§ Law in Context

ALISON CLARKE & PAUL KOHLER

Property Law

Commentary and Materials

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Possession

7.1. The nature of possession

7.1.1. Introduction

'Possession' can be described as the intentional exclusive physical control of a thing. A person who takes physical control of land or goods, with the intention of excluding all others from it or them, acquires possession of it or them as a matter of law. This is the case even if the taking of control was unlawful. So, if a thief steals your book or a squatter moves into your house, possession passes from you to her as a matter of fact and as a matter of law (although it has to be said that the courts have not always been happy to accept this: see section 7.4.1 below). Of course, this unlawful removal of possession from you does not affect your *right* to possession – you remain entitled to take possession back for yourself (subject to the public order safeguards considered in section 7.4 below) or to ask the court to put you back in possession and/or order appropriate compensation. The fact remains, however, that until you take such a step the taker/squatter is in law in possession.

In Chapter 2, we considered why a legal system might want to adopt such a rule. In this chapter, we look more closely at what amounts to possession, how it fits into the legal taxonomy of property interests, and how it can be acquired, transmitted, lost and regained, as well as at the broader implications of the basic rule that possession confers entitlement.

7.1.2. Possession, ownership and proprietary interests

In his essay 'Ownership', extracted in Chapter 6 above, Honoré put the right to possession as the first of his necessary ingredients in the notion of ownership, and indeed described it as 'the foundation on which the whole superstructure of ownership rests'.

In one sense, possession is simply an ingredient of ownership, as Honoré suggests. It is inherent in our idea of ownership that an owner of a thing has the right to take and keep physical control of it, to the exclusion of all others. However, the interrelationship between the two is more complex than this suggests.

The first point to make is that, procedurally, English law is more concerned with possession than with ownership. The law protects possession, in the sense that

anyone who is in possession is entitled to redress from the courts if that possession is unlawfully threatened or invaded. The law regards any person who is in fact in possession of land or goods as lawfully in possession, and any invasion of that possession as unlawful *unless made by someone with a better right to possession*. In other words, once a person has acquired possession, by any means whether lawful or unlawful, they thereby become *entitled* to possession as against everyone except a person with a better right to possession. Consider again the example just given of a thief or squatter who takes possession of your book or land. We said there that, by taking possession in fact, the taker acquires possession in law. What this comes down to is that simply by taking possession from you, the taker *thereby* acquires a better right to possession than everyone except you. Two aspects of this must be emphasised here. First, if you as the owner go to court to obtain redress from the taker you will win, but not because you are the owner: you will win because, as owner, you have a better right to possession than her, the taker. For reasons we look at in Chapter 10, the courts resolve questions of disputed entitlement by looking at relative rights to possession rather than at ownership. Secondly, the law is happy to protect the possession of thieves and other unlawful takers – not, admittedly, against true owners (although, as we see in Chapters 10 and 11, it may in time come to this, through the operation of limitation of action rules), but certainly as against all other comers. Why this should be the case is considered in detail in Chapter 11, but we will also have something to say about it here, because it gives the context to pragmatic decisions made by the courts on questions of what degree of use/control amounts to the physical control required for possession.

The next, and connected, point about the relationship between ownership and possession is that possession plays a key role in the process of proving entitlement to a thing. Again, this is something that is looked at in more detail in Chapter 10, but for present purposes it is sufficient to note that it is much easier to prove possession than it is to prove ownership. Ownership is in fact rather difficult to prove. Most things – even tangible things – are not authoritatively labelled with the name of their owner, and there is no gigantic universal register on which all ownership of all things is recorded, so there is no obvious way of proving conclusively that that you do in fact own the thing (the book, the picture, the land) you say you own. Possession, on the other hand, is relatively easy to demonstrate: you can prove that you are in possession of a thing simply by demonstrating that you are in fact in exclusive physical control of the thing, with the intention of excluding all others from it. And possession is not only easier to prove than ownership, it is also a reasonably good indicator of ownership, because, as a matter of observable fact, in the vast majority of cases possession coincides with ownership. Consequently, in our system at least, the basic principle that has evolved is that possession is *prima facie* proof of title: if you can show that you are in possession of a thing you will be assumed by law to be the owner of it, in the absence of evidence to the contrary.

The final point to make about the relationship between ownership and possession is this. To say that the law protects possession against strangers is just another way of saying that possession of a thing is a right in relation to the thing enforceable against third parties. In this sense, therefore, possession is by definition proprietary. It is also proprietary in the sense that the right acquired by taking possession is transmissible, as Pollock and Wright point out in their classic nineteenth-century treatise on possession:

> We have seen that possession confers more than a personal right to be protected against wrongdoers; it confers a qualified right to possess, a right in the nature of property which is valid against every one who cannot show a prior and better right. Having reached this point, the law cannot stop at protecting and assisting the possessor himself. It must protect those who stand in his place by succession or purchase; the general reasons of policy are at least as strong in their favour as in his, their case at least as meritorious. And the merits of a purchaser for value, who perhaps had no means of knowing the imperfection of his vendor's title, are clearly greater than those of the vendor himself. The qualified right of property which arises from possession must therefore be a transmissible right, and whatever acts and events are capable of operating to confirm the first possessor in his tenure must be capable of the same operation for the benefit of those who claim through him by such a course of transfer as would be appropriate and adequate, if true ownership were present in the first instance, to pass the estate or interest which is claimed. Hence the rule that Possession is a root of Title is not only an actual but a necessary part of our system.
>
> (Pollock and Wright, *Possession in the Common Law*)

However, although possession is in this sense proprietary, in the common law taxonomy of property interests, possession is an ingredient of property interests rather than an interest in its own right. We have already said that possession is an ingredient of ownership, but one of the ways in which an owner can subdivide his ownership in a thing is by granting to someone else the right to possession of the thing, retaining to himself ownership-minus-possession. Depending on the terms on which possession is granted, the grantee will then herself hold a derivative property interest in the thing (for example, a lease, or a beneficial interest under a trust, or a bailee's interest) of which possession is the primary ingredient. So, possession is not of itself a property interest, but it is a necessary ingredient in a variety of different property interests. We return to this point in Chapter 17 below.

7.1.3. What is possession?

It is not always easy to decide whether the control over, or the use to which a person puts, a thing is such that that person can be said to be in possession of the thing. Essentially, the law looks at two aspects of the relationship between the person and the thing: first, the nature and degree of physical control exerted by the person over the thing, and, secondly, the intention with which that control is exerted (traditionally, the *animus possidendi*). What is required is that the person

should have effective control of the thing, with the intention of excluding the rest of the world from it. These two factors – factual control and intention – will initially be considered separately, although as will soon become apparent, they are to a large extent interdependent.

7.1.3.1. Factual control

The nature and degree of factual control required to constitute possession varies depending on a number of factors. It is often said that the control must be exclusive – i.e. such as to exclude all others from the use of the thing – but even this requirement varies in stringency depending on the circumstances. In the cases considered under the heading 'The nature of the thing possessed' below, where there are practical difficulties in excluding all others, the exclusivity requirement is very relaxed. On the other hand, it is probably at its strictest when assessing when, if at all, possession has passed from a person in possession to an intruder claiming to have dispossessed him. In the latter case, it is not possible for both rival claimants to be in possession at the same time – possession must be in one or the other of them, or in neither, but it cannot be in both. As Pollock and Wright said:

> Physical possession is exclusive, or it is nothing. If two men have laid hands on the same horse or the same sheep, each meaning to use it for his own purpose and exclude the other, there is not any *de facto* possession until either of them has gotten the mastery. (Pollock and Wright, *Possession in the Common Law*, p. 21)

It is in deciding which of them has 'gotten the mastery', and at what point, that their respective entitlements become relevant.

The relevance of title

First, the person with the better title will find it easier to prove factual control than the person with a weaker title or no title at all. If there is any doubt as to which of two people is in possession, the one with the better title will be assumed to be in possession unless the other can prove substantial, unequivocal factual control. The classic statement of this comes from the judgment of Maule J in *Jones* v. *Maynard* (1849) 2 Ex 804 at 821:

> [I]t seems to me, that, as soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner, so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser. They differ in no other respects. You cannot say that it is joint possession; you cannot say that it is a possession as tenants in common. It cannot be denied that one is in possession, and the other is a trespasser. Then that is to be determined, as it seems to me, by the fact of the title, each having the same apparent actual possession – the question as to which of

> the two really is in possession, is determined by the fact of the possession following the title, that is, by the law, which makes it follow the title.

It follows that different degrees of factual control are required of different parties, depending on the circumstances – actions which are sufficient to demonstrate factual control on the part of the person with the right to possession might well be insufficient if performed by a trespasser claiming to have taken control or by some other person. In *Lows* v. *Telford* (1875–6) LR 1 App Cas 414 (Extract 7.1 below), for example, where the House of Lords held that possession had passed from Telford to Lows at the point when Lows, having broken into the premises in Telford's absence, was in the process of changing the locks (the crucial point at which Telford climbed in through a window and threw Lows out), the decisive factor was that Lows had a better right to possession of the premises than Telford. Had Lows been a trespasser, the result might have been different.

Powell v. *McFarlane* (1979) 38 P&CR 452 (extracted at www.cambridge.org/propertylaw/) provides another and more extreme example: compare the respective uses of the field made by Powell the trespasser (who was held not to have acquired possession) and McFarlane the paper owner (held not to have lost possession despite not having used or even visited the field for several years). This case also demonstrates how difficult it is to divorce the question of control from the question of intention: in deciding whether Powell had acquired possession, the court assessed the significance of what he had done on the field by reference to the intention with which he had done it. As we will see below, this is not a particularly easy task for the court to perform – a point equally evident from *Fowley Marine (Emsworth) Ltd* v. *Gafford* [1968] 2 QB 618, CA (extracted at www.cambridge.org/propertylaw/).

This point, that it is easier for a rightful taker to prove she is in possession than it is for a wrongful taker, has occasionally been misunderstood by the courts and taken to mean that possession does not shift from a person rightfully in possession to a wrongful taker unless and until the owner has 'acquiesced' in the taking, and that, consequently, a wrongful taker never acquires possession at all if no such 'acquiescence' takes place. So, for example, in *McPhail* v. *Persons Unknown* [1973] Ch 447 at 456, CA, Lord Denning said of squatters who had broken into, and were now living in, empty local authority houses:

> They were trespassers when they entered, and they continued to be trespassers as long as they remained there. The owner never acquiesced in their presence there. So the trespassers never gained possession ... As Sir Frederick Pollock put it [in *Pollock on Torts* (15th edn, 1951), p. 292]: 'A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner.'

If 'acquiescence' means just that the owner has stopped trying to exert physical control himself, this is uncontroversial: as *Powell* v. *McFarlane* demonstrates, it is

difficult for any taker to prove sufficient acts of intentional exclusive control for so long as the rightful possessor is still trying to exert *some* degree of control, however slight. Lord Denning, however, seems to be going much further than this, and attempting to introduce a requirement that no wrongful taker can acquire possession without a positive act of acceptance (if not permission) on the part of the person entitled to possession. Such a requirement would be inconsistent with the fundamental principles of relativity of title considered in Chapter 10. It would also be quite inconsistent with the many cases where a trespasser or wrongful taker has been held to be in possession of land or goods in circumstances where the person entitled to possession was either unaware of the trespass or taking or was aware of it and opposed to it but made only ineffectual attempts to regain possession: see, for example, *Mount Carmel Investments Ltd* v. *Peter Thurloe Ltd* [1988] 1 WLR 1078, CA.

