁴ Ellickson, 'The Inevitable Trend', above n 34, 1025. Italics in original.

⁸⁵ Ibid 1030–3.

understood by the relevant audience. As Rose has recently written, ‘property begins in a social context. A manifestation to inform the world means that there is in fact an audience out there, and the audience has to “get it”’.⁸⁶

A second question, but one that receives less attention in the literature, is whether the audience’s comprehension of the claim is not only a necessary but also a sufficient condition. The argument made here is that it is not. Consider, once again, the decision in *Pierson*. Rose summarised the import of the case in the following terms:

the court’s majority, citing much venerable authority, decided that the fox went to the shooter. Why? Because by shooting the fox (or mortally wounding it) the shooter “manifests an unequivocal intention” to take the animal and remove it from its wild and free former life. Mere pursuit was not enough; it did not give a clear enough “manifestation” to the world and would lead to “quarrels and litigation” among claimants.⁸⁷

As a summary of the majority’s reasoning, this is undoubtedly correct. As noted above, Tompkins J held that, unlike mere pursuit, someone who mortally wounds an animal ‘manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control.’⁸⁸ However, as a description of the actual dispute, it is inadequate. This is because *Pierson* was not a case in which conflict over a resource was caused by one party’s failure to comprehend the claim-

⁸⁶ Carol M Rose, ‘Introduction: Property and Language, or, the Ghost of the Fifth Panel Symposium - Properties of Carol Rose: A Celebration’ (2006) 18 *Yale Journal of Law & the Humanities* 1, 6.

⁸⁷ Ibid 5.

⁸⁸ *Pierson* 3 Cai R 175 (NY Sup Ct 1805), 178.

staking significance of the other party's act. As the head note to the case makes clear, Pierson knew that Post was in pursuit of the fox. This is why Pierson was described as a 'saucy intruder'.⁸⁹ Rather, *Pierson* was fundamentally a case about one party's failure to accept the legitimacy of the other's act. Irrespective of the prevailing custom amongst those who hunted foxes, Pierson simply did not accept that Post's unilateral act of pursuing a particular fox placed him under a non-consensual duty not to interfere with it.

Pierson thus demonstrates that possession is a bilateral rather than a unilateral phenomenon. It is not sufficient that the audience merely understands that, through his conduct, some individual is announcing his claim to some thing. In order for that property claim to be accepted, those audience members must also agree that he is announcing his claim in the prescribed manner. Indeed, Rose's own argument that possession 'seems to amount to something like yelling loudly enough to all who may be interested',⁹⁰ highlights this very point. As a matter of common experience, people know that merely yelling out one's intention to claim some object is, without more, seldom regarded as a determinative act. As anyone who has observed the often frenzied behaviour of shoppers at the annual sales will appreciate, if one wishes to claim a particular item, mere communication of that intention, however clear, is insufficient. One only makes one's claim good by what Smith might describe as the "clear act" of getting there first.

Whilst this observation does not purport to explain why it is that, irrespective of their clarity, some acts are regarded as amounting to possession and others are not, the important point is

⁸⁹ Ibid 181 (Livingston J). Once again, this underlines the fact that *Pierson* was not a dispute *between* fox hunters.

⁹⁰ Rose, 'Origin of Property', above n 27, 81.

that the particular act must be both comprehended *and* accepted by the relevant audience as a legitimate way in which to stake a claim to a particular thing. Whether some gesture or earmark counts as possession ultimately depends on the empirically verifiable fact of whether others respect the claim it purports to make.

V DO JUDGES APPLY THE EXPRESSIVE THEORY?

A Deficiencies in the Orthodox Conception

As was discussed above, canonical statements about the nature of possession in the law, such as that made by Lord Browne-Wilkinson in *Pye*, emphasise that possession is a composite concept consisting of a fact about a sufficient degree of physical control, called “factual possession”, and a second, discrete, fact about the putative possessor’s intention, described as an “intention to possess”.⁹¹ The claim made in this chapter is not that such formulations are hopelessly wrong, but instead that they fail to capture the true significance of certain relations between people and objects of property.

According to the expressive theory developed in this chapter, the significance of those acts that we call “possession” is that they send a recognised, and accepted, claim-staking signal. This has several important implications. First, contrary to formulations that stress the need for a sufficient or ‘appropriate degree of physical control’,⁹² the significance of the physical act does not depend on control *per se*. Whilst it may be that, following Smith’s analysis of the

⁹¹ It should be noted that this definition is not specific to claims of adverse possession. As Lord Browne-Wilkinson stated, the question is ‘what ... constitutes “possession” in the ordinary sense of the word?’ *Pye* [2003] 1 AC 419, 435 [39].

⁹² *Powell* (1977) 38 P&CR 452, 470 (Slade J); *Buckinghamshire CC* [1990] Ch 623, 641 (Slade LJ); *Pye* [2003] 1 AC 419, 436 [41] (Lord Browne-Wilkinson).

costs of informational complexity, a higher degree of control sends a clearer signal, it is nevertheless true that the significance of particular physical acts is that they manifest the possessor's intention in the recognised way.

This leads to a second, significant implication concerning the relationship between the elements of “factual possession” and “intention to possess”. Although courts acknowledge that, ‘[i]n general, intent has to be inferred from the acts themselves’,⁹³ leading accounts of possession invariably present these two concepts as discrete elements. To once again borrow from *Pye*, Lord Browne-Wilkinson stated that:

there has always, both in Roman law and common law, been a requirement to show an intention to possess in addition to objective acts of physical possession. Such intention may be, and frequently is, deduced from the physical acts themselves. But there is no doubt in my judgment that there are two separate elements in legal possession.⁹⁴

Contrary to such orthodox formulations, the expressive theory insists that there is no sharp divide between “factual possession” and “intention” to possess. Rather, the former represents the particular, and accepted, way in which the latter is made manifest to the relevant audience. In other words, the physical conduct is the *only* evidence from which we can infer the existence of the relevant intention.⁹⁵ Thus, courts should not ask one question about the physical act and a second, discrete, question about the actor's intention. The question is,

⁹³ *Tecbild v Chamberlain* (1969) 20 P&CR 633, 643 (Sachs LJ).

⁹⁴ *Pye* [2003] 1 AC 419, 435–6 [40].

⁹⁵ One may wonder how else one might infer the existence of this mental fact, particularly given that, as Slade J noted, subsequent statements about one's subjective intention will almost certainly be self-serving and thus of no probative value. *Powell* (1977) 38 P&CR 452, 476.

instead, whether the requisite intention is manifested through acts that are, within the relevant community, accepted ways of claiming a right to some object of property.

B *The Expressive Theory in Action?*

The expressive theory described in this chapter thus departs from the formal definitions of possession offered in the case law. However, this does not mean that judges fail to appreciate that acts that amount to possession are expressive in nature.

Take, for example, the decision in *Pye* itself. Pye was the “paper title” owner of valuable undeveloped land in Berkshire. Whilst waiting for planning permission, Pye had granted Graham, the owner of an adjoining farm, a grazing licence over the vacant land. After its expiration, Graham sought a renewal of the licence, but Pye refused. Despite this refusal, Graham continued to use and maintain the land as if it were part of his farm.⁹⁶ Pye subsequently sought an order for possession of the land but Graham resisted the application, arguing that, as he had been in adverse possession for 12 years, Pye’s title had been extinguished by operation of statute. The House of Lords unanimously agreed.

Lord Browne-Wilkinson, who delivered the leading speech, noted that the land was enclosed and that the Grahams held the key to the gate that gave access to the public highway.⁹⁷ This led his Lordship to conclude that, ‘[t]he Grahams were in occupation of the land which was within their exclusive physical control. The paper owner, Pye, was physically excluded from

⁹⁶ *Pye* [2003] 1 AC 419, 443 [58].

⁹⁷ *Ibid* 427 [8].

the land by the hedges and the lack of any key to the road gate.’⁹⁸ At first blush then, Lord Brown-Wilkinson’s speech appears to affirm what Rose described as the “realist” understanding of possession.

However, this observation is subject to two important qualifications. First, it is clear that his Lordship did not actually believe that the hedges and locked gate did anything other than block vehicular access. As he noted on several occasions, the disputed land remained accessible by foot from the public highway.⁹⁹ Secondly, and more importantly, it is clear that what was most significant in the circumstances was not the Grahams’ possession of the key, but their extensive use of the disputed land. Lord Browne-Wilkinson stated that after the expiration of the grazing agreement:

the Grahams did not vacate the disputed land ... They spread dung on the land, harrowed it and rolled it. They overwintered dry cattle and yearlings in a shed on the land ... the Grahams repeatedly did things on the disputed land which they would have had no right to do under the old grazing agreement even if it had still been in force. The objective facts demonstrated that the Grahams made such use of the disputed land as they wished irrespective of whether it fell within the terms of any hypothetical grazing agreement.¹⁰⁰

As his Lordship concluded, ‘[f]or all practical purposes the Grahams used the land as their own’.¹⁰¹ That is, the Grahams were behaving *as if they were owners*. The sum-total of their

⁹⁸ Ibid 436 [41].

⁹⁹ Ibid 428 [10], 444 [61].

¹⁰⁰ Ibid 443 [58].

¹⁰¹ Ibid 444 [61].

behaviour over the course of several years sent unmistakable claim-staking signals to all who cared to see. That it had the desired effect is proved by the evidence that many people simply believed that the Grahams owned the disputed land.¹⁰² That they could not, in fact, effectively “control” access to the land was of no importance. What was important was that they had staked their claim in a way that others both understood and respected.

The decision of the Victorian Court of Appeal in *Whittlesea County Council v Abbatangelo*¹⁰³ is also instructive. In *Abbatangelo* the plaintiff successfully claimed title by adverse possession over vacant land owned by the defendant council. As with all modern adverse possession cases, the Victorian Court of Appeal commenced its judgement by reciting the principles enunciated in the classic decision of Slade J in *Powell v McFarlane*. In particular, the Court stated that possession in the law requires both “factual possession” and an “intention to possess”, and that the former ‘requires a sufficient degree of physical custody and control.’¹⁰⁴

Though a good deal of both the trial and appeal were consumed by addressing conflicting submissions about who was responsible for the construction and maintenance of the fences,¹⁰⁵ it was significant that, as in *Pye*, much of the enquiry focused on the claimant’s extensive acts of user over the disputed land.¹⁰⁶ Not only did the family allow their livestock onto the disputed land, they also maintained it, used it for recreational activities and social gatherings, such as barbeques and childrens’ birthday parties, and erected play equipment on

¹⁰² Ibid 429–30 [19].

¹⁰³ (2009) 259 ALR 56 (*‘Abbatangelo’*).

¹⁰⁴ Ibid 60 [6] (the Court).

¹⁰⁵ Ibid 64 [27]–[29], 69–72 [55]–[62] (the Court).

¹⁰⁶ Ibid 60 [48] (the Court).

it. As was the case with the Grahams, the claimant and her family simply behaved as if the land was theirs.¹⁰⁷ Indeed, as the uncontested evidence of five neighbours demonstrated, the belief that the land in fact belonged to the claimant and her family was widely held in the local community.¹⁰⁸

Whilst most of the submissions regarding fencing were of little relevance to the question in issue, the judicial discussion of the nature of fencing proved very significant in light of the argument being made in this chapter. At trial, Pagone J remarked that:

[t]he fencing on the southern, that is the street, boundary of the disputed land over the years did, in my view, amount to an act of possession and exclusion. The fact that it might, from time to time, or indeed even always, have been different from the fences on either side of the disputed land does not detract *from the nature of a fence as a sign to all who see it not to enter. That it might be easy to climb through that particular fence, or that kind of fence (as it was also easy to climb through the other and different fences on the Abbatangelo property), does not detract from the signal which the existence of the fence would ordinarily convey, namely, that the land behind it had been enclosed by someone and from everyone else.*¹⁰⁹

In affirming Pagone J's decision, the Court of Appeal held that:

his Honour did not err in finding that ease of access through the fence on the southern boundary of the land did not detract from the nature of a fence as a sign to all who saw it not

¹⁰⁷ Ibid 71–2 [61] (the Court).

¹⁰⁸ Ibid 66 [43], 77 [82] (the Court).

¹⁰⁹ *Abbatangelo v Whittlesea County Council* [2007] VSC 529, [20]. Italics supplied.

to enter. As we have said already, the fact that a person, including an employee of the council, could have physically entered the land on foot by stepping through the wire strands was neither determinative nor necessarily of central importance. *The question was not whether the respondent had not done her best to exclude the appellant — because, for example, a different type of fence would have been more effective for this purpose — but whether it could be inferred from all of her acts that she intended to exercise custody and control of the land on her own behalf and for her own benefit.*¹¹⁰

The italicised portions of these passages demonstrate that, in spite of the standard formulation, judges do in fact appreciate that possession is expressive in nature. This is not to say that the account developed above explains the entirety of the case law. As the discussion on the “finders’ cases” in Chapter VI demonstrates, it plainly does not. Rather, the more modest claim being advanced is that judges appreciate that, in a society in which property rights are routinely respected, the significance of a fence is not to be found in its ability to keep anyone out. Instead, its significance lies in the unambiguous message it sends to others. Fences that actually guarantee effective control by excluding others are only required if the relevant population does not accept the legitimacy of the *in rem* duty that fencing, and the other symbolic acts that we call “possession”, purport to impose upon it. Unless we live in a fortified castle with a moat and portcullis, our actual ability to exclude intruders is, as Rose has noted, dependent on our ability to call the police.¹¹¹

¹¹⁰ (2009) 259 ALR 56, 79 [95] (the Court). Italics supplied.

¹¹¹ Carol M Rose, 'Nine-Tenths', above n 29, 48.

The argument made in the previous section was that the dominant legal test of possession does little to explain the outcomes in, for instance, cases on adverse possession. This is because, according to the account presented here, judges are in fact resolving these disputes by calling on a body of extra-legal knowledge about what sorts of act constitute a legitimate property claim. The truth of this argument is neatly demonstrated by the decision in *Popov*.¹¹²

Popov concerned a dispute over the ownership of the baseball that, when struck into the crowd by Barry Bonds, set a new record for homeruns hit in a single season. According to custom, homerun balls become abandoned property.¹¹³ As a consequence, and as was not disputed in the case, the first person to take possession of such a ball becomes its new owner. Unsurprisingly given its value, the scramble for the ball quickly degenerated into an unseemly and dangerous melee that required intervention from security.¹¹⁴ The question for the Court was thus whether, as McCarthy J phrased it, the plaintiff, ‘did enough to reduce the ball to his exclusive dominion and control. Were his acts sufficient to create a legally cognizable interest in the ball?’¹¹⁵

The evidence, such as it was, suggested that the ball landed in the webbing of the plaintiff’s mitt. Whilst his mitt ‘stopped the trajectory of the ball’,¹¹⁶ the ball subsequently rolled out from underneath the tangle of bodies and was gathered up by the defendant. What could not

¹¹² 2002 WL 31833731 (Cal Super 2002).

¹¹³ Ibid 3.

¹¹⁴ Ibid 2.

¹¹⁵ Ibid 4.

¹¹⁶ Ibid 1.

be determined, on the available evidence, was whether or not the plaintiff's loss of control was attributable to a fumble on his part or to the gross physical interference of the other fans.

Given the exiguous evidence, McCarthy J resolved the case by the novel means of declaring that the plaintiff had a 'legally cognizable pre-possessory interest' in the ball. According to his Honour, this interest arises '[w]here an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others'.¹¹⁷ Because, on this basis, each party had a proprietary interest in the ball, the order made was that it be sold and the proceeds divided equally between them.

Though undoubtedly novel, the manner in which McCarthy J resolved the dispute is not what is of interest in this case. Quite apart from the question of equal division, it is clear that, as Chambers has also noted,¹¹⁸ a "pre-possessory interest" is a jural oddity that is exclusive to the common law of California. What is significant is the nature of the central question the Court was being asked to resolve. Although it may have been presented as a complex question of law that required the judge to refer to the opinions of no fewer than four eminent law professors,¹¹⁹ it was clear that, in order to establish "possession", the plaintiff simply had to prove that he had "caught" the ball, in the normal sense of that word. As McCarthy J noted, '[t]he custom and practice of the stands creates a reasonable expectation that a person will achieve full control of a ball before claiming possession.'¹²⁰ Whilst his Honour wrote in terms of the need to, 'retain control of the ball after incidental contact with people and

¹¹⁷ Ibid 6.

¹¹⁸ Robert Chambers, *An Introduction to Property Law in Australia* (Thomson Reuters, 3rd ed, 2013) 52 [6.14]. At the very least, its existence would seem to run afoul of the *numerus clausus* principle.

¹¹⁹ 2002 WL 31833731 (Cal Super 2002), 4–6.

¹²⁰ Ibid 5.

things’,¹²¹ it is clear that the question presented to the Court in fact amounted to no more than the following: did the plaintiff catch the ball, or did he drop it?

Although the paucity of evidence ultimately made it impossible for the Court to answer that question, it should be obvious that there is nothing peculiarly legal about it. Whether or not someone “caught” or “fumbled” a ball is a question of social fact that has no uniquely legal dimension. The only controversy, which was purely evidential, was whether the plaintiff in fact did so. Although *Popov* is a particularly striking illustration, the argument defended in this thesis is that, despite the legal window dressing, all questions of possessions are, in the final analysis, questions of social fact that are resolved by the application of customary, rather than uniquely legal, knowledge.

VI CONCLUSION

Building on accounts first offered by Hegel and Rose, the argument made in this chapter is that possession as a source of entitlement to tangible things has little to do with the possessor’s ability to exclude other people. Instead, the significance of particular factual relationships with particular things is that they constitute the accepted way of staking a claim to an object of property within a certain population.

As was emphasised during the course of this chapter, the expressive theory of possession does not deny that acts of actual physical control, such as placing a valuable item in a safe, constitute core and unmistakable cases of possession. Nor does it insist that, despite the

¹²¹ Ibid 6.

misleading formulations in cases such as *Pye*, the judicial decisions are wrong. Instead, it emphasises that, in a society that habitually respects property rights, the relevance of certain physical acts is to be understood, not by some indicium of control, but instead by the clarity of the signal that they send to others. To make the same point in another way, so long as the signal is clear and accepted, it does not matter that the “possessor” exerts no actual control over the *res*. If it were otherwise, then acts such as attaching a “keep out” sign to a wooden stake or placing a coat over a seat in a cinema would have no effect.

In some respects the insights of the expressive theory should be obvious. In many cases, land being perhaps the most prominent example, the notion that one can exercise effective dominion is largely, if not entirely, illusory. Moreover, and perhaps more importantly, if possession as a means of creating property rights actually required the possessor to exercise effective control, what additional benefit would a property right confer on its holder? Despite this, our understanding of possession continues to be obscured by the law’s insistence that possession is a concept that consists of one fact about physical control combined with a second, discrete, fact about an intention to possess. The expressive theory rejects this two-part understanding. It insists that particular relations with things, whether or not they amount to actual control, are best understood as the accepted means by which an intention to claim an exclusive entitlement to some thing is communicated to the relevant audience.

In his seminal article on the topic, Epstein remarked that investigations into the nature and function of possession require one to ask a “little” and a “large” question.¹²² The little question is what particular acts count as possession; the large question is why acts of

¹²² Epstein, 'Root of Title', above n 79, 1225.

possession create property rights at all. The account of possession offered in this chapter addressed the “little” question. In Chapter IV, it will be argued that this expressive theory of possession also plays an important role in addressing the “large” question. This is because possession’s function as a signalling device forms a core component of theories advanced by modern game theorists who, using the insights of spontaneous order, seek to explain why it is that possession has the effect of creating original property rights in tangible things. It is to this topic that we now turn.

CHAPTER IV

THE POSSESSION CONVENTION

I INTRODUCTION

Waldron has written that a system of private property is one in which, ‘a rule is laid down that, in the case of each object, the individual person whose name is attached to that object is to determine how the object shall be used and by whom. His decision is to be upheld by society as final.’¹ The argument made in Chapter III was that the concept of possession is best understood as the series of acts that, whether or not they amount to effective control, are recognised within a particular community as fulfilling the allocative function of determining whose name is attached to which objects.

However, whilst the account offered in Chapter III may have answered the “*what?*” question, it does not answer the “*why?*” question. That is, it does not address the deeper mystery of why it is that possession, as opposed to some other mechanism, fulfils this most basic role. So, for example, if it is reasonable to assume that sophisticated legal orders are concerned with the distributive consequences of creating private entitlements to scarce resources, then why should the creation of those entitlements depend upon a mechanism as apparently crude as possession? To take a different sort of objection, if possession’s significance is limited to its role as a signalling device that is functionally equivalent to ‘yelling loudly enough to all

¹ Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1988) 39.

who may be interested',² then why, if I have made my claim sufficiently clear, does the law insist that I also enter into a particular physical relationship with the object in question? In short, what is so special about possession and why does it justify the creation of non-consensual duties that bind, at least nominally, the whole world?

Numerous jurists and philosophers have sought to answer this most difficult of questions. Startling as it may seem, the argument advanced in this chapter is not only that all have failed but, just as importantly, that all were doomed to fail. Although such theories may provide an independent *justification* for the "possession rule", they cannot *explain* why it, as opposed to some other allocative mechanism, such as flipping a coin, has come to fulfil the role of allocating "names to things". The argument made in this chapter is that all attempts to explain the mystery of the possession rule by reference to some rationale that is peculiar to it erroneously assume that it was, at some level, consciously selected as the basic rule for reducing objects of property to private ownership. Building on the work of Hume, Hayek and more recently, Sugden, it will be argued that the possession rule is not a product of conscious design but is instead an example of a convention that has arisen spontaneously, and unconsciously, through the repeated interaction of self-interested individuals.

Once we appreciate that the possession convention, and the formal legal rule into which it has evolved, was never consciously selected, then we can dispense with the notion that its origin can be traced to some elusive rationale, whatever it may be. Possession triumphed as the mechanism for resolving the most elementary questions of mine and thine, not because it is efficient or morally desirable, but because, for largely inscrutable reasons of human

² Carol M Rose, 'Possession as the Origin of Property' (1985) 52 *University of Chicago Law Review* 73, 81.

psychology, it is salient to those who are confronted with the coordination problem created by the ineradicable condition of scarcity.

II EXPLANATIONS OF THE POSSESSION RULE

A Instrumental Explanations

Jurists from Savigny to Holmes to Merrill have asked why possession, independently of its lawfulness, is a source of rights.³ As Gordley and Mattei have noted, finding an answer to this question famously preoccupied several brilliant nineteenth century Germany jurists.⁴

Savigny's influential answer was that the protection afforded to the non-owning possessor was explained by the need to prevent potentially violent acts of dispossession and consequent disruptions to public order.⁵ Savigny's argument was not as clear as it might have been. Gordley and Mattei observed that Savigny:

suggests two rather different explanations for the protection of possession, each of which had its champions among the German jurists. According to the first, the law protects the peace and order of society against unlawfulness and force. According to the second, the law protects the victim himself. The victim has a legally protectable claim against unlawful interference even though he does not have a legally protectable claim to possession.⁶

³ James Gordley and Ugo Mattei, 'Protecting Possession' (1996) 44 *American Journal of Comparative Law* 293, 295; Oliver Wendell Holmes, *The Common Law* (Little, Brown and Company, 1949) 206; Thomas Merrill, 'Ownership and Possession' in Yun-chien Chang (ed), *Law and Economics of Possession* (Cambridge University Press, 2015) 9, 9.

⁴ Gordley and Mattei, above n 3, 294.

⁵ Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (Liberty Fund, 2nd ed, 2009) vol II, 43–4.

⁶ Gordley and Mattei, above n 3, 296.

Though which of the two explanations Savigny actually preferred may be unclear, the first is most widely accepted.⁷

Savigny's most famous critic was Ihering. Ihering argued that Savigny was approaching the question from the wrong end.⁸ He denied that the law protected possession because it wished to protect a possessor from violent dispossession and the broader society from the consequent disruptions to public order. On Ihering's explanation, the rule has nothing to do with possessors *per se*. Rather, by allowing the fact of possession to constitute sufficient proof of title, the rule actually functions as an evidentiary concession that operates for the benefit of owners. According to Ihering, possession represents the 'outwork'⁹ or the 'actuality'¹⁰ of ownership.

Ihering's argument is thus predicated on the assumption that most possessors are also owners. Whether or not it is true, this assumption is widely held. Pollock, for example, argued that, 'for the very reason that possession in fact is the visible exercise of ownership, the fact of possession, unless otherwise explained, tends to show that the possessor is owner'.¹¹ Likewise, in *Allen v Roughley*, Kitto J wrote that:

[i]t is of fundamental importance to recognize that the presumption of title from the fact of possession does not rest upon an artificial rule arbitrarily adopted by the courts, and that the question before us is not whether such a rule is subject to an equally artificial qualification that the possession must have lasted for twenty years. The presumption is one of fact, and the

⁷ Ibid.

⁸ This summary follows that given in John M Lightwood, 'Possession in the Roman Law' (1887) 3 *Law Quarterly Review* 32; See also R W M Dias, *Jurisprudence* (Butterworths, 5th ed, 1985) 276–7.

⁹ Lightwood, above n 8, 44.

¹⁰ Ibid 49.

¹¹ Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (Clarendon Press, 1888) 25.

reason for it is simply that “men generally own the property they possess” ... The law recognizes the probability which common experience suggests.¹²

Although the success of Ihering’s explanation depends in large measure upon the truth of the assumption that most possessors are also owners, the existence of non-owning possessors is not fatal to his theory. Instead, these “false positives” are simply the inevitable price that must be paid for the overwhelming convenience of the rule. In Pollock and Maitland’s words, ‘[i]n order that right may be triumphant, the possessory action must be open to the evil and the good, it must draw no distinction between the just and the unjust possessor.’¹³

Gordley and Mattei have remarked of the continental debate that, ‘[r]arely if ever have more brilliant legal minds argued. Yet they found no convincing answer. Whenever one German jurist suggested a solution, another was able to explain why it would not work.’¹⁴ Indeed, they gloomily conclude that, ‘[s]tudying the debate should convince us that [that] question is unanswerable.’¹⁵

In studying Savigny and Ihering, it should always be borne in mind that neither was proposing a purely normative account of possession. Each was also attempting to explain the doctrines of the Roman law. Their accounts were thus constrained by the requirement that they “fit” the legal materials that they were seeking to explain.¹⁶ That qualification aside, each account has shortcomings when viewed in light of the broader question.

¹² (1955) 94 CLR 98, 138. Citations omitted.

¹³ Pollock and Maitland, above n 5, 44; Henry Bond, ‘Possession in the Roman Law’ (1890) 6 *Law Quarterly Review* 259, 263.

¹⁴ Gordley and Mattei, above n 3, 295.

¹⁵ *Ibid.*

¹⁶ Dias remarked of Savigny’s theory that, ‘[a]s an explanation of Roman law this theory is demonstrably wrong.’: Dias, above n 8, 275.

The basic flaw in Savigny's explanation is that his central concern has little to do with the basic function of the law of property. As was argued in Chapter II, the hallmark of property is the concept of "disaggregation"; the notion that the existence of the right does not depend upon some ongoing, physical connection with its subject matter. If one is concerned with the bodily integrity of the possessor and public order more generally, then one should not look to the concept of property, but instead to assault and other wrongs concerned with the protection of the person.¹⁷ As Pollock and Maitland remarked of the protection of possession in English law, '[t]he possessory assizes extend far beyond what is necessary for the conservation of the peace and the reparation of the wrong done by violent ejectment.'¹⁸ Certainly Savigny's explanation justifies no more than allowing "mere possessors" to sue for trespass, a tort which, as was explained in Chapter II, requires interferences with "actual possession".

Ihering's account is open to a different objection. He argued that possession is protected because it is a simple means by which an owner can prove her title. As was noted above, that possession will yield the "wrong answer" in those cases in which a possessor is not also an owner is the inevitable price that must be paid for its convenience. However, even if we give Ihering the benefit of the doubt and assume that these false positives will be relatively rare, his theory does not explain why the law protects possession in cases in which it can be proved that a possessor is not also an owner. To presage an issue that will be discussed in Chapter VII, it does not explain why, for example, we should protect the possession of those who are proven to be thieves or why, as was discussed in Chapter II, owners cannot raise their title as a defence to an action against a wrongful possessor.¹⁹

¹⁷ See also Holmes, above n 3, 207; Gordley and Mattei, above n 3, 296–7.

¹⁸ Pollock and Maitland, above n 5, 47.

¹⁹ Gordley and Mattei, above n 3, 299.

However, there exists a more fundamental shortcoming common to both explanations, namely, their insistence on drawing a sharp distinction between “possessors” and “owners”. If non-owners do not have the right to possess, then it becomes impossible to explain why the law protects possession that does not amount to ownership.²⁰ To put it another way, neither Ihering nor Savigny could explain why a possessor should not also be considered an owner. As Gordley and Mattei observe:

[o]nce continental jurists had defined the owner as a person with the right to possession, it seemed to them that they had to define the mere possessor as a person without this right. Once they had done so, they entered a theoretical box canyon from which they never emerged.²¹

The important point for the purposes of this chapter is that, whether Savigny or Ihering managed to account for the Roman law, their basic error was to regard “possession” as a form of legal interest in a thing that is distinct from “ownership”. This error was recently repeated by Merrill, who observed that, ‘[o]ne of the enduring mysteries about property is why the law protects both ownership and possession.’²² However, there is no mystery here. This is because, as Chapters I and II explained, the law does not protect possession, it protects ownership. The mistake being made here is the failure to see that the *fact* of possession is simply the way in which the *right* of ownership is created. The real mystery, and one which neither of these famous accounts addresses, is why the act of possession creates property rights in the first place.

²⁰ James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford University Press, 2006) 53.

²¹ Gordley and Mattei, above n 3, 293.

²² Merrill, above n 3, 9.

B *Non-Instrumental Explanations*

Although they have often failed to find favour with lawyers,²³ moral philosophers have attempted to resolve this deeper mystery by developing accounts that purport to explain why the act of possession justifies the creation of rights *in rem*. To take what is perhaps the most prominent example, Hegel famously wrote that:

[t]o have something in my power, even though it be externally, is possession. The special fact that I make something my own through natural want, impulse or caprice, is the special interest of possession. But, when I as a free will am in possession of something, I get a tangible existence, and in this way first became an actual will. This is the true and legal nature of property, and constitutes its distinctive behaviour.²⁴

Hegel stressed that possession, and by extension property, is not merely of instrumental significance. Rather, as a way of manifesting free will, the act of possession constitutes a valuable end in itself. He wrote that, '[s]ince our wants are looked upon as primary, the possession of property appears at first to be a means to their satisfaction; but it is really the first embodiment of freedom and an independent end.'²⁵

Locke approached the matter rather differently. Whereas Hegel was concerned with external things in so far as they were means of manifesting the human will, Locke proposed a labour-

²³ See, for example, Holmes, above n 3, 206–7; Bond, above n 13, 264–5.

²⁴ Georg Wilhelm Friedrich Hegel, *Philosophy of Right* (Batoche, 2001) 58 [45].

²⁵ *Ibid.*

based theory that was ultimately founded upon an axiom of self-ownership.²⁶ According to Locke's famous description:

[t]hough the earth and all inferior creatures be common to all men, yet every man has property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.²⁷

Although Hegel and Locke were concerned with possession for different reasons, both accounts can be used to provide an *a priori*, moral justification for the rule that acts of possession create a property right in a tangible thing.

As with the instrumental accounts discussed above, it is possible to mount objections to the substance of these accounts.²⁸ However, the particular shortcomings of each theory are of no relevance here. This is because each is subject to the same “meta-objection”, namely, that each is predicated on the false assumption that the mystery of the possession rule can be explained by some underlying moral rationale that is peculiar to, or immanent within, the act

²⁶ Alexander and Peñalver write that, unlike Hegel, Locke was concerned with ‘placing an aspect of herself into the object.’ Gregory S Alexander and Eduardo Moisés Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012) 63.

²⁷ John Locke, *Two Treatises of Government: And a Letter Concerning Toleration* (Yale University Press, 2003) §27, 111–2.

²⁸ For criticism of Hegel's will theory see Lightwood, above n 8, 41; Gordley and Mattei, above n 3, 298. For criticism of Locke's argument see R A Epstein, ‘Possession as the Root of Title’ (1979) 13 *Georgia Law Review* 1221, 1227.

of possession itself. The argument advanced in this chapter is that any resemblance is purely accidental. The possession rule was never “chosen” for its moral qualities. Rather, it is a convention that evolved unconsciously through the repeated interaction of self-interested individuals.

As will be explained throughout this chapter, although moral arguments can be deployed as a means of assessing the moral desirability of the possession rule, they cannot explain why possession, as opposed to some other potential mechanism, came to answer the most basic questions of mine and thine. In short, to attribute the existence of the possession rule to some unique, underlying rationale, whether moral or otherwise, is to fail to appreciate that there is no such rationale.

III HUME’S THEORY OF PROPERTY

A The Idea of Spontaneous Order

The foregoing section briefly discussed several prominent explanations of the possession rule. In doing so, it made two arguments. First, that, apart from their other flaws, the German jurists’ insistence in drawing a distinction between owners and non-owners prevented them from addressing the essential, anterior question: why does the act of possession create original property rights in the first place? Secondly, that although philosophers such as Hegel and Locke attempted to give a rights-based answer to this question, they laboured under the misapprehension that it was possible to give an *explanation* of the origin of the rule. This does not mean that their accounts are without merit. However, if the argument presented in this chapter is correct, it does mean that what appear to be *ex ante* explanations can in fact only ever be *ex post* justifications for the rule.

The explanation offered in this chapter diverges substantially from these established accounts because it argues that it is not possible to give a rational, *ex ante* explanation of the possession rule. This is because the possession rule, both in custom and in the law, is an example of “spontaneous order”.

Spontaneous order is the idea that complex and stable systems can emerge from anarchy without conscious planning and independently of the positive law or any other form of state decree. Writing in 1767, Ferguson explained this idea in the following terms, ‘[e]very step and every movement of the multitude, even in what are termed enlightened ages, are made with equal blindness to the future; and nations stumble upon establishments, *which are indeed the result of human action, but not the execution of any human design.*’²⁹ Perhaps the most famous proponent of spontaneous order was Hayek, who offered the following explanation of spontaneous order:

[i]t would be no exaggeration to say that social theory begins with – and has an object only because of – the discovery that there exist orderly structures which are the product of the action of many men but are not the result of human design. In some fields this is now universally accepted. Although there was a time when men believed that even language and morals had been ‘invented’ by some genius of the past, everybody recognizes now that they are the outcome of a process of evolution whose results nobody foresaw or designed.³⁰

²⁹ Adam Ferguson, *An Essay on the History of Civil Society* (Batoche, 2001) 143 Italics supplied.

³⁰ F A Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge and Kegan Paul, 1973) Vol 1, Rules and Order, 37.

