sites because of defamation allegations even where the information is true or in the public interest. These difficulties are exposed by the cases considered in this chapter.

At the time of writing, no legislation was forthcoming.

The rule in *Rylands* v *Fletcher*

This celebrated rule was stated in the case of *Rylands* v *Fletcher* (1868):

> Where a person for his own purposes brings and keeps on land in his occupation anything likely to do mischief if it escapes, he must keep it in at his peril, and if he fails to do so he is liable for all damage naturally accruing from the escape.

The rule has been held to apply whether the things brought on the land be 'beasts, water, filth or stenches'. The rule also applies to fire. It does not apply to the pollution of beaches by oil because, *inter alia*, the oil does not escape from *land* but from the sea (see *Southport Corporation* v *Esso Petroleum Co* (1954)).

In more recent times an element of foresight of consequences has been imported into the rule so that, although liability does not require negligence and is strict in that sense, it does require foresight of consequences, as where the defendant knew or ought to have known of them, before there can be a liability (see *Cambridge Water Co Ltd* v *Eastern Counties Leather plc* (1994) below).

This decision should be borne in mind when considering earlier case law appearing in this text. It may be that in some of the older cases the defendants escaped liability by showing that they had no foresight of consequences either subjectively (themselves) or objectively (through the rule of the reasonable person). Development along these lines may convert the rule in *Rylands* to an aspect of negligence.

Emanuel v *Greater London Council*, 1970 – An escape of fire (**448**)

In the case which gave rise to the rule, the defendant had constructed a reservoir on his land, employing competent workmen for the purpose. Water escaped from the reservoir and percolated through certain old mine shafts, which had been filled with marl and earth, and eventually flooded the claimant's mine. The defendant was held liable in that he had collected water on his land, the water not being naturally there, and it had escaped and done damage. Since the defendant employed competent workmen, it follows that the liability was absolute and did not depend on negligence, and in any case, the defendant's action was quite innocent as there was no reason why he should know of, or even suspect the existence of, the disused shafts. Thus, even in the leading case, *there was no foresight of consequences*.

In order for the rule to apply, there must be an escape of the thing which inflicts the injury from a place over which the defendant has occupation or control to a place which is outside his occupation or control. It is doubtful to what extent the rule covers personal injury.

Read v *Lyons*, 1947 – There must be an escape (**449**)

The rule is not confined to wrongs between owners of adjacent land and does not depend on ownership of land but the claimant must have some interest in the land. Thus in *McKenna* v *British Aluminium Ltd* (2002) *The Times*, 25 April the High Court dismissed an application to strike out (or bring to an end) claims in strict liability under *Rylands* v *Fletcher* and nuisance.

The judge stated that the 30 or so claimants who were alleging harm caused by emissions could not succeed in an action in nuisance or *Rylands* because they did not have an interest in the land affected by it. The judge concluded, however, that the claimants had an arguable case because of the Human Rights Act 1998 and that this Act may well have extended the common law (and see also *Weller* v *Foot and Mouth Disease Research Institute* (1965)). Neither is it confined to the escape of water, but may cover the escape of any offensive or dangerous matter arising out of abnormal use of land provided the defendant has control of it.

Charing Cross Electricity Supply Co v *Hydraulic Power Co*, 1914 – No need for ownership of land (**450**)

Attorney-General v *Corke*, 1933 – An abnormal use of land (**451**)

In general, there is no liability under the rule for damage caused by the escape of things naturally on the land, though there may be an action in nuisance or in negligence.

Giles v *Walker*, 1890 – Escaping thistles (**452**)

Davey v *Harrow Corporation*, 1957 – Escaping tree roots (**453**)

Although *Rylands* v *Fletcher* imposes strict liability, the following defences are still open to the defendant:

(a) That the escape was the claimant's fault. It should also be noted that there is no reason why the Law Reform (Contributory Negligence) Act 1945 should not apply where the claimant is partly to blame.

(b) That it was an act of God (see *Nichols* v *Marsland* (1876)), though the defence is not often successfully pleaded.

Greenock Corporation v *Caledonian Railway Co*, 1917 – The defence of an act of God fails (**454**)

(c) That the escape was due to the wrongful act of a stranger.