The nature of the thing possessed

Secondly, the nature and degree of control required varies depending on the nature of the thing said to be possessed. Some things are more susceptible to exclusive physical control than others. It is relatively easy to maintain total exclusionary control of some things – small chattels, lockable vehicles, self-contained buildings, for example – and in such cases a person claiming to be in possession is likely to have to demonstrate total physical control by showing that they can prevent all others from using or intruding on the thing. In the case of other things, however, it may be impossible, pointless or unnecessarily expensive to ensure that all outsiders are excluded. In such cases, very attenuated physical control may suffice. *Fowley Marine (Emsworth) Ltd* v. *Gafford* [1968] 2 QB 618, CA (extracted at www.cambridge.org/propertylaw/) is a good illustration. There, the plaintiff was held to be in possession of the bed and foreshore of a channel of tidal water over which there were public rights of navigation. Since there was no question of the plaintiff being able to exclude anyone from the channel, the court accepted that the fact that the plaintiff had laid (and licensed others to lay) permanent moorings in the bed was sufficient to establish possession. It had been suggested for the defendant that the plaintiff could have done more to demonstrate possession, such as setting up permanent and visible markers to delineate the area, but Willmer LJ rejected this as 'quite unrealistic' (and a possible obstruction to navigation: the channel was in Chichester harbour). It may be similarly unrealistic to expect a possessor to take all steps necessary to prevent infringements of their own rights: see Lord Watson in *Lord Advocate* v. *Young* (1887) LR 12 App Cas 544 at 553, to the effect that, in the case of property like foreshore, it is 'practically impossible' to prevent occasional infringements of the possessor's rights 'because the cost of preventive measures would be altogether disproportionate to the value of the subject'. The same point can be seen in *The Wik Peoples* v. *State of Queensland* (1996) 187 CLR 1 (extracted at www.cambridge.org/propertylaw/), where one of the issues was whether 'pastoral leases' granted to cattle ranchers over vast tracts of desert land in Australia

conferred possession on the grantees. The minority took the view that it was not incompatible with the grantees having possession that any drover or traveller was entitled to ride or drive stock across the land on traditional stock routes and to depasture the stock 'on any part of the land which [was] within a distance of half a mile from the road and [was] not part of an enclosed garden or paddock under cultivation, and which [was] not within a distance of one mile from the principal homestead or head station' (Brennan CJ at 2–3; compare Toohey J at 8–9 and Gaudron at 14–15; and see also *Goldsworthy Mining Ltd* v. *Federal Commissioner of Taxation* (1973) 128 CLR 199, where a dredging lease of an area of sea-bed was held to confer possession even though the Crown as landlord reserved rights of access for navigation and all minerals and petroleum).

The purpose for which the thing is used

This is closely allied to the previous point. If the use to which you put a thing does not require you to exclude all others from its use, can you nevertheless be said to be in possession of it? This question arises in an acute form in the native land use cases. Can those who make nomadic use of a tract of land be said to be in possession of the land, or even of the sites which they periodically visit? It may be that the answer is yes, if, even though they do not wholly exclude others all the time, they can nevertheless demonstrate an ability and intention to prevent others making any use of the land or sites in question which interferes with their own use. So, for example, one might say that nomadic users manifest an intention to be in exclusive control of 'their' land if they take steps to prevent others exhausting or polluting the resources of a site which they customarily visit, or prevent others using 'their' sites at the time when they customarily use it, or prevent others impeding the routes over which they customarily travel from site to site. On the other hand, it may be that possession is simply an inappropriate concept in the context of such use of things, and that a more simple and fruitful way forward would be to recognise that, in such cases, possession is not an appropriate prerequisite for title. These points are considered in more detail in section 7.2.2 below in the context of particular and general use rights.

Control through agents and control of contents

Finally, there are two rather obvious points that are worth making at this point. The first is that you can be in possession of a thing without personally having any physical control over it if someone else has physical control on your behalf, for example in her capacity as your employee or agent. This is demonstrated by the decision in *Sullivan* v. *Earl of Caithness* [1976] 2 WLR 361 (extracted at www.cambridge.org/propertylaw/), although, as will be seen there, this may perhaps leave us with some awkward questions about precisely where the principal has possession. Secondly, the person in possession of a thing is also *prima facie* in possession of all its contents. This is explicable on the basis that, if you are in physical

control of a container, you must also be in physical control of its contents. However, complications can arise where the possessor of the container (which might be a box, or a locked room, or an area of land) is unaware of either the existence of its contents or their precise nature: see *R.* v. *Cavendish* [1961] 2 All ER 856, CA, and *R.* v. *Warner* [1969] 2 AC 256 (both extracted at www.cambridge.org/propertylaw/). Also, there can be difficulties where others have access to the 'container'. We look at this point again in Chapter 11 in the context of the 'finding' cases, where we consider the relative claims to lost and abandoned goods that can be made by those who find and take possession of them, and those with freehold and leasehold interests in the land on (or in) which the goods are found. As will be seen in Chapter 11, the law has become considerably confused by a failure to appreciate that it is possession that forms the basis of any claim by finders and landowners.

7.1.3.2. Intention required

Intention to exclude

The difficulty of divorcing the acts said to constitute possession from the intention with which those acts were performed has already been noted. What then precisely is the intention required? It has been said that there must be an intention 'in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow' (Slade J in *Powell* v. *McFarlane*, extracted at www.cambridge.org/propertylaw/). It is important to clarify what is *not* required. First, it does not matter that the acts of possession were performed in the mistaken belief that the actor was owner. *Ex hypothesi*, such a person can have no intention to exclude the true owner. He does, however, have the intention to exclude the whole world, and that is all that is required. Those who take possession in the mistaken belief that they are entitled to do so are as much in possession as those who consciously take as trespassers (*Lodge* v. *Wakefield Metropolitan Borough Council* [1995] 38 EG 136, CA). Secondly, it is not necessary that the person assumed control with the intention of acquiring or assuming ownership: what is at issue here is possession (i.e. exclusive physical control).

However, this still leaves us with difficulties. Must the possessor's intention be to exclude the whole world for ever, or is it sufficient that he intends to do so only for a limited time or until some future event occurs? Suppose, for example, a person enters into possession mistakenly believing that the paper owner has granted him a lease of the land in question. Is his possession adverse as against the paper owner? Or take the position of a person who consciously takes over land as a trespasser, knowing that the true owner will not be using the land until some future event occurs (the true owner might be serving a long prison sentence, or have bought the land for road widening purposes and have no use for it until the road is to be built). Assume also that the trespasser knows that she is likely to be evicted by the true owner when that future event occurs. Is the trespasser in

possession? It would be odd if the answer was to depend on whether her present intention is to resist the true owner's attempts at eviction if and when they happen, rather than to go quietly when asked to leave. Is there any sensible dividing line that can be drawn between on the one hand those who have no intention of excluding the true owner but know there is no likelihood of the true owner taking steps to evict them for the time being and intend to stay for as long as that state of affairs continues, and on the other hand those who want to exclude the whole world but are aware that, if the true owner ever does take serious steps to evict them, they will probably bow to the inevitable and leave? To draw a distinction between the two is hard to justify in principle and, one suspects, not easy to do in practice. Nevertheless, applying the above formulation of Slade J in *Powell* v. *McFarlane*, those with the former state of mind are not in possession, whereas those with the latter are: see further *Buckinghamshire County Council* v. *Moran* [1990] Ch 623, where the Court of Appeal appeared to find no difficulty with the point.

Effect of ignorance

This problem has already been touched on above: can you be in possession – i.e. in intentional physical control – of something if you are unaware of its existence? At first sight, the necessary element of intention might appear to be wholly lacking in such a case. However, as already suggested, the answer probably lies in seeing this as a container/contents problem. In other words, in most cases, if you are in intentional control of a container – whether land, a building, or a box – you can safely be assumed to intend to be, and to in fact be, in control of its contents. In these cases, difficulties arise only when the contents prove to be different from those you thought were there (Class A drugs and not scent: see *R.* v. *Warner*, extracted at www.cambridge.org/propertylaw/) or wholly unexpected (stolen goods dumped in your yard, as the defendant claimed in *R.* v. *Cavendish* [1961] 1 WLR 1083, extracted at www.cambridge.org/propertylaw/). On the other hand, there are circumstances where it would not be appropriate to assume that the person in control of the container also has, or intends to exert, control over the contents. For example, it might not be appropriate to make this assumption about goods dropped or abandoned in the public part of a shop, or in an airport lounge open to the public (see *Bridges* v. *Hawkesworth* (1851) 21 LJ QB 75 and *Parker* v. *British Airways Board* [1982] QB 1004, in Chapter 11), or perhaps about the contents of parcels entrusted to the Post Office for delivery.

Extract 7.1 ***Lows* v. *Telford* (1875–6) LR 1 App Cas 414**

Telford and Westray were lawfully in possession of warehouse premises in Carlisle as tenants. Their landlord had, however, mortgaged the premises to a Mr Lows, and in his capacity as mortgagee Mr Lows was entitled to take possession of the premises at any time (see further Chapter 18). One morning, just before 6.00 am, when no one was there and without any warning, Lows broke into the premises with a carpenter and

another man. They got in by taking off the old lock, and they were just in the process of putting on a new one when Telford and Westray arrived. Telford and Westray got a ladder, climbed in by a side window and threw Lows and his men out. Lows brought what was in effect a private prosecution against them for forcible entry (see now section 6 of the Criminal Law Act 1977). Unsurprisingly, they were acquitted by the jury, and they in turn brought this action against Lows for malicious prosecution. The issue turned on whether, at the time when Telford and Westray re-entered through the side window and attacked Lows, they were still technically in possession of the premises and therefore merely defending their own possession, or whether Lows had already acquired possession by then. The court concluded that possession, 'although obtained in a very rough and uncourteous way', had already passed to Lows.

LORD SELBORNE: [Lows] had the legal title; he had (when no one was present to oppose him) effected an actual entry into the premises, beyond all doubt for the purposes of taking possession, and he by himself and his servants had already acquired such a dominion and control over the property, when Westray first came upon the ground, that [Telford and Westray] could not enter it without putting a ladder against the house and getting in through the window. I cannot doubt that in these circumstances and upon this evidence his possession was legally complete and exclusive; and that it was forcibly disturbed by the respondents.

[Lord Hatherley took the same view, and accordingly it was held that Lows had reasonable cause for bringing the prosecution, which therefore was not malicious.]