Hayek's basic position, and one which he shared with Hume,³¹ was the rejection of "constructivism"; the fallacy that the order that we observe in the world is attributable to some rational, designing mind.³² According to Hayek, spontaneous orders are not consciously designed but instead evolve.³³ Building on the work of Hume and, more recently, Sugden, it will be argued that the possession rule in the law is best understood in this way.

B Hume and Property Rights

Waldron has made the claim that scarcity is 'a presupposition of all sensible talk about property.'³⁴ This basic assumption also underpins Hume's influential account of the origin of property rights. Hume wrote that:

[o]f all the animals, with which this globe is peopl'd, there is none towards whom nature seems, at first sight, to have exercis'd more cruelty than towards man, in the numberless wants and necessities, with which she has loaded him, and in the slender means, which she affords to the relieving these necessities.³⁵

Crucially, Hume understood the concept of "scarcity" is not to be equated with that of a "shortage". On his account, scarcity is as much a consequence of human psychology as it is of the failure of a harvest. He observed that:

[t]his avidity alone, of acquiring goods and possessions for ourselves and our nearest friends, is insatiable, perpetual, universal and directly destructive of society. There is scarce any one, who is not actuated by it; and there is no one, who has not reason to fear from it, when it acts

³¹ John Gray, *Hayek on Liberty* (Routledge, 3rd ed, 2013) 30.

³² Ibid 29.

³³ Ibid 30.

³⁴ Waldron, above n 1, 31.

³⁵ David Hume, *A Treatise of Human Nature* (Oxford University Press, 2000) 311 [3.2.2.2].

without any restraint, and gives way to its first and most natural movements. So that upon the whole, we are to esteem the difficulties in the establishment of society, to be greater or less, according to those we encounter in regulating and restraining this passion.³⁶

Two important points emerge from this passage. First, that scarcity, and the consequent need for property rights, cannot be explained on the simple ground that there is not enough to “go around”. Rather, it is primarily attributable to the fact that humans are insatiably acquisitive. So whilst diminishing, the utility that one derives from the acquisition of each additional asset never falls to zero. Consequently, no matter the level of abundance, people are never completely satisfied with what they have. Secondly, this acquisitiveness poses a constant and existential threat to society. Indeed, Hume went so far as to make the, perhaps implausible, suggestion that once property rights have been established, ‘there remains little or nothing to be done towards setting a perfect harmony and concord.’³⁷

Hume’s explanation for the spontaneous emergence of property rights thus begins with the manifest advantages of stable societies when compared with the solitary misery of the state of nature:

‘[t]is by society alone [man] is able to supply his defects, and rise himself up to an equality with his fellow-creatures, and even acquire a superiority above them. By society all his infirmities are compensated; and tho’ in that situation his wants multiply every moment upon him, yet his abilities are still more augmented, and leave him in every respect more satisfy’d and happy, than ‘tis possible for him, in his savage and solitary condition, ever to become.’³⁸

³⁶ Ibid 316 [3.2.2.12].

³⁷ Ibid 315–6 [3.2.2.12].

³⁸ Ibid 312 [3.2.2.3].

This observation is not, however, sufficient to explain the emergence of property rights. As Hume himself remarked, '[b]ut in order to form society, 'tis requisite not only that it be advantageous, *but also that men be sensible of its advantages*'.³⁹ On Hume's account, we become sensible of the advantages of society because we are able to extrapolate from the beneficial governance arrangements that arise, by virtue of the natural bonds of affection between parent and child, within the nuclear family.⁴⁰

For Hume, the spontaneous emergence of property rights can be explained exclusively by reference to individual self-interest, albeit of an enlightened variety. He stressed that, 'a regard to public interest, or a strong extensive benevolence, is not our first and original motive for the observation of the rules of justice; since 'tis allow'd, that if men were endow'd with such a benevolence, these rules would never have been dreamt of.'⁴¹ Rather, property rights arise because we appreciate that, 'the principal disturbance in society arises from those goods, which we call external, and from their looseness and easy transition from one person to another.'⁴² The only way to prevent such traumatic disturbances is:

a convention enter'd into by all the members of society to bestow stability on the possession of all those external goods, and leave everyone in the peaceable enjoyment of what he may acquire by his fortune and industry ... Instead of departing from our own interest, or from that of our nearest friends, by abstaining from the possessions of others, we cannot better consult both these interests, than by such a convention; because it is by that means we maintain society, which is so necessary to their well-being and subsistence, as well as to our own.⁴³

³⁹ Ibid 312 [3.2.2.4]. Italics supplied.

⁴⁰ Ibid.

⁴¹ Ibid 318 [3.2.2.19].

⁴² Ibid 314 [3.2.2.9].

⁴³ Ibid.

Hume's state-of-nature story thus departs sharply from the more famous alternative given by Hobbes. According to Hobbes, the war of all against all could only be resolved by a mutual and explicit agreement to cede our rights to a sovereign invested with unlimited coercive powers: 'it is manifest, that during the time men live without a common Power to keep them all in awe, they are in a condition which is called Warre; and such a warre, as is of every man, against every man.'⁴⁴

By contrast, Hume's explanation does not require the existence of a Leviathan who, by the imposition of severe sanctions, enables cooperation to emerge from conflict.⁴⁵ Because, on his account, order-creating norms serve both the individual and collective interest, they are self-enforcing.⁴⁶ The particular genius of Hume's explanation is his understanding that these norms are *conventions*. The essential idea of property, according to Hume, consisted in a 'convention enter'd into by all the members of the society to bestow stability on the possession of those external goods'.⁴⁷

In discussing the emergence of order from chaos in terms of spontaneously emergent conventions, Hume anticipated, by several hundred years, many of the advances that modern game theory has made to our understanding of social institutions.⁴⁸ But what, precisely, does it mean to describe something as a "convention"?

⁴⁴ Thomas Hobbes, *Leviathan* (Penguin Books, 1968) 185.

⁴⁵ As Hobbes wrote, '[c]ovenants without the Sword, are but Words, and of no strength to secure a man at all.' Ibid 223. Hobbes's state of nature shares the structure of the Prisoners' Dilemma. The existence of the all-powerful sovereign with coercive powers allows those caught on the horns of the dilemma to escape by changing the payoffs. Edna Ullmann-Margalit, *The Emergence of Norms* (Clarendon Press, 1977) 65–7.

⁴⁶ See also Peter Vanderschraaf, 'The Informal Game Theory in Hume's Account of Convention' (1998) 14 *Economics and Philosophy* 215, 231.

⁴⁷ Hume, above n 35, 314 [3.2.2.9].

⁴⁸ K G Binmore, *Fun and Games: A Text on Game Theory* (D.C. Heath, 1992) 21. This would doubtless have surprised Hume, who famously described his great book as having fallen "dead-born from the press".

IV CONVENTIONS

A Conventions as Solutions to Coordination Problems

Although complex at the margins, the essence of the philosophical concept of a convention is relatively simple to appreciate with some examples. When driving down a road, one must either deviate to the right or the left when confronted with oncoming traffic. When arriving at a busy intersection, one must either yield or maintain speed. When separated from one's friends at a shopping centre, one must consider the most likely rendezvous point.

These are all mundane examples of “coordination problems”. A coordination problem is one of interdependent decision-making in which there are two or more choices and the objective of all participants is to settle upon some common choice. In such situations, as Ullmann-Margalit has explained, ‘the best choice for each depends upon what he expects the others to do, knowing that each of the others is trying to guess what *he* is likely to do.’⁴⁹

The problem is that, in the absence of prior agreement, it is very difficult to know what the other person *will do* in the circumstances. Take the question concerning on which side of the road vehicles should drive, often referred to as the “driving game”. There are two “solutions” to this game; “everyone drives on the left” and “everyone drives on the right”.⁵⁰ Either will answer to the needs of road users. Thus, for any given pair of drivers, called “Player A” and

⁴⁹ Ullmann-Margalit, above n 45, 78. Italics in original.

⁵⁰ In fact this game has three Nash equilibria. In addition to left-left and right-right, driving on either the left or the right with a probability of 50% is also a Nash equilibrium. However, for reasons discussed later in this chapter, it is not one that we would expect to survive. The concept of a “Nash equilibrium” is explained below.

“Player B”, there are four potential outcomes. The “payoffs”, the utility of any given choice in light of the other player’s choice, for each outcome are shown in Figure 1, below.⁵¹

Figure 1

		Player A	
		Left	Right
Player B	Left	10, 10	-10, -10
	Right	-10, -10	10, 10

Of the four potential outcomes, “left-left” and “right-right” represent “solutions” that will satisfy each player. The problem, is that, whilst the players wish to coordinate their choices, there is no uniquely rational reason for selecting one over the other.⁵² As a consequence, neither player’s choice of strategy will turn on *a priori* reasoning or “logic”. Rather, it will depend on his beliefs about what the other player will choose in the circumstances. In other words, what is required to solve this coordination problem is the existence of a notorious belief that people drive either on the left or the right. The philosophical concept of convention, in essence, describes the existence of such a belief within a particular population. Postema has written that:

conventions *solve* cooperation problems because they represent established ways in which people caught up in such problems overcome the uncertainty in their situation by adopting a

⁵¹ Note that there is nothing special about the cardinal value of the payoffs selected here. All that matters is that their ordinal value reflects the preference ranking of the players.

⁵² As Sugden notes, classical game theory cannot tell us which of these two equilibria the parties will select. See Robert Sugden, ‘The Evolutionary Turn in Game Theory’ (2001) 8(1) *Journal of Economic Methodology* 113, 115.

common rule that correlates their choices and actions in a way that enables them to achieve cooperatively their individual (or collective) aims. The convention “anchors” free-floating, mutually conditional preferences or expectations to a single equilibrium.⁵³

It is important to appreciate that a convention does not refer to a mere regularity of behaviour or habit. So, for example, people’s tendency to incessantly play with their smart phones whilst on public transport is not a convention in this sense. This is because the philosophical concept of a convention refers not merely to the observable regularity of behaviour but also, as McAdams notes, to the set of expectations that sustain it.⁵⁴ In other words, one follows a convention because of one’s belief that others follow it too.⁵⁵ A convention is thus a sort of self-fulfilling prophecy and, the more people who follow it, the more entrenched it becomes.

Hume, writing in 1738, well understood this. In a passage that has become something of a classic in the field, he argued that:

I observe that it will be for my interest to leave another in the possession of his goods, *provided* he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express’d, and is known to both, it produces a suitable resolution of behaviour. And this may properly enough be called a convention or agreement betwixt us, tho’ without the interposition of a promise, since the actions of each have reference to those of the other, and are perform’d upon the supposition that something is to be performed on the other part. Two men who pull the oars of a boat do it by an agreement or convention, tho’ they have never given promises to

⁵³ Gerald J Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer, 2011) 490. Italics in original.

⁵⁴ Richard H McAdams, ‘Conventions and Norms: Philosophical Aspects’ in James D Wright (ed), *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier, 2nd ed, 2015) vol 4, 844, 846.

⁵⁵ Robert Sugden, ‘Conventions’ in Peter Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Macmillan Reference, 1998) vol I, 453, 454.

each other. Nor is the rule concerning the stability of possession the less deriv'd from human conventions, that it arises gradually, and acquires a force by a slow progression and by our repeated experiences of the inconveniences of transgressing it. On the contrary, this experience assures us still more that the sense of interest has become common to all our fellows, and gives us a confidence of the future regularity of their conduct; and 'tis only on the expectation of this that our moderation and abstinence are founded.⁵⁶

Hume identifies two vital aspects of a convention in this passage. First, conventions do not arise from explicit agreements. Secondly, conventions both create and rely upon expectations about how, absent agreement, people will behave in particular circumstances. 'Justice', in Hume's words, establishes itself because 'every single act is performed in expectation that others are to perform the like.'⁵⁷

Thus, as Hume demonstrated, the emergence of order from chaos need not be attributed to either altruism or the presence of a sovereign wielding a big stick. Order arises because it is in people's best interest that it does so. As Sugden has explained:

[p]erhaps the most important lesson to be learned from the study of conventions is that a society can be ordered without anyone ordering it. In many significant cases, the coordination of individuals' actions can be brought about by self-reinforcing expectations, which evolve spontaneously out of the repeated interaction of self-interested individuals.⁵⁸

⁵⁶ Hume, above n 35, 314–5 [3.2.2.10].

⁵⁷ Ibid 320 [3.2.2.22].

⁵⁸ Sugden, 'Conventions', above n 54, 460.

B Pure and Impure Coordination Problems

As discussed above, a coordination problem is one in which two or more people with coinciding interests must fix upon the same choice. The classic example is deciding on which side of the road to drive. The “driving game” is a particularly clear example of a coordination problem because, at least in the generic case, no driver has any particular preference for “left” or “right”, or, if they do, this preference is dwarfed by the potentially catastrophic consequences of a head-on collision. In these situations, conformity is its own reward.⁵⁹

The strong convergence of interests that characterises coordination problems of this type neatly demonstrates how order can emerge spontaneously and why conventions that solve such problems are self-enforcing. However, it is obvious that many, if not most, problems of human interaction are not like the driving game because people very often have a preference about which action they would like to take. As Schelling observed, games of pure coordination and games of pure conflict do not cover the field of human interaction.⁶⁰ Instead, they are best seen as limiting cases between which sit those many and varied interactions that involve differing degrees of both conflict and mutual dependence. Schelling called these sorts of interactions games of ‘mixed-motive’.⁶¹

An important sub-set of these games of “mixed motive” are “impure coordination games”, a classic example of which is the “intersection game” that models the simultaneous arrival of two cars at an intersection. Determining which car must yield is a coordination problem because we can safely assume that a collision is regarded by each driver as the least favourable outcome. As a consequence, the players must coordinate their choices. However,

⁵⁹ See also Ullmann-Margalit, above n 45, 85.

⁶⁰ Thomas C Schelling, *The Strategy of Conflict* (Harvard University Press, 1960) 84.

⁶¹ *Ibid* 89.

unlike in the driving game, it is “impure” because neither participant is indifferent as to their choice. Each would prefer that the other yield. The payoffs in the intersection game are represented in Figure 2, below.⁶²

Figure 2

		Player A	
		Maintain Speed	Brake
Player B	Maintain Speed	-10, -10	5, 3
	Brake	3, 5	0, 0

The payoffs in this matrix reflect the fact that if Player A maintains speed, Player B’s best course of actions is to brake, and *vice-versa*, because if both players maintain speed, the outcome will be a potentially catastrophic collision. Likewise, if both parties brake, then, whilst they will have avoided the worst possible outcome of a collision, they will also have failed to solve their original problem. The strategies “maintain speed-maintain speed” and “brake-brake” can thus be described as “miscoordination events”.

The strategies “maintain speed-brake” and “brake-maintain speed” are, by contrast, solutions to the problem. In game theory, these solutions are said to constitute “Nash equilibria”.⁶³ The concept of a Nash equilibrium is essentially one of “best reply”. That is, whilst it may not represent the best outcome for one, or indeed either, player, a pair of strategies will be in

⁶² This matrix is taken from Robert Sugden, *The Economics of Rights, Co-Operation, and Welfare* (B. Blackwell, 1986) 38.

⁶³ Douglas G Baird, Robert H Gertner and Randal C Picker, *Game Theory and the Law* (Harvard University Press, 1994) 21–3, 310.

Nash equilibrium if each represents the best reply to the other. In other words, each is the best choice *given* the other player's choice. The concept is simple to illustrate. If I believe that the other car approaching the intersection will not yield, though I would prefer that it did, my best choice is to play the submissive strategy of slowing. Playing "yield" to "maintain speed" is a Nash equilibrium because neither party can, by unilateral action, improve his position.

The concept of a Nash equilibrium is perhaps the most significant contribution that game theory has made to social inquiry. This is because no solution to a problem of human interaction will succeed in the long term unless it represents a Nash equilibrium. As Binmore has observed, the rules that human societies create in order to regulate their affairs are 'rules for *sustaining an equilibrium* within the game of life'.⁶⁴

C Scarcity Creates an Impure Coordination Problem

The foregoing section sought to emphasise that coordination problems are not limited to those situations in which there is little or no divergence of interests between those who must agree upon complementary choices. Despite a divergence of interest between the participants, any problem will remain one that requires some element of coordination if it is one in which the decision of each participant to pursue her most desired outcome *irrespective* of the decision of the other party will result in the worst outcome for both.⁶⁵ As a consequence, the parties must choose between one of two or more equilibrium solutions.

⁶⁴ K G Binmore, *Game Theory and the Social Contract* (MIT Press, 1994) 26. Italics in original. See also Brian Skyrms, *The Stag Hunt and the Evolution of Social Structure* (Cambridge University Press, 2004) 9.

⁶⁵ This is unlike the more famous "Prisoners' Dilemma" in which the decision to "defect" rather than "cooperate" is the best choice irrespective of the other participant's choice. In the non-iterative version of the Prisoners' Dilemma, the decision to defect is "strictly dominant". As McAdams has recently noted, the tendency of scholars to see every competitive interaction as a manifestation of the Prisoner's Dilemma has, unfortunately, obscured the fact that many of these interactions actually pose problems of coordination. See Richard H McAdams, 'Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law' (2008) 82 *Southern California Law Review* 209.

A crucial question is whether this is also true of competition over scarce things. In other words, does the problem caused by the excess of “wants over things” create a coordination problem or a game of pure conflict in which the quantum of the loser’s loss is equal to that of the winner’s gain? The answer is that scarcity does create a coordination problem.

Imagine, to borrow an oft-used example, a stand-off between two people over a piece of firewood. If the only consequence of the competition were that one party acquired the firewood at the expense of the other, then this would be a purely competitive, zero-sum game in which neither party has any incentive to defer to the other. However, in real life, being successful or unsuccessful in acquiring the firewood is not the only consequence to which the parties must attend. This is because one potential outcome of the unrestrained competition over scarce things is a violent conflict in which one or more of the disputants may be injured, or worse. If one makes the reasonable assumption that most people regard such conflicts as the least desirable outcome in the circumstances, then each party has an incentive to place limits on the otherwise unconstrained competition over scarce things. Thus, despite the strong divergence of interests between those making rival claims to some resource, the fact of scarcity creates a coordination problem, albeit of a very impure variety.⁶⁶

It is for this reason that game theorists, and in particular biologists, have often used the “Hawk-Dove” game as a model for the emergence of property rights.⁶⁷ Hawk-Dove shares the logic of “Chicken”, the test of nerve in which teenagers demonstrate their *bravura* by simulating the conditions of a head-on automobile collision, the winner being the party who

⁶⁶ See also *ibid* 223–4.

⁶⁷ For an overview of the literature see James E Krier, ‘Evolutionary Theory and the Origin of Property Rights’ (2009) 95 *Cornell Law Review* 139, 150–7.

is last to take evasive action or “chicken out”.⁶⁸ Using the accepted game-theoretic nomenclature, “Hawk” describes a belligerent strategy. Someone who adopts this strategy will invariably fight for mastery of a disputed resource. “Dove”, on the other hand, is a submissive strategy. Someone who adopts this strategy will test the waters but defer to his opponent at the first sign of conflict. Assuming more-or-less equal fighting ability, the payoffs for these various outcomes are represented by in Figure 3, below.⁶⁹

Figure 3

		Player B	
		Dove	Hawk
Player A	Dove	1, 1	0, 2
	Hawk	2, 0	-2,-2

The payoffs in Figure 3 reflect the following preference ranking, from least to most preferred, as viewed from the participant whose strategy choice is in bold font: (1) **Hawk** plays Hawk; (2) **Dove** plays Hawk; (3) **Dove** plays Dove; (4) **Hawk** plays Dove.

When a Hawk meets another Hawk, both parties are assured of conflict and each runs the risk of sustaining a potentially devastating injury. When a Dove plays a Hawk, the Dove avoids the risk of injury but, in doing so, forgoes the entire resource. Where a Dove plays another Dove, the parties avoid the risk of injury, but must be content to divide the resource equally

⁶⁸ Apparently the “game-like” quality of this test of nerve was first noticed by Bertrand Russel who, in 1959, likened the game to the nuclear standoff between the United States and the Soviet Union. See William Poundstone, *Prisoner’s Dilemma* (Doubleday, 1992) 197–8.

⁶⁹ These payoffs are taken from Sugden, *Economics of Rights*, above n 62, 60. In evolutionary game theory, these payoffs represent reproductive fitness.

between themselves. Finally, when a Hawk meets a Dove, the Hawk takes the entire resource without risk of injury. It should be clear from the payoffs in Figure 3 that the outcomes Hawk-Dove and Dove-Hawk are Nash equilibria, and thus potential solutions to this coordination problem. On the other hand, the outcomes Hawk-Hawk and, for reasons further discussed below, Dove-Dove are not.

As will become clear throughout the remainder of this chapter, determining who gets to play Hawk, and who must be content with Dove, in any given encounter over some object of property is precisely the role of the basic allocative rule in any system of private property.

D The Assumptions of the Hawk-Dove Model

Before going any further, it is important to articulate the assumptions underlying Hawk-Dove as a model for the evolution of property rights.

The first relates to assumptions about the participants' rationality. Perhaps the most common criticism made of the application of game theory to problems of human interaction is that it is premised on the demonstrably false assumption that people behave rationally when interacting with each other.

However, this sort of criticism misunderstands what is meant by "rational" in this context. For the purpose of what follows, rationality does not require that one's subjective preferences reflect one's best interests when viewed objectively. As Rapoport has written, "[w]hatever is preferred (whether it seems selfish or altruistic from certain points of view) is assigned the

higher utility'.⁷⁰ Thus, if, for some perverse reason, I enjoy the thrill of being involved in a potentially fatal car accident, then the preference order that defines the “intersection game”, discussed above, simply does not apply to me.

What game theory instead assumes is that people are “instrumentally rational”, which requires that participants in a “game” have a complete and transitive set of preferences.⁷¹ This concept can be illustrated with a simple example. Imagine that I am offered the choice between an apple, a pear and a mango and that I prefer mangos to pears and pears to apples. Instrumental rationality requires that, if offered the choice between a mango and an apple, I choose the mango over the apple.

This is not to deny that there are many situations in life in which people do not have a transitive set of preferences. Finnis, who is sceptical about the utility of applying game-theoretic analyses to law, is surely right to argue that, ‘in real life, alternatives do not present themselves for choice in fully bounded situations or in transitive rankings.’⁷² However, whilst this might often be true, it is not universally so. Whether a game, such as Hawk-Dove, can persuasively serve as a model for some form of social interaction depends on the accuracy of the assumptions it makes about the preferences of the nominal players. The assumptions made by the Hawk-Dove model are broadly that people are generally acquisitive and seek to avoid violent confrontations where possible.

Whilst these assumptions are not true of all people all of the time, they are true of a great many people much of the time, making it reasonable to assume that, when confronted with a

⁷⁰ Anatol Rapoport, *Fights, Games, and Debates* (University of Michigan Press, 1960) 122.

⁷¹ Shaun Hargreaves Heap and Yanis Varoufakis, *Game Theory: A Critical Introduction* (Routledge, 2nd ed, 2004) 7–8, 10–11.

⁷² John Finnis, *Collected Essays. Volume IV, Philosophy of Law* (Oxford University Press, 2011) 68.

dispute over a scarce object, people's choices will, more or less, conform to the preference order that defines this particular game.

This observation raises an important point. As Rose has noted of the payoffs in Figure 3, the average payoff for the pacific Dove-Dove strategy is equal to that of Hawk-Dove and Dove-Hawk.⁷³ Given this, why do rational parties not simply agree to share the resource equally and thereby avoid conflict? The superficial answer is that, on the payoff structure that defines the game, Dove-Dove is not a Nash equilibrium. That is to say, if I know my opponent will adopt the submissive Dove strategy, I can improve my payoff by switching to Hawk. The more fundamental answer, however, is that Dove-Dove cannot form the basis of a stable property regime because the Hawk-Dove model is founded on the Humean assumption that, with some notable exceptions, humans are acquisitive and will take some disputed resource in its entirety if there is no cost to be paid for doing so.

The final assumption underlying the Hawk-Dove model is that, as others have also noted,⁷⁴ it assumes some level of abundance. This is because, as resources become scarcer, their value to the players will rise. If this continues, there will ultimately come a point at which, due to the threat of starvation etc., their value to any given player will outweigh the cost of fighting for them. When this occurs the payoff ranking that defines the Hawk-Dove game will no longer reflect most people's preferences and Hawk will become the dominant strategy.⁷⁵ Whilst this is undoubtedly true, the one qualification that must be made is that as resources become scarcer, disputes over them will be more fiercely fought, and the risk of injury will be

⁷³ Carol M Rose, 'Psychologies of Property (and Why Property Is Not a Hawk/Dove Game)' in J E Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, First edition, 2013) 272, 281.

⁷⁴ John Maynard Smith, *Evolution and the Theory of Games* (Cambridge University Press, 1982) 96; Krier, above n 67, 156.

⁷⁵ Such a situation would take on the preference structure of the Prisoners' Dilemma, which is not a coordination game.

correspondingly higher. Thus we would not expect the Hawk strategy to become strictly dominant until the relevant resource is approaching exhaustion.

V THE ROLE OF SALIENCE IN CONVENTIONS

A Symmetric Games and the Problem of “Mixed Strategy Equilibria”

As Maynard Smith has explained, a game such a Hawk-Dove is “symmetric” when:

the two contestants start in identical situations: they have the same choice of strategies and the same prospective payoffs. There may be a difference in size and strength between them, which would influence the outcome of an escalated contest, but if so it is not known to the contestants and therefore cannot affect their choice of strategies.⁷⁶

In other words, symmetric games assume homogeneity amongst the population of players. The most glaring shortcoming of the “symmetric” Hawk-Dove game is its failure to reflect the reality that, in many cases, there will be a substantial and appreciable disparity in size or fighting ability between the players. In such cases, the inability of the weaker party to harm the stronger party simply means that, at least from the perspective of the stronger party, there is no coordination problem.

However, as noted above, the success of Hawk-Dove as a model for the spontaneous emergence of property rights does not depend upon it applying to every dispute over a scarce thing. In any case, instances in which Hawk-Hawk confrontations will result in no harm to

⁷⁶ Maynard Smith, above n 74, 22.

the winner must be rare. As McAdams and Nadler have also noted,⁷⁷ this is particularly true if the “cost” of a Hawk-Hawk encounter includes the sense of embarrassment or uneasiness that one feels after, for example, conducting a screaming match in public. These issues aside, the more fundamental problem is that, in a perfectly symmetric game, no convention can arise. In order to explain why this is so, it is necessary to briefly return to the concept of a Nash equilibrium.

As noted above, a pair of strategies will be in Nash equilibrium where each is the best reply to the other. Hawk-Dove and Dove-Hawk are in Nash equilibrium because, even though the Dove player will not get exactly what she wants, she cannot improve her position *given* the other player’s decision to play Hawk. Crucially, however, Hawk-Dove and Dove-Hawk are not the only two Nash equilibria in the game. In repeated play, and assuming the payoffs in Figure 3, the players will also have reached a stable equilibrium where each player plays the Dove strategy with probability of 2/3 and the Hawk strategy with the probability 1/3.⁷⁸ This strategy is a Nash equilibrium because, once established, neither can improve his position by departing from it and any deviations from it will be self-correcting.⁷⁹

Unlike Hawk-Dove and Dove-Hawk, which are “pure strategy equilibria”, strategies that direct a player to play “Strategy A” with probability x% and “Strategy B” with probability 1-x% are called “mixed strategies”.⁸⁰ As McAdams also notes, mixed strategies in equilibrium

⁷⁷ Richard H McAdams and Janice Nadler, ‘Testing the Focal Point Theory of Legal Compliance: The Effect of Third-Party Expression in an Experimental Hawk/Dove Game’ (2005) 2 *Journal of Empirical Legal Studies* 87, 95.

⁷⁸ Sugden, *Economics of Rights*, above n 62, 61. This does not require that every individual play Dove with probability 2/3. A population will be in equilibrium if 2/3 of the population play Dove as a pure strategy whilst the remaining 1/3 play Hawk as a pure strategy. See Richard H McAdams, ‘Focal Point Theory of Expressive Law’ (2000) 86 *Virginia Law Review* 1649, 1692.

⁷⁹ Sugden, *Economics of Rights*, above n 62, 61; McAdams, ‘Focal Point Theory of Expressive Law’, above n 78, 1692–3.

⁸⁰ Baird, Gertner and Picker, above n 63, 37.

do not answer to the definition of a convention.⁸¹ This is because the expectations at the core of any convention depend upon a strong regularity of behaviour being exhibited by members of the relevant population. Any strategy that contains some randomizing element will, by definition, fail to achieve this.

Just as importantly, these non-conventional, mixed strategies make poor solutions to coordination problems. This can be simply demonstrated by reference to the Intersection Game. Imagine that, instead of “yield if on the left, maintain speed if on the right”, or some such similar convention, people instead negotiated intersections by adhering to the rule “maintain speed with probability $x\%$ and yield with probability $1-x\%$ ”. Though it may be stable, such a rule will inevitably result in the miscoordination events of yield-yield and, more worryingly still, maintain speed-maintain speed, in a certain percentage of cases.

Returning to Hawk-Dove, assuming the payoffs in Figure 3, Sugden demonstrates that the mixed strategy of playing Dove with the probability $2/3$ and Hawk with the probability $1/3$ creates a world in which 56% of all disputes over property are of the Hawk-Hawk or Hawk-Dove varieties.⁸² In other words, over half all disputes over scarce natural resources are resolved by force or the threat of force. This, as Sugden observed, does not look not like a peaceful world, but one which is languishing in Hobbes’s state of nature.⁸³

What is required is a convention which, just like “give way to the right”, enables any given person to determine, without the need for actual or threatened conflict, who is entitled to the disputed resource and who must defer. In other words, what is required is an allocative rule

⁸¹ McAdams, ‘Focal Point Theory of Expressive Law’, above n 78, 1695 McAdams thus defines a convention as ‘the prevailing *pure-strategy* equilibrium and the expectations that support it’: at 1694. Italics in original.

⁸² Sugden, *Economics of Rights*, above n 62, 61.

⁸³ Ibid. It also results in a lower average payoff than that which would be achieved under the pacific, though unstable, Dove-Dove compromise.

that determines who is to play Hawk, and who must be content with Dove, in respect of any given object of property.

We have now arrived at the fundamental problem with purely symmetrical games. As noted above, Hawk-Dove has three Nash equilibria, two of which are pure, and thus constitute possible conventions, and one of which is mixed, and thus does not. However, an important insight of modern evolutionary game theory is that, if the relevant population consists of perfectly homogenous players about whom all is known is their preferences as reflected in the ordinal ranking of the payoffs, the mixed strategy equilibrium is the only actual Nash equilibrium in the game.⁸⁴ This is because, when repeated or “iterated” encounters are totally featureless and anonymous, players are unable to develop reputations, divine patterns of behaviour and learn from experience. Where this occurs, no pure strategy Nash equilibrium will arise. Skyrms describes this as the ‘curse of symmetry’.⁸⁵ The question is then, if pure strategy Nash equilibria are the foundation of conventions, how can conventions spontaneously emerge in these situations?

B Breaking Symmetries

The answer is that conventions emerge spontaneously because life is not a symmetric game. People who are caught up in coordination problems modelled by iterative games such as Hawk-Dove do not regard each other as members of a homogenous mass. Instead, they become sensible of some feature that distinguishes them from their opponents in any round of the game. Game theorists describe these distinguishing features as “asymmetries”. Asymmetry recognition is crucial because it is only once players come to recognise some

⁸⁴ Hargreaves Heap and Varoufakis, above n 71, 215–6; Robert Sugden, ‘Salience, Inductive Reasoning and the Emergence of Conventions’ (2011) 79 *Journal of Economic Behavior & Organization* 35, 38.

⁸⁵ Brian Skyrms, *Evolution of the Social Contract* (Cambridge University press, 1996) 63.

individuating feature that they can begin to recognise patterns of behaviour, develop reputations and reason inductively from past experience.

As will be discussed in more detail below, an important insight of modern game theory is that any asymmetry, no matter how apparently irrelevant to the game, will do. Creating the necessary distinguishing feature may be as simple as labelling one player “Player A” and the other “Player B” or, as Hargreaves Heap and Varoufakis demonstrated, assigning each player either red or blue.⁸⁶ The crucial point is that mutual recognition of any asymmetry enables the players to ‘condition their behaviour on some feature of their opponent’.⁸⁷ This allows for the emergence of two new pure strategy equilibria.⁸⁸ In this case, these two pure strategy equilibria are: “Play Hawk if Player A/Red Player and Dove if Player B/Blue Player”, and *vice-versa*.

These new pure strategy equilibria constitute proto-conventions which, to use Sugden’s metaphor, compete with each other like seedlings in a crowded plot.⁸⁹ So how does one come to triumph at the expense of the other? The answer is that, in repeated play, some critical mass of players will, sooner or later, fancy that they can discern some pattern in the chaos.⁹⁰ So, for example, they will come to believe that “Blue” players tend to be more belligerent than “Red” players, or that “A” Players are more submissive than “B” Players. It is not required that such a belief is rational or inductively valid. Irrespective of its truth, once it begins to spread throughout the population, it becomes a self-fulfilling prophecy. The resulting “bandwagoning” effect not only vanquishes the competing pure strategy

⁸⁶ Hargreaves Heap and Varoufakis, above n 71, 232–4.

⁸⁷ Ibid 229.

⁸⁸ For a particularly clear explanation of this concept see McAdams, ‘Focal Point Theory of Expressive Law’, above n 78, 1691–6.

⁸⁹ Sugden, *Economics of Rights*, above n 62, 43.

⁹⁰ Ibid.

equilibrium, it also drives out the hitherto dominant mixed strategy equilibrium.⁹¹ The pure strategy equilibrium that remains at the end of this process is a convention in the sense described above.

C The Role of Salience in Selecting Asymmetries

The key message in the foregoing section was that the mutual recognition of some mutual asymmetry explains how and why conventions can emerge spontaneously as solutions to coordination problems.

Skyrms has explained this phenomenon by drawing an analogy with a column under compression.⁹² Although the column may appear perfectly symmetrical, it is a fact that, as more and more weight is added, the column will eventually buckle one way or another. As he writes, '[t]he slightest perturbation from the perfectly symmetrical state will be carried by the dynamics to one or the other.'⁹³ However, Skyrms's analogy is not a complete answer to the puzzle. This is because, in cases of human interaction, symmetries can only be broken if some critical mass of people come to identify the same feature that distinguishes any one player from any other player in any round of the game.

The problem here is not a dearth but a surfeit of potential asymmetries from which to select.⁹⁴ In any given interaction between two people, it is possible to identify an almost infinite number of asymmetries. So, two drivers approaching each other at an intersection might

⁹¹ That is, a pair of mixed strategies ceases to constitute a Nash equilibrium in an asymmetric game. See Hargreaves Heap and Varoufakis, above n 71, 229. The reason for this is simple to appreciate. If you persist with a mixed strategy in the face of an established convention such as "give way to the right", you are simply inviting an accident.

⁹² Skyrms, above n 85, 67–8.

⁹³ Ibid 68.