Rickards v *Lothian*, 1913 – An act of a stranger (**455**)

(d) That the damage was caused by artificial works done for the common benefit of the claimant and the defendant.

Peters v *Prince of Wales Theatre (Birmingham) Ltd*, 1943 – Property installed for common benefit (**456**)

(e) That there was statutory authority for the act of the defendant, provided that the defendant was not negligent. It should be noted that the defence of statutory authority is not available in respect of reservoirs (Reservoirs Act 1975, s 28 and Sch 2).

The rule is liberalised – foresight required?

In more recent times the rule has been liberalised. In *Cambridge Water Co Ltd* v *Eastern Counties Leather plc* (1991) *The Times*, 23 October, the High Court held that the storage

of organochlorines by businesses involved in the tanning industry and based at Sawston, an industrial village, was a natural use of land for the purposes of the rule in *Rylands* v *Fletcher*. Sawston was properly described as an industrial village, said Mr Justice Ian Kennedy, and the creation of employment was clearly for the benefit of that community. Storage in that place was therefore natural use of land. He rejected a claim from the water company in regard to the pollution of a nearby public water supply borehole.

The decision of Mr Justice Ian Kennedy was reversed by the Court of Appeal, which held that the accidental spillage of chemicals gave rise to strict liability (see *Cambridge Water* v *Eastern Counties Leather plc* [1994] 2 AC 664), so that Eastern Counties was liable. However, the House of Lords reversed the Court of Appeal and found that Eastern Counties was not liable (also reported at [1994] 2 AC 664). It based its decision on the need for foreseeability of consequences and not non-natural user. In fact, Lord Goff stated that the storage of chemicals in substantial quantities on industrial land '. . . should be regarded as an almost classic case of non-natural use'. It follows, therefore, that the element of foresight was built into *Rylands* and, since Eastern Counties had not foreseen the consequences of the spillage, it was not liable.

It may therefore be said that strict liability (i.e. non-negligent liability) for the escape from land of things likely to do damage only arises under *Cambridge Water* if the defendant knew or ought reasonably to have foreseen that those things might, if they escaped, cause damage. Incidentally, the House of Lords doubted whether the fact that Eastern Counties' activities gave employment could lead to the conclusion that keeping chemicals on land was natural use.

The House of Lords rules

The latest position derives from *Transco plc* v *Stockport Metropolitan Borough Council* [2004] 1 All ER 589. The facts can be stated briefly. The claimants' gas main was left without support by the collapse of an embankment on which it stood. The collapse was caused by a leak of water supplied by the defendants to a block of flats which they owned. The pipe carrying the water was of correct size but failed and leaked water. This was undiscovered for a prolonged period and a considerable quantity of water built up and escaped, causing the embankment to collapse. The House of Lords found for the defendants, mainly because the supply of water to the flats was nothing other than natural or ordinary user. However, since in all of the above events it was accepted that the defendants had not been negligent, and in case *Rylands* liability might succeed, the defendants asked the House of Lords to follow Australian authority and absorb *Rylands* into the principles of ordinary negligence.

The House of Lords quite firmly refused to do this. *Rylands*, they said, was an aspect of the law of private nuisance and would remain so. The main reasons given were:

- The age of the case the principles of which had been relied on for many years. To remove it might cause some future claimant to lose a right which *Rylands* gave, i.e. strict liability in the defendant where perhaps negligence could not be proved.
- The concern that the interpretation of statutes which do sometimes create strict liability might be taken as requiring negligence once *Rylands* had been absorbed.
- Although to absorb *Rylands* into the law of negligence would unify the law of England and Wales on this point with that of Australia it would effect disunity with Europe where some states, e.g. Germany and France, do have not dissimilar forms of strict liability.

Their Lordships' comments on the requirements of *Rylands* leave things much as they always have been.

Part 4

THE LAW OF PROPERTY

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THE LAW OF PROPERTY

English law divides property into real property and personal property. Real property includes only freehold interests in land, and personal property comprises all other proprietary rights, whether in land or chattels. This classification is not identical with the obvious distinction between immoveables and moveables, and this is the result of the attitude of early law to the nature of a lease.

The nature of property

Actions in respect of property fall into two kinds: actions *in rem* or real actions, and actions *in personam* or personal actions. An action *in rem* in English law is an action in which a specific thing is recovered; an action *in personam* gives damages only.