Notes and Questions 7.1

1 Consider whether the North American Indian land use described by Rose in Extract 4.4 in Chapter 4 above can and should be described as possessory (see further section 7.2.2 below)

2 Read *Powell* v. *McFarlane* (1979) 38 P&CR 452, either in full or as extracted at www.cambridge.org/propertylaw/ (if reading in full, note that parts of the judgment not included in the extract must now be read subject to the House of Lords decision in *J. A. Pye (Oxford) Ltd* v. *Graham* [2002] UKHL 30: see Notes and Questions 11.4 below), and consider the following questions:
   (1) It is clear from what Slade J says that the crucial element for the adverse possessor to prove is that he had the requisite intention – the *animus possidendi*. How, then, is the court to discover what that intention was? Slade J says that this must be inferred from what the intruder actually did on the land, and that statements of intention are of little probative value. What are the justifications for ignoring statements of intention? Do you agree with Slade J's reasons for disregarding contemporaneous statements of intention as well as those made after the event? How interested are the courts in discovering what the adverse possessor *actually* intended?
   (2) Why should it be more difficult for intruders to prove that they are in possession than it is for owners to do so? Examine the reasons given by Slade J.

(3) In both *Powell* v. *McFarlane* and *Tecbild Ltd* v. *Chamberlain* (1969) 20 P&CR 633 (referred to by Slade J in *Powell* v. *McFarlane*), the intruders failed on the ground that their activities were as consistent with an intention to derive some benefit/enjoyment from the land as they were with an intention to take possession of it to the exclusion of the paper owner. What more would Mr Powell and Mrs Chamberlain have had to do to manifest unequivocally an intention to take possession, given the character of the land in question?

(4) Consider the statement made by Slade J towards the end of this extract that a dispossessor must make his intentions clear before he can be said to be in possession. What does he mean? Is he right? See further *Prudential Assurance Co. Ltd* v. *Waterloo Real Estate Inc.* [1999] 17 EG 131, CA.

3 Read *Fowley Marine (Emsworth) Ltd* v. *Gafford* [1968] 1 All ER 979, CA, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following questions:

(1) Compare the intentions of those who laid permanent moorings in the Rythe in the mistaken belief that they were entitled to do so by virtue of a customary right, or by virtue of a right incidental to the public right of navigation, and the intentions of Fowley Marine, who laid them in the (possibly) mistaken belief that they owned the Rythe. Why is the second a possessory intent whereas the first is not?

(2) If Gafford had laid his permanent mooring in the mistaken belief that he owned that part of the bed of the Rythe, would Fowley Marine have succeeded in its trespass action against him?

(3) Was Fowley Marine able and/or entitled to exclude anyone from the Rythe? What use could it make of the Rythe for itself? See further section 7.2.2 below on particular and general use rights.

(4) Is it possible for different users to be in 'concurrent' possession of land, as suggested by the judge at first instance? Consider why the Court of Appeal rejected this analysis, and compare Pollock and Wright quoted at section 7.1.2 above.

4 Read *Wik Peoples* v. *Queensland* (1996) 187 CLR 1, either in full or as extracted at www.cambridge.org/propertylaw/. In view of the nature of the land, what additional rights would the pastoral lessees have had to have been given before they could be said to have had exclusive possession? If they had been granted exclusive possession, would this have been inconsistent with the continuation of any native land rights? (Compare *Fowley Marine* v. *Gafford* above, and see also section 7.2.1 below.)

5 Read *Sullivan* v. *Earl of Caithness* [1976] 2 WLR 361, CA, either in full or as extracted at www.cambridge.org/propertylaw/, and answer the following questions:

(1) Explain the distinction that May J makes between 'possession' and 'custody'. Is the distinction valid?

(2) If Caithness' mother kept the guns in a locked cupboard to which she had the only key, who would have been in possession of the guns – Caithness or his mother?

(3) If the government bans private possession of all guns, and requires local authorities to pay compensation to every person formerly in possession of guns in their area, will Caithness be entitled to receive compensation from both Oxfordshire and Surrey?
(4) Suppose Oxfordshire County Council decided to pass a bye-law banning all private ownership of firearms, so that it became an offence to be in possession of a firearm in Oxfordshire. Assuming Surrey County Council had no such bye-law, so possession of guns was legal in Surrey, would Caithness be committing an offence under the Oxfordshire bye-law?

6 Read *R.* v. *Cavendish* [1961] 1 WLR 1083, CA, either in full as or extracted at www.cambridge.org/propertylaw/, and consider the following:
(1) Assume Cavendish did not know Lisle and knew nothing at all about the stolen oil, and that there was no prior arrangement between them. Suppose then that Lisle, knowing Cavendish had previous convictions for offences of dishonesty (which he did), had left the drums in Cavendish's yard in the belief that Cavendish would accept them and pay him for them as soon as Cavendish returned and discovered them. Would Cavendish then be in possession of the drums? If yes, at what point would he acquire possession?
(2) Assume the same facts, but suppose also that Lisle told the fitter who helped him unload the drums that they were stolen. At that point, would Cavendish have acquired possession of the drums? Would it make any difference if the fitter then accepted the drums on Cavendish's behalf because he too believed that Cavendish was the sort of person who would buy stolen goods? If this belief was genuinely held by the fitter, but in fact wholly ungrounded and totally mistaken, who would have been in possession of the drums once they had been unloaded into the yard and Lisle had driven away?
(3) A distinction is sometimes (as here) drawn between 'actual' and 'constructive' possession. The former is meant to cover cases where the possessor has actual, personal, physical control of something and actually knows it, whereas the latter covers cases where either or both of these elements are deemed. Both, however, constitute possession in law.

7 Read *R.* v. *Warner* [1969] 2 AC 256, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

(1) In your bedroom there is a cardboard box, put there by a friend, which contains a substance which is a controlled drug. Consider whether, in each of the following circumstances, you are in possession of the drug:
(a) The box was left there by your friend without your knowledge. You have just discovered the existence of the box and the nature of its contents, and have decided to hand it in to the police, but have not yet had an opportunity to do so. Would it make any difference if (i) you decide to keep it instead, or (ii) you have not yet decided what to do with it?
(b) You know the box is there, but the box is sealed and you do not know what it contains.

(c) You know the box is there, and it is sealed, but you believe it contains cabbages. Would it make any difference if you thought it contained (i) prescription drugs lawfully acquired by your friend or (ii) jewellery stolen by your friend?

(d) You believe the box contains the controlled drug, but in fact it contains only cabbages.

(2) Is the distinction drawn between differences in kind and differences in quality satisfactory in this context? Can you suggest a better test to apply in deciding whether a person in possession of a container is in possession of its contents?

(3) Is the Post Office in possession of the contents of parcels entrusted to it for delivery?

7.2. Possession of land

7.2.1. Leases and licences

We have seen that possession means intentional exclusive physical control. However, it is possible to be in intentional exclusive physical control of land without being in possession of it. Here the essential distinction to be drawn is between possession (in this context usually referred to as 'exclusive' possession, although the 'exclusive' is redundant – as we saw earlier, possession is necessarily exclusive) and occupation. A person granted the right to possession of land acquires a property interest, whereas a person granted a right to occupy it – even if it is exclusive occupation – acquires only a personal right. Specifically, if L, the fee simple owner of land, grants T the right to possession of the land for a limited period of time, then T acquires a lease of the land. One of the rights that T enjoys by virtue of having possession as a tenant is the right to exclusive occupation of the land during the lease – i.e. the right to occupy it to the exclusion of L and of any third party. In this context, then, 'possession' includes, but means something more than, exclusive occupation.

The fee simple owner can of course grant someone a personal right to occupy the land for a limited period without granting him possession of the land. Such a right – a 'licence' – might be exclusive in the sense that it gives the grantee a personal right to exclude the owner for the duration of the permission. Nevertheless, the right will be purely personal and not proprietary, and it will not be enforceable against anyone other than the grantor. So, for example, the grantee will have no right to bring an action against a stranger who evicts him – only the owner will be able to do this (see *Hill* v. *Tupper* (1863) 2 H&C 121; 159 ER 51, Extract 5.1 above).

7.2.1.1. Why the distinction matters

For a number of reasons, it is important to be able to distinguish between a lease and a licence to occupy. The first is that a lease, characteristically of private property interests, is in principle assignable and enforceable against third parties, whereas a licence is not. In a lease, the landlord and tenant may have agreed to a

contractual restriction on the tenant's right to assign the lease, but this will be effective in contract only. In other words, a transfer of the lease by the tenant to a third party will always be effective to pass the title to the lease to the transferee, even if the transfer is in breach of contract. If the assignment does amount to a breach of contract, the landlord's primary remedy will be to take action against the transferee, who has now become the tenant. As for enforceability against third parties, this means not only that the tenant can defend his possession against intruders, as we saw above, but also that, if the landlord sells its interest in the land, the lease will be fully effective and enforceable against the landlord's buyer (assuming any land registration requirements are satisfied: see further Chapter 15 for the circumstances in which leases require registration). By contrast, because a licence to occupy is personal to the grantee, it is neither assignable by the licensee nor enforceable against third parties such as buyers of the licensor's interest, except through the very limited mechanisms applicable to any other contractual right.

The second reason why it is necessary to distinguish leases and licences is that statutory protection for occupiers (whether residential, business or agricultural) has traditionally been available only for tenants, not licensees. In the case of residential premises in particular, landowners have sought to disguise leases as licences in order to avoid giving occupiers the rent control, security of tenure and protection against unlawful eviction conferred on tenants by the Rent Acts. This reason is less pressing than it once was. This is partly because a dramatic decrease in statutory protection for residential occupiers has made the issue less important from the landlord's point of view, and partly because some of the more recent statutory protection has been drafted so as to cover those who occupy residential premises as licensees as well as tenants. However, there continue to be important statutory rights which are available only to tenants and not to licensees – see, for example, the enfranchisement rights conferred on tenants by statutes from the Leasehold Reform Act 1967 to the Leasehold Reform, Housing and Urban Development Act 1993, and the statutory covenants for structural and exterior repair implied into residential tenancies by the Landlord and Tenant Act 1985 as amended (the source of the problem in *Bruton* v. *London & Quadrant Housing Trust* [1999] 3 WLR 150, HL, discussed in Notes and Questions 17.5 below).

Thirdly, it is sometimes said that licences, unlike leases, are revocable by the grantor. However, this is misleading. The truth is that, in the case of leases, there are strict formal rules governing the permissible duration of the lease and the mechanisms by which it can be terminated. These are considered in detail in Chapter 17, but broadly the position is that there are two main categories of lease, the fixed-term tenancy where the lease is for a single fixed period stated in advance – for example, ten years – which automatically expires at the end of the period, and the periodic tenancy where the lease continues for recurring periods – for example, weekly, monthly or yearly – until terminated by a notice to quit of a

prescribed length. There are two additional categories: the tenancy at will (where the tenant is allowed to remain in possession until required by the landlord to leave) and the tenancy at sufferance (where the tenant is in possession without the permission of the landlord but on sufferance) and as we see in Chapter 17 these are both terminable at will by either landlord or tenant. In the case of licences, on the other hand, the duration of the permission to occupy, and the question of whether (and if so how) it can be withdrawn, depend entirely on the contract agreed between the parties: see *Winter Garden Theatre (London) Ltd* v. *Millennium Productions Ltd* [1948] AC 173, HL. Whether or not the right is legally enforceable depends on ordinary contract rules, so, for example, a grant of a right to occupy land for a fixed period in exchange for a lump-sum payment or licence fee is no more revocable that a grant of a lease for an equivalent period. The remedies available to the grantee for a wrongful revocation may be different: a lessee has a wide range of property remedies available as well as contractual remedies such as damages, whereas a licensee can rely only on contractual remedies. However, even using only contractual remedies, a licensee may nevertheless still be able to restrain a threatened revocation of the licence in breach of contract (see the *Winter Garden* case and *Verrall* v. *Great Yarmouth Borough Council* [1981] QB 202 noted in Chapter 5 and extracted at www.cambridge.org/propertylaw/).