⁹⁴ See also Krier, above n 67, 155.

notice the following differences: one is approaching from a large road and the other from a small road; one is to the left and the other is to the right; one is driving a large vehicle and the other a small vehicle. However, they may also notice other differences, such as: one is in a blue car and the other is in a red car; one is in a Mercedes and the other is in a Toyota; one is in a two door coupé, the other is in a sedan, and so on.

Given the almost infinite number of potential asymmetries that might distinguish two players, it would seem that the chances of some critical number of drivers chancing upon the same feature are vanishingly slim. As Sugden has argued,⁹⁵ if asymmetry recognition were a matter of random transient variation then one would expect, at the very least, that the emergence of any convention would take an agonisingly long time and that many panels would be damaged in the meantime.

However, equilibrium selection is not a random process akin to pulling the lever on a slot machine and hoping that the symbols line up. To the contrary, humans appear to be able to guess the sort of features that *other people* will find material to the resolution of some common problem. Schelling famously asked each member of a group of students to imagine that they were to meet someone in New York City, but had made no prior arrangements and had no means of communication.⁹⁶ All that each respondent knew of the other was that she had been given the same instructions. The respondents were then asked to choose a location and meeting time. Given the huge number of potential meeting places in a city the size of New York, one would expect that the chances of any pair of respondents selecting the same rendezvous time and place would be vanishingly slim.⁹⁷ Remarkably, however, of those

⁹⁵ Sugden, 'Salience', above n 84, 39.

⁹⁶ Schelling, above n 60, 55–6.

⁹⁷ In other words, this is a coordination problem in which players must choose between an infinite number of potential equilibria.

surveyed, an absolute majority selected the information booth at Grand Central Station as the rendezvous point and virtually all chose midday as the meeting time. Plainly, this result cannot be chalked up to “dumb luck”.

As Schelling explained, this simple coordination problem demonstrates that people seem to be able to ‘read the same message in a common situation’⁹⁸ and are thus able to “mutually recognize” some unique signal that coordinates their expectations of each other.’⁹⁹ In game theory, features that, for some reason, “stick out” are often described as being “salient”, “prominent” or representing “focal points”. According to Schelling, these simple games illustrate the truth that:

[p]eople *can* often concert their intentions or expectations with others if each knows the other is trying to do the same. Most situations ... provide some clue for coordinating behaviour, some focal point for each person’s expectation of what the other expects him to expect to be expected to do. Finding the key, or rather finding *a* key – any key that is mutually recognized as the key becomes *the* key – may depend on imagination more than logic; it may depend on analogy; precedent; accidental arrangement; symmetry; aesthetic or geometric configuration, casuistic reasoning, and who the parties are and what they know about each other ... It is not being asserted that they will always find an obvious answer to the question; but the chances of their doing so are ever so much greater than the bare logic of abstract random probabilities would ever suggest.¹⁰⁰

⁹⁸ Schelling, above n 60, 54.

⁹⁹ Ibid.

¹⁰⁰ Ibid 57. Italics in original.

The importance of Schelling's insight is that the riddle of equilibrium selection must be solved empirically, not analytically.¹⁰¹ Answering the question, "What would I do if I were her, wondering what she would do if she were me, wondering what I would do if I were her", and so on *ad infinitum*, cannot be answered through *a priori*, rational analysis. The salience of any particular solution need have nothing to do with its objective desirability, however assessed. This, however, is not a cause for concern because, when faced with a coordination problem, any choice is a good one so long as it is held in common with others. As Schelling wrote, '[t]he assertion here is *not* that people simply *are* affected by symbolic details but that they *should* be for the purposes of correct play.'¹⁰² Thus, if you become separated from your wife in a strange city, "go with your gut" is in fact good advice.

Importantly, Schelling's insight about the nature of salience applies equally to asymmetry selection in impure coordination problems. As Sugden writes, 'the problem of innumerable asymmetries is solved by salience-based reasoning'.¹⁰³ The ability of players to fasten upon the same asymmetry is plainly more than a matter of mere chance. Some asymmetries, for some mysterious reason, appear to stand out to those who are confronted with the same problem.

D *The Simplicity Imperative*

As was explained in the foregoing section, conventions spontaneously arise because members of the relevant population fasten upon some asymmetry that, for some reason, "sticks out" as material to the resolution of their common problem. What was stressed is that there is no necessary connection between the salience of some particular asymmetry and its economic

¹⁰¹ See also Sugden, 'Evolutionary Turn', above n 52, 116–7.

¹⁰² Schelling, above n 60, 98.

¹⁰³ Sugden, 'Salience', above n 84, 39.

efficiency or moral desirability.¹⁰⁴ Though conventions “solve” coordination problems, it does not follow, as Postema has explained, ‘that this solution is optimal from anyone’s point of view. Not only is it possible for some parties to regard some alternatives as preferable ... but it is possible that *all* may agree that the existing conventional arrangement is sub-optimal.’¹⁰⁵

But why is it that the moral or economic desirability of a solution is incidental to its salience? The answer to this question lies in the very function of asymmetry identification itself. As was described above, recognition of a common asymmetry allows those faced with a Hawk-Dove-like situation to determine who is to play Hawk, and who is relegated to Dove, in respect of any given resource. In other words, it fulfils a labelling or role-allocation function. It is therefore essential that the asymmetry on which the relevant convention turns is simple to apply. If, on the basis of the asymmetry in question, it is possible for the participants to be genuinely uncertain about which role they are to play in any given interaction, then neither will have a settled expectation about how the other will behave in the circumstances. Any such uncertainty will very rapidly destroy the convention in question. Consequently, an essential quality of any convention is certainty of application.

Sugden illustrates the point by discussing a hypothetical convention that turns on the asymmetry of beauty.¹⁰⁶ No convention could turn on subjective assessments of beauty. However, this is not how the players would approach the problem. Because the players are attempting to coordinate, they would instead attempt to guess the sorts of features that *other people* are likely to find attractive in the circumstances, knowing that others are attempting to

¹⁰⁴ Robert Sugden, ‘Spontaneous Order’ (1989) 3 *Journal of Economic Perspectives* 85, 94. In economic terms, there is no guarantee that a convention will be Pareto efficient. This is the lesson of the game known as the “stag hunt”.

¹⁰⁵ Postema, above n 53, 490.

¹⁰⁶ Sugden, *Economics of Rights*, above n 62, 100–1.

do the same. What such people require is a convention for interpreting the convention. As Sugden argues, this will inexorably lead to the creation of convention that turns on some simple, observable asymmetry, such as height or hair colour. Over time, the original “beauty convention” will be replaced by one that turns on some proxy that, though a crude approximation of beauty, has the virtue that it is simple to apply.

There is also a second reason why human interaction selects for simplicity in conventions. This is because, as Sugden also argues, the use of ambiguous proxies allows for cheating.¹⁰⁷ If the relevant convention is that Player A plays Hawk and Player B plays Dove, then people will naturally want to be assigned the role of Player A as often as possible. Thus, if it is possible to imitate the characteristics of Player A, that is what people will do. However, the consequence of mass imitation is that every player in every game would be labelled Hawk, thus destroying the convention. The conventions that we would expect to survive in any given population would thus not only be simple to apply, but also cheat proof.¹⁰⁸ Once again, this favours crude conventions that turn on some simple, observable criteria.

This “simplicity imperative” explains a very important feature of conventions, and one that will be discussed throughout the remainder of this thesis. The need to prevent interpretive confusion explains why no convention can turn on complex moral or distributive judgments about relative “need” or “desert”. Although there may be clear cases in which one could apply some moral judgment in order to split the claimants, there are simply too many instances in which “reasonable minds may differ”. As with Sugden’s beauty example, any putative convention that turned on such a contestable asymmetry would ultimately be

¹⁰⁷ Ibid 99.

¹⁰⁸ Ibid 166–7.

replaced by one which, though at best a crude approximation of the original, is simple to apply.

Sugden has suggested that the gravitational pull exerted by simplicity explains why conventions appear morally arbitrary.¹⁰⁹ However, if this explanation is true, the most important message to emerge from this section is not that conventions *seem* morally arbitrary; it is instead that they *are* morally arbitrary.¹¹⁰

E Possession and “Uncorrelated Asymmetries”

In light of the foregoing, it will come as no surprise that the argument defended in this chapter is that possession is the asymmetry that enables any two people to determine who is to play Hawk and who Dove in any dispute over an object of property. More particularly, the argument advanced below is that, in a dispute over some tangible thing, the party who is first to send the recognised claim-staking signal by the performing the appropriate act is assigned the aggressive role of Hawk. As Skyrms has noted, the game-theoretic account demonstrates that, '[t]he origin of property ... lies in broken symmetries.'¹¹¹

This explanation of the function of possession has its origins with Hume, who argued that it must naturally occur to people, 'as the most natural expedient, that every one continue to enjoy what he is at present master of, and that property or constant possession be conjoin'd to the immediate possession.'¹¹² More recently, Hume's argument has been refined by Sugden.¹¹³ On Sugden's account, the emergence of the possession convention is not

¹⁰⁹ Ibid 101.

¹¹⁰ It does not, of course, follow that they are therefore necessarily immoral. This is discussed further in Ch V.

¹¹¹ Skyrms, above n 85, 79.

¹¹² Hume, above n 35, 323 [3.2.3.4].

¹¹³ Sugden, *Economics of Rights*, above n 62, 87–103.

attributable to any immanent moral quality, but is instead explicable on the basis that possession, as an observable fact based on some connection between a person and thing, it both relatively simple to apply and cheat proof.¹¹⁴

As will be discussed below, these insights have important implications for our understanding of possession as it operates as a substantive element of the law. However, before discussing these insights, it is important to address a potential misunderstanding about the role of possession, and asymmetry selection more generally. There is a constant, and quite understandable, temptation to attribute the rise of the possession convention to some structural or strategic advantage that possession confers in the event of conflict. Epstein, for example, has argued that a possessor is more likely to prevail in a fight against an intruder because he can exploit his superior knowledge of his surroundings.¹¹⁵ Similarly, Hirshleifer has argued that, all things being equal, a resource is worth more to a possessor. As a consequence, she will fight harder and longer to retain it.¹¹⁶

The first difficulty with these explanations is that they are no more than plausible assertions. A possessor may have superior knowledge of a particular territory but, then again, he may not. Even if he does, it does not necessarily follow that he would be more successful in a fight. Likewise, the notion that a possessor values her territory more than an intruder is certainly plausible, but one could think of any number of circumstances in which this is not true. Some have argued that the tenacity of the possessor can be explained as a manifestation of the “endowment effect”, the idea in behavioural economics that losses are more painful

¹¹⁴ Ibid 101.

¹¹⁵ Richard A Epstein, ‘A Taste for Privacy’ (1980) 9 *Journal of Legal Studies* 665, 672–3.

¹¹⁶ Jack Hirshleifer, ‘Privacy: Its Origin, Function, and Future’ (1980) 9 *Journal of Legal Studies* 649, 657.

than gains are pleasurable.¹¹⁷ However, this argument cannot explain the mystery of possession because it presupposes that the act of possession confers some entitlement. In other words, it does not explain why it is that possessors think they have something to lose. In any case, and perhaps most generally, if the salient asymmetry actually reflected a superior chance of prevailing in the event of a fight, then we would expect to find a convention that favoured, for example, the larger of the two competitors.¹¹⁸

The important point is that differences in payoffs are not required in order to explain the possession rule. As was discussed above, and as biologists have long observed,¹¹⁹ any asymmetry, no matter how arbitrary, is capable of creating a convention.¹²⁰ Maynard Smith and Parker thus describe these distinguishing features as “uncorrelated asymmetries”.¹²¹ Maynard Smith has explained that:

there is no *need* for differences in payoff before asymmetries will settle contests. Consequently, it is a logical error, rather than a factual one, to conclude that because, in some case, ownership does settle contests, there must therefore be a payoff or resource-holding power difference associated with ownership. There may or may not be such a difference, but its presence cannot be deduced from the fact that ownership settles contests.¹²²

¹¹⁷ On which see, for example, David Cohen and Jack L Knetsch, ‘Judicial Choice and Disparities between Measures of Economic Values’ (1992) 30 *Osgoode Hall Law Journal* 737, 749–52; Russell Korobkin, ‘The Endowment Effect and Legal Analysis Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior’ (2002) 97 *Northwestern University Law Review* 1227, 1259–62.

¹¹⁸ For a similar observation see Sugden, *Economics of Rights*, above n 62, 91.

¹¹⁹ Hargreaves Heap and Varoufakis, above n 71, 230.

¹²⁰ *Ibid* 229.

¹²¹ John Maynard Smith and G A Parker, ‘The Logic of Asymmetric Contests’ (1976) 24 *Animal Behaviour* 159, 163–4.

¹²² Maynard Smith, above n 74, 96. Maynard Smith uses the term ownership synonymously with possession.

One may well wonder why such obviously arbitrary asymmetries, such as labelling a player either “red” or “blue”, have this effect. Hargreaves Heap and Varoufakis offer the following explanation:

[i]n interactions (like *Hawk-Dove*) in which there is *rational indeterminacy* in the conventional game theoretic sense, people try to condition their behaviour on *any* information that comes to hand, even meaningless information ... It is a simple psychological response to uncertainty. Indeed there is much evidence to support the idea that people look for ‘extraneous’ reasons to ‘explain’ what are in fact purely random types of behaviour. Of course, once they do so, an initial, random difference in the behaviour of the ‘reds’ and the ‘blues’ gets a bandwagon rolling, leading to a stable discrimination that succeeds in minimising costly conflict despite being non-rational ... So *ex post*, it will seem to make sense as each player does take the best action given that chosen by the other, even though there is no reason *ex ante* for this selection of actions.¹²³

Like a drowning man desperately looking for something to cling to, humans seem to be psychologically predisposed to discern patterns, even though the evidence for them may be extremely weak. However, when faced with choice between multiple equilibria, the validity of the inference is of no importance. All that matters is that the behaviour on which it is based is noticed by other people too. That some patterns and distinguishing characteristics seem to be particularly noticeable is attributable to this largely mysterious quality of “salience”, which itself seems to be part of the deep structure of our psychological pattern-recognition software.¹²⁴

¹²³ Hargreaves Heap and Varoufakis, above n 71, 233–4. Italics in original.

¹²⁴ Sugden attributes the salience of certain asymmetries, including possession, to their susceptibility to analogy, a quality he describes as “fertility”. See Sugden, *Economics of Rights*, above n 61, 94–5. However, this can only be a partial explanation as it does not explain why some particular asymmetry first appeared prominent to people facing the same coordination problem. This point is also noted in Hargreaves Heap and Varoufakis, above n 70, 242.

For present purposes, what merits emphasis is that, whilst it may well be that the possession convention can ultimately be traced to some belief that possessors have an advantage over non-possessors in a fight, it is immaterial whether this belief is also true.¹²⁵ What matters is the perception, not the reality. So long as a critical mass of people come to believe that possessors will aggressively defend some object, the truth of this belief is irrelevant both to the stability of the convention and to any given person's reason for adhering to it.

F Lessons for the Law

The assumption underpinning this chapter is that the *rule* of the positive law that “possession creates a relative title” cannot be understood in isolation from the customary possession *convention*. According to this account, the convention was so pervasive that it was, whether consciously or otherwise, incorporated into the law's formal system of rights and duties and, in the process, became the possession *rule*. The simple answer to the question, “why do acts of possession create property rights in tangible things?” is that this is what the relevant convention prescribes and the law, holding to the motto “if you can't beat 'em, join em”, accepted this as sufficient. If true, this demonstrates the powerful and enduring role of custom within the law.¹²⁶

More specifically, what is most striking about this game-theoretic account of possession is the degree to which it dovetails with the expressive theory discussed in Chapter III. First, this is because, as the discussion of “uncorrelated asymmetries” sought to make clear, neither

¹²⁵ Maynard Smith, above n 74, 22.

¹²⁶ See generally Henry E Smith, ‘Custom in American Property Law: A Vanishing Act’ (2012) 48 *Texas International Law Journal* 507. On the question of whether the state creates or, instead, merely recognises property rights see Richard A Epstein, ‘International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News’ (1992) 78 *Virginia Law Review* 85, 85; Richard A Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (Harvard University Press, 2011) 99.

account explains the significance of possession by an appeal to the possessor's superior ability to exclude others from the disputed resource. To the contrary, both posit that the significance of possession lies in its role as a device that sends recognised signals about claims to tangible things. In other words, on both accounts, the function of possession is purely *expressive*.

Secondly, both the expressive and game-theoretic accounts reinforce the argument made in Chapter III that there is no dichotomy between "lay" and "legal" conceptions of possession. As was discussed above, a convention will never spread within a particular population if it turns upon an asymmetry that people have difficulty identifying and applying. It follows that the asymmetry which distinguishes any two contestants must be, at the very least, one which both recognise. Consequently, any convention that depends upon an esoteric and uniquely legal conception of possession, comprehensible only to those with legal training, could never survive in the broader population. Whilst this does not prove that there is no uniquely legal conception of possession, it does demonstrate that such a conception would fail in its most basic aim of guiding people's behaviour.

Perhaps the most salutary aspect of the spontaneous order explanation concerns its implications for natural rights-based explanations of the possession rule. As has been discussed, Hegel and Locke, amongst others, attempted to explain the possession rule on the basis that it gives expression to some basic moral principle. The claim made above was that all such accounts fail as *explanations* of the possession rule in so far as they attribute its existence to its unique ability to serve some moral end. This is because there is simply no reason to believe that possession's salience as a solution to a coordination problem has anything to do with its intrinsic moral qualities. As Hume himself recognised, in a passage

that anticipated Schelling's work on focal points with remarkable accuracy, 'there are, no doubt, motives of public interest for most of the rules, which determine property; but still I suspect, that these rules are principally fix'd by the imagination, or the more frivolous properties of our thought and conception.'¹²⁷

It may be argued that the foregoing has only demonstrated that the salience of a solution to a coordination problem is not *invariably* related to its moral appeal. Thus, it remains possible that possession's prominence can be attributed to some inherent moral quality unique to it. However, anyone who advances this argument must face the daunting prospect of explaining why the possession rule is not confined to humans.¹²⁸ Biological studies have demonstrated that bees, baboons and even butterflies adopt what Maynard Smith described as the "bourgeois" strategy of playing Hawk if possessor and Dove if non-possessor.¹²⁹ As Maynard Smith notes, what is remarkable about this discovery is that, contrary to what we might expect, disputes in the animal world over resources from territory to potential mates are 'settled by prior ownership, and need not depend on perceptions by the contestants of differences in fighting ability.'¹³⁰ What is important for present purposes is that, unless we credit butterflies with a sense of self-ownership or free will, it is difficult to deny that the salience of possession has little, if anything, to do with its intrinsic moral significance, and is instead largely attributable to a genetic predisposition shared by insects and humans alike.

¹²⁷ Hume, above n 35, 323 [3.2.2.4] n 71.

¹²⁸ For an overview see Jeffrey Evans Stake, "The Property "Instinct"" (2004) 359 *Philosophical Transactions of the Royal Society* 1763.

¹²⁹ Maynard Smith, above n 74, 97–9.

¹³⁰ *Ibid* 98.

VI FROM CONVENTIONS TO NORMS

A Explaining the Normative Quality of Conventions

If there is one fundamental lesson to emerge from game theory and the study of conventions, it is that the emergence of order from chaos can be explained by the repeated interaction of self-interested individuals pursuing their own best interest. Nevertheless, there is something missing from this account: its failure to reflect our subjective experience of rule-compliance.¹³¹

To echo Finnis's criticism, people are not walking utility calculators whose every decision is assessed in accordance with a complete and transitive set of individual preferences conveniently represented in a payoff matrix.¹³² To the contrary, people comply with many duty-imposing rules because they feel that it is what they *ought to do* in the circumstances. Likewise, people generally disapprove of contraventions, even when they are not on the receiving end of them. In short, what is missing from the account given so far is how and why conventions come to have the status of "norms", viz. rules that, in people's subjective experience, have a legitimacy that transcends mere cost-benefit analyses or the fear of punishment.¹³³

Hume also asked this question. As discussed above, Hume attributed the emergence of the "artificial virtue" of "justice" to enlightened self-interest. Conventions, such as those that

¹³¹ See also Eric A Posner, 'Law, Economics, and Inefficient Norms' (1995) 144 *University of Pennsylvania Law Review* 1697, 1709.

¹³² Finnis, above n 72, 67–9.

¹³³ This working definition does not claim to be definitive. On this topic see also Robert D Cooter, 'Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant' (1995) 144 *University of Pennsylvania Law Review* 1643, 1656–7; Robert D Cooter, 'Against Legal Centrism' (1993) 81 *California Law Review* 417, 426; Posner, above n 131, 1699.

“bestow stability on possession”, emerge spontaneously because it is in people’s self-interest that they do so. Having explained this, Hume’s next task was to explain, ‘[w]hy we *annex the idea of virtue to justice, and of vice to injustice?*’.¹³⁴ So, why, for example, does the act of queue-cutting attract the opprobrium both of those in the queue and of general bystanders who happen to witness it? As Hume noted, a purely self-regarding explanation of this phenomenon only seems plausible in relatively small societies in which one can readily observe the corrosive effect of such breaches.¹³⁵ He wrote that:

when society becomes more numerous, and has encreas’d to a tribe or nation, this interest is more remote; nor do men so readily perceive, that disorder and confusion follow upon every breach of these rules, as in a more narrow and contracted society. But tho’ in our actions we may frequently lose sight of that interest, which we have in maintaining order, and may follow a lesser and more present interest, we never fail to observe the prejudice we receive, either mediately or immediately, from the injustice of others; as not being in that case either blinded by passion, or byass’d by any contrary temptation.’¹³⁶

So why is it that, even in very large societies, we are given to condemn, in decidedly normative terms, non-complying conduct even when it has no direct or appreciable effect on our interests? Hume’s answer was to posit the existence of an innate tendency towards what he called “sympathy”:

when the injustice is so distant from us, as in no way to affect our interest, it still displeases us; because we consider it as prejudicial to human society, and pernicious to every one that approaches the person guilty of it. We partake of their uneasiness by *sympathy*; and as every

¹³⁴ Hume, above n 35, 320 [3.2.2.23]. Italics in original.

¹³⁵ Ibid 320 [3.2.2.24].

¹³⁶ Ibid.

thing, which gives uneasiness in human actions, upon the general survey, is call'd *vice*, and whatever produces satisfaction, in the same manner, is denominated *virtue*; this is the reason why the sense of moral good and evil follows upon justice and injustice ... Thus *self-interest* is the original motive to the *establishment* of justice: But a *sympathy* with *public* interest is the source of the *moral* approbation, which attends that virtue.¹³⁷

Sugden has presented an updated version of Hume's account which, in most respects, closely tracks that of Hume. However, he dissents from Hume's belief that the normative dimension of conventions is ultimately attributable to some innate ability to sympathize with the public interest, arguing that this explanation is psychologically implausible.¹³⁸ On Sugden's account, it is possible to explain the normative character of conventions at the level of individual interactions and individual interests.

Imagine that I am approaching a roundabout and that another car appears on my left. According to the convention "give way to the right", I expect the driver to slow. However, he fails to slow and we narrowly avoid an accident. In failing to abide by the established convention, he has imperilled both of us. As a matter of common experience, as Sugden also notes, it is easy to appreciate why I will feel anger and resentment towards the other driver.¹³⁹ The more difficult question is why some bystander, not involved in the interaction, will also condemn the reckless driver's action in distinctly moral terms. According to Sugden, this has nothing to do with the bystander's sense of overall social welfare, but her appreciation that the intersection problem is a form of iterated game and that the convention-breaker may well be her "opponent" in a subsequent round. As a consequence, his behaviour poses a direct

¹³⁷ Ibid 320–1 [3.2.2.24]. Italics in original.

¹³⁸ Sugden, *Economics of Rights*, above n 62, 171.

¹³⁹ Ibid 149.

threat to her interests.¹⁴⁰ In short, if we follow some convention, and it is in our interest that others follow it too, then we will have a reason, rooted in self-interest, to condemn any and all breaches of it. As Sugden writes of the possession convention:

once a person has resolved to follow the convention, his interests are threatened by the existence of mavericks who are aggressive when the convention prescribes submission. Or in plainer English: provided I own *something*, thieves are a threat to me. So even if the conventions of property tend to favour others relative to me, I am not inclined to applaud theft.¹⁴¹

It is not clear, at least for the purpose of this discussion, that there is any great inconsistency between Sugden and Hume. In particular, there is no reason to regard Hume's appeal to "sympathy" as a reference to anything more than our ability to ask the question, "what if everyone behaved like that?".¹⁴² Consistently with his explanation for the spontaneous emergence of conventions, Hume's concept of "sympathy" may simply describe a psychological propensity, ultimately rooted in individual self-interest, to disapprove of behaviour, including our own, that is destructive of the conventions from which we benefit.¹⁴³

Whichever explanation one prefers, what is important is that, given that any convention is better than no convention at all,¹⁴⁴ people's tendency to approve of conforming action and disapprove of non-conforming action can be explained quite independently of the moral content of the convention itself. As Sugden writes, 'a convention of property may become a

¹⁴⁰ Ibid 156.

¹⁴¹ Ibid 159. Italics in original.

¹⁴² See in particular Hume, above n 35, 319 [3.2.2.22].

¹⁴³ See further J L Mackie, *Hume's Moral Theory* (Routledge & K. Paul, 1980) 84–5.

¹⁴⁴ Although, as Sugden notes, it is not invariably true that, relative to the state of nature, all conventions make everyone better off. Sugden, *Economics of Rights*, above n 62, 167.

generally accepted norm even though it cannot be justified in terms of any external standard of fairness.’¹⁴⁵

That is not to say the content of a convention cannot accord with some theory of morality. It is simply to say that any resemblance will be accidental.¹⁴⁶ The morality that grows up around conventions is a sort of morality of reciprocity that Sugden has described as a ‘morality of co-operation’,¹⁴⁷ but will here be referred to as “conventional morality”. Hume captured its essence when he wrote that:

justice establishes itself by a kind of convention or agreement; that is, by a sense of interest, suppos’d to be common to all, and where every single act is performed in expectation that others are to perform the like ... ‘tis only upon the supposition, that others are to imitate my example, that I can be induc’d to embrace that virtue.¹⁴⁸

B Defending Hawk-Dove

The argument made above was that the normative quality of any given convention is not dependent upon its substance. In the realm of conventional morality, the “wrong” of breaching a convention consists in, to paraphrase Hume, “failing to perform the like”. The implication of this insight is that, consistently with the arguments made throughout this chapter, it is possible to explain the undeniable “ought” quality that attends the possession rule without resort to moral theories, or theories of natural law, which seek to explain its

¹⁴⁵ Ibid 159.

¹⁴⁶ Robert Sugden, ‘Normative Expectations’ in Avner Ben-Ner and Louis Putterman (eds), *Economics, Values, and Organization* (Cambridge University Press, 1999) 73, 85; Sugden, *Economics of Rights*, above n 62, 172; Sugden, ‘Spontaneous Order’, above n 104, 95–6.

¹⁴⁷ Sugden, *Economics of Rights*, above n 62, 173.

¹⁴⁸ Hume, above n 35, 320 [3.2.2.22].

normativity in terms of the inherent moral significance of the act of possession, whatever that may be.

This explanation of the normative quality of conventions has another important implication. That is, that one's obligation, as a matter of "conventional morality", to follow some established convention transcends any pragmatic reason that may have motivated people to observe it in its infancy. In other words, irrespective of the nature of the asymmetry on which they happen to turn, conventions develop a normative life all of their own.

This point is particularly important in light of Rose's recent criticism of Hawk-Dove as a model of emergent property rights. The essence of Rose's objection is that, if non-possessors defer to possessors because they fear the latter's aggression, then Hawk-Dove, predicated as it is on the fear of violent reprisals, cannot explain the legal concept of ownership. She writes that:

[b]ut here is the rub: possession is not *property*. The critical point about property is that the non-owner show respect for the owner's property even when the non-owner has little reason to fear the owner's defence – that is, when the owner is not actually in possession, or when the owner is an obviously weaker party who could not repel invasion. When a non-owner defers to the owner under those circumstances, something other than fear is keeping her from moving in and stealing the car or the bicycle or whatever.¹⁴⁹

She goes on to observe that:

¹⁴⁹ Rose, above n 73, 282.

[t]he core attribute of property is precisely that the non-owner respects the owner's claim even when it is *not* defended. There is no question but that for some non-owners, rational fear is the only impediment to larceny. But that is not what makes a property regime work. By and large, in a functioning property regime, most non-owners are not larcenists, and they do not like larcenists. That set of sensibilities is what makes property regimes function: you do not guard your things all the time, because the "world" of non-owners respects your ownership.¹⁵⁰

Much of what Rose writes here is perfectly consistent with the arguments advanced in this thesis. In particular, she is right to emphasise the distinction between the fact of possession and the jural concept of ownership and that the observance of property rights is not, for the most part, dependent upon the fear that non-owners have of owners. Nevertheless, these observations do not expose any fundamental shortcoming in Hawk-Dove as a model for emergent property rights.

Rose's argument suffers from two shortcomings. The first is a misunderstanding of the relevant convention. The convention, at least amongst humans if not butterflies, is that possession creates some form of entitlement. As has been stressed throughout this thesis, that entitlement, once created, is not dependent upon some form of ongoing physical control.¹⁵¹ That this is true is demonstrated by one of Rose's own celebrated examples. As was noted in Chapter III, during winter, residents of Chicago observe an extra-legal rule according to which the person who clears and marks a curb-side parking space is entitled to the exclusive use of it until the snow thaws.¹⁵² What is notable about this rule is that the entitlement persists despite the absence of any physical control on the part of the "shoveler". All that

¹⁵⁰ Ibid 283. Italics in original.

¹⁵¹ Rose is not alone in this misunderstanding. See also Posner, above n 131, 1716.

¹⁵² Rose, 'Possession as the Origin of Property', above n 2, 81.

matters is that, by placing some incongruous object, such as chair,¹⁵³ in the cleared space, the resident has staked her claim in the manner that the convention prescribes.

Once again, this misunderstanding about the nature of the convention is attributable to the persistent, but unnecessary, tendency to believe that the salience of possession is attributable to the fighting advantage that physical control confers upon the possessor.¹⁵⁴ However, as the discussion of “uncorrelated asymmetries” sought to demonstrate, this need not be the case. All that is required is that some critical number of people hold that belief, irrespective of its truth. Once this belief becomes common knowledge, the outcome “possessors takes the prize” becomes a self-fulfilling prophecy. As a consequence, all that matters is that, like a cinema patron placing her jacket on the back of her seat, the “possessor” has staked her claim in the accepted manner.

The second, and more important, shortcoming concerns a failure to appreciate why conventions, irrespective of their substance, become norms. The essence of Rose’s objection to Hawk-Dove is that it fails to explain the existence of a “property ethic” that transcends fear of violent reprisals. However, as was discussed above, the possession rule’s strong normative dimension does not depend upon people’s initial belief, however accurate, that possessors are either particularly bellicose or especially adept fighters. The reason I do not approve of the theft of some millionaire’s unattended briefcase is the same reason that I do not approve of people sneaking through red lights when the police are otherwise engaged. I regard this behaviour as “wrong”. And I regard it as wrong because, at the deeper level that Hume called my capacity for “sympathy”, I understand that such behaviour is ultimately corrosive of the conventions from which I benefit.

¹⁵³ Robert C Ellickson, ‘The Inevitable Trend toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose’ (2010) 19 *William & Mary Bill of Rights Journal* 1015, 1025–6, 1029.

¹⁵⁴ Rose, above n 73, 282.

What this section has sought to emphasise is that the spontaneous order tradition is capable of explaining how and why emergent rules come to have the status of norms without recourse to notions of “altruism” or the “greater good”.

VII CONCLUSION

The previous chapter advanced a definition of possession that emphasised its expressive function. It argued that what is important about the concept of possession is not the degree of control which some person exercises over some thing, but whether that relationship between a person and a thing sends a recognised signal to others about the possessor’s intention to claim it for herself. In this chapter, it has been argued that the convention-based account of Hume and, more recently, Sugden, gives us reason to believe that this is true. In game-theoretic terms, possession breaks the symmetry between two people competing over a scarce resource and allows for the spontaneous emergence of a property convention which then becomes a property norm. Possession’s significance in the law can thus be explained on the Humean basis that fundamental legal norms evolve from the bottom up and are not imposed from the top down. The law protects possession because the law adopted, almost without modification, the spontaneously emergent convention according to which “possessor trumps non-possessor”.

Because application of the possession rule has such obvious distributive consequences, we are naturally resistant to the idea that it is morally arbitrary and picks winners and losers without regard to relative merit or desert. For this reason, we will always be tempted to ask, “*but what is so special about possession?*” However, the argument advanced in this chapter is

that attempting to solve the possession riddle by seeking a meaningful answer to this question is a doomed enterprise. Contrary to the natural law tradition, we cannot explain *why* the possession rule, as opposed to some other allocative mechanism, performs the role of allocating things to people. In game-theoretic terms, possession is “salient” and, crucially, there is no reason to believe that its salience is attributable to its particular instrumental desirability or to some immanent moral quality that is peculiar to it.

The convention-based argument made above does not claim to explain the entirety of the morality of property. To the contrary, it is but one small part. It is undeniably true that, for example, certain material things are inextricably linked to one’s sense of personhood.¹⁵⁵ This very important element of property cannot be explained by an appeal to “conventional morality”. Likewise, the argument made here is, strictly speaking, purely agnostic on the merits of philosophical arguments *qua* philosophical arguments. It simply insists that they cannot explain the origin of the rule. Whether one is a philosopher or a lawyer, the key to understanding the possession rule is to appreciate that it is, as Hume demonstrated, first and foremost a spontaneously emergent convention.

¹⁵⁵ Margaret Jane Radin, ‘Property and Personhood’ (1981) 34 *Stanford Law Review* 957, 969.

CHAPTER V

POSSESSION AND FAIRNESS

I INTRODUCTION

The previous chapter argued that, whilst certainly a legal *rule*, possession remains, first and foremost, an extra-legal *convention*. In particular, the account offered in Chapter IV stressed that the initial emergence and subsequent spread of the possession convention cannot be explained by some immanent moral quality that is peculiar to it. Indeed, building on Sugden's account, it was argued that the simplicity imperative means that the convention is necessarily blind to distributive considerations in any pairwise contest, however obvious they may appear to be.

However, that conventions are strictly *amoral* does not mean that they are also *immoral*. Thus, the fact that the possession convention is blind to merit does not necessarily make it unfair. The primary argument advanced in this Chapter is that, if we abandon the pretence that any allocative rule can reliably pick deserving or meritorious winners, fairness requires that no particular person or class of people is systematically excluded from benefitting from the rule. To continue with the game-theoretic nomenclature, the basic allocative rule will be fair both if and because it is possible for any given member of a population to be assigned the role of Hawk in any given contest over a scarce resource. This, so it is argued, is precisely what the possession rule allows.