It so happened that in early days the courts would allow a real action or *actio realis* only for the specific recovery of land. If an owner was dispossessed of other forms of property, the person who had taken the property had a choice; he could either restore the property taken or pay damages to the rightful owner. Hence, land became known as real property or *realty*, and all other forms of property were called personal property or *personalty*. So far the distinction corresponds to that between moveables and immoveables, but this convenient classification was disturbed by the lease for a term of years.

Although a lease of land was an interest in immoveable property, the real action was not available to the dispossessed tenant. Leases did not fit into the feudal system of landholding by tenure but were regarded as personal business arrangements whereby one person allowed another the use of the land for a period in return for a rent.

These transactions were personal contracts and created rights *in personam* between the parties, and not rights *in rem* which could affect feudal status. It was not an uncommon form of investment to buy land and let it out on lease to obtain an income on capital invested, and such transactions were more akin to commercial dealings than to landholding as it was understood in early days. Moreover, the system had its advantages, since a lease was immune from feudal burdens and could be left by will at a time when dispositions by will of other land were still not permitted.

Leaseholds, therefore, come under the heading of personal property or chattels, but because they partake so strongly of the character of land, they are often referred to as *chattels real* to distinguish them from pure personalty, e.g. a watch or a fountain pen. Since the property legislation of 1925 this distinction has lost much of its importance, but it is still true that if in his will a testator says, 'All my personalty to P and all my realty to R', P would get the leaseholds.

Pure personalty itself comprises two different kinds of property known as *choses in possession* and *choses in action*. *Choses in possession* denote chattels, such as jewellery and furniture, which are tangible objects and can be physically possessed and enjoyed by their owner. *Choses in action* are intangible forms of property which are incapable of physical possession, and their owner is usually compelled to bring an action if he wishes to enforce his rights over property of this kind. Examples of *choses in action* are debts, patents, copyrights, trade marks, shares, and negotiable instruments.

Up to now we have been considering the main rights which one has in one's own things. However, it is possible to have rights over the things of another. We have already mentioned the lease, which is the right to possess another's land for a term in return for a rent, but in addition it is possible to become the owner of a *servitude* over the land of another, e.g. a right of way, a right of light, or a right to the support of buildings. A servitude may also be a right to take something from the land of another, e.g. the right to fish or collect firewood. Rights of the first class are called *easements*, and of the second profits *à prendre*. Further, a person may raise a loan on the security of his property either real or personal, and the lender has certain rights over the property so used as a security if the loan is not repaid.

Ownership

Ownership is a term used to express the relationship which exists between a person and certain rights which are vested in him. Ownership is the greatest right or collection of rights – the ultimate right – which a person can have over or in a thing.

For example, X may own a fee simple (freehold) in Blackacre and may lease the land to Y, so giving up possession. But however long the lease, the ultimate right of ownership is in X, and eventually the right to possess, which he has for the moment forfeited, will return to him or to his estate if he is dead. Z may have a right of way over Blackacre. This is not ownership of Blackacre, but is ownership of a right over it which limits X's enjoyment of the land. B may have lent money to X on the security of the land, so that B is a mortgagee and, therefore, the owner of a right in Blackacre, but this does not constitute ownership of the land; it is a mere encumbrance attached to it, limiting X's enjoyment to the extent of the rights given to B as mortgagee. Nevertheless, the supreme right is vested in X, and this right is called ownership of Blackacre.

Ownership is a *de jure* (i.e. legal) relationship; there is no need to possess the thing. Possession tends to be *de facto* (i.e. factual), that is evidenced by physical possession, although, as we shall see, physical possession is not necessary in order to have legal possession.

It may be said that in a general sense all rights are capable of ownership, which is of many kinds:

(a) Corporeal. That is, the ownership of a thing or *chose in possession* such as a watch or a fountain pen.

(b) Incorporeal. That is, the ownership of a right only, e.g. the right to recover a debt of £20 from X by an action at law, or the ownership of a *chose in action*. A share certificate is a *chose in action*, and ownership of it is incorporeal, for it is ownership of certain rights: the right to dividends as and when declared, the right to vote at meetings, and so on.