The final distinction between leases and licences to be noted here is that the *caveat emptor* principle generally applies to leases but not to licences. One important consequence of this is that, subject to limited exceptions, a landlord gives no warranties about the state and condition of the land or that it is fit for the purposes for which it is let. This is not true in relation to licences (see *Wettern Electric* v. *Welsh Development Agency* [1983] 2 WLR 897), so in this respect at least licensees of land can be in a stronger position than lessees.

7.2.1.2. Distinguishing leases from licences

If these are the reasons why it is important to be able to distinguish a lease from a licence, how easy is it to draw the distinction in practice? The first point to make is that 'licence' is a broad term covering any permission to make any kind of use of any thing. When used in relation to land as opposed to other things, it covers not only the grant of a personal right to occupy the land but also the grant of any right to make use of the land in any other way which is purely personal and not proprietary. The difficulty in distinguishing leases and licences of course arises only where the licence amounts to the grant of a full right to occupy land.

There have been many judicial attempts at identifying the essential difference between a personal right to occupy land and a right to possession of it. In *Marchant* v. *Charters* [1977] 3 All ER 918, CA (extracted at www.cambridge.org/propertylaw/), Lord Denning described the difference as one of 'the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room?' However, in later cases, the courts have preferred to rely on the exclusive possession test

propounded by Windeyer J in the High Court of Australia in *Radaich* v. *Smith* (1959) 101 CLR 209 at 222:

> What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a *legal right of exclusive possession* of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise. To say that a man who has, by agreement with a landlord, a right of exclusive possession of land for a term is not a tenant is simply to contradict the first proposition by the second. A right of exclusive possession is secured by the right of a lessee to maintain ejectment and, after his entry, trespass. A reservation to the landlord, either by contract or statute, of a limited right of entry, as for example to view or repair, is, of course, not inconsistent with the grant of exclusive possession. Subject to such reservations, a tenant for a term or from year to year or for a life or lives can exclude his landlord as well as strangers from the demised premises. All this is long-established law: see *Cole on Ejectment* (1857), pp. 72–3, 287, 458.

It is now taken as established by the House of Lords in *Street* v. *Mountford* [1985] AC 809 (extracted at www.cambridge.org/propertylaw/), that this exclusive possession test is conclusive: an occupier cannot be a tenant if he does not have exclusive possession. However, this test is not as straightforward as it might seem, and it has not always proved easy to apply.

There are a number of difficulties. First, can we take it that the converse is true – i.e. that any person granted exclusive possession must have a lease (or some other proprietary interest entitling the holder to possession) rather than a licence? In principle the answer ought to be yes, but, as we see in Chapter 17, the courts have not always been willing to accept this.

Secondly, there is a persistent tendency to confuse possession with exclusive occupation (see, for example, how often in the judgment of Lord Templeman in *Street* v. *Mountford* 'possession' is used when what is meant is 'exclusive occupation' and *vice versa*). It is certainly true that, if a grant does not confer on the grantee the right to exclude all others – if, for example, it requires the grantee to share occupation with the grantor or with others granted rights by the grantor – then the grantee cannot be said to be in possession and so cannot be a tenant (see the joined cases *A. G. Securities* v. *Vaughan* and *Antoniades* v. *Villiers* [1990] 1 AC 417, extracted at www.cambridge.org/propertylaw/). However, it does not follow that someone who *is* given exclusive occupation rights by a grantor necessarily has possession (or any other proprietary rather than personal right). His exclusive occupation rights may be simply personal (i.e. enforceable against the grantor only), in the same way as the exclusive right to put pleasure boats on Basingstoke Canal was enforceable only against the grantor in *Hill* v. *Tupper* (1863) 2 H&C 121;

159 ER 51 (Extract 5.1 above) in which case he can only have a licence and not a lease. So we come back to the 'nature and quality' question posed by Lord Denning – when do exclusive occupation rights amount to possession and when are they merely personal rights to occupy? The courts have had particular difficulty with cases where the grantor is a social provider of housing (for example, a charity, as in *Gray* v. *Taylor* [1998] 1 WLR 1093, CA, extracted at www.cambridge.org/propertylaw/) or a local authority or housing association providing hostel accommodation or temporary housing for homeless persons. The courts have often expressed doubts as to whether the occupiers of such housing ought to have the full range of statutory rights conferred on tenants, but are faced with the difficulty that Parliament has not given social landlords wholesale exemption from the relevant statutory provisions.

Once it became established that exclusive possession is the conclusive determinant of a lease, landlords who wanted to disguise leases as licences adopted devices designed to ensure that their grantees did not have exclusive possession. Three such devices have received the attention of the House of Lords. The first two, considered by the House of Lords in the joined cases of *A. G. Securities* v. *Vaughan* and *Antoniades* v. *Villiers* [1990] 1 AC 417 (extracted at www.cambridge.org/propertylaw/) depend on the notion that exclusive occupation is an essential ingredient of possession. They involve granting the occupant a right to occupy that is not exclusive, either by the landlord reserving to itself the right to move in and share occupation with the grantee at any time, or by the landlord reserving a right to grant third parties rights to come and share occupation with the grantee. The courts have found it relatively easy to deal with such cases. If such rights are genuinely reserved, then the grantee does not have a right to exclude and therefore does not have possession and therefore cannot be a tenant, but if the provision reserving such rights is merely a sham, not reflecting the intentions of the parties, it will be disregarded and the reality of the situation will be recognised (see *Somma* v. *Hazelhurst* [1978] 1 WLR 1014, discussed by Lord Templeman in *Street* v. *Mountford*, and also *Antoniades* v. *Villiers*).

The second way of avoiding a grant of exclusive occupation depends on there being more than one intended occupier of the premises. Instead of granting all the intended occupiers a joint right to occupy the whole (which would have the effect of making them joint holders of an exclusive right to occupy the whole) the landlord grants each of them a separate right to occupy the premises, sharing occupation with the others. The courts have found this more difficult: there is no pretence here, in that each of the sharers is indeed sharing with the others. The sham – if there is one – lies only in treating the sharers as having separate interests in cases where in truth the intention was that they should jointly hold a single interest and be entitled as a group to exclusive occupation as against the landlord. The conclusion the courts have reached is that they will read the separate agreements as conferring a single joint interest when this is what the parties intended, but only where all the technical requirements for the creation of a joint interest are

satisfied – i.e. only where the intention is that each sharer should have an identical interest, starting and ending simultaneously: see *A. G. Securities* v. *Vaughan* (extracted at www.cambridge.org/propertylaw/), where the limitations of this approach are apparent.

The third device designed to ensure that occupants are licensees and not tenants is more sophisticated, depending on the *nemo dat* principle considered in Chapter 10 (i.e. that no one can grant another person a greater interest in a thing than she herself already has). This device involves ensuring that the occupants are granted their rights to occupy by someone who has contractual rights to manage the land but no interest in the land itself. Typically, the owner of the land grants exclusive rights to manage the land to a management company without granting it any proprietary interest in the land. The management company then grants occupation rights to the intended occupier. Since the grantor of the right to occupy has no property interest in the land, it is unable to confer a property interest on the grantee, so the occupation right granted can only be a licence and not a tenancy. However, despite the logic of this conclusion, the courts have been reluctant to accept it in cases where the parties clearly intend the occupier to have precisely the same rights and obligations in relation to the land as he would have if he was in possession. In *Bruton* v. *London & Quadrant Housing Trust* [1999] 3 WLR 150 (discussed in Notes and Questions 17.5 below), the House of Lords concluded that in such a case the occupier does indeed have a lease (at least for the purposes of imposing statutory repairing liability on the landlord) although, as we see in Chapter 17, there are considerable difficulties in seeing how this fits in with established property principles.

Notes and Questions 7.2

1 Read *Marchant* v. *Charters* [1977] 3 All ER 918, CA, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

(1) Lord Denning stated in this case:

> [Whether an occupant is a tenant or a licensee] does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these are factors which may influence the decision but none of them is conclusive.

To what extent is Lord Denning still correct, in the light of subsequent cases?

(2) What did Lord Denning mean by 'a stake in the room'? What facts led him to conclude that Mr Charters did not have one, and therefore was a licensee?

(3) Did Mrs Marchant grant Mr Charters the exclusive right to occupy the room?

2 Read *Street* v. *Mountford* [1985] AC 809, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

(1) Does it follow from what Lord Templeman says that it is possible (a) to be granted the right to possession of land, and yet still have only a licence (i.e. a non-proprietary right), or (b) for possession to be a free-standing proprietary status, not just an ingredient of an acknowledged proprietary interest such as ownership, lease etc.? See further section 17.3.1.6 below on this point.

(2) Lord Templeman said that, if an occupier is granted exclusive occupation, the *prima facie* intention to create a tenancy will nevertheless be negatived 'where the owner, a requisitioning authority, had no power to grant a tenancy'. Consider why this should be the case (see *Bruton* v. *London & Quadrant Housing Association* [1999] 3 WLR 150, HL, discussed in Notes and Questions 17.5 below)

3 Read *Gray* v. *Taylor* [1998] 1 WLR 1093, CA, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

(1) The first example Sir John Vinelott gives (of a beneficiary properly being required to pay for occupation of land held on trust for him) concerns a private trust. But the trust in this case is not a private trust but a public charitable trust. In a charitable trust, unlike a private trust, the trustees do not hold the trust property on trust for individual beneficiaries. Instead, they hold it on trust for the abstract charitable purpose for which the trust was created. So, for example, Oxfam holds its assets on trust for the relief of poverty, not on trust for the people on whom it spends its money. Those people who do happen to benefit from the charitable purpose being carried out are therefore not 'beneficiaries' of the trust in the technical sense: they have no *locus standi* to enforce the trust (this can be done only by the Attorney-General) and they have no interest in the trust property. Mrs Taylor's occupation of the flat could not therefore have been attributable to any trustee–beneficiary relationship.

(2) Compare the outcome and reasoning in this case with that in *Family Housing Association* v. *Jones* [1990] 1 WLR 779, CA, where occupants of housing provided by a housing trust pursuant to its purpose of providing short-term accommodation for the homeless were held to be tenants and not licensees (they had exclusive occupation: the opposite conclusion was reached by the House of Lords in *Westminster City Council* v. *Clarke* [1992] 2 AC 288, where the terms imposed on residents of a homeless persons' hostel resulted in them not having exclusive occupation of any one room). Slade LJ expressed misgivings about the effect of the court's decision:

> [W]hatever their wishes or intentions, it may at least be difficult for bodies charged with responsibilities for the housing of the homeless to enter into any arrangement pursuant to section 65(2) of the Housing Act 1985 under which the person housed is to enjoy exclusive occupation of premises, however temporarily, without conferring on that person security of tenure by virtue of the Act ... The result must be substantially to reduce the choice of methods available to bodies such as the housing association for dealing with their always limited supplies

> of housing stock. I am not sure that this result will necessarily inure to the benefit of the class of homeless persons in this country viewed as a whole. (*Family Association* v. *Jones* [1990] 1 WLR 779 at 793)

See further *Bruton* v. *London & Quadrant Housing Association* [1999] 3 WLR 150, HL, discussed in Notes and Questions 17.5 below.