Building on Hayek's account of law as a spontaneously emergent phenomenon, it is also argued that, because conventions generate widely held expectations about the resolution of common coordination problems, the positive law should, where possible, incorporate them into its formal system of rights and duties. Where, as is the case with possession, the extra-legal convention is at least tolerably fair, this argument for convergence between custom and law becomes even more compelling.

II HUME'S GUILLOTINE AND LOCKE'S CAVEAT: EPSTEIN'S PARTIAL DEFENCE OF THE POSSESSION RULE

In his celebrated paper, Epstein uses the following example to illustrate the predicament that lies at the heart of any system of private property:

[a] beautiful sea shell is washed ashore after a storm. A man picks it up and puts it in his pocket. A second man comes along and takes it away from him by force. The first man sues to recover the shell, and he is met with the argument that he never owned it at all. How does the legal system respond to this claim? How should it respond?¹

As Epstein observes, every system of property must decide '[w]hat principles decide *which* individuals have ownership rights ... over *what* things.'² The law appears to be caught in a bind because, although every system of private property must have an allocative rule based on some unilateral act, it nevertheless seems impossible to explain how and why any unilateral act can bind others in the absence of their consent. In the present context, the question is why the

¹ R A Epstein, 'Possession as the Root of Title' (1979) 13 *Georgia Law Review* 1221, 1221.

² Ibid. Italics in original.

non-consensual act of taking possession of some object has the effect of placing everyone else under a duty not to interfere with it. Epstein explains the dilemma in the following terms:

[t]he essence of any property right is a claim to bind the rest of the world; such cannot be obtained, contra Locke, by [any] unilateral conduct on the part of one person without the consent of the rest of the world whose rights are thereby violated or reduced. First possession runs afoul of this principle; so does the labor theory. Indeed the point is a matter of principle perfectly general, and it applies moreover to any and every theory that uses individual actions as the source of entitlements against the collectivity at large. Property may look to be an individualistic institution, but the very nature and definition of the right seems to require some collective social institution to lie at its base. No "natural" act can legitimate a social claim to property.³

So, to return to Epstein's example given above, the problem for the first shell collector is that he cannot demonstrate why, in the absence of consent, his unilateral act of placing the shell in his pocket should have the effect of placing the second collector under a strict duty of non-interference in respect of it. Epstein argues that his inability to do so is a particular manifestation of "Hume's guillotine", according to which one cannot, as a matter of logic, move from a factual premise to a moral conclusion.⁴

Strange as it may sound, the force of this argument appears to have occurred to Locke himself. Whilst Locke argued that mixing one's labour with some object creates a morally justifiable right to it, this famous proposition was subject to a less frequently discussed, but nevertheless extremely significant, qualification. Locke wrote that, '[f]or his "labour" being the

³ Ibid 1228.

⁴ Ibid 1240.

unquestionable property of the labourer, no man but he can have a right to what that is once joined to, *at least where there is enough, and as good left in common for others.*⁵

Whilst the italicised portion of this extract may appear to be so obviously reasonable as to amount to a platitude, Locke's "caveat" amounts to no less than a tacit concession that, contrary to the argument that immediately precedes it, the unilateral act of mixing one's labour with some object does not create duties that legitimately bind others. This is because what Locke neglects to mention is that property rights are only necessary when there is not enough to go around. If there were an infinite abundance of everything, there would be no need for property rights. The more important point, however, is that there will never be a situation in which there is "enough, and as a good left in common for others". This is because, contrary to what Locke implicitly suggests, scarcity does not result from shortages *per se*. Rather, if we follow Hume's account, discussed in Chapter IV, scarcity is a consequence of our insatiable and incurable acquisitiveness. If this is true, then scarcity is a permanent and inevitable feature of human life in periods of both feast and famine.

Locke's "caveat" thus appears to suggest that the paradox at the heart of private property troubled even the strongest proponents of the natural law tradition. No one, it seems, can explain why, in the absence of consent, any particular duty-owner is morally obliged to abide by his duty.

⁵ John Locke, *Two Treatises of Government: And a Letter Concerning Toleration* (Yale University Press, 2003), §27, 111–2. Italics supplied.

So how to break this impasse? Epstein argues that we do not need to. The virtue of the possession rule is that, whatever its philosophical shortcomings, it is accepted by duty-owners as the determinative rule. He writes that:

[w]ithin this viewpoint it is possible to show the unique place of first possession. It enjoyed in all past times the status of a legal rule, not only for the stock examples of wild animals and sea shells, but also for unoccupied land. In essence the first possession rule has been the organizing principle of most social institutions, and the heavy burden of persuasion lies upon those who wish to displace it.⁶

Epstein concludes that, '[i]t may be an unresolved intellectual mystery of how a mere assertion of right can, if often repeated and acknowledged, be sufficient to generate the right in question. As an institutional matter, however, it is difficult in the extreme to conceive of any other system.'⁷

III IS POSSESSION FAIR?

A Repugnant Conventions

Epstein's 'qualified defence'⁸ of the possession rule amounts to the following: if we wish to have a system of private property, then we need a rule that allocates objects of property to right-holders. Given that no one can satisfactorily explain why unilateral acts create binding duties *in rem*, the best allocative rule that we can have is the allocative rule that we have got. In other words, "better the devil you know".

⁶ Epstein, above n 1, 1241.

⁷ Ibid 1242.

⁸ Ibid 1238.

Epstein's argument is thus subtly different from that offered by theorists of spontaneous order. Whereas Epstein cuts the Gordian knot created by the "is-ought" problem by pointing to the status of the possession rule as an accomplished fact, spontaneous order-based accounts of possession simply ignore Hume's guillotine. As was argued in Chapter IV, conventions emerge and thrive for reasons that are totally unrelated to their moral justifiability. Likewise, though conventions become norms, their normative dimension, which is rooted in "conventional morality", has nothing to do with their substantive content. As Sugden explained, '[h]aving become a norm, a convention *becomes* a standard of fairness; but ... it does not become a norm *because* it is seen to be fair.'⁹

Importantly, this means that there is nothing to prevent the spontaneous emergence of conventions that are morally repugnant. As Hargreaves Heap and Varoufakis write:

evolutionary theory predicts that the slightest asymmetries will engender a convention even though it may not suit everyone, or indeed even if it short-changes the majority. It may be discriminatory, inequitable, non-rational, indeed thoroughly disagreeable, yet some such convention is likely to arise when antagonistic social interaction (like *Hawk-Dove*) is repeated.¹⁰

McAdams gives the example of a property convention that turns on the asymmetry of sex such that, in a contest between a man and a woman, the man is assigned the role of Hawk. Although such an asymmetry suffers from the weakness that it cannot resolve disputes between people

⁹ Robert Sugden, *The Economics of Rights, Co-Operation, and Welfare* (B. Blackwell, 1986) 159.

¹⁰ Shaun Hargreaves Heap and Yanis Varoufakis, *Game Theory: A Critical Introduction* (Routledge, 2nd ed, 2004) 247.

of the same sex, its simplicity means that it is nevertheless a plausible candidate for a convention. He writes that:

[w]hether you are a male or a female, if all other players play the strategy specified for their sex, your best response is to play the strategy specified for your sex. As with all conventions, once it arises, it will not pay for an individual to deviate. If a woman tries to play Hawk against men, who expect women to play Dove, she will simply endure the worst outcome (as will the men with whom she interacts). The result is a convention in which all property winds up in the hands of men. The same point can be made by using race roles instead of or in addition to sex roles, or any other immediately observable distinguishing trait.¹¹

The point that deserves emphasis is that even highly discriminatory and obviously unfair conventions can be perfectly stable. So long as a critical mass of people adhere to a convention, people do better by conformity than by defiance, even if though it may conspicuously and persistently benefit some at the expense of others. Once a convention has become established, it becomes resistant to individual acts of rebellion. Conventions can only be changed by concerted, collective action.¹²

B Unavoidable Inequality

Whilst the moral desirability of a convention is incidental to its “fitness”, it does not follow that conventions will therefore be immoral. It may well be that, by happy coincidence, a property convention is at least morally tolerable. However, before discussing whether or not

¹¹ Richard H McAdams, ‘Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law’ (2008) 82 *Southern California Law Review* 209, 247.

¹² Hargreaves Heap and Varoufakis, above n 10, 246.

the possession convention satisfies a minimum level of fairness, something must be said about the nature of the social interactions modelled by Hawk-Dove.

Hawk-Dove is not a zero-sum game. Because both players lose when a Hawk meets another Hawk, players have an incentive to coordinate their action. There is thus a sense in which any solution that avoids this outcome is a good one. However, because Hawk-Dove is not a pure coordination game, not all players will benefit equally from the convention. Because, as was discussed in Chapter IV, Dove-Dove is not a Nash equilibrium, it is inevitable that one party must leave disappointed.

As a consequence, where players are faced with an impure coordination problem, we cannot criticise any convention on the ground that it is discriminatory and productive of inequality. Discriminating between individuals by assigning them different, though complementary, strategies is precisely what all conventions do. That this discrimination has adverse distributive consequences for one of the players is not a failing but is, instead, an inevitable consequence of the predicament in which the players find themselves.¹³ Given this, on what grounds might we say that a convention is morally defensible or not?

C “Cross-cutting” Asymmetries and Fairness

The argument made in this section is that a convention will be *fair*, and thus morally acceptable, so long as no one is systematically excluded from benefiting from it. In the case of the basic allocative rule in property law, this argument can be put in the following way. Because such a rule cannot draw distinctions between people based on relative merit or desert, it must treat

¹³ See also McAdams, above n 11, 231.

everyone as equally deserving. As a consequence, a convention will be “unfair” if the asymmetry along which it breaks means that some people are systemically excluded from benefitting from it in the sense that they are forever doomed to be assigned the role of Dove.

If this is true, then a convention will be fair if it breaks along an asymmetry that allows any given member of the population to play Hawk at least some of the time. Sugden has described asymmetries that have this property as “cross-cutting” asymmetries.¹⁴ If the convention is such that any given individual has the same probability of being assigned a particular role as any other individual, then the asymmetry upon which it turns is “perfectly cross-cutting”.¹⁵ This basic notion of a cross-cutting asymmetry can be illustrated by reference to the “crossroads” coordination game, discussed in Chapter IV. There are a number of conventions that could solve this very common coordination problem, but not all are cross-cutting. Sugden gives the rule “cars give way to buses” as an example.¹⁶ Quite apart from the fact that it cannot resolve bus-truck or bus-bus encounters, this potential convention is not cross-cutting because those who travel exclusively by car must always adopt the submissive strategy of giving way. In contrast, the rule “give way to the right” is cross-cutting because there is nothing preventing any given road user from being positioned to the right of any other vehicle at an intersection.

Cross-cutting asymmetries are important in Sugden’s account because they explain why certain conventions come to have moral force.¹⁷ He argues that, so long as any given member of a population has a chance of being assigned the role Hawk in any given encounter, everyone will have a reason to condemn those who defy the convention by playing Hawk when it demands that they play Dove. If someone tells me that he never yields at an intersection irrespective of

¹⁴ Sugden, above n 9, 157.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid 157–9.

whether the other vehicle is approaching him from the left or right, I will condemn his behaviour because, to borrow Sugden's words, '[i]t is bound to occur to me that some day I might meet a fool like him approaching from my left.'¹⁸

On the account presented here, cross-cutting asymmetries are significant, but for a different reason. The significance of a cross-cutting asymmetry such as "give way to the right" is that, because any given person can find himself on either side of the relevant fault-line, a convention that turns on a cross-cutting asymmetry guarantees a minimum level of fairness by ensuring that no one is doomed to play Dove in every encounter.

Some might notice that the moral intuition here bears a passing resemblance to Rawls's famous thought experiment known as the "original position".¹⁹ Rawls's idea was that if we place ourselves behind a "veil of ignorance", so that we are ignorant of everything from our natural abilities to our place in the social hierarchy, we would not select a particular rule or institution that favoured any one sort of person over any other sort of person. Using the game-theoretic nomenclature, we would not agree to a rule that assigned the role of Hawk to one particular group, however it may be defined, more frequently than any other group. This is because, as Binmore has observed, '[d]evil take the hindmost ... becomes an unattractive principle for those bargaining in the original position, since you yourself might end up with the lottery ticket that assigns you to the rear.'²⁰ If this is true, then rational people bargaining in the original position may well agree upon an allocative rule that assigns the role of Hawk to any given person with more or less equal probability.

¹⁸ Ibid 157.

¹⁹ John Rawls, *A Theory of Justice* (Oxford University Press, 1972) 12, 136–42.

²⁰ K G Binmore, *Natural Justice* (Oxford University Press, 2005) 15.

It is important to stress that, so far as Rawls is concerned, this is as far as the resemblance goes. The purpose of this Chapter is not to defend a broader notion of justice as fairness. So, for example, it does not follow from the argument made above that we either do or ought to have an egalitarian distribution of property rights. This is because, just like the right to exclude, the possession rule only creates a first cut of property entitlements. It is not the purpose of such a rule to create a final, or an optimal, distribution of rights to scarce things. As Hume made clear, rules that bestow “stability on possession” aim only to prevent the social implosion that would otherwise occur if Hawk-Hawk interactions were the rule rather than the exception.²¹ In particular, the basic allocative rule says nothing whatever about whether parties can transfer, lease, mortgage or otherwise deal with the entitlements that its application creates. As Coase famously demonstrated,²² so long as rights are freely alienable and transactions costs are sufficiently low, we should expect that rights, irrespective of their initial distribution, will ultimately come to reside with those who most value them.²³

The important point is that, if the foregoing argument is true, the possession rule satisfies this minimum requirement of fairness because it turns on a cross-cutting asymmetry.²⁴ It is cross-cutting because there is nothing to prevent any given individual, regardless of her personal attributes, from being the first person to send the recognized claim-staking signal in respect of some tangible thing. In game-theoretic terms, the convention is such that any given person can be assigned the role of Hawk in any given encounter over any given thing. All that is required is that she beat her competitor to the punch.

²¹ David Hume, *A Treatise of Human Nature* (Oxford University Press, 2000) 330 [3.2.4.1].

²² R H Coase, ‘The Problem of Social Cost’ (1960) 3 *Journal of Law & Economics* 1, 6–8, 10.

²³ Though, as Coase himself stressed, the presence of transaction costs very often prevent this from occurring. See *ibid* 15–6.

²⁴ Sugden, above n 9, 158.

This is not to say that, like flipping a coin, possession is always “perfectly cross-cutting”. As is demonstrated by customary whaling rules and the decision in *Pierson*, discussed in Chapter III, performing the correct claim-staking act might at times require some degree of skill. In this respect it may not be precisely the sort of rule that people bargaining in Rawls’s original position would agree to because, when placed behind the veil of ignorance, no one can tell whether they are likely to be an ace marksman or a lousy shot with a harpoon. What such people would perhaps want is a convention that turns on a perfectly cross-cutting asymmetry. The role of skill in the allocation of entitlements raises difficult questions in moral philosophy that are beyond the scope of this thesis. Nevertheless, it is possible to conclude that incumbency is not the only virtue of the possession rule.²⁵ If the account offered above is true, it is also tolerably fair.

IV THE PLACE OF CONVENTIONS IN THE LAW

A Hayek and The Danger of “Divergence”

The argument made above provided a defence, on fairness grounds, of the role of one particular convention in the law of property. As is discussed immediately below, there is an argument to be made about the virtues of incorporating conventions into the positive law more generally.

Epstein has written of the possession rule that, ‘[t]he rule that possession lies at the root of title is one that a court can understand and apply; absent a better alternative it becomes therefore an attractive starting point for resolving particular disputes over the ownership of particular things.’²⁶ The argument made here is that, although it is undoubtedly important that any given

²⁵ Epstein, above n 1, 1242.

²⁶ Ibid 1229.

rule be intelligible to a court, this is not the primary virtue of the possession rule, or of conventional rules more generally. Rather, possession's primary virtue is that, as a salient convention, it can be understood and applied by laymen *without* the assistance of specialists or the need for judicial intervention. This basic point, emphasised throughout this thesis, was captured by Ackerman, who has written that:

[e]very day, Layman is obliged to make countless decisions as to whether one thing or another belongs to him or somebody else. Yet it is a rare thing indeed for him to find it profitable to obtain carefully considered legal advice before making this decision. Indeed, most of the time Layman negotiates his way through the complex web of property relationships that structures his social universe without even perceiving the need for expert guidance.²⁷

The reason why non-specialists can navigate their way through the web of property transactions which, as both Ackerman and Penner note,²⁸ are the stuff of daily life is that the basic rules, “possession creates entitlement”, “keep off” etc. are simple and salient. To put the same point in broadly Coasean terms, because spontaneously emergent conventions turn on distinctions that “stand out”, rules that track these distinctions enable people to determine who holds the right and who owes the correlative duty in respect of any given conduct with a high degree of accuracy and at very little cost.²⁹ The most obvious advantage of rules that piggyback on extra-legal norms is that they will, reliably achieve their most basic goal of avoiding miscoordination events; in this case, Hawk-Hawk confrontations.

²⁷ Bruce A Ackerman, *Private Property and the Constitution* (Yale University Press, 1977) 116.

²⁸ Ibid 97; J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 30.

²⁹ Though, as Ellickson also notes, Coase did not appear to appreciate that establishing the initial distribution of rights from which the parties may bargain is often costlier than the bargaining process itself. See Robert C Ellickson, *Order without Law: How Neighbors Settle Disputes* (Harvard U. P, New ed, 1994) 281.

This is not to say that such a rule will be optimal from any external perspective; it is simply to reprise the aforementioned argument that any solution to a coordination problem is better than no solution at all. Moreover, it is not an argument that the law should never seek to improve upon customary solutions to coordination problems. As Ellickson has argued, there are instances in which, ‘lawmakers interested in the resolution of humdrum disputes that arise *within* a group are unlikely to improve upon the group’s customary rules’.³⁰ However, as was stressed in the previous section, one could easily conceive of extra-legal rules that are morally repugnant and/or actively harmful to those to whom they apply, in which case the law ought to harness its own form of prominence in order to create an alternative convention.³¹

Be that as it may, the danger inherent in designing rules that diverge substantially from prevailing extra-legal conventions is that, just like the Académie française’s futile attempts to banish “le weekend” from demotic French, those rules will simply be ignored by those whose behaviour they are intended to guide.³² If there is one lesson to be drawn from the work of Law and Society scholars, it is that it is a mistake to believe that the state is the sole and exclusive source of “rules”.³³ Scholars such as Ellickson and Bernstein have demonstrated that communities are perfectly able to regulate their affairs by recourse to an entirely extra-legal code of rules.³⁴ As Ellickson concluded in his famous study of the cattlemen of Shasta County, ‘some spheres of life seem to lie entirely beyond the shadow of the law.’³⁵

³⁰ Ibid 283.

³¹ On law’s expressive power see Richard H McAdams, *The Expressive Powers of Law: Theories and Limits* (Harvard University Press, 2015) 63; Richard H McAdams and Janice Nadler, ‘Testing the Focal Point Theory of Legal Compliance: The Effect of Third-Party Expression in an Experimental Hawk/Dove Game’ (2005) 2 *Journal of Empirical Legal Studies* 87, 97–8.

³² For a similar observation see Thomas W Merrill and Henry E Smith, ‘The Morality of Property’ (2007) 48 *William and Mary Law Review* 1849, 1854.

³³ Ellickson, above n 29, 138–47.

³⁴ See, for example, Ellickson, above n 29; Lisa Bernstein, ‘Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry’ (1992) 21 *Journal of Legal Studies* 115.

³⁵ Ellickson, above n 29, 283.

It is possible to go further than this and argue that a substantial divergence between legal rules and conventional rules not only results in legal futility but also has the potential to confound the legitimate expectations of those who are formally subject to the law's jurisdiction but whose behaviour is not necessarily guided by it. This sort of argument has previously been made by Hayek.

Hayek regarded "the law", in contrast to legislation, as the collection of spontaneously emergent rules, standards, customs etc. that people actually rely upon in their dealings with others.³⁶ He described the law as a 'going order which nobody has designed, an order that has formed itself without the knowledge and often against the will of authority, that extends beyond the range of deliberate organization on the part of anybody'.³⁷ Given this, in Hayek's view the role of courts is simply to enforce the set of expectations created by those spontaneously emergent norms. The role of a judge is to determine whether the parties:

have conformed to expectations which the other parties had reasonably formed because they correspond to the practices on which the everyday conduct of the members of the group was based. The significance of customs here is that they give rise to expectations that guide people's actions, and what will be regarded as binding will therefore be those practices that everybody counts on being observed and which have thereby become the condition for the success of most activities.³⁸

Thus, what ought to be decisive in any dispute is not whether the impugned action was:

³⁶ FA Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge and Kegan Paul, 1973) vol 1 Rules and Order, 72–3. Hayek's view of law thus departs from the positivist tradition, according to which the question of whether a norm constitutes a "law" depends upon its source or pedigree. See John Gardner, 'Legal Positivism: 5 1/2 Myths' (2001) 46 *American Journal of Jurisprudence* 199, 199.

³⁷ Hayek, above n 36, 119.

³⁸ *Ibid* 96–7. Hayek's concept of a custom seems almost identical to that of a convention, discussed above.

expedient from some higher point of view or served a particular result desired by authority, but only whether the conduct under dispute conformed to recognized rules. The only public good with which [a judge] can be concerned is the observance of those rules that individuals could reasonably count on.³⁹

So long as parties are able to resolve any dispute by application of in-group norms and do not have recourse to the legal system,⁴⁰ no problem of confounded expectations is likely to occur. However, should a dispute end up in court, any substantial divergence between the conventional basis on which the parties conducted their affairs and the positive law, which a judge is called upon to apply, may lead to an outcome that is not only unexpected but also, at least on Hayek's account, unjust to the losing party.⁴¹ Even if, at least according to standard accounts,⁴² this sort of divergence might not strictly amount to a failure of the rule of law, it nevertheless has the potential to diminish the law's claim to authority in the eyes of those who are subject to it.

This "divergence" concern is not always a decisive argument for retaining conventional or customary arrangements. As Hayek himself acknowledged, "we have always done it this way" is not a sufficient reason to persist with a customary rule that is demonstrably undesirable.⁴³ However, it does provide another, cumulative, reason to retain conventional rules, particularly when, as was argued of the possession rule, they are tolerably fair.

³⁹ Ibid 87.

⁴⁰ Indeed, as Bernstein has demonstrated, keeping in-group disputes out of the courts can itself be a substantive in-group norm. See Bernstein, above n 34, 124–6, 134–5.

⁴¹ Perhaps the most historically important example of this consistency imperative in action was the incorporation of the *Lex Mercatoria* into the common law during the 18th century.

⁴² See, for example, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2nd ed, 2009) 214–8; Lon L Fuller, *The Morality of Law* (Yale University Press, 1964) 39.

⁴³ Hayek, above n 36, 88–9. Although Hayek argued that this should only be done through legislation which, unlike judicial decision, operates prospectively: at 89.

B *The Role of Possession in Land Registration Regimes*

The power of conventions in the law is neatly illustrated by the enduring importance of possession as a claim-staking act in jurisdictions that have moved to a comprehensive system of land registration. In such jurisdictions, possession remains relevant in at least two circumstances.

First, disputes in which neither party is the registered proprietor will be decided in favour of the party who can establish title by a prior act of possession. That is, prior possession is sufficient for the purpose of maintaining an action in trespass or ejectment against any third party who does not claim as, or through, the registered proprietor.⁴⁴ The point is clearly articulated by Hope J, who explained that:

if A was the registered proprietor of an estate in fee simple in land, and X remained in possession for twenty years, X would not obtain effective title as against A, but he would obtain a title against all the world save A and those claiming through him. If Y dispossessed him, I should have thought that X would be entitled to bring an action of ejectment against him; and indeed, A could do this whether he had been in possession for twenty years or for some lesser period.⁴⁵

Secondly, and perhaps more remarkably, many Australian jurisdictions have also gone so far as to recognise adverse possession as an exception to the fundamental principle of indefeasibility.⁴⁶ Importantly, Australia is not the only jurisdiction that continues to recognise

⁴⁴ See, for example, *Spark v Whale Three Minute Car Wash* (1970) 92 WN (NSW) 1087, 1105 (Slattery J); *Newington v Windeyer* (1985) 3 NSWLR 555, 563–4 (McHugh J).

⁴⁵ *Spark v Meers* (1971) 2 NSWLR 1, 13.

⁴⁶ Although not all jurisdictions achieve this through the same mechanism. Compare, for example, *Transfer of Land Act 1958* (Vic), s 42(2)(b) with *Real Property Act 1900* (NSW), s 45D(1). For an overview see Fiona Burns,

the significance of possession. In the United Kingdom, for example, the relevant legislative scheme provides that transferees of registered interests take subject to the unregistered interests of those who are, to use the legislative phrase, in ‘actual occupation’ of the land.⁴⁷ Moreover, as in Australian jurisdictions, the UK statute also recognises a modified version of the adverse possession doctrine.⁴⁸

It is not immediately apparent why possession should continue to play such an important role in jurisdictions with Torrens-type systems of land registration, the object of which is the creation of a definitive register of interests. As others have also asked,⁴⁹ what justifies the preservation of the doctrine of adverse possession, or something very much like it, when the identity of the registered proprietor can be discovered by a simple computer search? A solution to the puzzle is suggested below and, once again, the answer concerns the salience of possession.

C The Power of Salience

Burns has written that, ‘in a title-by-registration system, possession is no longer the bedrock of land law ... As possession declines as the normative principle, so the legitimacy of registration is amplified because the only way of dealing with the land is through alteration of the register.’⁵⁰ If the discussion above is correct then, whilst it may be true to say that altering the

‘Adverse Possession and Title-by-Registration Systems in Australia and England’ (2011) 35 *Melbourne University Law Review* 773, 792–803.

⁴⁷ *Land Registration Act 2002* (UK) sch 3, para 2. See generally E H Burn and John Cartwright, *Cheshire and Burn’s Modern Law of Real Property* (Oxford University Press, 18th ed, 2011), 1104–13.

⁴⁸ *Land Registration Act 2002* (UK) sch 6. Significantly, the UK scheme requires that the existing registered proprietor be notified of any application by an adverse possessor to become registered under the Act. See generally Charles Harpum, Stuart Bridge and Martin Dixon, *The Law of Real Property* (Sweet & Maxwell, 7th ed, 2008) 1494–1512 [35–070]–[35–095].

⁴⁹ *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, 426 (Lord Bingham) (‘Pye’). See generally Lynden Griggs, ‘Possessory Titles in a System of Title by Registration’ (1999) 21 *Adelaide Law Review* 157.

⁵⁰ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 22.

register is the only way of dealing with a registered *interest* in land, it is not true to say that it is the only way of dealing with registered *land*. This distinction is important because, to continue with Hope J's example, as the decision in *Asher v Whitlock* makes clear,⁵¹ there is no reason why "X" could not sell, gift, devise or otherwise alienate his "possessory title" to a parcel of land that has been recorded in a folio of the register.

More importantly, whilst it is true that the importance of possession has declined in land law, the advent of registration regimes has not entirely sapped it of its normative force. Though admittedly speculative, one argument that may explain the continuing role of possession in systems of "title-by-registration" is that, whether the resulting claim is ever formalised on the register, people accept that acts that amount to possession confer some form of entitlement on the person who performs them. As the discussion of *Pye* and *Abbatangelo* in Chapter III demonstrated, possession retains its salience as a means of announcing a property claim in jurisdictions with sophisticated registration systems. Given this, it seems unlikely that eliminating the possession rule from the *law* of property will also eliminate it from the *practice* of property. The consequence may simply be the creation of a "formal" and an "informal" system that will come to operate in parallel.

The argument for retaining formal recognition of the possession rule is thus that it prevents substantial divergence between the formal law of property and the norms that people actually use to guide their behaviour in respect of the objects of property. This is not necessarily a decisive argument. As was also noted above, one can easily conceive of some imperative that justifies the law's departure from a customary solution, and it is possible that the conclusiveness of the register is such an imperative. Moreover, this is not to deny that there is

⁵¹ [1865] LR 1 QB 1, 6 (Cockburn J). See also *Allen v Roughley* (1955) 94 CLR 98, 145 (Taylor J).

a complex interplay between legal and customary understandings of property, such that the former comes to influence the latter. For example, as Pottage has argued, modern registration regimes appear to have changed, quite fundamentally, the way in which we conceive of property in land.⁵²

However, even accepting that there is an interplay between law and custom, the more general point being made is simply that salient solutions to coordination problems are not easily ignored or dislodged. Although, as Posner has argued,⁵³ a register will often, although not invariably,⁵⁴ represent an improvement over the possession rule, it may well be that the sheer prominence of possession as a means of announcing a claim to a tangible thing is such that it cannot be completely excluded from our, or perhaps any, system of property.⁵⁵

V CONCLUSION

This Chapter commenced by considering Epstein's famous essay in which he defended the possession rule on the qualified basis that "the devil you know is better than the devil you don't". The argument made above went substantially further than this partial defence. It was argued that, not only does the possession convention have the distinct advantage of incumbency, the asymmetry on which it turns is such that no one is systemically excluded from playing "Hawk" in any given encounter over an object of property. Perverse as it may appear,

⁵² Alain Pottage, 'The Measure of Land' (1994) 57 *Modern Law Review* 361, 363.

⁵³ Eric A Posner, 'Law, Economics, and Inefficient Norms' (1995) 144 *University of Pennsylvania Law Review* 1697, 1716.

⁵⁴ This because the benefits of such a system must be weighed against the costs of creating and maintaining it. See Douglas Baird and Thomas Jackson, 'Information, Uncertainty, and the Transfer of Property' (1984) 13 *Journal of Legal Studies* 299, 303–8. This issue is discussed further in Chapter VII.

⁵⁵ See also Thomas W Merrill, 'Possession as a Natural Right' (2015) 9 *New York University Journal of Law and Liberty* 345, 364.

the moral arbitrariness and distributive blindness of the convention actually helps to ensure that it satisfies this minimal standard of fairness.

What is more, because possession is the salient solution to the coordination problem created by scarcity, incorporation of the possession convention into the positive law's formal system of rights and duties ensures that, unless divergence is justified on moral or instrumental grounds, the law will not confound widely-held normative expectations about the proper resolution of some question of mine and thine.

Chapters III, IV and V of this thesis have set out what has been described as “the expressive theory of possession”. Chapter III argued that the concept of possession refers to those acts and symbols that, within a given population, constitute an understood and accepted means of staking a claim to some object of property. Chapter IV argued that the possession *rule* of the positive law is, first and foremost, an extra-legal *convention* that generates widely-held expectations about how people are to behave when faced with a particular coordination problem. It was argued that, contrary to the natural law tradition, the emergence of the possession rule cannot be attributed to some moral quality that is peculiar to it. Nevertheless, as was argued in this chapter, that the possession rule is *amoral* does not mean that it is therefore immoral or otherwise unfair. Chapters VI and VII will complete this investigation into the nature and function of possession by discussing the implications of applying this account of possession to three notoriously difficult issues in personal property law. Chapter VI will consider the group of cases generally referred to as the “finders’ cases” and, finally, Chapter VII will consider the issues of theft and good faith purchase.

CHAPTER VI

LOSING, FINDING AND THE LIMITS OF POSSESSION

I INTRODUCTION

In Chapter III it was argued that possession describes the family of signals that, within a particular population, constitute recognised and accepted ways of reducing objects of property to private ownership. One may wonder why the possession rule persists in such an unadulterated form in societies, and particularly those with registration systems, in which so little is *res nullius*. One explanation advanced in Chapter V is that possession's remarkable salience is such that it will always remain an accepted way of announcing a property claim.

Putting aside this broader question, there is one event that necessitates the existence of some mechanism for assigning new names to objects of property that have already been reduced to private ownership. That is, every society, no matter how urbanised, must have some means of dealing with the inevitable fact that people will lose things. Although lost objects do not become *res nullius*, there must be some settled rule for peaceably filling the vacuum caused by the absence of the owner in order to prevent lost property from becoming, in Donaldson LJ's words, 'subject to a free-for-all in which the physically weakest would go to the wall.'¹ Whether or not the owner is ultimately found, what the law must do, as Auld LJ remarked, is

¹ *Parker v British Airways Board* [1982] QB 1004, 1009 ('Parker'). See also *Tamworth Industries Ltd v Attorney-General* [1991] 3 NZLR 616, 621 (Eichelbaum CJ) ('Tamworth').

to look ‘for a substitute owner’.² The question is, how should the law go about selecting such a person?

Though they do not become “ownerless” in a technical sense, lost things nevertheless return, in a very real sense, to “the commons”. As a consequence, one might assume that the problem of losing and finding could be easily solved by application of the possession rule, so that the first person to send the appropriate claim-staking signal would acquire a property right to the lost object. Because the title so acquired would be relative and not absolute, application of the possession rule would create a “substitute owner” without also preventing the owner from subsequently reclaiming the lost chattel from the finder. As will be discussed below, courts do indeed claim that disputes over lost objects are resolved by determining which of the two competing parties can show prior possession.³ That is, the orthodox position is that when two people, neither of whom claims as or under the owner, are in a dispute over a lost chattel, that dispute will be decided in favour of the party whose root of title is based on an earlier act of possession.

The question to be answered in this Chapter is whether, based on the expressive account of possession developed in the previous three Chapters, this explanation of the “finders’ cases” is actually true. The answer given below is that it is not. It will be argued that the attempts, both judicial and academic, to explain the law’s response to the problem of loss a manifestation of the possession rule are both artificial and unconvincing. Although no compelling moral or instrumental case has been made for departing from the possession rule as determinative in disputes over lost chattels, it is clear that, at least in cases in which one party is an “occupier”, such disputes are resolved by a collection of non-possessory, *sui*

² *Waverley Borough Council v Fletcher* [1996] QB 334, 345 (‘Waverley’).

³ See, for example, *Parker* [1982] QB 1004, 1008 (Donaldson LJ).

generis rules that turn on facts about the nature and location of the find. Whilst attempts to reconcile rules peculiar to finding with a general theory of possession have been undertaken in the hope of rationalising the law, the persistent attempts by both courts and commentators to shoehorn these *sui generis* rules into an ever more amorphous concept of possession have, ironically, succeeded only in distorting the basic concept.

II THE RULES IN OUTLINE

A Occupiers, Possessors and Owners: A Brief Note on the Nomenclature

Before commencing the substantive analysis, a brief note should be made about the terminology used below. First, the term “owner” will be used to refer to the right-holder who has lost the chattel in question. This term is not intended to suggest that she has the best possible right to the lost chattel. It simply denotes that her right remains superior to that of either of the competing finders. For obvious reasons, the owner never appears “on stage” in these disputes.

Secondly, as will be discussed in detail below, most cases involve disputes between finders and those with some form of control over the land on which the lost chattel was found. The question is what to call such people. Although one is tempted to describe them as “possessors”, to do so is to suggest that they have an estate or interest in the land in question. However, it is not clear whether or not the relevant rule includes people, such as contractual licensees, who have no proprietary interest in the land on which the chattel was found.