(c) Sole ownership. That is, as where X is the sole owner of Blackacre.

(d) Co-ownership. That is, as where X and Y are simultaneously owners of Blackacre, as joint tenants or tenants in common.

(e) Legal or equitable ownership. A grant (by conveyance (transfer) or will) giving X the fee simple absolute in possession of Blackacre constitutes him the legal owner. But a grant giving X a life interest only constitutes him as equitable owner, whose interest can exist only behind a trust, the legal estate being held by trustees.

(f) Trust or beneficial ownership. In the grant set out above giving X a life interest, the trustees hold the legal estate but not beneficially; the beneficial interest is in X and equity will protect it.

(g) Vested (completed) or contingent ownership. In a grant to X for life with remainder to Y, X and Y have equitable interests and both are vested. Admittedly Y will not become entitled in enjoyment until X dies, but his interest is, nevertheless, vested, and if Y were to die before X, the property would descend through Y's estate on X's death.

In a grant to X for life, with remainder to Y if he attains the age of 18 years, X's interest is equitable and vested, Y's interest is equitable and contingent since he must satisfy the requirement of majority before his interest vests. If Y does not reach 18 years the interest is held by the trustees on what is known as a 'resulting trust' for the settlor (if alive). If he is dead, the interest will go into his estate (or intestacy if there is no will), and in the case where there is a will, the gift will go to the residuary beneficiary, i.e. the one who gets the balance of the estate after particular gifts have been made.

Possession

The physical control of a thing by a person is what is normally known as possession, and if the idea of possession had remained wedded to physical control, the position would have been simple enough. But the widening sphere of legal activity made it necessary to attribute to persons who were not actually in physical control some or all of the advantages enjoyed by persons who were.

There are three possible situations at law:

(*a*) A person can have physical control without legal possession, as in the case of a porter carrying a traveller's suitcase in a station.
(*b*) A person can have possession and its advantages without actual physical control, e.g. a person may have books at home which are still in his possession even when he is away on holiday.
(*c*) A person can have both physical control and possession, e.g. a watch in his pocket or a pen in his hand.

Possession, therefore, has acquired a technical legal meaning, and the separation of possession from physical control has given the concept a high degree of flexibility.

The old theory of possession, derived from the Roman Law, relies upon (*a*) *corpus*, i.e. physical control, and (*b*) *animus*, i.e. the intention to exclude others. But although these concepts help in deciding possession, they do not provide the complete answer. In fact, English law has never worked out a completely logical and exhaustive definition of possession. The handing over of a key may be sufficient by itself to pass the possession of the contents of a room or box if it provides the effective means of control over the goods.

Wrongful interference

In the law of torts, wrongful interference to property is an invasion of possession. The policy of this branch of the law is to compensate the party whose interests have been affected, and

in order to enable such persons to recover, the court has contrived to attribute possession to them.

A bailee is a person who gets possession of a chattel from another with his consent. A bailment may be at will, i.e. revocable by the bailor at any time, or it may be for a term, i.e. for a fixed period of time, as by hiring a television set for six months. Where a bailment is at will, the bailee, who by definition has possession, can sue a third party for wrongful interference. Since the bailment is revocable at will, the bailor also has an interest worth protecting, and in order that he too may bring an action for wrongful interference, his right to possess is treated as possession itself. Where, on the other hand, the bailment is for a term, only the bailee can bring an action for wrongful interference and not the bailor, although, where the bailee brings the action, he will have to account to the bailor for any damages obtained. If a third person destroys or permanently injures the chattel while it is in the bailee's possession, the bailor may have an action against the third party for injury to his reversionary interest (*Mears* v *LSW Railway* [1862] 11 CB (NS) 850).

Where an employer has temporarily handed a thing to his employee, possession remains with the employer and the employee takes only custody. Thus an employer can sue for wrongful interference for an injury to the goods by a third party.

A person who loses a thing retains his ownership in it, and for the purpose of suing for wrongful interference someone who has taken it, his right to regain possession will suffice. But for the purpose of claiming from an insurance company for loss, he will be regarded as having lost possession, within the terms of the contract, if the thing cannot in fact be found.