4 Read the joined cases of *A. G. Securities* v. *Vaughan* and *Antoniades* v. *Villiers* [1990] 1 AC 417, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:
   (1) Lord Templeman gives two alternative reasons why clause 16 of the *Antoniades* licence should be ignored. Underlying the first is the proposition that, if the Rent Acts were not applicable (as they probably would now not be), the effect of clause 16 would be that Mr Villiers and Ms Bridger would initially jointly have a tenancy of the flat, but that this tenancy would automatically be converted into a licence if Mr Antoniades ever chose to exercise his power to share possession. Is this consistent with what Lord Oliver says? If not, which of them is correct?
   (2) His second reason is that it was a sham, not reflecting the genuine intention of the parties. What factors does the court take into consideration in deciding whether to treat an expressly agreed term as a sham? What is the relevance of the subsequent actions of the grantor?
   (3) In *Antoniades* v. *Villiers*, consider what the status of each of the parties would be if, soon after moving in, the couple split up and one of them left. Who would be liable for the payment of what rent? What if a third person then moved in with the one who remained, and signed a separate licence document with Mr Antoniades?
   (4) Explain why the occupants in *A. G. Securities* v. *Vaughan* could not together hold a tenancy of the flat as joint tenants. Could they have held such a tenancy as tenants in common?

7.2.2. Possession and particular use rights

7.2.2.1. General and particular use rights

A person entitled to possession of land is entitled to make whatever use of it she wants (subject only to any restrictions of the type considered in Chapter 6 such as nuisance, planning law, restrictive covenants etc.). A right to use land only for a particular, specified purpose, as opposed to general unrestricted use, cannot amount to possession but it may nevertheless constitute a property interest of some kind. The same is as true of communal and public property rights as it is of private property rights. So, for example, the communal use rights enjoyed by the inhabitants of New Windsor over Bachelors' Acre (to use it 'for lawful sports and pastimes': *New Windsor Corp*. v. *Mellor* [1975] 1 Ch 380, discussed in Notes and Questions 5.1 above) are particular use rights which do not give the inhabitants possession of Bachelors' Acre but nevertheless do give them property rights over it.

The use rights of the Murray Islanders in *Mabo* v. *Queensland (No. 2)* (1992) 175 CLR 1, discussed in Chapter 4, may at first sight look more like possessory rights, especially when contrasted with the particular use rights of the aboriginal clans in *Milirrpum* v. *Nabalco Pty Ltd* (1971) 17 FLR 141 (also Chapter 4), but the result of the Australian High Court's decision in *Mabo (No. 2)* and of the Australian Native Titles Act 1993 is that the holders' rights will continue only for so long as they are exercised in the same way. In this sense, their authorised use is particular not general: they cannot use the land for any purpose other than that for which they have always used it, so that a Murray Islander whose family has always used a particular tract of land as a house and garden has a property right to use it for that particular purpose, but no right whatsoever to use it for any other purpose, and even that particular use right will expire if it is not exercised (compare common law rights of common). Public rights and customary rights in England and Wales also tend to be particular rather than general use rights: consider, for example, a public right of way, or a right to use a public park, or the public navigational rights in *Fowley Marine (Emsworth) Ltd* v. *Gafford* [1968] 1 All ER 979, CA, discussed in Notes and Questions 7.1 above.

7.2.2.2. Compatibility of particular and general use rights

Two aspects of particular use rights, considered in detail in Chapter 8, should be noted here. The first is this. In a common law system like ours, a particular use right is necessarily exercisable over land in which someone else has a general use right (there is always at least a residual title somewhere). What happens when the particular use authorised by the right is so extensive that it makes the other person's general use right nugatory? This does not appear to be viewed as a problem in relation to communal or public particular use rights. In *Fowley Marine (Emsworth) Ltd* v. *Gafford* [1968] 1 All ER 979, CA, discussed in Notes and Questions 7.1 above, for example, the fact that there were public navigation rights over the Rythe was held not to be inconsistent with Fowley Marine being in possession of the Rythe, even though it meant that Fowley Marine could not actually make much use of the Rythe. Similarly, in *New Windsor Corp*. v. *Mellor* [1975] 1 Ch 380, discussed in Notes and Questions 5.1 above, Lord Denning said that, while a customary use must be reasonable to amount to a communal property right, it was not an objection that it prevented the servient owner from making any use of the land.

However, as we see in Chapter 8, incompatibility with possessory rights is seen as a problem in relation to private particular use rights. The only significant categories of private particular use rights recognised as proprietary in our system are easements (a right to do a specified thing on someone else's land, or run a specified service over it) and profits (a right to take something from someone else's land). Any particular use right which fails to fall within the confines of these two categories cannot be proprietary and will take effect in contract only (see, for example, the right to run pleasure boats over someone else's canal in *Hill* v. *Tupper*

(1863) 2 H&C 121; 159 ER 51, Extract 5.1 above). As will be seen from *Re Ellenborough Park* [1956] Ch 131, discussed in Notes and Questions 8.3 below, the scope of easements is strictly confined, and a major constraint is that the use authorised must not exclude the servient owner from using the land himself. This objection has led the courts to refuse to accept a right to roam over someone else's land as an easement, although this is not perhaps easy to reconcile with other court decisions accepting as easements rights of a more obvious commercial value: see, for example, *Re Ellenborough Park* itself, discussed in Notes and Questions 8.3 below, where residents' rights to use a communal garden laid out as part of a residential estate were held to be easements.

The second point arises in the aboriginal land rights contexts. As we see in Chapter 9, one of the reasons for the reluctance to recognise aboriginal land usage as proprietary has been a tendency to regard property and ownership as synonymous. A failure to appreciate that particular use rights are historically and analytically firmly established as property interests in the common law system can mislead the courts and others into measuring aboriginal land claims solely against a general use yardstick, and categorising any user right not amounting to possession as non-proprietary. The Australian Native Titles Act 1993 now recognises the diversity of land use rights requiring protection, and section 35(1) of the Canadian Constitution Act 1982 also distinguishes between aboriginal title and aboriginal particular use rights (including 'site-specific' rights: see *Delgamuukw* v. *British Columbia* [1997] 3 SCR 1010, discussed in Notes and Questions 5.2 above). Nevertheless, the reluctance to equate native non-general land user with traditional common law particular use rights still persists: see, for example, the assumption made in *Mabo (No. 2)*, *Delgamuukw* and *Wik Peoples* that a government grant of a fee simple or lease would extinguish native title rights. This appears to be on the basis that subjection to particular use rights is incompatible with a holding of a common law possessory interest, something that is demonstrably not the case.

7.3. Possession of goods: bailment

7.3.1. Nature of bailment

We have seen that, in the case of land, if a person has a proprietary interest in the land which carries with it the right to possession of the land, he can grant the right to possession away to another person for a limited period. The grantee then has a lease of the land, and 'lease' denotes both the interest held by the grantee and the ensuing relationship between grantor and grantee which subsists for the duration of that interest. Similarly, in the case of goods, the person with the proprietary interest in the goods which carries with it the right to possession (typically, the owner) can grant away that right to possession to another person for a limited period. This creates not a lease but a bailment, and again 'bailment' denotes both the interest held by the grantee and the ensuing relationship between grantor and grantee.

However, while there are similarities between lease and bailment, there are also significant differences. Most importantly, leases are exclusively consensual – they can only come into existence by a positive, deliberate grant of an interest by one person to another (which is not to say that it cannot be done inadvertently: see Chapter 17 as to the circumstances in which a grant will be implied by law). Consequently, there is always a contractual relationship between the grantor and the grantee which co-exists with the property relationship between them. Bailment, on the other hand, has a much wider ambit – although *precisely* how much wider is controversial. It clearly covers all consensual grants of possession, but it also covers at least some (and arguably all) cases where a person takes possession without the knowledge and consent of the owner. Thus, a relationship of bailment exists between a finder of goods and the owner, and also between a thief and the owner. We consider the precise ambit of bailment in detail in Chapter 17, but for present purposes we will assume that the relationship of bailment arises whenever goods are in the possession of a non-owner who realises that she is not the owner. Because, as we saw earlier, possession requires intentional physical control, this excludes from the bailment category those cases where a person inadvertently or unconsciously acquires control of someone else's goods (at least until the point where they realise the true position). So, for example, if someone slips a stolen wallet into my pocket without my knowledge, I am not the owner's bailee of the wallet unless and until I find it and realise that it is not mine. But, even after excluding these cases, this still leaves bailment covering a very wide and disparate range of situations. Not surprisingly, therefore, bailments are usually categorised according to the purpose of the bailment and/or the circumstances in which it arose, and the incidents of the relationship – the rights, duties and obligations of bailor and bailee – vary enormously from one category to another.

7.3.2. Rights, duties and obligations of bailor and bailee

Since bailments are not necessarily consensual, it follows that there is not always a contractual relationship between bailor and bailee. Whereas in leases the content of the relationship is determined by looking at the contractually agreed terms as well as by those terms implied by law, in bailments we often have to look elsewhere to discover the rights and obligations of the parties to the relationship.

We noted earlier that property law has traditionally taken surprisingly little notice of goods. Consequently, contract and tort lawyers have been allowed to make the running in the development of the law, and in the case of bailment in particular it is now hard to tease the proprietary elements out from the interstices of contract and tort. We shall see later in this chapter that one of the consequences of this is that the law has been very slow to develop proprietary remedies for the recovery of goods. Another consequence, and the one of more immediate relevance here, is that bailment has been seen as part of the law of obligations rather than the law of property. The attention of lawyers has therefore been concentrated not so much on the rights of the parties arising out of the bailment relationship but on

their obligations. Indeed, as we see in Chapter 17, the whole debate on the proper ambit of bailments is conducted in terms of obligations. This is one reason why, whereas in the case of leases such classification as there is depends on the duration of the rights conferred on the tenant, bailments are classified by reference to the purpose of the bailment or the circumstances in which it arose: it is this that tends to dictate the level of obligation imposed on the bailee by the bailment by both tort and (where there is one) contract. So, for example, the airline which takes custody of your luggage when you book into a flight has a greater obligation to take care of it for you than a person who finds it in the street if you have lost it.

As far as the rights of the parties are concerned, the obvious and important point to make is that, since bailments are not necessarily consensual, it follows that the bailee does not necessarily have a right to possession *as against the bailor* – whenever the bailment is not authorised by the bailor (for example, bailments arising out of finding, or theft, or unauthorised sub-bailment) the bailor has a better right to possession than the bailee *even during the currency of the bailment relationship*. This is to be contrasted with leases of land, where the lessee necessarily has a better right to possession than the lessor for so long as the lease lasts.