In order to prevent this peripheral issue from derailing the more important discussion, those who have some form of control over the land on which a lost chattel is found, whether or not they also have a property right in it, will be referred to by the generic appellation “occupier”. Although the term “occupier” is not entirely free of ambiguity, it is hoped that its use will avoid the sort of semantic distractions discussed in Chapter II.

Finally, because the rules on finding have been thoroughly discussed in the case law and by scholars, most recently by Hickey,⁴ the overview given here will be brief. However, before commencing, one important point must be reemphasised about the summary given below. One might argue, as does Hickey, that the term “finders’ cases” is an unhelpful, or even misleading, taxonomical category because it suggests a distinction without a difference.⁵ If one believes that the cases on finding can be explained as particular manifestations of the possession rule, there is no reason to distinguish cases on finding from those on the acquisition of original rights to things, such as foxes and whales, that are in fact *res nullius*.

However, as was foreshadowed in the Introduction, this is not the argument that will be made here. Instead, it will be argued that “finding” does indeed constitute a distinct taxonomical category within the law of property because, where one of the parties to the dispute is an occupier of the land on which the lost chattel was found, the law employs unique rules that turn, not on recognised claim-staking signals, but instead on one of the party’s status as an occupier. As a consequence, the brief outline offered below will distinguish between fact scenarios in which one the parties claims as an occupier and those in which neither party does.

⁴ Robin Hickey, *Property and the Law of Finders* (Hart Publishing, 2010).

⁵ Ibid 72. See also *Gray v Official Trustee in Bankruptcy* (1991) 29 FCR 166, 172 (Heerey J) (‘Gray’).

B *Finder vs Non-Occupier*

The simplest case is an uncontested find. If I see a \$20 note lying on the footpath and I pick it up and place it in my wallet, I will acquire a relatively good property right to that note by virtue of that very simple act of claim-staking. Thus, if someone, not being the owner, subsequently takes that note from me, I will be able to sue in conversion.

The authority for this proposition is *Armory v Delamirie*,⁶ in which Pratt CJ held that a chimneysweep's boy, who found a ring, was entitled to maintain trover against a goldsmith to whom he had delivered it for the purpose of obtaining a valuation. Pratt CJ held 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.'⁷ As Patteson J subsequently stated in the equally famous case of *Bridges v Hawkesworth*, '[t]he general right of the finder to any article which has been lost as against all the world except the true owner, was established in the case of *Armory v Delamirie*, which has never been disputed.'⁸

In *Bridges* itself, the plaintiff, a commercial traveller, entered the defendant's shop on business. Whilst in the shop he noticed a parcel containing £55 in bank notes lying on the floor. The plaintiff handed the notes to the defendant with instructions that they be returned to their owner. The defendant advertised the find but no one came forward to collect it. Three years later the plaintiff requested that the defendant return the notes to him, even offering to reimburse him for the expense incurred in advertising the find. The defendant refused and the

⁶ (1722) 1 Str 505; 93 ER 664 ('*Armory*').

⁷ Ibid 664.

⁸ (1852) 21 LJ QB 75, 77 ('*Bridges*'). See also *Bird v Fort Francis* (1949) 2 DLR 791, 793 (McRuer CJHC).

plaintiff commenced proceedings against him. The plaintiff lost at first instance but succeeded on appeal to the Court of Queen's Bench.

Although, to borrow Goodhart's wonderful phrase, *Bridges* has had a most 'distinguished posthumous career',⁹ it was in fact a very simple case decided by a straightforward application of *Armory*. As Patteson J held, the plaintiff succeeded because there were simply:

no circumstances to take it out of the general rule of law, that the finder of a lost article is entitled to it as against all parties except the real owner; and we think that rule must prevail, and that the learned Judge was mistaken in holding that the place in which they were found makes any legal difference.¹⁰

As Goodhart and, more recently, Hickey have demonstrated,¹¹ subsequently analyses of the decision in *Bridges* have mistakenly focused on the fact that notes were found in the "public" part of the shop. This misunderstanding was apparently caused by Patteson J's remark that the lost notes, 'were never in the custody of the defendant, nor within the protection of his house before they were found'.¹²

This remark led Lord Russell CJ, in the subsequent case of *South Staffordshire Water Co v Sharman*, to conclude that the decision in *Bridges* turned on the fact that notes were found in the public part of the shop and, consequently, that the decision was something of an anomaly that 'stands by itself, and on special grounds'.¹³ If Lord Russell were correct, it would not only follow that *Bridges* would have been decided differently had the notes been discovered

⁹ A L Goodhart, 'Three Cases on Possession' (1928) 3(2) *The Cambridge Law Journal* 195, 196.

¹⁰ (1852) 21 LJ QB 75, 78.

¹¹ Goodhart, above n 9, 197–8; Hickey, above n 4, ch 2.

¹² (1852) 21 LJ QB 75, 78.

¹³ [1896] 2 QB 44, 47 ('*Sharman*').

in a private part of the shop but also, and more significantly, it would have established that the status of one of the disputants as the occupier of the land on which the find was made is a relevant, if not decisive, factor in such cases.

Lord Russell's analysis was, however, a clear misreading of the decision. Justice Patteson's remark was not intended to highlight the importance of the location of the find. As he made explicit in the extract above, the place of find was irrelevant to the resolution of the dispute. His reference to the "protection of his house" was instead, as Hickey has demonstrated, a reference to the law of innkeepers.¹⁴ At common law, an innkeeper was strictly liable for loss or damage to his guests' goods. The corollary of an innkeeper's liability was his superior right, enforceable against third parties, to things which were *infra hospitium*, "within the protection of his house". Thus when Patteson J remarked that the notes were not within the protection of the shopkeeper's house, he was simply making clear that the defendant could not oust the plaintiff's claim as finder on the basis that the notes were *infra hospitium*.

Although it has never been overruled, it seems that the decision in *Bridges* is now a dead letter.¹⁵ As the discussion below will demonstrate, no modern judge presented with the facts in *Bridges* would approach it as Patteson J did. Nevertheless, the decision demonstrates that, at least until 1851, disputes over lost chattels were resolved by a straightforward application of the possession rule. The plaintiff succeeded in *Bridges* simply because he was the first person to signal his intention to claim the notes for himself, subject to the superior entitlement of the owner who lost them.

¹⁴ Hickey, above n 4, 30–2.

¹⁵ See also *ibid* 52.

However, even if the possession rule no longer resolves disputes between a finder and occupier, it remains true that it continues to resolve disputes over lost items where neither party to the dispute claims as the occupier of the land on which it was found.

C Finders vs Occupiers

1 The “Attached/Under” Rule

Different rules apply in disputes between a finder and the occupier of the land on which it is found. In these situations there is not one rule, but two. This is because the outcome turns not only on whether one of the parties claims as occupier, it also depends on whether chattel was attached to, or buried beneath, the surface of the land.

If the lost chattel was attached to, or buried beneath, the surface of the land, then the claim of the occupier will invariably trump that of the finder. To recall the Hohfeldian nomenclature discussed in Chapter II, the fact that the lost chattel is physically attached to, or subsumed under, the land is “operative” rather than “evidential” in nature.

The origin of the “attached/under” rule is the decision in *Elwes v Brigg Gas Company*,¹⁶ which was described by Auld LJ in *Waverley* as the ‘foundation of the modern rule.’¹⁷ In *Elwes* the defendant lessee found an ancient canoe buried beneath the surface of the soil. Despite his being totally ignorant of the canoe’s existence, it was held that the plaintiff lessor had a superior right to possession. Chitty J reasoned that if the canoe:

¹⁶ *Elwes v Brigg Gas Company* (1886) 33 Ch D 562 (*‘Elwes’*).

¹⁷ [1996] QB 334, 340.

ought to be regarded as a chattel, I hold the property in the chattel was vested in the Plaintiff, for the following reasons. Being entitled to the inheritance under the settlement of 1856 and in lawful possession, he was in possession of the ground, not merely of the surface, but of everything that lay beneath the surface down to the centre of the earth, and consequently in possession of the boat ... The Plaintiff then, being thus in possession of the chattel, it follows that the property in the chattel was vested in him. Obviously the right of the original owner could not be established; it had for centuries been lost or barred, even supposing that the property had not been abandoned when the boat was first left on the spot where it was found. The Plaintiff, then, had a lawful possession, good against all the world, and therefore the property in the boat. In my opinion it makes no difference, in these circumstances, that the Plaintiff was not aware of the existence of the boat.¹⁸

Although, as will be discussed below, Chitty J's reasoning is far from convincing, the "attached/under" rule has been applied in several subsequent cases and undoubtedly constitutes the orthodoxy.¹⁹

2 The "On/Unattached" Rule

A different rule applies in disputes between occupiers and finders where the lost chattel is found sitting unattached on the land. In such cases, the occupier will only succeed if she can demonstrate an intention to control property lost on her premises. In *Sharman*, decided just ten years after *Elwes*, Lord Russell CJ was asked to decide who, as between a workman and the freeholder, had the better title to two gold rings that a workman found buried beneath mud at the bottom of pool that he had been employed to clean out. As mentioned above, Lord

¹⁸ (1886) 33 Ch D 562, 568-9.

¹⁹ *Sharman* [1896] 2 QB 44, 46-7 (Lord Russell CJ); *City of London Corporation v Appleyard* (1963) 1 WLR 982, 986-7 (McNair J) ('*Appleyard*'); *Waverley* [1996] QB 334, 350 (Auld LJ).

Russell CJ erroneously distinguished *Bridges* on the basis that the decision in that case turned on the fact that the notes were found in the public part of the shop.²⁰

Because the rings were under the surface of the land, the case was resolved by a direct application of the “attached/under” rule, the authority relied upon being Pollock’s formulation of the rule in his *Essay on Possession*.²¹ Although this was sufficient to resolve the case, Lord Russell, with whom Willis J agreed, went on to observe that:

[i]t is somewhat strange that there is not more direct authority on the question; but the general principle seems to me to be that where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the locus in quo.²²

This “manifest intention to control” rule was subsequently confirmed by the Court of Appeal in *Parker*, in which the plaintiff, an outbound passenger, found a gold bracelet lying on the floor of the British Airways executive lounge at Heathrow Airport. The plaintiff handed the bracelet to an employee of the defendant but requested that the bracelet be returned to him in the event that the owner could not be found. In fact the owner was never found. However, instead of returning the bracelet, the defendant sold it for £850 and retained the proceeds of sale. After hearing of the sale, the plaintiff successfully sued the defendant for £850.

Parker ought to have been an extremely simple case. Because the plaintiff was the holder of a valid ticket and entitled to use the lounge, there was no issue of trespass. Likewise, because

²⁰ [1896] 2 QB 44, 47.

²¹ Ibid 46–7.

²² Ibid 47. By including things both ‘upon or in’ the land, Lord Russell extended, whether inadvertently or otherwise, the scope of the principle enunciated by Pollock.

the bracelet was lying on the floor, the Court of Appeal was not faced with the added complication of the “attached/under” rule derived from *Elwes*. It is thus unclear why the dispute could not have been resolved by a straight-forward application of *Bridges*, a decision which, in turn, rests on the authority of *Armory*, the correctness of which, as Donaldson LJ made clear, was not in doubt.²³

However, in delivering the leading judgment, Donaldson LJ felt moved to remark that, ‘[i]t is astonishing that there should be any doubt as to who is right. But there is.’²⁴ Purporting to follow Lord Russell’s *obiter* remarks in *Sharman*, Donaldson LJ held that, ‘I would accept Lord Russell of Killowen C.J.’s statement of the general principle ... provided that the occupier’s intention to exercise control over anything which might be on the premises was manifest.’²⁵ Eveleigh LJ expressly agreed.²⁶ Donaldson LJ formulated the relevant rule as follows: ‘[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 or in it.’²⁷ The defendant airline failed in *Parker* because it had not manifested the necessary intention to control items lost on its premises.²⁸

One final matter should be mentioned in this summary, namely, the question of what constitutes an “occupier” for the purpose of this rule. In *Hannah v Peel*²⁹ the plaintiff, a soldier, found a brooch lying in a crevice above a window frame in the bedroom of a house that had been requisitioned by the Ministry of Defence. The bedroom was being used as a

²³ [1982] QB 1004, 1009.

²⁴ *Ibid* 1008.

²⁵ *Ibid* 1013.

²⁶ *Ibid* 1020. See also the comments of Sir David Cairns: at 1021.

²⁷ *Ibid* 1018.

²⁸ *Ibid* 1019 (Donaldson LJ), 1020 (Eveleigh LJ), 1021 (Sir David Cairns).

²⁹ [1945] KB 509 (*‘Hannah’*).

sickbay. The house was owned, but never occupied, by the defendant. The soldier reported his find and the brooch ended up with the police who, after an unsuccessful attempt to find its owner, handed it, not to the plaintiff, but to the defendant. The defendant subsequently sold the brooch and the plaintiff successfully sued in detinue. As Birkett J observed, the dispute itself was very simple:

[a]s to the issue in law, the rival claims of the parties can be stated in this way: The plaintiff says: "I claim the brooch as its finder and I have a good title against all the world, save only the true owner." The defendant says: "My claim is superior to yours inasmuch as I am the freeholder. The brooch was found on my property, although I was never in occupation, and my title, therefore, ousts yours and in the absence of the true owner I am entitled to the brooch or its value."³⁰

After a thorough review of the authorities, Birkett J concluded that:

[t]he defendant was never physically in possession of these premises at any time. It is clear that the brooch was never his, in the ordinary acceptance of the term, in that he had the prior possession. He had no knowledge of it, until it was brought to his notice by the finder. A discussion of the merits does not seem to help, but it is clear on the facts that the brooch was "lost" in the ordinary meaning of that word; that it was "found" by the plaintiff in the ordinary meaning of that word, that its true owner has never been found, that the defendant was the owner of the premises and had his notice drawn to this matter by the plaintiff, who found the brooch.³¹

³⁰ Ibid 513.

³¹ Ibid 521.

Because the freeholder was never in occupation, *Hannah* does not conform to the archetypal “occupier vs finder” dispute. Hickey has remarked of Birkett J’s judgment that:

[i]n effect, what *Hannah v Peel* decides is that *possession* of land, as opposed to ownership or occupation, is a necessary prerequisite to any claim against a finder of goods, at least where the claimant has not otherwise established some title to the find, for example, by delivery or assumed duty.³²

This summary is not entirely accurate. Whilst Hickey is correct to say that *Hannah* decides that ownership, in the sense of having a freehold right, is not sufficient to trump the rights of a finder, it is not clear that this is also true of “occupation”. We simply do not know because this question did not arise on the facts. As Birkett J made clear, the defendant, ‘was never physically in possession of these premises at any time.’³³ Whether or not mere occupation, as opposed to possession, is sufficient to trump the rights of a finder could only be answered if there were a dispute between a finder and someone who was in occupation as a mere licensee, such as a guest at an hotel. Unfortunately, there appears to be no reported case which decides this question.

Given that, in deciding for the plaintiff, Birkett J professed to be following the decision in *Bridges*,³⁴ we can confidently say that, in a dispute between finder and a non-occupying owner, the possession rule, as exemplified in *Armory*, continues to apply.

³² Hickey, above n 4, 41–2.

³³ [1945] KB 509, 521.

³⁴ *Ibid.*

III ARE THESE RULES POSSESSORY?

A The Attached/Under Rule

According to the analysis offered above, if neither of the parties to the dispute claims as occupier, disputes over lost chattels will be resolved in favour of finders by a straightforward application of the possession rule. Moreover, as the decision in *Hannah* makes clear, the simple possession rule, derived from *Armory*, will also apply in disputes between finders and owners where those owners do not also “occupy”.

A more difficult question, and the primary question for this chapter, is whether the rules that govern disputes between occupiers and finders are really manifestations of the possession rule. Before answering this question, it is necessary to consider the judicial and academic attempts to bring these rules within the possessory fold, beginning with the “attached/under” rule.

As was discussed above, an occupier will prevail over a finder if the chattel in question is attached to or under the land on which it was found. One should begin by noting that, as a matter of basic land law, it is not at all clear why this should be. On first blush, this rule appears to be an outgrowth of the doctrine of fixtures, to which Chitty J made reference in *Elwes*.³⁵ This view is further supported by Auld LJ’s remark about *Elwes* that as, ‘Goodhart concluded in his celebrated article ... the lessor “was the possessor of the boat because he

³⁵ (1886) 33 Ch D 562, 657.

was in possession of the ground," to which I add what is implicit in that conclusion, *because the boat had become permanently fixed in the ground.*³⁶

This cannot, however, be correct. The consequence of concluding that the boat had become “permanently fixed in the ground” must be that the boat had ceased to exist as a chattel because it had merged with the realty. If this were the case then two things would follow. First, if the boat were a fixture, then *Elwes* would not have been a case of finding at all. The lessor would have succeeded by dint of the fact that, as a matter of basic land law, he was the owner of the boat because it formed part of the “land”. Secondly, and relatedly, to hold that a lost chattel has become a fixture would have the perverse consequence of foreclosing on the title of the owner.³⁷ Whilst destruction of the title of the owner is unproblematic in the case of a pre-historic boat, it is, as a matter of policy, the worst possible outcome in more mundane cases in which the owner may be in a position to reclaim the lost chattel.

If, on the other hand, the lost item does not become a fixture and retains its identity as a chattel, then there appears to be no legal reason for favouring the landholder. It will be recalled that in *Elwes* Chitty J held that the plaintiff, as life tenant and lessor, was, before he leased the land:

in possession of the ground, not merely of the surface, but of everything that lay beneath the surface down to the centre of the earth, and consequently in possession of the boat ... The Plaintiff then, being thus in possession of the chattel, it follows that the property in the chattel was vested in him.³⁸

³⁶ *Waverley* [1996] QB 334, 341. Italics supplied.

³⁷ This criticism is also made in Ben McFarlane, *The Structure of Property Law* (Hart Publishing, 2008) 157–8.

³⁸ (1886) 33 Ch D 562, 568.

The only authority cited by Chitty J in support of this conclusion was *Reg v Rowe*,³⁹ in which it was held that a canal company had sufficient title to the iron found at the bottom of its canal to enable the accused to be indicted for larceny. Pollock CB held the right which the canal company had to the iron, ‘was of the same nature as that which a landlord has in goods left behind by a guest. Property so left is in the possession of the landlord for the purpose of delivering it up to the true owner; and he has sufficient possession to maintain an indictment for larceny.’⁴⁰

Apart from the obvious point that the authority for Chitty J’s proposition is very slight, it is also not very persuasive given the facts in *Elwes*.⁴¹ This is because, as Hickey has demonstrated,⁴² Chitty J overlooked the fact that the outcome in *Rowe* was expressly based on Pollock CB’s conclusion that the canal company was under a legal obligation, analogous to that of an innkeeper, to return items lost in the canal to their owners. Clearly, no analogous duty arose on the facts in *Elwes*.

Perhaps the more important point is that Chitty J’s conclusion does not, as a matter of basic land law, follow from his premise. This is because the *ad coelum* principle to which his Honour appears to be referring in the extract above does no more than to describe that the object of a freeholder or a leaseholder’s right in English land law has three dimensions, not two.⁴³ To put the matter another way, the *ad coelum* principle simply makes clear that the protection offered by the law of tort is not confined to interferences that occur at ground

³⁹ *Reg v Rowe* (1859) Bells CC 93; 169 ER 1180.

⁴⁰ *Ibid*, 1181.

⁴¹ The decision in *Reg v Rowe* was mentioned briefly in Oliver Wendell Holmes, *The Common Law* (Little, Brown and Company, 1949), and followed in *Hibbert v McKiernan* [1948] KB 142.

⁴² Hickey, above n 4, 33.

⁴³ This is usually captured by the Latin maxim *cuius est solum eius ad coelum et ad infernos*. See generally *Commissioner for Railways v Valuer-General* [1974] AC 328, 351-2 (Lord Wilberforce); Kevin J Gray and Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009), 14–5 [1.2.14]–[1.2.17].

level, but extends to acts of boundary crossing that occur both above and below the surface of the earth. Contrary to what Chitty J appears to suggest, it does not follow from this that any object that happens to fall within the territorial boundaries of that three dimensional column is therefore “realty”. If it were otherwise, the doctrine of fixtures would be redundant. Likewise, it would also mean that if A conveyed his freehold title to B, B would be entitled to everything, whether a chattel or otherwise, that happened to be on the land at the time of the conveyance. This, as McFarlane also observes, cannot be correct.⁴⁴

More particularly, nothing in the *ad coelum* principle allows one to reason from the premise that the removal of a chattel would, in the absence of permission, constitute a trespass to land to the conclusion that the freeholder therefore has a property right in whatever it is that the trespasser has removed. This is best demonstrated by a simple example. Imagine that I accidentally hit a cricket ball over my neighbour’s fence. Whilst it is true that I will commit a trespass if I attempt to retrieve the ball without asking her permission, my neighbour’s right to exclude me from her land does not, without more, give her any entitlement to my ball as a chattel. This conclusion does not change depending upon whether the ball lands on my neighbour’s roof or becomes buried beneath her compost heap. In the absence of a consensual transfer, my neighbour will only acquire a right to the ball if she takes possession of it or if, as a matter of law, it becomes a fixture. Quite apart from the fact that an inadvertent act such as hitting a ball over a fence would never satisfy a test that turns on the affixer’s objectively ascertained intention to merge a chattel with land,⁴⁵ to apply the fixture rule to cases of finding would, as noted above, have the bizarre consequence of destroying the owner’s title.

⁴⁴ McFarlane, above n 37, 158–9. See also *Moffatt v Kazana* (1969) 2 QB 152.

⁴⁵ *Holland v Hodgson* (1872) LR 7 CP 328, 334–5 (Blackburn J); *Melluish (Inspector of Taxes) v BMI (No 3)* [1996] AC 454, 473 (Lord Browne-Wilkinson).

Given this, is there some other orthodox basis on which to justify the rule in *Elwes*? The most influential explanation is that given by Pollock, who wrote that:

[t]he possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence.⁴⁶

The question for Pollock was whether or not the principle to emerge from *Elwes* was unique to those cases of finding in which the lost chattel was buried beneath the surface of the land, or whether it could instead be explained as a particular manifestation of the general possession rule. He argued that:

[i]t is free to any one who requires a specific intention as part of *de facto* possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real *de facto* possession, constituted by the occupier's general power and intent to exclude unauthorized interference.⁴⁷

Pollock's account of *Elwes* was, as noted above, adopted without qualification by Lord Russell CJ in *Sharman*,⁴⁸ whose statement of principle was in turn approved by the English Court of Appeal in *Parker*.⁴⁹ For present purposes, the relevant concern is whether or not it is convincing.

⁴⁶ Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (Clarendon Press, 1888) 41.

⁴⁷ *Ibid.*

⁴⁸ [1896] 2 QB 44, 46–7.

⁴⁹ *Parker* [1982] QB 1004, 1013–4 (Donaldson LJ).

One shortcoming with Pollock's explanation of *Elwes* is that, as Hickey has argued, it was based on a 'general theory of possession, which was not expressly considered or invoked by the court.'⁵⁰ So far as the account developed here is concerned, the more significant shortcoming is that, if possession describes a signal by which someone informs others of his intention to stake a claim to some thing, then, as was also noted in Chapter III, it is impossible to possess some object whilst being entirely ignorant of its existence.

This problem will be discussed in greater detail below. For present purposes, it is sufficient to make the following observation about the decision in *Elwes*. When Chitty J remarked that, '[i]n my opinion it makes no difference, in these circumstances, that the Plaintiff was not aware of the existence of the boat',⁵¹ he was not assuming, as Pollock suggested, that the plaintiff's *animus possedendi* was already established by his general 'intent to exclude unauthorized interference'.⁵² So far as Chitty J was concerned, the lessor's intention simply did not enter into the matter. This is because his Honour appeared to believe that, as a matter of law, everything beneath the surface of the soil *was in fact the soil*. Although, as a matter of basic land law, Chitty J was wrong to think so, this is nevertheless the best, if not the only, explanation for his decision.

There is also another reason to believe that the "attached/under" rule has little, if anything, to do with a simple application of the possession rule. That is, courts appear to regard it as a *sui generis* rule that is justified by instrumental considerations that have nothing to do with possession. In *Waverley*, for example, the defendant, with the aid of a metal detector, found a

⁵⁰ Hickey, above n 4, 37.

⁵¹ (1886) 33 Ch D 562, 569.

⁵² Pollock and Wright, above n 46, 41.

medieval brooch buried nine inches beneath the surface of the soil in a public park in Surrey. Auld LJ, with whom Ward LJ and Sir Thomas Bingham MR agreed, resolved the dispute in favour of the plaintiff council by application of the “attached/under” rule.⁵³

Counsel for the defendant attacked the “attached/under” rule as an unprincipled and arbitrary way of distinguishing between the claims of occupiers and finders.⁵⁴ In defending the rule, Auld LJ did not explain or justify it by an appeal to the orthodox principle that “possession is a root of title”. Instead, his Honour highlighted the rationale for the rule. In particular, reprising comments made by Donaldson LJ in *Parker*, Auld LJ argued that the explanation for the rule is to be found in the law’s concern to prevent those who commit trespass by interfering with land from profiting from their wrong.⁵⁵ Putting aside the merits of this, and other, instrumental concerns discussed below, Auld LJ’s comments at least suggests that courts do not view the “attached/under” rule in possessory terms.

B *The “On/Unattached” Rule*

As discussed above, where there is a dispute between a finder and an occupier, but the lost item is not attached to or under the land, an occupier will only succeed if he has manifested an intention to control the land and the things that may be on it. Although this rule differs in substance from the “attached/under” rule, those who seek to explain it as a manifestation of the possession rule nevertheless face the same basic obstacle. That is, they must explain how someone can have an intention in respect of some object despite being completely ignorant of its existence. It is certainly incompatible with a theory of possession according to which the

⁵³ *Waverley* [1996] QB 334, 350. Auld LJ also held that he would have been prepared to find that the council had manifested the intention to control items lost on its property: at 350.

⁵⁴ *Ibid* 344–5.

⁵⁵ *Ibid* 345.

very function of the possession rule is to signal one's intention to stake a claim to some tangible thing. However, even if one does not subscribe to this particular view, the notion that one can possess some object despite being ignorant of its very existence is one which, as Epstein has also noted,⁵⁶ many find unsatisfactory.

Courts and commentators have attempted to walk this conceptual tightrope by arguing that there are circumstances in which an occupier's intention, though it may not be express, is nevertheless "manifest". In *Parker*, Donaldson LJ remarked that:

[i]t was suggested in argument that in some circumstances the intention of the occupier to assert control over articles lost on his premises speaks for itself. I think that this is right. If a bank manager saw fit to show me round a vault containing safe deposits and I found a gold bracelet on the floor, I should have no doubt that the bank had a better title than I, and the reason is the manifest intention to exercise a very high degree of control. At the other extreme is the park to which the public has unrestricted access during daylight hours. During those hours there is no manifest intention to exercise any such control. In between these extremes are the forecourts of petrol filling stations, unfenced front gardens of private houses, the public parts of shops and supermarkets as part of an almost infinite variety of land, premises and circumstances.⁵⁷

Likewise, Eveleigh LJ commented that:

I would be inclined to say that the occupier of a house will almost invariably possess any lost article on the premises. He may not have taken any positive steps to demonstrate his animus

⁵⁶ Richard A Epstein, 'Possession' in Peter Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Macmillan Reference, 1998) vol III, 62, 65.

⁵⁷ [1982] QB 1004, 1019.

possidendi, but so firm is his control that the animus can be seen to attach to it. It is rather like the strong room of a bank, where I think it would be difficult indeed to suggest that a bracelet lying on the floor was not in the possession of the bank. The firmer the control, the less will be the need to demonstrate independently the animus possidendi.⁵⁸

This view has also been advanced by Pollock.⁵⁹ Likewise, in discussing *Bridges*, Holmes wrote that, '[t]here can be no *animus domini* unless the thing is known of; but an intent to exclude others from it may be contained in the larger intent to exclude others from the place where it is; without any knowledge of the object's existence.'⁶⁰ In Hohfeldian terms, Pollock and Holmes treated the location of the find as an "evidential" rather than an "operative" fact. This is because, unlike in the case of the "attached/under rule", the relevance of the location of the find is that it provides evidence from which a court may infer the existence of the "operative" mental fact, namely the occupier's *animus possidendi*, or lack thereof.

This issue has been more recently discussed by Hickey. Although Hickey claims that Pollock and Holmes's "physical control plus intention" theory of possession is a novelty borrowed from Roman law,⁶¹ he argues that it can nevertheless help to explain, and perhaps even rationalise, the modern law's apparent preoccupation with the circumstances of the find. On Hickey's account, the circumstances of the find are relevant, but not because they determine which of several discrete rules must be applied in order to resolve a dispute over a lost chattel.⁶² Rather, they are relevant in so far as they justify raising a presumption in favour of an occupier and thus relieving him of the usual obligation to prove the mental fact of his intention by adducing evidence of it. Hickey writes that:

⁵⁸ Ibid 1020.

⁵⁹ Pollock and Wright, above n 46, 39.

⁶⁰ Holmes, above n 41, 222.

⁶¹ Hickey, above n 4, 34–7.

⁶² Ibid 46–7.

[p]ut shortly, disputes between possessors of land and finders are to be resolved according to which of the parties can show a prior right by virtue of possession. This always depends on the possessor of land's ability to oust the claim of the finder by proving the twin possessory elements of control and intention, but sometimes we remove from him the burden of proving the latter because it is so obvious as to speak for itself. The apparent rule giving a possessor of land a better right to goods attached to his land is no more than the most widely recognised example of this evidentiary concession.⁶³

Before discussing whether this explanation is correct, something must first be said about the function of presumptions in the law. Presumptions are not substantive rules of property law. They are adjectival rules that form part of the law of evidence. As Swadling explains:

[p]resumptions properly-so-called form part of the law of proof. Generally speaking, facts can be proved by admission, judicial notice, or evidence. In the absence of admission and judicial notice, the general rule is that facts must be proved by evidence, the burden of proving those facts lying on the party alleging them to have occurred. Very occasionally, however, proof by evidence of one fact, the "basic" or "primary" fact, gives that party to the litigation the benefit of another fact, the "secondary" fact, without any need to adduce evidence in proof. In such cases, the fact is proved by presumption. The burden then lies on the other party to adduce evidence to rebut the presumption. If they do not, the tribunal of fact must find the secondary fact proved.⁶⁴

The second inference is justified because, in the absence of actual evidence to the contrary, it accords with common experience and thus represents an outcome that one would reasonably

⁶³ Ibid 52.

⁶⁴ William Swadling, 'Explaining Resulting Trusts' (2008) 124 *Law Quarterly Review* 72, 74.

expect to obtain in the circumstances as established by proof of the primary fact.⁶⁵ Moreover, because presumptions are merely starting points, they must yield to actual evidence to the contrary. An “irrebuttable presumption” is an oxymoron. A presumption that cannot be rebutted by evidence to the contrary is not a method of proof but a substantive rule of law.⁶⁶

On Hickey’s account, rule concerned with the circumstances of the find can be reconciled with the general possession rule because they are not substantive but evidential in nature. That is, they merely describe the factual circumstances in which the law will allow occupiers to prove the requisite mental fact by presumption rather than by evidence. However, if this is to be regarded as a satisfactory explanation then it must, at the very least, be possible to conceive of facts on which that presumption can be rebutted.

Serious doubt is thrown on this by the decision of the Full Federal Court in *Chairman, National Crime Authority v Flack*.⁶⁷ In *Flack* the respondent was the lessee of a house in Sydney, to which her son had free access. The police, who suspected the son of drug offences, searched the house and discovered a briefcase containing \$433,000 in cash concealed at the back of a cupboard in the hallway. The uncontested evidence was that the respondent was not only unaware of the existence of the suitcase, but horrified when its presence in her home was brought to her attention.⁶⁸ Pursuant to statutory powers, the appellant seized the suitcase as evidence. Sometime later, the respondent sought an order for the delivery up of the suitcase and its contents on the basis of her prior possession.

⁶⁵ Ibid; *Calverley v Green* (1984) 155 CLR 242, 264 (Murphy J).

⁶⁶ Swadling, above n 64, 75.

⁶⁷ (1998) 86 FCR 16 (*‘Flack’*).

⁶⁸ Ibid 19–20 (Foster J).

Because the owner of the suitcase, presumably the respondent's son, never lost it, *Flack* was not a traditional case of finding. However, as was expressly noted, this made no difference to the applicable principles.⁶⁹ Following the Court of Appeal in *Parker*, a majority of the Court, Heerey and Tamberlin JJ, found for the respondent on the basis that, as the occupier of a private home, she had manifested the necessary intention to control items on her premises, whether she was aware of their existence or not.⁷⁰ However, Foster J delivered a powerful dissenting judgment. His honour dissented on the ground that the presumption generated by the circumstances of the find was rebutted on the facts, writing that:

I return to the finding which I have made, namely that had her son, or anyone else, sought Mrs Flack's permission to leave this case and its contents in her custody or possession, this permission would have been refused. That is, I am satisfied that she would never voluntarily have taken possession of the briefcase and contents nor assented to them passing into her custody or control. In these circumstances, I ask myself how can it be presumed simply from her status as householder that she had these goods in her possession? To make that assumption on the basis that her occupation and control of her premises as a householder necessarily manifested an intention on her part to exercise control over them would be to fly in the face of a contrary finding of fact. The presumption, which is not irrebuttable, must yield to the finding. To put the matter another way, is it reasonable that Mrs Flack, who clearly manifested shock and horror when confronted with the presence in her home of these goods, and who, quite clearly, would not have countenanced their presence had she known of them, be nevertheless entitled or obliged, by the presumption relied upon, to assume possession of them? This would be to impose upon her possession of unwanted goods.⁷¹

⁶⁹ Ibid 27 (Heerey J).

⁷⁰ Ibid 25–7 (Heerey J), 30–1 (Tamberlin J).

⁷¹ Ibid 22.

As Foster J's dissenting judgment makes clear, the decision of the majority in *Flack* makes it difficult to conceive of circumstances in which the presumption would or could be rebutted. Although, as a matter of law, it is possible to defend the outcome on the basis that the intention is general and does not apply specific chattels, the result strongly suggests that the location of the find, at least so far as private houses are concerned, is not regarded by courts as giving rise to an evidential presumption but, like the "attached/under" rule, is treated as a discrete rule of law.

C Is the Presumption Justifiable?

A final argument should be made here about the desirability of the presumption. As was noted above, allowing a party to prove a fact by presumption rather than evidence is only justified because there is some sound reason to believe that the state of affairs represented by the secondary fact is likely to obtain given proof of the primary fact. Thus, if Hickey's explanation is preferable to the "discrete rules" account offered here, there must be some reason to believe that occupiers actually have some intention in respect of chattels that have been lost on their land.

The truth, or otherwise, of this assumption does not determine whether these rules are properly classified as "presumptions" for the purposes of the law of evidence and proof. As discussed above, the answer to this narrower question depends upon whether the *prima facie* position created by the presumption is able to be rebutted by evidence to the contrary. However, it does determine whether such rules can satisfactorily be explained as instances of the general possession rule in action.