Trespass to land by relation is another example of the artificial manipulation of the concept of possession to provide a remedy in trespass to one who needs to be compensated. When a person, with a right to possess, enters because of that right, he is regarded as having been in possession from the time when his right originally accrued, e.g. from the time when he made the original contract for a purchase or a lease. He can, therefore, sue for any trespass that has been committed between the accrual of the right and the actual entry.

As we have seen, difficulties have arisen over the requirement of the intention to exclude others as a necessary ingredient of possession where property of one sort or another has been found on the land of a person who was not its owner (see *Parker* v *British Airways Board* (1982) and *South Staffordshire Water Co* v *Sharman* (1896) and the cases noted with it).

However, it should be noted that *unless an owner* of chattels can be shown to have *abandoned* or *sold* them he remains their owner and has a better title than a finder or a person on whose property they are found.

Moffat v *Kazana*, 1968 – The rights of an owner (**457**)

Adverse possession

A person may sometimes acquire the ownership of land by adverse possession. This arises from the occupation and use of land without the permission of, or any interference from, the true owner, as where a stranger encloses and cultivates a portion of a neighbour's land or occupies another's house. Under s 15 of the Limitation Act 1980 adverse possession for a period of 12 years will give the possessor a title, but such adverse possession must take the form of open and visible acts which are inconsistent with the title of the owner, and in this case possession is viewed much more strictly than in the others we have been considering above.

Hayward v *Challoner*, 1967 – The period required (**458**)
Littledale v *Liverpool College*, 1900 – Acts must be inconsistent with owner's rights (**459**)

Whether adverse possession necessarily involves inconvenience to the true owner is not clear. In *Wallis's Caton Bay Holiday Camp* v *Shell-Mex & BP* [1974] 3 All ER 575, the defendants had purchased land for development, though they had no immediate use for it. The claimants used it for 12 years for the purposes of grazing cattle on it and cultivating it. The Court of Appeal held that the claimants had not established a good possessory title because what they had done was of no inconvenience to the defendants who had no immediate use for the land. However, in *Treloar* v *Nute* [1977] 1 All ER 230, the claimant owned freehold land for which he had no immediate use and which was left derelict. The defendants bought land adjacent and occupied part of the derelict land for a period of 12 years. In holding that the defendants had a good possessory title to that land the Court of Appeal said it was not necessary to import into the definition of adverse possession a requirement that the owner must be inconvenienced or affected by that possession.

This line of reasoning was adopted also in *Buckinghamshire County Council* v *Moran* [1989] 2 All ER 225 where the council had acquired a plot of land adjacent to some houses for future use as a road diversion. They had no immediate use for it. Mr Moran (and previous owners) treated it as part of the garden of the Moran residence. It was fenced in and the grass was cut regularly and bulbs planted. This went on for more than 12 years and the Court of Appeal eventually held that Mr Moran had a possessory title to the plot although the council having no immediate use for the plot were not inconvenienced by what had been done.

Where a tenant, during the currency of his tenancy, takes possession of other land belonging to the landlord, the land is presumed to have been taken as part of the holding comprised in the tenancy, and the tenant cannot acquire a good possessory title unless he communicates to his landlord some disclaimer of the landlord's title.

It should be noted that periods of successive trespass (for that is what it is) may be added together. A trespasser who has occupied for, say, five years may add to that a period of seven years enjoyed by the immediate previous trespasser in order to bar the claim of the true owner provided there was no gap in adverse possession. However, each occupier must have had exclusive possession. Thus where the landlord of a property adjoining the disputed strip of land claimed adverse possession of it on the basis that his tenants had enjoyed exclusive possession for the necessary time his claim failed because the tenants had from time to time given the keys to others and that showed a lack of intention to exclude others which is a requirement of the law of adverse possession (see *Battersea Freehold and Leasehold Property Co Ltd* v *Wandsworth LBC* [2001] 20 LS Gaz R 41).

Rather than wait for a legal claim to be brought, a claim to legalise adverse possession can be made to the Land Registry in London. It will then be up to the Registry to determine the claim.

It should be noted that there are a few limited exceptions where the 12-year period is increased, e.g. to 30 years in the case of acquisition of title by the Crown (Limitation Act 1980, s 15(1)).

Smirk v *Lyndale Developments Ltd*, 1974 – Taking possession of a landlord's land (**460**)