However, it must be emphasised that all bailees, even those with no right to possession as against their bailor, necessarily have a better right to possession than the rest of the world. In this respect, they are in a wholly different category from licensees. Whereas licensees, whether of land or of goods, have purely personal rights enforceable only against those who granted them the rights, bailees necessarily by virtue of the fact that they have possession, have rights in relation to the goods enforceable against the whole world in the sense that they can restrain all outsiders from interfering with their rights. We return to this point in Chapter 17, when we consider how far bailments can be said to be proprietary.

7.4. Protection of possession

7.4.1. Protection of property rights by protection of possession

To a large extent, English law protects property rights by protecting possession rather than by protecting ownership. If you want to bring an action for the recovery of land or goods you must prove that the thing is yours in the sense that you have a right to possession of it rather than yours in the sense that you own it. Similarly, if you are seeking redress for interference with or damage to property, your action will be framed as a complaint of interference with your possessory rights, rather than interference or damage to the thing itself or to your ownership rights.

7.4.2. Tort and the protection of property rights

7.4.2.1. The role of tort in the protection of property rights

Apart from this focus on possession rather than ownership, there are two other peculiarities about English law's protection of property rights. The first is that,

particularly in the case of goods, the main mechanism for dealing with complaints about infringements of property rights is the law of tort. So, for example, although property law provides a direct action for the recovery of possession of land, there is no equivalent action for the recovery of goods. Instead, if your complaint is that someone has wrongfully deprived you of your goods, you will have to rely on the specialised tort of conversion (considered further below). Similarly, a complaint about damage to goods or an interference with their use and enjoyment will have to be dealt with by the tort of trespass to goods (or possibly negligence). Even in relation to land, tort law has a significant role to play in the protection of property rights. As we have said, a complaint that someone is wrongfully in possession of your land will be dealt with by a straightforward property action for the recovery of possession. If, however, your complaint is of damage to land, or any other interference with the exercise of property rights over it or your use and enjoyment of it, again you will usually have to rely on tort law – this time on nuisance (considered in Chapter 6) or trespass to land – although there may be other avenues to pursue if you can demonstrate a proprietary relationship between yourself and the defendant, such as a leasehold relationship.

In Extract 7.2 below, Weir considers the problems caused by this reliance on tort law for the protection of property rights. As he explains, some of the practical difficulties have now been removed, or at least ameliorated, by the Torts (Interference with Goods) Act 1977. In particular, the Act gives the court a general jurisdiction to make an order for the delivery of goods in any action for wrongful interference with goods (the generic term used in the 1977 Act for all the torts protecting property rights in goods). This removes a significant failing in the previous law. As we see below, a person complaining of wrongfully withheld goods usually has to rely on the tort of conversion, and the only remedy for conversion used to be damages: the court had no power to order the return of the goods themselves. This was unobjectionable in the case of most fungible goods where the complainant was likely to be interested only in the financial loss suffered, but was obviously inadequate where, for whatever reason, the complainant valued the thing as thing rather than as wealth, to adopt the terminology Bernard Rudden uses in 'Things as Thing and Things as Wealth' (Extract 2.3 above). Section 2(2) of the 1977 Act now gives the court power to make such an order instead of or as well as ordering damages.

However, as Weir points out, despite the changes made by the 1977 Act, the basic problem remains that tort law is in many respects an inappropriate mechanism for dealing with protection of property rights. In particular, in tort law the emphasis is on the commission of a wrong by the defendant, and this gives rise to significant complications in many areas of the law relating to goods, and to unnecessary differences between rules applicable to land and those applicable to goods. So, for example, the rules applicable in deciding when, if at all, the owner of lost goods loses his title to them (noted briefly in Chapter 10) are not only complex in themselves but wholly different from those applicable where a person has lost possession of land.

7.4.2.2. Scope of the property torts

The role of the tort of nuisance is considered in some detail in Chapter 6. Detailed consideration of the other property torts is beyond the scope of this book, but for present purposes it is helpful to have a broad understanding of the way in which the most important ones – conversion and trespass – work.

Conversion

What amounts to a conversion of goods?

It is not easy to provide a definition of conversion which is both short and accurate. Very broadly, it involves a wilful interference with someone else's goods by dealing with them in a way that is inconsistent with that person's title and possession of them – Weir describes it as '[treating] goods as if they were [yours] when they are not' (Weir, *A Casebook on Tort*, p. 476; and see also the judicial analyses in *Kuwait Airways Corp.* v. *Iraqi Airways Co.* [2002] UKHL 19 at paragraphs 37–44 and *Marcq* v. *Christie Manson & Woods Ltd* [2003] EWCA Civ 731). It covers such actions as wrongfully taking goods (either by taking possession for yourself, even temporarily, or by depriving the person entitled to possession by wrongfully delivering the goods to someone else), wrongfully detaining them (for example, by failing or refusing to return bailed goods to the owner when he becomes entitled to them and demands their return), wrongfully disposing of or receiving them (so that, on an unauthorised sale of goods, both the seller and the buyer are liable in conversion), and wrongful destruction of goods (damage falling short of destruction would be trespass, not conversion). Whatever it is that constitutes the interference must be done intentionally, but the wrongdoer need not realise that what is being done is wrongful. So, for example, an auctioneer innocently selling stolen goods may be liable in conversion, because he is intentionally and wrongfully depriving the owner of possession even though he does not realise it, and so too is an innocent purchaser of wrongfully sold goods. Finders, however, are not liable in conversion unless and until they do anything adverse to the rights of the true owner, such as refusing to return the found goods to the owner, nor are bailees holding over after the bailment has ended.

There used to be a separate tort of detinue, partially overlapping conversion, but this has now been subsumed into the tort of conversion by section 2 of the Torts (Interference with Goods) Act 1977.

Who can sue

Although conversion is traditionally described as an action for the protection of ownership of goods (for example, in the Law Reform Committee's *Eighteenth Report on Conversion and Detinue* (Cmnd 4774, 1971), paragraph 13), this is misleading, in that it is only the possessor of goods, or the person with an immediate right to possession, who can sue in conversion. Ownership is neither a necessary nor a sufficient condition. So, if you the owner of goods have parted with possession of them (for example, by a bailment for a fixed period, or by

mortgaging them), you cannot sue a third party wrongdoer in conversion, but your bailee or mortgagee can do so. Your bailee or mortgagee will, however, be liable in conversion to you if they do anything in breach of or outside the terms of the bailment or mortgage which gives you an immediate right to the return of the goods and which is adverse to your possessory rights (for example, by wrongfully selling or refusing to return the goods).

Remedies

It will be apparent from the above that the tort of conversion has the potential for over-compensating the claimant and unfairly penalising the defendant. As Weir points out in Extract 7.2 below, there is a problem about multiplicity of defendants since the events causing the loss of the claimant's goods may have involved a series of conversions by different people, each of whom is *prima facie* liable to compensate the claimant for the full value of the lost goods. This is so even if the claimant is only a bailee, with a limited interest in the goods. Also, in assessing damages, the conduct of the defendant is irrelevant (the liability of the thief who steals the goods is the same as that of the innocent purchaser who buys the stolen goods from him), as is the amount (if any) of the defendant's gain. All these problems were considered by the Law Reform Committee's *Eighteenth Report on Conversion and Detinue* (Cmnd 4774, 1971) and as a result substantial changes in the law were made by the Torts (Interference with Goods) Act 1977.

Trespass

What amounts to trespass

Both trespass to goods and trespass to land involve an unlawful direct physical interference with someone else's possession. No damage to the land or goods is necessary – any direct physical interference is actionable. Unlike conversion, trespass is not a strict liability tort: the interference must probably be intentional or negligent. There is a defence of necessity to an action in trespass (for example, that the defendant was acting in the public interest to avert danger) but it is of very limited scope, and has been held not to justify homeless people taking over vacant local authority housing (*Southwark London Borough Council* v. *Williams* [1971] 1 Ch 734, CA) nor protesters against GM food digging up GM crops (*Monsanto* v. *Tilly* [2000] Env LR 313, CA).

Who can sue

Trespass is an injury to possession, and the only claimant is the person who was actually in possession of the land or goods at the time of the trespass (although see Palmer, *Bailment*, pp. 204–6, for some exceptional cases when a bailor can also sue and also *Monsanto* v. *Tilly* [2000] Env LR 313, CA). The claimant need not also be the owner – in the case of goods, finders, and even thieves, can sue

in trespass, since it is accepted that both are in possession, as we see in *Costello* v. *Chief Constable of Derbyshire Constabulary* [2001] 3 All ER 150 discussed in Chapter 11. Indeed, a non-possessing owner may well be the defendant: it is a trespass for a bailor to interfere with or remove the goods during and contrary to the terms of the bailment, as it is for a landlord to interfere with or take back possession of the premises during the lease, except when authorised to do so by the lease.

Remedies

The usual tort remedies of damages (assessed by reference to the harm caused to the claimant) and injunction are available, and in addition, where the trespass involved removal of goods, the claimant is entitled to their return under section 3 of the Torts (Interference with Goods) Act 1977.

7.4.3. Self-help remedies

7.4.3.1. Survival of self-help remedies

The second peculiarity of the legal protection of property rights in this jurisdiction is the survival of self-help remedies. In general (subject to some partial and relatively recent statutory restrictions relating to residential premises considered below), those claiming a right to possession of land or goods in the hands of others are free to take possession of them for themselves without having recourse to the courts, provided they do so peaceably (as to which see below). This applies not only to owners seeking to recover possession from wrongful takers, but also to those seeking to recover possession from those who were once lawfully in possession but whose possessory rights have now expired (for example, former bailees and former tenants). It also applies where a person is in possession by permission of the claimant, which the claimant now unilaterally withdraws. So, mortgagees of land or goods who have retained the right to take possession of the mortgaged property at any time during the mortgage (a not uncommon situation: see Chapter 18) may exercise that right simply by physically seizing possession, and the same applies to landlords of non-residential premises and bailors where the lease or bailment is at will or terminable by notice by the grantor (Chapter 17). It even applies where the claimant's right to possession consists only of a right to forfeit the otherwise superior possessory right of the person in possession because of some breach of obligation. So, for example, landlords whose tenants are in breach of one of the terms of the lease can seize their tenants' goods by levying distress and, if the premises are non-residential, prematurely terminate the lease by retaking possession on a breach of the terms of the lease. Court procedures are available for both of these processes, but the landlord does not always have to use them: in most cases it can instead opt for self-help and physically seize possession for itself.