The deficiency in Hickey's account is that it does not overcome what might be described as the basic "argument from ignorance". The fundamental problem is, as outlined above, that knowledge is the *sine qua non* of an intention of any sort. Take the example of people who occupy land as a private home. Whilst it is true that such people do, for example, have a generalised intention to exclude everyone but invitees, it is not possible to extrapolate from this reasonable claim, substantiated by the existence of front-door locks, to the further claim that they also have an intention to control objects of whose very existence they are ignorant.

Occupiers of private homes have no intention in relation to such things because, unlike property lawyers attempting to rationalise cases on finding, they simply have no reason to consider the possibility until such a find is actually made. For the vast majority of such people, the question of whether they have an intention in respect of items which, unbeknownst to them, some third party has lost on their premises is, to borrow the phrase made famous by Donald Rumsfeld, to enter the realm of the "unknown unknown". To test the matter in another way, in how many homes does one see a basket labelled "lost property"? If we are indeed in the realm of the "unknown unknown", then the attempt to justify an occupier's superior entitlement to lost chattels on the ground of a presumptive belief about his intention represents the use of a presumption to prove a fiction.

Even Tamberlin J, who formed part of the majority in *Flack*, recognised the artificiality of attempting to bring these rules within the possession fold. His Honour wrote that:

[t]he notion of a person intending to exercise possession or control over an article of which he or she was at all relevant times unaware is somewhat artificial. In some respects it is analogous to a legal "fiction" in the sense that it is a statement which on its face is false but is recognised as having utility in the application of legal principles ... However, its proper

characterisation in my view, is rather that of a rebuttable presumption of fact. The presumed intention of a housekeeper to extend the protection of her home to everything in it, is a concept which has been applied in the authorities and serves a useful purpose in resolving disputes between claimants to possession where there might otherwise be an unexplained gap or vacancy in the possessory chain. The presumption is designed to assist in the development of a coherent doctrine of possession. In his text, Professor Fuller specifically refers to fictions of applied law, such as the fiction of “finding” in an action of trover. It provides assistance in dealing with the difficult questions which can arise in deciding which of two competing parties, if any, has the better claim to possession of an article.⁷²

Although legal fictions may have uses, it should always be remembered that they are nevertheless just that: fictions. Whilst the fiction of the occupier’s intention might bring a certain taxonomical simplicity to the law of property, it only does so by creating an ever more artificial, strained and amorphous concept of possession.

D Conclusion

The previous section opened by considering whether there is one rule that applies to cases of finding or several, discrete rules. It has been argued that, although it may be attractive to explain the cases discussed above as nothing more than particular manifestations of the possession rule, this is the least plausible reading of them. The better view is that cases of finding turn on a set of discrete rules, the applicability of which depend on the identity of the litigants and the circumstances of the find.

⁷² Ibid 30.

When a dispute over a lost chattel is between two parties, neither of whom claims as the occupier of the land on which it was found, the dispute will be resolved by a straightforward application of the possession rule. However, this is not true of disputes between a finder and an occupier. Despite valiant attempts to argue otherwise, the resolution of these cases cannot be explained in terms of priority of possession. Rather, it seems clear that they depend on discrete rules that turn on the circumstances of the find, including the nature of the premises and the location of the lost chattel at the time of finding. If such cases did turn on possession then they would invariably be resolved in favour the finder for the simple reason that she was the first party to signal her intention to stake a claim to the lost chattel.

If the foregoing analysis is true, then one interesting, though clearly unintended, consequence seems to follow. If in some cases occupiers succeed against finders merely by dint of their status as occupiers, then it would seem that we amend the list of ways in which one can acquire an original property right in a chattel, discussed in Chapter I. In addition to possession, natural increase etc., we would have to add that occupiers of land will acquire original rights to chattels where they have become attached to or subsumed under land or lost on land that constitutes “a private home”, whatever that may mean. Given that there is a *numerus clausus* or closed-list of property rights, but no equivalent restriction on the ways in which such rights can be created, this amendment, though perhaps undesirable and almost certainly accidental, can seemingly be made without contravening any basic rules of property law.

Finally, what is never explained is why both courts and commentators feel it necessary to explain the outcome in these “finder vs occupier” disputes by an appeal to the possession rule. As Krier and Serkin remark, these attempts at conceptual gymnastics have resulted in

common law judges making, ‘a proper spectacle of themselves as they struggled to determine who, as between locus owner and finder, was the prior possessor of the item in question’.⁷³ But to what end? Just as there is no apparent benefit in persisting with the fiction that a bailor-at-will has “constructive possession” of the bailed goods, no obvious goal is achieved by the attempts to explain the outcomes in these cases as turning on the equally artificial “prior possession” of the occupier.

Although, as Hickey has argued,⁷⁴ the existence of discrete rules may seem taxonomically unsatisfactory, it is not as unsatisfactory as the attempts to explain these rules as examples of the possession rule in action. Hickey has himself quite rightly criticised the tendency of the courts to ‘bend and augment basic concepts, to propose qualifications to established rights in pursuit of the elusive policy’.⁷⁵ However, in the case of possession, the “bending and augmenting of basic concepts” is precisely what his account seems to require.

IV INSTRUMENTAL JUSTIFICATIONS

A Introduction

As was noted above, courts have often justified the rules on finding on the ground that they serve useful instrumental purposes. So, for example, the “attached/under” rule was justified on the ground that it prevents trespassers from benefitting from their wrongdoing. An even more obvious instrumental consideration is the desirability of returning the lost chattel to its

⁷³ James E Krier and Christopher Serkin, ‘The Possession Heuristic’ in Yun-chien Chang (ed), *Law and Economics of Possession* (Cambridge University Press, 2015) 149, 162.

⁷⁴ Hickey, above n 4, 47.

⁷⁵ *Ibid* 161.

owner.⁷⁶ Eichelbaum CJ has gone so far as to remark that, '[t]he ultimate object of the law in this area must be to enhance the prospects that the lost article will be reunited with its owner'.⁷⁷

Thus, at least on first blush, there appear to be sound reasons for creating rules that are peculiar to cases of finding. Nevertheless, it will be argued below that no one has yet articulated a compelling reason of any sort for departing from the possession rule as the simplest and most effective means of resolving disputes over lost chattels.

B Benefitting from Wrongdoing

Take, first, the concern that courts appear to have about trespassers benefitting from their wrongdoing. Is this concern sufficiently serious to justify a departure from the possession rule such that, as we have seen in *Waverley*, the claim of a finder ought to be subordinated to the occupier of the land on which the lost chattel was found? There are several arguments which suggest that it is not.

The first is simply that the law already has an adequate response to acts of trespass; namely, the tort of trespass. If an act of trespass causes loss, then the right-holder can sue for damages in tort. In the event that the right-holder is compensated, or indeed suffers no loss, then it is not clear why it matters that the tortfeasor may also have benefited from his breach of duty. In particular, those who defend this departure from the possession rule must justify why the

⁷⁶ Ibid 94; D R Harris, 'The Concept of Possession in English Law' in A G Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 69, 82–3.

⁷⁷ *Tamworth* [1991] 3 NZLR 616, 623.

conduct of the finder warrants an exception to the fundamental principle that damages in tort are only to be awarded for losses that the right-holder has actually suffered.⁷⁸

One response to this argument is that, but for the rule, the occupier will have suffered a loss, namely the value of the lost chattel to which the finder claims a right. However, it should be immediately apparent that this is begging the question. This argument is hopelessly circular because determining whether the finder or occupier has a superior entitlement to the lost object is the very question that the court is being asked to decide. Indeed, the more realistic view is that the effect of the “attached/under” rule is simply to confer upon occupiers a right to a chattel which, but for the actions of the finders, may very well have remained undiscovered.

A better argument is that there are indeed cases in which a tortfeasor is obliged to pay damages measured, not by the victim’s loss, but by the quantum of his gain.⁷⁹ So, for example, in cases that have traditionally come under the headings of “wayleaves”⁸⁰ and “mesne profits”,⁸¹ trespassers have been ordered to pay a reasonable sum for the benefit they obtained through acts of trespass, without proof of loss to the victim. Likewise, in the realm of personal property, there is authority for the proposition that those who detain goods

⁷⁸ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn).

⁷⁹ James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Bloomsbury Publishing, 2002) 113–8.

⁸⁰ *Martin v Porter* (1839) 5 M&W 351; 151 ER 149; *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538, 541–2 (Lindley LJ); *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd (No 2)* (1989) 24 NSWLR 499, 507–8 (Hodgson J).

⁸¹ *Swordheath Properties Ltd v Tabet* (1979) 37 P&CR 327, 330 (Megaw LJ); *Ministry of Defence v Ashman* (1993) 66 P&CR 195, 200–1 (Hoffman LJ). See also Elizabeth Cooke, ‘Trespass, Mesne Profits and Restitution’ (1994) 110 *Law Quarterly Review* 420, 422–3.

belonging to another may have to pay damages measured in accordance with a reasonable hire fee, irrespective of whether the victim actually suffered any loss.⁸²

However, two points should be made in response to such an argument. First, the awards made in these cases effected “restitution” and not “disgorgement.”⁸³ That is, their effect was not to strip the tortfeasor of any gain that he may have made through the commission of his wrong, but instead to reverse a transfer of value that came from the plaintiff and was received by the defendant in breach of duty.⁸⁴ As a consequence, it is perfectly possible that a wrongdoer ordered to pay restitutionary damages will still “turn a profit”.

Secondly, and more importantly, English law allows individuals to acquire property rights through acts that constitute tortious if not criminal wrongdoing. Most obviously, if I squat on your land without your permission I become a trespasser, but in doing so I acquire a relative title which may, by operation of statute, mature into the best possible right at your expense.⁸⁵ Likewise, as will be discussed further in Chapter VII, it is clear that English law allows thieves to acquire ownership rights in the things that they steal. If the law allows those who are not merely tortfeasors but also criminals to gain valuable rights from their wrongdoing, what justifies Donaldson LJ’s claim that, ‘[t]he finder of a lost chattel acquires very limited rights over it if he takes it into his care and control with dishonest intent or in the course of trespassing’?⁸⁶ No answer has been given that satisfactorily explains the apparently anomalous treatment of trespassing finders.

⁸² *Strand Electric Co v Brisford Entertainments Ltd* [1952] 2 QB 246, 254 (Lord Denning); *Gaba Formwork Contractors Pty Ltd v Turner Corporation Ltd* (1991) 32 NSWLR 176, 188 (Giles J); *Bunnings Group Ltd v Chep Australia Ltd* (2011) 82 NSWLR 420, 471–2 [194]–[199] (Giles JA).

⁸³ On the difference between the two species of gain-based damages see Edelman, above n 79, 65–78.

⁸⁴ That is, these are examples of restitution for wrongs, not for unjust enrichment. On this distinction see Andrew Burrows, *The Law of Restitution* (OUP Oxford, 2011) 9–12.

⁸⁵ See *Limitation of Actions Act 1958* (Vic) s 18.

⁸⁶ *Parker* [1982] QB 1004, 1017. As Roberts has also noted, this passage betrays a basic misunderstanding of the principle of relative title. See Simon Roberts, ‘More Lost than Found’ (1982) 45 *Modern Law Review* 683,

A final objection to the “attached/under” rule concerns the practical consequence of its application. This objection comprises two, related, points. First, as will also be discussed in greater detail below, the effect of a rule that invariably resolves disputes between finders and occupiers in favour of the latter must surely be to encourage finders to conceal their find, thus reducing virtually to nil the chances that the lost chattel will be returned to its owner. Secondly, because dishonest finders will invariably conceal their find, the consequence of the attached/under rule will simply be to, in effect, punish those finders who are honest enough to publicise their find in the hope that it will result in the lost chattel being reunited with its owner.

C Facilitating Reunification

No one would deny that reunification of a lost object with its owner is the most desirable resolution to any case of losing and finding.⁸⁷ The question is, what, if any, alteration to the possession rule would be most likely to facilitate that result? In a dispute between a finder and an occupier, an obvious candidate would be one which favoured the occupier, on the simple ground that, as Harris has noted,⁸⁸ the owner is most likely to enquire after the lost object at the place of loss. This apparently common sense position supplied the rationale for the distinction that American law traditionally drew between chattels that are “lost” and those that are merely “misaid”. The distinction between these two events is that, in cases of loss, the owner is unaware of becoming parted from her chattel whereas, in cases of mislaying, she

687. Roberts was generally critical of the decision, remarking that Donaldson LJ's judgment 'contains rather little that could pass for conventional legal analysis': at 685. Tellingly, Sir David Cairns expressly declined to offer an opinion on the position of thieves and trespassers: [1982] 1 QB 1004, 1021.

⁸⁷ This does not apply to cases such as *Waverley* and *Elwes* in which, due to the age of the lost chattel, the trail of ownership has long since gone cold.

⁸⁸ Harris, above n 76, 82.

has merely temporarily forgotten where she placed it.⁸⁹ If a chattel was “mislaid”, American law resolved any dispute in favour of the occupier on the basis that he is in the best position to return the lost chattel to its owner. Where a chattel was “lost” and there was, consequently, no chance of the owner being located, the law allowed the finder to prevail.⁹⁰

The solution to the problem of owner reunification is not as simple as the foregoing analysis might suggest. This is because, as both courts and commentators have well understood,⁹¹ a rule that invariably resolves all disputes against finders would in fact undermine the very goal that it is seeking to achieve. As noted above, the consequence of such a rule would simply be to encourage finders to conceal their find, thus eliminating any chance that the lost chattel will be reunited with its owner. Moreover, an attempt to ameliorate this problem of misaligned incentives by distinguishing objects that have been “lost” from those which have been “mislaid” is of no assistance because, as several commentators have convincingly argued,⁹² a distinction that turns on a fact about the unknown owner’s mental state at the time of the “loss” is almost impossible to apply in practice. Epstein was thus surely correct when he remarked of the finders’ cases that, ‘choosing a sound rule is no easy task because it is difficult to discover which rules create the optimum incentives for the parties.’⁹³

In *Parker*, Donaldson LJ sought to create the necessary incentives by formulating a series of duties that are specific to finders. In particular, he held that, ‘[a] person having a finder's right has an obligation to take such measures as in all the circumstances are reasonable to acquaint the true owner of the finding and present whereabouts of the chattel and to care for it

⁸⁹ Richard A Posner, ‘Savigny, Holmes, and the Law and Economics of Possession’ (2000) 86 *Virginia Law Review* 535, 556.

⁹⁰ R H Helmholz, ‘Equitable Division and the Law of Finders’ (1983) 52 *Fordham Law Review* 313, 313–4.

⁹¹ *Parker* [1982] QB 1004, 1017 (Donaldson LJ); *Tamworth* [1991] 3 NZLR 616, 623–4 (Eichelbaum CJ). See also Anon, ‘Comments’ (1939) 8 *Fordham Law Review* 222, 235–7.

⁹² Helmholz, above n 90, 316–7; Hickey, above n 4, 59–60.

⁹³ Epstein, above n 56, 65.

meanwhile.’⁹⁴ The first observation that must be made about this apparent duty is that it is unlikely to exist. As Hickey has also noted,⁹⁵ not only was it unnecessary for the resolution of the dispute in *Parker*, it was also unsupported by any authority.

The second, and perhaps more important, observation is that it is not clear whether imposing such a duty on finders would actually improve the frequency with which lost items are returned to their owners. An important fact about the finders’ cases, and one so obvious that it almost passes unnoticed, is that disputes between finders and occupiers only occur *because* the finder has publicised his find. Donaldson LJ’s supposed duty was irrelevant to the resolution of the dispute in *Parker* for the very reason that the plaintiff voluntarily handed the bracelet to the defendant in the hope that it might be reunited with its owner. Had he not done this, the defendant would have remained ignorant of the bracelet’s existence and there would have been no dispute in the first place. One can, of course, respond that it is impossible to infer from the facts in cases such as *Parker* and *Hannah* that this is what people usually do. This is quite true. However, we cannot draw the opposite inference either. Given that instances in which a finder conceals his find will never be the subject of a dispute, we simply cannot know.

Perhaps what one can reasonably say is that people are unlikely to look to the English Court of Appeal in order to discover the norms that ought to guide their behaviour in these situations. Whether or not people decide to publicise their find will instead depend upon prevailing social expectations as modified by various factors, including the value of the lost item, whether the owner was likely to have had some sentimental attachment to it, the

⁹⁴ [1982] QB 1004, 1017.

⁹⁵ Hickey, above n 4, 75. For further criticism see Graham Battersby, ‘Acquiring Title by Theft’ (2002) 65 *Modern Law Review* 603, 604–5.

likelihood of locating the owner, and so on. In light of this, perhaps Harris was right to say that:

[t]he reported decisions give no clear guidance on the judicial view of the underlying purpose of our possessory remedies in disputes between occupier and finder. It seems that judges subconsciously think more of the question “Who ought to hold the chattel in the event of the true owner never appearing?” than of the question “Is the true owner more likely to discover his chattel if possession is given to one rather than the other?”⁹⁶

D Are Disputes Between Finders and Occupiers Exceptional?

Hickey argues that the present law on finding is perfectly adequate. On his account there is no need to ‘bend and augment basic concepts, to propose qualifications to established rights in pursuit of the elusive policy’⁹⁷ because the basic principles do not operate in isolation but are subject to the ‘countervailing rules of crime and tort.’⁹⁸ There is much to be said for this argument. However, even if we ignore the role played by these rules of general liability, it is clear that the instrumental concerns discussed above do not constitute compelling reasons for departing from the possession rule as the mechanism for resolving disputes over lost things.

This is, first, because the law has not articulated a compelling reason for treating trespassing finders differently from others who acquire property rights through wrongful conduct or otherwise benefit from the breach of a legal duty. Secondly, whilst the desirability of reuniting owners with their lost chattels is undoubted, it is almost impossible to determine which rules maximise the chances of this coming to pass. If the argument offered above is

⁹⁶ Harris, above n 76, 83.

⁹⁷ Hickey, above n 4, 161.

⁹⁸ Ibid.

correct, it seems that we can do little better than to appeal to the better angels of our nature. In short, not only are these rules non-possessory in nature, no one has yet proposed a convincing justification for departing from the possession rule as the basis on which to decide disputes over lost chattels in which neither party claims as, or through, the owner.

One final possibility that has not yet been tested is whether a departure from the possession rule is justified on the ground that there is something unique about the particular relationship between finders and occupiers such that one party is more deserving than the other. A potential basis for distinguishing finders from occupiers has been suggested by Tettenborn. Writing on the decision in *Parker*, he argued that the claim of a finder should be preferred to that of an occupier on the basis that the act of finding can be compared to *specificatio*, discussed on Chapter I. He wrote that the Court of Appeal's decision in *Parker* was correct:

both on principle and in law. The point is, as the Proculians wisely saw in the law of *specificatio*, that people who *do* things to property are generally more meritorious than people who merely *have* it. Mr Parker *did* something; he found the bracelet, picked it up, in a sense improved it: against this British Airways' claim that they merely *had* (nay occupied) the place where Mr Parker found it, is insubstantial indeed.⁹⁹

Tettenborn is here following the tradition of justifying the outcome in such cases by an appeal to reasons that never occurred to the judges who decided them. This aside, his attempt to draw a comparison between finding and specification is unconvincing. Whilst someone who turns grapes into wine may attempt to justify his entitlement to the wine on broadly Lockean grounds, this does not readily apply to someone who, as Tettenborn himself said,

⁹⁹ Andrew Tettenborn, 'Gold Discovered at Heathrow Airport' (1982) 41 *The Cambridge Law Journal* 242, 242. Italics in original.

did no more than to pick up a bracelet that was lying on the ground. At the very least *Parker* is not a promising vehicle for this argument.¹⁰⁰ In any case, and this is not a criticism of Tettenborn's analysis, this argument simply supports the retention of possession as the applicable rule in such cases.

The reality is that, at least in the cases discussed above, there is no obvious moral ground on which to distinguish the claims of finders from occupiers. In a contest between a finder and an occupier, the former can always say, "I found it, not you", to which the latter will always respond, "yes, but only because you were on my land."¹⁰¹ This conclusion does not change even if the finder is a trespasser. As noted above, provided that the trespassing finder compensates the occupier for any loss caused by his breach of duty, there is no obvious reason why the law should also confer on the occupier a relative title to chattels the existence of which, but for the actions of the finder, she would have remained entirely ignorant. As Birkett J tellingly observed of disputes between finders and occupiers, '[a] discussion of the merits does not seem to help'.¹⁰²

V ARE THE RULES ON FINDING DESIRABLE?

A Introduction

If the foregoing analysis is correct, no one has yet demonstrated either a compelling instrumental or moral reason for departing from the possession rule in cases of finding. Nonetheless, it is clear not only that the law has departed from the possession rule, but also

¹⁰⁰ Applying this argument to the facts of *Waverley*, for example, might be more promising.

¹⁰¹ As Helmholz notes, this equivalence suggests that 'equitable division' is the appropriate outcome. Helmholz, above n 90, 315, 326.

¹⁰² *Hannah* [1945] KB 509, 521.

that it has been replaced by rules that are equally arbitrary. As counsel for the defendant finder asked in *Waverley*, if a watch is lost on a muddy path, why should the landholder's claim to the watch be stronger than that of the finder simply because, after a day or two, the watch may have become covered by a thin film of mud?¹⁰³ In response, Auld LJ defended the "attached/under" rule by reference to the unconvincing instrumental justifications, discussed above,¹⁰⁴ but also observed that, '[a]s to borderline cases ... potential absurdities can always be found at the margins in the application of any sound principle.'¹⁰⁵

Auld LJ is undoubtedly correct to note that, given the right factual scenario, any rule can be made to appear capricious and absurd in its operation. Just as importantly, in the absence of any moral or instrumental reason for favouring one party over another, a rule's arbitrariness ceases to be an objection to its adequacy. If, as is true in cases of finding, it is impossible to split the rival claims on "desert", what is crucial is that the relevant rule can be simply and consistently applied across a diverse range of factual scenarios. To put it another way, Auld LJ's dictum might to be reworded to say: "an absurd rule can be forgiven so long as it produces very few marginal cases." The primary argument made in this section is that, whilst this is true of the "attached/under" rule, it is not true of the "on/unattached" rule.

B *The "Attached/Under" Rule*

It is, of course, possible to conceive of circumstances in which there may be some uncertainty about the application of the "attached/under" rule. For example, to use the example given in *Waverley*, a wrist watch may be only partially buried in a muddy path. Nevertheless,

¹⁰³ [1996] QB 334, 345.

¹⁰⁴ Ibid 345–6.

¹⁰⁵ Ibid 345.

instances in which it is unclear as to whether some object is indeed attached to or under the surface of the land must be rare. That there does not appear to be any reported decision in which a court was confronted with some uncertainty about the application of the “attached/under” rule is testament to this. Thus, at the very least, the “attached/under” rule satisfies the certainty of application imperative.

A different sort of objection to the “attached/under” rule is that, to the extent that it is *sui generis* and not possessory, it does not harness the salience of the possession rule. As was discussed in Chapter IV, salience is the mysterious but empirically observable phenomenon that allows for the spontaneous emergence of solutions to coordination problems. As was discussed in Chapter V, legal solutions to coordination problems that do not harness extra-legal salience run the very real risk of confounding the expectations that salient conventions create. This danger of “divergence” creates a powerful argument for ensuring compatibility between legal and extra-legal norms, so long as this does not compromise other values which the law may wish to promote.

Whilst the need to prevent divergence is important, it is not of grave concern in the context of the sorts of disputes discussed above. This is because “occupier vs finder” disputes must be extremely rare, a fact attested to by the paucity of decided cases on the topic. The reason for this rarity is not far to seek. If a chattel is lost other than in a public place, one would expect it to be found by the occupier in the vast majority of instances. As the facts of the cases discussed above demonstrate, lost chattels will only be discovered by invitees or trespassers in unusual circumstances. In the absence of Court of Appeal authority, it would undoubtedly be desirable to simply return to the possession rule in all cases of finding. However, given the

rarity of such cases, the “attached/under” rule constitutes a very minor, and thus tolerable, example of divergence in the law.

C The “On/Unattached” Rule

Like the “attached/under” rule, the “on/unattached” also suffers from this “salience deficit” and is thus a possible source of unwelcome divergence between custom and law. However, unlike that rule, “on/unattached” is not redeemed by the simplicity of its application. This is because, in contrast to the “attached/under” rule, the “on/unattached” rule does not turn on a simple fact about the location of the find. Rather, it turns on whether or not a particular mental fact, the *animus possedendi*, can be inferred from the fact of the location of the find. In the Hohfeldian nomenclature discussed in Chapter II, the location of the find operates as an “evidential fact” from which the existence of this, further, “operative” mental fact can be inferred. Quite apart from the objection that one simply has no intention in respect of things of which one is ignorant, the “on/unattached” rule turns on inferences which themselves depend on contestable assumptions about the significance of the location of the find.¹⁰⁶

Fortunately, the uncertainty generated by the “on/unattached” rule is ameliorated by the fact that, in some circumstances, courts do not treat the location of the find as an evidential fact from which one can infer the existence of the requisite intention, but as grounds for the application of a discrete rule. So, it seems inconceivable that, at least following *Flack*, a finder could ever succeed against an occupier in a dispute over a lost chattel found in a family home. However, this is not because the *animus possidendi* is proved by a genuine

¹⁰⁶ This question of the location of the find has been discussed by the courts in terms of points on a continuum, limited by bank vaults at one extreme and public parks on the other. See *Parker* [1982] QB 1004, 1019 (Donaldson LJ). It is thus interesting to note that, in *Waverley*, Auld LJ would have been prepared to hold that the council had manifested the requisite intention in respect of a public park: [1996] QB 334, 350.

presumption. Rather, as argued above, it is because the courts treat “occupier of private home prevails over finder” as a substantive rule of law.

Once again, what should be emphasised is that the uncertainty created by the “on/unattached rule” is not justified by the need to arrive at the “right answer”. This is because, as was argued above, there is no sound basis on which to prefer the claim of an occupier over a finder, or *vice-versa*. As a consequence, the only imperative that the relevant rule must serve is certainty in its application. Whilst the “attached/under” rule appears to satisfy this imperative, the “on/unattached” rule is both arbitrary *and* uncertain its application. There is thus a strong argument, Court of Appeal authority or no, that it ought to be replaced by one which, though arbitrary, is at least simple to apply. Unsurprisingly, the possession rule recommends itself as the most obvious candidate.

VI NAVIGATING THE PROPERTY UNIVERSE

A Can There be Unwitting Possessors?

The primary argument of this chapter has been that it is both artificial and unsatisfactory to describe the outcome in a case such as *Elwes* as turning on the plaintiff’s prior possession of the lost object. This follows from the central argument advanced in this thesis, which is that possession is a purposeful act by which one stakes one’s claim to a material thing. One cannot therefore possess some object, in the sense discussed in Chapters III and IV, unless one is, at the very least, aware of its existence.

A simple objection to this argument is that it is indeed possible to possess something despite being ignorant of its existence. So, to take a particularly good example, Bell has written that, 'I must surely be in possession of milk or mail that is delivered to my house, even if I am asleep when it arrives.'¹⁰⁷

Whilst one can appreciate Bell's argument, there are nevertheless two responses to it. The first is that, as the presence of mailboxes amply demonstrate, people turn their minds to the possibility of receiving mail even though they may not know precisely when it will arrive. Thus, unlike ancient canoes buried beneath the surface of the land, mail and milk do not fall into the realm of "unknown unknowns". The second and more relevant rejoinder is that, as is discussed below, this tendency to create an ever-broader and more abstract notion of possession unnecessarily overburdens the concept.

B Non-Possessory Rules of Thumb

On the account presented in this thesis, the function of possession is to reduce objects of property to private ownership. If this is true, it is reasonable to assume that the possession rule plays a reduced role in societies, such as modern Australia, in which so little is *res nullius*. This is not to say that it becomes irrelevant. As was discussed in Chapter III, a successful outing to the cinema, for example, still requires that we are cognisant of conventional claim-staking behaviour. Likewise, as was argued in this chapter, the possession rule continues to select a substitute owner where a chattel has been lost and neither of the rival parties to the find claims as occupier of the land on which it was found. Moreover, as

¹⁰⁷ Andrew P Bell, *Modern Law of Personal Property in England and Ireland* (Butterworths, 1989) 38.

will be discussed in Chapter VII, possessory signals remain important if we wish to acquire a right and thus need to know the identity of the right-holder.

Nevertheless, the relative rarity of ownerless things in a society has two implications. First, it makes rules on the transfer of rights correspondingly more important. Secondly, and more relevantly, it means that, unlike hunters or settlers, we do not assume that the things with which we typically interact are appropriate objects of claim-staking behaviour. If I see a car parked by the curb, my decision about the duties that I owe, or do not owe, in respect of it does not generally turn on the presence, or absence, of recognisable possessory earmarks. Rather, my default assumption is that the car belongs to some other legal person, to whom I invariably owe the simple duty to “keep off”.¹⁰⁸

Waldron has written of ownership as an organizing idea that a layman is able to “go about his business” without expert guidance:

because he knows in an informal and non-technical way which things are “his” and which are not. If something is “his” then (roughly) he determines what use is to be made of it; if not somebody else does. Of course this is rough and ready knowledge by the standards of legal science. But it is there and it is socially very important: in the case of the overwhelming majority of citizens, it provides the main basis on which they learn to apply the property rules of their society.¹⁰⁹

Putting aside cases of cinema seats and car spaces in the snow, in highly urbanised societies in which so little is *res nullius*, making this determination about what things either are, or

¹⁰⁸ J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 30, 75; Henry E Smith, ‘The Language of Property: Form, Context, and Audience’ (2003) 55 *Stanford Law Review* 1105, 1115–7.

¹⁰⁹ Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1988) 43.

could legitimately become, “mine” only rarely requires that I answer the question, “does someone possess this?”

So, to return to Bell’s example as an illustration, the reason why no one interferes with the mail in someone else’s letterbox has nothing to do with whether or not the occupier of the house “possesses” his daily newspaper prior to retrieving it from his mailbox. Instead, people refrain from interfering with other people’s mail because they adhere to the general duty not to interfere with things that do not belong to them, irrespective of who, if anyone, happens to possess them at the time. Whilst it is true that the question of who is in possession of some object at any given time may be relevant to the passage of title and,¹¹⁰ consequently, standing to sue if tortious interference does occur,¹¹¹ it does nothing to alter the general duty of non-interference owed by others in respect of some thing. Penner has remarked that:

[w]e all owe the single, general duty not to interfere with property that is not our own. It doesn’t matter in the least to my understanding of my own duty in respect of the property of others, and thus the way in which I guide my behaviour in respect of that duty, whether I know who happens to own the individual houses I pass walking down the street. My duty does not change in the least if one of the houses is sold to a new owner. Something that is completely extraneous to the compliance with a duty, such as the knowledge of who owns the particular car I refrain from taking for a joy ride, is not properly comprised in the description of that duty.¹¹²

¹¹⁰ Although, in the case of sale, the passage of title does not require manual delivery. However, where there is a purported gift, the issue is more complex. In particular, it depends upon whether a donee’s consent is required in order for title to pass. On this topic see Jonathan Hill, ‘The Role of the Donee’s Consent in the Law of Gift’ (2001) 117 *Law Quarterly Review* 127, 129–33.

¹¹¹ Although, as was discussed in Chapter II, in many cases the law, often for entirely sensible reasons, often fudges this issue by deeming that certain people have “constructive possession” of chattels.

¹¹² James Penner, ‘Hohfeldian Use-Rights in Property’ in JW Harris (ed), *Property Problems: From Genes to Pension Funds* (Kluwer Law International, 1997) 164, 170.

Importantly, Penner's remarks about the irrelevance of the identity of the owner applies equally to the question of who, if anyone, happens to possess a particular thing at a particular time. Where some object is already owned and is not obviously lost or abandoned, the answer to that question neither alters the nature of the duty owed to the right-holder nor anybody's reason for complying with it. Thus, whilst some might insist that there can be unwitting possessors, the more important point is that, so far as the law of property is concerned, it is not a question that requires an answer. To the contrary, and consistently with the argument made in this chapter, these scholastic enquiries into the nature of possession not only make unnecessary demands of the concept, they also fail to reflect the much simpler practice of property.

VII CONCLUSION

Chapters III, IV and V of this thesis developed an expressive theory of possession, according to which possession in property law is best understood, not as a factual relationship of control over a tangible thing, but instead as a series of related acts that convey one's intention to claim an entitlement to a particular thing. This chapter has attempted to describe the implications of this theory when applied to what is perhaps the most famous group of cases in personal property law, the "finders' cases".

The primary argument advanced in this chapter is that, departing from the orthodox position, these cases cannot be explained as particular examples of the possession rule in action. It is true to say that if neither party claims as occupier, then the outcome turns on a simple application of the possession rule. However, if one party claims under the special status of "occupier", the dispute will be resolved by application of discrete rules that turn on the

particular factual circumstances of the find. Because, in such cases, the occupier is very often ignorant of the very existence of the lost chattel, these rules cannot be reconciled with the idea of possession as a claim-staking act. Just as importantly, by departing from the possession rule in cases of finding, the law has, without instrumental or moral justification, replaced a salient though arbitrary rule with one that, at least in the case of the “on/unattached ruled”, is non-salient, arbitrary *and* uncertain in its application.

Perhaps most importantly, what merits criticism is the persistent and strained attempt, both on the part of courts and commentators, to explain these rules as examples of the possession rule in action. The argument made in this chapter is that these attempts at rationalisation have only succeeded in creating an ever more artificial concept of possession that neither rationalises the law nor reflects the much simpler way in which people navigate the web of property transactions that they encounter in everyday life.

CHAPTER VII

THEFT, GOOD FAITH PURCHASE AND THE LIMITS OF CONVENTIONS

I INTRODUCTION

In Chapter V it was argued that, although spontaneously emergent conventions are strictly amoral, there is reason to believe that the possession convention it is more than tolerably fair. Nevertheless, the application of the possession convention may still, on occasion, place the law in invidious positions. This might be because the simple and morally neutral operation of the possession convention permits individuals of questionable merit to be vested with a property right. Alternatively, it may be because it selects two “Hawks”, leading to disputes in which parties, each of whom have complied with the convention, have equally meritorious yet incompatible claims to some object of property.

In this final chapter, these issues will be discussed with reference to two notoriously difficult problems in the law of property; the acquisition of property rights through acts of theft and the position of the good faith purchaser at common law. The argument made below is that the issues of theft and good faith purchase do not demonstrate that the possession rule is a flawed means of allocating property rights. Instead, they highlight the inherent limitations of rules that are, at base, spontaneously emergent conventions. Moreover, that these problems are inevitable does not make them insoluble. It simply means that their solutions must be found in doctrines and instrumental considerations that are unrelated to the basic mechanism by which a society allocates “names to things”.