Nineteenth-century legal historians saw this tolerance towards self-help remedies as an indication of the sophistication of our legal system and our respect for the rule of law:

> Had we to write legal history out of our own heads, we might plausibly suppose that, in the beginning law expects men to help themselves when they have been wronged, and that, by slow degrees, it substitutes a litigatory procedure for the rude justice of revenge. There would be substantial truth in this theory. For a long time law was very weak, and as a matter of fact it could not prevent self-help of the most violent kind. Nevertheless, at a fairly early stage in its history, it begins to prohibit any and every attempt to substitute force for judgment. Perhaps we may say that, in its strife against violence it keeps up its courage by bold words. It will prohibit utterly what it cannot regulate.
>
> This at all events was true of our English law in the thirteenth century. So fierce is it against self-help that it can hardly be induced to find a place even for self-defence ... [The thought is] that self-help is an enemy of law, a contempt of the king and of his court ... [However] it would be a great mistake were we to suppose that during the later middle ages the law became stricter about this matter; it became laxer ... In our own day our law allows an amount of quiet self-help that would have shocked Bracton. It can safely allow this, for it has mastered the sort of self-help that is lawless.
>
> (Pollock and Maitland, *The History of English Law*, vol. 2, p. 572)

Holdsworth took the same view:

> The aim of early bodies of law is to induce men to submit to the decision of the court instead of helping themselves to what they deem to be their rights, or instead of prosecuting the feud against those who have injured them. Early law endeavours, therefore, to limit rigidly the conditions under which the individual may have recourse to self-help. It attempts, not so much to arbitrate between the parties, as to secure the observance of rules which will prevent the individual helping himself without the sanction of the court ...
>
> But although early law can thus set conditions for the exercise of the right of self-help, no body of law can altogether repress it – nor, if it was able, would it be desirable to do so. If the individual can be allowed to help himself quietly to his rights without disturbing the general public, if as a rule the individual does not try to help himself unless he has right on his side, it will save time and trouble if the individual is allowed to act. But these conditions are not complied with till the rule of law has become second nature. In primitive times the individual, whenever he has the power or the opportunity, will help himself; and it is such self-help on all occasions that it is desirable to repress. Therefore, we find that early law limits, or rather attempts to limit, far more narrowly than later law the sphere of private action.
>
> (Holdsworth, *A History of English Law*, vol. II, pp. 99–100)

See also Holdsworth, *A History of English Law*, vol. III, pp. 278 *et seq.*, and the similar views expressed by Maitland, 'The Beatitude of Seisin', p. 26; compare the rather different historical analysis provided by Lawson, *Remedies of English Law*, p. 25, who ascribes the English tolerance of self-help to the fact that 'the main lines of private law had already been laid down by the early years of the nineteenth century, before the belated establishment of organised professional police forces,

and hence at a time when the ordinary citizen had frequently no public authority to look to for help in redressing his wrongs'.

However, this nineteenth-century confidence did not survive long into the twentieth century, and in the latter half of the twentieth century Parliament enacted quite extensive statutory restrictions on taking possession of residential property without judicial process (see below). During the same period there has also been significant judicial condemnation of self-help remedies. In *Billson* v. *Residential Apartments Ltd* [1992] 1 AC 494 at 536, Lord Templeman described forfeiture of leases by physical re-entry as a 'dubious and dangerous method' of determining the lease, and in *McPhail* v. *Persons Unknown* [1973] Ch 447 at 456–7, CA, Lord Denning emphasised the obvious point about disturbance of the peace:

> The owner [seeking to recover possession of land from squatters who had broken into the premises] is not obliged to go to the courts to obtain possession. He is entitled, if he so desires, to take the remedy into his own hands. He can go in himself and turn them out without the aid of the courts of law [see now Part II of the Criminal Law Act 1977]. This is not a course to be recommended because of the disturbance which might follow ... In a civilised society, the courts should themselves provide a remedy which is speedy and effective, and thus make self-help unnecessary.

In line with this, the Law Commission has been recommending curtailment of self-help since 1985, with some back-tracking in 1998. In 1985, it made a firm recommendation that the ban on forfeiting leases by physical entry should be extended to all leases (Law Commission, *Codification of the Law of Landlord and Tenant: Forfeiture of Tenancies* (Law Commission Report No. 142, 1985): 'the loss of his tenancy is usually a serious matter for a tenant whether he is in occupation or not, and we do not think it should ever occur except by consent or with the authority of the court': paragraph 3.8) and by abolishing the physical taking of goods as distress for rent (Law Commission, *Distress for Rent* (Law Commission Report No. 194, 1991): see further Extract 7.3 below). In 1998, it appeared to have a change of heart, and published a consultative document retreating from its earlier position and provisionally concluding that forfeiture of tenancies by physical re-entry is 'nowadays frequently used by landlords as an effective management tool' and should therefore be preserved after all (Law Commission, *Landlord and Tenant Law: Termination of Tenancies by Physical Re-entry: A Consultative Document* (Law Commission Consultative Document, January 1998)). However, there are signs that it is now moving back to its former position, and its most recent consultation paper, *Termination of Tenancies for Tenant Default* (Law Commission Consultation Paper No. 174, 2004) puts forward proposals for a complete overhaul of forfeiture which would leave little room for self-help.

The main obstacle in the way of parliamentary reform is the perceived inadequacy of court procedures for landlords and mortgagees seeking possession in

response to default. In *Kataria* v. *Safeland plc* (1998) 05 EG 155, CA, where a landlord had forfeited the lease of 'a modest walk-in kiosk' by physical re-entry (behaviour described as 'monstrous' in the circumstances by the judge at first instance), Brooke LJ complained in the Court of Appeal:

> Twelve years ago, the Law Commission recommended the introduction of a statutory scheme whereby business landlords too [i.e. like residential landlords] would be required to obtain a court order before proceeding to re-enter, see [Law Commission, *Codification of the Law of Landlord and Tenant: Forfeiture of Tenancies* (Law Commission Report No. 142, 1985)]. Nearly four years ago the Commission published a draft Bill to give effect to that recommendation: see [Law Commission, *Landlord and Tenant Law: Termination of Tenancies Bill* (Law Commission Report No. 221, 1994)]. Nothing has been done and nothing will be done to implement these recommendations unless and until fast track procedures are put in place to help landlords to obtain possession orders speedily in clear and obvious cases. In the meantime, landlords are, in my judgment, at liberty as a matter of law to go on behaving as [the landlord] did in this case if they consider it proper to do so.
>
> (*Kataria* v. *Safeland plc* [1998] 05 EG 155 at 157)

Whatever view one takes of the merits of self-help remedies in general, there are obvious dangers in allowing a claimant to achieve by self-help a result that could not be achieved by invoking judicial process. This has caused considerable problems in English law. In many cases, where a claimant can choose whether to proceed by physical action or by judicial process, the court has power, if application is made to it, to postpone the order of possession, or grant it subject to conditions, or even refuse possession altogether and order damages instead. Indeed, as we saw above, until 1977, the court had no power at all to make a possession order in favour of a claimant seeking to recover his goods in an action for conversion (and even now has only a discretion as to whether to do so or not), and yet at all times such a claimant has been entitled to bypass the courts and retake those goods for himself. In a dissenting judgment in the Court of Appeal decision in *Billson* v. *Residential Apartments Ltd* [1991] 3 WLR 264, where the majority accepted an interpretation of section 146 of the Law of Property Act 1925 which resulted in tenants losing their right to apply to the court for relief against forfeiture if the landlord re-entered peacefully, but not if the landlord proceeded by judicial process, Nicholls LJ pointed out the dangers:

> [I]f the landlord chooses to effect the forfeiture by forcing his way into the premises, he is in a better position than if he had applied to the court for an order for possession ... [I]f he takes the law into his own hands, and without further warning to the tenant retakes possession of the leased property, no application for relief from forfeiture can then be made. The court is powerless ... That cannot be right. Such a conclusion would be an incitement to all landlords to re-enter forcibly whenever they can do so ... Nor can it be right to encourage law-abiding citizens to embark on a course

> which is a sure recipe for violence ... The policy of the law is to discourage self-help when confrontation and breach of the peace are likely to follow. If a tenant, who is in breach of covenant, will not quit but persists in carrying on his business despite the landlord's right of re-entry, the proper course for a responsible landlord is to invoke the due process of the law and seek an order for possession from the court. But a landlord can hardly be expected to do so if, in terms of his legal rights, he will be severely prejudiced thereby. Nor can he be expected to respect, or even understand, a law which tells him that he should not resort to violence or force in such circumstances but tells him at the same time that, if he does forcibly re-enter, his position in law will be better than if he invokes the court's process.

In that case, Nicholls LJ's minority view was subsequently upheld by the House of Lords, reversing the Court of Appeal decision. However, the Court of Appeal has recently confirmed that essentially the same inconsistency still exists in the case of mortgagees seeking possession of dwelling-houses (see further *Ropaigealach* v. *Barclays Bank plc* [1999] 3 WLR 17, CA, and for an analysis of the law relating to retaking of goods without a court order, where the same problems can arise, see the Law Reform Committee's *Eighteenth Report on Conversion and Detinue* (Cmnd 4774, 1971) paragraphs 116–26, 'Recaption of Chattels').

7.4.3.2. Restrictions and deterrents

There are express statutory provisions which prohibit the use of self-help in some circumstances. Where they apply, they restrict the circumstances in which residential occupiers can be evicted without a court order. In particular, if you are a landlord of premises let as a dwelling, you cannot enforce any right to forfeit the lease except by judicial process if any person is lawfully residing there because of section 2 of the Protection from Eviction Act 1977. Also, if the premises were 'let' as a dwelling ('let' here, but not in section 2, covering the grant of a licence as well as a tenancy) and the tenancy or licence has now expired, you cannot recover possession from the former tenant or licensee except by judicial process (section 3 of the 1977 Act). However, section 3 does not apply to all residential tenancies and licences: if the tenancy or licence is 'excluded' (as to which see section 3A), former tenants and licensees can still be evicted by physical re-entry.

In all other cases, if you are entitled to possession, you are entitled to take it for yourself by physical action. However, there are reasons why you might prefer not to do so, but to rely on the court instead. The first is that the consequences of getting it wrong can be severe. If it turns out that you were not after all entitled to possession at that time, or were not entitled to take it for yourself without judicial process, you will be liable at common law for damages for trespass. In addition, in the case of land, if the person you evicted or tried to evict was a 'residential occupier', you will be committing both the statutory tort of unlawful eviction (sections 27–32 of the Housing Act 1988) and the criminal offence of unlawful eviction (section 1 of the Protection from Eviction Act 1977). For the purposes of both the tort and the crime,

'residential occupier' covers not only a tenant or licensee of residential property but also anyone else occupying premises as a residence 'whether under a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises'. This includes most, but not all, lawful residential occupiers – mortgagors, for example, are not included, for reasons apparent from Chapter 18. Damages for the tort of unlawful eviction are measured primarily by reference to the gain accruing to the taker rather than the loss suffered by the victim.

The other good reason for not taking possession of land by physical entry is the danger of committing a criminal offence under section 6 of the Criminal Law Act 1977, which applies even to lawful takers. Unsurprisingly, the criminal law has always taken steps to regulate physical taking of possession of land. This area of law used to be governed by a network of ancient statutes, the Forcible Entry Acts, whose obscurity and uncertainty of ambit was of itself sufficient to deter most people from resorting to self-help remedies. However, all these ancient offences were swept away by the Criminal Law Act 1977 and replaced by the section 6 offence of using or threatening violence to secure entry to premises. Section 6 provides that:

(1) ... any person who, without lawful authority, uses or threatens violence for the purpose of securing entry into any premises for himself or for any other person is guilty of an offence, provided that –
  (a) there is someone present on those premises at the time who is opposed to the entry which the violence is intended to secure; and
  (b) the person using or threatening the violence knows that that is the case.

It is expressly provided that the offence is committed whether the violence is directed against the person or against property, and that the fact that a person has any interest in or right to possession of premises does not mean that they have 'lawful authority' for these purposes. This offence is probably less extensive and certainly more clearly defined than the old Forcible Entry Acts. Nevertheless, the danger of incurring criminal liability (and the attendant bad publicity) remains a powerful deterrent.