II POSSESSION AND THEFT

A Proprietary Overkill

The account of the possession convention offered in Chapter IV made two important claims. The first was that the rule which allocates “names to things” was never designed, but emerged unconsciously and spontaneously through the interactions of countless people confronted with the same coordination problem. The second was that, due to what was described as the “simplicity imperative”, any such rule is bound to be blind to fine-grained details such as the identity and relative merit of the competing parties. Any rule that depended on an assessment of the parties’ *bona fides* or the relative distributive merit of their claims would be too difficult to apply and, as a consequence, would be replaced by a rule which, though cruder, created fewer interpretive difficulties for those who have to apply it.

That conventions are morally inert is not itself a cause for concern. This is because the purpose of basic allocative rules such as possession is to create a first, and not a final, distribution of property entitlements. Nevertheless, because it is morally neutral and undiscriminating in its operation, the possession rule can and sometimes does generate property rights in situations in which they appear to be unnecessary or even undesirable. Hickey has described this phenomenon as ‘proprietary overkill’.¹

This issue of proprietary overkill was raised by Crompton J in *Buckley v Gross*.² *Buckley* concerned a dispute over a quantity of tallow that had melted in a fire and reconstituted in the Thames, whence it was collected by several opportunists. Some of the tallow was then sold to

¹ Robin Hickey, ‘Possession as a Source of Property at Common Law’ in Eric Descheemaeker (ed), *The Consequences of Possession* (Edinburgh University Press, 2014) 77, 92.

² (1863) 3 B&S 566; 122 ER 213 (*‘Buckley’*).

the plaintiff, from whom it was seized. Following an order from a police magistrate, the tallow was detained under powers conferred by statute. The police subsequently sold it to the defendant, whom the plaintiff sued for conversion. The Court unanimously found for the defendant, holding that, whilst the plaintiff's possession would have been sufficient "title" against a "wrongdoer", the police were not "wrongdoers" because the order made by the magistrate under the Act had lawfully extinguished the plaintiff's title.³ For present purposes, the most interesting aspect of the case was Crompton J's concern about the potential consequences of the possession rule. His honour wrote that:

[h]ere, in my mind, the plaintiff's possession was gone. The goods were properly taken from him, and there is no such doctrine as that it will reinvest in him in the manner contended for; *otherwise every person who was possessor of goods for any time, however short, might bring an action against any person afterwards found in possession of them, however he may have come by it. That would be pressing too far the doctrine of sufficient title against a wrongdoer.*⁴

A similar argument has been made by Gordley and Mattei, who claim that the logical consequences of Pollock's view that possession creates a relative title:

go beyond anything he or an English court would be likely to accept. If Pollock were right, a possessor would have a title which, like an owner's, would not be extinguished when he abandoned the property. Indeed, if Pollock were right, anyone who had been in possession, even for a day, could, until the statute of limitations ran, claim the property from any current possessor who could not trace title flawlessly from a prior possessor. If that is English law, one should spend one's next vacation taking brief possession of as many English houses as possible

³ Ibid 215–6 (Cockburn CJ), 216 (Crompton J), 216–7 (Blackburn J).

⁴ Ibid 216. Italics supplied.

in hopes of returning years later and finding them occupied by someone who cannot prove title.⁵

Contrary to what they appear to believe, Gordley and Mattei's nominally troubling example is in fact a textbook illustration of the principle of relative title. One might therefore respond to their argument by noting that, because the rights created by acts of possession are relative and not absolute, their concern is of little practical significance. Nevertheless, this does not answer the broader question of why it is either necessary or desirable for the law to permit this multiplication of rights. One particularly important consequence of the rule that "possession creates title" is the ability of a wrongdoer to acquire a property right through an act of possession that amounts to theft.

B Possession and Theft: The Position at Common Law

According to Hickey, the common law's attitude to the acquisition of property rights through illegal acts was not always clear. On his account, the question of whether thieves acquire property rights remained an open one as late as 1887.⁶ However, whatever doubts the law may have entertained in the late nineteenth century have since been resolved by a line of cases concerning statutory powers of seizure and detention exercised by police. These cases demonstrate definitively that possession, however acquired, is sufficient to create a relative property right.

⁵ James Gordley and Ugo Mattei, 'Protecting Possession' (1996) 44 *American Journal of Comparative Law* 293, 303.

⁶ Robin Hickey, 'Possession Taken by Theft and the Original Acquisition of Personal Property Rights' in Nicholas Hopkins (ed), *Modern Studies in Property Law*, volume 7 (Hart Publishing, 2013) 401, 404–5, 412–3.

The first in this line of cases was the Court of Appeal's decision in *Webb v Chief Constable of Merseyside Police*,⁷ in which the claimant sought the return of £36,000 in cash, or damages for its conversion, which police had seized on suspicion that it represented the proceeds of drug trafficking. The Court of Appeal found for the claimant, holding that, even though the trial judge found that the money represented the proceeds of crime,⁸ the police could not retain the money once their statutory powers of detention had expired.⁹

Very shortly thereafter, the Court of Appeal gave judgment in what is now the leading case, *Costello v Chief Constable of Derbyshire Constabulary*,¹⁰ in which the appellant sought the return of a car that police had detained pursuant to statutory seizure powers that had since expired. Although the Court upheld the trial judge's finding that the car was stolen and that the appellant was fully aware of this fact,¹¹ it was unanimously held that the police must release it to the appellant on the ground that he was the prior possessor, and that the law protects possession no matter how it is acquired. Lightman J, with whom Keene LJ and Walker LJ unreservedly agreed, concluded that:

[i]n my view on a review of the authorities ... as a matter of principle and authority possession means the same thing and is entitled to the same legal protection whether or not it has been obtained lawfully or by theft or by other unlawful means. It vests in the possessor a possessory title which is good against the world save as against anyone setting up or claiming under a better title. In the case of a theft the title is frail, and of likely limited value ... but nonetheless remains a title to which the law affords protection.¹²

⁷ [2000] QB 427 ('*Webb*').

⁸ Ibid 434.

⁹ Ibid 448 (May LJ), 449-50 (Pill LJ).

¹⁰ [2001] EWCA Civ 381 ('*Costello*').

¹¹ Ibid [8] (Lightman J).

¹² Ibid [31].

An issue in *Costello* was the status of the much earlier decision in *Buckley*. As was noted above, the plaintiff in *Buckley* could not succeed against the police's successor in title because, as Cockburn CJ concluded, the order made by the police magistrate under the relevant Act had the effect of divesting the plaintiff of his right to the tallow. Cockburn CJ held that:

[t]he 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 this enactment. As against the plaintiff, therefore, the defendant derives title, not from a wrong doer, but from a person selling under authority of the justice, whether rightly or not is of no consequence.¹³

In *Costello*, Lightman J held that there was nothing in *Buckley* to derogate from the basic principle that possession, however acquired, creates a relative title. On his view, the *ratio* to emerge from *Buckley* was limited to situations in which property seized under a statutory power is subsequently sold. In such cases, 'the transferee obtain[s] the possessory title in defeasance of the thief or receiver.'¹⁴ Lightman J's analysis thus accords with the view that the decision in *Buckley* did not create a substantive exception to the possession rule, but simply turned on a judicial order made under the authority of a particular statute.¹⁵

Although Lightman J's decision did not meet with universal approval,¹⁶ Battersby wrote of the case that:

¹³ *Buckley* (1863) 3 B&S 566, 572; 122 ER 213, 215. Cockburn CJ's reasoning was subsequently applied by Holroyd Pearce LJ in *Irving v National Provincial Bank Ltd* [1962] 2 QB 73, 79–80.

¹⁴ [2001] EWCA Civ 381, [31].

¹⁵ G Battersby and A D Preston, 'Stolen Goods and the Sale of Goods Act 1893, s.25(2) - A Rejoinder' (1975) 38 *Modern Law Review* 77, 80; Graham Battersby, 'Acquiring Title by Theft Case' (2002) 65 *Modern Law Review* 603, 608; Robin Hickey, *Property and the Law of Finders* (Hart Publishing, 2010) 118–9.

¹⁶ See David Fox, 'Enforcing Possessory Title to a Stolen Car' (2002) 61 *The Cambridge Law Journal* 27, 29.

[t]he decision and the reasoning in *Costello* seem absolutely compelling. The notion of relative title, which is built into our law of property, is reasserted in the most uncompromising way. Possession, however, acquired, will found a title which will prevail against all claimants whose rights are subsequent to those of the possessor, and, conversely, will be defeated only by those who have continuing rights which are prior to those of the possessor.¹⁷

The reasoning in *Costello* was subsequently applied by the Court of Appeal in *Gough v Chief Constable of West Midlands Police*,¹⁸ in which the claimant sought delivery up and damages in respect of various car parts that the police had seized in the belief that they were stolen. The Court held that the police could not retain the goods after its statutory powers of seizure had expired. After reviewing the decisions in *Webb* and *Costello*, Park J, with whom Carnwath LJ and Potter LJ agreed, concluded that such disputes are resolved according to ‘common law principles deriving from the law of detinue and conversion’,¹⁹ and 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.’²⁰

C Asking the Right Question: Theft and The Limits of Conventions

Unsurprisingly, the outcome in cases such as *Gough* and *Costello* was not universally applauded. After all, these are cases in which a plaintiff is seeking the court’s assistance in enforcing *the very duty* that he himself deliberately transgressed. Potter LJ expressed his misgivings by remarking that:

¹⁷ Battersby, above n 15, 609.

¹⁸ [2004] EWCA Civ 206 (*Gough*).

¹⁹ Ibid [15].

²⁰ Ibid.

[w]e are bound by the decisions of this court in *Webb* and *Costello* ... Nonetheless, I find it inherently rebarbative that, by means of civil proceedings in detinue based on the superior possessory title of the claimant over property held by the police following seizure in the course of investigating a suspected offence, a person may be held entitled to recover and continue to enjoy property even though the court may be satisfied that he is not the true owner and has acquired the property illegally, albeit the true owner is not identifiable.²¹

Likewise, Hickey, who is critical of these decisions, has written that:

by definition, the thief's possession is premised on some high degree of disregard for the property of his victim. Any argument in favour of property acquisition by the thief risks being inappropriately insensitive to the continuing property rights of the victim, and the common law would need at least to offer an express account as to why *proprietary* protection is justified notwithstanding the claimant's obvious disregard for the property of another.²²

On Hickey's account, and consistently with the argument made in Chapter IV, proprietary protection is not justified in such cases because any concerns that we may have about violations of the thief's bodily integrity, of the sort proffered by Savigny,²³ are poorly addressed through property law.²⁴ Hickey argues that Roman law more sensitively addressed this issue because it allowed a possessor to bring an interdict against anyone who used force to dispossess him, but stopped short of concluding that his possession also made him *dominus*. Possessors who were not also owners could thus not bring the *vindicatio* and, consequently, had no claim

²¹ Ibid [48].

²² Hickey, 'Possession as a Source of Property at Common Law', above n 1, 93 Italics in original.

²³ See also Oliver Wendell Holmes, *The Common Law* (Little, Brown and Company, 1949) 212–3.

²⁴ Hickey, 'Possession as a Source of Property at Common Law', above n 1, 82–3. The argument advanced in Chapter IV was that these are matters best addressed by the law of wrongs against the person, and not the law of property.

against the dispossessor's successors in title. Acts of possession in Roman law, Hickey concludes, resulted in 'obligations, not property.'²⁵

Hickey's criticism extends to other public policy-type justifications raised in the cases. Of the argument, discussed below, that finding for the claimant is necessary in order to prevent what would otherwise be the *ultra vires* expropriation of property rights, he writes that:

the argument is flawed insofar it assumes precisely that which is at stake, namely that possession obtained by theft results in the acquisition of a property right by the thief. Unless this premise is correct, it is meaningless to speak of expropriation in this context, for there can be no expropriation without prior subsisting property.²⁶

Consequentialist justifications, such as the "expropriation argument", only beg the question if we assume that acts of possession do not invariably create a relative title in the object possessed. Hickey's argues that, contrary to the decisions in the line of cases discussed above, 'it is far from self-evident that property acquisition is warranted on the authorities, the better view being at least that the common law has declined to commit itself on the matter.'²⁷ Thus, for Hickey, the question is whether theft and other serious wrongdoing constitutes an exception to the rule that possession is a "root of title" at common law. Irrespective of whether Hickey's view of the law is correct, the argument advanced here is that this is not the correct question to ask. Rather, the question ought to be, "should the court deny the plaintiff relief in the circumstances?". As will be discussed below, when framed in this way, the enquiry becomes one of "illegality".

²⁵ Ibid 83.

²⁶ Hickey, 'Possession Taken by Theft and the Original Acquisition of Personal Property Rights', above n 6, 408.

²⁷ Ibid.

There is an important distinction between these two enquiries. The first is asking whether or not the plaintiff has actually acquired a property right. The second, by contrast, is not questioning the normal operation of the possession rule. It assumes that the plaintiff has acquired a property right. It instead asks whether he should be able to enforce that right against the defendant in the circumstances.²⁸ The distinction between these two questions is important because, whilst they may yield the same outcome on given facts, the first inquiry has the potential to create an exception to the possession *rule* that, though seemingly sensible, is undesirable because it is too subtle to be replicated in the underlying *convention* that actually guides people's behaviour.

This replication problem arises because, as has been stressed throughout this thesis, any convention that is to determine who is to play Hawk and who Dove in any dispute over a tangible object must be salient, simple and cheat-proof if it is to be effective. However desirable it may appear to be, a convention that required members of a population to assess the *bona fides* of the individual selected as Hawk as a condition of treating them as the legitimate right-holder would create too many interpretive difficulties to survive as means of allocating "names to things". As a consequence, even if the law created an exception to the possession rule in cases of theft, people would continue to treat possessing thieves as legitimate right-holders because, absent compelling evidence to the contrary, this is simply what the convention prescribes.

This point is consistent with arguments advanced by Penner and Smith. As Penner has argued, when one walks through a carpark, one's duty to refrain from interfering with any given car

²⁸ *Tinsley v Milligan* [1994] 1 AC 340, 374 (Lord Browne-Wilkinson) ('*Tinsley*').

does not alter according to whether ‘one of the cars has just been sold, so that there is a new owner, or if one of the cars has been lent to the owner’s sister-in-law’.²⁹ To this list we might add that it does not matter that one of the cars in the carpark has been stolen. The duty of non-interference that everyone owes has nothing to do with the personal status of the owner but is, instead, mediated by the purely impersonal concept of a “thing”. As Smith argues, organising a system of property around the concept of an impersonal “thing” is necessary in order to contain what would otherwise be unmanageable complexity.³⁰ If it is true that, as Smith writes, ‘[t]he things defined by the basic exclusion strategy mediate the relations between often anonymous parties’,³¹ then it follows that a duty-owner’s obligation to comply with her duty of non-interference in respect of some car cannot depend on her assessment of whether or not it was stolen.

D Illegality and Coherence

The argument made above was that the inherently blunt nature of conventions means that they will, on occasion, pick unmeritorious winners, such as thieves. Consequently, the judicial creation of an exception to the *rule* that “possession is a root of title” in cases of theft will not prevent thieves being treated as owners outside the courtroom. Because the exception is too complex to be replicated in the underlying convention, it will simply create a cleft between the law and practice of property. However, it does not follow from this that the courts must therefore resolve cases such as *Costello* in favour of the plaintiff. This is because the relevant question is not whether the plaintiff has acquired a property right, but whether the court ought

²⁹ J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 75.

³⁰ Henry E Smith, ‘Property as the Law of Things’ (2011) 125 *Harvard Law Review* 1691, 1701.

³¹ Ibid 1706. See also Thomas W Merrill and Henry E Smith, ‘What Happened to Property in Law and Economics?’ (2001) 111 *Yale Law Journal* 357, 359.

to *enforce* that right in the circumstances. As was foreshadowed above, this is a question that engages the substantive doctrine of “illegality”.

“Illegality”, as it applies in situations such as this, is an ambiguous and unfortunate term. The doctrine of illegality is not concerned with “criminality” *per se*. Nor is it concerned exclusively with Lord Mansfield’s statement in *Holman v Johnson* that, ‘[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.’³² Rather, as Edelman and Bant have observed, it is best understood as referring to the overarching imperative of ensuring that the law is, when viewed as a whole, coherent.³³ “Illegality” functions as a defence to *prima facie* liability, not because of some extenuating circumstance in the defendant’s conduct, but because to grant the plaintiff relief would, in the circumstances, undermine or “stultify” the underlying purpose of some interlinking statute or rule of the common law.³⁴ So, for example, where two people steal a car, the driver does not owe his co-offender a common law duty to take reasonable care when driving it because, as the High Court said in *Miller v Miller*:

[t]he statutory purpose of a law proscribing dangerous or reckless driving is not consistent with one offender owing a co-offender a duty to take reasonable care. And in a case where two or more are complicit in the offence of illegally using a vehicle, the statutory purpose of the law proscribing illegal use ... is not consistent with one offender owing a co-offender a duty to take reasonable care.³⁵

³² *Holman v Johnson* (1775) 1 Cowp 341, 343; 98 ER 1120, 1121. This maxim of the law is usually rendered in the Latin *ex turpi causa non oritur actio*.

³³ James Edelman and Elise Bant, *Unjust Enrichment* (Bloomsbury Publishing, 2nd ed, 2016) 303.

³⁴ *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 519–20 [37]–[38] (French CJ, Crennan and Kiefel JJ); Edelman and Bant, above n 33, 158–62.

³⁵ (2011) 242 CLR 446, 482 [101] (French CJ, Hayne, Crennan and Kiefel JJ).

*Equuscorp Pty Ltd v Haxton*³⁶ provides another illustration. *Equuscorp* concerned an investment scheme in which investors borrowed their contribution from a scheme company. However, because the marketers of the scheme had failed to comply with certain statutory requirements regarding the issuing of a prospectus, the loans were unenforceable. The question was whether allowing the lender's assignee to recover the money by bringing a claim in unjust enrichment would undermine the statutory purpose of protecting investors. A majority of the Court held that it would.³⁷ French CJ, Crennan and Kiefel JJ held that:

[r]ecovery from the investors would have been recovery from persons whose protection was the object of the statutory scheme ... This is a clear case in which the coherence of the law, and the avoidance of stultification of the statutory purpose by the common law, lead to the conclusion that [the assignee] did not have a right to claim recovery of the money advanced under the loan agreements as money had and received.³⁸

The relevant question for present purposes is not whether there should be a blanket exception to the possession rule in situations in which possessors are also thieves. It should be assumed that the plaintiff has a valid property right that he may otherwise gift, sell, mortgage and so on. Rather, the question is whether granting the plaintiff the relief he seeks would, in the circumstances, introduce incoherence into the law.

At common law, it has long been established that property rights pass under illegal agreements.³⁹ Where there has been a transfer of possession under an illegal contract, the

³⁶ (2012) 246 CLR 498.

³⁷ Ibid 522–3 [54] (French CJ, Crennan and Kiefel JJ), 544 [111] (Gummow and Bell JJ).

³⁸ Ibid 522–3 [45].

³⁹ *Singh v Ali* [1960] AC 167, 176–7 (Lord Denning). This seems to occur irrespective of whether execution of the contract is also accompanied by a transfer of possession. See *Belvoir Finance Co Ltd v Stapleton* [1971] 1 QB 210, 217 (Lord Denning MR), 220 (Sachs LJ).

possessor, whether a purchaser, bailee or tenant, can rely on her possession in order to resist an action for recovery of the asset.⁴⁰ In *Taylor v Chester*, for instance, the plaintiff pledged half a £50 Bank of England note as security for sums incurred, so reads the headnote, ‘for wine and suppers supplied to the plaintiff by the defendant in a brothel kept by her, to be there consumed in debauch.’⁴¹ In an action by the plaintiff to recover the half note Mellor J, delivering the decision of the Court, held that:

[t]he plaintiff, no doubt, was the owner of the note, but he pledged it by way of security for the price of meat and drink provided for, and money advanced to, him by the defendant. Had the case rested there, and no pleading raised the question of illegality, a valid pledge would have been created, and a special property conferred upon the defendant in the half-note, and the plaintiff could only have recovered by showing payment or a tender of the amount due. In order to get rid of the defence arising from the plea, which set up an existing pledge of the half-note, the plaintiff had recourse to the special replication, in which he was obliged to set forth the immoral and illegal character of the contract upon which the half-note had been deposited. It was, therefore, impossible for him to recover except through the medium and by the aid of an illegal transaction to which he was himself a party. Under such circumstances, the maxim “in pari delicto potior est conditio possidentis,” clearly applies, and is decisive of the case.⁴²

Though the brothel madam was equally tainted by the illegality, as Mellor J explained, ‘the plaintiff could not recover without shewing the true character of the deposit; and that being upon an illegal consideration, to which he was himself a party, he was precluded from obtaining

⁴⁰ *Feret v Hill* (1854) 15 CB 206; 139 ER 400, 407 (Maule J), 408 (Crowder J).

⁴¹ *Taylor v Chester* (1869) LR 4 QB 309.

⁴² *Ibid* 314.

“the assistance of the law” to recover it back.’⁴³ Lord Browne-Wilkinson summarised the position at common law in the following terms:

(1) property in chattels and land can pass under a contract which is illegal and therefore would have been unenforceable as a contract; (2) a plaintiff can at law enforce property rights so acquired provided that he does not need to rely on the illegal contract for any purpose other than providing the basis of his claim to a property right; (3) it is irrelevant that the illegality of the underlying agreement was either pleaded or emerged in evidence: if the plaintiff has acquired legal title under the illegal contract that is enough.⁴⁴

His Lordship then went on to harmonise the position at law and equity, holding that, ‘the rule is the same whether a plaintiff founds himself on a legal or equitable title: he is entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction.’⁴⁵

His Lordship’s summary of the law would seem to suggest that plaintiffs in cases such as *Costello* will succeed because all they need demonstrate is that they were in possession of the goods at the time of seizure. Moreover, as the passage above makes clear, the fact that it emerges in evidence that those goods were stolen is not material. However, this apparently simple analysis is made doubtful by two important factors. First, although the implications for property law are not yet clear, Lord Toulson, with whom a majority of the Supreme Court agreed on this point, has recently held that the inflexible “reliance” test is no longer good law

⁴³ Ibid 315.

⁴⁴ *Tinsley v Milligan* [1994] 1 AC 340, 370 (*‘Tinsley’*). See also *Bowmakers Ltd v Barnet Instruments Ltd* [1945] 1 KB 65, 71 (Du Parcq CJ).

⁴⁵ *Tinsley* [1994] 1 AC 340, 376.

and should be replaced by a discretionary “range of factors” test.⁴⁶ Secondly, and perhaps more importantly, cases such as *Taylor v Chester* are concerned with situations in which both parties are tainted by the illegality. This is why courts are content, to borrow Lord Eldon’s famous description, to ‘[l]et the estate lie where it falls.’⁴⁷ However, the maxim *in pari delicto potior est conditio possidentis* cannot apply to the cases discussed above because the police are not party to an illegal transaction.

As Potter LJ’s and Hickey’s observations, noted above, make plain, cases such as *Costello* certainly place courts in an invidious and embarrassing position. If the resolution of these cases is to turn on illegality, and coherence more generally, what does “coherence” demand in the circumstances? Though it may be unexpected, the argument advanced below is that coherence between the civil and criminal law demands that the plaintiff succeed.⁴⁸

This particular coherence issue arose in the decision of the New South Wales Court of Appeal in *State Rail Authority of New South Wales v Wiegold*.⁴⁹ The respondent in *Wiegold* suffered a serious injury in a workplace accident caused by the negligence of the appellant. Due to impecuniosity caused by his inability to work, the respondent began to cultivate and sell hemp. He was subsequently convicted of drug cultivation and served a custodial sentence. The question for the Court was whether the respondent could claim damages for loss of earnings during the period of his imprisonment. A majority of the Court answered in the negative. Samuels JA, with whom Handley JA agreed, held that:

⁴⁶ *Patel v Mirza* [2017] AC 467, 501–2 [110]. The case concerned a claim in unjust enrichment. For analysis see James Goudkamp, ‘The End of an Era? Illegality in Private Law in the Supreme Court’ (2017) 133 *Law Quarterly Review* 14.

⁴⁷ *Muckletson v Brown* (1801) 6 Ves Jun 52, 69; 31 ER 934, 942.

⁴⁸ See, for example, *Hall v Herbert* [1993] 2 SCR 159, 179–80 (McLachlin J). See also Ernest J Weinrib, ‘Illegality as a Tort Defence’ (1976) 26 *University of Toronto Law Journal* 28, 54.

⁴⁹ (1991) 25 NSWLR 500 (*Wiegold*).

[i]f the plaintiff has been convicted and sentenced for a crime, it means that the criminal law has taken him to be responsible for his actions, and has imposed an appropriate penalty. He or she should therefore bear the consequences of the punishment, both direct and indirect. If the law of negligence were to say, in effect, that the offender was not responsible for his actions and should be compensated by the tortfeasor, it would set the determination of the criminal court at naught. It would generate the sort of clash between civil and criminal law that is apt to bring the law into disrepute.⁵⁰

In *Webb*, discussed above, May LJ expressed a concern about the need to prevent statutory powers of seizure, used to gather evidence in preparation for a criminal prosecution, from being deployed as *de facto* powers of expropriation in the absence of a criminal conviction. He argued that:

[a]lthough from the Chief Constable's perspective the money is the proceeds of crime, from another perspective the court should not, in my view, countenance expropriation by a public authority of money or property belonging to an individual for which there is no statutory authority. There is statutory machinery for the prosecution of those who deal in drugs and for the confiscation upon conviction of the proceeds of their drug dealing. There is statutory machinery for the confiscation upon conviction of the proceeds of other serious crime. There is statutory machinery for the forfeiture of the cash proceeds of drug trafficking which are being imported into or exported from the United Kingdom. There is no statutory power to confiscate the proceeds of drug dealing within the United Kingdom where the person entitled to possession of the money is not convicted of a drug trafficking offence.⁵¹

⁵⁰ Ibid 514. See also *Gray v Thames Trains Ltd* [2009] 1 AC 1339.

⁵¹ [2000] QB 427, 446.

As this passage makes clear, the source of the court's power to confiscate the proceeds of crime is statute. It thus seems to be a basic requirement of the rule of law that, in the absence of an express statutory warrant, courts cannot make what amount to confiscation orders in favour of the executive. Battersby has made a similar argument, remarking of the decision in *Costello*, '[w]elcome too is the Court of Appeal's adherence to the constitutional principle that the police have no greater powers than any other citizen except where the law specifically confers greater powers'.⁵²

Even if one does not accept that cases such as *Gough* and *Costello* give rise to a rule of law issue, they do raise an important coherence argument, and it is one that favours the claimant. The coherence issue is one of consistency between the civil and criminal divisions of the law. As May LJ's judgment makes clear, Parliament has made confiscation orders conditional on the successful criminal prosecution of the accused. Importantly, unlike parties in a civil trial, defendants in criminal prosecutions are afforded unique procedural protections. In particular, they enjoy the benefit of a more onerous standard of proof. As Samuels JA held in *Wiegold*, a court will not make orders in a civil trial that stultify the criminal law. The need for consistency between the two jurisdictions must extend to safeguarding the particular protections extended to an accused in a criminal trial. Thus, in the absence of a criminal conviction, the finding in a civil trial that the claimant is also a thief cannot justify a departure from the normal rule "first in time, better in right". To treat such a finding of fact as dispositive would be to circumvent those protections which, by requiring a criminal conviction, the relevant statute has conferred upon right-holders. However "inherently rebarbative" such a result may appear to be, the need to ensure that the civil law does not undermine the criminal protections assumed by the

⁵² Battersby, above n 15, 609. A fundamental principle that is usually traced back to Lord Camden's famous judgment in *Entick v Carrington* (1765) 19 St Tr 1030.

applicable statutory regime requires that, in the absence of a criminal conviction, the prior possessor must prevail.

E Conclusion

Hickey has written of this issue that:

[o]riginal acquisition rules are important. In the end, they are the rules that will determine the distribution of resources within a given community. It is plain that if this distribution is generally considered just, then rules about how distribution is to be effected must endorse and in the end serve the prevailing principles of justice. A community which takes justice seriously should, at the very least, be able to explain and defend the particular rules it invokes about original acquisition, and this includes (perhaps especially includes) original acquisition which seems to run counter to normally accepted principles of justice, as *prima facie* appears to be the case where we reward a thief or other wrongdoer.⁵³

Whilst these comments seem eminently reasonable, they are, nevertheless, incorrect. For one, as was discussed in Chapter V, rules about original acquisition do not, as Coase demonstrated, determine the distribution of resources in a given community. To the contrary, they only create a “rough first cut” of entitlements. More importantly, what the foregoing analysis has sought to demonstrate is that, contrary to Hickey’s argument, the problem of rights acquired by thieves does not in fact raise an issue about the desirability of possession as a mechanism for creating original property rights.

⁵³ Hickey, ‘Possession Taken by Theft and the Original Acquisition of Personal Property Rights’, above n 6, 409–10.

As Hume demonstrated, the basic allocative rule in any system of private property is, first and foremost, a convention. As has been discussed throughout this thesis, the simplicity imperative dictates that conventions are necessarily crude, morally blind and undiscerning. As a consequence, any allocative rule that successfully fulfils the narrow objective of resolving the coordination problem caused by scarcity will inevitably, on occasion, pick unmeritorious winners, including thieves. Thus, whilst adherence to an established convention becomes, as was discussed in Chapter IV, an obligation grounded in “conventional morality”, there is no reason to believe that its substance will conform to “normally accepted principles of justice”, whatever they may be. To put the same point another way, any rule that is, by its design, sensitive to “accepted principles of justice” will be too complex to answer the most basic questions of mine and thine.

However, this does not mean that where a possessor is also a thief, her property right will invariably be enforced by a court in a civil action. Whilst such a possessor will, through the normal operation of the rule, acquire a valid property right capable of being sold, gifted mortgaged, and so on, it may be that the enforcement of her claim would, in the circumstances, undermine other important principles. Whilst the argument made above was that, in disputes such as *Costello*, coherence provides an additional justification for the outcome reached on doctrinal grounds, this may not always be so. In any case, putting this particular argument to one side, what is crucial to appreciate is that the operation of the possession rule is not the issue of substance here. Whether or not the plaintiff ought to succeed should not turn on whether she has a property right acquired through the act of possession. Rather, it should turn on whether, bearing in mind the design of the law as a whole, she is asking the court to pursue mutually contradictory aims.

This chapter has thus far considered the difficult issue of possession and theft. The remainder of the chapter considers a closely related and equally difficult question; how should the law treat those who, in ignorance, acquire property rights from thieves and other wrongdoers?

IV POSSESSION AND *BONA FIDE* PURCHASE

A Conventional Expectations

As has been argued throughout this thesis, the existence of a convention within some population creates expectations about how, in the absence of explicit agreement, people will behave in particular circumstances. In the case of the possession convention, people rely upon and organise their affairs in accordance with the accepted meaning of those interactions with things that amount to acts of “possession”.

Something very much like this concept of “conventional expectations” lies at the heart of a theory of possession recently proposed by Austin. Austin argues that the significance of possession is not to be found in moral philosophy but, instead, in its function as a sort of rudimentary or *de facto* register of title.⁵⁴ She writes that:

[o]n my account, possession gives someone a title claim not because possession justifies ownership in some manner – as useful labour, as a reward, etc. – *but because a system of property must conform to the rule of law and this requires a public system of title. In this way possessory title does not point to justification stories for ownership but towards the requirements of the practice of law.*⁵⁵

⁵⁴ Lisa M Austin, ‘Possession and the Distractions of Philosophy’ in JE Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, First edition, 2013) 182, 189.

⁵⁵ Ibid 190. Italics supplied.

Austin's theory provides an interesting contrast to that of Ihering, discussed in Chapter IV. Unlike Ihering, who argued that the possession rule should be understood as an evidentiary concession to owners, Austin claims that it serves as an evidentiary concession to third parties who, as adherents to the convention, draw the inference of ownership from the fact of possession. She argues that, '[w]hat possessory title rules say, in general, is that you should consider as owner the person who is *acting* as owner; the person acting as owner is the person acting as if she is the rightful possessor by exercising control over the thing in question.'⁵⁶

Thus, whereas the success of Ihering's argument depends upon the truth of the assumption that most possessors are also owners, Austin's explanation turns on the different claim that the law ought to allow people to assume that the person acting as the owner is the owner, even if this is not always true. She writes that, 'possessory title rules do not say: the person holding the apple *is* the owner. They are rules addressed to third parties who need to know that things are owned and by whom if they are to follow the law.'⁵⁷

Austin's basic claim is consistent with the central argument of this thesis. This is because, if we accept that possession describes those acts that convey a recognized claim to some thing, then we must also accept that the receipt of these signals generates corresponding "conventional expectations" amongst the people to whom they are directed. This observation about the role of possession is of limited significance if one's wish is simply to avoid breaching property duties, in which case one need only "keep off". However, it is of great significance to people who either wish to acquire the right-holder's right or to engage in conduct that requires

⁵⁶ Ibid 189. Italics in original.

⁵⁷ Ibid 190. Italics in original.

the grant of a licence. Unlike those who simply wish to avoid breaching property duties, people in this position need to know the identity of the right-holder. On Austin's account, and consistently with the argument made in this thesis, possession is the observable fact that enables such people to quickly and cheaply make this determination.

A potential challenge to Austin's theory of possession comes in the form of an observation recently made by Ellickson. He argues that those who are interested in acquiring a property right or other interest do not in fact rely on simple possessory acts, of the sort discussed throughout this thesis, which signal one's intention to stake a claim to some thing. He writes that:

[a]n owner also commonly has reason to communicate much more detailed information to members of a much narrower audience, namely those who wish to engage in a transaction involving a particular asset. An owner of land, for example, may wish to sell it, lease it, mortgage it, or encumber it with a servitude. A transferee involved in one of these sorts of transactions commonly will offer the owner better contract terms if the owner can assure the transferee that third parties who historically have been associated with the resource have previously relinquished to the owner all their rights to it. To provide this sort of title assurance information to transferees, a property claimant typically uses forms of communication that are quite different from the ones a claimant uses to communicate to a casual passersby. Title assurance information is much more particularized than an ownership earmark, the audience for title assurance information is far smaller, and the members of that audience have more time and greater incentive to engage in careful research. Beginning in ancient Mesopotamia, states have encouraged the development of recording and registration systems to facilitate the communication of detailed information about the quality of land titles. Unlike an ownership

earmark, title assurance information typically is communicated by means of words, indeed, written words.⁵⁸

Ellickson's argument is another manifestation of the "intensiveness vs extensiveness" trade-off developed by Smith, and discussed in Chapter III. Because the audience for "title assurance information" is much smaller than that for general ownership claims, the message can be correspondingly more complex. To an extent, Ellickson is undoubtedly correct. No one, for example, would consider purchasing a house from someone simply on the basis that she happened to be holding the front door key. Any potential purchaser would, at the very least, instead consult the relevant register.

However, Ellickson's claim that purchasers, for example, do not rely on basic possessory earmarks is not universally true. Whether or not a purchaser ought to rely on a vendor's possession as sufficient evidence of his title instead depends upon an economic calculus that requires the prospective purchaser to weigh the cost of investigating the vendor's title against the value of the transaction.⁵⁹ As is discussed further below, in the case of a large transaction, such as the purchase of real property, incurring such costs will be justified. However, in low value transactions, it will not be. No one who, for example, purchases a bottle of milk from the corner milk bar would bother to investigate the quality of the vendor's title. Where the stakes are so low, possession affords sufficient proof.

⁵⁸ Robert C Ellickson, 'The Inevitable Trend toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose' (2010) 19 *William & Mary Bill of Rights Journal* 1015, 1027.

⁵⁹ For similar observations see Benito Arruñada, 'The Titling Role of Possession' in Yun-chien Chang (ed), *Law and Economics of Possession* (Cambridge University Press, 2015) 207, 216–7; Thomas Merrill, 'Ownership and Possession' in Yun-chien Chang (ed), *Law and Economics of Possession* (Cambridge University Press, 2015) 9, 31.

B *The Good Faith Purchaser at Common Law*

One can condense the message of the previous section into the following: if, through an accepted act of possession, someone is behaving as if they are an owner then, in the absence of evidence to the contrary, people ought to treat them as such. One of the benefits of reliance on these simple possessory signals is that third parties, and in particular purchasers, can make quick and cheap determinations about who owns what. However, the corresponding detriment is that there is nothing to prevent prospective purchasers from relying, in good faith, upon possessory signals that are sent by those who are themselves in contravention of the convention, such as thieves. The archetypal example of this problem is the predicament caused by the good faith or *bona fide* purchaser.

Imagine that B, an apparently reputable provedore, has an enormous black truffle on display in her shop window. C, a chef, purchases it from B. However, unbeknown to C, B actually stole the truffle from A. Several days after purchasing the truffle, C receives a letter from A demanding its return. C then returns to the store to remonstrate with B, but she is nowhere to be found. It is obvious that C has an action in contract against B for breach of the implied warranty to pass good title.⁶⁰ However, as will frequently be the case with thieves and fences, she has made herself difficult to find. To borrow Lord Salmon's neat line, '[u]sually the rogue ... is not worth powder and shot.'⁶¹ Putting aside the contractual issue, the question for the law of property is whether A or C has the better title to the truffle. In other words, should the law favour the good faith purchaser or the innocent victim of the theft? McFarlane, has described

⁶⁰ See, for example, *Goods Act 1958* (Vic) s 17(a).

⁶¹ *Moorgate Mercantile v Twitchings* [1977] AC 890, 907.

this invidious choice as the ‘basic tension of property law’.⁶² Given that one party must prevail, which does the law choose?

To return to the truffle example, the law’s general, though not invariable, answer is to resolve the dispute in favour of A. A will generally prevail because, at common law, the guiding principle is that one cannot pass a better title than one has.⁶³ A’s claim to the truffle will prevail over that of C for the simple reason that A’s title is older, and thus better, than the derivative title that C acquired from B. C cannot resist A’s claim on the basis that B was acting as if she were the owner of the truffle, however convincing she may have been.⁶⁴ As Swadling remarks, ‘[t]he general rule is that property rights survive dispositions by non-owners, even where the recipient is an innocent purchaser for value. Security of ownership almost invariably takes priority over security of transaction.’⁶⁵

However, this is not always true. The law recognises a series of exceptions to the *nemo dat* principle that enable purchasers, and others who have relied upon a vendor’s possession as proof of his right, to succeed at the expense of existing right-holders. The effect of these exceptions is to underwrite, in the circumstances in which they apply, the conventional expectations created by the receipt of widely accepted possessory signals.

⁶² Ben McFarlane, *The Structure of Property Law* (Hart Publishing, 2008) 5.

⁶³ This basic principle is usually rendered in the Latin maxim *nemo dat quod non habet*, and is enshrined in *Goods Act 1958* (Vic) s 27. For an excellent summary of the *nemo dat* rule and its exceptions at common law see William Swadling, ‘Restitution and Bona Fide Purchase’ in William Swadling (ed), *The Limits of Restitutionary Claims: A Comparative Analysis* (The United Kingdom National Committee of Comparative Law, 1997) 79, 82–9.

⁶⁴ Note that the *Factors Act* does not apply in cases of theft because the mercantile agent is not in possession with the owner’s consent. See, for example, *Factors Act 1889* (UK) s 2. Relatedly, jurisdictions that have retained the market overt rule recognise exceptions in the case of theft. See *Sale of Goods Act 1895* (SA) s 24; *Sale of Goods Act 1895* (WA) s 24; *Sale of Goods Act 1896* (Tas) s 29.

⁶⁵ Swadling, above n 63, 80.

An obvious example is the old mercantile custom, and later rule of the common law, known as “market overt”, according to which purchasers acquired clear title to stolen goods that were sold by merchants in the markets in which the custom applied.⁶⁶ Another example is the second sales rule under the *Sale of Goods Act*, which allows a good-faith purchaser to acquire clear title to goods which, unbeknownst to the purchaser, the vendor in possession has already sold.⁶⁷ The rationale for this rule appears to be that, by leaving the vendor in possession of the goods, the purchaser is allowing other prospective purchasers to draw an inference of ownership, or good title, from his continued possession.⁶⁸ To take another example, good faith purchasers do not inherit the voidable titles of their vendors.⁶⁹ Perhaps the most historically important exception to *nemo dat* is the so-called “currency rule”, which provides that creditors who receive particular chattels that constitute “money” in good faith in satisfaction of a debt take free of equities.⁷⁰ Where a chattel functions as money, the rule is that ‘possession alone must decide to whom it belongs.’⁷¹

These exceptions are not confined to sales. Registration systems, beginning with the *Bills of Sale Act 1878* (UK), were passed in order to overcome the problem of “ostensible ownership” created by owners who retain possession of chattels that they have mortgaged.⁷² The mischief addressed by such registration schemes is that, because people draw an inference of ownership

⁶⁶ See generally Brian Davenport and Anthony Ross, ‘Market Overt’ in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (LLP, 2nd ed, 1998) 337; JG Pease, ‘Market Overt in the City of London’ (1915) 31 *Law Quarterly Review* 270, 274–5. The rule was abolished in the UK by the *Sale of Goods (Amendment) Act 1994* (UK). It survives in South Australia, Western Australia and Tasmania. See *Sale of Goods Act 1895* (SA) s 22; *Sale of Goods Act 1895* (WA) s 22; *Sale of Goods Act 1896* (Tas) s 27.

⁶⁷ *Goods Act 1958* (Vic) s 30; *Sale of Goods Act 1979* (UK) s 24. See generally M G Bridge, *Personal Property Law* (Oxford University Press, 4th ed, 2015), 215–9.

⁶⁸ For discussion see M G Bridge et al, *The Law of Personal Property* (Sweet & Maxwell, 2013) 368–9 [13–064]; Swadling, above n 63, 88.

⁶⁹ *Goods Act 1958* (Vic) s 29.

⁷⁰ For the classic statement of the rule see *Miller v Race* (1758) 1 Burr 452, 457; 97 ER 398, 401 (Lord Mansfield).

⁷¹ *Woakey v Pole* (1820) 4 B&Ald 1, 7; 106 ER 839, 841 (Best J).

⁷² The classic authority on ostensible ownership is *Twyne’s Case* (1601) 3 Co Rep 80 b; 76 ER 809. On the concept itself see Douglas G Baird and Thomas H Jackson, ‘Possession and Ownership: An Examination of the Scope of Article 9’ (1982) 35 *Stanford Law Review* 175, 179–81.

from the fact of possession, those who subsequently deal with a mortgagor, in particular those who extend him unsecured credit, are given a misleading impression of his ability to repay.⁷³ So strong is the tendency to draw this inference that, as Goode observes, prior to the advent of registration regimes, ‘it was considered an almost conclusive badge of fraud for the secured creditor to leave his debtor in possession of the security, thus enabling the debtor to get further credit on the strength of his apparent unencumbered ownership.’⁷⁴

In order to address this problem, Parliament passed various iterations of the *Bills of Sale Act*, obliging mortgagees to register their “bills”, the instruments by which such interests were created. Failure to comply with the registration requirements under the Act rendered the interest void.⁷⁵ Modern registration regimes go further and not only capture retention of title and similar arrangements,⁷⁶ but also leases of goods and other forms of bailment that do not, in either form or substance, secure the payment of a debt.⁷⁷ The expansion of such regimes was necessitated by modern commercial drafting techniques that outflanked older registration requirements.⁷⁸ However, despite their complexity, it is significant that even under modern registration regimes such as the *PPSA*, security interests can still be perfected by the simple expedient of transferring possession of the collateral to the secured party.⁷⁹ As Goode and McKendrick have observed of the various methods of perfection, possession remains ‘the oldest and the safest method.’⁸⁰

⁷³ The mischief is not confined to credit transactions. The separation of possession from ownership can also create problems for good faith purchasers who are unaware that their vendor is merely a bailee. See the comments of Lord Wilberforce in *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890, 901.

⁷⁴ R M Goode, ‘The Modernisation of Personal Property Security Law’ (1984) 100 *Law Quarterly Review* 234, 238.

⁷⁵ *Bills of Sale (1878) Amendment Act 1882* (UK) s 8.

⁷⁶ See, for example, *Personal Property Securities Act 2009* (Cth) s 12(2)(d) (‘PPSA’).

⁷⁷ *Ibid* s 12(3)(c). See further A J Duggan and David Brown, *Australian Personal Property Securities Law* (CCH Australia, 2nd ed, 2015) 77–81 [3.33]–[3.39].

⁷⁸ *Associated Alloys v CAN 001452106 Pty Ltd (in Liq)* (2000) 202 CLR 588, 614–18 [60]–[68] (Kirby J); Goode, above n 74, 247–8.

⁷⁹ *PPSA 2009* (Cth) s 21(2)(b).

⁸⁰ Royston Miles Goode and Ewan McKendrick, *Goode on Commercial Law* (Penguin, 4th ed, 2010) 680.

C Good Faith Purchase and the Limits of Conventions

The previous section described how the law resolves disputes between owners and good faith purchasers. Whilst there are situations in which the law will underwrite the inference of ownership that people draw from the fact of possession, the basic position is that one cannot pass better title than one has.⁸¹ If the law invariably allowed third parties to rely on possession as conclusive evidence of title then, as is the case with cheques and other bills of exchange, all objects of property would be fully negotiable.⁸² However, they are not.

A more difficult question is how the law *ought* to resolve the problem created by the good faith purchaser. As Levmore demonstrated in a comparative study, there is no universally accepted answer to this question.⁸³ Perhaps this should convince us of the truth of McFarlane's remark that the contest between owners and good faith purchasers raises an 'impossibly difficult question.'⁸⁴ The fundamental difficulty is that the convention must be able to successfully mediate the relationships of a huge number of anonymous parties. Consequently, the relevant rule must turn on the conventional meaning of the possessory act, and not the identity or characteristics of the person performing it. As was argued in Chapter V, the impersonal nature of the convention is desirable because it makes it fair. On the other hand, the irrelevance of the identity of the signaller also allows thieves to play "Hawk" and, in the case of good faith purchase, instructs third parties to 'consider as owner the person who is *acting* as owner'⁸⁵

⁸¹ *Shogun Finance Ltd v Hudson* [2004] 1 AC 919, 934 [14] (Lord Nicholls); William Swadling, 'Rescission, Property and the Common Law' (2005) 121 *Law Quarterly Review* 123, 130.

⁸² Negotiability is used here in the sense that good faith successors in title take free of equities. On the two meanings of 'negotiable' see Bridge et al, above n 68, 13 [1-026].

⁸³ Saul Levmore, 'Variety and Uniformity in the Treatment of the Good-Faith Purchaser' (1987) 16 *Journal of Legal Studies* 43. See also, Alan Schwartz and Robert E Scott, 'Rethinking the Laws of Good Faith Purchase Essay' (2011) 111 *Columbia Law Review* 1332, 1334–5.

⁸⁴ McFarlane, above n 62, 189.

⁸⁵ Austin, above n 54, 189.

even if he is later revealed to be a rogue. The problem of good faith purchase thus demonstrates the limits of rules that are, at heart, conventions.⁸⁶

This problem of irreconcilable conventional expectations can be illustrated by reference to the truffle example, given above. By taking possession of the truffle lying on the forest floor, A has complied with the convention and is thus entitled to expect that, through his act of possession, he has acquired a property right that is enforceable against all comers. Likewise, by purchasing the truffle from someone who, according to the convention, was behaving as if she were its owner, C has developed the identical, but incompatible, expectation. As Savage CJ remarked of the position of the good faith purchaser:

[p]ossession of personal property is *prima facie* evidence of property ... The *bona fide* purchaser, therefore, is justified in considering the fraudulent vendee the true owner – such *bona fide* purchaser as the terms *bona fide* import, having no notice of the fraud; and considering the possessor as the owner, the *bona fide* purchaser is justified in purchasing such property and giving value for it, or in making advances upon it, or incurring responsibility upon the credit of it, or in receiving it in pledge for money or property loaned upon it.⁸⁷

It will be recalled from Chapter V that Hayek thought that the material question in any dispute was whether the parties had ‘conformed to expectations which the other parties had reasonably formed because they correspond to the practices on which the everyday conduct of the

⁸⁶ On the irreconcilable nature of the parties’ claims see generally *Bishopsgate Motor Finance Corp v Transport Brakes Ltd* [1949] 1 KB 322, 337–8 (Denning LJ); Bridge, above n 67, 196–7; Douglas Baird and Thomas Jackson, ‘Information, Uncertainty, and the Transfer of Property’ (1984) 13 *Journal of Legal Studies* 299, 300.

⁸⁷ *Root v French*, 13 Wend 570, 572 (NY Sup Ct, 1835). The reference to “fraudulent vendee” here is to a bankrupt rogue who fraudulently purchased the disputed goods from the plaintiff and then transferred them to the defendant, the good faith purchaser, who received them in partial satisfaction of an existing debt. So, the relationship between the rogue and the defendant was actually that of vendor-purchaser. For an excellent discussion of the pre-Civil War sales cases see Harold R Weinberg, ‘Markets Overt, Voidable Titles, and Feckless Agents: Judges and Efficiency in the Antebellum Doctrine of Good Faith Purchase’ (1981) 56 *Tulane Law Review* 1.

members of the group was based.’⁸⁸ The riddle of the good faith purchaser is that, if we apply Hayek’s rule of thumb to the truffle example, there is no basis on which to distinguish the claims of A and C because each is the product of expectations generated by their conformity to the applicable convention.

Nor does Austin’s theory of possession provide a solution. Whilst she argues that, as a *de facto* register of title, the possession rule should be understood as a requirement of the rule of law,⁸⁹ it remains true that, where two parties have conformed to the convention that underpins the relevant legal rule, no fundamental principle of legality provides a basis on which to favour the purchaser at the expense of the owner, or *vice-versa*. To the contrary, all the rule of law seems to require in the circumstances is that such disputes be resolved by a rule that is clear, prospective, stable, and so on.⁹⁰

If the problem of *bona fide* purchase does indeed highlight the limits of conventions, then the obvious response would seem to be to replace possession with registration as the appropriate means of announcing a property claim. Indeed, Posner has made this argument, writing that:

[a]lthough the possession norm improves the position of parties relative to anarchy, legal rules improve their position relative to the possession norm. The problem with the possession norm is that it does not protect property in which a person has invested resources but cannot overtly possess – for example, large areas of land or chattels that are best used by third parties. The

⁸⁸ F A Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge and Kegan Paul, 1973) vol 1 Rules and Order, 96–7. Hayek was perfectly aware that judges will, on occasion, be called upon to decide between litigants who have relied upon rules that generate legitimate though irreconcilable expectations: at 115.

⁸⁹ Austin, above n 54, 190.

⁹⁰ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2nd ed, 2009) 214–8. This is not to say that others do not subscribe to a ‘thicker’ conception of the rule of law.

natural solution to this problem is a recording system, such as those used for real estate transactions and security interests in personal property.⁹¹

Whilst it is undoubtedly true that registration systems can greatly improve the lot of good faith purchasers, they are not a panacea. This is so for two reasons. First, as was argued in Chapter V, even in jurisdictions with sophisticated title-by-registration regimes, possession retains its legitimacy as a way of announcing a property claim. Secondly, and perhaps more importantly, the benefits of a registration regime must be weighed against its costs.

As was noted earlier in this chapter, no one who purchases a bottle of milk from the corner store would bother to consult a register in order to determine the quality of the vendor's title. Given the value of the transaction, the cost of doing so is prohibitive. Moreover, in addition to the cost to the purchaser of consulting the register, one must also consider the cost of both creating and updating the register to ensure its accuracy. As Baird and Jackson have argued, these costs mean that, whilst registration regimes are an effective and desirable means of publicising ownership interests in objects of property, such as land, that are valuable and seldom transferred,⁹² they are poorly suited to chattels that are relatively cheap and frequently transferred.⁹³ Thus, at least in low-cost, high-volume transactions, a simple convention such as the possession rule remains, whatever its faults, the only viable mechanism for determining who owns what.

Given this, should we conclude that, at least where registration systems are inappropriate, *bona fide* purchase poses an essentially insoluble problem? The answer is “no”. The contest between

⁹¹ Eric A Posner, ‘Law, Economics, and Inefficient Norms’ (1995) 144 *University of Pennsylvania Law Review* 1697, 1716.

⁹² Baird and Jackson, above n 86, 304.

⁹³ *Ibid* 306.

owners and good faith purchasers only appears to raise an impossibly difficult question because, as lawyers, we tend to seek the answer in the wrong place. The argument made below is that the answer to this question cannot be found in the basic deontology of property law, in which possession, as the basic right-creating act, plays such a central role. Instead, as in the case of theft, the satisfactory, though not costless, resolution of the problem depends upon considerations that are unrelated to the particular mechanism through which property rights are created.

D Consequentialist Solutions

As Waldron has written, '[i]n a private property system, a rule is laid down that, in the case of each object, the individual person whose name is attached to that object is to determine how the object shall be used and by whom. His decision is to be upheld by society as final.'⁹⁴ To respect that decision as final requires that, with the possible exception of claims brought in nuisance,⁹⁵ disputes over conflicting uses of some thing cannot be resolved by asking a court to rule on their relative distributive virtues. Thus, as Chapter I sought to make clear, so far as the law is concerned, the "correct" answer in any given case simply turns upon the distinctly non-consequentialist application of "rights" and "duties" created by, most prominently, acts of possession. As Lord Selborne LC famously remarked, 'Parliament is, no doubt, at liberty to take a higher view upon a balance struck between private rights and public interests than this Court can take.'⁹⁶ Likewise, in his debate with Coase, Simpson observed that, '[d]espotic

⁹⁴ Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1988) 39.

⁹⁵ On which see Henry E Smith, 'Exclusion and Property Rules in the Law of Nuisance' (2004) 90 *Virginia Law Review* 965, 967–8; Richard A Epstein, 'Nuisance Law: Corrective Justice and Its Utilitarian Constraints' (1979) 8 *Journal of Legal Studies* 49, 74–5.

⁹⁶ *Goodson v Richardson* (1874) LR 9 Ch App 221, 224.

dominion is what the right of private property is all about, and it includes the right to behave in ways which make no contribution whatsoever to the national wealth'.⁹⁷

A key feature of private property is thus that the distributive consequences of a right-holder's decision do not bear upon her right to make it. Nevertheless, the argument advanced here is that, where compliance with the basic allocative rule generates inconsistent claims, the proper solution must turn on consequentialist arguments that, whilst familiar to economists, are foreign to property law and its basic deontological structure. The claim made here is not merely that this is how the law *ought* to resolve the good faith purchaser puzzle, but that consequentialist arguments both explain and justify the exceptions to the *nemo dat* rule, discussed above.

The currency rule provides a particularly good illustration of this point. If a system wishes to ensure that certain physical tokens function as means of payment, it is not enough that they be designated as "legal tender", which simply means that, when tendered in satisfaction of debt, they constitute good discharge of particular sums specified in a particular unit of account.⁹⁸ It is also essential that creditors who accept these tokens in good faith in satisfaction of a debt take free of other potential claims. As Viscount Haldane LC explained:

[i]f a sovereign or bank note be offered in payment it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire into title. The reason of this is that chattels of such a kind form part of what the law recognizes as currency, and treats as passing from hand to hand in point, not merely of possession, but of property. It would cause great inconvenience

⁹⁷ A W Brian Simpson, 'Coase v. Pigou Reexamined' (1996) 25 *Journal of Legal Studies* 53, 88.

⁹⁸ See, for example, *Currency Act 1965* (Cth) s 16; *Reserve Bank Act 1959* (Cth) s 36. See generally David Fox, *Property Rights in Money* (Oxford University Press, 2008) 28–9 [1.90].

to commerce if in this class of chattel an exception were not made to the general requirement of the law as to title.⁹⁹

If creditors were subject to the claims of others then, at the very least, we would expect notes and coins to circulate at a discount to their face value.¹⁰⁰ The need to ensure that certain physical tokens function as stable media of exchange, units of account and stores of value justifies breaking the deadlock between owners and transferees in favour of the latter where the chattel in question passes into “currency”.¹⁰¹

The market overt rule is another good example of a rule that is justified on consequentialist grounds. This exception to the *nemo dat* is usually explained on the basis that, particularly in high-volume, low-value transactions, absolving purchasers of the need to investigate a vendor’s title ensures confidence in the market.¹⁰² As Blackstone wrote:

property may also in some cases be transferred by sale, though the vendor *hath none at all* in the goods: for it is expedient that the buyer, by taking proper precautions, may at all events secure his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of law is, that all sale and contracts of any thing vendible, in fairs or markets *overt* ... shall not only be good between the parties, but also binding on all those that have any right or property therein.¹⁰³

⁹⁹ *Sinclair Brougham* [1914] AC 398, 418.

¹⁰⁰ Fox, above n 98, 61–2 [2.32]–[2.39].

¹⁰¹ On the functions of money see *ibid* 6–10 [1.19]–[1.30].

¹⁰² Swadling, above n 63, 83–4.

¹⁰³ William Blackstone, *Commentaries on the Laws of England. Book II, Of the Rights of Things* (Oxford University Press, 1st ed, 2016) 304 *Italics in original*.

The utilitarian justification for a rule that favours transferees is ultimately that, to the extent that confidence in the market will encourage greater commercial exchange, the market overt rule will, on balance, make a society wealthier.¹⁰⁴

Another, and complementary, sort of utilitarian argument is that, in the presence of transaction costs, the applicable rule should fix liability on the “cheapest” or “least-cost avoider”.¹⁰⁵ So if, for instance, it could be demonstrated that the cost of preventing a theft is less than the cost of investigating the quality of a vendor’s title to particular goods, the law ought to favour purchasers over owners.¹⁰⁶ This same efficiency argument can be applied to disputes between purchasers and mortgagees of chattels. As Baird and Jackson have noted, registration systems are desirable because they increase the amount of information available to prospective transferees, thus reducing the chances of a dispute between, for example, a mortgagee and a purchaser.¹⁰⁷ However, if a dispute does occur, efficiency demands that it be resolved against the mortgagee if she neither registered her right nor took possession of the collateral. This is because the existence of a register means that it is cheaper for a mortgagee to publicise her right than it is for a prospective purchaser to investigate an otherwise hidden encumbrance on the vendor’s title.

¹⁰⁴ However, this benefit must be weighed against the danger of an increase in theft. This is because, as Weinberg has argued, rules, such as market overt, that relieve purchasers of the need to investigate the quality of the vendor’s title reduce the effective cost of stolen goods. If the fall in price results in an increase in demand, we should expect to see a corresponding increase in theft to meet that demand. See Harold R Weinberg, ‘Sales Law, Economics, and the Negotiability of Goods’ (1980) 9 *Journal of Legal Studies* 569, 576–80.

¹⁰⁵ Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970) 135–8; Stephen G Gilles, ‘Negligence, Strict Liability, and the Cheapest Cost-Avoider’ (1992) 78 *Virginia Law Review* 1291, 1305–6.

¹⁰⁶ Weinberg, above n 104, 583–6. This would include analysis of, for instance, which of the two groups can more effectively pool their risks so as to more cheaply insure against loss. As Weinberg notes, the fact that the basic *nemo dat* rule has survived for so long is *prima facie* evidence that it is efficient: at 586. See further Levmore, above n 83, 46–8. This position at common law is nevertheless that an owner is under no duty to safeguard his property. See *Moorgate Mercantile v Twitchings* [1977] AC 890, 902–3 (Lord Wilberforce), 925 (Lord Fraser).

¹⁰⁷ Baird and Jackson, above n 86, 301.

What is important about all of these examples is that they represent solutions to the problem of good faith purchase that turn on consequentialist rationales which are independent of the allocative rule upon which the parties' equally meritorious yet incompatible claims are founded. Whilst it is not being argued that they are necessarily optimal solutions,¹⁰⁸ what these exceptions to *nemo dat* demonstrate is that the problem created by *bona fide* purchase can be satisfactorily, though not painlessly, resolved. However, like a government considering which of two houses it ought to compulsorily acquire in order to build a new road, the answer is not to be found in either the basic allocative rule or the essentially deontological structure of property law.

V CONCLUSION

An important argument made throughout this thesis is that the rule that determines what belongs to whom must turn on an asymmetry that is simple to identify and apply in a wide range of circumstances. In our system, the relevant asymmetry is constituted by those relations between people and things that, within a particular population, amount to possession. This simplicity imperative means that the application of the rule, and the convention that underpins it, cannot depend upon difficult and unreliable judgments, such as whether or not the person performing the possessory act is a thief. As a consequence, application of the possession rule will, on occasion, place the law in an invidious position. Two such instances, theft and good faith purchase, were considered in this chapter.

¹⁰⁸ Schwarz and Scott have, for instance, argued that the "double moral hazard" created by the good faith purchase problem cannot be efficiently resolved by property law at all. On their account, instead of allocating the property right to the owner at the expense of the purchaser, or *vice-versa*, the best way to ensure that both owners and purchasers invest in the optimal level of precaution is through the imposition of a negligence standard. See Schwarz and Scott, above n 83, 1339–40.

The obvious solution to the problem created by the simplicity imperative would appear to be to replace possession with registration as the source of, to borrow Ellickson's term, "title assurance information". The obstacle is that the move from possession to registration is only viable where the object in question is valuable and infrequently transferred. The argument advanced above was that problems, such as theft and good faith purchase, created by incompatible conventional expectations can be satisfactorily answered. However, contrary to what one might expect, the answers are not to be found in the expressive mechanism by which the law allocates property rights to those who are competent to bear them.

CONCLUSION

If one were to peruse the leading textbooks on personal property law, real property law or jurisprudence, one would likely be left with the impression that possession is a uniquely complex, arcane and ambiguous concept, and that its peculiar secrets are the sole preserve of eminent legal scholars and natural law theorists. As should be evident from the analysis in this thesis, it is undoubtedly true that the possession rule does raise conceptual and moral questions that often do not admit of simple or, for that matter, particularly comforting answers. Nevertheless, by concentrating on the most troublesome aspects of the concept, we can easily overlook a simple and important truth about possession; that it is a pervasive and, on the whole, unremarkable feature of life in those societies that recognise private property rights.

Indeed, when viewed from afar, what is striking about the “possession puzzle” is that, for all the controversy and debate that the concept has generated in textbooks and scholarly journals, it remains true that laymen, with no training in law or philosophy, are nevertheless perfectly able to “get it”. Merrill has recently made a similar observation, writing that:

[w]hen you entered this room you did not have to devote any intellectual effort to perceiving which seats were taken, which had been claimed by someone who intended to return, and which were open. Your brain processed this information without thinking about it. This feature of possession has been obscured by property teachers, who love to dwell on a small number of cases in which claims of possession are contested, such as the dispute between Pierson and Post over who was first to possess the fox. Such cases are fascinating, and we can learn important things about possession by studying them. But the reality is that 99.9 percent of the time, our perceptions are made effortlessly and unconsciously, and are not challenged by others who are

processing the same information. Indeed, this is how we successfully navigate through daily life without significant conflict over thousands of items of value that cross our paths.¹

Merrill's observations accord with the central argument advanced in this thesis, which is that, despite the persistent scholarly disagreement discussed in Chapter II, the concept of possession is much simpler than generations of lawyers and law students have been led to believe. On the account presented here, possession does not describe some species of right that is different from the generic property right, described in Chapter I. Nor does it refer to some esoteric, and uniquely legal, concept that consists of one fact about "physical control" and a second, discrete, fact about the putative possessor's intention. Rather, on the account presented in this thesis, possession refers to any act, earmark or symbol that, as a matter of an extra-legal convention, is recognised by members of a particular population as a legitimate way of staking a claim to an object of property.

In particular, what is crucial to appreciate is that, contrary to the standard formulations, the efficacy of these particular acts, symbols and earmarks does not depend upon a possessor's "physical control" in the sense of his ability to exclude others. To the contrary, all that matters is that, in a community whose members respect property rights as a matter of course, the "possessor" has staked his claim in the prescribed way.

The account developed in this thesis does not attempt to undertake the essentially anthropological exercise of exhaustively describing those particular relations between people and things that amount to "possession" in particular communities. The point made here is simply that what amounts to possession in the law cannot be neatly separated from what

¹ Thomas W Merrill, 'Possession as a Natural Right' (2015) 9 *New York University Journal of Law and Liberty* 345, 358.

amounts to possession in custom. This is because, as was discussed in Chapter IV, the possession *rule* of the positive law is, first and foremost, an extra-legal *convention* that has been applied by, and incorporated into, the common law. Thus, whether or not some act amounts to possession remains a question of social fact. As the discussion of *Popov v Hayashi* in Chapter III sought to make clear, the extra-legal nature of this enquiry does not fundamentally change simply because, in disputes that end up before the courts, this determination is made by a judge who will, depending on her determination, make binding orders.

To offer this conceptually neat explanation of the nature of possession is not to deny that there will, at times, be problems generated by uncertainty in its application. This might be because, as in *Pierson v Post*, members of a particular group disagree about whether or not some particular act amounts to possession. Alternatively, and perhaps more likely, it may be because, as in *Popov*, there is simply insufficient evidence to determine whether or not the putative possessor performed the requisite act. Nevertheless, it should be emphasised that disagreements, particularly of the sort in *Pierson*, represent the exception and not the rule. This is because, as was discussed in Chapter IV, any convention that regularly gives rise to interpretive confusion amongst those whose behaviour is to be guided by it will not survive in the long run. In short, if possession were as confusing as the conflicting academic accounts would have us believe, it would simply cease to be the mechanism that determines elementary questions of mine and thine.

More generally, as was briefly noted in Chapter III, the widely-held view that possession is a hopelessly ambiguous concept is, at least in part, attributable to the natural tendency of lawyers to view legally significant concepts through the lens of litigated disputes. In common law

systems, it is necessary to begin with the decided cases because the *ratio decidendi* to emerge from these decisions *is* the law. Nevertheless, as the “finders’ cases”, discussed in Chapter VI, demonstrate, to focus exclusively on difficult cases can lead to the distortion of otherwise coherent concepts. Moreover, and just as importantly, this focus on the periphery at the expense of the core can also paint an unfairly gloomy picture of their efficacy as behaviour-guiding norms. What must always be remembered is that, as Merrill observed in the extract above, for every *Pierson*, there are countless, quotidian property interactions in which the possession rule functions so effectively that its presence passes unnoticed. This natural tendency to overlook the “easy cases” reinforces the truth of the methodological claim, made in the Introduction, that in order to understand the nature and function of possession in the law, one must address the extra-legal origins of the rule and its salience in property interactions in which the positive law is never invoked.

The theory developed in Chapters III and IV made no broad, normative, claims about the possession rule or its ramifications. Indeed, as was discussed in detail in Chapter IV, an important part of this account is that moral arguments about the significance of possession cannot explain why it, as opposed to some other mechanism, came to fulfil the essential function of determining what belongs to whom. To the contrary, it was emphasised that, like all spontaneously emergent conventions, possession is strictly amoral. That is to say, its moral desirability is incidental to its ability to spread throughout a population. The moral dimension of convention is purely conventional. People *ought* to follow the possession convention, not because of its substance, but because it is the established way in which members of a population solve a recurrent coordination problem.

However, whilst the moral desirability of the possession convention is incidental to its fitness, it does not follow that it is therefore immoral or unfair. The argument advanced in Chapter V was that we can go beyond Epstein's minimalist defence of the possession rule. This is because, whilst the arbitrariness of the rule makes it insensitive to distributive concerns in any given pairwise contest, it also ensures that no one is systematically excluded from benefitting from it. This blind operation of the rule ensures that it satisfies a minimum standard of fairness. Thus, when one considers all the possible ways in which a system of private property could assign property rights to those capable of enjoying them, possession is not merely a tolerable rule, it may also be a desirable one.

Moreover, the fact that the application of the possession rule may, at times, place the law in an embarrassing position or generate inconsistent, though equally meritorious, claims does not undermine its role as the dominant allocative rule in property law. Conventions must be simple and, as the discussion in Chapter VII sought to make clear, problems such as stultification are not unique to disputes about the acquisition of property rights. Rather, they are an inevitable feature of any complex system of law that must attempt to reconcile often competing moral and instrumental priorities. What must be stressed is that the resolution of difficult questions such as theft and good faith purchase do not implicate the possession rule *per se*. Rather, they require that the law grapple with questions of efficiency, internal consistency and other instrumental considerations that transcend the narrower issue of the purely expressive mechanism by which the law solves the coordination problem created by the ineradicable condition of scarcity.

Perhaps what is most remarkable about the possession rule described in this thesis is its longevity and resistance to change. If this essentially Humean account is correct, the

convention that helped an anarchic mob to emerge from the state of nature continues to resolve elementary questions of mine and thine over smartphones, electric cars and other things that Hume could scarcely have imagined when he wrote his famous work in 1738. This is not to deny that, at least in some areas of the law, the role of possession is waning. So, for instance, the old learning on the negotiability of cheques and bills of exchange will soon be of historical interest only. Indeed, one can foresee a not-too-distant future in which chattel money itself becomes obsolete. To borrow Pound's neat phrase, '[w]ealth, in a commercial age, is made up largely of promises',² so that most dealings with what we call "money" have ceased to be a matter of property law and now fall under the law of contract, in which the concept of possession plays no role. As lawyers have long understood, these changes reflect what Nicholas described as the difference between 'owning and being owed something.'³

Despite the significance of these, and other, changes, it remains true that we continue to inhabit corporeal bodies and to live in world full of tangible things capable of being possessed. For so long as our transhuman future remains the subject of science fiction, the concept of possession laid out in this thesis will remain a fundamental feature of those societies that recognise the right to private property.

² Roscoe Pound, *An Introduction to the Philosophy of Law* (Project Gutenberg, 2010) 236.

³ Barry Nicholas, *An Introduction to Roman Law* (Clarendon Press, 1976) 99.

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