7.4.4. Unlawful eviction and harassment

The common law has not evolved satisfactory remedies to protect residential occupiers of land from harassment by their landlords. The torts of nuisance and trespass, and the property actions for non-derogation from grant or breach of covenant for quiet enjoyment, have not proved to be adequate either in deterring landlords from harassing or unlawfully evicting their tenants or in compensating tenants who have suffered such treatment. They are now supplemented by the statutory tort of unlawful eviction already referred to, together with the additional tort of unlawful harassment (sections 27–32 of the Housing Act 1988), and the criminal offence equivalents in sections 2–4 of the Protection from Eviction Act 1977.

7.4.5. Trespassing and the criminal law

Those who take possession of land unlawfully have always been exposed to criminal liability if their entry involved violence directed at people or property. Since 1977, however, it has also become possible in some circumstances to incur criminal liability simply by being in possession of land as a trespasser. Section 7 of the Criminal Law Act 1977 makes it a criminal offence to fail to leave residential premises having been required to do so by either a 'displaced residential occupier' or a 'protected intending occupier', if you are on the premises as a trespasser after having entered as such. The 1977 Act also makes it an offence to enter on or to be in possession of a foreign mission (as defined) as a trespasser, and to trespass with an offensive weapon (sections 8 and 9 respectively). These offences are now augmented by the public order offences set out in Part V of the Criminal Justice and Public Order Act 1994, which cover miscellaneous examples of 'collective trespass or nuisance on land'. For the scope of these new public order offences, see further *Winder* v. *DPP*, *The Times*, 14 August 1996 and *DPP* v. *Barnard*, *The Times*, 9 November 1999.

Extract 7.2 Tony Weir, *A Casebook on Tort* (7th edn, London: Sweet & Maxwell, 1992), pp. 473–8

If England had a rational system of law there would be no need for a special section on torts to chattels ... It is quite true that goods get lost or stolen as well as damaged, and that commercial wrongdoing is not exactly like dangerous behaviour, but the tort of negligence can perfectly well embrace cases where a person has been indirectly deprived of a physical asset and the tort of trespass can cope with cases of forthright snatching. In a rational system this would be quite adequate, for a plaintiff who had lost goods would obtain tort damages from a defendant only if he was to blame for their loss.

Two conditions would have to be fulfilled before the role of tort could be so sensibly restricted: first, the law of property must provide a means whereby the owner of goods can get them back from whoever is in possession of them without any right to retain them; secondly, the law of contract, rather than the law of tort, must regulate the right of contractors to the property they contract about. Neither condition is satisfied in England.

PROPERTY

The common law has no special remedy for the owner of a thing who wishes to claim it back from the person in possession of it. This gap has therefore to be filled by a remedy in tort. Unfortunate consequences ensue. The first is to introduce into tort law an area of liability without fault: this is unavoidable, because however innocent a person may be in acquiring possession of a thing he must deliver it up to the true owner unless he has some special right to retain it. The second consequence is to raise problems about who may sue: in a property remedy we would naturally define the plaintiff in terms of his *ownership* or other property right, but when the remedy is in tort one tends to regard the plaintiff's loss as a necessary and sufficient criterion of eligibility to sue. This may, thirdly, give rise to multiple plaintiffs when different people have concurrent

interests in the thing. Tort has its own problems, as we have seen, when several people suffer loss as a result of injury to person or property, but these problems will be greatly extended if we make tort perform a property role as well. Fourthly, what of the plaintiff's behaviour? In tort cases his contributory negligence has a role to play in reducing the damages he obtains. This can hardly happen in a property remedy: the owner either gets his thing back or he doesn't. Fifthly, what of the defendant? In a property remedy we would insist that the defendant be in actual possession of the thing: after all, an owner who wants his thing back must sue the person who actually has it. In a tort suit we would be more interested in the defendant's past behaviour – what did he do with the thing? – than in his present position or possession. Sixthly, if the owner, not being bound to sue the present possessor, can sue all those through whose hands the goods have passed, there will be grave problems of multiple defendants. We have seen what happens in proper tort cases – the victim may sue any or all of the tortfeasors until he has been paid off, and then those who have paid more than their fair share can claim contribution from those who have paid less ... but one cannot simply apply this solution to litigation about lost property. Finally, what order is the judge to make? In tort cases he orders the defendant to pay monetary compensation, but in a property remedy he may have to order specific restitution, and if that is impossible he will be tempted to order the defendant to pay the value of the thing even if that differs from the sum which he would award as compensation. These are the problems which arise when tort takes on the role of property law.

Extract 7.3 Alison Clarke, 'Property Law' (1996) 49 *Current Legal Problems* 97 at 111–15

DISTRESS FOR RENT

In a Report issued this year [Law Commission, *Distress for Rent* (Law Commission Report No. 194, 1991)] [the Law Commission] condemns distress as wrong in principle and recommends its abolition, but only when promised improvements to court procedures for recovery of rent are made.

The right for landlords to distrain for overdue rent arises automatically from the obligation to pay rent. It allows the landlord to enter the let premises as soon as rent is due and seize goods found there (not necessarily belonging to the tenant), and then either retain them until the rent is paid, or sell them and recover the rent from the proceeds. Leave of the court is required for distraint in the case of some but not all residential tenancies. Significantly, it is used in practice by landlords only when leave of the court is not required. The law relating to distress is ancient and of labyrinthine complexity.

The recent increase in the use of self-help remedies has been particularly marked in the case of distress for rent. The Commission explains that when it first looked at distress in 1966 [Law Commission, *Interim Report on Distress for Rent* (Law Commission Report No. 5, 1966)] it found that its use was extremely limited. The subsequent Working Paper published in 1986 [Law Commission, *Distress for Rent* (Law Commission Consultative Document No. 97, 1986)], which expressed the provisional view that it should be abolished, was written on that assumption.

Responses to the Working Paper, however, revealed a different picture. It was clear that the use of distress had increased considerably (although the evidence was insufficient to permit an accurate estimate of the extent of the increase). While most (not all) people can face the abolition of an obsolescent remedy with reasonable equanimity, it takes some fortitude to persist with the plan to abolish at a time when it has re-emerged as a useful remedy, particularly when the reason for its re-emergence appears to be a breakdown in the machinery for exercise of the alternative remedies.

Nevertheless, the decision by the Commission to recommend that abolition should be delayed until the alternatives are improved comes as a disappointment. As the Report itself explains, the Civil Justice Review Body set up in 1985 has already made detailed recommendations for the introduction of a new rent action, precisely in order to remedy the defects in rent collection by judicial process which have driven landlords back to self-help. The Commission explains the considerable progress that has been made in expanding and implementing the recommendations for reform ...

[However], after cataloguing the enormous problems of landlords faced with the 'expense, delay, ineffectiveness and uncertainty of court proceedings' which were revealed in the course of the Commission's consultation process, it concludes:

> It is clear that landlords do have a genuine grievance about the court system and that it is failing to provide them with an adequate means of recovering rent arrears. The Civil Justice Review gives hope for improvement, but it cannot yet be said whether or when this aim will be achieved.

Neither the proposed new rent action nor the Lord Chancellor's programme has received universal acclaim, and of course it is by no means a foregone conclusion that any promised reform will work even if it is carried out. Nevertheless, it takes a certain degree of timidity and pessimism, unexpected qualities to find in a law reform agency, to assume that it will not until the contrary has been proved.

Whatever view is taken of the Law Commission's recommendation to delay abolition, it could hardly be accused of timidity in relation to the primary recommendation itself. Although reporting that 'a large majority' of those who responded to the working paper were opposed to total abolition of distress, the Commission reported that 'No response to our consultation suggested any justification for its retention which met the fundamental objections to it.' It gives the fundamental objections as these:

> 3.2 We see distress for rent as wrong in principle because it offers an extra-judicial debt enforcement remedy in circumstances which are, because of its intrinsic nature, the way in which it arises and the manner of its exercise, unjust to the debtors, to other creditors and to third parties. The characteristics of distress for rent which contribute to this are:

(a) priority given to landlords over other creditors;
(b) vulnerability of third parties' goods;
(c) harshness which is caused by the limited opportunity for the tenant to challenge the landlord's claim, the scope for the rules of distress to be abused, the

unexpected intrusion into the tenant's property and the possibility of the sale of the goods at an undervalue;

(d) disregard of the tenants' circumstances which demonstrates its general lack of recognition of a modern approach to debt enforcement.

These criticisms are devastating, and fully justified by the detail that follows [see Part III of the Report]. The best that can be said for distress is that it is so awful that the mere threat of its use is enough to make most people pay up – the argument that kept wholesale imprisonment for debt alive in this country until 1971. The Commission notes that such statistics as there are appear to suggest that, when threatened but not used, distress is a highly effective remedy [*ibid*., paragraph 3.10]. When used, it is dismally inefficient: goods normally taken tend to be such that the cost to the tenant of losing them far exceeds the price they will fetch when sold [*ibid*., paragraphs 3.16 and 3.17]. It is difficult to accept that such a remedy should be allowed to continue to exist, and a matter for regret that the Law Commission drew back from recommending its immediate abolition.

Notes and Questions 7.3

1 Other common law jurisdictions have abolished distress for rent without the qualms expressed by the Law Commission, although, as the Commission pointed out, in many cases this may have been because it was little used, or because 'the other available methods for recovering rent arrears were able to absorb the additional work without difficulty'. However, events succeeding the North Carolina Court of Appeals decision in *Spinks* v. *Taylor*, 266 SE 2d 857 (NC App 1980) (concerning the legality of the landlord's practice of padlocking a tenant's front door as soon as any rent was overdue) reveal that at least one state in the United States has done so in the face of procedural problems as bad as, if not worse than, ours. The brief for the appellee, the landlord Mr Taylor, is said to have revealed that, because Mr Taylor's local magistrate's court was unable to hear all ejectment actions filed each day, the clerk's office imposed a limit of ten ejectment actions per landlord per day, with an overall limit of twenty-five ejectment actions a day (so, presumably, not all landlords were allowed their full allowance of ten every day). Since Mr Taylor had 825 tenants and approximately 400 of them were in default by the seventh of each month, and since he preferred to take action when tenants were not more than one month in arrears, it must have been virtually impossible for him to have all his actions heard. Nevertheless, the immediate legislative response to the court's decision that his padlocking procedure was valid was to pass the Landlord Eviction Remedies Act in 1981 prohibiting all self-help remedies forthwith (distress as well as forfeiture by actual re-entry) for landlords of residential premises.

2 A footnote to Extract 7.3 suggests that the numerical majority in favour of retention may not be altogether surprising: 'It is a fact of life for law reformers that lenders, landlords, and sellers (repeat players) tend to be over-represented in responses to consultation, whereas borrowers, tenants and consumers (single shot players) are under-represented. Equally, those who respond tend to come from the reputable end of the market, not given to perpetrating the abuses that unsatisfactory law makes available to the less scrupulous. Consequently, their experience tends to be of the system working at its best.'

3 Consider the 'fundamental objections' to distress for rent expressed by the Law Commission noted above. To what extent do they apply to self-help remedies in general?